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Leviathan Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations

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LEVIATHAN GOES TO WASHINGTON: *HOW TO ASSERT THE SEPARATION OF POWERS IN DEFENSE OF FUTURE GENERATIONS*

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ABSTRACT‡

The separation of powers was originally drawn from the common law of England, vindicated during the American Revolution as a fundamental bulwark against tyranny, and constitutionalized in the

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‡ The spelling, grammar, punctuation, and capitalization of some source quotations in this article are updated and modernized for clarity. Bluebook citation standards are conformed to throughout this article. The Bluebook does not include citation forms for original revolutionary tracts or speeches printed after the fact according to Seventeenth- and Eighteenth-Century print culture among other specific source classifications. This article thus adopts its own forms where the Bluebook is silent under the overriding principle that citations are made for the purpose of helping future researchers locate the information cited. In order to not overly encumber the text, only difficult to find letters, laws, or tracts cite to the book, collection, or website that contain the information cited. This article prefers citation and pagination directly to original tracts that are now easily found and broadly available in digital databases. For original tracts the article uses this form: Author's Name, *Title of Tract* pagination [Year Printed]. The same form is used for poems, plays, and songs without pagination sometimes with the year first performed in brackets where appropriate. In the case of epic poems and plays like Milton's *Paradise Lost* and Goethe's *Faust*, book.act.line numbers are given separated by periods instead of pagination. The article also adopts the ordinary form for citing to classics like Cicero or Plato of Author's Name, *Title of Tract* book.section.line separated by periods. For speeches and sermons printed after the fact, the article uses the citation form in Bluebook Rule 16 for periodical materials giving the full date the speech was given and indicating the year it was printed in brackets. Short cites are not used for original tracts not printed as books, speeches, manifestos, classics, plays, songs, poems, movies, TV show episodes, documentaries, or twitter posts. While Bluebook whitepages rule 18.7.1 may be used when a specific sound recording is relevant; where a musical source is a song, a general citation to the song is preferred. Presidential proclamations and other official executive orders and statements issued prior to modern codification practices are cited as found in the UCSB Presidency Project, where the full documents are freely available and searchable online. In general, brackets are used to indicate the year a source was likely printed or performed for the first time, the actual author, or other historical information not expressly included in the original print. By contrast, parentheses are generally used to contain the dates, editions, and editorial staff of particular sources or collections that are expressly indicated in the work to locate pagination to accurately pinpoint the information cited.

first three articles of the U.S. Constitution. It was adopted as an assurance that the present generation would not assert dead-hand control over the future of American society for mere efficiency, vanity, or greed. The separation of powers, therefore, exists to empower future generations to contend for their rights of life, liberty, and property.

Both the long history of the separation of powers and the recent, controversial practices of multinational government contractors guide debate on this topic to the origin and ends of the patent and copyright laws in the United States. For the first legitimate intellectual property (IP) law and antitrust law, which was the Case and Statute of Monopolies, was also a nascent defense of the separation of powers. In America, the primary champions of this law were James Otis and Phillis Wheatley.

Most living legal academicians and members of the federal bench are unaware of the common law root of the separation of powers. Most do not know what impact James Otis or Phillis Wheatley had on the founding generation. To successfully litigate under the separation of powers, one must ordinarily teach his or her judges of this paramount, constitutionalized, common law.

At the same time, it comes to no surprise that those who want to preserve white, male superiority are presently attempting to abandon the separation of powers. For absent a swift and robust unconstitutional contravention of the separation of powers, younger generations of Americans will grow up in a diverse society that is not majority-white and they will not generally appoint misogynistic or racist men to rule the land. This is, therefore, a time of intense fearmongering, lying, greed, and white fragility—usually unleashed as an attempt to preserve or reignite a dying system of racism, misogyny, and injustice in America without the separation of powers.

To younger generations: It is my hope that you keep cool, guard your own integrity, and avoid the embarrassments of your elders who are presently in power. It is my wish that you overcome when those entrusted with power are filled with anger, when they act out and embarrass themselves by violating your rights, when they act illegally out of ignorance of the law. My intention is to help you find a way to reassert the separation of powers to rescue the nation for our children who will otherwise suffer in the bed made by the old, dead hand of Boomer vanity, ambition, and greed. I believe in you, and I believe that you can do this.

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INTRODUCTION: THE BURDEN OF GOVERNMENT LEGITIMACY

In England they say that Parliament is omnipotent and that the crown is the fountain of justice.[1] They also say the Queen may unilaterally write and rewrite the constitutions of her colonies.[2] The constitution of England itself, the supreme and reigning superpower over all English dominions, is and has always been unwritten and involves many traditions regarding its tripartite style of government with its Crown, Lords, and Commons.[3]

These traditions are perhaps most pleasing to observe in the recent Netflix smash *The Crown*, which offers a unique look into the current British monarch's ideas of government form and its proper sources of power.[4] Many changes were made over the centuries to mod-

1. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *149–51, *156–57, *257.

2. R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.) (citing Campbell v. Hall [1774] 1 Cowp. 206, 204–05 (Eng.)).

3. James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* 2 [1774] (the English constitution may also be styled the "British constitution"). *See* 1 J.S. BUCKINGHAM, THE PARLIAMENTARY REVIEW, AND FAMILY MAGAZINE 268 (J.S. Buckingham ed., 1833) ("This British constitution is certainly a very Proteus in its changes.").

4. *The Crown: Scientia Potentia Est* 1:49–3:41 (Netflix release Nov. 4, 2016).

ernize and update the English system.[5] The legitimacy claimed by England for its form of government, however, still arises from the continued domination of the English people symbolized by the Norman Conquest.[6]

When William the Bastard conquered the peoples of England he subjected them to feudal slavery.[7] The Bastard King invented the English property system upon feudal compacts premised on the idea that "all land is held ultimately of the king," so that he could oppress the people with onerous taxes.[8] The new Bastard King, William I, took his share of these taxes directly from his Lords, who became "the sovereign auditors [i.e., tax collectors] of the kingdom."[9]

The King's feudal property system was so unjust that the heirs of the Bastard's Lords eventually took their stand at Runnymede.[10] There they demanded that their rights as Lords be protected by contract from the arbitrary government of the wicked King John, heir of the Bastard Crown.[11] The contracts the Lords extorted from King John are known as the Magna Carta and Carta Foresta, and are the first known concessions from the crown to the Rule of Law and public trust.[12]

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5. *See, e.g.*, Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66 (Eng.); Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77 (Eng.); Appellate Jurisdiction Act 1876, 39 & 40 Vict. c. 59 (Eng.).

6. Sir Henry Vane the Younger, *A Healing Question* 4–5 [1656] (Vane observed many weaknesses in the English form of government, "that . . . rose in and with the *Norman* Conquest" and stated that there "were never so many fair branches of liberty planted on the root of private and selfish interest"). *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *94, *103; 2 WILLIAM BLACKSTONE, COMMENTARIES *242–43 ("What we call purchase . . . the feudists called *conquests* . . . the Norman jurists . . . styled the first purchaser. . . the conqueror or *conquereur*."); THOMAS HOBBES, LEVIATHAN 317 (A.R. Waller ed., 1904) [1651]. *But see* Jeremiah Dummer, *A Defence of the New-England Charters* 8 [1715] (the Americans, by contrast, vindicated the title of Native American peoples to their lands, and claimed their property rights in America from the common law ownership and sale of them from the Natives to the English transplants as the basis of the colonist's property rights; not the letters patent or charter powers of the crown through conquest or dominion).

7. 1 WILLIAM BLACKSTONE, COMMENTARIES *296–97. *See* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 12 (4th ed., 2002) (The Norman Conquest was "a catastrophe that determined the whole future of English law.").

8. BAKER, *supra* note 7, at 224–25; 1 WILLIAM BLACKSTONE, COMMENTARIES *313–14; 2 WILLIAM BLACKSTONE, COMMENTARIES *242–43.

9. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 282 (1856) (citing 4 EDWARD COKE, INSTITUTES *115).

10. *Magna Carta* [1215].

11. *Id. See* Jill Lepore, *The Rule of History*, NEW YORKER (Apr. 20, 2015), https://www.newyorker.com/magazine/2015/04/20/the-rule-of-history

12. *Magna Carta* [1215]; *Carta de Foresta* [1217]; 2 EDWARD COKE, INSTITUTES *a proeme* ("a King cannot avoid his charter").

King John soon thereafter had the first Magna Carta annulled by the Pope.[13] Then in 1217 a second version was acquiesced to, but it remained for all its glory, a mere ornament of government.[14] During this time, some brave jurists began inferring common law rights into the king's first tort statute in order to ensure rights to wholesome food and drink for the people.[15] They also began to develop the jurisprudence of the Great Writ known as habeas corpus as a fundamental law of the realm.[16]

These common law sources of justice were no mere ornament.[17] Over the years, the Houses of Lords and Commons also developed a kind of separation of power from the royal executive powers, but only as a check upon the king.[18] It was not until English common law was united with the ideals in the Magna Carta by the unwritten British constitution that the English ideals in government began to take a uniform, active role in British society.[19]

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13. Lepore, *supra* note 11.

14. *Id.*

15. Rattlesdene v. Grunestone [1317] YB 10 Edw II (54 SS) 140 (Eng.) (despite the king's tort statute, which expressly limited judges to hearing only trespass *vi et armis* and *contra pacem* the court made a legal fiction that the wine was adulterated with "force and arms, namely with swords and bows and arrows" even though it was almost certainly an accident), *in* J.H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 341, 391, 562, 564, 566–67, 572 (2013) (Baker and Milsom gave numerous examples of the Court's inherent, unqualified common law jurisdiction that appeared to stem from *Rattlesdene,* to make safe the public from the sale of unwholesome food and drink *without* a warranty—for example *James Hales' Reading on Costs* [1532] said "if someone sells me unwholesome beef or mutton, without a warranty, I shall nevertheless have an action"; Judge Babington in *Caunt's Case* [1430] said, "If I go into a tavern to eat, and the taverner gives and sells me unwholesome drink or meat, whereby I am made extremely sick, I shall clearly have an action on my case; and yet he made no warranty to me." In *Lupus v. Chandler* [1606], Judge Goldsmith wrote that, "wine, which is corrupt victual prohibited by the law to be sold, know it to be thus corrupt, so that even if it is not warranted, and the vendee does not put his trust in him, nevertheless an action on the case lies.").

16. *See, e.g.*, John Sarger's Case [1481] Y.B. Pas. 21 Edw. IV, fo. 22, pl. 6 (Eng.), *in* BAKER & MILSOM, *supra* note 15, at 565–66.

17. BAKER, *supra* note 7, at 60–64, 196–202.

18. JAMES OTIS, COLLECTED POLITICAL WRITINGS OF JAMES OTIS 39 (Richard Samuelson ed., 2015) ("The English government by some indeed considered as democratical, others have not scrupled to call it an anarchy; but the best opinion is, that the true British constitution, as settled by the glorious revolution, is a mixed monarchy, or a composite of the three famous kinds, viz. of monarchy, supplied by the King, aristocracy, supplied by the lords, and of democracy, supplied by the commons. This when the checks and balances are preserved, is perhaps the most perfect form of government, that in its present depraved state, human nature is capable of."); *Cf.* BAKER, *supra* note 7, at 167–69.

19. Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.) (opinion of Lord Coke) ("when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void").

Lord Coke was the first person to champion an application of the principles of the Magna Carta uniformly in court as paramount law.[20] Coke created, for the first time, a common law doctrine that all positive laws against the English constitution or natural equity are void.[21] His decision in *Dr. Bonham's Case* gave rise to a progeny of common law that held violations to the English unwritten constitution, including violations of the rights embodied in the Magna Carta, as void.[22]

If there is any justice in overruling unjust laws, it did not flow from the kings and queens of England.[23] For taking on the crown in open court, on behalf of the common people, Lord Coke was removed from the bench and tried in the infamous Star Chamber.[24] The progeny of cases that began with *Dr. Bonham's Case*, now taken for granted by most U.S. judges,[25] were the first to hold laws unconstitutional, defying the arbitrary attempts of the king to silence and control Lord Coke.[26]

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20. *Id.*; *see* 2 EDWARD COKE, INSTITUTES *19–27; *cf.* Lepore, *supra* note 11 ("Edward Coke, the person most responsible for reviving interest in Magna Carta in England, described it as his country's 'ancient constitution.'").

21. Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.).

22. *See* Day v. Savadge [1614] Hob. 85, 87 (Eng.) ("an act of parliament, made against natural equity, as to make a man a judge in his own case, is void in itself") (extending Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)); William Wetmore, *Wetmore's Minutes of the Trial, Essex Inferior Court, Newburyport, Oct. 1773, Caesar v. Greenleaf* [1773], *in* 2 JOHN ADAMS, LEGAL PAPERS OF JOHN ADAMS 67 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) [hereinafter ADAMS, LEGAL PAPERS] (the freedom cases in Massachusetts that occurred just before the revolution arose directly from Lord Coke's ideas).

23. 2 EDWARD COKE, INSTITUTES *a proeme* (King John attempted to avoid the Magna Carta, but to no avail—for the king cannot repeal the charter that created him—thus some have called the king a corporation to explain the phrase *the king is dead, long live the king*); Petition of Right 1628, 3 Car. 1, c. 1 (Eng.) (this document, like Magna Carta remained a mere ornament, it was authored by Coke in the House of Commons, but it did not restrain the king's power to violate the laws, as confirmed by the feudal sovereign and qualified immunity asserted in *The Bankers Case*).

24. 1 JOHN LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 290–97 (1849) (Though his enemies conspired to revenge the crown against him, "Coke's energy and integrity triumphed."); EDWARD COKE, THE SELECTED SPEECHES AND WRITINGS OF SIR EDWARD COKE lvii (Steve Sheppard ed., 2003). *Cf.* Millar v. Taylor [1769] 4 Burr. 2303, 2373 (Eng.) (Yates, J., dissenting) (The Star Chamber is "a Court the very name whereof is sufficient to blast all precedents brought from it.").

25. *See* George P. Smith, II, *Marbury v. Madison, Lord Coke And Dr. Bonham: Relics Of the Past, Guidelines For The Present—Judicial Review In Transition*, 2 U. PUGET SOUND L. REV. 255, 267 (1979).

26. Lepore, *supra* note 11 (Coke "was rumored to be writing a book about Magna Carta; Charles I forbade its publication.").

Lord Coke's precedents continued to grow and develop in England despite royalist politics.[27] His precedents were doubted and rejected by the fatalism of Hobbes and Selden.[28] The Precedents were wholly disdained by the Cromwellian Puritans.[29] They were entirely abandoned by William & Mary in their so called Revolution of 1688.[30] Nevertheless, Coke's claims of English legitimacy based upon an overruling English constitution survived, and at length crossed the Atlantic to inspire the American Revolution.[31]

King George III's failure to follow Coke's precedents lost him the Empire.[32] In 1761, James Otis, inspired by Coke, declared in open Colonial Court that "an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very words of this Petition, it would be void."[33] Otis repeated this argument in tracts he published in England, where he was "the acknowledged head of the opposition."[34]

After Otis rose up and his loving sister, Mercy, sung out his praises in the public fray calling him "the first champion of American

27. Day v. Savadge [1614] Hob. 85, 87 (Eng.) (extending Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.) (opinion of Lord Coke)).

28. HOBBES, *supra* note 6, at 98–99, 193 (expressly rejecting Lord Coke's ideas); *id.* at 61 (praising John Selden's works); JOHN SELDEN, THE TABLE-TALK OF JOHN SELDEN 61 (Samuel Harvey Reynolds ed., 1892) [hereinafter SELDEN, TABLE-TALK] (rejecting equity itself as "roguish" and arbitrary, and thus opposing the basis of Coke's opinion in *Dr. Bonham's Case* that laws against natural equity are void).

29. Lepore, *supra* note 11 (Oliver Cromwell was rumored to have called the Magna Carta the "Magna Farta" and Coke's Petition of Right the "Petition of Shite").

30. Raoul Berger, *Doctor Bonham's Case: A Statutory Construction or Constitutional Theory?*, 117 U. OF PENN. L. REV. 521, 523 (1969).

31. OTIS, *supra* note 18, at 175 (repeating Otis's argument from *Paxton's Case*, the citizens of Massachusetts Bay expounded the basis of every American written constitution to come, "that *acts of parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*") (extending Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)); PARKER P. SIMMONS, JAMES OTIS'S SPEECH ON THE WRITS OF ASSISTANCE 1761., at 2, 5, 18 (Albert Bushnell Hart & Edward Channing eds., 1906) (the remedy for disposing of unjust laws adopted by the Americans was "to confer on the judiciary the power to declare unconstitutional statutes void"). *See* Laura K. Donohue, *National Security Law and Privacy*, C-SPAN (Sept. 15, 2015), https://www.c-span.org/video/?328003-4/laura-donohue-balancing-national-security-privacy-concerns [hereinafter Donohue, *National Security*].

32. Letter from Thomas Hutchinson to Richard Jackson (Sept. 12, 1765), *in* JOSIAH QUINCY, JR., REPORTS OF CASES 441 (1865) ("Our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is *ipso facto* void.").

33. SIMMONS, *supra* note 31, at 5 (from the report of John Adams).

34. WILLIAM TUDOR, THE LIFE OF JAMES OTIS 180 (1823).

freedom,"[35] Sir William Blackstone stared back across the Atlantic to the rising glory of America and frowned.[36] Blackstone betrayed his Lord Coke by saying of Parliament, "what they do, no authority upon earth can undo."[37] Thus, as Thomas Jefferson observed, "Blackstone and Hume have made tories of all England."[38]

William Blackstone's notion of parliamentary omnipotence ironically helped Jeremy Bentham demolish the Blackstonian defense of the English Separation of Powers.[39] However, by then parliamentary omnipotence was already tried in the American Revolution and proven unequivocally false.[40] In the place of English government, the Americans vindicated the existence of an "infinitely good and gracious Creator of the universe" as "the *only* one who is *omniscient* as well as *omnipotent*."[41]

After the American Revolution, the royalist utopian philosopher, Jeremy Bentham, renewed calls to make the English government omnipotent through the implementation of *The Panopticon*.[42] Inspired by the Puritans, Jeremy Bentham told the rulers of the world that

35. 1 MERCY OTIS WARREN, A HISTORY OF THE RISE, PROGRESS, AND TERMINATION OF THE AMERICAN REVOLUTION 47 (1805) (James Otis had "the honor of laying the foundation of a revolution." – "He was the first champion of American freedom, who had the courage to put his signature to the contest between Great Britain and the colonies."); TUDOR, *supra* note 34, at 180–83.

36. 1 WILLIAM BLACKSTONE, COMMENTARIES *206 (regarding us as "zealous Republicans," whose ideas were tantamount to anarchy, "or total dissolution of the government").

37. *Id.* at *156–57.

38. Letter from Thomas Jefferson to Horatio G. Spafford (Mar. 17, 1814) (Jefferson advised that we should be careful not to substitute "Blackstone for my Lord Coke, as an elementary work.").

39. 1 WILLIAM BLACKSTONE, COMMENTARIES *156–57; JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT xxxiv–xxxv n. s, 141 (2d ed., 1823) [1776] [hereinafter BENTHAM, A FRAGMENT]; M. DUMONT, PRINCIPLES OF LEGISLATION: FROM THE MS. OF JEREMY BENTHAM 300 (John Neal trans., 1830) ("Why did he [Blackstone] not perceive that without changing his argument, one might draw from it a conclusion diametrically opposite, and altogether as fair: namely, that the British constitution ought to unite all the peculiar vices of democracy, of aristocracy, and of monarchy?"). *See also* [Jeremy Bentham,] *Short Review of the Declaration* [1776], *in* [JEREMY BENTHAM & JOHN LIND,] AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 131–32 (1776) [hereinafter BENTHAM & LIND] (Bentham emphatically agreed with Blackstone that Parliamentary law should be unchallengeable, and so he wanted to crush the Americans for defying English law.).

40. King George III, *The King's Speech of Nov. 30, 1774* [1775] (this speech, published in the colonies, declared parliamentary omnipotence and Parliament's support of the king's efforts to bring the Americans to heel); THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

41. OTIS, *supra* note 18, at 123–25.

42. Letter from Jeremy Bentham to Crecheff in White Russia, 1787 [*Letter I*], *in* 1 JEREMY BENTHAM, PANOPTICON 2–3 (1791) [hereinafter BENTHAM, PANOPTICON] (Jeremy Bentham argued that a *Panoptic* tower was required to make worldly rulers omniscient and omnipotent like gods.).

their governments may not be omnipotent now, but they could be.[43] He argued that using Panopticon prisons to destroy all human privacy could manipulate the masses to believe that their rulers were omniscient and thereby perceived as omnipotent.[44]

Though Bentham had a profound effect on Latin America and Russia, he had very little, if any, effect in the United States.[45] He vigorously attempted to influence the founders, but his influence was stifled by his counterrevolutionary tract condemning the American Revolution.[46] Bentham also repelled Americans when he demoralized the French Declaration of Rights as "nonsense upon stilts," befriended Aaron Burr in exile, and petitioned President Andrew Jackson to abandon the separation of powers.[47]

If the American Revolutionaries noticed him (and there is little evidence they did), they would have recognized the utopian artifice of Bentham's panoptic madness as a perfected version of feudalism.[48] Just as Otis argued, "the origin of *deifying* princes . . . was from the trick of gulling the vulgar into a belief that their tyrants were *omniscient*, and that it was therefore right, that they should be considered as

43. Letter from Jeremy Bentham to the Duke of Wellington (Dec. 12, 1828), *in* 11 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 9 (John Bowring ed., 1843) [hereinafter BENTHAM, THE WORKS]; 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 11 SMITH].

44. 1 BENTHAM, PANOPTICON, *supra* note 42, at i, 139–40; MIRIAM WILLIFORD, JEREMY BENTHAM ON SPANISH AMERICA 102–03, 127–28 (1980).

45. Jeremy Bentham, *Anti-Senatica: An attack on the U.S. Senate, sent by Jeremy Bentham to Andrew Jackson, President of the United States* 60–61 [1830], *in* 11 SMITH, *supra* note 43, at 264–65 (failing to convince President Jackson to make an attempt to disband the U.S. Senate); *id.* at 218 (in his forward, Charles Warren Everett explained why Bentham's utopian fantasies of a single representative assembly had little effect on President Jackson, or anyone in America).

46. [Jeremy Bentham,] *Short Review of the Declaration* [1776], *in* BENTHAM & LIND, *supra* note 38, at 120 (calling the U.S. Declaration of Independence a "cloud of words").

47. Jeremy Bentham, *Anarchical Fallacies* [1796], *reprinted in* 2 BENTHAM, THE WORKS, *supra* note 42, at 501; 21 BENTHAM, THE WORKS, *supra* note 42, at 432–33; DUMONT, *supra* note 39, at 300 (advocating a unity of powers in the style of Turgot and Condorcet); Letter from Jeremy Bentham to Andrew Jackson (Apr. 26, 1830), *in* 11 SMITH, *supra* note 43, at 215 ("If I do not mistake you, you are embarked, or about to embark, on a civil enterprise, which Cromwell, notwithstanding all his military power, failed in,—I mean the delivery of the people from the thralldom in which, everywhere, from the earliest recorded days, they have been held by the harpies of the law.").

48. BENTHAM, A FRAGMENT, *supra* note 39, at xxxiv–xxxv n. s, 141 (advocating for the destruction of the Court's power to declare unjust laws against natural equity or against the constitution void—a total demolition of the principles of Lord Coke. The Americans purposely accomplished the opposite, confirmed permanently by Chief Justice Marshall when he decided *Marbury v. Madison*.).

omnipotent."[49] Thus, Bentham's *Panopticon* was directly preempted by James Otis.[50]

The Americans abolished the English Navigation Acts, which were the invention of the notorious American Puritan George Downing.[51] They vindicated the peaceful resistance of Roger Williams and Anne Hutchinson by establishing a separation of church and state, abolishing religious tests, and ordaining First Amendment freedoms.[52] They turned away from Cromwellian Imperialism and created a government based upon the holding in *Dr. Bonham's Case*.[53]

In the years preceding the American Revolution, King George III affirmed the omnipotence of his Parliament in Blackstonian style, his Parliament affirmed the unbounded powers of the crown, and both were humiliated by defeat.[54] Despite the English government's pretention of god-like omnipotence, *Dr. Bonham's Case* was affirmed in America.[55] A new nation founded by social compact was established upon a fiery resistance to English domination.[56]

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49. OTIS, *supra* note 18, at 125.

50. BENTHAM, PANOPTICON, *supra* note 42, at 2–3; Sarah E. Spengeman, Saint Augustine and Hannah Arendt on Love of the World (June 2014) (unpublished Ph.D. dissertation) (on file with the University of Notre Dame) ("Totalitarianism actually believes that human beings can become omnipotent only if they are properly organized.").

51. Letter from John Adams to William Tudor (July 14, 1818). *See also* SIMMONS, *supra* note 31, at 22 ("He was not only not received, but ill treated, which he resented on his return to England, by proposing an act of navigation, which was adopted, and has ruined Holland, and would have ruined America, if she had not resisted.").

52. Isaac Backus, *An Appeal to the Public for Religious Liberty* 25–26 [1773] ("How weighty are these arguments against confounding church and state together? Yet this author's appearing against such confusion, was the chief cause for which he was banished out of the Massachusetts colony."); ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION 435 (Edward Bean Underhill ed., 1848) [1644] [hereinafter WILLIAMS, THE BLOUDY] (This is regarded as the first expression of the "wall of separation" between church and state—appearing years earlier than Sir Henry Vane the Younger's advocacy of this separation in his anonymously published tract *Zeal Examined*.); ROGER WILLIAMS, THE HIRELING MINISTRY NONE OF CHRIST'S 23–25 (1652) [hereinafter WILLIAMS, THE HIRELING] ("[It is] against the testimony of Christ Jesus, for the civil state to impose upon the souls of the people, a religion . . . . CHRIST JESUS NEVER CALLED FOR THE SWORD OF STEEL TO HELP THE SWORD OF SPIRIT.") (emphasis added). *See also* Thomas Jefferson, *Virginia Statute for Religious Freedom* [1777] ("truth is great and will prevail if left to herself"); Isaac Backus, *Truth is Great, and Will Prevail* 3–5 [1781].

53. Marbury v. Madison, 5 U.S. 137, 177 (1803); *see* SIMMONS, *supra* note 31, at 2, 5, 18.

54. King George III, *The King's Speech of Nov. 30, 1774* [1775]; DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

55. OTIS, *supra* note 18, at 175; THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

56. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776); *Marbury*, 5 U.S. at 177; *see* OTIS, *supra* note 18, at 241 (the bases of English imperialism upon fraud and force were recognized as illegitimate "*Hobbesian* maxims" by the founders).

Finding a peculiar agreement with Baron de Montesquieu and Edward Coke, the founders turned away from Hobbesian fatalism and set out to establish a government upon the separation of powers.[57] John Adams published a tract in 1776 entitled *Thoughts on Government,* which firmly advocated a separation between the Legislative, Executive, and Judiciary branches.[58] This system was copied into the U.S. Constitution for the purpose of avoiding the arbitrary powers of tyranny in government.[59]

Part I of this article will give a broad overview of the separation of powers. Part II will define the problem of internet flux and convergence and explore how it causes old distinctions to appear meaningless, which was used to merge war and peace powers and the laws of land and sea. Finally, Part III examines the origin and ends of antitrust and public interest federal jurisdiction as grounds to dispute and counter violations of the separation of powers in court.

57. 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 3–4 (Thomas Nugent trans., 1899) [1748] ("Man, in a state of nature . . . would feel nothing in himself, at first, but impotency and weakness: his fears and apprehensions would be excessive. . . . In this state, every man, instead of being sensible of his equality, would fancy himself inferior: there would, therefore, be no danger of their attacking one another; peace would be the first law of nature.") (citing and refuting HOBBES, *supra* note 6, at 64–65); Milborn's Case [1572] 7 Co. Rep. 6b, 7a (Eng.) ("*ratio legis est anima legis, et mutata legis ratione, mutatur et lex*" – the reason for a law is the soul of the law, and if the reason for a law has changed, the law is changed); Funk v. United States, 290 U.S. 371, 385 (1933) (The maxim that *cessante ratione legis, cessat ipsa lex* "means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself.") (internal quotation marks omitted); Zadvydas v. Davis, 533 U.S. 678, 699 (2001) ("(*'Cessante ratione legis cessat ipse lex'*) (the rationale of a legal rule no longer being applicable, the rule itself no longer applies)) (quoting 1 EDWARD COKE, INSTITUTES *70b). *But see* John Adams, *Thoughts on Government* 6 [1776] (disagreeing with Montesquieu's idea that fear is the emotion that causes men and women to see in each other an equal); OTIS, *supra* note 18, at 64 (Otis confirmed that the origin of U.S. liberty and peace is natural human love, referring to Terence's verse "*homo sum: humani nihil âne alienum puto*" (Otis's English translation above) to justify his comments: "Let not the Poor envy the Rich, nor the Rich despise the Poor: But let us remember we are all of one Flesh and Blood: and that the Good of the whole is closely and intimately connected with the Welfare and Prosperity of each Individual. The Love of our Neighbour is an evident Principle of natural as well as revealed Religion.")

58. John Adams, *Thoughts on Government* 21 [1776].

59. U.S. CONST. arts. I, II, & III; *see* THE FEDERALIST NO. 47 (James Madison); John Adams, *Thoughts on Government* 22 [1776] (among the direct influences that Adams' tract had over the development of the U.S. Constitution, his view that judges should hold their offices "during good behavior" was adopted verbatim into the U.S. Constitution). *Cf.* THE FEDERALIST NO. 49 (James Madison) (defending the good behavior requirement).

Part I: The Separation of Powers

The principles of natural equity, the common law, and the rights of man inspired by Edward Coke pervade the U.S. social compact.[60] There are many examples of the underlying principles of the social compact in the resolves,[61] declarations of rights,[62] and constitutions[63] ordained by the people prior to and during the Revolutionary War; and so the principles of the compact was unanimously and vigorously reaffirmed in *Marbury v. Madison*.[64] However, the clearest and most universal embodiment of these principles is found in the Declaration of Independence.[65]

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60. Simmons, *supra* note 31, at 2, 5, 18; Otis, *supra* note 18, at 175.

61. Patrick Henry et al., *The Virginia Resolves* (May 30, 1765), *in* Journals of the House of Burgesses 1761–1765, at 360 (John Pendleton Kennedy ed., 1907) ("[T]he first adventurers and settlers of His Majesty's colony and dominion of Virginia brought with them and transmitted to their posterity [and to all later settlers] . . . all the liberties, privileges, franchises, and immunities that have at any time been held, enjoyed, and possessed by the people of Great Britain."); John Ashley et al., *The Sheffield Resolves* (Jan. 12, 1773) ("That Mankind in a state of nature are equal, free, and independent of each other, and have a right to the undisturbed enjoyment of their lives, their liberty and property," and that these rights were "transmitted to us by our worthy and independent ancestors, at the most laborious and dangerous expense."); Joseph Warren et al., *The Suffolk Resolves* (Sept. 9, 1774).

62. The Declaration of Independence para. 2 (U.S. 1776). *See infra* note 63 (most of the state constitutions were placed within their original constitutions).

63. Vt. Const. of 1777, ch. 1, arts. 1–19 ("all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety"—after this text the first Vermont constitution expressly abolished slavery); N.J. Const. of 1776, art. 4 ("That all inhabitants [i.e., including women and black folk] of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for Representatives in Council and Assembly; and also for other public officers, that shall be elected by the people of the county at large.") (emphasis added); Md. Const. of 1776 pt. 1, art. 3 (expressly reserving the privilege to all its inhabitants of the English Common Law, which included the holding from *Somerset v. Stewart*); Mass. Const. pmbl. & pt. 1 (1780); Va. Const. of 1776 art. 1, § 1 ("all men are by nature equally free and independent"); Ga. Const. of 1777 pmbl., arts. 58, 60–61.

64. Marbury v. Madison, 5 U.S. 137, 177 (1803); *see* Otis, *supra* note 18, at 175; Levi Hart, *Liberty Described and Recommended*, Eben. Watson, Sept. 20, 1774, at 16–17, 20 [1775]; Lemuel Haynes, *Liberty Further Extended* [1776], *in* Ruth Bogin, *"Liberty Further Extended": A 1776 Antislavery Manuscript by Lemuel Haynes*, 40 The Wm. & Mary Q. 85, 95 (1983) (Asserting the common law rule from *Dr. Bonham's Case* as a reason to end American Slavery: "Every privilege that mankind enjoy[s] have their origin from God; and whatever acts are passed in any Earthly Court, which are Derogatory to those edicts that are passed in the Court of Heaven, the act is *void*."); Tudor, *supra* note 34, at 272.

65. The Declaration of Independence paras. 1–2, 11, 14–15, 19–20, 22–24 (U.S. 1776).

To understand and appreciate the American ideal of the separation of powers, it is important to first understand the compact by which the separation of powers was established.[66] Reaching this understanding requires recognition of the English common law precedent that began with *Dr. Bonham's Case* and how it inspired the revolution.[67] It also requires a working knowledge of the governmental legitimacy that Edward Coke proposed, and James Otis championed, as the everlasting cornerstone of the American Union.[68]

This understanding begins with an explanation of the triad of founding documents, which includes the Declaration of Independence, the U.S. Constitution, and the Judiciary Act of 1789.[69] Each of these documents were meant to function in conjunction with one another, to foster a vibrant and flourishing society.[70] As now retired Justice Sandra Day O'Connor explained,

> The Judiciary Act marked the last great event in our Nation's founding and formed the genesis of our Nation's continuing constitutional revolution. It is the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself. The Declaration of Independence made clear that our revolution sought to defend our Nation's most basic liberties and values: the Constitution gave form to the government that would protect those liberties and the common good. That government would succeed, and those liberties would be protected, only through the Nation's commitment to the legal process and the rule of law. The Judiciary Act fulfilled that commitment.[71]

Justice O'Connor, though correct in her description of the triad, was prone to presume the perfection of the operation of these documents through a colorblind lens she used on the constitution; a way of seeing

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66. *Id.* (the complaints in many of the Declaration's paragraphs allude to matters expressly resolved by the firm adoption of the separation of powers).

67. SIMMONS, *supra* note 31, at 2, 5, 18; OTIS, *supra* note 18, at 175.

68. OTIS, *supra* note 18, at 175 (finding "that *acts of parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*.").

69. THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776); U.S. CONST. arts. I, II, & III; Judiciary Act of 1789, 1 Stat. 73.

70. Cohens v. Virginia, 19 U.S. 264, 414–15 (1821) (interpreting the U.S. Constitution and the Judiciary Act under the objects of the U.S. social compact to exercise supreme authority of the federal courts over the state courts on the basis of the public interest/trust purposes of the U.S. Constitution as required by our compact saying, "We think that, in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme so far as respects those objects and so far as is necessary to their attainment."); THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776); U.S. CONST. arts. I, II, & III; Judiciary Act of 1789, 1 Stat. 73.

71. Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990).

the founding documents that was in vogue for her time.[72] More recently, however, Michelle Alexander and Harper Lee produced a sea change in American culture against the idealization of good intentioned race-blindness—for social justice will not come from blindness, but from seeing.[73]

Our founding documents do not have the magic properties Justice O'Connor assumed they did, because just as Judge Hand warned us, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."[74] Thus, people must actively engage in the revolution in our government, to which Justice O'Connor referred, and not passively regard it from the sidelines.[75] The legiti-

72. *See* Jennifer R. Byrne, *Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action*, 42 ST. LOUIS U. L.J. 619, 619–20 (1998); Grutter v. Bollinger, 539 U.S. 306, 310 (2003) (noting Justice O'Connor's bias toward a colorblind America when she said, "[t]he Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as possible," and also stated "[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); Virginia v. Black, 538 U.S. 343, 356–57 (2003) (noting Justice O'Connor's characterization of cross-burnings as if they could be legitimate, First Amendment protected expressions of speech—when to the Union and to all black folk cross burnings are synonymous with fighting words. Her First Amendment dream was not for truth, but for a pluralism that condones race hatred and violence.). Individuals among those whose speech was protected by O'Connor's opinion in *Black* to advertise a coming race war in America seem to have caused a coninuing escalation of race based violence including the Charlottesville protests that claimed Heather Heyer's life, the police murder of George Floyd and several other murders like it, the Charleston church massacre, and many other instances of race based hatred; all of these taken together are a strong reason to believe that O'Connor's suggestion in the year 2003 that the court should overrule its former constitutional protections of racial minorities in the United States after the year 2028 was premature. *See* Debbie Elliot, *5 Years After Charleston Church Massacre, What Have We Learned*, NPR (June 17, 2020, 1:39 PM), https://www.npr.org/2020/06/17/878828088/5-years-after-charleston-church-massacre-what-have-we-learned. *See also* Nicholas Lemann, *Can Affirmative Action Survive?*, NEW YORKER (July 26, 2021), https://www.newyorker.com/magazine/2021/08/02/can-affirmative-action-survive.

73. MICHELLE ALEXANDER, THE NEW JIM CROW 228–29 (2010) ("'What a tragedy! Millions of Negroes have been crucified by conscientious blindness. . . . Jesus was right about those men who crucified him. They knew not what they did. They were inflicted by a terrible blindness.'") (quoting MARTIN LUTHER KING JR., STRENGTH TO LOVE 45–48 (1963)); HARPER LEE, GO SET A WATCHMAN 181–82 (2015) ("Blind, that's what I am. I never opened my eyes. I never thought to look into people's hearts, I looked only in their faces. . . . I need a watchman to lead me around and declare what he seeth every hour on the hour.") (referring to *Isaiah* 21:6).

74. Hon. Learned Hand, Speaker at I am an American Day: Spirit of Liberty Speech (1944); *see* Letter from John Adams to Thomas Jefferson (Aug. 24, 1815) (The Revolutionary War was "only an Effect and Consequence of" the Revolution, for "The Revolution was in the Minds of the People, and this was effected, from 1760 to 1775, in the course of fifteen Years before a drop of blood was drawn at Lexington.").

75. MD. CONST. OF 1776 pt. 1, art. 4 ("The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of man-

macy of the U.S. Government is thus continuously secured by the common people.[76]

The legitimacy of the U.S. Government exists in the revolutionary moment of time.[77] It exists when injured parties are vindicated in court, when a judge makes equitable orders to secure their freedom, the fidelity of their vote, and their health and safety at work; the legitimacy of the U.S. Government consists in its active assertion of the equality of every person's rights regardless of race, gender, nationality, religion, or any other classification.[78] Our natural liberty and equality is vindicated in public demonstrations in which the participants proclaim—*all power to all the people!*[79]

When functioning properly, the triad of founding documents empowers the U.S. Government to breathe in the revolutionary fire of the people through peaceful processes.[80] The founding fathers and

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kind."). *Cf.* Falbo v. United States, 320 U.S. 549, 561 (1944) (Murphy, J., dissenting) ("The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.").

76. Frederick Douglass, What to the Slave is the 4th of July? (July 5, 1852), *in* 1 AMERICAN SPEECHES 533 (Ted Widmer ed., 2006) (quoting Henry Wadsworth Longfellow, *A Psalm of Life* [1838]); Letter from Susan Brownell Anthony to Clara Bewick Colby (Dec. 17, 1898).

77. *See, e.g.,* Phillis Wheatley, *To the University of Cambridge* [1767] (exhorting us to "redeem each moment, which with haste / Bears upon its rapid wing Eternal bliss"); Susanna Wright, *On Time*, *in* Milcah Martha Moore's Book 135 (Catherine La Courreye Blecki & Karin A. Wulf eds., 1997) [hereinafter MILCAH] ("Enjoy the present & be bless'd, / While yet they're in your power, / Nor place your happiness or rest, / On any future hour.").

78. U.S. CONST. amend. XIV, § 1 (requiring the equal protection of the law). *See generally* Brown v. Board of Education, 347 U.S. 483 (1954); Gray v. Sanders, 372 U.S. 368 (1963); Fay v. Noia, 372 U.S. 391 (1963) (Justice O'Connor helped to gradually overrule this case to destroy its affirmation of habeas corpus protection mandated by the U.S. Constitution.); Loving v. Virginia, 388 U.S. 1 (1967); Abood v. Detroit Board of Education, 431 U.S. 209 (1977) (this precedent was recently frayed by the court, leaving it not necessarily overruled or distinguished, but undermined with holes and backdoors for judges to plausibly ignore it—then it was overruled in *Janus v. American Federation*).

79. *See generally* SELMA (Paramount Pictures 2014); Fred Hampton, Sr., Speech at Olivet Baptist Church in Chicago: Power Anywhere There's People (1969); Dr. Martin Luther King Jr., leader of the Civil Rights Movement, Speaker at March on Washington: I Have a Dream (Aug. 28, 1963); Alicia Garza, Founder of BLM, Keynote Address at 2015 Law for the People Convention in Oakland (Oct. 23, 2015).

80. Samuel Cooper, *Sermon on the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 3 [1780] (we are like Moses' vision of "'a bush burning and yet not consumed'"). *See, e.g.*, Susan B. Anthony, *Address of Susan B. Anthony* (1873), *in* ANON., AN ACCOUNT OF THE PROCEEDINGS ON THE TRIAL OF SUSAN B. ANTHONY, ON THE CHARGE OF ILLEGAL VOTING 178 (1874) [hereinafter ANON., AN ACCOUNT] (Had the U.S. Judiciary properly taken in the revolutionary fire of the people through peaceful process in this case, women would have had the right to vote in 1873.); Gray v. Sanders, 372 U.S. 368, 381 (1963) (It took all the way until 1963 for the U.S. judiciary to finally get the picture that it might have a role to play in securing the voting rights of the people according to the principles of the compact of 1776: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth

mothers believed that power itself corrupts and human nature is not itself to blame for failures in government form.[81] Thus, with Montesquieu the founders departed from Hobbesian fatalism, declared that the state of nature is liberty and peace, and established the separation of powers.[82]

The separation of powers found in the first three articles of the U.S. Constitution gives form to the U.S. Government and exists as part of the spirit of our laws.[83] This spirit originated in a paramount and superintending U.S. social compact represented by the Declaration of Independence.[84] Americans know this view is correct and proper because of the U.S. Constitution's preamble, which states its purposes and objects, including the formation of "a more perfect union"; a Union born on July 4, 1776.[85]

Amendments can mean only one thing—one person, one vote."); *see* Ida B. Wells-Barnett, *Lynch Law in America*, 23 THE ARENA 15, 20–21 (1900) (If the Courts properly engaged with Ida B. Wells' revolutionary motions in her time, *Plessy v. Ferguson* would have had a much different outcome—instead the Court allowed the "unwritten law" of racial prejudice and hatred to control the written laws.). *Cf.* LUCY STONE, WOMAN SUFFRAGE IN NEW JERSEY 12 (Mar. 6, 1867) ("In New Jersey, women and negroes voted from 1776 to 1807, a period of thirty-one years.").

81. Letter from Abigail Adams to John Adams (Mar. 31, 1776) ("Remember all Men would be tyrants if they could."); John Adams, *Thoughts on Government* 17–18 [1776] (the separation of powers is meant to keep men in power from devolving into "ravenous beasts of prey"); THE FEDERALIST NO. 47 (James Madison) ("The accumulation of powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

82. John Adams, *Thoughts on Government* 21 [1776]; THE FEDERALIST NO. 47 (James Madison); Phillis Wheatley, *Liberty & Peace* [1784]; 1 MONTESQUIEU, *supra* note 57, at 3–4 (Arguing that Hobbes mistakenly "attributes to mankind, before the establishment of society, what can happen but in consequence of this establishment, which furnishes them with motives for hostile attacks and self-defense[.]").

83. U.S. CONST. arts. I, II, & III.

84. THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776).

85. U.S. CONST. pmbl. *See* THE DECLARATION OF INDEPENDENCE paras. 1, 32 (U.S. 1776) (forming the "United States" for the first time—before this declaration they were mere colonies). *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–60 ("The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute. We find it laid down in some of our earliest authorities in the common law; and civilians are accustomed to a similar expression, *cessante legis prœmio, cessat et ipsa lex*. . . . There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions.") (citing Chisholm v. Georgia, 2 U.S. 419, 474–75 (1793) (Opinion of Jay, C.J.)). *See also* Vanhorne's Lessee v. Dorrance, 2 U.S.

The objects of the Union (i.e., the ultimate purpose or spirit of the laws), that are referred to in the U.S. Constitution's preamble, are embodied by the Declaration of Independence.[86] They are the founders' best estimation of what the legitimacy of any government upon the earth depends.[87] The legitimacy of the separation of powers consists in its protection of preexisting natural human rights, voting rights, and the right to amend constitutions, to secure the consent of the governed.[88]

The objects of the Union, thus, consist in the preservation of at least four elements: A legitimate voting system;[89] the ideal of *Our Federalism!* reflected in the Ninth and Tenth Amendments;[90] the idea that all men and women are equal by law and by birth;[91] and finally the sovereign right and duty of the people to amend or abolish their constitutions, when they are arbitrary or tyrannical, in order to replace them with a form of government that better secures their safety and happiness.[92]

304, 311 (1795) (referring to the U.S. social compact as accepted by Pennsylvania to protect property rights).

86. THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776). *See* Matilda Joslyn Gage, *The United States on Trial, not Susan B. Anthony* (1873), *in* ANON., AN ACCOUNT, *supra* note 80, at 179 ("Governments derive their just powers from the consent of the governed. That is the axiom of our republic. . . . The first principles of government are founded on the natural rights of individuals; in order to secure the exercise of these natural, individual rights our government professed to be founded."); Funk v. United States, 290 U.S. 371, 385 (1933) (The maxim that *cessante ratione legis, cessat ipsa lex* "means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself.") (internal quotation marks omitted); Milborn's Case [1572] 7 Co. Rep. 6b, 7a (Eng.) ("*ratio legis est anima legis, et mutata legis ratione, mutatur et lex*" (the reason for a law is the soul of the law, and if the reason for a law has changed, the law is changed)).

87. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776). *See* [Mercy Otis Warren,] *Observations on the New Constitution* 6 [1788] ("All writers on government agree, and the feelings of the human mind witness the truth of these political axioms. . . .").

88. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

89. *Id. See* Gray v. Sanders, 372 U.S. 368, 381 (1963); John Adams, *Thoughts on Government* 10 [1776] ("Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections.").

90. U.S. CONST. amends. IX & X; Pennsylvania v. Union Gas, Co., 491 U.S. 1, 25, 27 (1989) (Stevens, J., concurring).

91. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See* OTIS, *supra* note 18, at 120 ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?"); JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 1, 10 (1788) [hereinafter ADAMS, A DEFENCE] ("In America, the right of sovereignty resides indisputably in the body of the people, and they have the whole property of land. There are no nobles or patricians—all are equal by law and by birth.").

92. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

The legitimacy of the separation of powers must, therefore, be vindicated under the Declaration's principles or else it ought to be cast aside for a more just form of government.[93] There are many reasons to doubt the legitimacy of the U.S. Government, including the existence of the absolute enslavement of black folk that the U.S. Government oversaw prior to the Civil War.[94] Misogyny laws and unwritten lynch law also indicated the insufficiency of the separation of powers to secure the consent of the *whole* people.[95]

Not only these deficiencies, but the most infamous Taney Court opinion, *Dred Scott,* was reaffirmed in *The Slaughterhouse Cases,* as an arbitrary rationale to block the natural rights and liberties of every person.[96] Thus, the question that plagues us after *Slaughterhouse* does not necessarily regard the construction of the Thirteenth Amendment.[97] For as Frederick Douglass preemptively observed, the U.S. Constitution cannot legitimately be interpreted to justify slavery under the original U.S. social compact.[98]

Whenever the U.S. Constitution is interpreted to justify the unequal protection of the laws against women, black folk, and foreigners it violates the U.S. social compact.[99] The lack of integrity and deficiency of character that caused U.S. courts to contradict our founding compact after the Civil War is largely inspired by the rationale of *Dred*

93. *Id.*

94. Dred Scott v. Sandford, 60 U.S. 393, 404 (1856).

95. *See* Minor v. Happersett, 88 U.S. 162, 178 (1874); Wells-Barnett, *supra* note 80.

96. The Slaughterhouse Cases, 83 U.S. 36, 73 (1872) (failing to overrule "the celebrated *Dred Scott* case," and maintaining *Dred Scott*'s holding that African Americans were meant to be excluded from the rights vindicated by the U.S. social compact, even after slavery was ended under the Thirteenth Amendment) (citing *Dred Scott*, 60 U.S. at 393).

97. U.S. CONST. amend. XIII. *Cf.* 13TH (Netflix 2016) (presenting the argument that the Thirteenth Amendment's language is the real problem).

98. Frederick Douglass, What to the Slave is the 4th of July? (July 5, 1852), *in* 1 AMERICAN SPEECHES 530 (Ted Widmer ed., 2006) (the principles of the Declaration of Independence are "saving principles" that require the U.S. Constitution to be interpreted as "A GLORIOUS LIBERTY DOCUMENT" that includes African Americans in its promises); *see* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

99. Letter from John Adams to Massachusetts Militia (Oct. 11, 1798) ("We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our constitution as a whale goes through a net."); Levi Hart, *Liberty Described and Recommended*, EBEN. WATSON, Sept. 20, 1774, at 20 [1775]. *See* Lemuel Haynes, *Liberty Further Extended* [1776], *in* Bogin, *supra* note 64, at 94 ("it cannot be tho't impertinent for us to turn one eye into our own breast, for a little moment, and see, whether thro' some inadvertency, or self-contracted spirit, we do not find the monster lurking in our own bosom.").

Scott.[100] The false idea from *Dred Scott,* that the U.S. social compact was only meant to include white propertied men, directly inspired *Minor*, *Downes*, and *Plessy*.[101]

All of this unjust case law should be overruled at common law as an obvious misreading of the U.S. social compact.[102] Under *Dred Scott* and the ever-expanding body of case law that derives from *Slaughterhouse*, the U.S. Courts administered the laws under a false version of the founding compact.[103] If the actual founding compact is regarded once more, these same courts would be required to administer equal rights and equal protection of the laws for everyone.[104]

The Declaration of Independence says "all men are created equal," and asserts that every one of us is endowed by our creator, with

100. The Slaughterhouse Cases, 83 U.S. 36, 73 (1872) (refusing to say that *Dred Scott* was wrongly decided, and so it impliedly adopted *Dred Scott*'s reading of the U.S. social compact as exclusive to white men) (citing *Dred Scott*, 60 U.S. at 393); *id.* at 95 (Field, J., dissenting) (Justice Field also appeared to accept Chief Justice Taney's holding in *Dred Scott* as if the Fourteenth Amendment was not a referendum on the Court's misreading of the U.S. social compact as excluding black folk, but only a reversal of an otherwise legitimate reading of the U.S. social compact) (quoting *Dred Scott*, 60 U.S., at 419 (Opinion of Taney, C.J.)).

101. Minor v. Happersett, 88 U.S. 162, 166 (1875); Plessy v. Ferguson, 163 U.S. 537, 542, 543 (1896); Downes v. Bidwell, 182 U.S. 244, 274–76 (1901); Lochner v. New York, 198 U.S. 45, 53 (1905); Brown v. Board of Education of Topeka, 347 U.S. 483, 492 (1954) (only overruling *Plessy* regarding public schools; in all other matters, including the U.S. social compact, *Plessy* and *Slaughterhouse* are still controlling law); Tuaua v. United States, 788 F.3d 300, 304 (D.C. Cir. 2015) (citing *Dred Scott*, 60 U.S., at 404–05).

102. *See, e.g.,* Blanche Bong Cook, *Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the "WHP") or Johny and the WHP*, 31 YALE J. L. FEMINISM 57, 64 n.27, 133–34 (2019) (Making the case that *Dred Scott* needs to be overruled with these words: "Power is neither natural nor inevitable. It is made. And it can be unmade.").

103. *Slaughterhouse*, 83 U.S., at 73 (citing *Dred Scott*, 60 U.S. at 393). *See also* Tuaua v. United States, 788 F.3d 300, 304 (D.C. Cir. 2015) (citing *Dred Scott*, 60 U.S., at 404–05), *extended in* Fitisemanu v. United States, Nos. 20-4017 & 20-4019, slip op. at 21–22, 25 (10th Cir. 2021) (quoting The Slaughterhouse Cases, 83 U.S. 36, 72–73 (1872)) (citing *Dred Scott*, 60 U.S., at 404–05) ("the Supreme Court concluded in *Dred Scott v. Sandford* that African Americans couldn't become citizens even if they had been born in the United States"—the Court cited to numerous postbellum cases like *Elk v. Wilkins* that repeated this rule from *Dred Scott* as the presumptive rule, that remained after the Citizenship Clause of the Fourteenth Amendment was ratified, to justify withholding Samoan citizenship rights—in other words, the rule from *Dred Scott* is used as the baseline rule of no rights despite the fact that *Dred Scott* gave a false reading of the U.S. social compact that did not exist at the founding and also despite the fact that the common law disagrees with *Dred Scott* and was recently reaffirmed in *Boumediene v. Bush*).

104. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. 304, 325, 347, 373–74 (1816); Calder v. Bull, 3 U.S. 386, 388 (1789) (Opinion of Chase, J.); Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795) (Opinion of Paterson, J.); Chisholm v. Georgia, 2 U.S. 419, 468 (1793) (Opinion of Cushing, J.) ("the great end and object" of U.S. governments is to "secure and support the rights of individuals"); THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

equal, unalienable rights.[105] It does not say that American liberty and equality are exclusive to only white propertied men; the Declaration of Independence was actually meant to include "apple women and orange girls," and black people too; for it was asserted at that time, in the face of British cruelty, that "the colonists, black and white, born here, are free born British subjects, and entitled to all the essential civil rights of such."[106] If the U.S. Supreme Court administered the laws under the actual U.S. social compact embodied by these words, the Civil War might have been avoided, and the Fourteenth Amendment Equal Protection Clause would not have been necessary.[107]

The plain and clear meaning of the text of the Declaration of Independence is also confirmed by the writings of James Otis and Phillis Wheatley prior to the ratification of the Declaration.[108] For James Otis, a white Harvard educated property owner and one of the most famous of the New England elite, repeatedly and vigorously contended for the rights of all men and women, "white, brown and black."[109] This was no mere pretense, for when Phillis Wheatley, an enslaved African American poet, asserted herself as a representative of the sovereign dignity of the peoples of America before King George III, she wondrously prevailed against him.[110]

Thus, the first application of the U.S. social compact in Massachusetts was used to set all slaves free in *Mumbet's Case*.[111] Even before Elizabeth Freeman (i.e., Mumbet) won her case, the U.S. social compact did a wonder in New Jersey, for "In New Jersey, women and

105. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

106. OTIS, *supra* note 18, at 122, 147.

107. *See* Alexander Hamilton, *The Farmer Refuted* 24 [1775] ("It is therefore, evident to a demonstration, that unless every *free agent* in America be permitted to enjoy the same privilege, we are entirely stripped of the benefits of the constitution, and precipitated into an abyss of slavery."). The Equal Protection Clause is an express requirement of the Rule of Law, because the U.S. Government's failure to administer an equal protection of the laws sunk the nation into Civil War. U.S. CONST. amend. XIV, § 1.

108. OTIS, *supra* note 18, at 147; Phillis Wheatley, *On the Affray at King's Street* [1770] (evidence of Wheatley's likely leadership and participation in the marches and demonstrations against the British occupation were printed in the papers vindicating those who fell in the Boston Massacre including Crispus Attucks, a black man, named in this poem).

109. OTIS, *supra* note 18, at 265–66.

110. *See, e.g.* Phillis Wheatley, *To the King's Most Excellent Majesty* [1768]; Phillis Wheatley, *To His Excellency General Washington* [1776]; Phillis Wheatley, *Liberty & Peace* [1784].

111. *Mumbet's Case* [also known as *Brom & Bett v. Ashley*], Court Decision, Aug. 1781, *reprinted in* ROGER BRUNS, AM I NOT A MAN AND A BROTHER 468–70 (1977) (I refer to this as Freeman's case because Mum Bett's full name was Elizabeth Freeman). *See* Catherine Sedgwick, *Slavery in New England* [1853], *in* 34 BENTLEY'S MISCELLANY 421 (1853) (Referring to Freeman's case as the first application of the Declaration of Independence in Massachusetts.).

negroes voted from 1776 to 1807, a period of thirty-one years."[112] Thus, as in the Bible, "all *men*" is intended to include women, and the Suffragettes' contribution of the Declaration of Sentiments was thus originally confirmed by Phillis Wheatley's revolution of Miltonic poetics, by drawing on religious sources.[113]

However, the social compact became broken and the natural, God-given rights of women, black folk, and poor folk were stolen from them after the revolution through deceit, infidelity, and cowardice.[114] Thousands of black folk, like Lemuel Haynes, fought in the Revolutionary War and earned their freedom; but their marvelous words and deeds forgotten.[115] Black folk never lost their citizenship in Massachusetts, but *Dred Scott* was decided based upon the false idea that free black people in Massachusetts *never existed*.[116]

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112. STONE, *supra* note 80, at 12.

113. OTIS, *supra* note 18, at 119–20 (recognizing men and women both free and equal from birth); PAULA LOSCOCCO, PHILLIS WHEATLEY'S MILTONIC POETICS 54 (2014) (witnessing Wheatley's one woman revolution, i.e., her revision of Milton's woman); THE DECLARATION OF SENTIMENTS para. 2 (U.S. 1848) (asserting the place at the table that Phillis Wheatley originally claimed, saying "all men and women are created equal"). *See* Samuel Sewall, *Talitha Cumi* [1724], *reprinted in* EVE LAPLANTE, SALEM WITCH JUDGE 305 (2007) [hereinafter LAPLANTE, SALEM] (quoting *Galatians* 3:28); *Genesis* 5:2 ("He created them male and female, and He blessed them and named them Man in the day when they were created."). Men like James Wilson and John Quincy Adams nevertheless continued to hold problematic views of women when they appeared to ignore Phillis Wheatley and drew their views directly from Milton. *See, e.g.*, 1 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 35 (Bird Wilson ed., 1804) [hereinafter WILSON, THE WORKS] (quoting John Milton, *Paradise Lost* IV.298, VIII.488–89, VIII.601–03 [1667]); JOHN QUINCY ADAMS, SOCIAL COMPACT 25 (1842) [hereinafter QUINCY ADAMS, SOCIAL] (quoting John Milton, *Paradise Lost* IV.304–11 [1667]). John Adams was, perhaps, the worst betrayer of women. *See* Letter from John Adams to James Sullivan (May 26, 1776).

114. Instead of uniformly applying the principles of the U.S. social compact, which requires the equal protection of the laws in support of the presumptive freedom of every person, the antebellum U.S. Supreme Court arbitrarily supported the ongoing, illegal slave trade by allowing its district courts to determine the slavery of black folk BY CASTING LOTS. JOHN QUINCY ADAMS, ARGUMENT . . . IN THE CASE OF THE UNITED STATES, APPELLANTS, VS. CINQUE, AND OTHERS, AFRICANS, CAPTURED IN THE SCHOONER AMISTAD 82–83 (1841) [hereinafter QUINCY ADAMS, ARGUMENT].

115. *See, e.g.,* Lemuel Haynes, *The Battle of Lexington* [1775]; Lemuel Haynes, *Liberty Further Extended* [1776], *in* Bogin, *supra* note 64, at 94–95 ("Liberty is a jewel which is handed down to man from the cabinet of heaven, and is coeval with his existence. . . . Therefore we may reasonably conclude, that liberty is equally as precious to a *black man*, as it is to a *white one* . . . ."); FOR LOVE OF LIBERTY: THE STORY OF AMERICA'S BLACK PATRIOTS, part 1 (PBS 2010).

116. *Compare* Dred Scott v. Sandford, 60 U.S. 393, 416 (1857), *with* QUINCY ADAMS, SOCIAL, *supra* note 113, at 8 ("It has been repeatedly and most righteously adjudicated, by the highest judicial tribunal of Massachusetts, that slavery cannot exist within the borders of the commonwealth, under the present Constitution. There is and can be no social compact between the master and the slave.").

Chief Justice Taney degraded the U.S. social compact by undermining the American Revolution itself.[117] A slick of unjust slavery and misogyny laws grew like fungus under Taney's banal, forgetting of the very bases of U.S. Government.[118] Under a Taney-esque brand of unthinking banality, women and black folk lost their voting rights in New Jersey by a mere law that directly conflicted with the word and spirit of the Constitution of New Jersey; a direct disregard for the principle in *Marbury v. Madison*.[119]

In the South, the Virginia Declaration of Rights, and the Maryland guarantee of common law rights under *Somerset's Case* became mere ornaments and free black folk like, John Marrant and Benjamin Banneker, became legend.[120] The Taney Court's feudal ornamentation of what was meant to be fundamental law led to the American Civil War.[121] The Taney Court thus degraded Lord Coke's effect in America,

117. *See* Dred Scott v. Sandford, 60 U.S. 393, 408–09 (1857) (including an index of feudal, colonial laws supporting slavery and general discrimination against black folk, and resolving to interpret the U.S. Constitution and state constitutions according them, as if the American Revolution had no real effect on American law).

118. *Ex parte* Merryman, 17 F. Cas. 144, 150 (C.C.D. Md. 1861) (No. 9,487) (Opinion of Taney, C.J.) (arguing that the Fifth Amendment was a mere copy of the British unwritten constitution, overriding the Declaration of Independence). *Cf.* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 210–17 ("The Declaration of Independence has accordingly *always* been treated as an act of paramount and sovereign authority, complete and perfect *per se*," and therefore it should be considered "not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice.") (emphasis added).

119. STONE, *supra* note 80, at 14 ("Thus, in defiance of the letter of the Constitution and of the Statutes and uniform practice of a generation, women and negroes were disfranchised by an arbitrary act of the Legislature, without discussion and almost without comment.").

120. MD. CONST. OF 1776 pt. 1, art. 3 (The constitution of Taney's home state contained a Declaration of Rights that expressly secured in its third article to "the inhabitants of Maryland" an entitlement "to the common law of England, and the trial by Jury, according to that law."). At any point after 1772, the English common law required the *abolishment of slavery* according to *Somerset's Case*. Somerset v. Stewart [1772] 98 ER 499, 510 (Eng.) (Slavery is "so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."); VA. CONST. OF 1776 pt. 1, § 1 ("all men are by nature equally free and independent"); GA. CONST. OF 1777 pmbl., arts. 58, 60–61 (citing directly to the Declaration of Independence as the basis of its legitimacy and refusing "to exclude any person from the inherent privilege of *every freeman*, the liberty to plead his own cause").

121. The three cases that caused the most dysfunction leading up to the Civil War were *Luther*, *Dred Scott*, and *Ableman*—and Taney claimed his place as direct cause of the Civil War in *Ex parte Merryman* by blocking President Lincoln's attempts to resolve the disputes between North and South through peaceful judicial processes. *See, e.g.* Luther v. Borden, 48 U.S. 1, 46–48 (1849); Dred Scott v. Sandford, 60 U.S. 393, 404 (1856); Ableman v. Booth, 62 U.S. 506, 519–21 (1858); *Ex parte* Merryman, 17 F. Cas. 144, 150 (C.C.D. Md. 1861) (No. 9,487) (Opinion of Taney, C.J.). *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,

unsettled *Marbury v. Madison*, and called into question the foundations of the United States upon natural law.[122]

The U.S. Supreme Court recently showed interest in helping the nation overcome these challenges. For example, in *Obergefell,* Chief Justice Roberts dissented, "The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*."[123] Then he drew an inference from *Dred Scott* to *Lochner*.[124] Drawing from the dissents of those cases, Chief Justice Roberts implied that *Obergefell*'s protection of marriage rights for gay men must also violate the separation of powers.[125]

The question of whether *Obergefell* violated the Rule of Law, as *Dred Scott* and *Lochner* did, is contingent on whether it vindicates the equal protection of the laws for every person.[126] The question is not dependent on whether the Court restrains its use of substantive due

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5 n.19 (2016) [hereinafter Schroeder, *The Body*] (my considered opinion on these cases as to why they are a direct cause of the Civil War). *Cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 410 n.179 (2011) (noting *Dred Scott* as a cause of the Civil War); Seth Barrett Tillman, *Merryman Redux: A Response to Professor John Yoo*, 22 CHAPMAN L. REV. 1, 12–13 (2019) (noting and disagreeing with Professor John Yoo's opinion that President Lincoln's defiance of Chief Justice Taney seemed to cause the Civil War—like Professor Tillman, I disagree with Professor Yoo, but for different reasons than Tillman). *But see* Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, 224 MILITARY L. REV. 481, 492 (2016) (disagreeing with my reading of *Ex parte Merryman*).

122. *See supra* note 121. *Cf.* William Wetmore, *Wetmore's Minutes of the Trial, Essex Inferior Court, Newburyport, Oct. 1773, Caesar v. Greenleaf* [1773], *in* 2 ADAMS, LEGAL PAPERS, *supra* note 22, at 67 (citing Day v. Savadge [1614] Hob. 85, 87 (Eng.) (extending Lord Coke's decision in *Dr. Bonham's Case*)); Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.").

123. Obergefell v. Hodges, 135 S. Ct. 2584, 2616–17 (2015) (Roberts, C.J., dissenting) (citing Dred Scott v. Sandford, 60 U.S. 393, 432 (1857)). The U.S. Supreme Court is in unanimous agreement that the Court may correct past injustices resulting from our failed reconstruction. *See* Timbs v. Indiana, 139 S. Ct. 682, 688–89 (2019) (noting the Black Codes that the South used to essentially re-enslave black folk after the Civil War as reason to incorporate the Eight Amendment rule against excessive fines against the states).

124. *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting Lochner v. New York, 198 U.S. 45, 60–61 (1905)).

125. *Id.* at 2616–17 (Roberts, C.J., dissenting) ("'we are under a government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean'") (quoting Dred Scott v. Sandford, 60 U.S. 393, 621 (1857) (Curtis, J., dissenting)).

126. The Rule of Law, as Cicero and the founders conceived it, consists in the idea that the law rules over human beings equally, and that no human being rules over the law. 1 WILSON, THE WORKS, *supra* note 113, at i (The inscription on the title page reads, "'Legum omnes servi sumus, ut liberi esse possimus.'" *We are all slaves to the law so that we might be free*.) (quoting Cicero, *Pro Cluentio* 53.146). Letter from Francis W. Gilmer to Thomas Jefferson (July 10, 1816) ("what Cicero says, 'Legum denique idcirco omnes servi sumus, ut liberi esse possimus,' has never been contradicted") (quoting Cicero, *Pro Cluentio* 53.146)).

process.[127] Although *Dred Scott* was *not* the first case to apply a broad protection of rights beyond the words of the U.S. Constitution, it did however attempt a novel demolition of the U.S. social compact, through Fifth Amendment due process.[128]

By reaffirming *Dred Scott*'s novel abandonment of the U.S. social compact through the Fifth Amendment (which makes *no sense*), the U.S. Supreme Court developed a progeny of unconstitutional case law after the Civil War, beginning with *The Slaughterhouse Cases*.[129] The commonality among each of these cases, including *Downes*, *Plessy*, *Minor*, *Buck*, and *Lochner*, is the abandonment of natural human rights.[130] They subverted the guarantee of natural liberty that arises from the U.S. social compact.[131]

The U.S. social compact was created with the intention to include each and every person in the United States.[132] It was a promise that the state governments and the United States Government would protect each person's natural rights, including their rights to "life, liberty, and the pursuit of happiness."[133] The problem with the *Dred Scott* decision, therefore, is its endorsement of the idea that Fifth Amendment due process can be properly interpreted without considering the promises of the U.S. social compact.[134]

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127. *See, e.g., Obergefell*, 135 S. Ct. at 2616–17 (Roberts, C.J., dissenting) (contending that the court had to learn to restrain its use of the "strong medicine" of substantive due process). *But see* John Adams, *Thoughts on Government* 17–18 [1776] (positing that if the court removes itself as a check in the balance of powers then the other branches may become like ravenous beasts).

128. *Dred Scott*, 60 U.S. at 450; The Slaughterhouse Cases, 83 U.S. 36, 73 (1872).

129. *Slaughterhouse*, 83 U.S. at 73.

130. Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896) (affirming state separate but equal laws based on its understanding of *The Slaughterhouse Cases*); Downes v. Bidwell, 182 U.S. 244, 274–76 (1901) (adopting treasonous *Dred Scott* dicta that people in U.S. territories have no constitutional or natural rights); Minor v. Happersett, 88 U.S. 162, 165–66, 178 (1875) (arbitrarily revoking each woman's rights of citizenship); Lochner v. New York, 198 U.S. 45, 53 (1905) (the *Lochner* decision flowed from *Slaughterhouse*'s presumption from *Dred Scott*, that the Court is impotent to vindicate natural human rights under the U.S. social compact—thus giving manmade rights through employment contracts more weight than natural human rights).

131. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 311 (1795) (asserting to the U.S. social compact to protect Pennsylvania property); THE CASE OF ELIZABETH RUTGERS VERSUS JOSHUA WADDINGTON 28 (Henry B. Dawson intro., 1866) [1784] (Opinion of James Duane, J.) [hereinafter THE CASE OF ELIZABETH RUTGERS] (The doctrine of federal supremacy arose from the "very great force . . . arising from the federal compact," under the Law of Nations prior to the ratification of the Supremacy Clause of the U.S. Constitution.).

132. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

133. *Id.*

134. Dred Scott v. Sandford, 60 U.S. 393, 450 (1857).

The *Dred Scott* decision violated the Rule of Law and the separation of powers by giving an arbitrary construction of the U.S. Constitution.[135] Chief Justice Taney's arbitrary construction of due process was not a new strategy, however, for it was deployed over a hundred years prior by the Puritan witch hanging judges of Salem, Massachusetts.[136] The idea of substantive versus procedural due process referred to by Chief Justice Roberts is a contrived distinction that was not considered in *Dred Scott*, nor does it help explain *Dred Scott*'s departure from the U.S. social compact.[137]

The decision in *Obergefell*, by great contrast, approaches an equal application of the law, appears to defend a natural human right, and thus vindicates the separation of powers by applying the Rule of Law.[138] Therefore, to vindicate the legitimacy of his Court, Chief Justice Roberts should have seized the opportunity presented in *Obergefell* to overrule the racist holding in *Osborn v. Nicholson* for violation of the U.S. social compact.[139] For the U.S. social compact is the seat of U.S. governmental legitimacy.[140]

The U.S. system of the separation of powers successfully avoided a reign of terror as occurred in France during their revolu-

135. *Id.* at 621 (Curtis, J., dissenting). *See* John Adams, *Thoughts on Government* 8 [1776] (the separation of powers exists to preserve the Republic, which is defined as a government of laws, and not of men); U.S. CONST. art. IV, § 4.

136. *See* Nathaniel Ward, *The Body of Liberties passim* [1641] (witches were given "due process" under this unjust Puritan code of laws that named witchery, gay sex, and promiscuity as crimes punishable by death).

137. Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 270–71 (2016).

138. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2591 (2015).

139. *Id.* (affirming the right to marry as a fundamental human right); Osborn v. Nicholson, 80 U.S. 654, 662 (1871) (refusing to give legal force to African American marriages as a natural right that preexists the Thirteenth Amendment—giving an example of how *Dred Scott*'s false version of the U.S. social compact continued to have harmful legal effects on black folks in the United States after the Civil War); *Dred Scott*, 60 U.S. at 413, 416, 599–600 (based in part upon numerous laws that criminalized marriages between white folk with non-white folk, and the laws of Missouri that apparently prohibited marriages of African slaves, in order to destroy the bid of Scott's wife and children for freedom).

140. THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776) (naming the "united States" as a legitimate government entity for the first time in history and carefully naming the basic reasons why the United States is legitimate—this is recognized internationally as the summation of the U.S. social compact). *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 210–17 (meticulously showing that all thirteen original states drafted and ratified their constitutions concurrently with or after the Declaration, because prior to the Declaration they were colonies and not legitimized as states; Story carefully addressed the historical issue of how the chronology and content of the original state constitutions strongly confirmed the primacy of the Declaration as the statement of each state's legimacy under a federal Union, such that each former colony was now independent from England and united with each other as states).

tion.[141] French Revolutionaries, such as Condorcet and Turgot, opposed the American separation of powers, favoring a Unity of Powers in France.[142] They expressly disputed American bicameralism and federalism, and thus the French powers were all gathered in one National Assembly in the style of the Puritan Government advocated by Marchamont Nedham in England.[143]

The National Assembly of the First French Republic ended in a bloodbath, known as the "French Reign of Terror."[144] The French Declaration of Rights never achieved any real application in French government through judicial review and the present day government of France is its Fifth Republic.[145] The still living First U.S. Republic continues to distinguish itself from the Unity of Powers that doomed the First French Republic by adhering to its principle of the separation of powers.[146]

Justice O'Connor offered evidence of the comparative difference in American government to that of the French, by noting its relative stability and peaceful progress.[147] The distinctive American separation of powers, especially its independent judiciary that helped the United States avoid a Reign of Terror, is worthy of note.[148] However, Justice

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141. O'Connor, *supra* note 71, at 5.

142. JOHN ADAMS, DISCOURSES ON DAVILA 82 (1790) [hereinafter ADAMS, DISCOURSES] (criticizing Condorcet, *Lettres d'un bourgeois de* New Haven *à un citoyen de Virginie* [1787] for supporting a government without a separation of powers); 3 ADAMS, A DEFENCE, *supra* note 91, at 213 (responding to Turgot's opinion that there should be no separation of powers in government, and tracing the project back to the Puritan Revolution under the influence of Marchamont Nedham, showing that the same idea that destroyed England destroyed France).

143. Letter from John Adams to Thomas Boylston Adams (Apr. 7, 1796).

144. O'Connor, *supra* note 71, at 4–5 ("During the same period, the United States was in comparison a tranquil place.").

145. DECLARATION OF THE RIGHTS OF MAN arts. 1–17 (Fr. 1789). *See* O'Connor, *supra* note 71, at 4–5. *See also* HANNAH ARENDT, ON REVOLUTION 134, 148–49 (1990) (noting that the French idea of the rights of man was a pre-government idea of rights, and thus, following the worthwhile criticisms Edmund Burke, Arendt revealed how the French idea of rights itself may have exploded the French government or at least precluded the French Revolutionaries from succeeding in "the task of foundation" by establishing a government upon which the rights named in the French Declaration could be carried into practical effect); Trop v. Dulles, 356 U.S. 86, 102 (1958) (adopting Arendt's idea of a "right to have rights" and demonstrating that the foundation of the United States under a compact of rights carried out a practical effect in the real world on a case-by-case basis, as Justice O'Connor illuminated on a more broad and sweeping basis in her University of Cincinnati speech).

146. John Adams, *Thoughts on Government* 7–8 [1776]; U.S. CONST. arts. I, II, & III.

147. O'Connor, *supra* note 71, at 4.

148. *Id.* at 2–3. *Cf.* 3 ADAMS, A DEFENCE, *supra* note 91, at 213 (giving a lengthy exposition and rejection of the English Puritan Marchamont Nedham's tract *The Excellency of a Free State*); ADAMS, DISCOURSES, *supra* note 142, at 82 ("A legislature in one assembly, can

O'Connor underestimated and even appeared ignorant of the American Terror, and so she trivialized its hideous existence in America.[149]

The American Terror, while it never succeeded in taking over and ending the government thus far, continues to cause innumerable instances of pain and suffering.[150] Its confederate flags still fly in the South, representing the slavery and oppression of African Americans.[151] Nevertheless, Justice O'Connor clung to false hopes that a new American utopia might soon arrive and so she softly and smilingly eroded the protection of American rights from the bench.[152]

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have no other termination than in civil dissention, feudal anarchy, or simple monarchy."). *But see* Virginia v. Black, 538 U.S. 343, 356–57 (2003).

149. O'Connor, *supra* note 71, at 4–5; *Black*, 538 U.S. at 356–57 (O'Connor decided KKK cross burnings were a legitimate expression of free speech as if there is any context in which it might not mean clear and present danger for black folk: "For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who 'were married in full Klan regalia beneath a blazing cross.'"). *See* Letter from John Adams to Thomas Jefferson (June 30, 1813) ("what think you of Terrorism, Mr. Jefferson?"). *Compare* Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), *and* Letter from John Adams to Thomas Jefferson (Sept. 17, 1823), *with* Samuel Cooper, *Sermon on the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 20 [1780] (rebuking those who would "attempt to water American soil with human blood").

150. *See* Joe Heim, *Recounting a day of rage, hate, violence and death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/ ("The marchers took off at a brisk pace and immediately began yelling slogans: 'Blood and soil!' 'You will not replace us!' 'Jews will not replace us!' . . . Some made monkey noises at the black counterprotesters. Then they began chanting, 'White lives matter!' . . . At 9:30 am, about 30 clergy members clasped arms and began singing 'This Little Light of Mine.' Twenty feet away, the white nationalists roared back, 'Our blood, our soil!'").

151. Javonte Anderson, *Capitol riot images showing Confederate flag a reminder of country's darkest past*, USA TODAY (Jan. 7, 2021, 8:58 PM), https://www.usatoday.com/story/news/2021/01/07/capitol-riot-images-confederate-flag-terror/6588104002/; Barbara Combs, *The Confederate Battle Flag Is a Symbol of Intimidation*, N.Y. TIMES (Dec. 22, 2015, 2:22 PM), https://www.nytimes.com/roomfordebate/2015/06/19/does-the-confederate-flag-breed-racism/the-confederate-battle-flag-is-a-symbol-of-intimidation. The idea of Terrorism began in France, where it was endorsed by Thomas Jefferson as a legitimate government policy by stating: "[t]he tree of liberty must be refreshed form time to time with the blood of patriots and tyrants." Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787). Jefferson's quote about the tree of liberty was ever since cited by homegrown American Terrorists including the Southern Rebels, Timothy McVeigh, and the insurrectionists of January 6, 2021. *See* Thompson Smith, *The Patriot Movement: Refreshing the Tree of Liberty with Fertilizer Bombs and the Blood of Martyrs*, 32 VALPARAISO U. L. REV. 269, 269–71 (1997) (noting the connection of Jefferson's comments endorsing the French Terror with American terrorism including the Civil War and the Oklahoma City bombing); Franita Tolson, *Op-Ed: Why the Mob Thought Attacking the Capitol was Their '1776 Moment'*, L.A. TIMES (Jan. 21, 2021, 3:00 AM), https://www.latimes.com/opinion/story/2021-01-21/insurrection-capitol-attack-patriotism-1776 (noting how Jefferson's line about refreshing the tree of liberty helped the Capitol Building insurrectionists justify their attempted coup d'etat).

152. Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992) (affirming *Roe v. Wade* on the very thin basis of *stare decisis*—a common law doctrine recently unsettled by many

Americans can be sure by the light of recent experience that Justice O'Connor's prophesy of an emerging post-racial, post-gender, and post-hate utopia was false.[153] Americans can also be sure by a candid read of history that the same sort of smiling, well-meaning erosion of rights by those that clung to false, utopian hopes enabled both the French and Puritan Reigns of Terror.[154] Vigorous action should, therefore, be taken by each branch of government to contend against the American Terror in defense of the equal rights and liberties of the people.[155]

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recent U.S. Supreme Court opinions); Grutter v. Bollinger, 539 U.S. 306, 356–57 (2003); Virginia v. Black, 538 U.S. 343, 356–57 (2003). *See* Stephen E. Gottlieb, *Sandra Day O'Connor's Position on Discrimination*, 4 U. of Md. L.J. of Race, Religion, Gender & Class 241, 249–50, 256 (2004) (Perhaps too kind, Gottlieb concluded, "Doctrinally, O'Connor has barely gotten past the questions of explicit, facial, *de jure* discrimination of 1954."); Earl M. Maltz, *Ignoring the Real World: Justice O'Connor and Affirmative Action in Education*, 47 Cath. U. L. Rev. 1045, 1057–58 (2008) (O'Connor hoped that by 2028 we would "be living in an equal-opportunity utopia. Of course, we were all soon disabused of that notion.").

153. *See* Heim, *supra* note 150; Gene Demby, *Dylann Roof and the Stubborn Myth of the Colorblind Millennial*, NPR (June 20, 2015, 8:49 AM), https://www.npr.org/sections/codeswitch/2015/06/20/415878789/dylann-roof-and-the-stubborn-myth-of-the-colorblind-millennial; Alexander, *supra* note 73, at 228–29; Lee, *supra* note 73, at 181–82. However, there is more work to be done exposing and dismantling the colorblindness and genderblindness of the liberal giants of a now bygone era—especially Rawls' "veil of ignorance"—which is a *horrible* theory that justice should come from blindness instead of seeing. Jonathan Rawls, A Theory of Justice 118–23 (1991); Isaiah Berlin, Liberty: Four Essays on Liberty 188 (2002).

154. *See* Letter from John Adams to Thomas Jefferson (Feb. 10, 1812) (noting Dr. Priestley "believed upon the Authority of Prophesy, that the French Nation would establish a free Government and that The King of France who had been executed, was the first of the Ten Horns of the great Beast and that all the other Nine Monarks [sic] were soon to fall off after him"); *see also* 1 Bentham, Panopticon, *supra* note 42, at 122–23 (Bentham's utopic madness was in full bloom in France during the French Revolution, by which he claimed a magical utopia would emerge by his theories, "Morals reformed, health preserved, industry invigorated, instruction diffused, public burdens lightened, economy seated as it were upon a rock, the Gordian knot of the Poor-laws not cut but untied—all by a simple idea in architecture[!]" Instead, a Reign of Terror erupted.). Justice O'Connor's sanguine pronouncement in *Grutter* that a post-racial, post-discrimination utopia might emerge in 2028 may also cause, or at least coincide with, eruptions of violence in America. Grutter v. Bollinger, 539 U.S. 306, 310 (2003).

155. U.S. Const. arts. I, II, III, & IV, § 4. U.S. government officials may draw particular inspiration from Elizabeth Freeman's peaceful resistance against the terrorism of Shays' Rebellion. Catherine Sedgwick, *Slavery in New England* [1853], *in* 34 Bentley's Miscellany 423–24 (1853) (chronicling "'You call me 'wench' and 'nigger,' and you are not above rummaging my chest. You will have to break it open to do it!' . . . 'He turned,' she said, 'and slunk away like the whipped cur that he was!'") (statements of Elizabeth Freeman). Thomas Jefferson's encouragement of the Shays' rebels and the American Terror in general was refuted by Elizabeth Freeman's power. *Cf.* Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787).

Part I will describe the breadth and limits of the powers of each branch of government, their role in U.S. Government, and the proper bounds in which each is meant to secure the legitimacy of the whole.[156] It begins with a look into the raid at La Placita Park in Los Angeles, before it expounds the separation of Legislative, Executive, and Judiciary powers.[157] Ultimately, this part will show how the separation of powers creates the Republican legitimacy of the U.S. Government typified by the Rule of Law.[158]

The Raid at La Placita Park

There is a delusion in our society that the rational system of government set out by the U.S. Constitution will automatically secure justice.[159] It will not.[160] For if the separation of powers magically secured justice in the land, President Herbert Hoover would not have been able to surreptitiously oversee a program of Mexican repatriation that unconstitutionally deported 2 million natural born U.S. citizens, naturalized U.S. citizens, and legal immigrants of Mexican ancestry in the 1930's.[161]

It was the middle of the great depression, and the people of the United States overwhelmingly felt that jobs should be reserved for U.S. citizens, i.e., white men.[162] The raids, deportations, the ironic degradation of the status of U.S. citizenship itself, were all wildly popular

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156. U.S. CONST. arts. I, II, & III.

157. *Id.*

158. U.S. CONST. art. IV, § 4; John Adams, *Thoughts on Government* 2 [1776]; 1 WILSON, THE WORKS, *supra* note 113, at i (The inscription on the title page reads, "'Legum omnes servi sumus, ut liberi esse possimus.'" *We are all slaves to the law so that we might be free*.) (quoting Cicero, *Pro Cluentio* 53.146). *Cf.* Letter from Francis W. Gilmer to Thomas Jefferson (July 10, 1816) (referring to the ancient idea of the Rule of Law, "what Cicero says, 'Legum denique idcirco omnes servi sumus, ut liberi esse possimus,' has never been contradicted") (quoting Cicero, *Pro Cluentio* 53.146).

159. Hand, *supra* note 74.

160. To name one person whose life and death proves this—Kalief Browder. Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

161. Apology Act for the 1930's Mexican Repatriation Program, West's Ann. Cal. Gov. Code §§ 8720–23 (Around 1.2 million of the deported were natural born U.S. Citizens: "Throughout California, massive raids were conducted on Mexican-American communities, resulting in the clandestine removal of thousands of people, many of whom were never able to return to the United States, their country of birth."); Alex Wagner, *America's Forgotten History of Illegal Deportations*, THE ATLANTIC (Mar. 6, 2017), https://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/ [hereinafter Wagner, *America's*].

162. FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S 57–60, 75 (1995) ("employers everywhere not only acceded

among a suffering white underclass who were willing to degrade their own citizenship to hurt others based on racial and religious prejudices.[163] The ironies of the eugenics ideology in America took centerstage at La Placita.[164]

Simple, Protestant white folk, undermined the very basis of their religion on Paul's appeal to his Roman citizenship as a Jew born in Tarsus.[165] In the 1930's a generation of common Americans desecrated their own religious beliefs to banish brown bodies from the land.[166] The racist, self-destruction of the lowly white and brown folk

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to government restrictions but heeded the hue and cry of patriotic groups and organizations to save all jobs for 'real Americans'"—as if Mexico isn't *in* America).

163. *Id.*

164. *See Id.* at 320; Immigration Act of 1924, 43 Stat. 153 (this law, advocated for by Eugenicists, created the U.S. Border Patrol to police the U.S.–Mexico Border, to exclude those who were not of Northern European heritage in violation of the Treaty of Guadalupe Hidalgo, which ceded California from Mexico to the United States); Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo), Mex.-U.S., arts. VIII & IX, Feb. 2, 1848, 9 Stat. 922 (Mexicans living in California had the choice to become "citizens of the United States," and those that did "shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution."); Apology Act for the 1930s Mexican Repatriation Program, CAL GOV. CODE § 8720 (West 2006); California Values Act, 2017 Cal. Legis. Serv. Ch. 495, § 7284.2 (SB 54) (West) ("Immigrants are valuable and essential members of the California community. Almost one in three Californians is foreign born and one in two children in California has at least one immigrant parent. A relationship of trust between California's immigrant community and state and local agencies is central to the public safety of the people of California."). *See also* Justin Wise, *Documents: Anne Frank's family tried to immigrate to the US*, THE HILL (July 6, 2018 9:40 AM), https://thehill.com/homenews/395769-documents-anne-franks-family-tried-to-immigrate-to-the-us [hereinafter Wise, *Documents*] (Anne Frank was denied asylum based upon her genetic inferiority according to the Eugenic Immigration Act of 1924); *Cf.* HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 445–61 (1922) (containing Laughlin's *Model Eugenical Sterilization Law*, which was enacted by many state legislatures and upheld in the U.S. Supreme Court case *Buck v. Bell*); Gesetz zur Verhütung erbkranken Nachwuchses [Nazi Sterilization Law], July 13, 1933, REICHSGESETZBLATT, TEIL I [RGB? I] at 529 (Ger.) (this law among others leading to the Final Solution was modelled closely after Harry Laughlin's *Model Eugenical Sterilization Law*).

165. *See* Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) ("Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar."); *id.* at 798 (Black, J., dissenting) (citing *Acts* 25:16).

166. *See* Antonio Olivo, *Ghosts of a 1931 Raid*, L.A. TIMES (Feb. 25, 2001, 12:00 AM), https://www.latimes.com/archives/la-xpm-2001-feb-25-me-30223-story.html; Holmes v. Jennison, 39 U.S. 540, 575–76, 579 (1840) (Opinion of Taney, C.J.) (When asked whether the government of Vermont could extradite a U.S. citizen to Canada to stand trial there, Chief Justice Taney refused and the State of Vermont complied with his decision: "[i]t was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people and one nation, and to cut off all communications between foreign governments, and the several state authorities. The power now claimed for the states is utterly incompatible with this evident intention, and would expose us to one of those dangers, against which the framers of the Constitution have so anxiously endeavored to guard." Thus, unofficial sys-

in U.S. society was organized by federal government elites, but it was carried out like an unwritten lynch law without any official color of legitimacy.[167]

There is, therefore, no unjust federal law to overturn, no official presidential order to dispute, and there is not even a specific California law or state order to examine.[168] Basicially every level of the American government was violating the laws, the U.S. Constitution, and the U.S. social compact with a sheer disrespect for natural human rights.[169] Turning to the separation of powers at such a time and place as La Placita in the 1930's is to raise "false hopes," and so Americans must take care not to fall into such a delusion.[170]

The raid of La Placita Park was the most public facing raid of the 1930s Mexican Repatriation Program and is the public symbol of the deluge of "massive raids" that were secretly "conducted on Mexican-American communities" in the United States.[171] The symbol of La Placita is important to remember when one considers asserting an Arendtian "right to have rights" vindicated in *Trop v. Dulles*.[172] La Placita should be remembered when one attempts to reassert the rights of due process for immigrants in removal proceedings upheld in *Padilla v. Kentucky*, or as one asks federal courts to remain committed to the

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tems like Doak's that secretly license state authorities to do their dirty work under state police powers are unconstitutional.).

167. BALDERRAMA & RODRÍGUEZ, *supra* note 162, at 57–60, 94–99; Abraham Hoffman, *Stimulus to Repatriation: The 1931 Federal Deportation Drive and the Los Angeles Mexican Community*, 42 PAC. HIST. REV. 205, 206–18 (1973) ("Doak's anti-alien drive not only failed to solve the unemployment problem; it created new tensions and accelerated hostile attitudes."); Wells-Barnett, *supra* note 80, at 15 (Lynch law "represents the cool, calculating deliberation of intelligent people who openly avow that there is an 'unwritten law' that justifies them in putting human begins to death without complaint under oath, without trial by jury, without opportunity to make defense, and without right of appeal."). *See* Diane Bernard, *The time a president deported 1 million Mexican Americans for supposedly stealing U.S. jobs*, WASH. POST (Aug. 13, 2018,7:00 AM), https://www.washingtonpost.com/news/retropolis/wp/2018/08/13/the-time-a-president-deported-1-million-mexican-americans-for-stealing-u-s-jobs/ (there were notable collusions between the federal government and local authorities and major businesses—including reimbursements for laying off Mexican American workers).

168. BALDERRAMA & RODRÍGUEZ, *supra* note 162, at 121–22; Wagner, *America's*, *supra* note 161.

169. *See* Wagner, *America's*, *supra* note 161.

170. Hand, *supra* note 74 (explaining that once liberty dies in the "hearts of men and women no constitution, no law [and] no court can save it").

171. Apology Act for the 1930's Mexican Repatriation Program, West's Ann. Cal. Gov. Code § 8721. *See* Olivo, *supra* note 165.

172. Trop v. Dulles, 358 U.S. 86, 101–02 (1958).

Reno v. Flores settlement.[173] For none of this, no law or judgment, however eloquently put, would have stopped the raid at La Placita.[174]

California since apologized for its part in the La Placita raid, but the Mexican repatriation program's existence in our history stands for the fact that the abstraction of liberty into the papers of government is not liberty.[175] At their very best, laws, constitutions, and court judgements are only a mirror of natural, God-given liberty.[176] Without the action of ordinary people to secure fidelity with the laws, the mere existence of law cannot prevent "the savage few" from overthrowing liberty with their "ruthless . . . unbridled will."[177]

Thus, it is exceedingly practical to acknowledge the existence of the American Terror.[178] Americans should remember, as John Adams and Thomas Jefferson remembered, "the Terrorism of a former day."[179] Adams and Jefferson remembered "the Terrorism, excited by Genet, in 1793 when ten thousand People in the Streets of Philadelphia, day after day, threatened to drag Washington out of his House, and effect a

173. Padilla v. Kentucky, 559 U.S. 356, 374–75 (2010) ("The severity of deportation—'the equivalent of banishment or exile,'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.") (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)); Reno v. Flores, 507 U.S. 292, 348 (1993) (the federal courts should overrule this settlement and adopt Stevens' dissent).

174. BALDERRAMA & RODRÍGUEZ, *supra* note 162, at 57–60 (revealing that federal officials have been willing to betray the constitution and take advantage of the racism of ignorant locals, sheriffs, and police). *Cf.* Kevin Liptak et al., *Trump Pardons Former Sheriff Joe Arpaio*, CNN, Aug. 27, 2017, https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html.

175. CAL. GOV. CODE § 8720 (West 2006).

176. Chisholm v. Georgia, 2 U.S. 419, 455 (1793) (Opinion of Wilson, J.) ("Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator. A state, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance.").

177. Hand, *supra* note 74. *See* [Mercy Otis Warren,] *Observations on the New Constitution* 4 [1788] ("Self defence is a primary law of nature, which no subsequent law of society can abolish; this primeval principle, the immediate gift of the Creator, obliges every one to remonstrate against the strides of ambition, and a wanton lust of domination, and to resist the approaches of tyranny, which at this day threatened to sweep away the rights for which the brave sons of America have fought with an heroism scarcely paralleled even in ancient republics.").

178. Cicero, *Pro Milo* 10–11 (when we say that during the clash of arms the laws fall silent, we do not mean to justify martial law or anarchy, but like Cicero we are vindicating the natural law—our natural right to defend ourselves from intruders trying to deport us or strip us of our legal and natural citizenship—the laws that a legitimate court should observe during or after such a struggle takes place). *See, e.g.*, [Mercy Otis Warren,] *Observations on the New Constitution* 7 [1788] (showing us how to acknowledge the limits of our idealistic systems).

179. Letter from John Adams to Thomas Jefferson (June 30, 1813).

Revolution in the Government, or compel it to declare War in favour of the French Revolution."[180]

The idealized system of separated and limited powers survived these terrors and more, but it *only* survived.[181] The separation of powers is designed to contend with the reality that power itself corrupts, but it is not the key to utopia; it cannot bring about the end of time.[182] As founder Mercy Otis Warren advocated during our revolution, though the gates of Eden are locked and its fruits barred to humankind for now, the separation of powers can make an imperfect defense for America.[183]

As such, the separation of powers can help Americans check government actors through the courts whenever government actors try to transcend the proper bounds of their powers.[184] For example, when former President Trump announced he might try to put an end to birthright citizenship for immigrants, the courts are empowered to disagree and state that he was proposing an unconstitutional violation of the separation of powers.[185] They are also empowered to strike down the laws of Congress, if they supported such a Trumpian reversal, under the express language of the Fourteenth Amendment.[186]

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180. *Id.*

181. U.S. CONST. art. I, II, & III.

182. John Adams, *Thoughts on Government* 17–18 [1776]; Letter from John Adams to Samuel Adams (Oct. 18, 1790).

183. Mercy Otis Warren, *Simplicity* [1779].

184. I mean to say is that as long as the judiciary helps individuals resist illegal and unconstitutional government acts, that the government will be resigned, like Secretary Doak was during the raids at La Placita, to carry out their actions in secret, without acknowledging them openly. *Cf.* Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1400 (2002).

185. United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898) (quoting U.S. CONST. amend. XIV, § 1); Joel Rose, *FACT CHECK: 14th Amendment on Citizenship Cannot Be Overwritten by Executive Order*, NPR (Oct. 30, 2018, 7:04 PM), https://www.npr.org/2018/10/30/662335612/legal-scholars-say-14th-amendment-doubt-trump-can-end-birthright-citizenship-wit [hereinafter Joel Rose].

186. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."). The extension of legal citizenship to all those born in the United States (all of whom are natural citizens) goes back to Cicero, Paul of Tarsus, and the use of citizenship as the way to end a person's slavery—it consists in the revolutionary sentiment that all are born equal and free. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); George Mason, *Virginia Declaration of Rights (draft)* [1776], *reprinted in* BRUNS, *supra* note 111, at 389–90 ("When Mason wrote that all men are 'born equally free,' Virginia conservatives were noticeably alarmed."); Samuel Cooper, *Sermon on the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 14 [1780] ("We want not, indeed, a special revelation from Heaven to teach us that men are born equal and free; that no man has a natural claim of dominion over his neighbors, nor one nation any such claim upon another; . . . . These are the plain dictates of that reason and common sense with which the

Courts are not entirely effective, however, because lies can conceal executive abuses from judicial review.[187] Even while actual government policy is shrouded in presidential lies, local police officers and sheriff departments are free to turn away from federal injustices, to vindicate "*Our Federalism!*," and to sing out like Johnny Cash at the White House "*What is Truth*."[188] Local state actors and artists can be

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common parent of men has informed the human bosom."); Jonathan Edwards, Jr., *The Injustice and Impolicy of the Slave-Trade, John Carter*, Sept. 15, 1791, at 5 ("It is a principle, the truth of which hath in this country been generally, if not universally acknowledged, ever since the commencement of the late war [i.e., the Revolutionary War], *that all men are born equally free*. If this be true, the Africans are by nature equally entitled to freedom as we are; and therefore we have no more right to enslave, or to afford aid to enslave them, than they have to do the same to us."). *See* Amy H. Kastely, *Cicero's De Legibus: Law and Talking Justly Toward a Just Community*, 3 YALE J.L. & HUMAN. 1, 15 (1991) ("'All natives of Italian towns have two fatherlands, one by birth and the other by citizenship . . . one fatherland which was the place of his birth and one by law; . . . But that fatherland must stand first in our affection in which the name of republic [*rei publica*] signifies the common citizenship of all of us.'") (quoting Cicero, *De Legibus* 2.2.5); Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) ("Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar."); *id.* at 798 (Black, J., dissenting) (citing *Acts* 25:16).

187. Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 22, 2018); Sarah Stillman, *The Five-Year-Old Who was Detained at the Border and Persuaded to Sign Away Her Rights*, NEW YORKER (Oct. 11, 2018), https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights; Sarah Stillman, *Migrants Say they are Still Being Threatened with Child Separation*, NEW YORKER (June 26, 2018), https://www.newyorker.com/news/dispatch/migrants-say-they-are-still-being-threatened-with-child-separation. *See* Alexandria Ocasio-Cortez (@AOC), TWITTER (June 18, 2019, 9:03 AM), https://twitter.com/aoc/status/1140968240073662466?lang=EN ("This administration has established concentration camps on the southern border of the Untied States for immigrants, where they are being brutalized with dehumanizing conditions and dying. This is not hyperbole, It is the conclusion of expert analysis.") (citing Jack Holmes, *An Expert on Concentration Camps Says That's Exactly What the U.S. Is Running at the Border*, ESQUIRE (June 13, 2019), https://www.esquire.com/news-politics/a27813648/concentration-camps-southern-border-migrant-detention-facilities-trump/); Interview by Brooke Baldwin with Warren Binford, CNN (June 21, 2019), https://transcripts.cnn.com/show/cnr/date/2019-06-21/segment/06 (prior to this report, many believed that child separations were ended or ending according to federal court orders directing the government to reunite children with their families); Memorandum from Jennifer L. Costello on Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in Rio Grande Valley (July 2, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf. *Cf.* Hannah Arendt, *Lying in Politics* [1972], *in* HANNAH ARENDT, CRISES OF THE REPUBLIC 5 (1972) [hereinafter ARENDT, CRISES].

188. Younger v. Harris, 401 U.S. 37, 44 (1971); Johnny Cash, *What is Truth* [1970] (performed at the Nixon White House right before the Watergate scandal broke). *See* Nina Mariah Donovan, *Nasty Woman* [2016] (a viral spoken word poem performed by famed actress Ashley Judd at the 2017 Women's March in Washington, D.C.—largely seen as a referrendum on the election of Donald Trump). *See also* Michael Cohen, *Michael Cohen compares GOP lying for Trump to his lying for Trump*, C-SPAN (Feb. 27, 2019), https://www.c-span.org/video/?c4782564/michael-cohen-testimony (poets and artists like Cash and Donovan, following in the footsteps of Phillis Wheatley, fulfill the role of inviting and inspiring repentence by men like Michael Cohen for their participation in corruption).

the first line of defense to the rights of immigrants.[189]

While local government actors might help, La Placita requires us to doubt their resolve.[190] For the Trump Administration laid pretextual grounds for another La Placita raid in border states, openly defying state and local sanctuary laws that defend the Article III warrant requirement.[191] The separation of powers remains, however, a fundamentally imperfect defense against the Jeffersonian Terror, empowering Americans to defend their rights, as the Black Panthers so nobly advocated in the spirit of American written constitutions *by any means necessary*.[192]

Article I: The Legislative Power

The Legislative power, which is the power to make laws, is vested by the U.S. Constitution in Congress.[193] The Congress is composed of "a Senate and House of Representatives."[194] The Representatives of the House must be at least twenty-five years old, serve short two year terms, and represent equal districts of people ap-

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189. 2018 Cal. Legis. Serv. 7284.2 (West) ("Immigrants are valuable and essential members of the California community. Almost one in three Californians is foreign born and one in two children in California has at least one immigrant parent. A relationship of trust between California's immigrant community and state and local agencies is central to the public safety of the people of California."), *aff'd* United States v. California, 921 F.3d 865, 891 (9th Cir. 2019) (states *can* "choose to discriminate against federal immigration authorities by refusing to assist their enforcement efforts" under the "Tenth Amendment and the anticommandeering rule"); San Francisco Administrative Code, ch. 12H.1–2 (1989), available at https://sfgov.org/oceia/sanctuary-city-ordinance-0; Corey Brettschneider, *Local and State Government Can Protect the Constitution From Trump*, TIME (Nov. 30, 2016, 3:48 PM), https://time.com/4584803/donald-trump-states-rights/.

190. BALDERRAMA & RODRÍGUEZ, *supra* note 162, at 57–60.

191. David Post, *Let's call them 'constitutional cities,' not 'sanctuary cities,' okay?*, WASH. POST (Mar. 30, 2017, 1:36 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/30/lets-call-them-constitutional-cities-not-sanctuary-cities-okay/ (the controversy over ICE detainers is that they are not valid warrants, they are Admin Law searches and seizures, and thus they violate the separation of powers by working around Article III Courts).

192. THE HATE U GIVE (20th Century Fox 2018) (presenting the Black Panther Party's idea of fighting for justice by any means necessary); Tolson, *supra* note 151 (analyzing the events of January 6, 2021 in light of Thomas Jefferson's infamous endorsement of the French Reign of Terror commemorated by his reference to refreshing the tree of liberty with blood). *Compare generally* ADAMS, A DEFENCE, *supra* note 91 (advocating for the separation of powers in response to the Frenchmen Turgot and Condorcet who advocated a Unity of Powers that demolished France in a Reign of Terror), *with* Letter from M. Turgot to Dr. Price (Mar. 22, 1778), *in* JAMES MUNSON BARNARD, A SKETCH OF ANNE ROBERT JACQUES TURGOT WITH A TRANSLATION OF HIS LETTER TO DOCTOR PRICE (Hellen Billings Morris trans., 1899).

193. U.S. CONST. art. I, § 1.

194. *Id.*

portioned by census every ten years.[195] Senators must be at least thirty years old, serve six year terms, and there are two Senatorial seats for each state in the Union.[196]

If a bill passes a majority vote in both houses, the bill is taken to the president, who can either sign it into law; or, if he or she chooses, it can be vetoed.[197] A presidential veto can only be overridden by a two-thirds vote in both the House and Senate.[198] If either the veto is overridden, or if the president signs the bill into law, or if the president ignores it for ten days while Congress is in session; then a law has been successfully created.[199]

The system of two legislative bodies in Congress is called bicameralism.[200] Bicameralism was created to embody complimentary and countervailing ideals of the Republic.[201] The House embodies the ideal of democracy by its frequent elections, and its members matching the population by census.[202] Since the House is the best approximation of the will of the people at any given time, the Constitution requires that all bills introducing new taxes must originate in the House.[203]

The Senate, on the other hand, represents the equal sovereignty of each state in the Union regardless of the exact population.[204] It has

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195. U.S. CONST. art. I, § 2, cl. 1–3.

196. U.S. CONST. art. I, § 3, cl. 1. *Cf.* Jane Chong, *This Is Not the Senate the Framers Imagined*, THE ATLANTIC (Jan. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/01/not-senate-framers-imagined/605017/ (noting the changes to the Senate brought about by the Seventeenth Amendment).

197. U.S. CONST. art. I, § 7, cl. 2–3 (the veto replaces the English system's assent of the monarch, which is a subtle but meaningful reversal of feudal law—i.e., in America Congress has the power to make laws and the Executive only has a check on that power, whereas in England the Crown constitutionally still possesses the legislative power and the Parliament only exercises it by the Crown's grace and assent).

198. *Id.*

199. *Id.* (if the President fails to sign the law in ten days, Congress can "by their adjournment prevent its return, in which case it shall not be a law"). *See* Pocket Veto Case, 279 U.S. 655, 673–75 (1929) ("adjournment" means that Congress is not in session—and is taken as an indication of Congress's implied choice to prevent the law's return—so the term pocket veto is a bit of a misnomer, because it is created by Congress's implied choice to block the creation of the law by adjournment rather than merely by the President's inaction).

200. *See* INS v. Chadha, 462 U.S. 919, 948–51 (1983). *See, e.g.,* U.S. CONST. art. I, §1; *id.* at § 7, cl. 2–3.

201. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); THE FEDERALIST NO. 22 (Alexander Hamilton) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of legitimate authority.").

202. U.S. CONST. art. I, § 2, cl. 1–3.

203. U.S. CONST. art. I, § 7, cl. 1 ("All bills for raising revenue shall originate in the House of Representatives . . . .").

204. U.S. CONST. art. I, § 3, and § 8, cl. 1 (this ideal also requires that federal taxes be uniform throughout the states—this does not mean that *all* laws must be uniform). *See*

less members and longer terms so that it is more stable and represents the sovereignty of each state united.[205] Thus, the president is required to submit his or her nominations for the Judiciary Branch and various other administrative bodies, as well as treaty proposals, to the advice and consent of the Senate.[206]

Congressional powers are mostly domestic in nature, but the Senate has a quasi-international role regarding advice and consent on the ratification of treaties and the nomination of U.S. ambassadors.[207] The Senate's role in giving advice and consent is a check on the president's power; it is *not* a power to clog.[208] The Senate cannot constitutionally clog the president's power to make nominations or treaty proposals;[209] nor can the state governments clog or supplant the treaty making process.[210]

Therefore, the U.S. Senate violated the separation of powers when it clogged President Obama's Supreme Court Justice nominee,

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Chisholm v. Georgia, 2 U.S. 419, 477 (1793) (Opinion of Jay, C.J.) (finding it more important to the concept of equal sovereignty that individuals have the power to sue their states in federal court, than that states should be able to avoid suits in the style of King Charles II). Administering the equal sovereignty of the states without respecting the equal sovereignty of individual people led to grave injustices. Shelby County v. Holder, 570 U.S. 529, 544 (2013) (eviscerating the Voting Rights Act based upon equal state sovereignty; the same rationale was cited in *Dred Scott* to destroy human rights); Dred Scott v. Sandford, 60 U.S. 393, 406–07, 416–17 (1857) (Daniel, J., concurring); *id.* at 527 (Catron, J., concurring) ("He secures his equality through the equality of his State by virtue of that great fundamental condition of the Union—the equality of the States."); The Antelope, 23 U.S. 66, 122–23 (1825) (drawing a presumption of slavery from "the equality of nations" to nullify U.S. anti-slavery statutes).

205. THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison) ("great injury results from an unstable government").

206. U.S. CONST. art. II, § 2, cl. 2.

207. U.S. CONST. art. II, § 2, cl. 2; *id.* at art. VI.

208. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320–21 (1936) (quoting President George Washington, *Message to the House Regarding Documents Relative to the Jay Treaty*, Mar. 30, 1796).

209. *Id.*; THE FEDERALIST NO. 76 (Alexander Hamilton) ("But might not his nomination be overruled? I grant it might, *yet this could only be to make place for another nomination by himself*.") (emphasis added); THE FEDERALIST NO. 75 (Alexander Hamilton) ("To have intrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations . . . While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the co-operation of the Executive." Hamilton finally concluded that if "a body more numerous than the Senate," as it existed in 1790 with 26 Senators came to pass by the addition of many more States to the Union, that the Senate "would be very little fit for the proper discharge of the trust." Thus, the founders planned for a more numerous Senate by precluding them a greater role in the treaty making and nominating processes.).

210. Holmes v. Jennison, 39 U.S. 540, 574 (1840) (Opinion of Taney, C.J.).

Merrick Garland, by refusing to hold advice and consent hearings.[211] Equally violative of the separation of powers was the U.S. Supreme Court's attempt to control the president's power of appointment by advisory opinion in *NLRB v. Noel Canning*.[212] Indeed, president Obama may have properly followed the example of president George Washington by recess appointing Garland in the face of the Senate's arbitrary attempt to clog his powers.[213]

The president has *no legislative power*, and while it is now commonplace among our presidents to accompany the signing of bills into law with signing statements, when these statements attempt to create or mold the law the statements are improper.[214] If a president ignores a law for ten days, the law would go into effect with or without his or her signature.[215] The use of the veto is a check on legislative power, but not an exercise of legislative power, and presidential signing statements are thus not law.[216]

The House holds the ultimate power of impeachment, and the Senate the sole power to try all impeachments.[217] The House may im-

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211. *Id.*; U.S. CONST. art. II, § 2, cl. 2. *Cf.* Martha Minow & Deanell Tacha, *US needs a government of laws, not people*, BOSTON GLOBE (Mar. 21, 2016, 10:05 PM), https://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYEIbtXCQylM/story.html?s_campaign=8315.

212. NLRB v. Noel Canning, 573 U.S. 513, 548–49 (2014). *Cf.* Schroeder, *The Body*, *supra* note 121, at 68 (identifying *Noel Canning* as an impermissible advisory statement); Joshua J. Schroeder, *America's Written Constitution: Remembering the Judicial Duty to Say What the Law Is*, 43 CAPITAL U. L. REV. 833, 843, 851, 869 (2015) [hereinafter Schroeder, *America's*] (offering further commentary on the illegitimacy of *Noel Canning* as an impermissible advisory statement).

213. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."); Message from President George Washington to the Senate (Dec. 10, 1795) (recess appointing John Rutledge to be Chief Justice of the U.S. Supreme Court). *See* THE FEDERALIST NO. 67 (Alexander Hamilton).

214. U.S. CONST. art. I, § 1, cl. 1 ("All legislative powers herein granted shall be vested in a Congress" and therefore *no* legislative powers were vested in the President.); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. OF LEGIS. 363, 366 (1987). *Cf.* Clinton v. City of New York, 524 U.S. 417, 448–49 (1998) (invalidating the Line Item Veto Act for violating bicameralism and presentment).

215. U.S. CONST. art. I, § 7, cl. 2.

216. *Id.*; Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 330 (1994) (Presidential signing statements "lack the force of law") (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). *But see* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006) (defending the constitutionality of President George Bush's claim of a unitary executive power to make signing statements that appear to dismiss the law itself) (citing Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 Weekly Comp. Pres. Doc. 425 (Mar. 9, 2006)).

217. U.S. CONST. art. I, § 2, cl. 5, and § 3, cl. 6.

peach any member of government, including a sitting Senator or Representative, the president or vice president, or a Justice of the U.S. Supreme Court, by a simple majority vote.[218] Then, the Senate retains adjudicatory power of trying and finally removing the impeached officer from the government if convicted by "two thirds of the members present."[219]

Ordinarily the vice president, who is the president of the Senate, acts as the Chief Judge in Senate impeachment trials.[220] However, in the case of the impeachment of a president, the Chief Justice of the U.S. Supreme Court holds that duty.[221] The Senate may try "all civil officers" including the president and vice president for "treason, bribery, or other high crimes and misdemeanors."[222] In the case of the impeachment of federal judges they must be removed on grounds of bad behavior.[223]

The federal legislative powers are vested and limited by the eighteen clauses under Article I, § 8 of the U.S. Constitution.[224] Of these powers, perhaps the most significant is Congress's sole powers to declare war and to raise and support armies and navies.[225] In the eighteenth clause of § 8 in Article I, Congress is granted the open-ended power to make laws "necessary and proper" to the execution of the legislative powers, "and all other powers vested by this Constitution in the government of the United States."[226]

Thus, Congress can make laws to help in the necessary and proper execution of executive and judicial powers, not expressly vested

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218. U.S. CONST. art. I, § 2, cl. 5.

219. U.S. CONST. art. I, § 3, cl. 6.

220. *Id.*; 1 SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE, AN ASSOCIATE OF THE SUPREME COURT OF THE UNITED STATES, IMPEACHED 14 (1805) (President of the Senate Aaron Burr presiding).

221. U.S. CONST. art. I, § 3, cl. 6; 1 PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF PRESIDENT WILLIAM JEFFERSON CLINTON 39–40 (1999) [hereinafter PROCEEDINGS] (Chief Justice Rehnquist as President pro tempore of the Senate presiding).

222. U.S. CONST. art. II, § 4; 105 CONG. REC. H11774 (daily ed. Dec. 18, 1998) (The House of Representatives impeached President Clinton on charges of obstruction of justice and perjury, which illustrates the breadth of what is impeachable under "other crimes or misdemeanors." The House's successful inclusion of crimes considered by many to be small or petty in the ambit of impeachable charges highlights the fundamentally political nature of the act of impeachment.).

223. U.S. CONST. art. III, § 1; 1 SMITH & LLOYD, *supra* note 220, at 132–33, 145 ("the tenure by which a judge holds his office, is good behaviour, therefore that he is removable for misbehavior").

224. U.S. CONST. art. I, § 8, cl. 1–18.

225. U.S. CONST. art. I, § 8, cl. 11–12.

226. U.S. CONST. art. I, § 8, cl. 18.

in the Congress and non-legislative in nature.[227] In *McCulloch v. Maryland*, the U.S. Supreme Court affirmed this broad power, allowing Congress to charter a national bank even though Congress has no express charter power.[228] As long as a law is necessary and proper, the enactment of law is not limited by § 8, for under *McCulloch* Congress is ordinarily allowed its "choice of means."[229]

The quality of Congress's laws vary according to the objects Congress's laws intend to effect.[230] While Congress often legislates on matters Congress solely may regulate, where Congress's laws are tantamount to directives, there are matters of foreign affairs and justice that Congress may only seek to guide, to which Congress's laws do not hold the final say.[231] For example, Congress may expand or limit the jurisdiction of the U.S. Courts through the Judiciary Act, but Congress cannot subsume or clog the judicial power itself.[232]

The laws of Congress are also limited by "*Our Federalism!*" acknowledged in the Ninth and Tenth Amendments.[233] The Tenth Amendment reserves all powers not delegated by the U.S. Constitution to Congress, and not prohibited by the U.S. Constitution "to the States respectively, or to the people."[234] The Ninth Amendment states that

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227. *Id.*

228. McCulloch v. Maryland, 17 U.S. 316, 409–25 (1819) (expounding U.S. CONST. art. I, § 8, cl. 18).

229. *Id.* at 424 ("the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election").

230. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 327 (1936) (deciding that there is a marked difference in the effect of Congress's laws regarding domestic versus foreign affairs).

231. *Id.* at 319 (The President "alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.").

232. INS v. Chadha, 462 U.S. 919, 961–62 (1983) ("One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures. The Framers were well acquainted with the danger of subjecting the determinations of the rights of one person to the 'tyranny of shifting majorities.' . . . It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches.") (quoting Edward Hirsch Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 375 (1976)); Martin v. Hunter's Lessee, 14 U.S. 304, 329–30 (1816) ("The judicial power must, therefore, be vested in some court by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution, they might defeat the Constitution itself, a construction which would lead to such a result cannot be sound. . . . If, then, it is a duty of Congress to vest the judicial power of the United States, it is *a duty to vest the whole judicial power*.") (emphasis added).

233. U.S. CONST. amends. IX, X; Pennsylvania v. Union Gas, Co., 491 U.S. 1, 25, 27 (1989) (Stevens, J., concurring).

234. U.S. CONST. amend. X.

the enumeration of rights "in the Constitution . . . shall not be construed to deny or disparage others retained by the people."[235]

As *McCulloch* repeatedly held, the U.S. Constitution did not limit Congress's "choice of means."[236] For the U.S. Constitution is "a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."[237] Thus, the U.S. Constitution is designed without express limitations on "the minor ingredients" of government, because those limitations were meant to be "deduced from the nature of the objects themselves."[238]

The U.S. Constitution's "great outlines should be marked, its important objects designated," so that the Court can determine the proper limits of Congress's powers from it.[239] The primary objects or purposes of the Union are referred to in the preamble and Article IV, § 4.[240] Thus, while Congress can charter a corporation for a legitimate purpose, it *cannot* do anything in support of an illegitimate purpose, like causing domestic violence, subverting domestic tranquility, or obstructing the administration of justice.[241]

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235. U.S. CONST. amend. IX (this amendment does not mention the states in any capacity). *But see* Lessee of Livingston v. Moor, 32 U.S. 469, 551–52 (1833) (refusing to use the Ninth Amendment to modify or overrule state laws that may violate it—it is an open quandary whether the Supreme Court's antebellum refusal to secure the natural human rights recognized by the Ninth Amendment itself violated the Ninth Amendment).

236. McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

237. *Id.*

238. *Id.* at 407. This actually traces back to the common law itself, which was also a peculiar agreement that Lord Coke had with Montesquieu's idea of the *Spirit of the Laws* that was always applied to U.S. Constitutional law. *See* Milborn's Case [1572] 7 Co. Rep. 6b, 7a (Eng.) ("*ratio legis est anima legis, et mutata legis ratione, mutatur et lex*" (the reason for a law is the soul of the law, and if the reason for a law has changed, the law is changed)); 1 MONTESQUIEU, *supra* note 57, at 7–8; Funk v. United States, 290 U.S. 371, 385 (1933) (explaining the maxim that *cessante ratione legis, cessat ipsa lex* "means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself") (internal quotation marks omitted); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–60 ("The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute. We find it laid down in some of our earliest authorities in the common law; and civilians are accustomed to a similar expression, *cessante legis prœmio, cessat et ipsa lex*. . . . There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions.") (citing Chisholm v. Georgia, 2 U.S. 419, 474–75 (1793) (Opinion of Jay, C.J.)).

239. *McCulloch*, 17 U.S., at 407.

240. U.S. CONST. pmbl.; *id.* art. IV, § 4.

241. U.S. CONST. pmbl.; *id.* art. IV, § 4.

The most commonly used power of Congress is its Commerce Power.[242] The objects of the Commerce Clause are found within the clause itself, for it says that Congress has the power to regulate *commerce*, an object of peace, not war.[243] The framers' configuration of a presumptive power to regulate commerce rather than honor or glory in wars between the states reflects the framers' hope that "a nation of merchants would scarcely reach to its weapons at slight provocations."[244]

The pro-commerce aspect of the Legislative Power is also preemptive in nature, as the U.S. Supreme Court found in its dormant Commerce Clause jurisprudence.[245] According to the dormant Commerce Clause, no state can enact protectionist measures that block or hinder the commerce or trade of the other states.[246] Aside from Congressional authorization and market participation exceptions, the states cannot create laws or issue orders that restrain interstate trade.[247]

The concepts of dormant commerce and privileges and immunities are related.[248] Indeed, both overlap so well that they sometimes appear to eclipse each other in federal jurisprudence.[249] Therefore, where a state law fits under the exceptions to the dormant Commerce Clause, the law may still fail under the Privileges and Immunities Clause, which provides, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[250]

However, the Commerce Clause is far more expansive because it includes commerce with foreign nations and with Native American

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242. U.S. CONST. art. I, § 8, cl. 3.

243. *Id.*

244. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 768–69 (1986) [hereinafter Carol Rose] ("In comparison to the typical aristocratic (but violent) pursuits of honor and glory, commerce was thought to spring from calmer passions; a nation of merchants would scarcely reach to its weapons at slight provocations. Indeed, some thought the whole regime of private property and commercial enterprise aimed at disarming social conflict.").

245. *See, e.g.*, Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

246. *Id.* at 145; New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273–74 (1988).

247. Gibbons v. Ogden, 22 U.S. 1, 233 (1824) (Johnson, J., concurring) (invalidating a New York State granted Livingston-Fulton steamboat patent saying "the abstract right of commercial intercourse . . . is common to all"); W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 653 (1981) (acknowledging the Congressional authorization exception); United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 219–20 (1984) (acknowledging the market participation exception).

248. U.S. CONST. art. IV, § 2, cl. 1.

249. *United Bldg. & Constr.*, 465 U.S. at 222–23.

250. U.S. CONST. art. IV, § 2, cl. 1; *United Bldg. & Constr.*, 465 U.S., at 221–23.

Tribes.[251] Thus, the dormant Commerce Clause also strikes down state laws that restrain or interfere with international commerce and/or trade with Native Americans.[252] By great contrast, presidential statements and orders "lack the force of law,"[253] and they may be grounds for impeachment for the crime of obstruction of commerce if the the president "obstructs, delays, or affects commerce . . . by . . . extortion."[254]

The preemptive quality of federal laws and treaties as supreme laws of the land is recognized in the Supremacy Clause.[255] However, the supremacy of federal laws and treaties predates the ratification of the U.S. Constitution and ultimately arises out of the original U.S. social compact.[256] Federal preemption is either express or implied, however, there is no consistent standard of implied preemption, for the mere "complexity" of a federal enabling law was recently held enough to imply federal preemption.[257]

The objects of the Patent & Copyright Clause are also built directly into the Patent & Copyright Clause, for this clause says that the laws it authorizes Congress to pass must protect "*inventors*" and "*authors*," instead of the crown or head of state.[258] This is a ringing

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251. U.S. CONST. art. I, § 8, cl. 3.

252. *Id.*; Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue & Fin., 505 U.S. 71, 81 (1992); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453–54 (1979). *Cf.* Holmes v. Jennison, 39 U.S. 540, 570 (1840) (Opinion of Taney, C.J.) ("All the powers which relate to our foreign intercourse are confided to the general government.").

253. Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 330 (1994) (Presidential statements are not preemptive of state laws).

254. Hobbs Act, 18 U.S.C. § 1951; United States v. Staszcuk, 517 F.2d 53, 65 (7th Cir. 1975) ("'The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, the carrying out of which would obstruct commerce.'") (quoting United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967)). *Cf.* McDonnell v. United States, 136 S. Ct. 2355, 2362 (2016) (involving the successful prosecution of former Virginia Governor Bob McDonnell for violating the Hobbs Act); David Jackson, *Donald Trump, Venting Fury Over Budget Fight, Threatens to Close U.S.-Mexico Border*, USA TODAY (Dec. 28, 2018, 8:17 AM) (this was an underdiscussed ground for impeachment during the Trump Administration).

255. U.S. CONST. art. VI, cl. 2.

256. *See, e.g.*, THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 8–9, 28 (citing THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776)).

257. Wyeth v. Levine, 555 U.S. 555, 575, 609–10 (2009) (the two general areas of implied preemption recognized by the Court are known as conflict and field preemption, but their application in Court is hardly separate or uniform); Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327–29 (2015) ("The sheer complexity associated with enforcing §30(A), coupled with the express provision of an administrative remedy, §1396c, shows that the Medicaid Act precludes private enforcement of §30(A) in the courts.").

258. U.S. CONST. art. I, § 8, cl. 8; 2 WILLIAM BLACKSTONE, COMMENTARIES *410 (describing the king's "prerogative *copyright* subsisting in certain books" that violates the freedoms of religion and speech among other fundamental bases of the U.S. Government); *id.* at

endorsement of Edward Coke and John Milton's principled defense of the separation of powers.[259] Copyrights and patents may also be secured for only "limited times," reflecting a public goods rationale that private rights in creative works are taken from and must eventually return to the public domain.[260]

The Patent & Copyright Power is related to Congress's power "to define and punish piracies and felonies committed on the high seas."[261] The relationship of copyright and patent infringement to piracy, traces back to the development of feudal copyright and patent law.[262] The rhetoric of peer-to-peer filesharing websites like The Pirate Bay, the founder of Silk Road, Dread Pirate Roberts, and the European

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*406–07 (describing the origins of patent and copyright protection in statute law as an attempt to limit the times by which the crown could award a patent or copyright). *Cf.* Lydia Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 2–3 (2008).

259. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538–39 (2013) (quoting 1 EDWARD COKE, INSTITUTES *223); JOHN MILTON, AREOPAGITICA *passim* (James Russell Lowell, intro. 1890) [1644] [hereinafter MILTON, AREOPAGITICA] (defending the rights of the author to print freely against the copyrights of the crown).

260. U.S. CONST. art. I, § 8, cl. 8. *See* The Statute of Monopolies, 21 Jac. 1 c. 3 [1624] (introduced by Lord Coke); Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813). *Cf.* Carol Rose, *supra* note 244, at 768; Millar v. Taylor [1769] 4 Burr. 2303, 2365 (Eng.) (Yates, J., dissenting) ("If the author will voluntarily let the bird fly, his property is gone; and it will be in vain for him to say 'he meant to retain' what is absolutely flown and gone.").

261. U.S. CONST. art. I, § 8, cl. 10. Phillis Wheatley's right of attribution published in the attestation of her book was enforced against printers in America to protect her right to make a living on the sale of her books imported from printers in England. This right may be extended once more from the same rationale under a recent case applying the common law limits on the restraint of alienation of chattels (a precursor to antitrust and IP law) to the importation of books. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538–39 (2013) (quoting 1 EDWARD COKE, INSTITUTES *223). Common law copyright was adjudged to apply to creations made outside of the nation, including upon the high seas. *See* Emerson v. Davies, 8 F. Cas. 615, 619–22 (C.C.D. Mass. 1845) (No. 4,436) (Opinion of Story, J.) (No one has the "right to publish a map taken substantially and designedly from the map of [another] person, without any such exercise of skill, or labor, or expense. If he copies substantially from the map of the other, it is downright piracy." This definition of copyright piracy was not mere infringement but included the reverse-passing off of someone else's work "as his own composition."). Justice Story's definition of copyright piracy as reverse-passing off in *Emerson* was captured in § 43(a) of the Lanham Act, but that claim is now considered repealed by the right of attribution extended in the Visual Artists Rights Act in *Dastar*, a decision that can be distinguished or reversed by extending *Kirtsaeng*. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 30, 34–35 (2003).

262. Millar v. Taylor [1769] 4 Burr. 2303, 2313–15 (Eng.). *See, e.g.*, MPAA Press Release, *Donuts & the MPAA Establish New Partnership to Reduce Online Piracy*, MOTION PICTURE ASS'N (Feb. 9, 2016), https://www.mpaa.org/press/donuts-and-mpaa-establish-new-partnership-to-reduce-online-piracy/.

political "Pirate" Parties reveal the extent to which the word *piracy* lost its former meaning in the present day.[263]

However, the problem with the infringement-as-piracy idea in terms of the U.S. Constitution is that it could render the limitation of piracy laws to the "high seas" superfluous.[264] Judicial interpretation of Article I, § 8, clause 10 of the U.S. Constitution, which patrols the fringe of Congressional war powers, found that pirates were at "war with the whole world" to justify government acts of war upon pirates on the high seas.[265] The idea of a global internet service was unimaginable at the time this limitation was framed.[266]

However, Jefferson especially feared to see a civil forfeiture system "on any other element than the water,"[267] and many of the founders, including Jefferson, proudly violated the English copyright law as an infringement of their natural human right of free speech.[268] In the founding era, nations attempted to keep the waters of the oceans "free" by granting licenses for privateering, including to censor

263. Ernesto Van der Sar, *The Pirate Bay Turns 15 Years Old*, TORRENT FREAK (Aug. 10, 2018), https://torrentfreak.com/the-pirate-bay-turns-15-years-old-180810/; Ben Jones, *Pirate Party Enters the German Parliament*, TORRENT FREAK (June 21, 2009), https://torrentfreak.com/pirate-party-enters-the-german-parliament-090621/; Alex Hern, *Five stupid things Dread Pirate Roberts did to get arrested*, THE GUARDIAN (Oct. 3, 2013), https://www.theguardian.com/technology/2013/oct/03/five-stupid-things-dread-pirate-roberts-did-to-get-arrested.

264. U.S. CONST. art. I, § 8, cl. 10.

265. *Id.*; *see* The Malek Adhel v. United States, 43 U.S. 210, 228 (1844).

266. *See* Letter from Thomas Jefferson to James Monroe (Aug. 11, 1786).

267. *Id* ("Every rational citizen must wish to see an effective instrument of coercion, and should fear to see it on any other element than the water. A naval force can never endanger our liberties, nor occasion bloodshed; a land force would do both.").

268. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 541, 552 (2013). *See* Letter from Thomas Jefferson to James Madison (July 31, 1788); Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 208 (1801) [hereinafter JEFFERSON, NOTES] (levelling an attack against Phillis Wheatley, the mother of copyright law, saying, "Among the blacks is misery enough, God knows, but no poetry. Love is the peculiar œstrum of the poet. Their love is ardent, but it kindles the senses only, not the imagination. Religion indeed has produced a Phillis Whately [sic.]; but it could not produce a poet. The compositions published under her name are below the dignity of criticism."). Jefferson wrote his Notes to the French, so it is of particular interest that Voltaire disagreed with Jefferson regarding the quality of Phillis Wheatley's poetry. Letter from Voltaire to A M. Le Baron Constant de Rebecque (Apr. 11, 1774), *in* 16 VOLTAIRE, œUVRES COMPLÈTES DE VOLTAIRE 594–95 (1882) (praising Wheatley's work).

speech.[269] Privateers violently seized pirate vessels, towed them to a prize court, and sued the property itself.[270]

In the United States, the power to attack and seize a pirate vessel is strictly limited to the laws that Congress passes under art. I, § 8, cl. 10 of the U.S. Constitution.[271] The president holds no unbounded, or undefined power to carry on acts of war on the high seas beyond what Congress legislates.[272] For example, when President John Adams attempted to license a ship's capture without authorization from Congress, the U.S. Supreme Court found that it was a "plain trespass" suable in court.[273]

Congressional attempts to regulate the border of national war powers to preserve peace and free trade were defied by such characters as Citizen Genêt, William Eaton, and Aaron Burr.[274] Citizen Genêt opened a French Prize Court in Philadelphia, began enlisting Americans as French privateers in the French war against England, and seized numerous English merchant ships in America without authorization.[275] He defied President Washington's *Proclamation of Neutrality* and Congress's decision not to declare war on England.[276]

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269. U.S. CONST. art. I, § 8, cl. 10. *Compare* CHARLES ROBERT RIVINGTON, THE RECORDS OF THE WORSHIPFUL COMPANY OF STATIONERS 25–26 (1883) (English copyright and patent was first developed as a royal strategy to police speech—especially religious speech), *with* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 386 (1969) (finding that First Amendment free speech rights extend to the right to access the speech of others occurring over telecommunications networks—this was an extension of the same rights the founders asserted in regard to hard copies of books and letters distributed through overseas networks using ships), *and* Radio Act of 1912, Pub. L. No. 264, 37 Stat. 302 (repealed 1927) (the first telecom act was enacted in response to the sinking of RMS Titanic to protect our right to access the speech of others through postal service networks to obtain hard copies of the speech of others).

270. The Palmyra, 25 U.S. 1, 11–13, 17–18 (1827) ("The strict rules of the common law as to criminal prosecutions have never been supposed by this Court to be required in informations of seizure in the admiralty for forfeitures, which are deemed to be civil proceedings *in rem*.").

271. U.S. CONST. art. I, § 8, cl. 10.

272. *The Palmyra*, 25 U.S. at 16 (considering the behavior of a privateer "in the just exercise of his instructions from the President, UNDER THE ACTS OF CONGRESS") (emphasis added).

273. Little v. Barreme, 6 U.S. 170, 179 (1804).

274. William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U. L. REV. 173, 174–78 (2002); ROGER G. KENNEDY, BURR, HAMILTON, AND JEFFERSON: A STUDY IN CHARACTER 125–26, 322–23, 386–88 (1999) (Kennedy offers a fair assessment of the conspiracy that consumed Jefferson and Burr); CHIPP REID, TO THE WALLS OF DERNE: WILLIAM EATON, THE TRIPOLI COUP, AND THE END OF THE FIRST BARBARY WAR 175 (2017) [hereinafter CHIPP REID].

275. Casto, *supra* note 274, at 176.

276. *Id.* at 176; President George Washington, Proclamation 4—Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the

When questioned about his actions, Genêt blamed the U.S. Government for violating its treaty with France and appealed from the president to the people.[277]

William Eaton went rogue in the pirate war the U.S. waged with the Ottoman Empire.[278] Suffering insurmountable losses at sea, Eaton defied U.S. neutrality and Congress's decision not to declare war on Tripoli by going ashore in North Africa.[279] He hired a mercenary army to install Hamet Caramelli to the throne of Tripoli, took over the city of Derne, and betrayed Caramelli in exchange for favorable terms for U.S. trade routes into the Mediterranean Sea.[280]

Finally, Aaron Burr allegedly attempted to revolutionize Mexico, which defied U.S. neutrality and Congress's decision not to declare war on Spain.[281] President Thomas Jefferson was fed intelligence from the notorious General Wilkinson, who may have entrapped Burr.[282] This evidence led to Burr's extradition from the Mississippi Territory, Burr's federal prosecution and acquittal, and Burr's eventual banishment to Europe.[283] William Eaton testified against Burr at his treason trial.[284]

Despite similarly defying the limitations of U.S. war powers, Eaton was treated as a hero, Burr as a traitor, and Genêt as almost

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United Netherlands Against France (Apr. 22, 1793) (colloquially referred to as Washington's *Proclamation of Neutrality*).

277. Casto, *supra* note 274, at 178; Letter from Edmund Charles Genet to Thomas Jefferson (July 4, 1797); Letter from Alexander Hamilton to Rufus King (Aug. 13, 1793) (setting forth "[t]he facts with regard to Mr. Genet's threat to appeal from the President to the People"); Letter from John Adams to Thomas Jefferson (June 30, 1813). *See* Alexandre Deleyre, *Opinion D'Alexandre Deleyre, Depute par le Departement de la Gironde, Contre l'appel au peuple, sur le jugement de Louis XVI* 1 [1793]. After the Gironde appealed to the people in France, the country was "glutted with blood," ultimately disempowering Genêt and causing him to live out the rest of his life as a refugee in the United States. 3 WARREN, *supra* note 35, at 407–08 ("The guillotine was glutted with the blood of innocent victims, while the rapidity of execution, and their jealousy of each other, involved the most guilty, and cut down many of the blackest miscreants, as well as the most virtuous characters in the nation.").

278. CHIPP REID, *supra* note 274, at 122–23.

279. *Id.* at 173–74.

280. KENNEDY, *supra* note 274, at 266–74.

281. *Id.* at 266–68, 273.

282. *Id.* at 273–82. *See Ex parte* Bollman, 8 U.S. 75, 130–33 (1807) (Swartwout, a party in this case, later wrote a treatise defending his name, and lambasting Wilkinson's character.).

283. KENNEDY, *supra* note 274, at 333–34. *See* United States v. Burr, 25 F. Cas. 187, 201 (C.C.D. Va. 1807) (No. 14,694).

284. KENNEDY, *supra* note 274, at 273–74; *Burr*, 25 F. Cas., at 199–200.

insane.[285] It appears that Genêt's incendiary deeds were just a pregame of more to come, for U.S. politics never arrived at a principled way of handling those defiant to the limitations of U.S. war powers.[286] In fact, the Adams Administration confused these matters all the more when it signed the Logan Act and the Alien & Sedition Acts into law.[287]

Under the heads of these laws the president's presumed power to do horrific things in the name of national security began to grow—and this growth of power never stopped, indeed, the Alien Enemies Act and Logan Act are still good law.[288] Today the U.S. President can imprison those he or she deems an enemy of the state in the infamous Guantanamo Bay military prison without a trial regardless of U.S. citi-

285. Chipp Reid, *supra* note 274, at 273–77; Kennedy, *supra* note 274, at 313; Casto, *supra* note 274, at 179–80.

286. *See, e.g.*, James Roger Sharp, *What Benjamin Netanyahu could learn from Citizen Genet*, Syracuse (Feb. 27, 2015), https://www.syracuse.com/opinion/2015/02/what_benjamin_netanyahu_should_learn_from_the_1793_citizen_genet_affair_commenta.html.

287. Alien Enemies Act of 1798, 50 U.S.C. §§ 21–24 (still a good law); Logan Act, 18 U.S.C. § 953 (also still a good law). *See* James Madison, *The Virginia Resolution* [Dec. 24, 1798] (declaring the Alien & Sedition Acts were unconstitutional, and redeclaring the basis of the Union on the liberty of the press—though the state has no power to declare the law overruled for being unconstitutional, it is free to make the observation that it should be); Thomas Jefferson, *The Kentucky Resolutions* [Nov. 10, 1798 & Dec. 3, 1799] (Jefferson's Oct. 4, 1798 draft was far more radical that the drafts adopted by Kentucky, because it claimed that the state was nullifying the federal laws outside of the federal courts, whereas the ones adopted only said they should be nullified or be considered nullified by the states—but they both condemn the Alien & Sedition Acts as violations of the U.S. social compact. Violating a law is one of the ways to get a law overruled in the federal court—a proper case should have been taken up in a federal court to overrule these laws following these resolutions.); Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal., 1984) (overturning Korematsu's conviction under the Alien Enemies Act—a law which remains on the books from 1798, and empowered the President to intern Japanese Americans); Civil Liberties Act of 1988, 50 U.S.C.A. § 4212(b) (apologizing for and remunerating Japanese internment—but not repealing the Alien Enemies Act that was used to imprison them); Cong. Comm. on Standards of Official Conduct, 102d Cong., Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives 254 n.32 (1992) ("This statute, which appears to have been a reaction to the attempts of one citizen to engage in private diplomacy [i.e., Dr. Logan], has never been the basis of a prosecution, and this Committee has publicly questioned its constitutionality. . . . Members should be aware, however, that the law remains on the books."); CMT Staff, *President Comments on Dixie Chicks*, CMT (Apr. 25, 2003), http://www.cmt.com/news/1471528/president-comments-on-dixie-chicks/ ("Bush stated, 'I mean, the Dixie Chicks are free to speak their mind. They can say what they want to say,'" but the Logan Act is so broad it could have been used to charge them.).

288. Proclamation No. 2525, 7 Fed. Reg. 329 (Jan. 17, 1942) (citing Alien Enemies Act of 1798, 50 U.S.C. §§ 21–24); Daniel Hemel & Eric Posner, *Why the Trump Team Should Fear the Logan Act*, N.Y. Times (Dec. 4, 2017), https://www.law.uchicago.edu/news/hemel-and-posner-explain-why-trump-team-should-fear-logan-act (attempting to show that the Logan Act is not the paper tiger it appears to be).

zenship.[289] He or she can also, apparently, imprison U.S. citizens by racial classification indefinitely, *en masse*, without a trial.[290]

President Adams transgressed President Washington's legitimate use of presidential power in Washington's *Proclamation of Neutrality* by signing the unconstitutional Alien & Sedition Acts into law.[291] These acts allowed the U.S. President to access war powers *without a declaration of war*.[292] The Alien Enemies Act, which remains active, allows the president to unilaterally deport all enemy aliens regardless of legal status in the United States under the mere pretense of a national emergency.[293]

Congress also attempted to criminalize all speech by U.S. citizens in foreign nations that might affect presidential negotiations with the Logan Act.[294] This act was designed to stifle Dr. Logan's efforts to bring about peace through private negotiations in France during the *XYZ Affair*.[295] Dr. Logan considered the Act, "[m]ore honored in its

289. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (Sept 18, 2001) (allowing the President to define who are "terrorists"; all such people can, on the face of this and related laws, be detained without a trial); National Defense Appropriations Act for Fiscal Year 2012, Pub. L. No. 112–81, 125 Stat. 1298 (Dec. 31, 2011). *See* Joseph Tanfani, *Judge pushes U.S. to explain why it's holding an American citizen in secret in Iraq*, L.A. TIMES (Nov. 30, 2017, 3:30 PM), https://www.latimes.com/politics/la-na-pol-detainee-habeas-20171130-story.html. *The Amistad* is worth considering in relation to the topic of Guantanamo Bay. QUINCY ADAMS, ARGUMENT, *supra* note 114, at 15 ("This is what the Spanish minister demanded, that the vessel should be set at liberty, and the negroes sent to Cuba to be tried. And he is so confident in the disposition of the United States in favor of this demand, that he even presumes the President of the United States had already immediately dispatched an order to the Court in Connecticut, to stay its proceedings and deliver up the negroes to the Government of Spain.").

290. Proclamation No. 2525, 11 F.C.A., titl. 50, § 21 (citing Alien Enemies Act of 1798, 50 U.S.C. §§ 21–24); Executive Order No. 9066, 7 Fed. Reg. 1407 (1942). *See* Korematsu v. United States, 323 U.S. 214, 223–24 (1944). Chief Justice Roberts' held *Korematsu* overruled by history, and yet affirmed the president's Muslim travel ban and left the Enemy Aliens Act untouched. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (appearing to believe that this opinion formally repealed *Korematsu*, while leaving intact all the ways the president may intern people based on their race) (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

291. President George Washington, Proclamation 4—Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France (Apr. 22, 1793); Alexander Hamilton, *Defense of the President's Neutrality Proclamation* [May 1793].

292. Alien Enemies Act of 1798, 50 U.S.C. §§ 21–24; Logan Act, 18 U.S.C. § 953.

293. Alien Enemies Act of 1798, 50 U.S.C. § 21. *Cf.* Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019). (Trump repeatedly tried to characterize this emergency of asylum seekers on the Southern Border as an invasion that fits the limitations required by the Alien Enemies Act).

294. Logan Act, 18 U.S.C. § 953.

295. *Id.*

breach than in its observance," and so it came to pass that the Logan Act never supported a single prosecution.[296]

The Logan Act is a peculiar act because its enforcement requires an officer of the executive department to do something impractical, i.e., to initiate legal action against a private citizen in court.[297] The president need not ask the court for help when he or she has the sole power in foreign affairs and is more than equipped to dispose of any such matter with more ease and justice than the Judicial or Legislative Branches.[298] The Logan Act was, is, and, therefore never should be used to support a prosecution.[299]

Logan Act enforcement by a judge would be a violation of the separation of powers because "the president alone has the power to speak or listen as a representative of the nation" in foreign affairs.[300] A private U.S. citizen's word or deed in a foreign country may or may not help or hurt the president's negotiations, but it is up to the president to decide the appropriate action with respect to such a citizen's speech abroad.[301] Neither Congress nor the Court may intrude upon this Executive Power.[302]

Article II: The Executive Power

The executive power is vested by Article II of the U.S. Constitution in the president.[303] He or she must be at least thirty-five years old and elected in four year terms, with a two term limit.[304] The presidential election is decided by the states, such that most states cast all their electoral votes for the candidate that gets the majority popular vote of the state.[305] When a candidate fails to win a majority of electoral votes, the president is chosen by the House of Representatives.[306]

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296. DEBORAH NORRIS LOGAN, MEMOIR OF DR. GEORGE LOGAN OF STENTON 87, 99 (Frances A. Logan ed., 1899); CONG. COMM. ON STANDARDS OF OFF. CONDUCT, MEMORANDUM FOR ALL MEMBERS AND OFFICERS n.34 (Sept. 29, 2006) ("[T]he Logan Act . . . has never been the basis of a prosecution . . . .").

297. Logan Act, 18 U.S.C. § 953.

298. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).

299. *See* LOGAN, *supra* note 296, at 87, 99.

300. *Curtiss-Wright*, 299 U.S. at 319.

301. *See* LOGAN, *supra* note 296, at 89–93 (an open letter Dr. Logan published in the papers to defend himself); CMT Staff, *supra* note 287.

302. *Curtiss-Wright*, 299 U.S. at 319 ("Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.").

303. U.S. CONST. art. II, § 1.

304. U.S. CONST. art. II, § 1, cl. 1, 5.

305. U.S. CONST. art. II, § 1, cl. 2–3; *id.* amend. XII.

306. U.S. CONST. amend. XII.

Electoral college votes—meant to vindicate the sovereignty of the states—are determined by a calculation accounting for the population of each state.[307] Throughout U.S. history, the electoral college system produced six notable anomalies.[308] The most recent of these anomalies—the election of Presidents Bush and Trump in which the electoral college winner was not the winner of the popular vote—stand out from the previous four because they stem directly from judicial intervention.[309]

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307. *See* THE FEDERALIST NO. 68 (Alexander Hamilton). *But see* U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV (the three fifths compromise made only three fifths of the slave populations count toward seats in Congress, a controversial topic prior to the Civil War).

308. John Ferling, *Thomas Jefferson, Aaron Burr and the Election of 1800*, SMITHSONIAN MAG. (Nov. 1, 2004), https://www.smithsonianmag.com/history/thomas-jefferson-aaron-burr-and-the-election-of-1800-131082359/ (explaining that in the Election of 1800 there was no popular vote taken—Burr and Jefferson tied in the Electoral College and Jefferson only won when Electors that would have voted Burr abdicated in Jefferson's favor, this led to the adoption of the Twelfth Amendment); Letter from Andrew Jackson to Henry Lee (Oct. 7, 1825) (explaining that in 1824, no presidential candidate won a majority of electoral votes and the House of Representatives chose John Quincy Adams even though he had less of the popular vote than Jackson); RECONSTRUCTION: AMERICA AFTER THE CIVIL WAR hr. 2 (PBS television broadcast April 9, 2019) (explaining that in the Compromise of 1877, also known as the Great Betrayal of 1877, the North compromised with the South exchanging 20 disputed electoral votes to go to President Hayes who lost the popular vote for Hayes' assurances that he would end reconstruction by removing federal troops from the South); Henry F. Graff, *Grover Cleveland: Campaigns and Elections*, UVA: MILLER CENTER, https://millercenter.org/president/cleveland/campaigns-and-elections (last visited June 11, 2021) (explaining that in 1888, Grover Cleveland ran on a tariff policy that won the popular vote but lost the election—this is the only apparent example prior to Gore and Hillary where the popular vote went the opposite way of a straight electoral college vote); Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html.

309. Bush v. Gore, 531 U.S. 98, 110–11 (2000) (per curiam) (stopping the recount in Florida in President Bush's favor by a margin of 537 votes and deciding the election); Shelby County v. Holder, 570 U.S. 529, 554 (2013) (overruling the Voting Rights Act). *Shelby County* gutted the Voting Rights Act with enough time for Republican controlled states to make good use of the gutting in the 2016 Presidential Election. *Id. See* Ari Berman, *Welcome to the First Presidential Election Since Voting Rights Act Gutted*, ROLLING STONE (June 23, 2016, 3:40 PM), https://www.rollingstone.com/politics/politics-news/welcome-to-the-first-presidential-election-since-voting-rights-act-gutted-179737/; Jennifer G. Hickey, *Republicans Build on Their Dominance in State Legislatures*, FOX NEWS (Nov. 18, 2016), https://www.foxnews.com/politics/republicans-build-on-their-dominance-in-state-legislatures ("Republicans control both chambers in 32 states, while Democrats now have total control of just California, Delaware, Hawaii, Oregon and Rhode Island."); David A. Lieb, *AP Analysis Shows how Gerrymandering Benefited GOP in 2016*, PBS NEWS HOUR (June 25, 2017, 3:01 AM), https://www.pbs.org/newshour/politics/ap-analysis-shows-gerrymandering-benefited-gop-2016 ("extreme Republican advantages in some states were no fluke"); Keesha Gaskins, *Tying Presidential Electors to Gerrymandered Congressional Districts Will Sabotage Elections*, BRENNAN CTR. FOR JUST. (Jan. 22, 2013), https://www.brennancenter.org/our-work/analysis-opinion/tying-presidential-electors-gerrymandered-congressional-districts-will (a

President George Washington established the traditional two term limit when he declined to seek a third term and retired to his Virginia estate instead.[310] This two term tradition was observed by every president until the Roosevelts refused to abide by it.[311] Thereafter, the U.S. Constitution was amended to expressly prevent a repeat of Franklin D. Roosevelt's controversial third and fourth presidential terms.[312]

The powers of the president are by nature executive and come second in rank to the Legislative Power.[313] Domestically, the president is required to guide the debates in Congress by presenting the State of the Union every year.[314] The president nominates all major roles in the Cabinet, Judiciary, and Administrative councils with the advice and consent of the Senate, and the president must take care to execute the laws of Congress in a reasonable manner.[315]

If the president or their officers fail to execute the laws properly or exceed the powers delegated to them by Congress, they have acted

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few public interest groups called out possible ways that Republican controlled states could ensure a gerrymandered result in the 2016 election); *Electoral College Chaos: How Republicans Could Put a Lock on the Presidency*, FAIR VOTE (Dec. 13, 2012), https://www.fairvote.org/electoral-college-chaos-how-republicans-could-put-a-lock-on-the-presidency.

310. Letter from George Washington to Jonathan Trumbull (July 21, 1799) (denying the invitation to run for a third term). *Cf.* James H. Hutson, *John Adams' Title Campaign*, 41 THE NEW ENG. Q. 30, 33–34 (1968) (noting Adams' attempt to endow President Washington with royal titles).

311. Theodore Roosevelt, Acceptance Speech at 1912 Progressive National Convention (Aug. 6, 1912) (accepting a nomination to run for a third term); Andrew Glass, *Democrats Nominate FDR for Third Term, July 18, 1940*, POLITICO (July 18, 2018, 12:02 AM), https://www.politico.com/story/2018/07/18/democrats-nominate-fdr-for-third-term-july-18-1940-724615.

312. U.S. CONST. amend. XXII.

313. U.S. CONST. art. II, § 3 (the U.S. Constitution requires the president to report to Congress and to request that it set policies the president thinks are expedient, and Congress may or may not oblige). *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) (stating that "the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute" and overruling a presidential order that "does not direct that a congressional policy be executed in a manner directed by Congress" but unconstitutionally "directs that a presidential policy be executed in a manner prescribed by the President").

314. U.S. CONST. art. II, § 3.

315. U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3. Advice and consent of the Senate is not required for "inferior officers" as designated by Congress "as they think proper." *See, e.g.*, Pro. Air Traffic Controllers Org. v. Fed, Lab. Rel. Auth., 685 F.2d 547, 576,77 (D.C. Cir. 1982) (explaining how the violation of the Civil Service Reform Act by conducting a strike was enough to justified the president's firing of over 11,000 air traffic controllers, breaking their Union, and banning them from future civil service; the court did not broach the question of whether the president's removal power was unconstitutional for violating public safety, by backing the overworking of air traffic controllers—the reason for their strike).

ultra vires.[316] In such cases, the U.S. Judiciary can take corrective action to ensure that the law as applied conforms to the requirements of the law.[317] The courts' capacity to correct the executive is embodied by the equitable power to issue injunctions and the power to appoint private attorneys to prosecute criminal contempt.[318]

The president's power of removal is not expressly addressed in the Constitution.[319] This power took center stage in the foundational case *Marbury v. Madison*, which was a showdown between the powers of all three branches of government involving the powers of removal and appointment.[320] The *Marbury* Court ruled that even though President James Madison's withholding of William Marbury's commission was illegal, the Court was powerless to force his hand by writ of mandamus, overruling the Judiciary Act of 1789.[321]

In *Parsons v. United States*, the Court considered *Marbury* in light of the decision of 1789 and found that the president has the power to remove a U.S. Attorney before his or her statutory four-year term limit is over.[322] In *Myers v. United States*, the Court found that limitations on the president's power of removal by the Senate was unconstitutional.[323] Then, in *Humphrey's Executor,* the Court found

316. *See, e.g.,* City of Arlington v. FCC, 569 U.S. 290, 297–98 (2013) (explaining that every federal agency's "power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires"; i.e., whenever an agency acts beyond its enabling legislation it may be challenged in the court).

317. *See* United States v. Morton Salt Co., 338 U.S. 632, 638 (1950).

318. *See* Marbury v. Madison, 5 U.S. 137, 173 (1803); FED. R. CRIM. P. 42(a)(2). *See also* Crowell v. Benson, 285 U.S. 22, 44–454 (1932) (demonstrating that one of the first acts that convinced the U.S. Supreme Court to allow the growth of what is now referred to as the administrative state was a provision that expressly allowed the Court to preside over "injunction proceedings . . . brought by any party in interest against the deputy commissioner" in order to set aside or suspend agency orders that are "not in accordance with law"; the very foundations of the administrative state is based upon *Crowell's* presumption of Article III judicial review of *ultra vires* cases).

319. *See* U.S. CONST. art. II; *cf.* EDMUND RANDOLPH, A VINDICATION OF MR. RANDOLPH'S RESIGNATION 9 (1795).

320. *Marbury*, 5 U.S. at 157 ("Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission.").

321. *Id.* at 173.

322. Parsons v. United States, 167 U.S. 324, 343–44 (1897).

323. *See* Myers v. United States, 272 U.S. 52, 226 (1926) (extending *Parsons*, 167 U.S. at 343–44).

that the president can only remove an officer of a quasi-judicial or quasi-legislative agency "for cause."[324]

After the Watergate Scandal broke, President Richard Nixon ordered the Attorney General to remove Special Prosecutor Archibald Cox.[325] Rather than remove Cox, Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus both resigned—then Solicitor General Robert Bork was sworn in as acting Attorney General and fired Cox for President Nixon.[326] This event, known as the "Saturday Night Massacre," resulted in a federal court finding that the removal of Cox was illegal that followed an attempted cover up by President Nixon.[327]

The U.S. Supreme Court reshaped the balance between *Myers* and *Humphrey's Executor* in *Bowsher v. Synar* and *Morrison v. Olson*.[328] After these cases, *Myers*' characterization of the president's removal power of any officer as "illimitable" was struck down, but *Myers*' holding that Congress cannot involve itself in the removal of government officers remains good law.[329] A lasting holding from these cases is that the president may remove "inferior officers" at his or her discretion.[330]

President Ronald Reagan took this discretion to an extreme when he fired over 11,000 air traffic controllers for violating the Civil Service Reform Act (CSRA) by going on strike.[331] *PATCO v. FLRA* de-

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324. Humphrey's Executor v. United States, 295 U.S. 602, 627–32 (1935) (confining the president's illimitable power of removal to exclusively executive officers).

325. Dylan Matthews, *Richard Nixon also fired the person investigating his presidential campaign*, VOX (May 10, 2017, 12:40 PM), https://www.vox.com/policy-and-politics/2017/5/10/15603886/saturday-night-massacre-explained-nixon-watergate-archibald-cox.

326. *Id.*

327. *Id.*; Jeffrey Frank, *Comey's Firing is—and isn't—Like Nixon's Saturday Night Massacre*, NEW YORKER (May 10, 2017), https://www.newyorker.com/news/daily-comment/comeys-firing-is-and-isnt-like-nixons-saturday-night-massacre; Nader v. Bork, 366 F. Supp. 104, 108 (D.C. Cir., 1973) ("The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal."); United States v. Nixon, 418 U.S. 683, 694–96 (1974).

328. Bowsher v. Synar, 478 U.S. 714, 720 (1986); Morrison v. Olson, 487 U.S. 654, 686 (1988).

329. *Bowsher*, 478 U.S. at 726; *Morrison*, 487 U.S. at 685–87 ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.").

330. United States v. Perkins, 116 U.S. 483, 484–85 (1886), *cited with approval in* Myers v. United States, 272 U.S. 52, 161–64 (1926), *Morrison*, 487 U.S. at 689 n.27, *and* Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 483–84 (2010).

331. Bryan Craig, *Reagan vs. Air Traffic Controllers*, UVA: MILLER CENTER, https://millercenter.org/reagan-vs-air-traffic-controllers (last visited Aug. 9, 2021) (the President fired 11,345 or so of the nearly 13,000 that went on strike). *Cf.* Hassan A. Kanu, *Labor Board*

cided the legality of this removal and did not broach the question of whether the president's discretion to fire an entire fleet of federal employees was unconstitutional.[332] Years later in 2012, the U.S. Supreme Court unsettled *Marbury v. Madison* by jurisdictionally insulating the CSRA from constitutional challenge.[333]

During the Trump era, the U.S. Supreme Court adopted the unitary executive theory in a majority opinion for the first time in *Seila Law v. CFPB*, which decided that Congress cannot insulate an officer from removal.[334] Prior to *Seila Law*, the unitary executive theory existed in Justice Scalia's dissent in *Morrison v. Olson*, but was not generally accepted as law.[335] Following *Seila Law*, however, the Court decided in *United States v. Arthrex, Inc.* that inferior officers may act as principle officers without the president nominating them with advice and consent of the Senate as long as they are reviewable by a principle officer nominated by the president with advice and consent of the Senate based on the unitary executive theory idea that "[t]hrough the President's oversight, 'the chain of dependence [is] preserved.'"[336]

President Donald J. Trump triggered new controversies over the removal power and the presidential duty to execute the laws by riveting the presidential chain of dependence that was venerated in

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Pick Litigated Reagan's 'Watershed' Air Traffic Case, BLOOMBERG NEWS (Sept. 19, 2017, 3:58 PM), https://news.bloomberglaw.com/daily-labor-report/labor-board-pick-litigated-reagans-watershed-air-traffic-case (from 2017 to 2021, Peter Robb served as General Counsel of the NLRB after being the lead attorney in the controversial *PATCO v. FLRA* case.).

332. PATCO v. FLRA, 685 F.2d 547, 578 (D.C. Cir., 1982).

333. Elgin v. Dep't of Treasury, 567 U.S. 1, 5 (2012) (blocking the Court's original jurisdiction to review constitutional challenges to the CSRA).

334. Seila Law v. CFPB, 140 S. Ct. 2183, 2203 (2020) ("The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections."). *But see* U.S. CONST. art. II, cl. 2 (the constitution does not force the states to hold popular elections for the president).

335. Morrison v. Olson, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting) ("The President is directly dependent on the people, and, since there is only *one* President, *he* is responsible."). *But see* U.S. CONST. art. II, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."; the states are not constitutionally required to hold popular elections for president).

336. Morrison v. Olson, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting) ("The President is directly dependent on the people, and, since there is only *one* President, *he* is responsible."). *But see* U.S. CONST. art. II, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."; the states are not constitutionally required to hold popular elections for president).
May, if it so chooses, select the electors itself" regardless of the popular vote, "which indeed was the manner used by state legislatures in the several States for many years after the framing of our Constitution") (citing McPherson v. Blacker, 146 U.S. 1, 365 (1892)).

Seila Law to create unprecedented upheaval in U.S. Government.[337] First, Trump removed hundreds of officers without nominating new ones, operating much of the government through acting officers.[338] Second, Trump pocket vetoed a spending bill that caused a government shutdown raising serious questions of whether the president can force government employees, including the same class of air traffic controllers, to work without pay as indentured servants.[339]

There are also similarities between acting Attorney General Matthew Whitaker and acting Attorney General Robert Bork.[340] The litigation over acting AG Bork surrounded the legality of firing special counsel Archibald Cox.[341] There was also litigation involving acting AG Whitaker, who was put into place instead of Deputy AG Rosenstein, while special counsel Robert Mueller's investigation into the 2016 election was ongoing.[342]

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337. *See, e.g.*, David A. Graham, *The Strangest Thing About Trump's Approach to Presidential Power: Many presidents have pushed the limits of their authority. But not like this.*, THE ATLANTIC (June 7, 2018), https://www.theatlantic.com/politics/archive/2018/06/the-strangest-thing-about-trumps-approach-to-presidential-power/562271/.

338. *Transcript: President Trump on "Face the Nation," February 3, 2019*, CBS (Feb. 3, 2019, 7:31 AM), https://www.cbsnews.com/news/transcript-president-trump-on-face-the-nation-february-3-2019/ [hereinafter *Transcript: President*]; Kristina Davis, *Prominent private litigator Brewer picked for San Diego U.S. attorney nomination*, SAN DIEGO TRIBUNE (June 20, 2018, 5:05 PM), https://www.sandiegouniontribune.com/news/courts/sd-me-usatty-nomination-20180620-story.html; Jan Diehm et al., *Who has left Trump's administration and orbit?*, CNN, https://www.cnn.com/interactive/2017/08/politics/trump-admin-departures-trnd/ (last updated Oct. 21, 2019).

339. NTEU v. United States, Nos. 19–50, 19–51, 19–62, 2019 U.S. Dist. LEXIS 9305, at *3 (D.D.C. 2019), *aff'd*, 444 F. Supp. 3d 108 (D.D.C. 2020).

340. Kevin Johnson & Bart Jansen, *Two Republican former AGs raise questions on Trump's naming Matthew Whitaker to lead Justice Department*, USA TODAY (last updated Nov. 11, 2018, 4:01 PM), https://www.usatoday.com/story/news/politics/2018/11/09/two-former-attorneys-general-questioning-propriety-whitaker-appointment/1946855002/ ("'Even Richard Nixon didn't put in somebody as acting attorney general who had not been confirmed,' Mukasey said . . . ."—Bork was confirmed to be Solicitor, so he was confirmed though not for the AG role.)

341. *See* Nader v. Bork, 366 F. Supp. 104, 108 (D.C. Cir. 1973); United States v. Nixon, 418 U.S. 683, 694–97 (1974).

342. Andrew Prokop, *Is Rod Rosenstein fired, resigning, or staying? The drama, explained.*, VOX (Sept. 24, 2018, 2:30 PM), https://www.vox.com/2018/9/24/17896140/rod-rosenstein-resigns-fired-mueller-trump-russia ("On Friday [Sept. 21, 2018], Fox's Laura Ingraham tweeted that 'Rod Rosenstein must be fired today,' but Fox's Sean Hannity notably urged the president *not* to fire anyone. (Ingraham later deleted her tweet.)"); Brett Samuels, *Trump formally nominates Jeffrey Rosen to replace Rosenstein at DOJ*, THE HILL (Mar. 26, 2019, 4:58 PM), https://thehill.com/homenews/administration/435931-trump-formally-nominates-jeffrey-rosen-to-replace-rosenstein-at-doj (for all intents and purposes Rosenstein was officially being fired when Trump nominated Jeffrey Rosen to fill his job). *Cf.* John Yoo, *Whitaker's Appointment is Unconstitutional*, THE ATLANTIC (Nov. 13, 2018), https://www.theatlantic.com/ideas/archive/2018/11/whitaker-cant-take-officeand-that-helps-muel-

The question of whether the president can remove officers when he has no immediate, viable replacement for them appears to be ripe for review.[343] It first became an issue when former President Trump signed Executive Orders 13769 & 13780, effecting a travel ban on seven Muslim majority nations.[344] Former President Obama holdover Attorney General Sally Yates refused to enforce the Executive Orders and declared them unconstitutional; then former President Trump fired her without an alternative AG ready to swear into office.[345]

Not only did former President Trump remove AG Yates to fill the office with an acting AG who reversed Yates's order, but Trump also purged forty-six U.S. Attorneys *en masse* without alternate picks.[346] Trump initially did not refill these spots, allowing them to be filled by questionable interim appointments not anticipated by the law.[347] He did the same thing with other positions, including members

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ler/575770/ [hereinafter Yoo, *Whitaker's*] (the nomination of Whitaker was so out of order that even John Yoo, author of the Bush era *Torture Memos*, declared it unconstitutional).

343. Aaron Blake, *Sally Yates is now a martyr for the anti-Trump movement. But legally speaking, it's more complicated.*, WASH. POST (Jan. 31, 2017, 11:49 AM), https://www.washingtonpost.com/news/the-fix/wp/2017/01/31/sally-yates-is-now-a-martyr-for-the-anti-trump-movement-but-legally-speaking-its-more-complicated/ (including an interesting video exchange between Jeff Sessions and Sally Yates at her Senate confirmation hearing, which appeared to show that they agreed that Yates' later actions were required of her).

344. Exec. Order No. 13769, 3 Fed. Reg. 8,977 (2017); Exec. Order No. 13780, 3 Fed. Reg. 13,209 (2017).

345. Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html ("The president replaced Ms. Yates with Dana J. Boente, the United States attorney for the Eastern District of Virginia, saying that he would serve as attorney general until Congress acts to confirm Senator Jeff Sessions of Alabama. In his first act in his new role, Mr. Boente announced that he was rescinding Ms. Yates's order.").

346. *Id.*; Charlie Savage & Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. TIMES (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/us/politics/us-attorney-justice-department-trump.html (notably, Dana J. Boente was one of the U.S. Attorneys that Trump refused to accept a resignation from).

347. *See, e.g.*, Davis, *supra* note 338 (explaining that after a time of uncertainty, the acting USA after the purge became Alana W. Robinson, then long after the 300 day window anticipated by the law was over, AG Jeff Sessions arbitrarily nominated Adam Braverman who was sworn into the office and served as USA, and since then Trump nominated private citizen Robert Brewer to the post, attempting to buck Senatorial curtesy rules that normally would allow Senator Kamala Harris to make the pick in order to strong arm the Senate to accept a spoils system like the one that emerged during the Andrew Jackson administration). *Cf.* Eleanor Clift, *The Unheralded Death of the Blue Slip*, THE DAILY BEAST (Sept. 26, 2017, 6:56 AM), https://www.thedailybeast.com/the-unheralded-death-of-the-blue-slip; Jordain Carney, *Senate battle heats up over 'blue slips,' Trump court picks*, THE HILL (Oct. 11, 2017, 1:54 PM), https://thehill.com/homenews/senate/354955-senators-battle-over-trumps-court-nominees ("Trump currently has 149 vacancies to fill in the federal court system, with nominees already named for 50 of those spots.").

of his own cabinet, firing them without cause, regardless of whether he had an alternate ready to go.[348]

Trump's strategy, apparently taken from his reality TV Show *The Apprentice,* of ruling the government through an informal revolving door of "acting" executive officers, is grounds for judicial review of his decision to appoint Matthew Whitaker as acting AG without advice and consent from the Senate.[349] During his presidency, Trump went on the record with Margaret Brennan on Face the Nation and appeared to clarify the intentionality and purpose behind his chaotic style of administration:

> Brennan: 'Cause you have an acting AG until you get Barr confirmed—
> Trump: Yes.
> Brennan: An acting defense secretary. An acting chief of staff. An acting interior secretary.
> Trump: It's OK. IT'S EASIER TO MAKE MOVES WHEN THEY'RE ACTING.[350]

While some may contend the nomination of William Barr made pending litigation moot, litigation regarding former President Trump's appointment of acting officers like Whitaker is shown to be "capable of repetition, yet evading review."[351] The installation of Matthew Whitaker as acting AG was especially concerning, not merely because he appeared unqualified, but also because Whitaker's installation arguably violated the proper "chain of command" that the legitimacy of presidential power depends upon.[352]

Trump fired FBI Director James Comey, after Comey seemed to help him clinch the presidency, because of Comey's support of the investigation into Russia's involvement in the 2016 election.[353] Trump

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348. Diehm et al., *supra* note 338.

349. *The Apprentice: Meet the Billionaire* (NBC television broadcast Jan. 8, 2004); Jen Kirby, *A brief guide to the legal challenges against acting Attorney General Matthew Whitaker*, VOX (Dec. 6, 2018, 5:15 PM) https://www.vox.com/2018/11/21/18105428/matthew-whitaker-legal-challenges-mueller-trump.

350. *Transcript: President*, *supra* note 338 (emphasis added).

351. Roe v. Wade, 410 U.S. 113, 125 (1973) (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

352. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497, 507 (2010); Yoo, *Whitaker's*, *supra* note 342; Ruth Marcus, *Matthew Whitaker is a Crackpot*, WASH. POST (Nov. 8, 2018, 5:34 PM), https://www.washingtonpost.com/opinions/matthew-whitaker-is-a-crackpot/2018/11/08/69e8e190-e395-11e8-8f5f-a55347f48762_story.html.

353. Michael D. Shear & Matt Apuzzo, *FBI Director James Comey is Fired by Trump*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html; Jordain Carney, *Top Dems: IG report shows Comey's actions helped Trump win election*, THE HILL (June 14, 2018, 5:45 PM), https://thehill.com/policy/national-security/392369-top-dems-ig-report-shows-comeys-actions-helped-trump-win-election.

repeatedly threatened to fire Special Counsel Robert Mueller directly, or to classify the findings of his report.[354] Following Attorney General William Barr's letter to the ranking members of the House and Senate Judiciary Committees, Trump hailed the report as an exoneration of all wrongdoing and expressed that it should be made public.[355]

However, a special counsel's decision not to indict a sitting president is *not* an exoneration.[356] A sitting president should *never* be indicted for a crime given the harrowing variety of government havoc that could result.[357] An indicted president still in office would have his hands on all the levers of government—a situation rife for corruption

354. Maggie Haberman & Michael S. Schmidt, *Trump Sought to Fire Mueller in December*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/us/politics/trump-sought-to-fire-mueller-in-december.html; Darren Samuelsohn, *GOP wants Mueller transparency—with caveats*, POLITICO (Jan. 16, 2019, 6:59 PM), https://www.politico.com/story/2019/01/16/congress-mueller-investigation-final-report-senate-republicans-1106912.

355. Letter from AG William P. Barr to Sen. Lindsey Graham et al. (Mar. 24, 2019), https://www.justice.gov/ag/page/file/1147981/download [hereinafter Barr's "Principle Conclusions"]; Jill Colvin, *Trump says public should see 'ridiculous' Mueller report*, AP NEWS (Mar. 21, 2019), https://apnews.com/article/093727be24b649f7adad971e0b48878d ("'Let it come out, let people see it,' Trump told reporters Wednesday. 'Let's see whether or not it's legit.'"); Dylan Scott, *Trump: Barr letter on Mueller report shows 'total and complete exoneration'*, VOX (Mar. 24, 2019, 4:40 PM), https://www.vox.com/policy-and-politics/2019/3/24/18279887/trump-mueller-report-barr-letter-exonerated-cleared (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 24, 2019, 4:42 PM) ("No Collusion, No Obstruction, Complete and Total EXONERATION. KEEP AMERICA GREAT!"), searchable on https://www.thetrumparchive.com; Sarah Sanders (@PressSec), TWITTER (Mar. 24, 2019, 4:13 PM), https://twitter.com/PressSec/status/1109911057013919746 ("The findings of the Department of Justice are a total and complete exoneration of the President of the United States.").

356. U.S. CONST. art. II, § 2, cl. 1 (the President has every power to pardon and stave off all criminal proceedings while still sitting for good reason—he is also at the head of the Justice Department, the indicting department, so it would be somewhat unlikely to expect the department to indict the President it serves—none of this is exonerating); MSNBC, *New Reporting Suggests Strain Between William Barr And Mueller Team*, YOUTUBE (Apr. 4, 2019), https://www.youtube.com/watch?v=_VrwvmRQprs ("Ultimately, history teaches us, that Presidents in the end, when they try this stuff, they lose.") (statement of Rachel Maddow).

357. *See* A Sitting President's Amenability to Indictment and Crim. Prosecution, 24 Op. O.L.C. 222, 222, 254 (2000) ("The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions." – "[C]riminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation. Indictment also exposes the President to an official pronouncement that there is probable cause to believe he committed a criminal act, impairing his credibility in carrying out his constitutional responsibilities to 'take Care that the Laws be faithfully executed,' and to speak as the 'sole organ' of the United States in dealing with foreign nations. . . . Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.").

and abuse—and thus he must leave office or be removed by impeachment before he is indicted for crimes committed while in office.[358]

Accordingly, the Mueller Team did not pursue an indictment against the president but rather expected that their report would be made available to Congress for use in any resulting impeachment proceeding.[359] When the Mueller Team publicly disputed Barr's exonerating summary of the report as misleading, Trump reverted back to his earlier position and advocated for the report to be sealed.[360] The House Judiciary Committee in charge of impeachments seized on the rift between Mueller and Barr and subpoenaed the whole, unredacted report—Barr defied this subpoena and the full (unredacted) Mueller report has yet to be released to the House.[361]

On April 18, 2019, AG Barr publicly released a redacted version of the Mueller Report confirming that Barr lied to Congress and the American people.[362] The Mueller Report, though it did not exonerate

358. *See* Proclamation No. 4311, 39 Fed. Reg. 32,601 (Sept. 10, 1974); A Sitting President's Amenability to Indictment and Crim. Prosecution, 24 Op. O.L.C. at 223–24 (2000) (citing U.S. CONST. art. I, § 3, at cl. 7; THE FEDERALIST NOS. 65, 69, 77 (Alexander Hamilton)) (establishing that the impeachment clause itself is not a general bar on indictments of sitting presidents, but that the former attorneys general have concluded that the Justice Department constitutionally should refrain from indicting sitting presidents as a rule). *Cf.* United States v. Burr, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694).

359. *See* Mimi Rocah, *Barr Looks Like He's Trying to Protect Trump, Not Get Out the Mueller Report*, DAILY BEAST (Apr. 4, 2019, 10:52 PM), https://www.thedailybeast.com/barr-looks-like-hes-trying-to-protect-trump-not-get-out-the-mueller-report.

360. Andrew Desiderio & Kyle Cheney, *Trump changes tune on public release of Mueller report*, POLITICO (Apr. 2, 2019, 4:35 PM), https://www.politico.com/story/2019/04/02/trump-mueller-report-1249947 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 2, 2019, 8:54 AM), searchable on https://www.thetrumparchive.com ("There is no amount of testimony or document production that can satisfy Jerry Nadler or Shifty Adam Schiff. It is now time to focus exclusively on properly running our great Country!")).

361. Nicholas Fandos, *Justice Dept. Agrees to Turn Over Key Mueller Evidence to House*, N.Y. TIMES (June 10, 2019), https://www.nytimes.com/2019/06/10/us/politics/mueller-judiciary-committee.html ("The Judiciary Committee initially requested—and then subpoenaed—the full text of Mr. Mueller's report without redactions weeks ago, as well as all of the evidence underlying it. Mr. Barr refused and after negotiations broke down, Mr. Trump asserted executive privilege over the material, prompting the committee's contempt recommendation.").

362. *Compare* Barr's "Principle Conclusions", *supra* note 355 ("The Special Counsel's decision to describe the facts of his obstruction investigation without reaching any legal conclusions leaves it to the Attorney General to determine whether the conduct described in the report constitutes a crime. . . . I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense. Our determination was made without regard to, and is not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president."), *with* 2 ROBERT S. MUELLER, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 8 (2019), https://www.justice.gov/storage/report.pdf ("while this report does not conclude that the President committed a crime, it also does not exonerate him"); *id.* at 178 n.1091 ("A

the president, gave assurances that "the evidence does not establish that the president was involved in an underlying crime related to Russian election interference."[363] The facts presented in the first volume of the Mueller Report, however, could support the prosecution of several counts of treason arguably making Mueller culpable of an even more serious fraud upon the public than Barr.[364]

At the very least, the facts in the Mueller Report contained multiple instances of criminal solicitation that it did not name as criminally chargeable solicitation.[365] Failing to identify specific instances of solicitation clearly for the House of Representatives arguably resulted in weakened impeachment charges on December 18, 2019, for "abuse of power" and "obstruction of Congress."[366] Then only

possible remedy through impeachment for abuses of power would not substitute for potential criminal liability after a President leaves office."). *Cf.* Katelyn Polantz, *Judge blasts Barr's Justice Dept. for 'getting a jump on public relations' in Mueller report rollout*, CNN POLITICS (May 25, 2021, 1:23 PM), https://www.cnn.com/2021/05/25/politics/mueller-report-justice-department-william-barr/index.html.

363. *See, e.g.*, 2 MUELLER, *supra* note 362, at 157 ("In this investigation, the evidence does not establish that the President was involved in an underlying crime related to Russian election interference.").

364. 1 MUELLER, *supra* note 362, at 110, 124–26, 130, 132–40, 149, 185; 2 MUELLER, *supra* note 362, at 12, 100–03 ("The President told Hicks to say only that Trump Jr. took a brief meeting and it was about Russian adoption."); U.S. CONST. art. III, § 3 (defining treason). *Cf.* Trump v. Vance, 140 S. Ct. 2412, 2423 (2020) (citing to Aaron Burr's treason trial to justify state criminal subpoenas issued on a sitting president); Kevin Breuninger & Amanda Macias, *Tom Barrack's Arrest Puts the Spotlight on United Arab Emirates' Crucial Role in Trump's Foreign Policy*, CNBC (July 20, 2021, 7:55 PM), https://www.cnbc.com/2021/07/20/trump-friend-tom-barrack-arrest-puts-the-spotlight-on-united-arab-emirates.html; 1 MUELLER, *supra* note 362, at 134 (noting that Barrack suggested that Trump hire Manafort).

365. 2 MUELLER, *supra* note 362, at 27 n.112, 56–60, 145 (for example, the Mueller Report "did not investigate Cohen's campaign-period payments to women" even though they were "potentially relevant," though the Report itself resulted in successful criminal prosecution of Michael Cohen that produced public congressional testimony that Trump solicited illegal payments to Stormy Daniels).

366. H.R. Res. 755, 116th Cong. (2019) (enacted) (impeaching Trump for "abuse of power" and "obstruction of Congress," including that Trump specifically "solicited the Government of Ukraine" for corrupt purposes linked to Russian interests and generally "betrayed the Nation by abusing his high office to enlist a foreign power [i.e., Russia] in corrupting democratic elections"—the solicitation charge attached to the "abuse of power" article came about because of a whistleblower complaint filed directly with Congress that confirmed Trump's pressure campaign on Ukraine in apparent service to Russia) (citing Unclassified Letter from Whistleblower to Hon. Richard Burr & Hon. Adam Schiff (Aug. 12, 2019) (revealing Trump's July 25, 2019, phone call with Ukrainian President Volodymyr Zelenskyy "to take actions to help the President's 2020 reelection bid" by smearing then presidential hopeful Joseph Biden and his son Hunter Biden)). The Mueller Report arguably left a whistleblower on his or her own to name Trump's crimes clearly so that the House of Representatives could impeach Trump for something other than mere obstruction. *See* 1 MUELLER, *supra* note 362, at 67–78 (the Mueller team knew that Trump had motive to pressure foreign nations in favor of Russia to further his ambitions of building a Trump Tower,

a little over a year later on January 6, 2021, when President Trump's attempts to corrupt Ukraine in favor of his election bid failed, the president incited an insurrection for the purpose of invalidating a legitimate election result.[367]

Trump was impeached for a second time on the charge of inciting an insurrection.[368] Inciting an insurrection is not a common law crime like solicitation, but it appears to be a similar statutory charge inclusive of the common law definition of solicitation.[369] It also appears that inciting an insurrection is a lesser, inclusive charge in the first definition of treason in § 2381 that precedes the definition of inciting insurrections in § 2383, and that Trump could potentially be charged with each alongside and in support of each other now that Trump is no longer in office.[370]

Despite the former president's apparent attempts to corrupt foreign governments to help him win his 2020 presidential bid, the president is meant to take an independent role in foreign affairs, for "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or

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Moscow); *id.* at 129–44 (the Mueller team knew that Paul Manafort who was Trump's campaign chair, previously led a campaign to plant a Russian operative at the top of the Ukrainian Government named Victor Yanukovych against U.S. interests in the region); 2 MUELLER, *supra* note 362, at 156 (obstruction of the Mueller investigation itself became the focus of the Mueller probe and other possible crimes that implicated Trump, that were the original purpose of the Mueller investigation to discover and document, were not identified clearly enough).

367. *Transcript of Trump's Speech at Rally Before US Capitol Riot*, ASSOCIATED PRESS (Jan. 13, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27; *House Impeachment Managers' Video Compilation of January 6 Attack on the U.S. Capitol*, C-SPAN (Feb. 9, 2021), https://www.c-span.org/video/?c4944572/house-impeachment-managers-video-compilation-january-6-attack-us-capitol.

368. H.R. Res. 24, 117th Cong. (2021) (enacted) (citing U.S. CONST. amend. XIV, § 3 (stating that any person that has "engaged in insurrection or rebellion against" the United States is precluded from "hold[ing] any office . . . under the United States"—if Trump was convicted on this count in the Senate, it was hoped that it might preclude him from running for any office again)).

369. 18 U.S.C. § 2383 (defining inciting an insurrection as a crime); 18 U.S.C. § 373 (defining solicitation as a crime).

370. 18 U.S.C. § 2383; 18 U.S.C. § 373; H.R. Res. 24, 117th Cong. (2021) (enacted). *See Watch: McConnell's Full Remarks Following Senate Vote to Acquit Trump*, NBC NEWS (Feb. 13, 2021), https://www.nbcnews.com/video/watch-mcconnell-s-full-remarks-following-senate-vote-to-acquit-trump-100994117808 ("President Trump is still liable for everything he did while he was in office as an ordinary citizen, unless the statute of limitations has run, still liable for everything he did while he's in office; didn't get away with anything, yet. We have a criminal justice system in this country; we have civil litigation. And former presidents are not immune from being accountable by either one.")

listen as a representative of the nation."[371] As to treaties, "[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[372] As Justice Sutherland wrote,

> The marked difference between foreign affairs and domestic affairs is . . . [in cases dealing with domestic affairs] the resolution *directs* the official to furnish the information. In a case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement [from the President or his Secretary] that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.[373]

This means that a joint resolution of Congress regarding domestic affairs is mandatory where it can reasonably be carried out for the defense or welfare of the people.[374] However, in cases of foreign affairs the president can only be *requested* to comply.[375] For example, the president may properly block a private sale of machine guns to a war zone without congressional authorization.[376]

When a president enters into an agreement with a foreign power, or with multiple foreign powers, and their agreement is ratified as a treaty with the advice and consent of the Senate, it becomes a supreme law of the land.[377] Indeed, the first application of federal supremacy in the United States gave preemptive force to a treaty in *Rutgers v. Waddington*.[378] This case derived federal supremacy from the United States social compact sounding in the *jus gentium* at common law prior to the U.S. Constitution's ratification.[379]

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371. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).

372. *Id.*

373. *Id.* at 321 (emphasis added).

374. *Id.*; Nixon v. Adm'r Gen. Servs., 433 U.S. 425, 483–84 (1977) (affirming a statute that ordered an agency to take custody of presidential papers after Nixon resigned).

375. *See Curtiss-Wright*, 299 U.S. at 321. *Cf.* United States v. Burr, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) (in a matter of foreign affairs the federal courts' subpoena could only be a request in this matter); United States v. Nixon, 418 U.S. 683, 713, 715 (1974) ("The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." The Court continued citing to the *Burr* case, "It is therefore necessary in the public interest to afford Presidential confidentiality to the greatest protection consistent with the fair administration of justice.").

376. *See Curtiss-Wright*, 299 U.S. at 319–20, 329.

377. U.S. CONST. art. VI, cl. 2. *See also* Chirac v. Lessee of Chirac, 15 U.S. 259, 271, 277 (1817) (stating that when a treaty becomes the supreme law of the land, the treaty can modify state laws and even if the treaty expires, the rights conveyed by the treaty do not expire or otherwise give way to previously enacted state laws).

378. THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 28, 36–37, 46.

379. *Id.* at 28. ("We must acknowledge there appears to us very great force in the observation arising from the federal compact. By this compact these states are bound together as one great independent nation; and with respect to their common and national affairs, exer-

In lieu of actual treaties, which require the advice and consent of the senate, executive agreements are a popular alternative among our presidents.[380] While these agreements may be submitted to the Senate for approval as an official treaty, there is nothing about executive agreements that is inherently unconstitutional.[381] There are many situations where an executive agreement is sufficient and appropriate.[382]

However, the Senate's use of advice and consent as a party tool to obstruct presidential foreign negotiations is a violation of the separation of powers.[383] The act of individual senators purposely disrupting executive negotiations made by the president with foreign sovereigns by making executive agreements a matter of internal politics by grandstanding is also a violation of the separation of powers.[384] Passing a

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cise a joined sovereignty, whose will can only be manifested by the acts of their delegates in Congress assembled.").

380. *Treaty vs. Executive Agreement*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/s/l/treaty/faqs/70133.htm (last visited Oct. 14, 2018).

381. *Id. See, e.g., Curtiss-Wright,* 299 U.S. at 320–21 (quoting Message from President George Washington to the U.S. House of Representatives (Mar. 30, 1796)) ("'The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. . . . To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.'"); *see also* Holmes v. Jennison, 39 U.S. 540, 574 (1840) (Opinion of Taney, C.J.) ("[I]n every instance where there was no engagement by treaty to deliver, and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty, and no law of Congress to authorize it"—Chief Justice Taney's opinion, which was adopted as law by the Supreme Court of Vermont, suggests the unconstitutionality of executive agreements like the UKUSA "Five Eyes" Agreement for violating the property and privacy of individuals in the United States without a treaty confirmed by the Senate, and without making a law of Congress to authorize it.).

382. *See, e.g.,* Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of government ordained by the Constitution. The Act of October 1, 1890 [allowing the president to make executive trade agreements] . . . is not inconsistent with that principle.").

383. *See Curtiss-Wright,* 299 U.S. at 319.

384. *Id.* ("Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."). *See also* Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) ("If the Congress chooses not to confront the President, it is not our task to do so."). *Cf.* Myers v. United States, 272 U.S. 52, 148–49 (1926) (explaining why the Senate could not constitutionally clog the president's removal power beyond its impeachment power), *cited with approval in* Bowsher v. Synar, 478 U.S. 714, 730 (1986); Morrison v. Olson, 487 U.S. 654, 685–86 (1988). *See, e.g.*, Jonathan Capehart, *Tom Cotton picked apart by Army general over 'mutinous' Iran letter*, WASH. POST (Mar. 13, 2015, 10:29 AM), https://

law that requires the president to disclose his secrets involving foreign affairs is patently unconstitutional.[385]

Senators recently violated the separation of powers on all these counts.[386] Under the leadership of Senator Cotton, a Rump Senate of forty-seven senators, signed a letter addressed directly to Iran to embarrass the foreign affairs powers of the president.[387] Then Congress passed an unconstitutional law that would (1) require the president to disclose his Iran negotiations to the House of Representatives, and (2) require the president to submit future negotiations with Iran to congressional oversight.[388]

The resulting argument over Twitter between Senator Cotton and Iranian dignitaries also illustrates the actual constitutional design.[389] Congress is not equipped with translators or diplomats to successfully carry out such a letter.[390] A majority of the Senate could call forward translators and attempt to subpoena foreign dignitaries, but Senator Cotton did not have a majority of the Senate with him and

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www.washingtonpost.com/blogs/post-partisan/wp/2015/03/13/tom-cotton-picked-apart-by-army-general-over-mutinous-iran-letter/.

385. *See Curtiss-Wright*, 299 U.S. at 321 (quoting Message from President George Washington to the U.S. House of Representatives (Mar. 30, 1796)) ("'To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.'"); *See also* THE FEDERALIST NO. 64 (John Jay), NOS. 69, 75 (Alexander Hamilton) ("It seldom happens in the negotiation of treaties, of whatever nature, but that perfect SECRECY and immediate DESPATCH are sometimes requisite."). *Cf.* U.S. CONST. art. I, § 5, cl. 3 (giving Congress discretion to keep their own deliberations secret).

386. Letter from Senator Tom Cotton et al. to Leaders of the Islamic Republic of Iran (Mar. 10, 2015) (signed by 47 U.S. Senators, and unconstitutionally addressed to foreign dignitaries on behalf of the United States).

387. *Id.*

388. Congressional Review and Oversight of Agreements with Iran, 42 U.S.C. § 2160e (2015). *See Curtiss-Wright*, 299 U.S. at 319–21 (quoting Message from President George Washington to the U.S. House of Representatives (Mar. 30, 1796)) (in support of these limits on congressional power, Justice Sutherland cited to a message of President Washington that explained why the executive branch could not allow the House a right to review the president's secret negotiations—and thus he refused the House's demands regarding the Jay Treaty).

389. Megan Specia, *Republican senators' open letter to Iran sparks fierce Twitter spat*, MASHABLE, Mar. 10, 2015, https://mashable.com/2015/03/10/republicans-open-letter-to-iran/#92hdx6NfaSqU ("The Foreign Minister also informed the authors that majority of US international agreements in recent decades are in fact what the signatories describe as 'mere executive agreements' and not treaties ratified by the Senate.").

390. FP Staff, *Sen. Tom Cotton's Farsi Version of His Explosive Letter to Iranian Leaders Reads Like a Middle Schooler Wrote It*, FOREIGN POLICY (Mar. 30, 2015, 12:33 PM), https://foreignpolicy.com/2015/03/30/sen-tom-cottons-farsi-version-of-his-explosive-letter-to-iranian-leaders-reads-like-a-middle-schooler-wrote-it/.

even if he did the court would likely overrule this behavior for lacking a "legitimate legislative purpose."[391]

Cotton's Rump Senate appeared afflicted by the concern that the president's power over foreign affairs would run rampant absent their check.[392] The fears of the Rump Senate were unfounded because, absent a congressional declaration of war, the president has the duty and power to preserve the peace.[393] This includes, for example, a unilateral power to proscribe U.S. citizens from conscripting themselves as mercenaries in foreign wars.[394]

Presidential peace orders in matters of foreign affairs require no law or resolution from Congress, while presidential war orders are limited to the high seas absent a congressional declaration of war.[395] This difference was illustrated in *Curtiss-Wright* and *Little v. Barreme*.[396] In *Curtiss-Wright*, the Supreme Court endorsed a presidential peace order regardless of congressional resolutions, and in *Little,* the Supreme Court found liability for a "plain trespass" regardless of a presidential war order.[397]

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391. Letter from Senator Tom Cotton et al. to Leaders of the Islamic Republic of Iran (Mar. 10, 2015) (signed by a minority U.S. Senators on behalf of the entire U.S. Senate); Trump v. Mazars, 140 S. Ct. 2019, 2028, 2031–32 (2020).

392. *Id. See* Michael Ramsey, *Did the Senators' Letter to Iran Concede Too Much?*, THE ORIGINALISM BLOG (Mar. 10, 2015), https://originalismblog.typepad.com/the-originalism-blog/2015/03/did-the-senators-letter-to-iran-concede-too-muchmichael-ramsey.html (last visited Feb. 24, 2019) (reflecting the radical sentiments behind Senator Cotton's letter and arguing that the letter was not radical enough).

393. *See* Alexander Hamilton, *Defense of the President's Neutrality Proclamation* [May 1793]; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 614 (1952) (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793)) ("'We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.'")).

394. *See* President George Washington, Proclamation 4—Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France (Apr. 22, 1793); Glass v. The Sloop Betsey, 3 U.S. 6, 16 (1794) (upon a proper case or controversy the Court did not wait for Congress to speak before it said, "And the said Supreme Court being further of opinion, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, it is therefore Decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the Consuls of France, not being so warranted, is not of right.").

395. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936); Little v. Barreme, 6 U.S. 170, 178–79 (1804).

396. *Curtiss-Wright*, 299 U.S. at 311; *Little*, 6 U.S. at 178.

397. *Curtiss-Wright*, 299 U.S., at 319; *Little*, 6 U.S., at 179.

At the fringe of the president's neutral peace powers, is his power to expel non-enemy, foreign combatants by refusing them accommodation in U.S. ports.[398] Accordingly, President Jefferson expelled British vessels by proclamation in response to the *Chesapeake Affair,* in which four U.S. naval officers were seized and pressed into British slavery.[399] Three were African Americans and the fourth was an English immigrant, and Jefferson boldly addressed all of them as natural born, legitimate officers and freemen to dispute English impressment.[400]

When the president makes orders of quasi-war on the high seas, as President Adams did in *Little*, he or she requires the authorization of a duly enacted piracy law.[401] When the president wishes to make war on land, his or her orders commanding such acts must necessarily follow a congressional declaration of war.[402] The president cannot legitimately exercise war powers without a declaration of war, even where Congress attempts to waive the declaration of war requirement.[403]

398. *Compare* U.S. CONST. art. I, § 8, cl. 10, *with* President Thomas Jefferson, Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters (July 2, 1807) ("Hospitality under such circumstances ceases to be a duty, and a continuance of it with such uncontrolled abuses would tend only, by multiplying injuries and irritations, to bring on a rupture between the two nations.").

399. *See* President Thomas Jefferson, Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters (July 2, 1807).

400. *See Id.* (the men taken "were native citizens of the United States"); JOSEPH T. WILSON, THE BLACK PHALANX 73–74 (1890) [hereinafter JOSEPH T. WILSON] (Jefferson's Proclamation vindicated the honor of "three negroes, Ware, Martin and Strachan [who] were natives of America" and "John Wilson, a white man . . . [who] was a British subject."). *Cf. Curtiss-Wright*, 299 U.S. at 319 (similarly affirming the President's decision to block a sale of goods to Bolivia to preserve peace).

401. *See Little*, 6 U.S. at 170.

402. *Id.* at 178–79; U.S. CONST. art. I, § 8, cl. 11; James Madison, *Helvidius No. IV* [Sept. 14, 1793] ("In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department."); 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.").

403. U.S. CONST. art. I, § 8, cl. 11; *id.* art. III, § 3, cl. 1. *See* Holmes v. Jennison, 39 U.S. 540, 577 (1840) (Opinion of Taney, C.J.) ("The question to be decided is a question of foreign policy; committed, unquestionably, to the general government. The federal government has also the power to declare war; and whenever it becomes a question whether we are to be at peace or at war, undoubtedly the general government must determine that question. And if Congress decides that the honour and interest of the country does not require war, and, on that account, refuses to declare it, is not this an exercise of its power over the subject?"). *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) (nondelegation doctrine should apply to congressional attempts to waive its duty to declare war before delegating war powers).

Since the Vietnam War, Congress has nevertheless waived a wide range of war powers to the president.[404] These war powers were steadily expanded to carry on the wars on drugs and crime.[405] Finally, in the wake of 9/11 Congress waived war powers to wage the war on terror, now known as the "Long War,"[406] which justified expanding the practice of suspicionless searches on U.S. citizens that violate the holding in *Kyllo v. United States*.[407]

Congressional waivers of war powers to the president can implicate Congress in treason and other crimes that Congress did not intend, including the suspicionless surveillance on members of Congress themselves.[408] Unlike *Marshall Field & Co. v. Clark*, where the Supreme Court held that Congress may delegate power to make executive trade agreements, resolutions allowing the use of military force

404. Gulf of Tonkin Resolution, 78 Stat. 384. *See* Alien Enemies Act, 50 U.S.C. §§ 21–24 (1940); War Powers Resolution, 50 U.S.C. §§ 1541–49 (1973). *Cf.* Sarnoff v. Shultz, 409 U.S. 929, 930 (1972) (Douglas, J., dissenting) ("No declaration of war has been made respecting Vietnam.").

405. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236; Seizure and Forfeiture of Carriers Transporting, etc., Contraband Articles, 49 U.S.C. §§ 781–89; Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1837; Controlled Substances Act, 21 U.S.C. §§ 801–904; *The Contras, Cocaine, and Covert Operations*, NAT'L SEC. ARCHIVE: GEO. WASH. U., https://nsarchive2.gwu.edu//NSAEBB/NSAEBB2/index.html [hereinafter *The Contras*] (President Reagan knowingly funded wars in Nicaragua with drug money, to support the ultimate trafficking of cocaine into the United States).

406. Authorization for Use of Military Force (AUMF) of 2001, Pub. L. No. 107–40, 115 Stat. 224; National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. No. 112–81, 125 Stat. 1298.

407. Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801–1813; USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272 (2001). *See* Kyllo v. United States, 533 U.S. 27, 34–40 (2001) ("Where, as here, the Government uses a device that is not in general public use, to explore the details of the home that would previously have been unknowable without physical intrusion, *the surveillance is a 'search' and is presumptively unreasonable without a warrant*.") (emphasis added).

408. Letter from Rep. Anna G. Eshoo to Hon. John Ratcliffe & Hon. Paul M. Nakasone (Aug. 28, 2020) ("The surveillance of Congressional and judicial communications by the executive branch seriously threatens the separation of powers principles of our constitution.") (quoting BARTON GELLMAN, DARK MIRROR 326 (2020)); FISA, 50 U.S.C. §§ 1801–13. *Cf. In re* All Matters Submitted to the Foreign Intel. Surveillance Ct., 218 F. Supp.2d 611, 624–25 (FISA Ct. 2002) (the secret FISA Court broke its silence in 2002 when the barriers between domestic and international investigation at the FBI were inappropriately broken down by Congress—thus allowing the FBI to treat all U.S. citizens like hostile enemies); U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.").

beyond the high seas require a declaration of war.[409] This is implied from the rule in *Little v. Barreme*.[410]

The president cannot rule according to martial law, unless there is actual, physical violence shuttering the doors of Article III courts.[411] To do this would be to administer a government of men rather than law by suspending the common law of habeas corpus.[412] The curtilage of the home continues to be protected by this common law, for as James Otis declared in 1761, "A man, who is quiet, is as secure in his house, as a prince in his castle."[413]

Presidential privilege may be limited by the laws of Congress according to *Nixon v. Adm'r Gen. Servs*.[414] On their face, laws made to subpoena confidential presidential documents on behalf of the public do not violate the separation of powers, presidential privilege, the Bill of Attainder Clause, or the individual rights of the president.[415] Fed-

409. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of government ordained by the Constitution."); Holmes v. United States, 391 U.S. 936, 949 (1968) (Douglas, J., dissenting); U.S. CONST. art. I, § 8, cl. 11.

410. Little v. Barreme, 6 U.S. 170, 178 (1804) (implying that the court will not uphold inherent presidential war powers, but that it will invalidate presidential war orders wherever they surpass Congress's duly enacted piracy laws and declarations of war as "a plain trespass" so that foreigners can sue for redress in American Courts).

411. *Ex parte* Milligan, 71 U.S. 2, 131 (1866) (during the Civil War trial by martial law was overruled by the U.S. Supreme Court wherever actual violence did not shutter the doors of Article III Courts.). *See* THE CONSPIRATOR (Lionsgate 2010) (this movie starring Robin Wright and James McAvoy tells the story of how and why *Ex parte Milligan* came to be).

412. *Milligan*, 71 U.S. at 129–31 (distinguishing this case from *Luther v. Borden*, where the U.S. Supreme Court turned a blind eye on the basic constitutional rights of Martin and Rachel Luther as a nonjusticiable political question—*Luther*'s failure to protect basic human rights is one of the main turning points that drove the nation into Civil War).

413. SIMMONS, *supra* note 31, at 4, 17. *See* Kyllo v. United States, 533 U.S. 27, 34–38 (2001) ("The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate'; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on." Thus refusing to develop jurisprudence based upon what "home activities are 'intimate' and which are not.").

414. Nixon v. Adm'r Gen. Servs., 433 U.S. 425, 441–84 (1977).

415. *See id.* (considering whether the Presidential Recordings and Materials Preservation Act violated the separation of powers, presidential privilege, privacy rights, First Amendment rights, or the Bills of Attainder Clause—the Court found that there was no violation on the face of the Act). *Cf.* Trump v. Mazars, 140 S. Ct. 2019, 2028, 2031–32 (2020) (requiring congressional subpoenas, without a law, to be supported by a legitimate legislative purpose).

eral courts can also subpoena confidential executive documents as was done in *United States v. Burr*.[416]

If a president makes war on his own people with civil forfeiture, dragnet surveillance programs, or by the supplanting of ordinary criminal law procedures of Article III courts with the arbitrary practice of martial law administered by executive councils, it is the duty of the legislative and judicial branches to check these abuses of power.[417] Recognizing this duty, Rep. Barbara Lee cast the only vote against passing the AUMF of 2001 in the wake of 9/11.[418] As Justice Sutherland also concluded, "this court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so[.]"[419]

Leading the way again, around twenty years after her original resistance to AUMF, Rep. Barbara Lee managed to pass a bill to repeal the AUMF 2002 in the House of Representatives.[420] Congress should take Lee's note, learn from her integrity, and join her in repealing all former waivers of its war making powers as violations of the nondelegation doctrine, and otherwise require the president to maintain neutrality with other nations whenever Congress has not declared war.[421] The judiciary should, wherever Congress fails to repeal them,

416. United States v. Burr, 25 F. Cas. 187, 199–201 (C.C.D. Va. 1807) (No. 14,694) (forcing the Executive to choose "either to produce the relevant information or to suffer dismissal"; this holding should call the constitutionality of the Classified Information Procedures Act (CIPA) into doubt); CIPA, Pub. L. No. 96–456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1–16). As Professor Donohue's research suggests, the courts have begun presuming states secrets privilege under CIPA without an express invocation of states secrets by the Executive Branch. Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 211–12 (2010) [hereinafter Donohue, *The Shadow*] ("Extraordinarily, the court did not require that the head of the department with control over the information formally invoke the privilege . . . . Once again, the executive branch had not actually invoked the state secrets privilege—nor did it need to do so.").

417. *See generally* U.S. CONST. pmbl.; *id.* arts. I, III; *Milligan*, 71 U.S. at 129–31 (quoting Holmes v. Jennison, 39 U.S. 540, 564 (1840) (Opinion of Taney, C.J.)); United States v. The Amistad, 40 U.S. 518, 552–53 (1841) (quoting Holmes v. Jennison, 39 U.S. 540, 569 (1840) (Opinion of Taney, C.J.); *id.* at 598 (see the note regarding the results of the case)). In the case of *Holmes*, the Court denied that states have the power to deliver up a U.S. citizen to be tried in the criminal courts of foreign nations. *Holmes*, 39 U.S. at 598.

418. Rep. Barbara Lee, *Speech on 9/14/01*, https://lee.house.gov/news/videos/watch/speech-on-9/14/01.

419. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 327 (1936).

420. H.R. 256, 117th Cong. (2021) (sponsored by Rep. Barbara Lee).

421. A non-exhaustive list of these laws includes: Alien Enemies Act, 50 U.S.C. §§ 21–24; War Powers Resolution, 50 U.S.C. §§ 1541–49; AUMF of 2001, Pub. L. No. 107-40, 115 Stat. 224; NDAA for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298; Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1837; Controlled Substances Act, 21 U.S.C. §§ 801–904; Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–13; USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). *See* Marshall Field & Co. Field v.

overrule all federal laws that violate the separation of powers through waiver and order the executive to desist all war making activities that are not expressly supported by duly enacted piracy laws and declarations of war.[422]

Finally, the president has two primary ways to check the powers of Congress and the judiciary.[423] First is the veto power, which was discussed in the previous section.[424] Second is the pardon power, which was meant to remedy unjust convictions or to commute punishments that significantly outweigh the crime.[425] The president's pardon power is limited only to federal cases, whereas crimes tried in state courts can only be pardoned by a governor, unless the state is in open insurrection.[426]

A pardon "carries an imputation of guilt; acceptance a confession of it."[427] This distinguishes a pardon from immunity, because immunity does not impute or confer any sort of guilt onto its benefici-

Clark, 143 U.S. 649, 692 (1892); Holmes v. United States, 391 U.S. 936, 949 (1968) (Douglas, J., dissenting); Holmes v. Jennison, 39 U.S. 540, 577 (1840) (Opinion of Taney, C.J.).

422. *See, e.g.*, *Milligan*, 71 U.S. at 129–31 (overruling all military tribunals where an Article III Court is available to hear a writ of habeas corpus). The Court has jurisdiction to resolve the declaration of war question, but it was not yet briefed on the question as beheld by Justice Douglas's dissents in *Holmes* and *Hart*, and no case afterward decided the matter. Holmes v. United States, 391 U.S. 936, 938 (1968) (Douglas, J., dissenting) ("It is clear from our decisions that conscription is constitutionally permissible when there has been a declaration of war. But we have never decided whether there may be conscription in absence of a declaration of war. Our cases suggest (but do not decide) that there may not be."); Hart v. United States, 391 U.S. 956, 960 (1968) (Douglas, J., dissenting).

423. U.S. CONST. art. I, § 7, cl. 2; *id.* art. II, § 2, cl. 1.

424. U.S. CONST. art. I, § 7, cl. 2.

425. U.S. CONST. art. II, § 2, cl. 1; United States v. Wilson, 32 U.S. 150, 160 (1833) ("A pardon is an act of grace . . . ."); THE FEDERALIST NO. 74 (Alexander Hamilton). *See, e.g.*, Abraham Lincoln, Exec. Order No. 1—Relating to Political Prisoners (Feb. 14, 1862); Jordan Fabian, *Obama grants clemency to 231 inmates in one-day record*, THE HILL, (Dec. 19, 2016, 3:09 PM), https://thehill.com/homenews/administration/311059-obama-commutes-sentences-as-time-in-office-dwindles. *Cf.* Gregory Korte, *Can Trump really do that? The presidential pardon power, explained*, USA TODAY (June 4, 2018, 3:46 PM), https://www.usatoday.com/story/news/politics/2018/06/04/presidential-pardons-explanation-executive-clemency-powers/660381002/ ("Trump's pardons are raising new questions about [the pardon power's] purpose and limits.").

426. Abraham Lincoln, Exec. Order No. 1—Relating to Political Prisoners (Feb. 14, 1862); Carlesi v. People of the State of New York, 233 U.S. 51, 59 (1914). *Cf.* United States v. Schaffer, 240 F.3d 35, 38 (2001) (declaring the effect of a pardon before a final determination on the merits was to moot the retrial case and any pending appeals, when accepted before the retrial); David Grann, *Trial by Fire*, NEW YORKER (Sept. 7, 2009), https://www.newyorker.com/magazine/2009/09/07/trial-by-fire (Governor Rick Perry refused to grant Cameron Todd Willingham clemency even though he was likely not guilty due to forensic evidence that came to light after his case was already decided.).

427. Burdick v. United States, 236 U.S. 79, 90–91, 94 (1915).

ary.[428] A pardon must also be accepted in order to be legally valid, meaning that the admission of guilt through acceptance of a pardon is legally mandatory.[429] Furthermore, according to D.C. Circuit precedent, pardons moot all pending appeals and orders granting new trials.[430]

However, President Trump not only pardoned Sheriff Arpaio for his existing conviction, but also for "any other [contempt] offenses . . . that might arise, or be charged, in connection with *Melendres v. Arpaio*."[431] This appears to be an attempt to grant immunity for future flouting of the Article III equitable powers invested in the court's decision in *Melendres*.[432] In so much as Trump's pardon was an attempt to immunize the office of Sheriff of Maricopa County from contempt, it was unconstitutional.[433]

It appears that former President Trump intended to immunize the Maricopa County Sheriff's Office from constitutional violations arising from its "concentration camp" for immigrants.[434] On August 22, 2017, Trump stated that Sheriff Arpaio was convicted of contempt for

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428. *Id.* at 94–95 (dismissing contempt proceedings for refusing to testify, because a pardon is not legislative immunity by which the Fifth Amendment right to remain silent can be overcome).

429. *Id.* at 91 (observing "the necessity of the acceptance of a pardon to its legal efficacy"). *Cf.* Tim Marcin, *Joe Arpaio Found Out He Admitted Guilt with Trump Pardon on Live TV*, NEWSWEEK (Jan. 15, 2018, 2:25 PM), https://www.newsweek.com/joe-arpaio-found-out-admitted-guilt-trump-pardon-live-tv-781824.

430. United States v. Schaffer, 240 F.3d 35, 38 (D.C. Cir. 2001).

431. Executive Grant of Clemency to Joseph M. Arpaio (Aug. 25, 2017).

432. Melendres v. Arpaio, 989 F. Supp. 2d 822, 910 (D. Ariz. 2013), Maricopa County v. Melendres, 784 F.3d 1254 (2016) (explaining Judge Snow's orders attached to the office of Sheriff of Maricopa County and not Arpaio personally), *cert. denied* 577 U.S. 1062 (2016).

433. *See* United States v. Arpaio, 887 F.3d 979, 982 (9th Cir. 2018). The former president's apparent attempt to immunize the Maricopa County Sheriff's Office from the consequences of violating "the constitutional rights of Hispanic people" is obviously unconstitutional, because the president has no power to immunize the government from the consequences of violating the terms of the U.S. Constitution. Jaques Billeaud, *Former Maricopa County Sheriff Joe Arpaio's Immigration Patrols to Cost Public $200M*, AZCENTRAL. (May 17, 2021, 10:10 PM), https://www.azcentral.com/story/news/local/phoenix/2021/05/17/arizona-former-sheriff-joe-arpaios-immigration-patrols-cost-public-200-m/5141225001/.

434. Executive Grant of Clemency to Joseph M. Arpaio (Aug. 25, 2017) (expressly intending to release Arpaio from future "offenses . . . that might arise, or be charged, in connection with *Melendres v. Arpaio*"—the *Melendres* case named Arpaio in his official capacity not as an individual—it was not a case about the individual person, but wholly regarded his office); Melendres v. Arpaio, 695 F.3d 990, 994 (9th Cir. 2012) (referring to "Sheriff Joseph M. Arpaio and the Maricopa County Sheriff's Office (collectively, the Defendants)"). *Cf.* Billeaud, *supra* note 433 (Trump's pardon can reasonably be interpreted as an attempt to help the Maricopa County Sheriff's Office avoid paying the high costs of institutionalizing concentration camps for racist reasons).

"doing his job."[435] The former president also nearly quashed the case "months before the case went to trial . . . but the President was advised that that would be inappropriate."[436]

A presidential quash of Arpaio's case would have been grounds for an obstruction charge against Trump, a potentially impeachable offense.[437] As it stands, the former president allowed the case to go forward and pardoned Arpaio only after the Sheriff was removed from office.[438] The court order remains binding on the office of Sheriff of Maricopa County, a monitor was duly appointed to ensure the Sheriffs compliance with the order, and one might hope "the world spins madly on."[439]

The world, however, is beginning to spin in reverse.[440] After all this, the Ninth Circuit split with D.C. Circuit precedent by allowing Sheriff Arpaio to appeal his moot conviction.[441] Instead of dismissing Arpaio's appeal, the Ninth Circuit appointed a special prosecutor to defend Arpaio's conviction in the U.S. Supreme Court; such an appointment might have been made to monitor compliance with the district court's order upon the Sheriff's Office rather than this distraction.[442]

The Ninth Circuit may appoint a special prosecutor under Federal Rule of Criminal Procedure 42(a)(2) to defend the court's binding orders against the Maricopa County Sheriff's Office on its own motion

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435. *President Trump Hints at Pardoning Sheriff Joe Arpaio*, C-SPAN (Aug. 22, 2017), https://www.c-span.org/video/?c4680470/president-trump-hints-pardoning-sheriff-joe-arpaio.

436. Rachel Maddow, *Trump exposed to new obstruction charge over Arpaio queries*, MSNBC (Aug. 28, 2017), https://www.msnbc.com/rachel-maddow/watch/trump-exposed-to-new-obstruction-charge-over-arpaio-queries-1034767427813?v=raila&.

437. *Id.*; 1 PROCEEDINGS, *supra* note 221, at 784 ("Obstruction of justice undermines the judicial system in the same fashion that perjury does, and it also warrants conviction and removal."); 2 MUELLER, *supra* note 362, at 8 ("Because we determined not to make a traditional prosecutorial judgment, we did not draw ultimate conclusions about the President's conduct. . . . Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.").

438. Maddow, *supra* note 436.

439. Melendres v. Arpaio, 989 F. Supp. 2d 822, 910 (D. Ariz. 2013); Melendres v. Arpaio, 784 F.3d 1254, 1266 (9th Cir. 2015); The Weepies, *World Spins Madly On* [2006].

440. John Adams, *Thoughts on Government* 22 [1776].

441. United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072, at *2 (D. Ariz. 2017) (citing United States v. Schaffer, 240 F.3d 35, 38 (D.C. Cir. 2001)); United States v. Arpaio, 887 F.3d 979, 981–82 (9th Cir. 2018) (impliedly disagreeing with *Schaffer*).

442. United States v. Arpaio, 887 F.3d 979, 984 (9th Cir. 2018) (Tallman, J., dissenting) (citing FED. R. CRIM. P. 42(a)(2)) (correctly noting that the Court's power under Federal Rule of Criminal Procedure 42(a)(2) "allows the Court to appoint a private attorney to investigate and prosecute potential instance of criminal contempt," and since Arpaio is no longer sheriff of anything, there is no risk that he personally could be in contempt of Judge Snow's order). *See supra* note 187 and accompanying text.

under the Court's inherent contempt power under Article III.[443] The Court does not need to be moved in order to take this action.[444] However, it appears that the Ninth Circuit committed itself to defend moot convictions rather than prosecuting live, presently occurring contempts of court.[445]

During concerns that the president participated in Russian meddling in the 2016 election, former President Trump was convinced that he had the "absolute right" to pardon himself of his own crimes.[446] However, as Trump eventually discovered, the president is constitutionally barred from pardoning any person including himself from impeachment.[447] If a president pardoned himself from being criminally charged for treason, obstruction of justice, or other impeachable offenses, he may still be impeached for these offenses and the pardon itself may be cited as prima facie evidence of the president's guilt in his impeachment trial.[448]

The real existential threat to the Republic is not the president's pardon power, it is the court's feudal doctrines of non-justiciability, and

443. U.S. CONST. art. III; Judiciary Act of 1789, 1 Stat. 83, § 17 (vesting the federal courts the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing"); *Ex parte* Robinson, 86 U.S. 505, 510 (1873) ("The power to punish contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."); FED. R. CRIM. P. 42. *Cf.* United States v. Arpaio, 887 F.3d 979, 982 (9th Cir. 2018) (it is unclear that the special prosecutor will continue investigating the Maricopa County Sheriff's Office itself for compliance with Judge Snow's order, but it appears that the special prosecutor can and should—this lack of clarity in the special counsel order itself and the Ninth Circuit's preoccupation with defending a moot conviction may be the basis of the dissent by Tallman and the dissenting justices *en banc*—the lack of clarity itself opens the Court up to an imputation of improper political reasons for the order instead of a genuine intent to enforce duly ordered findings of the lower courts).

444. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 799–800 (1987).

445. United States v. Arpaio, 887 F.3d 979, 980 (9th Cir. 2018) (making no mention of the current Sheriff of Maricopa County Paul Penzone or Judge Snow's order).

446. John Wagner, *Trump says he has 'absolute right' to pardon himself of federal crimes but denies any wrongdoing*, WASH. POST (June 4, 2018), https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1_story.html.

447. *Id.*; U.S. CONST. art. I, § 2, cl. 5; *id.* art. II, § 2, cl. 1 (the president has the power to grant "reprieves and pardons for offenses against the United States, except in cases of impeachment").

448. Burdick v. United States, 236 U.S. 79, 94–95 (1915).

sovereign and qualified immunity.[449] If former President Trump did meddle in the 2016 election with the help of the Russians, these doctrines say that all must blindly bow to his powers regardless of their legitimacy.[450] Therefore, our greatest concern exists in the slavish reemergence of feudal law in the third branch of government—the judiciary.[451]

Article III: The Judicial Power

The Judicial Power is the last and lowest of the three powers of government, and yet it is also the most final and far reaching of the three.[452] Where the first two powers are vested directly through the U.S. Constitution, the third judicial power is vested by the U.S. Constitution through the Judiciary Act.[453] The Judiciary Act is therefore considered the third of the three founding documents, and its existence as a mere law that can be amended by Congress confirms the judiciary's lower comparative station.[454]

The humility of the judiciary is also signified by the fact that the judges on the U.S. Supreme Court are appointed to power by the president with advice and consent of the Senate.[455] These proceedings can be highly controversial, especially to those with a controversial

449. Luther v. Borden, 48 U.S. 1, 46 (1849) (non-justiciability doctrine); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) [hereinafter *Fitzgerald I*] (so called absolute immunity)); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) [hereinafter *Fitzgerald II*] (qualified immunity). *Cf.* Ali Vitali, *Trump Says He Could 'Shoot Somebody' and Still Maintain Support*, NBC NEWS (Jan. 23, 2016), https://www.nbcnews.com/politics/2016-election/trump-says-he-could-shoot-somebody-still-maintain-support-n502911.

450. Jane Mayer, *How Russia Helped Swing the Election for Trump*, NEW YORKER (Oct. 1, 2018), https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump. *See Luther*, 48 U.S. at 46 (approving by default of "the declaration of martial law by the legislative authority of the State, made for the purpose of self-defense").

451. *Luther*, 48 U.S. at 46; *Fitzgerald I*, 457 U.S. at 749; *Fitzgerald II*, 457 U.S. at 818. *See* The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.), *distinguished and delegitimized by* Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Opinion of Wilson, J.); *id.* at 451 (Opinion of Blair, J.); *id.* at 468 (Opinion of Cushing, J.); *id.* at 475–78 (Opinion of Jay, C.J.); *id.* at 437–45 (Iredell, J., dissenting) (Iredell's dissent vigorously defended *The Bankers Case*, but it was distinguished and delegitimized by the other justices). *Cf.* Schroeder, *The Body*, *supra* note 121, at 24.

452. U.S. CONST. art. III.

453. *Id.* ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."); Judiciary Act of 1789, 1 Stat. 83, §§ 1–35.

454. O'Connor, *supra* note 71, at 3–5 (citing Judiciary Act of 1789, 1 Stat. 83).

455. U.S. CONST. art. II, § 2, cl. 2.

past like Bork, Thomas, or Kavanaugh.[456] It is a highly political and an imperfect way of choosing jurists to sit on the land's highest courts, but it is necessary as only death or impeachment can remove them involuntarily.[457]

The federal judge's lifetime appointment without possibility of removal except by impeachment composes the basis of judicial independence in the United States.[458] This Article III system, which successfully separated the judicial power from the executive and legislative is considered the United States' most original addition to the study of political science.[459] This system was adopted in the U.S. Constitution directly from John Adams' 1776 tract *Thoughts on Government* where he said,

> The judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be *during good behavior* and their salaries ascertained and established by law.[460]

According to Adams' suggestions, the U.S. Constitution secures for federal judges a lifetime office "during good behavior."[461] During impeachment proceedings, such as the impeachment of Associate Justice Samuel Chase of the U.S. Supreme Court, the Senate must find that a federal judge objectively participated in bad behavior on the

456. *Taking a Stand on Confirmation: Senatorial Voices for and Against Bork*, N.Y. TIMES, Oct. 6, 1987, at B6; *see also* Megan McCluskey, *'Like a Frat Out of Hell.' Jimmy Kimmel Delivers a Blistering Play-By-Play of the Kavanaugh Hearing*, TIME (Sept. 28, 2018, 11:47 AM), https://time.com/5409751/jimmy-kimmel-kavanaugh-hearing/; Dan Mangan, *There are key differences between the possible Brett Kavanaugh showdown with accuser Christine Blasey Ford and the Anita Hill-Clarence Thomas saga*, CNBC (Sept. 18, 2018), https://www.cnbc.com/2018/09/18/hearing-for-brett-kavanaugh-and-accuser-looks-like-anita-hill-case.html.

457. U.S. CONST. art. II, § 2, cl. 2.; Adam Edelman, *Sen. Lindsey Graham got really, really mad at the Kavanaugh hearing*, NBC (Sept. 27, 2018), https://www.nbcnews.com/politics/supreme-court/sen-lindsey-graham-got-really-really-mad-kavanaugh-hearing-n914456. Richard Wolff, *Brett Kavanaugh's credibility has not survived this devastating hearing*, THE GUARDIAN (Sept. 27, 2018), https://www.theguardian.com/commentisfree/2018/sep/27/brett-kavanaugh-credibility-devastating-hearing; Alan Fram & Lisa Mascaro, *Kavanaugh sworn in after Senate approves him by 50-48 vote*, THE BOSTON GLOBE (Oct. 6, 2018), https://www.bostonglobe.com/news/politics/2018/10/06/gop-poised-elevate-kavanaugh-supreme-court/p7VM2vHiUelBEn17UGRTiP/story.html.

458. U.S. CONST. art. III, § 1; John Adams, *Thoughts on Government* 21–22 [1776].

459. *See* O'Connor, *supra* note 71, at 2, 6.

460. John Adams, *Thoughts on Government* 21–22 [1776] (emphasis added).

461. U.S. CONST. art. III, § 1; John Adams, *Thoughts on Government* 21–22 [1776].

bench.[462] If a federal judge has not committed any instance of bad behavior, he or she should not be impeached.[463]

The role that presidents and Congress hold in appointing and impeaching was intended to preclude judges from holding duties that might inure political bias.[464] The alternative of periodic judicial elections proposed by some under democratic principles is usually a guise for a fatalistic belief that judges are fundamentally unable to be impartial decision makers.[465] The result of this alternative, as implemented in many of the states, is highly problematic.[466]

Subjecting judges to periodic elections does not necessarily lead to good behavior; it often leads to the worst judicial behavior of all.[467]

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462. 2 SMITH & LLOYD, *supra* note 220, at 132–33, 145 ("the tenure by which a judge holds his office, is good behaviour, therefore that he [i.e., Associate Justice Chase] is removable for misbehavior").

463. *Id.*; U.S. CONST. art. III, § 1.

464. *See* U.S. CONST. art. III, § 1; John Adams, *Thoughts on Government* 21–22 [1776].

465. *See* Carrie Johnson, *Is it Time to Reconsider Lifetime Appointments to the Supreme Court?*, NPR (Feb. 17, 2016, 6:00 AM), https://www.npr.org/2016/02/17/466976937/is-it-time-to-reconsider-lifetime-appointments-to-the-supreme-court.

466. *See Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), https://www.brennancenter.org/rethinking-judicial-selection/significant-figures. One of the only states to retain a real independent judiciary branch is Massachusetts, which originally abolished slavery through its courts, while there is a history in the South of abandoning the appointment process for choosing judges by popular vote in periodic elections, during reconstruction Southern States had to readopt the appointment model in order to rejoin the Union, and now it is being abandoned again. *Mumbet's Case* [also known as *Brom & Bett v. Ashley*], Court Decision, Aug. 1781, *reprinted in* BRUNS, *supra* note 111, at 468–70 ; Commonwealth v. Jennison, *Charge of the Chief Justice and Jury Verdict* (Mass. 1783), *reprinted in* 13 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY, 294–95 (1875); *see* Roy S. Moore, *Administrative Order of the Chief Justice of the Alabama Supreme Court* 4 (2016) (the elected Chief Justice Roy Moore of Alabama attempted to block the U.S. Supreme Court's opinion *Obergefell v. Hodges* from taking effect in Alabama). *See, e.g.*, FLA. CONST. OF 1868, art. VI, § 3 ("The Supreme Court shall consist of a chief justice and two associate justices, who shall hold their offices for life or during good behavior. They shall be appointed by the Governor and confirmed by the Senate."); ALA. CONST. OF 1819, art. V, §§ 11–13 (giving judges fixed salaries, requiring them to serve during good behavior, and upholding a nomination process through a vote in the legislature); ALA. CONST. OF 1861, art. V, § 11 ("the General Assembly shall provide by law for the election of judges"); ALA. CONST. OF 1901, art. VI, § 152 (the government of Alabama never bounced back from the secessionist creation of elections for the judiciary—in this light, Roy Moore and his attempts to erode federal jurisdiction over Alabama from the bench make logical sense because Alabama never came back into the fold); T.A. Frank, *The Last Days of Roy Moore: Inside the Strange, Surreal, Bewildering End of the Alabama Special Election*, VANITY FAIR (Dec. 13, 2017), https://www.vanityfair.com/news/2017/12/the-last-days-of-roy-moore-inside-the-end-of-the-alabama-special-election.

467. *See* Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. (Dec. 2, 2015), https://www.brennancenter.org/sites/default/files/201908/Report_How_Judicial_Elections_Impact_Criminal_Cases.pdf (judicial elections distract judges by giving them incentives other than administering justice and establishing the truth). *See also* Matt Ford, *When Your Judge Isn't a Lawyer*, THE ATLANTIC (Feb. 5, 2017), https://

For example, the elected judge, Roy Moore, of Alabama created numerous fiascos on the bench involving the repeated resistance to federal court orders in an apparent appeal to his political base.[468] His ongoing bad behavior on the Alabama bench and his attempt to run for office in the United States Senate after twice being removed from the Alabama Supreme Court is a stain on Alabama law and politics.[469]

The Roy Moore fiascos are a living symbol of the entrenchment of racism and bigotry in the South,[470] but politicizing the bench also created horrifying instances of bad behavior in the North.[471] The most despicable of these include the Kids for Cash scandal, where judges purchased a financial interest in correctional institutions and used their positions to ensure maximum profits biasing their judgements in criminal cases, and the Porn-Gate scandal, where former Pennsylvania Attorney General Kathleen Kane exposed numerous vulgar and offensive emails including porn exchanged by Pennsylvania Supreme Court Justices.[472] Now the Kids for Cash judges are serving time in federal prison, at least two elected Pennsylvania Supreme Court justices resigned due to Porn-Gate, three others are reportedly still being

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www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/ (reporting that Montana, Arizona, Colorado, Nevada, New York, Texas, South Carolina, and Wyoming allow non-lawyer judges—in the case that these judges violated codes of judicial conduct they cannot (as in *Williams-Yulee*) be censored by the appropriate state bar); Williams-Yulee v. Florida Bar, 575 U.S. 433, 439–43 (2015) (it is a very high likelihood that if Williams-Yulee had won her election while violating Florida's Canons of Judicial Conduct she would not have been censored by the Florida Bar; and even if she was, the determination in federal court would likely have been much different, i.e., nonjusticiable political questions are usually blocked from federal review when the court doesn't want to answer questions like this—as things stand now, censoring her after she lost was a pyrrhic victory).

468. *See, e.g.,* Matt Ford, *The Incendiary Roy Moore*, THE ATLANTIC (Sept. 27, 2017), https://www.theatlantic.com/politics/archive/2017/09/roy-moore-firebrand/541341/; Noah Feldman, *Alabama's Renegade Judge Defies Gay Marriage Order*, BLOOMBERG OPINION (Jan. 28, 2015, 7:56 AM), https://www.bloomberg.com/opinion/articles/2015-01-28/renegade-alabama-judge-roy-moore-defies-gay-marriage-order.

469. *See* Jess Bidgood et al., *For Roy Moore, a Long History of Combat and Controversy*, N.Y. TIMES (Nov. 18, 2017), https://www.nytimes.com/2017/11/18/us/roy-moore-alabama.html.

470. *See* Glassroth v. Moore, 335 F.3d 1282, 1302–03 (11th Cir. 2003) (comparing Justice Moore to segregationist judges that resisted federal orders to desegregate the South); USA Today, *Sharia Law, Slavery and Abolishing Amendments: 6 of Roy Moore's Most Memorable Quotes*, USA TODAY (Dec. 12, 2017, 1:25 PM), https://www.usatoday.com/story/news/politics/onpolitics/2017/12/12/sharia-law-slavery-6-roy-moores-most-memorable-quotes/943955001/ (including racial slurs against Asians, Native Americans, Muslims, and, of course, Roy Moore stated that the meaning of Trump making America great again was that Trump would bring the country back to the time of African slavery).

471. *See* Berry, *supra* note 467, at 2.

472. *See* KIDS FOR CASH (SenArt Films 2013); David Gambacorta, *The Great Pennsylvania Government Porn Caper*, ESQUIRE (Feb. 24, 2016), https://www.esquire.com/news-politics/a42234/porngate-pennsylvania-kathleen-kane/?Src=longreads.

investigated, and AG Kane was charged with perjury and other crimes, and resigned.[473]

The general problem with electing judges is that election processes invite bad judicial behavior.[474] We usually allow and even applaud such behavior in our presidents and our congressional representatives.[475] The same behavior our politicians ordinarily engage in, such as promising to be tough on crime in political ads, is not acceptable from those in charge of jury instructions, bail hearings, custody battles, and criminal sentencing.[476]

The judiciary is meant to be impartial, unbiased, and independent from the "jarring interests" of politics.[477] The founders knew that subjecting prospective and sitting judges to elections is obviously inappropriate, because it would force judges to promise politically biased outcomes in cases before the facts could be reviewed.[478] Indeed, judicial independence from politics was once a mark of statehood in America, and the reemergence of political terms for judges in many states resembles a backsliding into mere territorial or colonial status.[479]

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473. *See* KIDS FOR CASH (SenArt Films 2013); Wallace McKelvey, *'Porngate' scandal in Pennsylvania: The basics and the background*, PENNLIVE (June 22, 2016), https://www.pennlive.com/news/2016/01/porngate_scandal_in_pennsylvan.html (it is extremely difficult to keep up with the specifics of who is affected, has resigned, is resigning or will resign or will be removed or will be tried and/or convicted in Pennsylvania over these emails); Barbara Goldberg, *Second Pennsylvania judge resigns amid 'Porngate' scandal*, REUTERS (Mar. 15, 2016, 4:15 PM), https://www.reuters.com/article/us-pennsylvania-kane/second-pennsylvania-judge-resigns-amid-porngate-scandal-idUSKCN0WH2MR.

474. KIDS FOR CASH (SenArt Films 2013); Gambacorta, *supra* note 464; Roy S. Moore, *Administrative Order of the Chief Justice of the Alabama Supreme Court* 4 (2016).

475. *See, e.g.*, *Teddy Roosevelt's 'Bully Pulpit' Isn't the Platform it Once Was*, NPR (Nov. 4, 2013, 3:18 AM), https://www.npr.org/2013/11/04/242405056/teddy-roosevelts-bully-pulpit-isnt-the-platform-it-once-was.

476. *See* 1 SMITH & LLOYD, *supra* note 220, at 306 ("political charges ought not to be delivered from the bench"); Williams-Yulee v. Florida Bar, 575 U.S. 433, 439–43 (2015); Berry, *supra* note 467, at 2–3.

477. John Adams, *Thoughts on Government* 21–22 [1776]; THE DECLARATION OF INDEPENDENCE paras. 10–11, 17, 20–21 (U.S. 1776) (accusing the king of establishing political, arbitrary, and biased judges and judicial processes in America); SIMMONS, *supra* note 31, at 9–13 (explaining how the American idea of separation of powers came about by the experience of Massachusetts Bay after "Chief Justice Sewall died, and Lieutenant Governor Hutchinson was made his successor, thereby united in his person, the office of Lieutenant Governor with the emoluments of the commander of the castle, a member of the Council, Judge of Probate and Chief Justice of the Supreme Court!").

478. John Adams, *Thoughts on Government* 21–22 [1776]; THE DECLARATION OF INDEPENDENCE paras. 10–11, 17, 20–21 (U.S. 1776).

479. *Williams-Yulee*, 575 U.S. at 438. *See* Benner v. Porter, 50 U.S. 235, 237, 240–43 (1850) (Limited judicial terms in the State of Florida were carried over from the organic act that organized Florida when it was merely a territory.); Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 546 (1828) (the Court previously took great care in distinguishing itself from such legislative courts that held their offices for limited terms). *Cf.* Downes v. Bidwell, 182

Another violation of the ideal of the separation of powers is legislative mandates of mandatory minimum sentencing, especially in cases of three strikes laws.[480] Congress cannot dictate the foreign affairs decisions of a president, it can only make suggestions—so too it cannot dictate all future sentencing for judges.[481] Judicial adherence to non-mandatory sentencing guidelines is a matter of judicial prudence, as confirmed by both *Chisholm v. Georgia* and the Eleventh Amendment.[482]

Despite persuasive reasons to avoid judicial elections, there are also reasons to doubt the current federal system.[483] For example,

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U.S. 244, 267–70 (1901) (here the U.S. Supreme Court analyzed many of the organic laws that organized the courts in various U.S. territories—the result of this case was a violation of the U.S. social compact and should be considered bad law, but the research is useful); P.R. CONST. art. V, § 8 (beside the fact that justice of the Supreme Court of Puerto Rico must retire at age 70, they are free from term limits and elections—this means a territory has a characteristic of statehood (i.e., an independent judiciary) that many of our states refuse to establish).

480. Lockyer v. Andrade, 538 U.S. 63, 70 (2003) (the U.S. Supreme Court failed to overrule a cruel and unusual use of the California three strikes law to give two consecutive 25 year sentences "for stealing approximately $150 in videotapes"—the Court should have struck down the three strikes laws on its own motion for violating federal and California Separation of Powers by attempting to dictate the judgments of the Court; this ought to have been the determination of the *Lockyer* Court according to Constitutional Avoidance, under its duty to interpret the laws and constitutions of the states in such a way that it does not violate the U.S. Constitution—here, the implied interpretation of the California Constitution in *Lockyer* allows the legislature to dictate the judgments of the criminal courts, which in turn violates the U.S. Constitution's requirement that states keep a republican form of government); CAL. CONST. art. III, §§ 1–3 (requiring the separation of powers between "legislative, executive, and judicial," and expressly stating that the U.S. Constitution "is the supreme law of the land"); U.S. CONST. art. IV, § 4 (requiring states to maintain a republican form of government); John Adams, *Thoughts on Government* 8 [1776] (defining a republican form of government as one that is a government of laws and not of men that requires a working system of the separation of powers that does not arbitrarily dictate the judgments of the courts with legislation that forces them to disregard mitigating factors).

481. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936); United States v. Booker, 543 U.S. 220, 245 (2005) (holding that federal sentencing guidelines are not mandatory, overruling "mandatory" federal guidelines for violating the Sixth Amendment).

482. Chisholm v. Georgia, 2 U.S. 419, 471 (1793) (Opinion of Jay, C.J.) (Chief Justice Jay firmly held that feudal principles in *The Bankers Case* were abolished by The Declaration of Independence and the American Revolution, and therefore an individual may sue a state in federal court.); U.S. CONST. amend. XI (stripping the Court of its power used in *Chisholm* through the Constitution rather than by amending the Judiciary Act confirming that amendments to the Judiciary Act to limit federal jurisdiction is an attempted modification of the Court's prudential standing, which may also be confirmed by a study of the Marshall Court).

483. ATTICUS V. THE ARCHITECT (Steve Wimberly 2017); Tuaua v. United States, 788 F.3d 300, 304 (D.C. Cir. 2015) (citing Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857)) (drawing its essential constitutional rationale from *Dred Scott* to exclude the people of American Samoa from their legal rights of citizenship) *extended in* Fitisemanu v. United

Aaron Swartz revealed a connection between grant money paid by special interests for the production of law review articles and the influence law review articles have over judicial outcomes.[484] It is not difficult to spot where judges cite to special interest funded law review articles and fail to exercise their independent power.[485]

Moreover, perks paid out to federal judges from companies and individuals with business before the court is commonplace.[486] In fact, Justice Antonin Scalia died on a hunting trip paid for by a large holding company known as J.B. Poindexter & Co., while it had business before the court.[487] The continuous, passive influence over federal judicial outcomes by certain individuals representing political and monied interests is undeniable.[488]

States, Nos. 20-4017 & 20-4019, slip op. at 21–22, 25 (10th Cir. 2021) (quoting The Slaughterhouse Cases, 83 U.S. 36, 72–73 (1872)) (citing *Dred Scott*, 60 U.S., at 404–05) (explaining that "the Supreme Court concluded in *Dred Scott v. Sandford* that African Americans couldn't become citizens even if they had been born in the United States" to justify denying the birthright citizenship of those born in American Samoa).

484. THE INTERNET'S OWN BOY (Participant Media 2014) (Swartz worked with a law student to download all the legal articles in a popular legal research database, and then showed a troubling connection between the funders of research and favorable judicial outcomes).

485. *See, e.g.*, Schroeder, *America's*, *supra* note 212, at 851 n.112 (noting Akhil Amar's influence over the Court's decision to depart from the prohibition on advisory statements); Joshua J. Schroeder, *Choosing an Internet Shaped by Freedom: A Rationale to Rein in Copyright Gate Keeping*, 2 BERKELEY J. OF ENTERTAINMENT & SPORTS L. 48, 70 (2013) [hereinafter Schroeder, *Choosing*] (there is a circuit split between the Ninth and Second Circuits over the fate of internet governance through common law secondary copyright liability and the interpretations of the Courts cite to Nimmer's idea of "red flag knowledge" rather than the common law, which is a radical departure from ordinary judicial practice in itself—the radical inference is that the U.S. Congress meant to include copyrights according to Nimmer in the Copyright Statute (which there is no evidence of) rather than preserving common law copyright absent any negative in the statute according to the rule from *Dr. Foster's Case*); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 31 (2d Cir. 2012) (citing to Nimmer's private opinions about "red flag knowledge," which the courts now vigorously define and interpret as if it were written in the law somewhere); N.L.R.B. v. Noel Canning, 573 U.S. 513, 549 (2014) (impliedly and accidentally reversing *Youngstown* and the Jay Court's prohibition on advisory statements by citing to Akhil Amar's *Unwritten Constitution*) (citing AKHIL AMAR, THE UNWRITTEN CONSTITUTION 576–77 n.16 (2012)).

486. Center for Public Integrity et al., *Supreme Court Justices Earn Free Trips and More on the Side*, TIME (July 2, 2015), https://time.com/3945044/supreme-court-justices-free-trips/; KIDS FOR CASH (SenArt Films 2013).

487. Mark Berman & Jerry Markon, *Why Justice Scalia was staying for free at a Texas resort*, WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/17/justice-scalias-death-and-questions-about-who-pays-for-supreme-court-justices-to-visit-remote-resorts/.

488. Reity O'Brien & Chris Young, *Majority of Supreme Court members are millionaires*, CTR. FOR PUB. INTEGRITY (June 14, 2013), https://www.publicintegrity.org/2013/06/14/12827/majority-supreme-court-members-millionaires.

It is, however, a fallacy that simply because there is bad behavior in the judiciary that an elective system would ameliorate it.[489] The check that should be exercised to solve bad behavior among the judiciary is the impeachment process.[490] The separation of powers exists to preserve "the great political virtues of humility, patience, and moderation, without which *every man* in power becomes a ravenous beast of prey."[491] The third, last, and most humble branch of government is tasked with interpreting the highest sources of legal power including the U.S. Constitution, the law of nations, natural law, and equity.[492] This fact was embodied by the holding of *Marbury v. Madison* that, "It is emphatically the province and duty of the Judicial Department to say what the law is."[493] Accordingly, the judiciary was able to expound the separation of powers and overrule a part of the Judiciary Act itself.[494]

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489. *See, e.g.*, Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, THE ATLANTIC, (Sept. 3, 2013), https://www.theatlantic.com/national/archive/2013/09/an-elected-judge-speaks-out-against-judicial-elections/279263/.

490. U.S. CONST. art. I, § 2, cl. 5; Nicholas Wu, *Ayanna Pressley introduces impeachment resolution against Brett Kavanaugh*, USA TODAY (Sept. 17, 2019), https://www.usatoday.com/story/news/politics/2019/09/17/ayanna-pressley-bring-impeachment-articles-against-kavanaugh/2349623001/. *See, e.g.*, 2 SMITH & LLOYD, *supra* note 220, at 132–33, 145 ("the tenure by which a judge holds his office, is good behaviour, therefore that he is removable for misbehavior"); ATTICUS V. THE ARCHITECT (Steve Wimberly 2017) (if there ever was a case to be made for Congress to increase its investigations into the Courts and Department of Justice for impeachable offenses, it was the miscarriage of justice carried out by those who orchestrated the downfall of Don Siegelman, including former federal Judge Mark Fuller and former Attorney General Eric Holder).

491. John Adams, *Thoughts on Government* 17–18 [1776]; Letter from Abigail Adams to John Adams (Mar. 31, 1776) ("Remember all men would be tyrants if they could.").

492. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. art. III; Judiciary Act of 1789, 1 Stat. 83, §§ 9, 11, 13; Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."). *See* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 7 ("[E]quity must have a place in every rational system of jurisprudence, if not in name, at least in substance. It is impossible that any code, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them."); *id.* at §§ 77–79 (discussing the concurrent jurisdiction of equity with the common law).

493. Marbury v. Madison, 5 U.S. 137, 177 (1803).

494. Judiciary Act of 1789, 1 Stat. 83, § 13, *overruled by Marbury*, 5 U.S. at 173, 177 ("Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.").

The Judiciary Act was formerly used to deny jurisdiction in cases the Supreme Court found imprudent to hear.[495] However, the Judiciary Act was amended in the 1930s to merge the courts of law and equity, to abolish the forms, and to create an Advisory Committee on Rules of Civil Procedure to replace the operation of the forms with the purpose of extending jurisdiction to every injured party.[496] The central purpose of the Civil Rules was to minimize the prudential bases for denying jurisdiction.[497]

Immediately before the first Federal Rules of Civil Procedure merged law and equity, the beginning of administrative law, as it is known today, was established by *Crowell v. Benson*.[498] The *Crowell* case decided, for the first time in U.S. history, that it was not a *per se* violation of the separation of powers for Congress to delegate adjudica-

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495. Cohens v. Virginia, 19 U.S. 246, 404, 429–30 (1821). *Cf.* Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 869–70, n.101 (2010).

496. Rules Enabling Act, 28 U.S.C. § 2072 (enacted in 1934); Colo. River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976) (The Court later appeared to replace the prudential system maintained by *Cohens* of balancing of the law with the constitution by asserting a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." It should be noted that this rule about federal jurisdiction is applied arbitrarily and has not resulted in virtually unflagging use of federal jurisdiction. It has succeeded in convincing the Court to arbitrarily apply federal jurisdiction, however, for the Court no longer follows *Cohens*—it no longer balances the reversible laws and rules against the U.S. Constitution to determine federal jurisdiction. This judicial arbitrariness is symbolized by *Iqbal* and *Twombly*, because they allow federal courts to determine federal jurisdiction based upon a standard of plausibility of facts not provided in any prior rule or law. Under *Twombly*, the courts may follow *Dioguardi v. Durning* and other similar cases or trespass them at will as if *stare decisis* means nothing.). *Cf.* Schroeder, *America's*, *supra* note 212, at 883–85 (this article reviews recent cases that unsettled *stare decisis*).

497. FED. R. CIV. P. 8(a)(2) (requiring only a short and plain statement of the *claim*); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (quoting FED. R. CIV. P. 8(a)) ("Under the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Thus, this Court wisely turned to the lower courts and said, "here is another instance of judicial haste which in the long run makes waste."). *But see* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (requiring the pleading of *facts*—something explicitly and purposely not required by the Supreme Court's own Civil Rules).

498. Rules Enabling Act, 28 U.S.C. §§ 2071–77; Crowell v. Benson, 285 U.S. 22, 58–65 (1932). *See* Rules Enabling Act, 48 Stat. 1064, § 2 ("The court may at any time unite the general rules prescribed by it for cases in equity with those in action at law so as to secure one form of action and procedure for both[.]"); FED. R. CIV. P. 2 (there is now only one form of action, the civil action). *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 659–62, n.62 (2004) (noting "the significance of *Crowell* to the modern administrative state," consisted in "the widespread reliance on *Crowell* in crafting rules to govern the judicial review of agency action").

tive authority to an administrative agency.[499] This case allowed the beginning of the development of what is now called the administrative state.[500]

Congress and the U.S. Supreme Court later developed administrative law, including *Chevron* deference, the arbitrary and capricious standard, and *ultra vires*.[501] Some scholars argued that the apparent mirroring of Article II rulemaking, enforcement, and adjudicative agencies with the original three branches of U.S. Government creates the legitimacy of administrative law.[502] However, there is no evidence to suggest that this is the case.[503]

The actual legitimacy of the administrative state arises from the continued availability of Article III review wherever administrative agencies touch on fundamental rights and the separation of powers.[504] An Article III court has collateral jurisdiction, according to *Crowell*, to review administrative law akin to the way federal civil courts review criminal cases through habeas corpus.[505] The point where Article III review of fundamental rights and the separation of powers ends is also where the legitimacy of administrative law must also end.[506]

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499. *Crowell*, 285 U.S. at 58–65 (requiring as a condition that non-Article III decisions must be reviewable in an Article III Court in the same way criminal court cases are reviewable on habeas corpus). *See* Northern Pipeline v. Marathon Pipe Line, 458 U.S. 50, 78 (1982) ("[t]he use of administrative agencies as adjuncts was first upheld in *Crowell v. Benson*").

500. Stern v. Marshall, 564 U.S. 462, 504 (2011) (citing generally Crowell v. Benson, 285 U.S. 22 (1932)); *id.* at 506 (Breyer, J., dissenting) (noting that the majority underestimated the strength of the constitutional basis of non-Article III Courts to adjudicate disputes under *Crowell*). *See* Pfander, *supra* note 498, at 659–62, n.62.

501. Administrative Procedures Act, 5 U.S.C. §§ 500–96; Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 476 U.S. 837, 844 (1984); Auer v. Robbins, 519 U.S. 452, 461 (1997). *See* Jared P. Cole, *An Introduction to Judicial Review of Federal Agency Action*, CONG. RSCH. SERV., Dec. 7, 2016, at 3 n.33, 5 (citing cases involving *ultra vires*).

502. Ralph F. Fuchs, *An Approach to Administrative Law*, 18 N.C. L. REV. 183, 185 (1940).

503. *See, e.g.*, Louis J. Virelli III, *Administrative Abstention*, 67 ALA. L. REV. 1019, 1067 (2016) ("agencies occupy a tenuous position in our tripartite democracy, yet perform many, if not all, of the functions of the three constitutionally mandated branches").

504. *Crowell*, 285 U.S. at 58–65; Cole, *supra* note 493, at 3–5.

505. *Crowell*, 285 U.S. at 58–59 (citing *In re* Grimley, 137 U.S. 147, 154–55 (1890)). *See* U.S. CONST. art. I, § 9, cl. 2 ("the writ of habeas corpus shall not be suspended").

506. *Crowell*, 285 U.S. at 57 ("The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation on their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic char-

Over a series of recent cases, the U.S. Supreme Court unsettled the precedents once considered the backbone of administrative law.[507] While none drew *Crowell* jurisdiction into question, cases like *Stern v. Marshall* appeared to generalize *Crowell* to the point of superfluity.[508] Essential administrative law precedents were also unsettled by the plausibility standard of *Iqbal* and *Twombly*—a standard that does not conform to the Rules.[509]

The express purpose of the Civil Rules was to liberally open jurisdiction to anyone that makes "a short and plain statement of the claim" for which relief may be granted.[510] Plausibility of *facts* is an arbitrary standard with no possible uniform way of application by district judges.[511] It arises neither from prudential jurisprudence, the

acter alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.").

507. U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made . . . ." This means that cases at equity are meant to arise under the laws and that the laws were meant to be shaped and interpreted at equity—law and equity are not mutually exclusive and they never have been.). *See, e.g.*, Armstrong v. Exceptional Child Care Ctr., Inc., 575 U.S. 320, 327–29 (2015) (There is a growing pool of cases that limit and/or remove equity in a way that increases the unequal application of the laws throughout the states and the sheer confusion regarding the state of federal law in relation to federal agencies: "The sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts." The complexity of a law coupled with an administrative remedy is enough to oust the Court's equitable enforcement of the law according to the U.S. Supreme Court.).

508. Stern v. Marshall, 564 U.S. 462, 504 (2011) (citing generally Crowell v. Benson, 285 U.S. 22 (1932)). *See also* Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018); Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1374 (2018).

509. Ashcroft v. Iqbal, 556 U.S. 662, 696 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (requiring the pleading of *facts*—something explicitly and purposely not required by the Supreme Court's own Civil Rules)). *See* Karen Petroski, *Iqbal and Interpretation*, 39 FLA. ST. U. L. REV. 417, 456, 464 (2012) (thinking about the plausibility standard as a version of agency deference, though this is intrinsically awkward, because the Advisory Committee on the Civil Rules is the U.S. Supreme Court's agency that the plausibility standard does *not* defer to). *But see* FED. R. CIV. P. 8(a)(2) (requiring only a short and plain statement of the *claim*); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (quoting FED. R. CIV. P. 8(a)) (This holding is still good law: "Under the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Thus, the *Dioguardi* Court wisely turned to the District Court and said, "here is another instance of judicial haste which in the long run makes waste.").

510. FED. R. CIV. P. 8(a)(2). *See* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

511. *Iqbal*, 556 U.S. at 696; *Twombly*, 550 U.S. at 556. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 334–35 (2013) [hereinafter Miller, *Simplified*] (noting that "plausibility" is defined in an "amorphous" way that invites judges

positive law, nor from older sources of equity or common law.[512]

Indeed, the Supreme Court in *Iqbal* and *Twombly* made no attempt to reconcile or overrule existing case law mandated under the Rules' claim pleading.[513] *Iqbal* and *Twombly* are a fundamental embarrassment of the Rules' requirement of maximum access to justice on the pleadings, and a violation of *stare decisis*.[514] The plausibility standard the Court committed itself to, or any other standard besides the one expressly given in Rule 8, is an illegitimate form that was supposed to be abolished by Rule 2.[515]

The judiciary may only speak on cases and controversies that properly arise under the laws.[516] Advisory statements upon hypothetical laws and hypothetical facts are prohibited.[517] The judiciary must wait until a proper case or controversy arises under the laws before it can legitimately act, and even then the determinations made outside of the facts of the case are ordinarily considered *obiter dictum*, i.e., unbinding on future precedent.[518]

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to individually "evaluate the merits of the plaintiff's case . . . without having the benefit of discovery, let alone anything remotely approximating a trial or the input of a jury").

512. 28 U.S.C. § 2072; FED. R. CIV. P. 8(a)(2); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 7, 13; BAKER, *supra* note 7, at 61–64; Maty v. Grasselli Chemical Co., 303 U.S. 197, 200 (1938) (This case was decided right before the Civil Rules were established, and it noted that the purpose of the pleadings was to serve as a means of "arriving at fair and just settlements of controversies"—they were not to become arbitrary grounds for dismissal.).

513. FED. R. CIV. P. 8(a)(2). *See Maty*, 303 U.S. at 200 ("Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end."); *Dioguardi*, 139 F.2d at 775 (this and other cases like it, that actually apply Rule 8, are still good law, because *Twombly* and *Iqbal* did not apply Rule 8, they made up an arbitrary form that arguably also violates Rule 2).

514. *Maty*, 303 U.S. at 200; FED. R. CIV. P. 8.

515. *Iqbal*, 556 U.S. at 696; *Twombly*, 550 U.S. at 556; FED. R. CIV. P. 2 & 8. *Cf.* BAKER, *supra* note 7, at 61–64 (it appears that under the Rules as applied by *Iqbal* & *Twombly* litigants have less access to justice than they used to have when they sued under the writ of trespass on the case).

516. U.S. CONST. art. III, § 2, cl. 1.

517. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 614 (1952) (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793) (refusing to make advisory statements at the President's request)). *Cf.* Glass v. The Sloop Betsey, 3 U.S. 6, 16 (1794) (the Court spoke when a proper case or controversy arose before it).

518. *Glass*, 3 U.S. at 16. *See, e.g.,* Myers v. United States, 272 U.S. 52, 141 (1926) (arguing that Chief Justice Marshall's commentary regarding the limits of the Executive appointment and/or removal powers were "obiter dictum," because the result of *Marbury* was to limit the Court's powers to issue a writ of mandamus).

However, when injured individuals dispute their rights in open court—the court cannot legitimately deny them.[519] Not even the political question doctrine can legitimately dismiss cases brought by ordinary persons injured by government violations of the separation of powers.[520] As Chief Justice Marshall opined,

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws *whenever he receives an injury*. One of the first duties of government is to afford that protection.[521]

Nothing can stand in the way of the judiciary in its task of securing these rights.[522] There is no law, constitutional interpretation, or executive application that can stand against the court's power to redress injuries, because the judiciary speaks only once all these things are past.[523] The window known as federal jurisdiction exists after the injury is done, when the claim is ripe, and before any further occurrence renders the claim moot.[524] In this window it is "the very essence of judicial duty" for the federal courts to say what the law is.[525]

The judicial power to overrule laws as unconstitutional comes from natural equity as Sir Henry Hobart confirmed in *Day v. Savadge*.[526] The U.S. social compact was inspired by this case to preserve natural equity in judicial courts and to expound on the laws under the U.S. Constitution in order to come to a final determination of what the law is.[527] The judiciary's province and duty under the consti-

519. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. IX; Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Opinion of Wilson, J.); *id.* at 451 (Opinion of Blair, J.); *id.* at 468 (Opinion of Cushing, J.); *id.* at 475–78 (Opinion of Jay, C.J.).

520. U.S. CONST. amends. III, IV, V (Taney's opinion in *Luther v. Borden* turned a blind eye to clear violations by the state police of these three Amendments); Luther v. Borden, 48 U.S. 1, 66–67 (1849) (Woodbury, J., dissenting).

521. Marbury v. Madison, 5 U.S. 137, 163 (1803) (emphasis added).

522. *Id.*

523. *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967).

524. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 328 (1979) (Stevens, J., concurring).

525. *Marbury*, 5 U.S. at 178.

526. Day v. Savadge [1614] Hob. 85, 87 (Eng.) (extending Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.) ("when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void")).

527. OTIS, *supra* note 18, at 175 (arguing "that *acts of parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*."); SIMMONS, *supra* note 31, at 2, 5, 18 (the remedy for disposing of unjust laws adopted by the Americans was "to confer on the judiciary the power to declare unconstitutional statutes void"); William Wetmore, *Wetmore's Minutes of the Trial, Essex Inferior Court, Newburyport, Oct. 1773, Caesar v. Greenleaf* [1773], *in* 2 ADAMS, LEGAL PAPERS, *supra* note 22, at 64–67 (quoting Day v. Savadge [1614] Hob. 85, 87 (Eng.)).

tution flows directly from the "very great force in the observation arising from the federal compact."[528]

It is also one of the basic principles of statutory interpretation that federal courts must interpret federal laws in a way that complies with the constitution wherever possible.[529] The federal courts therefore should only overrule laws when there is no reasonable way to interpret the law that does not conflict with the constitution.[530] This doctrine traces back to the first federal cases and later became known as "constitutional avoidance."[531]

The prohibition on advisory statements, on the other hand, arose from the first U.S. Supreme Court during the neutrality crisis also known as the *Citizen Genêt Affair*.[532] During this time, the newly formed United States government was caught in a quandary of whether or not to risk independence by supporting French allies in a renewed war against England.[533] Congress did not declare war and President Washington proclaimed U.S. neutrality.[534]

The French Consul, known as Citizen Genêt, did not get his way and consequently appealed to the people.[535] He flamboyantly stoked American hatred for England, throwing parties along the coast, and capturing British merchant ships along the way, refitting them as French cruisers.[536] Genêt set up a French Admiralty Court in Philadelphia and recruited American privateers to hunt down British sailors on the high seas.[537]

528. THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 28; *Marbury*, 5 U.S. at 177.

529. This is known as Constitutional Avoidance Doctrine. Ashwander v. T.V.A., 297 U.S. 288, 348 (1936) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)) ("'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'").

530. I.N.S. v. St. Cyr, 533 U.S. 289, 299–300 (2001) (upholding Constitutional Avoidance Doctrine).

531. *Id.*

532. Casto, *supra* note 274, at 173. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 614 (1952) (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington, U.S. President (Aug. 8, 1793)) (refusing to make advisory statements at the President's request)). *Cf.* Glass v. The Sloop Betsey, 3 U.S. 6, 16 (1794) (the Court spoke when a proper case or controversy arose before it).

533. Casto, *supra* note 274, at 177.

534. President George Washington, Proclamation 4—Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France (Apr. 22, 1793).

535. Casto, *supra* note 274, at 178. *See* Letter from Alexander Hamilton to Rufus King [Aug. 13, 1793] (setting forth "[t]he facts with regard to Mr. Genet's threat to appeal from the President to the People").

536. Casto, *supra* note 274, at 175.

537. *Id.*

The situation reached a head when Genêt's cruiser, *L'Embuscade*, seized the British merchant vessel, *Little Sarah*, off "the capes of Delaware."[538] At the sight of British vessels being towed into port with "the British colours . . . *reversed*, and the French flying above them" crowds of Philadelphians "burst into peals of exaltation."[539] As soon as the Washington administration learned of the taking of the *Little Sarah*, the administration approached Genêt to inquire about detaining the ship.[540]

At this, Genêt "flew into a great passion, talked extravagantly and concluded by refusing to order the vessel to stay."[541] When Secretary of State Thomas Jefferson inquired about the matter, Genêt launched into a complaint regarding the U.S. policy of neutrality and "charged us with . . . violat[ing] the treaties between the two nations."[542] Alexander Hamilton and James Madison began a vigorous debate in the press over the matter of neutrality that ended in more agreement than disagreement between them.[543]

John Adams later remembered "ten thousand people in the streets of Philadelphia, day after day, threatened to drag Washington out of his House."[544] President Washington and his cabinet determined to make their principled response to Genêt's appeal to the people center around the case of *Little Sarah*.[545] It is interesting to note that when the cabinet considered shooting the small ship down as it left the harbor, it was Jefferson (i.e., the most outspoken American enthusiast of French terrorism at the time) who dissented because "it is morally certain that bloody consequences would follow."[546]

During this quandary, President Washington asked, "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."[547] Washington continued, "What must the World

538. *Id.*

539. Letter from Thomas Jefferson to James Monroe (May 5, 1793).

540. Casto, *supra* note 274, at 177–78.

541. Thomas Jefferson, Memorandum of a Conversation with Edmond Charles Genet (July 10, 1793).

542. *Id.*

543. Letter from Thomas Jefferson to James Madison (Aug. 11, 1793); Letter from Thomas Jefferson to James Madison (Aug. 3, 1793) ("We have decided unanimously to require the recall of Genet.").

544. Letter from John Adams to Thomas Jefferson (June 30, 1813).

545. Casto, *supra* note 274, at 180.

546. Thomas Jefferson, Dissenting Opinion on the Little Sarah (July 8, 1793). *Cf.* Letter from Thomas Jefferson to William Smith (Nov. 13, 1787) (writing from Paris and appearing to support government administered terror).

547. Letter from George Washington to Thomas Jefferson (July 11, 1793).

think of such conduct, and of the Government of the U. States in submitting to it?"[548] Perplexed by this debacle, Washington's cabinet resolved to convene the Supreme Court justices to answer their urgent questions.[549]

The Washington Cabinet amassed twenty-nine legal questions to be answered by the Supreme Court.[550] Of the many questions made to the justices of the first U.S. Supreme Court, Thomas Jefferson preliminarily inquired, "Whether the public may, with propriety, be availed of [the Court's] advice on these questions."[551] After travelling to Philadelphia, and convening over the request of Washington's Cabinet, the Jay Court unanimously refused to grant the president's request for advice.[552]

The justices referred the cabinet to "[t]he Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort."[553] The Court concluded that, "the power given by the Constitution to the president of calling on the heads of department for opinions, seems to have been *purposely* as well as expressly limited to *executive* departments."[554] Therefore, the Court denied Washington's request saying, "we exceedingly regret every event that may cause embarrassment to your administration; but we derive consolation from the reflection, that your judgment will discern what is right."[555]

Justice Frankfurter quoted directly to this Jay Court letter to President Washington in his *Youngstown Sheet & Tube, Co. v. Sawyer* concurrence.[556] Thus, Justice Frankfurter signaled that even at times when the Supreme Court properly asserts its jurisdiction to vindicate the separation of powers, the Court's opinions are by nature of their

548. *Id.*
549. Casto, *supra* note 274, at 178.
550. *Id.* at 180; [Thomas Jefferson et al.,] IV. Questions for the Supreme Court [July 18, 1793].
551. [Thomas Jefferson et al.,] IV. Questions for the Supreme Court [July 18, 1793].
552. Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793).
553. *Id.*
554. *Id.*
555. *Id.*
556. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 614 (1952) (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793)).

power limited.[557] Thus, whatever the Court says in a certain case, the other branches must refuse to "disregard the gloss which life has written upon" the constitution.[558]

Unfortunately, the Supreme Court recently began dictating this gloss of life as if the Court is life itself, commanding rather than being commanded by the provisions of the Constitution.[559] By doing so the Court violated the prohibition on advisory opinions that Justice Frankfurter attempted to uphold.[560] The Supreme Court is dutybound *not* to illuminate all the dark corners of how the separation of powers is supposed to operate.[561] As Chief Justice Marshall opined,

> A Constitution, to contain accurate detail of all the subdivisions of which great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public.[562]

Chief Justice Marshall prescribed that the constitution's "nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[563] Accordingly, many of the earliest judicial opinions regarding the constitution determined its objects from the provisions of the U.S. social compact as a general guide.[564]

557. *Id.* (neither of the parties to the case will "find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world").

558. *Id.* at 610.

559. NLRB v. Noel Canning, 573 U.S. 513, 528–30 (2014) (citing *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)).

560. *Id.*

561. *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793)).

562. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

563. *Id.*

564. *Id.*; Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795) ("The preservation of property then is a primary object of the social compact, and by the late Constitution of Pennsylvania, was made a fundamental law."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–60 (citing Chisholm v. Georgia, 2 U.S. 419, 474–75 (1793) (Opinion of Jay, C.J.)) ("The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute. We find it laid down in some of our earliest authorities in the common law; and civilians are accustomed to a similar expression, *cessante legis prœmio, cessat et ipsa lex*. . . . There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to

The radical nature of Justice Scalia's legal positivism necessarily denies the existence of that social compact in at least two ways:[565] first, it attempts to destroy the "gloss which life writes upon the" constitution by proclaiming our constitutions "dead, dead, dead";[566] second, it improperly dictates constitutional guidelines to the legislature and executive for all future exigencies of state by forcing the constitution to "partake of the prolixity of a legal code."[567]

The judiciary and the American legal community should respectfully turn away from Justice Scalia's delusions and affirm once

the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions.").

565. *Originalism: A Primer on Scalia's Constitutional Philosophy*, NPR (Feb. 14, 2016), https://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy. Bork and Scalia's political realism was not necessarily conservative, and notable conservative thinkers like Harry Jaffa vehemently attacked it. *See, e.g.*, Erik Linstrum, *Political scholar Jaffa defends moral foundation of government*, DAILY PRINCETONIAN (Sept. 30, 2003), https://www.dailyprincetonian.com/article/2003/09/political-scholar-jaffa-defends-moral-foundation-of-government (citing Harry Jaffa, *Natural Law and American Political Thought* (Sept. 29, 2003), https://jmp.princeton.edu/events/natural-law-and-american-political-thought) ("Justice Scalia, like all Legal Positivists, denies to the Declaration of Independence any constitutional status whatever."); J. Paul Kelleher, *Neil Gorsuch's "natural law" philosophy is a long way from Justice Scalia's originalism*, VOX (Mar. 20, 2017, 8:20 AM), https://www.vox.com/the-big-idea/2017/3/20/14976926/gorsuch-natural-law-supreme-court-hearings.

566. Bruce Allen Murphy, *Justice Antonin Scalia and the 'Dead' Constitution*, N.Y. TIMES (Feb. 14, 2016), https://www.nytimes.com/2016/02/15/opinion/justice-antonin-scalia-and-the-dead-constitution.html ("'The only good Constitution is a dead Constitution.'") (statement of Justice Scalia). Judge Bork disputed and disagreed with Scalia on the matter of his dead constitution. Ollman v. Evans, 750 F.2d 970, 995–96 (D.C. Cir. 1984) (Bork, J., concurring) ("Judge Scalia's dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But most doctrine is merely the judge-made superstructure that implements basic constitutional principles. . . . A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty.").

567. McCulloch v. Maryland, 17 U.S. 316, 407 (1819); *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring); Antonin Scalia, *Common-Law Courts in a Civil-Law System*, Mar. 8–9, 1995, *in* 18 THE TANNER LECTURES ON HUMAN VALUES 79, 111 (1997) (explaining Scalia's support for legal positivism, which is essentially a preference for legal codes, by mischaracterizing *McCulloch*, a case that rejected the prolixity of legal codes); NFIB v. Sebelius, 567 U.S. 519, 654 (2012) (Opinion of Roberts, C.J.) (quoting *McCulloch*, 17 U.S. 316, 411, 421 (1819)) (Quoting *McCulloch*, Roberts said, "Such laws, which are not 'consist[ent] with the letter and spirit of the constitution,' are not '*proper* for carrying into Execution' Congress's enumerated powers." In *McCulloch*, Chief Justice Marshall held that the Court cannot and should not dictate Congress's choice of means, and Justice Scalia argued in *Sebelius* that the Court can and should, but he failed to carry Roberts' vote, and therefore he failed to reverse *McCulloch*.); NLRB v. Noel Canning, 573 U.S. 513, 555–57 (2014) (Scalia concurred with this advisory statement).

more that the constitution is a living document.[568] The constitution is living because its provisions were not meant to provide for exigencies "which can be best provided for as they occur."[569] It is living because the gloss which life writes upon the constitution is ever changing and moving with the people who engage themselves in each branch of the U.S. government.[570]

The gloss that life writes upon the constitution is a real, vital, and breathing aspect of constitutional law; it is a mystery that cannot be codified, measured, or predicted beforehand.[571] Justice Frankfurter's gloss that life writes upon the constitution can only be observed in the present moment, and discussed after the fact.[572] Constitutional construction must, therefore, also evolve and change through the Ciceronian practice of justification through public discourse, on a case by case basis, and in the courts according to the facts and circumstances of the times.[573]

568. The life of our constitutions exist in the ministers our constitutions empower to serve the people, to protect the rights of each person. Letter from Thomas Jefferson to John Cartwright (June 5, 1824) ("But can they [our Constitutions] be made unchangeable? Can one generation bind another, and all others, in succession for ever? I think not. The Creator has made the earth for the living, not the dead. Rights and powers can only belong to persons, not to things, not to mere matter, unendowed with will. The dead are not even things.").

569. *McCulloch*, 17 U.S. at 415.

570. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

571. *Id.*

572. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776); John Adams, *Thoughts on Government* 10–11 [1776] (setting forth the basic idea of the separation of powers).

573. Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring) (citing Brown v. Board of Education, 347 U.S. 483, 492–95 (1954)) ("A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint. The evolution I suggest does not constitute a major change in doctrine but is, as will be shown, entirely consistent with the implications of Supreme Court precedents."); Crowell v. Benson, 285 U.S. 22, 57 (1932) (the federal courts retained their power to reevaluate old agency determinations on a case by case basis to see whether they fit the needs of the times, because "fundamental rights depend . . . upon the facts, and finality as to facts becomes in effect finality in law"); Kastely, *supra* note 186, at 1, 7–9 ("this equating of law with justice and reason means that law depends upon a practice of justification," which is talking with others in our communities about the law to decide whether it is right or wrong, just or unjust—"we are not asked to reach a final judgment on them," meaning that circumstances are alive and may change, causing a law that may be just at one time to become unjust in another or vice versa). *Cf.* ON THE BASIS OF SEX (Focus Features 2018) ("'A court ought not be affected by the weather of the day. But will be by the climate of the era.'") (the future Justice Ginsburg quoting Paul Freund).

PART II: THE PROBLEM OF FLUX AND CONVERGENCE

As Kafka once stated, "It is difficult to speak the truth, for although there is only one truth, it is alive and therefore has a live and changing face."[574] Thus, Justice Scalia's style of post-modern Benthamism will always fail to reduce constitutional law into predictable, rational formulae.[575] Laws, and the factual circumstances that laws address, do not usually reduce into Platonic absolutes, but rather ordinarily flux and converge over time.[576]

Since the forms were closed in 1938, the writ of trespass on the case—under which the bench addressed matters of flux and convergence—fell into disuse and now lies forgotten.[577] The bench proceeded

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574. HANNAH ARENDT, MEN IN DARK TIMES 28 (1974) [hereinafter ARENDT, MEN] (quoting Franz Kafka, though the translation is likely hers). *See* Max Kennerly, *Lessons from Kafka: Aaron Swartz and Prosecutorial Overreaching*, LITIGATION & TRIAL LAW BLOG (Jan. 14, 3013), https://www.litigationandtrial.com/2013/01/articles/series/special-comment/kafka-aaron-swartz/ [hereinafter Kennerly, *Lessons*] (quoting from portions of Kafka's *The Trial*). *See also* Crowell v. Benson, 285 U.S. 22, 57 (1932) (holding that the Legislative and Executive branches of government were powerless to "sap the judicial power as it exists under the federal Constitution . . . to establish a government of a bureaucratic character alien to our system wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to the facts becomes in effect finality in law").

575. Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 113 (1999). *Compare* Jaffa, *supra* note 565 (noting that Scalia categorically rejected the significance of the Declaration of Independence as a part of his commitment to legal positivism), *with* [Jeremy Bentham,] *Short Review of the Declaration* [1776], *in* BENTHAM & LIND, *supra* note 38, at 120. *But see* Maryland v. King, 569 U.S. 435, 582 (2013) (Scalia, J., dissenting) (Scalia nevertheless balked at the prospect of actually instituting Bentham's ideas in America: "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.").

576. *See* Wire Fraud Statute, 18 U.S.C. § 1343 (this statute first appeared in the 1952 as 6 Stat. 722, long before the internet, and when the government prosecuted Aaron Swartz for wire fraud it meant defining "property" in the statute as including copyright over documents created for knowledge and learning for which most authors made no money, and did not intend to make money); Max Kennerly, *Explaining the Outrageous Aaron Swartz Indictment for Computer Fraud*, LITIGATION & TRIAL LAW BLOG (July 19, 2011) https://www.litigationandtrial.com/2011/07/articles/series/special-comment/aaron-swartz-computer-fraud-indictment/ [hereinafter Kennerly, *Explaining*] (a preliminary analysis done in real time before Swartz's death). *See also* Schroeder, *Choosing*, *supra* note 485, at 50 (noting the impending conflict between net neutrality rules and copyright law because communications and copyrighted content are the same thing when digitized and communicated over the internet). *Cf.* Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) (recently, in a surprise decision the unanimous U.S. Supreme Court let Chris Christie's cronies off for their part in the Bridge-gate scandal, because their part in it was purely for political gain rather than "to obtain money or property").

577. BAKER, *supra* note 7, at 68 ("'The forms of action we have buried,' said Maitland at the turn of the twentieth century, 'but they still rule us from their graves.' Yet the posthumous rule of the forms of action has tended towards a tyranny which in life they were never permitted . . . ." The only reason this may also be so in the United States is because our bar

to apply old forms to new problems in an exceedingly erratic way.[578] For example, courts applied constructive possession principles originally developed in property cases involving hunters, whalers, and migratory animals to cases about Egyptian artifacts, internet domains, and cocaine.[579]

Internet flux and convergence practically demolished any rational construction of the Federal Telecommunications Act of 1996 ("FTA").[580] When Congress enacted the FTA, it perceived that the internet was good for little more than distributing pornography.[581]

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and bench forgot how to assert *trespass on the case* or its practical equivalent under the Federal Rules of Civil Procedure to help the common law evolve with the times.). *See, e.g.*, United States v. Windsor, 570 U.S. 744, 762–64 (2013) (attempting to fashion a way to address "an injustice that they had not earlier known or understood" directly under the U.S. Constitution).

578. United States v. Schultz, 333 F.3d 393, 405 (2d Cir. 2003) (applying *ferae naturae* common law principles about capturing and hunting animals to a case about Egyptian archeology and patrimony law).

579. *Id.*; State v. Schmidt, 110 N.J. 258, 266–67 (1988) (citing Pierson v. Post, 3 Cai. 175, 180–81 (N.Y. 1805)); Network Solutions, Inc. v. Umbro Intern., Inc., 259 Va. 759, 771 (2000). *Cf.* Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 977 (1813) [hereinafter THE PARLIAMENTARY] (Opinion of Ashurst, J.) (When a judge is inspired by former case law to create a new protection at common law, he or she should issue a writ of trespass on the case as the judges in *Millar* did to recognize a new right at common law, "It had been said, that when the bird was once out of the hand, it was become common, and the property of whoever caught it; this was not wholly true, for there was a case upon the law books, where a hawk with bells about its neck had flown away; a person detained it, and an action was brought at common law against the person who did detain it a book with an author's name to it was the hawk, with the bells about its neck, and an action might be brought against whoever pirated it.").

580. *See* Reno v. ACLU, 521 U.S. 844, 857–58 (1997) ("As stated on the first of its 103 pages, [the Telecommunication Act's] primary purpose was to reduce regulation and encourage 'the rapid deployment of new telecommunications technology.' *The major components of the statute have nothing to do with the Internet*; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting.") (emphasis added). *Cf.* Ernesto Falcon, *While the Net Neutrality Fight Continues, AT&T and Verizon are Opening a New Attack on ISP Competition*, ELEC. FRONTIER FOUND. (June 8, 2018), https://www.eff.org/deeplinks/2018/06/while-net-neutrality-fight-continues-congress-and-states-att-and-verizon-are (these so-called competitors joined together to petition the FCC to exempt themselves from the Telecommunications Act of 1996 primary purpose of preserving competition).

581. Esbin, *supra* note 575, at 55 (noting that Congress paid more attention to the Internet's "indecent," meaning pornographic, potential than anything else); Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.). *See also* Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207, 212 (2003) (explaining how the FTA failed to capture the basic reality that: "Converging technologies and markets make it quite possible for a single venture to own or lease facilities capable of operating across previously discrete and mutually exclusive markets."); Robert C. Atkinson, *Telecom Regulation for the 21st Century: Avoiding*

Congress thus drafted FTA according to "status-based embedded assumptions about market share, essentialness, pervasiveness, and use of public resources," artificially preserving soon to be obsolete market structures.[582]

The most problematic market structure that still enjoys a legal monopoly, in spite of the internet, is cable.[583] Traditional cable services *do not exist* anymore; the services sold under the name of cable services today are, as far as the hardware is concerned, internet streaming services.[584] Cable streaming and internet streaming services are the same services artificially sold separately, contradicting antitrust law, net neutrality rules, and § 43(a) of the Lanham Act.[585]

Gridlock, Adapting to Change, 4 J. TELECOMM. & HIGH TECH. L. 379, 380, 403 (2006) (arguing that Congress needs to "start from scratch"). *Cf.* J. Gregory Sidak, *The Failure of Good Intentions: The Worldcom Fraud and the Collapse of American Telecommunications after Deregulation*, 20 YALE J. ON REG. 207, 215 (2003) (raising major questions regarding how far *Chevron* deference can go to justify FCC's policies, if they are patently flawed to the tune of "a trillion dollars or more of wasted investment").

582. Frieden, *supra* note 581, at 209–10; Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

583. Scholars quickly noticed that the internet was missing from the FTA, and that the FTA *alone* keeps cable and other services separate from internet services for purposes of access and billing. *See* Esbin, *supra* note 575, at 80.

584. Tim Berners-Lee, *Answers for Young People*, W3ORG, https://www.w3.org/People/Berners-Lee/Kids.html (last visited on Aug. 10, 2021) (explaining internet basics, that computers send and receive packets of digitized information over a wire—this is the internet); Curt Franklin, *How Cable Television Works*, HOW STUFF WORKS, https://electronics.howstuffworks.com/cable-tv.htm, at 3 (last visited on Oct. 29, 2018).

585. Franklin, *supra* note 584, at 3 (noting the transition from traditional cable, to the digital internet distribution model); Schroeder, *Choosing*, *supra* note 485, at 51 (Comcast/NBC/Universal owned the exclusive rights to the 2012 Summer Olympics, exclusively licensed Google/YouTube to distribute it online, and required online viewers to purchase a cable subscription to watch the Olympics online through YouTube); Brian Fung, *Most Americans streamed the Olympics from PCs, not mobile devices. Here's why.*, WASH. POST (Aug. 24, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/08/24/how-internet-users-watched-the-rio-olympics-according-to-data/ (Comcast/NBC/Universal again purchased the exclusive rights to broadcast the Olympics in 2016, and again, viewing it online required purchasing a cable subscription). *See also* Jon Brodkin, *Verizon throttled fire department's "unlimited" data during Calif. Wildfire*, ARSTECHNICA (Aug. 21, 2018), https://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/; Deficit Reduction Act of 2005, 120 Stat. 21; In the Matter of Digital Television Distributed Transmission System Technologies, 23 FCC Rcd. 16731 (2008); DTV Delay Act, 123 Stat. 112–114; In The Matter Of: Authorizing Permissive Use Of The "Next Generation" Broadcast Television Standard, 32 FCC Rcd. 9930 (2017) (establishing ATSC 3.0 on a "Internet Protocol (IP)-based broadcast transmission platform"). This spectrum was taken from television channels and auctioned to cell phone companies. Colin Lecher, *How the FCC's massive airwaves auction will change America—and your phone service*, THE VERGE (Apr. 21, 2016), https://www.theverge.com/2016/4/21/11481454/fcc-broadcast-incentive-auction-explained.

Unfortunately, the Supreme Court propped up these obsolete streams of profit in their ruling *American Broadcasting Cos. v. Aereo*—a decision based upon the Court's adoption of the false propaganda spun by public relations experts, rather than the facts confirmed by telephonic science.[586] As the *Crowell* Court observed, this was the final nail in the coffin, because "finality as to the facts becomes in effect finality in law."[587] It no longer matters if cable as it existed in 1976 exists today, because the *Aereo* Court held that it does as a matter of law.[588]

The Court's decision in *Aereo* is erroneous because television and cable are no longer analog as they were in 1976, when the current copyright law was passed.[589] When *Aereo* was decided, cable networks were already phasing out analog transmissions in favor of new digital cable/television distribution.[590] The *Aereo* Court was misinformed that the only way to defend "'the very existence of broadcast television as we know it'" was to grant old cable and broadcast companies dead hand control over the internet.[591]

586. Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 450–51, 455–59 (2014) (Scalia, J., dissenting) ("So which is Aereo: the copy shop or the video-on-demand service? In truth, it is neither. Rather, it is akin to a copy shop that provides its patrons with a library card. Aereo offers access to an automated system consisting of routers, servers, transcoders, and dime-sized antennae. Like a photocopier or VCR, that system lies dormant until a subscriber activates it. . . . The Court's conclusion that Aereo performs boils down to the following syllogism: (1) Congress amended the Act to overrule our decisions holding that cable systems do not perform when they retransmit over-the-air broadcasts; (2) Aereo looks a lot like a cable system; therefore (3) Aereo performs. That reasoning suffers from a trio of defects.").

587. Crowell v. Benson, 285 U.S. 22, 57 (1932).

588. *Id.*; *Aereo*, 573 U.S. at 450–51 (arbitrarily propping up old FTA distinctions in IP law that no longer exist in reality).

589. By "no longer analog," I mean that cable networks adopted Tim Berners-Lee's technology to stream cable content digitally. *Aereo*, 573 U.S. at 450–51; Franklin, *supra* note 584, at 3; In the Matter of Digital Television Distributed Transmission System Technologies, 23 FCC Rcd. 16731 (2008) (establishing the rules for the digital transmission of television over the air, so that large portions of spectrum could be taken from traditional television broadcasters and auctioned to cell phone companies); In The Matter Of: Authorizing Permissive Use Of The "Next Generation" Broadcast Television Standard, 32 FCC Rcd. 9930 (2017) (establishing ATSC 3.0 on a "Internet Protocol (IP)-based broadcast transmission platform").

590. Brief for Petitioners at 39, Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431 (2014) (No. 13–461) (arguing that watching live TV online through *Aereo*'s service would threaten the very existence of live TV—when the digitization of live TV literally means that all live TV in the United States is now distributed at a functional level over the internet); *Aereo*, 573 U.S. at 455–59 (Scalia, J., dissenting) (correctly expressing suspicion about the very existence of traditional broadcast services in the internet age).

591. *Aereo*, 573 U.S. at 455–59 (Scalia, J., dissenting).

One low price for access to all digitized content is still something the internet is capable of providing.[592] Most experts believed that this was the internet's natural end, but they underestimated the old and dying propensity of the Baby Boomer generation for greed and gullibility.[593] The Boomers are presently in the process of asserting dead hand control over the internet based on their preference for a dead past that will ultimately cost Americans billions of dollars to subsidize.[594]

The Boomer-controlled Congress and court has failed to face (or even to understand) the reality that "the internet seamlessly blends

592. Telecommunications Act of 1996, Pub. L. No. 104–104, pmbl., 110 Stat. 56 (1996) (the purpose of the FTA and the FCC was to reduce price for access and expand service to every person); 47 U.S.C. § 257 (2018) (directing the FCC to review "market entry barriers for entrepreneurs and other small businesses" for "promotion of the public interest, convenience, and necessity"). Paying for internet service itself (i.e., the use of the actual cable/telephone networks to send and receive information) and paying for over the top online services like audio-visual content including movies, music, and books will become even more confusing as a few companies like AT&T, Verizon, and Comcast are trying to corner the markets. *See, e.g.*, Chloe Aiello, *AT&T bumps the price of DirecTV Now*, CNBC, (July 2, 2018, 1:18 PM), https://www.cnbc.com/2018/07/02/att-is-bumping-directv-now-packages-by-5.html ("Although AT&T attributed its changes to market forces, the company may be under pressure to find new sources of revenue after its $85.4 billion purchase of Time Warner."); Schroeder, *Choosing*, *supra* note 485, at 51 (noting that NBC is owned by Comcast—a competitor of AT&T/TWC—and that in 2012 NBC purchased exclusive rights to air the Olympics in the United States, and NBC/Comcast exclusively distributed Olympic content through YouTube/Google, which would not allow Americans to watch the Olympics online without purchasing a "traditional" cable subscription).

593. *See, e.g.*, Esbin, *supra* note 575, at 113 ("The coming era of digital personal communications . . . is an era of converging technologies, converging products, converging media and converging industries. More and more, the computer, broadcast, cable, telephone, satellite, and media entertainment industries will find themselves part of a much larger marketplace. These industries must learn to compete in broad markets, driven by consumer needs rather than be protected from competition in their traditional market segments."); *Aereo*, 573 U.S. at 455–60 (Scalia, J., dissenting); Julius Genachowski, Fed. Commc'ns Comm'n Chair, Remarks at Brookings: Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity (Sept. 21, 2009) (transcript available at http://techpresident.com/blog-entry/preserve-brilliance-julius-genechowskis-remarks-brookings) (presuming that the internet would be used for democratizing effects).

594. FCC Restoring Internet Freedom, 47 C.F.R. pts 1, 8, 20 (repealing FCC net neutrality rules); Deficit Reduction Act of 2005, Pub. L. No. 109–171 ,§ 3003, 120 Stat. 21 (2006) (the federal government made billions of dollars auctioning off spectrum to the highest bidder after pushing television stations off traditional channels and onto the internet); Aaron Pressman, *Why Almost 1,000 TV Stations Are About to Shift Channels*, FORTUNE (Apr. 19, 2017), https://finance.yahoo.com/news/why-almost-1-000-tv-142229062.html; *See* Carol Rose, *supra* note 244, at 768 (In matters of inherent public property like the internet, the "real danger is that individuals may 'underinvest' in such activities, particularly at the outset" because "increasing participation enhances the value of the activity rather than diminishing it."). *Cf.* Zaid Jilani, *Killing Net Neutrality has brought on a New Call for Public Broadband*, THE INTERCEPT(Dec. 15, 2017), https://theintercept.com/2017/12/15/fcc-net-neutrality-public-broadband-seattle/ (this is a nice idea, but it will not succeed without a strong assertion of antitrust principles because the government already sold the air to private interests).

content and conduit."[595] From the birth of the internet onward, the natural and ongoing flux and convergence of networks, technologies, and content leveled the vertically situated market structures of the past.[596] However, legally enforced dead hand control allows companies to continue billing for now obsolete, formerly vertically separated markets.[597]

So much wonder and credulity are expressed by older generations over the topic of the internet as it continues to demolish the world they once knew.[598] Internet genius, inventor, and activist, Aaron Swartz, told Americans of an unfortunate run-in he had with such an elder congressman; who expressed his unfounded worries and fears as reason enough to break the internet.[599] The congressman was a progressive, a liberal, an advocate for civil liberties,

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595. *See* Frieden, *supra* note 581, at 212–14.

596. *Id.*; PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 47–50 (2d ed. 1999) (noting fragmentation and convergence driving the telecom markets since the FTA was passed).

597. Frieden, *supra* note 581, at 212; Jeremy G. Philips, *Don't Look Now, but the Great Unbundling Has Spun Into Reverse*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/business/dealbook/bundling-online-services.html (the myth of the bundle (and ergo unbundling) was created by telecom giants to preserve their parallel revenue streams as the internet destroyed any literal or practical or objective difference between them, and the result is this: "Consumers merely have swapped one bundle for another (or often, several)." We are paying far more than we had in the past for services that the internet has minimized the cost of providing to us. Antitrust issues abound.). Major antitrust issues, reviewable by FCC's public interest standard, are ignored and rubber stamped. United States v. Radio Corp. of Am., 358 U.S. 334, 351–52 (1959) ("antitrust considerations alone" can "keep the statutory [public interest standard] from being met"); Jim Chen, *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUS. L. REV. 1311, 1316 (2007) ("The prospect that the Commission or the Justice Department would actually bar a merger, however, has diminished to a historic nadir."); Karle Bode, *FCC Commissioner Says Her Agency is Now Just a Giant Rubber Stamp for Sinclair Broadcasting*, TECHDIRT (Apr. 5, 2018), https://www.techdirt.com/articles/20180404/08140239558/fcc-commissioner-says-her-agency-is-now-just-giant-rubber-stamp-sinclair-broadcasting.shtml.

598. WASH. STATE: OFF. OF THE ATT'Y GEN., INTERNET SAFETY FOR SENIORS, https://www.atg.wa.gov/internet-safety-seniors (last visited Oct. 29, 2018) ("Seniors generally buy into a few myths about information exposure online. The first myth is that if you don't use a computer you aren't exposed online."); Katie Gibbons, *Over-55s at risk from online fake news*, THE TIMES (Feb. 17, 2018, 12:01 AM), https://www.thetimes.co.uk/article/fake-news-risk-to-over-55s-wsd8zh6pv; Alexis C. Madrigal, *Older People Are Worse than Young People at Telling Fact from Opinion*, THE ATLANTIC (Oct. 23, 2018), https://www.theatlantic.com/technology/archive/2018/10/older-people-are-worse-than-young-people-at-telling-fact-from-opinion/573739/.

599. Aaron Swartz, *F2C2012 Keynote Address at Freedom to Connect 2012: How We Stopped SOPA*, YOUTUBE (May 21, 2012), https://www.youtube.com/watch?v=fgh2dFngFsg [hereinafter Swartz, *Keynote*].

> The Congress was going to break the internet and they just didn't care. I remember when this moment first hit me. I was at an event and I was talking, and I got introduced to a Senator—one of the strongest proponents of the original COICA ["Combating Online Infringements and Counterfeits Act"] bill in fact. And I asked him why despite being such a progressive, despite giving a speech in favor of civil liberties, why he was supporting a bill that would censor the internet?
>
> And you know that typical politician smile he had suddenly faded from his face, and his eyes started burning this fiery red, and he started shouting at me. He said, "Those people on the internet! They think they can get away with anything! They think they can just put anything up there, and there's nothing we can do to stop them! They put up everything! They, they put up our nuclear missiles and they just laugh at us! Well, we're going to show them. There's got to be laws on the internet. It's got to be under control."
>
> N-now as far as I know no one has ever put up the U.S.'s nuclear missiles on the internet. I mean, it's just not something I've heard about. But, that's sort of the point, he wasn't having a rational concern, right, it was this irrational fear that things were out of control. Here was this man, a United States Senator, and those people on the internet, they were just mocking him. They had to be under control. Things had to be under control. And I think that was the attitude of Congress.[600]

As the Millennial prodigy Aaron Swartz first demonstrated, the "fiery red" shouting elders may pose a significant barrier to progress, but this barrier can be overcome with patience and good humor.[601] All that was required to halt COICA in its progress was one Senator, and the activism led by Aaron Swartz was able to convince Senator Ron Wyden to halt the bill.[602] Aaron Swartz demonstrated that grass roots activism organized through the internet could bring about sweeping legal change.[603]

Internet flux and convergence is not the end of the separation of powers as Swartz demonstrated.[604] While the internet may have accel-

600. *Id.*

601. *Id.*

602. *See* Aaron Swartz, *Wyden Again Halts the Internet Censorship Bill*, HUFFINGTON POST (June 1, 2011, 11:17 AM), https://www.huffpost.com/entry/wyden-again-halts-the-int_b_869281.

603. *About*, DEMAND PROGRESS, https://demandprogress.org/about/ (last visited July 26, 2021) (naming Aaron Swartz as a cofounder—one of Swartz's many successful experiments with the internet—and naming the successful campaigns Demand Progress led against internet censorship).

604. *See, e.g.*, Josh Blackman, *Donald Trump's Constitution of One*, NAT'L REV. (May 12, 2016, 8:00 AM), https://www.nationalreview.com/2016/05/donald-trump-constitution-end-

erated it, flux and convergence always did create a pretext for violations of the separation of powers.[605] Part II will detail prevalent separation of powers violations predicated on the elderly cohort's failure to keep up with the accelerated changes brought by internet fueled flux and convergence that affect the law.[606]

A Message from Senator Dianne Feinstein

In 1997, the self-described Boomer prophets William Strauss and Neil Howe, known as "Strauss-Howe," copped a phrase from *A Game of Thrones* writing ominously that "winter is coming."[607] Strauss-Howe explained that the Boomer generation was the key to America's survival in the coming winter.[608] They glowingly wrote of

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separation-powers/ ("Beyond libel laws, the serial-tweeter even said he would censor the Internet in the name of national security. In a speech in December, Trump urged shutting down parts of the Internet to stop ISIS—as if the Internet can be sectioned off like rooms in a casino.").

605. *See, e.g.*, Andrew Griffin, *London Terror Attack: Trump Says Internet must be 'Cut Off' to Stop Further Attacks*, INDEPENDENT (Sept. 15, 2017), https://www.independent.co.uk/life-style/gadgets-and-tech/news/donald-trump-twitter-internet-cut-terror-attacks-parsons-green-tube-attack-explosion-latest-a7948141.html (it is extremely unclear what cutting off the internet even means). Tech and telecom companies groom the public to accept false information about technology that feeds into major country-wide decisions about how to govern technology. *See, e.g.,* Karl Bode, *'5G' Wireless Doesn't Even Technically Exist Yet, But Everyone's Pretty Sure It's Going to Fix Everything*, TECHDIRT (Mar. 17, 2014, 8:52 AM), https://www.techdirt.com/articles/20140306/08062826462/5g-wireless-doesnt-even-technically-exist-yet-everyones-pretty-sure-its-going-to-fix-everything.shtml; Brian Barrett, *Inside the Olympics Opening Ceremony World-Record Drone Show*, WIRED (Feb. 9, 2018), https://www.wired.com/story/olympics-opening-ceremony-drone-show/ (this drone show never happened, and yet mainstream articles regarding the drone show at the Olympics remain so pervasive that most people actually believe they saw the drone show).

606. Avi Selk, *'There's so many different things!': How Technology Baffled an Elderly Congress in 2018*, WASH. POST (Jan. 23, 2019), https://www.washingtonpost.com/lifestyle/style/theres-so-many-different-things-how-technology-baffled-an-elderly-congress-in-2018/2019/01/02/f583f368-ffe0-11e8-83c0-b06139e540e5_story.html. *See* Bianca Majumder, *Congress Should Revive the Office of Technology Assessment*, CTR. AM. PROGRESS (May 13, 2019, 9:00 AM), https://www.americanprogress.org/issues/green/news/2019/05/13/469793/congress-revive-office-technology-assessment/ (Congress became willfully ignorant on technology ever since Newt Gingrich disbanded the Office of Technology Assessment that was originally established in 1972 to explain the impacts complex technology might have on constituents to Congress.).

607. WILLIAM STRAUSS & NEIL HOWE, THE FOURTH TURNING: AN AMERICAN PROPHECY 7 (1997) (appearing to take this phrase from *A Game of Thrones*); GEORGE R. R. MARTIN, A GAME OF THRONES 240 (1996) (inventing this phrase to mean something along the lines of that an apocalypse is coming).

608. STRAUSS & HOWE, *supra* note 607, at 325 (taken from Nathaniel Hawthorne's glowing opinion of the Puritans).

their future selves, "Thus will the Gray Champion [i.e., the Boomers] ride once more."[609]

Strauss-Howe's prophesies, written in a time of relative peace and prosperity,[610] appealed to Boomer vanity by putting the whole Boomer generation at the center of an imaginary political movement.[611] Strauss-Howe foretold that the next turning would occur around the year 2020, during which the "Aging Boomers will be drawn to . . . preservation of values that will increasingly seem antiquated to others."[612] It appears, however ironically, that the long awaited anticipation created by Strauss-Howe actually helped to cause the insurrection.[613]

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609. *Id.* at 51, 285. *See also id.* at 141, 325 ("As the next Gray Champion, the Boom Generation will lead at a time of maximum danger—and opportunity. . . . The continued maturation of Boomers is vital for the Crisis to end in triumph."); *id.* at 329–30 (feeding the Boomer ego by naming the Boomers who will be edging toward their 80's "old priest-warriors" and "elder expressions of the *Prophet* archetype" and writing boldly of the unending relevance of the Boomer: "Whether we welcome him or not, the Gray Champion will command our duty and sacrifice at a moment of Crisis.").

610. *See Peace, Prosperity, and Scandal*, CBS (Jan. 15, 2001, 1:48 PM), https://www.cbsnews.com/news/peace-prosperity-and-scandal/ ("On the peace-and-prosperity front, the numbers are beyond spin and are in Mr. Clinton's favor: America's economy enjoyed its longest peacetime expansion during his two terms in office.").

611. *See* David Greenberg, *The Crackpot Theories of Stephen Bannon's Favorite Authors*, POLITICO (Apr. 20, 2017), https://www.politico.com/magazine/story/2017/04/20/stephen-bannon-fourth-turning-generation-theory-215053/; *see also* Neil Howe, *Where did Steve Bannon get his worldview? From my book.*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/entertainment/books/where-did-steve-bannon-get-his-worldview-from-my-book/2017/02/24/16937f38-f84a-11e6-9845-576c69081518_story.html ("When 'The Fourth Turning' came out, our biggest partisan fans were Democrats . . . . Yet we've also had conservative fans . . . ."). These self-described prophesies appealed to Boomers, whether liberal or conservative, because the book itself described Millennials (they coined the "Millennial generation" and defined the Millennials when they were still children, before they had a chance to speak for themselves) in very unflattering light, as if Millennials were puddy in the Boomers' hands. *Id.*; STRAUSS & HOWE, *supra* note 607, at 285, 325 (predicting that "the young Millennials will follow the Gray Champion off a cliff," if the Boomers decide; in several places the book revels in the Boomers' role of defining the destiny of the Millennial generation and it exhorts Boomers to assert heavy handed control over Millennial futures, likely because Strauss-Howe feared that Millennials would be the most dangerous generation).

612. STRAUSS & HOWE, *supra* note 607, at 282; Jeremy W. Peters, *They Predicted 'The Crisis of 2020' . . . in 1991. So How Does This End?*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/28/us/politics/coronavirus-republicans-trump.html ("Their conclusions about the way each generation develops its own characteristics and leadership qualities influenced a wide range of political leaders, from liberals like Bill Clinton and Al Gore to pro-Trump conservatives like Newt Gingrich and Stephen K. Bannon.").

613. STRAUSS & HOWE, *supra* note 607, at 6, 31 ("Sometime before the year 2025," Strauss-Howe prophesied "[t]he nation could erupt into insurrection or civil violence, crack up geographically, or succumb to authoritarian rule."). *See* Adele M. Stan, *Insurrectionist in Chief: How Steve Bannon led the Vanguard of the Capitol Riots*, NEW REPUBLIC (Mar. 10, 2021), https://newrepublic.com/article/161574/steve-bannon-capitol-riots-insurrectionist-

An abiding belief that Boomers will be the saviors of humanity, supported by Strauss-Howe, emboldened many to take key roles in the January 6 coup attempt.[614] The Boomer tendency toward pride predated Strauss-Howe and perhaps they would have taken these actions without prophesy.[615] However, the Boomer tendency of denying that their generation is even capable of leaving America in a lurch, is a form of the "toxic positivity" that infused Donald J. Trump with an unnatural boldness that helped him win the presidency.[616]

Millennials do not similarly feel entitled to pretend superiority.[617] Millennials were not the architects of the January 6, 2021 insurrection, nor did they vote for Donald Trump who incited it.[618] Unlike the Boomers, who were known for rejecting the elderly in their

chief (discussing the Boomer prophesies of Strauss-Howe, that originally became popular because they satisfied Boomer vanity, as a direct cause of the insurrection of January 6, 2021).

614. JILL FILIPOVIC, OK BOOMER, LET'S TALK 13–14 (2020) ("Boomers on the left and the right cast their early adult years as a period of idealism and progress. They think themselves as having improved the world. A few Boomers certainly did, but overall, the Boomer generation brought us a rapid national shift away from the ideals of gender equality, racial justice, and pacifism. Perhaps this generation-wide self-delusion helps explain why Boomers have such a casual relationship with the truth. . . . Here's a smattering of what Fox News viewers and readers of FoxNews.com have heard from anchors, contributors, and guests:" Here Filipovic listed headlines that characterized Millennials as everything from the laughable "easily offended cocoon-dwellers" to asking, "Are Millennials to blame for all the world's problems?" to stating flatly "In 2017, the average terrorist is a Millennial.").

615. *Id.* at 14 (noting how Boomers from "aging lefties" to "the conservatives at Fox" all seem to "take credit for twentieth-century social progress while binge-watching Fox News and disseminating conspiracies theories on Facebook"). *Compare* STRAUSS & HOWE, *supra* note 607, at 141, 325 ("As the next Gray Champion, the Boom Generation will lead at a time of maximum danger—and opportunity. . . . The continued maturation of Boomers is vital for the Crisis to end in triumph."), *with* HOBBES, *supra* note 6, at 283 (appearing to describe believers in Strauss-Howe: "in such a number of men, that out of pride, and ignorance, thake their own Dreams, and extravagant Fancies, and Madnesse, for testimonies of Gods Spirit"); *id.* at 231 (naming human "pride" as the basis of his theory that all humanity must fall under absolute rule of "*Leviathan*"). *Cf.* Stan, *supra* note 613.

616. *See* MARY TRUMP, TOO MUCH AND NEVER ENOUGH 211 (2020).

617. FILIPOVIC, *supra* note 614, at 147 ("most [Millennials] were almost apologetic for suggesting that their pain might matter"); Andrew Van Dam, *The Unluckiest Generation in U.S. History: Millennials have faced the worst economic odds, and many will never recover*, WASH. POST (June 5, 2020), https://www.washingtonpost.com/business/2020/05/27/millennial-recession-covid/.

618. Aaron Blake, *More Young People Voted For Bernie Sanders Than Trump And Clinton Combined – By A Lot*, WASH. POST (June 20, 2016, 2:03 PM), https://www.washingtonpost.com/news/the-fix/wp/2016/06/20/more-young-people-voted-for-bernie-sanders-than-trump-and-clinton-combined-by-a-lot/ [hereinafter Blake, *More*]; Carrie Dann, *Younger voters choose Biden over Trump—but they're not wild about either*, NBC NEWS (Sept. 17, 2020, 1:30 AM), https://www.nbcnews.com/politics/meet-the-press/younger-voters-choose-biden-over-trump-they-re-not-wild-n1240269.

youth,[619] Millennials welcomed lessons by members of the Silent generation, such as Joan Didion, who doubted the dogmas of inherent Boomer goodness throughout their lives.[620]

Thus, on March of 2014, Millennial ears were open and listening when Senate Intelligence Committee Chairwoman Dianne Feinstein, member of the Silent generation, announced from the Senate floor information that should have changed the trajectory of American history.[621] Feinstein announced that the CIA improperly accessed the Senate committee staff's computers during the Senate investigation of the CIA's torture program.[622] Feinstein revealed a breach of the separation of powers on the national stage, no corrective

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619. Malcolm Kaines, *Baby Boomers, Critics of Millennials, Once Advised: 'Ignore Anyone Over 30'*, MEDIUM (July 29, 2018), https://medium.com/@MKaines/baby-boomers-critics-of-millennials-once-said-ignore-anyone-over-30-9b2f694b8dec.

620. Vicky Spratt, *The Real Reason Millennial Women Should All Be Obsessed With Joan Didion*, GRAZIA (Oct. 30, 2017), https://graziadaily.co.uk/life/tv-and-film/can-learn-joan-didion-documentary/ (reviewing the highly watched Netflix documentary about Didion *The Centre Will Not Hold*). As Millennials learned from Didion's cutting critiques of the Boomers, during the summer of love in 1967, the Boomers fed their five year olds acid, attempted to levitate the Pentagon, accepted the white supremacist Charles Manson among their ranks, and largely avoided joining the parallel occurring freedom summer events led by Dr. King. JOAN DIDION, THE WHITE ALBUM 42–47 (1990) [hereinafter DIDION, THE WHITE] ("Many people I know in Los Angeles believe that the Sixties ended abruptly on August 9, 1969, ended at the exact moment when word of the murders on Cielo Drive traveled like brushfire through the community, and in a sense this is true. The tension broke that day. The paranoia was fulfilled." Didion wrote of the day the news of the Tate murders broke: "I remembered all of the day's misinformation very clearly, and I also remember this, and wish I did not: *I remember that no one was surprised.*"); *id.* at 206–08 (After the Sixties passed away, many struggled against a deep seated fatalism, as one person Didion recalled, "attempted suicide in Mexico and then, in a recovery which seemed in many ways a more advanced derangement, came home and joined the Bank of America's three-year executive-training program."); JOAN DIDION, SLOUCHING TOWARDS BETHLEHEM 130–32 (1981) [hereinafter DIDION, SLOUCHING] (noticing, after seeing Hippies in black face harassing a black person, Boomers feeding acid to their babies); Peter Manseau, *Fifty Years Ago, a Rag-Tag Group of Acid-Dropping Activists Tried to "Levitate" the Pentagon*, SMITHSONIAN MAG. (Oct. 20, 2017), https://www.smithsonianmag.com/smithsonian-institution/how-rag-tag-group-acid-dropping-activists-tried-levitate-pentagon-180965338/; Daniel Kreps, *How a Stolen Beach Boys Song Helped Lead to Charles Manson's Murderous Path*, ROLLING STONE (Mar. 17, 2017), https://www.rollingstone.com/tv/tv-news/how-a-stolen-beach-boys-song-helped-lead-to-charles-mansons-murderous-path-117577/ (talking about how the Beach Boys recorded one of Manson's super creepy songs about enslaving and possibly murdering women originally titled *Cease to Exist*); *American Experience: Freedom Summer* (PBS television broadcast January 17, 2014) (noting the uncomfortable coexistence of Hippies and those actually fighting social justice causes).

621. Dianne Feinstein, Chairman, S. Intel. Comm., *Floor Speech on the CIA and the Separation of Powers*, C-SPAN (Mar. 11, 2014), https://www.c-span.org/video/?c4486741/dianne-feinstein-cia-separation-powers [hereinafter Feinstein, *Floor Speech*].

622. *Id.*

action was taken by the Boomer controlled White House and Congress, and eventually Feinstein herself walked back her calls for reform.[623]

The CIA confirmed that it hacked Congress by removing or altering evidence collected by the Senate Intelligence Committee during the Senate's review of the CIA torture program.[624] This strongly supports the idea that authorization of war powers through resolution cannot be meaningfully overseen when war powers are used to coerce Congress into reauthorizing them.[625] It appears that meaningful Senate oversight of executive war powers delegated by resolution is, therefore, not possible.[626]

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623. Eyder Peralta, *CIA Chief Apologizes to Sens. Feinstein, Chambliss Over Computer Intrusion*, NPR (July 31, 2014, 12:28 PM), https://www.npr.org/sections/thetwo-way/2014/07/31/336855226/cia-chief-apologizes-sens-feinstein-chambliss-over-computer-intrusion (CIA admitted what it did, but split hairs over whether it was a separation of powers violation, and then nothing happened—Obama was president, and the press did not dig into the intrusion); Evan Halper, *After calling for surveillance reform, Feinstein casts crucial vote to kill it*, L.A. TIMES, (Jan. 17, 2018, 11:40 AM), https://www.latimes.com/politics/la-na-pol-fisa-democrats-20180117-story.html.

624. Peralta, *supra* note 623.

625. Feinstein, *Floor Speech*, *supra* note 621.

626. This is an apparent, recent confirmation of what the founders thought when they ratified the declaration of war requirement. THE FEDERALIST No. 41 (James Madison) ("Is the power of declaring war necessary? No man will answer this question in the negative."); James Madison, *Helvidius No. IV* [Sept. 14, 1793] ("In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department."). Nevertheless, presidents still claim the power to wage war through U.N. resolution, without congressional approval through either declaration or resolution arguably making congressional oversight superfluous. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act*, 89 AM. J. OF INT'L L. 21, 33–39 (1995) (noting that Truman never got congressional approval for the Korean War—and cited to the U.N. Participation Act of 1945 to justify going to war for the first time); David Gray Adler, *The Law: The Clinton Theory of the War Power*, 30 PRESIDENTIAL STUDIES Q. 155, 156 (2000) (tracing the lineage of "[u]nilateral acts of presidential war making" from "Truman in Korea" to "Reagan in Grenada, to Bush in Panama, to Clinton in Iraq and Bosnia" and this article predated 9/11 and our war against terror in Iraq, Afghanistan, and elsewhere). Setting aside the fact that presidents since Truman claim unilateral war powers, the congressional tradition of waiving war powers on the belief that they could be supervised in a meaningful way was first based upon a lie, the existence of which reveals they never were supervised in a meaningful way. Gulf of Tonkin Resolution, H.R.J. Res. Pub. L. No. 88-408, 78 Stat. 384 (1964) (this resolution is the first congressional authorization of military force and set the standard for the way wars are waged by the United States ever since, based upon a lie that U.S. forces were attacked in the Gulf of Tonkin). The untrue claim that there was an attack in the Gulf of Tonkin as a the basis for going to war with Vietnam without a declaration was first revealed by the Pentagon Papers as analyzed in Hannah Arendt's essay *Lying in Politics*. ARENDT, CRISES, *supra* note 187, at 5; U.S. DEP'T OF DEF., REPORT OF THE OFF. OF THE SEC'Y OF DEF. VIETNAM TASK FORCE (1969), https://www.archives.gov/research/pentagon-papers [hereinafter PENTAGON PAPERS]. The Gulf of Tonkin lie was finally revealed to have originated by the president himself when President Johnson's papers were declassified, and now "[w]e can . . . finally tell the full story of what happened—and didn't—in the Gulf of Tonkin." D.D. Guttenplan, *When presidents lie to*

Feinstein's announcement should have inspired members of Congress to take strong action to protect the legislative power from the executive use of illegitimate war powers.[627] The first motion it should have made was to reinvoke the presumption of executive neutrality established by George Washington with the support of the first Supreme Court unless or until a war is actually declared by Congress.[628] That did not happen.[629]

Instead, the over-simplified, unitary executive theory continued to press forward.[630] This theory arises from the idea that the three branches of government are each unitary owing responsibility only to themselves, implying that each branch has no duty to work with the other branches to govern.[631] The idea of unitary powers undermines

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make war, GUARDIAN (Aug. 2, 2014, 5:00 AM), https://www.theguardian.com/commentisfree/2014/aug/02/vietnam-presidents-lie-to-wage-war-iraq (linking to D.D. Guttenplan's presentation *War, Lies and Audiotape* about the unlikelihood that the Gulf of Tonkin incident happened and yet: "Even today, the Gulf of Tonkin resolution remains the template for presidential war-making."); Scott Shane, *Vietnam War Intelligence 'Deliberately Skewed,' Secret Study Says*, N.Y. TIMES (Dec. 2, 2005), https://www.nytimes.com/2005/12/02/politics/vietnam-war-intelligence-deliberately-skewed-secret-study-says.html ("'The overwhelming body of reports, if used, would have told the story that no attack happened,' he wrote. 'So a conscious effort ensued to demonstrate that an attack occurred.'").

627. Connie Bruck, *The Inside War: To Expose Torture, Dianne Feinstein fought the C.I.A.—and the White House*, NEW YORKER (June 22, 2015), https://www.newyorker.com/magazine/2015/06/22/the-inside-war ("Most important, he [President Obama] refused to characterize the procedures as torture, or to say that they should not be used again. 'I defer to the policymakers in future times,' he said."). *See also* Spencer Ackerman, *There's a Secret Patriot Act, Senator Says*, WIRED (May 25, 2011, 4:56 PM), https://www.wired.com/2011/05/secret-patriot-act/; Swartz, *Keynote*, *supra* note 599 (noting a single U.S. Senator, Ron Wyden, was responsible for putting the COICA bill on hold, taking a pivotal act in saving the internet from SOPA, PIPA, and ACTA).

628. President George Washington, Proclamation 4—Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France (Apr. 22, 1793); Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793) (supporting Washington's neutrality decision based upon the separation of powers); Glass v. The Sloop Betsey, 3 U.S. 6, 16 (1794) (stripping France of all legitimacy regarding its by-any-means-necessary attempts to convince George Washington and the United States to join French wars).

629. Sheryl Gay Stolberg, *Senate Rejects Bipartisan Effort to End 9/11 Military Force Declaration*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/2017/09/13/us/politics/senate-rejects-rand-paul-effort-to-end-military-force-declaration.html.

630. *See, e.g.*, Dana D. Nelson, *The 'unitary executive' question*, L.A. TIMES (Oct. 11, 2008, 12:00 AM), https://www.latimes.com/opinion/la-oe-nelson11-2008oct11-story.html ("In answering Gwen Ifill's question about vice presidential powers at last week's debate, Joe Biden redirected attention to the still not very well known concept of the 'unitary executive.'").

631. U.S. CONST. art. I, § 6, cl. 1 (specifically allowing members of Congress to be arrested for treason); *id.* art. II, § 4 ("The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors."); *id.* art. III, § 3, cl. 1 (defining treason).

express constitutional limits upon each of the three powers so they can attack each other as vigorously as possible, which is clearly antithetical to the "good government" the founders hoped to establish.[632]

The Senate Intelligence Committee published its report on the CIA torture program, which was commented on by the ACLU and other groups, but was largely forgotten by the general public.[633] Ameri-

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See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 614 (1952) (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793)) (demonstrating that when the Court asserts the separation of powers to refuse making impermissible advisory statements at the President's request, the Court nonetheless should say that it regrets every instance it might embarrass the president's power). *Cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 677–78 (2006) (Scalia, J., dissenting) (noting a "novel unitary scheme of Article III review of military commissions that was absent in 1942"—but the difference is not a novel unitary scheme, but the absence of a declaration of war which should have distinguished *Ex parte Quirin*, a WWII case, from *Hamdan* and any case since the end of WWII—the last war we formally declared); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1, 2 (2002) [hereinafter Yoo, *War*] (noting that the issue of "control" over war is the center of the ongoing debate between Professor Yoo, author of the infamous Bush-era torture memos, and Professor Ramsey, former clerk of Justice Scalia, each of whom maintain a unitary view of power-as-mere-control rather than powers as something more complex like a means for legitimate governance).

632. The prevalence of the unitary powers ideology weighs strongly in favor of answering Alexander Hamilton's opening question of the Federalist Papers about whether human beings "are really capable or not of establishing good government from reflection and choice" in the negative. THE FEDERALIST No. 1 (Alexander Hamilton); Yoo, *War*, *supra* note 626, at 28 (resisting the ways that the founders "sought to control executive power by disrupting the structural unity of the executive branch," because as an advocate of unitary executive power, Yoo saw power as a mere *Lord of the Flies* styled struggle for control in which he contended the executive prevails). Yoo's regular pro-Congress debate partner Professor Ramsey contended that the legislature prevails; but both Yoo and Ramsey were preoccupied with mere unitary control of government and they each make little space for the nuance required for how government officials should properly govern. *id. See also* Jonathan Stein & Tim Dickinson, *Lie by lie: A Timeline of How We Got Into Iraq*, MOTHER JONES (Sept./Oct. 2006), https://www.motherjones.com/politics/2011/12/leadup-iraq-war-timeline/ (naming Yoo's statements as a DOJ lawyer that laws and treaties don't apply to the president's inherent war powers). *Cf.* THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776) (naming the English government illegitimate for "render[ing] the Military independent of and superior to the Civil power"); JEFFERSON, NOTES, *supra* note 268, at 323 (Echoing the Declaration in his draft of the Virginia constitution, and indicating that the Suspension Clause of the U.S. Constitution was later ratified in order to maintain that "[t]he military shall be subordinate to the civil power."); U.S. CONST. art. I, § 9, cl. 2. *But see* Hamdi v. Rumsfeld, 542 U.S. 507, 580–83 (2004) (Thomas, J., dissenting) (arguing that the "unitary Executive" was reason enough for the Court to suspend habeas jurisdiction).

633. *See generally Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program Together with Foreword by Chairman Feinstein and Additional and Minority Views*, S. Rep. No. 113–288 (2014) (whatever is in this report is at least in part a product of the CIA's hacking efforts—and it is unclear how much of its findings were compromised); Ashley Gorski & Noa Yachot, *Who's Afraid of the Torture Report?*, ACLU BLOG (Nov. 10, 2015, 6:00 PM), https://www.aclu.org/blog/national-security/torture/whos-afraid-torture-report (noting that Obama officials were blocking officials from reading the Senate report on torture even after it was publicly released).

cans will never know the extent to which the report's findings were adulterated by the executive, nor what may have been uncovered had the Senate Intelligence Committee been allowed to investigate without interference.[634] The fact of executive interference with the legislative branch is, however, undeniable.[635]

Executive meddling in legislative affairs by the use of war powers casts doubt on the legitimacy of all U.S. laws.[636] If even Congress is not secure from war powers, then those war powers, whatever they are, cannot be legitimate—because war powers must derive from Congress alone.[637] In the words of John Adams, "an executive that unduly takes control of Congress is a government of men that is subverting or altogether destroying the Rule of Law."[638]

Only a small contingent of lawmakers, led by Senator Ron Wyden of Oregon, disputed the legitimacy of secret law.[639] The rest appeared to presume the legitimacy of the industrial war and prison complexes in the United States according to secret law, even after Edward Snowden's disclosures,[640] and none appeared to recognize their

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634. Spencer Ackerman, *'A constitutional crisis': the CIA turns on the Senate*, GUARDIAN (Sept. 10, 2016, 8:00 AM), https://www.theguardian.com/us-news/2016/sep/10/cia-senate-investigation-constitutional-crisis-daniel-jones.

635. *Id.*

636. *Id.*; U.S. CONST. art. III, § 3, cl. 1 (an executive that hacks Congress to get his way is arguably committing treason as defined in the constitution—an impeachable offense).

637. U.S. CONST. art. I, § 8, cl. 10–16; James Madison, *Helvidius No. IV* [Sept. 14, 1793] ("In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department.").

638. John Adams, *Thoughts on Government* 8, 13–14, 26 [1776].

639. Ron Wyden, *On NSA Spying & Secret Law*, C-SPAN (Dec. 31, 2012), https://www.c-span.org/video/?c4279272/ron-wyden-nsa-spying-secret-law; Press Release, Sen. Ron Wyden, Wyden: Gorsuch's History on Torture and Secret Law is Disqualifying for Supreme Court (Mar. 23, 2017), https://www.wyden.senate.gov/news/press-releases/wyden-gorsuchs-history-on-torture-and-secret-law-is-disqualifying-for-supreme-court. *See* Kastely, *supra* note 186, at 8 (noting that the legitimacy of the laws requires that they be made public).

640. *See, e.g.*, Norman Solomon, *Big Brother's Loyal Sister: How Dianne Feinstein is Betraying Civil Liberties*, COMMON DREAMS (Nov. 6, 2013), https://www.commondreams.org/views/2013/11/06/big-brothers-loyal-sister-how-dianne-feinstein-betraying-civil-liberties; Swartz, *Keynote*, *supra* note 599 (noting that some of the most corrupt or misinformed individuals are progressive and Democrat); James Risen, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html ("Dana Priest, a Pulitzer Prize-winning reporter for The Washington Post, added: 'Obama's attorney general repeatedly allowed the F.B.I. to use intrusive measures against reporters more often than any time in recent memory. The moral obstacles have been cleared for Trump's attorney general to go even further, to forget that it's a free press that has distinguished us from other countries, and to try to silence dissent by silencing an institution whose job is to give voice to dissent.'"); Glenn Greenwald, *Democrats Continue to Delude Themselves About Obama's Failed Guantánamo Vow*, THE INTERCEPT (Aug. 12, 2015), https://theintercept.com/2015/08/12/democrats-continue-lie-obamas-failed-guantanamo-vow/.

own vulnerability until Barton Gellman published his book *Dark Mirror* that revealed that members of Congress may regularly be monitored and perhaps manipulated by executive branch surveillance.[641] When President Obama put Congress to the test in 2014 and asked it to abide by an executive that hacks Congress whenever the Senate tries to oversee executive torture programs, Congress failed to push back.[642]

Under the leadership of Senator Feinstein, Congress managed to say what happened at least, which is something the Boomers in leadership resisted.[643] The Boomers' preference for appearing to be inherently good was overridden by Senator Feinstein, even when it caused members of her own party to take some heat.[644] By airing this grievance publicly on the floor of Congress, Feinstein gave future generations an opportunity to discuss the events giving rise to a government spy program with the capability of hacking Congress.[645]

However, it is unfortunate that Congress was unable to gather the political will to pass laws that preclude future presidents from corrupting congressional investigations by targeting them with spy operations and specifically to stop the executive branch from continuing to torture people.[646] Failing to end secret torture chambers administered by the U.S. Government without oversight leant gravity to QAnon conspiracies, which supported Trump's candidacy with mis-

641. *See* Letter from Rep. Anna G. Eshoo to Hon. John Ratcliffe & Hon. Paul M. Nakasone (Aug. 28, 2020) ("The surveillance of Congressional and judicial communications by the executive branch seriously threatens the separation of powers principles of our constitution.") (quoting GELLMAN, *supra* note 407, at 326).

642. Even when Congress itself was the victim of acts of espionage by their own government, Congress *still* did not change existing laws that allow the President sweeping control over domestic communications. Jason Koebler, *The CIA Hacked Senate Computers, Lied About It, and No One is Getting Fired*, VICE: MOTHERBOARD (July 31, 2014), https://motherboard.vice.com/en_us/article/gvy537/the-cia-hacked-senate-computers-lied-about-it-and-no-one-is-getting-fired; Josh Gerstein, *Feinstein still pressing Obama to declassify 'torture report'*, POLITICO (Nov. 29, 2016), https://www.politico.com/blogs/under-the-radar/2016/11/feinstein-cia-torture-report-231978 (Congress has the power to fix this, but Feinstein only managed to beg Obama to do the bare minimum of what Congress should do for itself); U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy . . . .")

643. Feinstein, *Floor Speech*, *supra* note 621.

644. *Id.*; Bruck, *supra* note 627.

645. Feinstein, *Floor Speech*, *supra* note 621.

646. *See* Sara Morrison, *The Senate voted to let the government keep surveilling your online life without a warrant*, VOX (May 14, 2020, 4:46 PM), https://www.vox.com/recode/2020/5/13/21257481/wyden-freedom-patriot-act-amendment-mcconnell.

information.[647] Congress's lack of action in 2014 also added a measure of reality to Trump's consistent attack on the Washington "swamp" that he purportedly tried to drain on January 6, 2021.[648]

Young Americans can still pull the Boomers' hands off the self-destruct button if young Americans endeavor to understand how the Baby Boomers are subverting the separation of powers.[649] Members of the Silent Generation, like Senator Feinstein, were willing to air messages on the Senate floor to reveal both a corruption of the separation of powers by a Boomer run White House.[650] Ever since Feinstein's message the government began to unravel until finally on January 6, 2021, the President Trump attempted to stage a *coup d'etat*.[651]

The self-interested rationalism of the Baby Boomers in charge that encouraged and excused the attacks of January 6, 2021, resemble Marat's declarations of rational self-interest that directly predated the

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647. *See* Mikael Thalen, *QAnon's Guantanamo Frenzy*, Daily Dot (Aug. 2, 2021), https://www.dailydot.com/debug/conspiracy-theory-newsletter-guantanamo-bay-facebook-08-02-2021/. *Cf.* Greenwald, *supra* note 640 (Obama promised to end Guantanamo and failed to shut it down).

648. *See* Ken Bensinger & Jessica Garrison, *Watching the Watchmen*, BUZZFEED NEWS (July 20, 2021, 8:36 AM), https://www.buzzfeednews.com/article/kenbensinger/michigan-kidnapping-gretchen-whitmer-fbi-informant (reporting that "the FBI, played a far larger role than has previously been reported" in pro-Trump plots to retain the presidency); Zoe Tillman, *Trump Gave Capitol Rioters the Language to Defend the Insurrection and Deny Reality*, BUZZFEED NEWS (July 17, 2021, 11:01 AM), https://www.buzzfeednews.com/article/zoetillman/january-six-suspects-trump-statements. *Cf.* McKenzie Sadeghi, *Fact check: Claims of FBI role in Jan. 6 Capitol attack are false*, USA Today (June 25, 2021, 5:35 PM), https://www.usatoday.com/story/news/factcheck/2021/06/25/fact-check-no-evidence-fbi-organized-jan-6-capitol-riot/7753276002/.

649. *See* Stan, *supra* note 613 (discussing the Boomer prophesies of Strauss-Howe as a cause, and may be *the* cause, of the January 6, 2021, coup attempt). *Cf.* FILIPOVIC, *supra* note 614, at 13–14; BRUCE CANNON, A GENERATION OF SOCIOPATHS: HOW THE BABY BOOMERS BETRAYED AMERICA xxv (2017) (calling the Boomer systems created to steal wealth from the young "generational plunder").

650. Feinstein, *Floor Speech*, *supra* note 621 ("Based on what Director Brennan has informed us, I have grave concerns that the CIA's search may well have violated the separation of powers principles embodied in the United States Constitution, including the Speech and Debate clause. It may have undermined the constitutional framework essential to effective congressional oversight of intelligence activities or *any other government function*.") (emphasis added); Daniel Cooney, *Sen. Dianne Feinstein on NSA Ruling: Telecom Companies Should Hold Data*, NBC (May 10, 2015), https://www.nbcnews.com/meet-the-press/sen-dianne-feinstein-telecom-companies-should-hold-data-n356721 (originally a proponent of the USA Patriot Act, after the Senate was hacked by the CIA, Feinstein continued to hold out hope that executive spying of Americans could be limited by overseeing who holds our data—which is a non-solution).

651. HOBBES, *supra* note 6, at 46–48, 231; Dan Zak, *Baby boomers are the zombie invasion we've feared*, WASH. POST, (June 29, 2016), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/06/29/baby-boomers-are-the-zombie-invasion-weve-feared/ ("Our elders have broken the tradition of being good ancestors.").

French Reign of Terror.[652] Americans can learn from history that ordinary gamblers make the most capable terrorists.[653] Americans can also, like Phillis Wheatley, oppose the selfishness that caused the Boomers' worst mistakes in order to help free people once again from oppression and bondage; the choice is eternally theirs.[654]

The Merger of War and Peace Powers

The separation of war and peace powers in the constitution resides in the power and duty of Congress to declare war.[655] Peace powers are presumed—Congress does not need to declare peace before it can regulate commerce with foreign nations, between the states, or with Native American tribes.[656] The president does not need congressional approval to enter into peace talks or trade negotiations, to

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652. Zak, *supra* note 651; 1 JEAN-PAUL MARAT, A PHILOSOPHICAL ESSAY ON MAN 138–39 (1773) (causing rivers of blood to flow in France based upon rational self-interest); ERNEST BELFORT BAX, JEAN PAUL MARAT 325–30 (1879) (Speaking of Marat, French mothers said of their children: "'We will give them for a gospel,' said one, 'the complete words of this great man.'"). *See, e.g.,* Tom Toles, Opinion, *He who dies with the most toys now loses!*, WASH. POST (Oct. 24, 2016), https://www.washingtonpost.com/news/opinions/wp/2016/10/24/he-who-dies-with-the-most-toys-now-loses/ (denouncing Boomer selfishness ideologies). The American Revolutionaries frequently denounced selfishness. Ann Bleecker, *A Pastoral Dialogue* [1780], *in* ANN ELIZA BLEECKER, THE POSTHUMOUS WORKS OF ANN ELIZA BLEECKER 253–59 (1793) ("Americans! Ye thought your labours o'er, / Ah no! the hydra Envy brings you more.").

653. *Compare* Jose A. Del Real & Jonah Engel Bromwich, *Stephen Paddock, Las Vegas Suspect, Was a Gambler Who Drew Little Attention*, N.Y. TIMES (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/us/stephen-paddock-vegas-shooter.html (explaining that Paddock was a millionaire real estate businessman who liked casinos, he did not hold any strong religious views, and he seemed like a "nice" guy), *with* Elaina Plott, *Why Trump Can't Quit Steve Wynn*, THE ATLANTIC (Jan. 28, 2018), https://www.theatlantic.com/politics/archive/2018/01/trump-wynn/551693/ (Trump is a billionaire real estate businessman who likes casinos, he does not hold any strong religious views, and to many he seems like a "nice" guy.).

654. Phillis Wheatley, *To the University of Cambridge* [1767] (Wheatley advised the students of Harvard to "Suppress the sable monster in its growth"); Phillis Wheatley, *To the Right Honorable William, Earl of Dartmouth* [1773] (Wheatley explained the basis for her cause for American freedom saying, "And can I then but pray / Others may never feel tyrannic sway?"—this poem was written in front of the wealthy English merchant Thomas Wooldridge who was so inspired by it that he sent it to the Earl of Dartmouth on her behalf—this Earl was in charge of managing all the American Colonies during the revolutionary era and is the namesake of Dartmouth College). *See* 2 WILLIAM LEGGE, THE MANUSCRIPTS OF THE EARL OF DARTMOUTH 107–08 (George Athan Billias intro., 1972) (confirming that Wooldridge sent Phillis Wheatley's poem to William Legge the Earl of Dartmouth in 1772).

655. U.S. CONST. art. I, § 8, cl. 11; MONSIEUR DE VATTEL, THE LAW OF NATIONS 314–15 (Edward D. Ingraham ed. & trans., 1867) [1758].

656. U.S. CONST. art. I, § 8, cl. 3.

embargo arms deals, or to block U.S. citizens from mercenary service.[657]

By contrast, war powers are not presumed.[658] On the high seas, a piracy law passed by Congress is required; on land, a formal declaration of war is required.[659] Within the physical borders of the United States, legitimate war powers do not exist unless America is attacked.[660] The president has inherent war powers to put down

657. *See* President George Washington, Proclamation 4—Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France (Apr. 22, 1793) (ordering U.S. citizens not to sell themselves as mercenaries to the French Government in their war against England); President Thomas Jefferson, Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters (July 2, 1807) (revoking hospitality toward British vessels impressing U.S. citizens into British service); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 311, 331–32 (1936) (affirming the president's power to block a sale of machine guns to the Chaco region of Bolivia).

658. U.S. CONST. art. I, § 8, cl. 10–11.

659. *Id.*; Little v. Barreme, 6 U.S. 170, 178 (1804) (holding that the president's attempt to order the civil forfeiture of a vessel beyond the authorization of Congress was a plain trespass); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring) ("Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may, in fact, exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.").

660. *Ex parte* Milligan, 71 U.S. 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority [i.e., the Civil War]."—the rule is that as long as the doors of the court are not shuttered by actual violence, that civil law rules, and martial law (which is not a law) is illegitimate and not permitted); *Youngstown*, 343 U.S. at 585–86 ("The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. . . . Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.").

insurrections, as in the Civil War, and to repel an attack by a foreign nation on American soil, as in the attack on Pearl Harbor.[661]

Declarations of war are well defined in the law of nations, and it appears that the United states has only recently lost touch with this basic requirement.[662] In conflicts preceding the Korean and Vietnam

661. *Milligan*, 71 U.S. at 127 ("Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."); Duncan v. Kahanamoku, 327 U.S. 304, 334–35 (1946) (affirming *Milligan*'s "'open court' rule" in response to the Japanese invasion at Pearl Harbor); U.S. CONST. pmbl.; *id.* art. IV, § 4 (The preamble states that a purpose of the U.S. Government is to ensure "domestic Tranquility," and thus in this interest "on application of the legislature, or of the executive (when the legislature cannot be convened)" the states shall be protected "against domestic violence." Domestic violence includes the Southern slavery system; the Confederate States in rebellion had more than a long enough chance to end the institution of slavery and given the time to do so they attempted to reform the entire U.S. as a slavery country, and then they tried to secede. As a practical matter, when every level of government is besieged with treason, and the U.S. Supreme Court appears to throw its entire weight behind the rebels in the South as the Taney Court did—the President must take action in the style of President Lincoln to safeguard the font from which every power of the federal government is derived—the U.S. social compact.). *But see Ex parte* Merryman, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9,487) (The Southern sympathizer Chief Justice Taney held that President Lincoln suspended habeas corpus by arresting a suspect of armed insurrection who we might consider a terrorist suspect today. Then Chief Justice Taney considered a habeas writ to release Merryman before Lincoln had any chance of investigating whether Merryman had any connection to the suspected crimes or trying him for such crimes could take place—*Ex parte Merryman* directly precipitated the Civil War, and gave pretextual legal cover for those who carried out the Lincoln assassination.); Abraham Lincoln, Exec. Order No. 1—Relating to Political Prisoners (Feb. 14, 1862) (noting that the federal courts and all levels of the federal government were besieged with treason—possibly referring to *Merryman*).

662. THE FEDERALIST NO. 41 (James Madison) ("Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative."); VATTEL, *supra* note 655, at 314–15 ("The right of making war belongs to nations only as a remedy against injustice: it is the offspring of unhappy necessity. This remedy is so dreadful in its effects, so destructive to mankind, so grievous even to the party who has recourse to it, that unquestionably the law of nature allows it only in the last extremity,—that is to say, when every other expedient proves ineffectual for the maintenance of justice. . . . [then Vattel goes over the baseline requirements for going to war and concludes] But all this is not sufficient. As it is possible that the present fear of our arms may make an impression on the mind of our adversary, and induce him to do us justice,—we owe this further regard to humanity, and especially to the lives and peace of the subjects, to declare to that unjust nation, or its chief, that we are at length going to have recourse to the last remedy, and make use of open force, for the purpose of bringing him to reason. This is called *declaring war*."). *See* Fisher, *supra* note 626, at 33–39 (noting the role of UN Security Council decisions in the creation of the Korean War); *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring) (President Truman started his war in Korea without congressional approval, and then ordered the nation's privately owned steel mills to be seized for public use in furtherance of war, and when one of these steel mills disputed this order in court he told the court that he "invested himself with 'war powers,'" to which the Court replied that it would be nothing "more sinister and alarming" if such a thing were legitimately possible, noting that a declaration of war may be required.); Exec. Order No.

Wars, the declaration of war requirement was observed.[663] Only in the post-WWII era the distinction between war and peace, which was regularly expounded on the floor of Congress, was forgotten.[664] For example, John Quincy Adams defined the war and peace powers from the floor of Congress saying,

> There are, then, Mr. Chairman, in the authority of Congress and of the Executive, two classes of powers, altogether different in their nature, and often incompatible with each other—the *war power* and the *peace power*. The peace power is limited by regulations, and restricted by provisions, prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations. The power is tremendous: it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life.[665]

Thus, when President Truman tried to seize all U.S. steel mills to support his private war in Korea without congressional approval, the U.S. Supreme Court responded, "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."[666] Justice Jackson further clarified that, "Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress."[667]

10340, 17 Fed. Reg. 3,139 (1952) (ordering the seizure of several steel businesses across the United States listed in the order).

663. The Korean War was waged without any form of congressional approval and the Vietnam War was indulged solely by congressional resolution. Fisher, *supra* note 626, at 33–39; Sarnoff v. Shultz, 409 U.S. 929, 930 (1972) (Douglas, J., dissenting) ("No declaration of war has been made respecting Vietnam. Hence the question can be phrased in terms of the constitutionality of the use of funds to pursue a 'Presidential war.'").

664. *See, e.g.*, Ronald K. L. Collins & David M. Skover, *What is War?: Reflections on Free Speech in "Wartime"* 36 RUTGERS L.J. 833, 839 (2005) ("a formal declaration has not proven historically to be a condition precedent for the existence of 'war'; and in more modern times, such a declaration has become entirely irrelevant").

665. JOHN QUINCY ADAMS, SPEECH OF JOHN QUINCY ADAMS, ON THE JOINT RESOLUTION FOR DISTRIBUTING RATIONS TO THE DISTRESSED FUGITIVES FROM INDIAN HOSTILITIES IN THE STATES OF ALABAMA AND GEORGIA 3–4 (1836) [hereinafter QUINCY ADAMS, SPEECH] (emphasis added).

666. *Youngstown*, 343 U.S. at 587, 590 (quoting the executive order, basing its seizure of steel mills on the "'American fighting men and fighting men of other nations . . . now engaged in deadly combat with the forces of aggression in Korea'"); *id.* at 642 (Jackson, J., concurring) ("That seems to be the logic of an argument tendered at our bar—that the President having, of his own responsibility, sent American troops abroad derives from that act 'affirmative power' to seize the means of producing a supply of steel for them.").

667. *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring). Justice Jackson's concurrence was not clear enough to stop the President from redefining the declaration of war in Japan to require unconditional surrender. Dorothy Day, *We Go on Record: the CW Response*

The expansion of presidential powers during the Truman Administration was years in the making.[668] Advocacy for the obsolescence of declarations of war trace back at least as far as the Spanish–American War; and the beginning of Theodore Roosevelt's political career.[669] It appeared that in the year 2020, Theodore Roosevelt finally prevailed in his struggle to merge the war and peace powers and vest them in the president as imagined by his *Corollary on the Monroe Doctrine*.[670]

Though Congress and the president seem to regard declarations of war as a vestige of a bygone era, the question has never been briefed in the U.S. Supreme Court.[671] Apart from the president's duty to defend the people of the United States from invasion or rebellion, no U.S.

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to Hiroshima, CATHOLIC WORKER (Sept. 1, 1945) http://www.catholicworker.org/dorothyday/articles/554.html ("Mr. Truman was jubilant. President Truman. True man; what a strange name, come to think of it. We refer to Jesus Christ as true God and true Man. Truman is a true man of his time in that he was jubilant. He was not a son of God, brother of Christ, brother of the Japanese, jubilating as he did. He went from table to table on the cruiser which was bringing him home from the Big Three conference, telling the great news; 'jubilant' the newspapers said. Jubilate Deo. We have killed 318,000 Japanese."). *See* Gar Alperovitz, *Did America Have to Drop the Bomb? Not to End the War, But Truman Wanted to Intimidate Russia*, WASH. POST (Aug. 4, 1985) https://www.washingtonpost.com/archive/opinions/1985/08/04/did-america-have-to-drop-the-bombnot-to-end-the-war-but-truman-wanted-to-intimidate-russia/46105dff-8594-4f6c-b6d7-ef1b6cb6530d/.

668. Letter from Theodore Roosevelt to Sir George Otto Trevelyan (June 19, 1908) ("I believe in power" — "I don't think that any harm comes from the concentration of power in one man's hands.").

669. Prior to his involvement position as Assistant Secretary to the Navy and as leader of the Rough Riders in Cuba, he was only a local political figure. THEODORE ROOSEVELT, ROUGH RIDERS 26, 58, 187 (1899); Treaty of Paris of 1898, Spain-U.S., art. 1–3, Dec. 11, 1898, 11 Bevans 615 (ceding Guam, Puerto Rico, and the Philippines to the United States, and creating the opportunity for the United States to invade Cuba in order to eventually force Cuba to allow the United States to open Guantanamo Bay prison on Cuban soil). *See* Platt Amendment, 31 Stat. 895, 897 (1901) (requiring Cuba to lease the U.S. lands); 1903 Treaty of Relations, Cuba-U.S., art. 1, Feb. 16–23, 1903, 6 Bevans 1116 (creating Guantanamo Bay); Theodore Roosevelt, Exec. Order No. 518 (Oct. 23, 1906) (order for U.S. reoccupation of Cuba).

670. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (appropriating funds to build a wall between the United States and Mexico without congressional approval). *Compare* President Theodore Roosevelt, Fourth Annual Message (Dec. 6, 1904) (primarily justifying "interference from the United States . . . in the last resort" in other countries in the Western Hemisphere, and noting that interference with Cuba was required citing to the Platt Amendment), *with* President James Monroe, Seventh Annual Message (Dec. 2, 1823) (primarily declaring noninterference in foreign countries, and noting "[w]ith the existing colonies or dependencies of an European power we have not interfered and shall not interfere"); Letter from Theodore Roosevelt to Sir George Otto Trevelyan (June 19, 1908) ("I believe in power" — "I don't think that any harm comes from the concentration of power in one man's hands."). *But see* Sierra Club v. Trump, 977 F.3d 853, 888–90 (9th Cir. 2020).

671. Holmes v. United States, 391 U.S. 936, 938 (1968) (Douglas, J., dissenting) ("It is clear from our decisions that conscription is constitutionally permissible when there has been a declaration of war. But we have never decided whether there may be conscription in

Supreme Court opinion upheld a presumption that war powers are inherent presidential powers.[672] If the Court ever did, it might render itself superfluous.[673]

Though the Court is in nearly unanimous agreement that Article III should not be rendered ineffective in matters of war and peace, it has yet to formulate an effective way to adjudicate constitutional violations occurring under war resolutions.[674] It is hard to say why, when, or even whether the Court left the question of congressional declarations of war behind.[675] It appears that the question is still ripe for review under *Flast* as noted by Justice Douglas in his *Sarnhoff v. Schultz* dissent.[676]

Since WWII, the question of what war powers are vested in which branches of government—absent a formal declaration—was left

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absence of a declaration of war. Our cases suggest (but do not decide) that there may not be."). *Cf. Youngstown*, 343 U.S. at 585–86.

672. *Holmes*, 391 U.S. at 949 (Douglas, J., dissenting) (it seems that the existence of the military industrial complex largely exists in an empty space in the law created by the Court's refusal to answer this question); *Youngstown*, 343 U.S. at 585–86 (deciding only that if a President does not have congressional approval, he cannot seize the nation's steel mills—however, the Court did not make clear what kind of approval would be required). Jurisdiction to hear the question still appears to exist under *Flast*. Sarnoff v. Shultz, 409 U.S. 929, 930 (1972) (Douglas, J., dissenting) (citing Flast v. Cohen, 392 U.S. 83 (1968)).

673. Justice Thomas argued that the Court should not help a U.S. citizen illegally and arbitrarily imprisoned in Guantanamo Bay. Hamdi v. Rumsfeld, 542 U.S. 507, 592–93 (2004) (Thomas, J., dissenting) (arguing that the Court should allow the president to lock a U.S. citizen in a foreign prison without a trial and throw away the key, practically advocating the overruling of *Ex parte Milligan* by arguing that U.S. citizens today should be treated like enemies of the state, and suspending the writ of habeas corpus in Hamdi's case and almost entirely removing federal jurisdiction to review any such cases arising from presidential detention of U.S. citizens as long as the executive branch alleges that the crimes these disappeared persons committed against the United States were truly heinous).

674. *Id.* at 536 (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."). *Id.* at 554 (Scalia, J., dissenting) (Justice Scalia and Justice Stevens dissented, because they believed that Hamdi deserved to be tried for treason in an Article III Court, "Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.").

675. *Holmes*, 391 U.S. at 936 (mem.) (noting that, perhaps, if the question presented included whether "in the absence of a declaration of war" whether the U.S. Government could "compel military service in [an] armed international conflict oversees" he would have voted for certiorari like Justice Douglas).

676. Sarnoff v. Shultz, 409 U.S. 929, 930 (1972) (Douglas, J., dissenting) (citing Flast v. Cohen, 392 U.S. 83 (1968)) ("The action here, as in *Flast*, is a challenge by federal taxpayers of a violation of a specific constitutional provision. Actions of the Congress and of the Executive are involved here as in *Flast*. The question is therefore no more 'political' in this case than in *Flast*."); *Holmes*, 391 U.S. at 936 (mem.); Hart v. United States, 391 U.S. 956, 960 (1968) (Douglas, J., dissenting) (a dissent along the same lines as *Holmes*, arguing the Court should have granted certiorari).

unanswered.[677] Leaving this vital question undecided, the post-9/11 Court lurched forward.[678] In *Hamdi v. Rumsfeld* the Court set forth a confusing simultaneous application of *Ex parte Quirin* and *Ex parte Milligan* though the former was decided under a declaration of war and the latter was not.[679]

The unfortunate post-9/11 result was a tripartite compromise represented by *Hamdi*, *Padilla*, and *Rasul*.[680] While these cases acknowledged the right to counsel, to habeas corpus, and to due process,

677. *Holmes*, 391 U.S. at 949 (Douglas, J., dissenting); *Youngstown*, 343 U.S. at 585–86 (this case hinted at the fact that a declaration of war would be necessary to justify a government taking of the nation's steel mills, but did not get it did not need to get into the details—thus it can be characterized as a nondelegation case for its focus on Congress's Takings Clause power). World War II involved six declarations of war against Japan, Germany, Italy, Bulgaria, Hungary, and Romania.

678. Hamdi v. Rumsfeld, 542 U.S. 507, 518–19, 535 (2004) (plurality opinion) (citing *Ex parte* Quirin, 317 U.S. 1, 28, 30, 61 (1942) (involving a military execution of a U.S. citizen in the United States during WWII); Korematsu v. United States, 323 U.S. 214, 233–34 (1944) (Murphy, J., dissenting) (involving the internment of loyal U.S. citizens during WWII)); *id.* at 543 (Souter, J., concurring in part and dissenting in part) (citing *Ex parte* Endo, 323 U.S. 283, 285–88 (1944) (another case regarding Japanese internment during WWII)); *id.* at 586–87 (Thomas, J., dissenting) (citing *In re* Yamashita, 327 U.S. 1, 12 (1946) (a case involving the military execution of General Yamashita during General McArthur's military rule of the Philippines); Duncan v. Kahanamoku, 327 U.S. 304, 313–14 (1946) (a case involving the martial rule of Hawaii after Pearl Harbor); Lichter v. United States, 334 U.S. 742, 767 n. 9 (1948) (a suit regarding the U.S. recovering an excess of profits made by private companies on war contracts)); Rumsfeld v. Padilla, 542 U.S. 426, 444 (2004) (citing Ahrens v. Clark, 335 U.S. 188, 190–92 (1948) (a case denying habeas review to Germans being deported from Ellis Island, because Ellis Island was according to *Ahrens* beyond the jurisdiction of the Court—this was wholly overruled in *Boumediene* regardless of whether a declaration of war was made, because habeas jurisdiction is based upon federal jurisdiction over the custodian, regardless of the geographic location)); Rasul v. Bush, 542 U.S. 466, 472–73 (2004) (citing Johnson v. Eisentrager, 339 U.S. 763, 777–78 (1950) (a case involving habeas jurisdiction over cases regarding war crimes committed by foreign enemies held in military bases abroad, during war)).

679. *See, e.g.*, *Hamdi*, 542 U.S. at 523 (plurality opinion) (citing *Ex parte* Quirin, 317 U.S. 1, 21 (1942) (noting that the petitioners who were denied habeas relief, including one naturalized U.S. citizen, were trained "at a sabotage school near Berlin, Germany" – "*[a]fter the declaration of war* between the United States and the German Reich") (emphasis added); *Ex parte* Milligan, 71 U.S. 2, 124–25 (1866) (During the Civil War, an insurrection or rebellion which was perpetrated by the Southern States *without a declaration of war*, Milligan was held and tried by a military commission in the North. It would be absurd to say that Congress could have declared war on its own states, or that Lincoln should have waited for Congress to do so before putting down the Confederate Rebellion.)).

680. *Hamdi*, 542 U.S. at 509, 535–36 (plurality opinion) (deciding that U.S. citizens have a right to due process before their life, liberty, or property are taken from them—but decided that a military tribunal could satisfy this requirement); *Padilla*, 542 U.S. at 434–35 (deciding that habeas jurisdiction turns on the federal jurisdiction over the custodian, not the prisoner—but deciding that the exact custodian must be named in the habeas petition based on the interpretation of a law directly overruled by *Boumediene*); *Rasul*, 542 U.S. at 474–75 (deciding that enemy aliens held in Guantanamo Bay have a constitutional right to a habeas petition).

Justice O'Connor's plurality in *Hamdi* left open the possibility that process given in military courts could suffice as due legal process.[681] In all earlier case law and under the light of all human history, this is an unsustainable contradiction.[682]

The *Hamdi* plurality gave rise to a strange, new Article III review process for military tribunals.[683] The travesty of the *Hamdi* plurality's trusting civil jurisdiction to the military consists in the fact that martial law is necessarily arbitrary and uncontrollable;[684] the *Hamdi* plurality's use of a *Mathews* balancing test to cede power to the executive as if the military law is an ordinary administrative enabling law smacks of a naivete that preceded the rise of dictatorships preceding WWII.[685] Like the more recent congressional oversight failure in executive torture programs, the *Hamdi* plurality invited a cyberattack on the Court.[686]

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681. *Hamdi*, 542 U.S. at 537–38 (plurality opinion) (The Court found that Hamdi was given "no process," however it held, "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.").

682. *See Milligan*, 71 U.S. at 124–25 ("Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."); 2 WILLIAM BLACKSTONE, COMMENTARIES *413 ("For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law . . . .").

683. *See Hamdi*, 542 U.S. at 537–38 (plurality opinion) (there is literally no guidance for how civil courts should review the legal process of military tribunals because no court has tried to do this before).

684. *Id.*, *not following Milligan*, 71 U.S., at 124–25 ("Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."); 2 WILLIAM BLACKSTONE, COMMENTARIES *413 ("For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law.").

685. *See Hamdi*, 542 U.S. at 537–38 (plurality opinion); Harry Schnitker, *Pope Pius XII and the Holocaust*, CATHOLIC NEWS AGENCY (Aug. 8, 2011), https://www.catholicnewsagency.com/resource/56005/pope-pius-xii-and-the-holocaust (explaining Ludwig Kaas' fatal mistake); Gesetz zur Behebung der Not von Volk und Reich [Ermächtigungsgesetz] [Enabling Act], Mar. 23, 1933, RGB? I at 141 (Ger.) (the delegation of plenary rulemaking authority to the Executive without the possibility of independent judicial review created the Third Reich). *See also Rasul*, 542 U.S. at 473–74 (quoting Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945) (Frankfurter, J., dissenting)) ("Habeas corpus is, however, 'a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.' The writ appeared in English law several centuries ago, became 'an integral part of our common-law heritage' by the time the Colonies achieved independence, and received explicit recognition in the Constitution, which forbids suspension of '[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it.'"); Preiser v. Rodriguez, 411 U.S. 475, 485 (1973); U.S. CONST. art. I, § 9, cl. 2).

686. *Hamdi*, 542 U.S., at 509, 538 (plurality opinion) (deciding that there is a "possibility that the standards we have articulated could be met by an appropriately authorized and

The *Hamdi* Court's naive trust in military tribunals to administer due process, not only invited the military to entirely ignore the Court's decision in *Hamdi* (which the military did), but also entrusted the Court itself to the hands of a dangerous branch of government by departing from the unanimous Court opinion in *Ex parte Milligan* that mandated the opposite.[687] The military maintains capabilities of hacking the highest officials in numerous governments including our own as revealed by Edward Snowden, Senator Feinstein, and recent reporting on Pegasus, one of many private run spy programs that the United States military may pay a private contractor to use.[688] U.S. officials are on the recently leaked list of "tens of thousands of . . . individuals . . . selected for possible surveillance" by Pegasus, and judges including those on the U.S. Supreme Court could be targeted by foreign governments or by our own through Pegasus or a similar program, and the Court has no reason to suspect that the military will abstain from using these capabilities, especially after the military flouted *Hamdi*.[689]

The new post-9/11 system gave Americans far less than the constitution mandated under *Ex parte Milligan*, but it was not a total

properly constituted military tribunal"—after this decision the military completely defied the standards Justice O'Connor articulated and destroyed any future chance for the court to assert habeas corpus for Hamdi, revealing that by holding out for a "possibility" that the military might be able to administer due process for U.S. citizens without an actual court, Justice O'Connor squandered both Hamdi's rights as a citizen to resist martial law as well as the Court's power to immediately resist military force wherever a citizen is being treated as a foreign enemy without a trial).

687. *See* Letter from Rep. Anna G. Eshoo to Hon. John Ratcliffe & Hon. Paul M. Nakasone (Aug. 28, 2020) ("The surveillance of Congressional and judicial communications by the executive branch seriously threatens the separation of powers principles of our constitution.") (quoting GELLMAN, *supra* note 407, at 326); Feinstein, *Floor Speech*, *supra* note 621; Stephanie Kirchgaessner, *Officials Who are US Allies Among Targets of NSO Malware, says WhatsApp Chief*, THE GUARDIAN (July 24, 2021, 5:00 AM), https://www.theguardian.com/technology/2021/jul/24/officials-who-are-us-allies-among-targets-of-nso-malware-says-whatsapp-chief ("The leak contained tens of thousands of phone numbers of individuals who are believed to have been selected as candidates for possible surveillance by clients of NSO, including heads of states such as the French president, Emmanuel Macron, government ministers, diplomats, activists, journalists, human rights defenders, and lawyers.").

688. Feinstein, *Floor Speech*, *supra* note 621; Letter from Rep. Anna G. Eshoo to Hon. John Ratcliffe & Hon. Paul M. Nakasone (Aug. 28, 2020); Kirchgaessner, *supra* note 687; Dana Priest et al., *Private Israeli Spyware Used to Hack Cellphones of Journalists, Activists Worldwide*, WASH. POST (July 18, 2021), https://www.washingtonpost.com/investigations/interactive/2021/nso-spyware-pegasus-cellphones/ (only a fraction of the total number of people that may be under surveillance by Pegasus was analyzed).

689. Feinstein, *Floor Speech*, *supra* note 621; Letter from Rep. Anna G. Eshoo to Hon. John Ratcliffe & Hon. Paul M. Nakasone (Aug. 28, 2020) (noting that the judiciary and the legislative branches may fall pray to the executive spy programs, and may already be compromised on a regular basis); Kirchgaessner, *supra* note 687.

bust.[690] The Supreme Court successfully reaffirmed its jurisdiction to review the habeas petitions of U.S. citizens and foreigners regardless of the geographic location where a prisoner is held.[691] In *Boumediene v. Bush*, the Supreme Court finally overruled the Military Commissions Act of 2006 as an unconstitutional suspension of the Great Writ of habeas corpus.[692]

The story of the Court's vindication of habeas jurisdiction from *Rasul*, to *Hamdan*, and finally to *Boumediene* represents the vital operation of the separation of powers by the Supreme Court.[693] Of the three original post-9/11 Supreme Court opinions released on June 28, 2004, only *Rasul* ultimately led to further review and a proper separation of powers finding in *Boumediene*.[694] The other two cases, *Hamdi* and *Padilla*, failed Americans in their most basic judicial duty of properly asserting the Article III Power.[695]

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690. *Hamdi*, 542 U.S. at 509, 535–36 (plurality opinion); *Padilla*, 542 U.S. at 434–35; *Rasul*, 542 U.S. at 474–75. The constitutional baseline guarded by habeas corpus law, that *Hamdi*, *Padilla*, and *Rasul* failed to entirely uphold was that the military must be made subordinate to the civil law. *Milligan*, 71 U.S. at 124–25; 2 WILLIAM BLACKSTONE, COMMENTARIES *413.

691. *Hamdi*, 542 U.S. at 535 (plurality opinion) ("we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts"); *Rasul*, 542 U.S. at 468 ("Aliens held at the base, like American citizens, are entitled to invoke the federal courts' § 2241 authority." However, § 2241 was later ruled an unconstitutional suspension of the writ of habeas corpus in *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).).

692. *Boumediene*, 553 U.S. at 792.

693. *See* Aamer v. Obama, 742 F.3d 1023, 1028–29 (D.C. Cir. 2014) ("The story starts with *Rasul v. Bush*. In that case, several Guantanamo detainees had filed a petition for habeas corpus seeking 'release from custody, access to counsel, freedom from interrogations, and other relief.' . . . The Supreme Court held that the district court had jurisdiction to hear all of these claims. . . . Shortly thereafter, Congress passed the Detainee Treatment Act of 2005, which contained a provision designed to abrogate *Rasul* and strip federal courts of jurisdiction over Guantanamo detainees' claims. After the Supreme Court held that this provision could not apply retroactively to cases pending at the time the DTA was enacted [in *Hamdan v. Rumsfeld*], 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." In response, the Supreme Court held in *Boumediene*, 553 U.S. at 792, that, "MCA section 7 'operates as an unconstitutional suspension of the writ.'"); Bostan v. Obama, 662 F. Supp. 2d 1, 3 (D.D.C. 2009) (trying to balance *Boumediene* with *Hamdi*).

694. *Aamer*, 742 F.3d at 1028–29.

695. *See Bostan*, 662 F. Supp. 2d at 4 (interpreting *Hamdi* balancing as reason to allow the military tribunal to admit hearsay as evidence); Rumsfeld v. Padilla, 542 U.S. 426, 455 (2004) (Stevens, J., dissenting) ("It is quite wrong [for the majority] to characterize the proceeding as a 'simple challenge to physical custody,' that should be resolved by slavish application of a 'bright-line rule,' designed to prevent 'rampant forum shopping' by litigious prison inmates. As the Court's opinion itself demonstrates, that rule is riddled with exceptions fashioned to protect the high office of the Great Writ. This is an exceptional case that we clearly have jurisdiction to decide.").

While *Boumediene* directly called *Hamdi* and *Padilla* into question, it did not finally or unequivocally overrule them.[696] Both *Hamdi* and *Padilla* were decided based upon the Court's now debunked assumption that the government did not intend to suspend the writ.[697] In light of the fact that *Hamdi* and *Padilla* misjudged the government's intentions, and the laws they arose under are now abrogated by *Boumediene*, whatever parts of their holdings that may still be cited as persuasive precedent should be set aside as erroneous dicta.[698]

The three sister rulings *Padilla*, *Hamdi*, and *Rasul* were decided on the same day in 2004. Each ruling represented three perspectives on the Supreme Court, and shortly thereafter, each fared much differently than the other.[699] First, *Padilla* represented an attempt to resurrect formalism that was swiftly undermined if not rendered wholly impracticable by *Boumediene*.[700] Taken simply, *Pa-*

696. *Boumediene*, 553 U.S. at 771 (citing *Hamdi*, 542 U.S. at 564 (Scalia, J., dissenting)) ("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."); *id.* at 795–96 (citing *Padilla*, 542 U.S. at 435–36)) (hinting that the government could channel future cases "to one district court" in order to "reduce administrative burdens on the Government" whenever a habeas petition is filed in another district—the question of whether a court can and should also correct minor errors such as the persons named as custodian in a petition instead of denying jurisdiction altogether, remains open). *Cf.* Hensley v. Municipal Court, San Jose, 411 U.S. 345, 350, n. 8 (1973) (stating that *Wales v. Whitney* was no longer controlling, which apparently allowed *Padilla* to use it as controlling in that case).

697. *See Hamdi*, 542 U.S. at 525 (plurality opinion) ("All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241."); *id.* at 554 (Scalia, J., dissenting) ("No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause."); *Padilla*, 542 U.S. at 432, 442 (refusing to reach the suspension clause issue based upon 28 U.S.C. § 2241(a) "within their respective jurisdictions" limiting language—but *Boumediene* ultimately held § 2241(e) of that same statute was an unconstitutional suspension of the writ, revealing that this law does not define the "respective jurisdictions" of the Court, but that the Court's jurisdiction as defined by the Court rides over this law); *Boumediene*, 553 U.S. at 795–96 ("Channeling future cases to one district court would no doubt reduce administrative burdens on the Government. . . . If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia.").

698. *See Boumediene*, 553 U.S. at 771, 795 ("The only law we identify as unconstitutional is MCA § 7, 28 U.S.C. § 2241(e)."). *See also* Schroeder, *The Body*, *supra* note 121, at 78. *Cf.* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548 (2013) ("we are not necessarily bound by dicta should more complete argument demonstrate that dicta is not correct").

699. Only *Rasul* was challenged by Congress, and ultimately defended by the Court in *Boumediene*. *See Aamer*, 742 F.3d at 1028–29 (recounting this fact).

700. *Padilla*, 542 U.S. at 434–35, 446–47 (citing Wales v. Whitney, 114 U.S. 564, 574 (1885) (*Padilla* drew its immediate custodian rule from this pre-Civil Rules case)) (basing its formalistic finding,in part, upon the "important corollary to the immediate custodian rule in challenges to present physical custody under § 2241"—a law overruled as an uncon-

dilla created an absurd, formalistic basis for dismissal as if Civil Rule 2 never closed the forms.[701]

In contrast with *Padilla*, the *Hamdi* decision set forth an administrative state solution.[702] In this case, Justice O'Connor attempted to transcend the obvious factual distinctions between *Ex parte Milligan* and *Ex parte Quirin* with *Mathews v. Eldridge* judicial balancing.[703] In *Hamdi* Justice O'Connor only appeared to appeal to the center, while in actuality threatening to unsettle all past habeas usages and holdings, by denying the right of a non-military trial.[704]

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stitutional suspension of the writ in *Boumediene*); *Boumediene*, 553 U.S. at 751, 752, 793 ("prudential barriers that may have prevented the English courts from issuing the writ . . . are not relevant here," and also "federalism concerns . . . are not relevant here"). *Cf.* FED. R. CIV. P. 2 ("There is one form of action—the civil action." The purpose of this rule is to preclude formalities like the *Wales* immediate custodian rule.); FED. R. CIV. P. 60(a) (expressly empowering federal judges to correct minor errors like failing to name an immediate custodian "on motion or on its own, with or without notice" as *Boumediene* arguably did); *Hensley*, 411 U.S. at 350–51, n.8 (setting *Wales v. Whitney* aside as no longer controlling in habeas cases).

701. *Padilla*, 542 U.S. at 434–35 (defying Civil Rule 2, and applying the formalism of yesteryear—even acknowledging that actual custody is no longer required to file habeas corpus, but still clinging to arbitrary formalism anyway, when there is actual custody); FED. R. CIV. P. 2. *See Hensley*, 411 U.S. at 350, n.8 ("Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." This Court specifically held that *Wales v. Whitney* "may no longer be deemed controlling," and yet that did not stop *Padilla* from defying *stare decisis* and resurrecting the arcane and scholastic manacle of *Wales* from its grave.). *Cf.* Adam Serwer, *The Supreme Court is Headed Back to the 19th Century*, THE ATLANTIC (Sept. 4, 2018), https://www.theatlantic.com/ideas/archive/2018/09/redemption-court/566963/ (noting the Roberts Court's general strategy of resurrecting precedents of yesteryear including pre-Civil Rules formalism that "led the Supreme Court to overturn the Civil Rights Act of 1875").

702. *See Hamdi*, 542 U.S. at 529 (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

703. *Id.*

704. *Id.* at 537–38 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."). The idea that due process of the law can be administered by a military tribunal is patently absurd. *See Ex parte* Milligan, 71 U.S. 2, 124–25 (1866); 2 WILLIAM BLACKSTONE, COMMENTARIES *413 (Joseph Chitty Esq. 1826) (1753). In *Hamdi*, Justice O'Connor ironically relied upon a cost/benefit balancing test originally developed by eugenics propagandists in support of eugenics laws. LAUGHLIN, *supra* note 164, at 454 (the introduction to Laughlin's model sterilization law contains a cost/benefit balancing test that weighs strongly in favor of adopting eugenics). These tests were eventually asserted in *Buck v. Bell* to justify the forced sterilization of women. Buck v. Bell, 274 U.S. 200, 207–08 (1927) ("The principle that sustains compulsory vaccination [i.e., that the benefits outweigh the costs] is broad enough to cover cutting the Fallopin tubes.") (citing Jacobson v. Massachusetts, 197 U.S. 11, 24 (1905) (deciding "the risk of such an injury" should "be seriously weighed against the benefits")). O'Connor nevertheless maintained, perhaps in defense of her preference for balancing tests, that "[t]he Court has never cited *Buck v. Bell*, for instance, as support for any important proposition." SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 105 (2004)

Justice O'Connor's oxymoronic plurality in *Hamdi* made strange bedfellows of Justice Scalia and Justice Stevens, who dissented together, because the Court failed to secure Hamdi a real trial; applying administrative law presumptions in the place of constitutionally mandated common law habeas corpus review.[705] In a rare occurrence, Justice Scalia and Justice Stevens joined in a righteous gambit against Justice O'Connor's frivolous redefinition of the common law,

> Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections *it* thinks appropriate. It "weigh[s] the private interest . . . against the Government's asserted interest," and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a 'neutral' military officer rather than judge and jury. It claims to engage in this sort of "judicious balancing" from *Mathews v. Eldridge*, a case involving . . . *the withdrawal of disability benefits!* Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.[706]

[hereinafter O'CONNOR, THE MAJESTY]. However, *Buck* was cited by Justice Brandeis for an important proposition in his dissent in *Olmstead v. United States*, which was routinely cited by the Court thereafter. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (ironically citing *Buck v. Bell* to justify his oft cited "right to be left alone" idea, which he appeared to limit as a right for "civilized men" only), *followed by* Mapp v. Ohio, 367 U.S. 643, 659 (1961); Griswold v. Connecticut, 381 U.S. 479, 494 (1965); Roe v. Wade, 410 U.S. 113, 152–54 (1973) (citing to both *Buck v. Bell* and Justice Brandeis's dissent in *Olmstead* side by side, to define the outer limits to the right to abortions); Bowers v. Hardwick, 478 U.S. 186, 199 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003). The sheer complexity of *Buck's* long progeny allowed Justice Powell to lift the cost/benefit balancing test from the American eugenic past sybolized by *Buck* without naming this past. Mathews v. Eldridge, 424 U.S. 319, 347–49 (1976) (balancing costs and benefits for the express purpose of denying an evidentiary hearing, a denial of due process rights like *Buck*). Finally, when Justice O'Connor tried to use this test to limit the role of habeas corpus in the war on terror, her opinion was entirely ignored by the military emphasizing the fact noted by *Milligan* and its progeny that the military cannot be relied upon to administer due process of the law. Dahlia Lithwick, *Nevermind: Hamdi Wasn't So Bad After All*, SLATE (Sept. 23, 2004, 5:37 PM), https://slate.com/news-and-politics/2004/09/hamdi-wasn-t-so-bad-after-all.html ("With a yawn and a shrug, the administration sidestepped the courts and the judiciap process once again, abandoning this criminal prosecution altogether and erasing the episode from our national memory.").

705. *See Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting) ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.").

706. *Id.* at 575–76 (Scalia, J., dissenting).

The absurdities and oxymorons in Justice O'Connor's *Hamdi* plurality opinion were set aglow by Justice Thomas's dissent as well.[707] Justice Thomas could not endorse *Mathews v. Eldridge* and appeared not to understand that *Mathews* was Justice O'Connor's pretext for the real decision in *Hamdi*.[708] For *Mathews*, the *Hamdi* plurality, and Justice Thomas all appeared to agree with the denial to U.S. citizens of the usual habeas remedy of release pending charges and a public trial in a civil court.[709]

Perhaps more alarming than Justice Thomas's lock 'em up and throw away the key approach, was Justice Ginsburg and Justice Souter's concurrence with Justice O'Connor's decision.[710] These "liberal" judges signed onto a radical restructuring of due process and habeas common law that, if it were enacted by Congress, would be an unconstitutional suspension of the writ.[711] Part of their error was the attempt to objectify the suspension of the writ as a legal act, when it

707. *See id.* at 580–81 (Thomas, J., dissenting).

708. *Id.* at 533–34 (plurality opinion) (Attempting to use *Mathews* to justify something less than an actual treason trial to hold U.S. citizens in Guantanamo Bay as suspected traitors: "Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding."); Mathews v. Eldridge, 424 U.S. 319, 349 (1976) ("We conclude that an evidentiary hearing is not required . . . and that the present administrative procedures fully comport with due process."). *Mathews* used a cost/benefit balancing test to justify less process that would be required in an Article III Court, and when it is used it is usually to justify giving less process than would ordinarily be required. *See, e.g.,* Kaley v. United States, 134 S. Ct. 1090, 1100–01 (2014) (revealing that the idea that *Mathews* favored civil rights to be a grave misunderstanding of that case by both the prosecutors and the defense attorneys in *Kaley*; the Court's *Mathews* analysis favored the prosecutors and not the defendants); Thuraissigiam v. DHS, 140 S. Ct. 1959, 1982 (2020) (this case extended dicta from Justice O'Connor's application of *Mathews* in *Landon v. Plasencia* as if it were the holding of that case to deny immigrant rights).

709. *See Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting) (Referring to *Mathews*, "I do not think that the Federal Government's war powers can be balanced away by this Court."). *Cf.* Lithwick, *supra* note 686 (noting that the result of the *Hamdi* plurality was a complete denial of rights to Hamdi despite its attempts to require quasi-judicial process in a military tribunal; the actual result of *Hamdi* was apparently what Justice Thomas wanted).

710. *See Hamdi*, 542 U.S. at 558–59 (Souter, J., concurring in part and dissenting in part).

711. *Id.* (allowing that simply because there is "probably" a history of presidents holding alien enemy combatants incommunicado without access to the writ as justification for executive overreach through fraud and force—Souter did not point to any judicial opinion that legitimizes a violation of the separation of powers because none exist, and he did not substantiate his claim that presidents probably always held alien enemy combatants in prison, incommunicado, without access to the writ with historical evidence that this actually happened in America—indeed, he cited to King Edward III circa 1350 as perhaps the origin of such attempts to legitimize violations of the separation of powers as an inheritance of the founders).

can never be a legal act—suspension is *always* an act of unlawful force.[712]

Justice O'Connor stated the Court's duty to vindicate its relevance as an independent, third branch of power to protect individual rights even during war, but she did not follow through on this intention.[713] The *Hamdi* case was strangely remanded for more "process" under *Mathews*, when its judgement of *no due process* should have resulted in release pending a civil trial.[714] By issuing an order opposite of her judgment, Justice O'Connor abdicated her duty to defend our rights, and thus Yaser Esam Hamdi, a U.S. citizen, was deported with no further process.[715]

The *Hamdi*, *Padilla*, and *Rasul* decisions were not the first to sidestep the question of whether a declaration of war is the exclusive

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712. *See id.* (presuming AUMF and other laws did not suspend the writ, when all that matters is whether the writ was *actually* suspended in the facts and circumstances as presented in the case before the court—something which the Court *always* has jurisdiction to review); *Id.* at 552 (Justice Souter managed to compare Hamdi's situation to *Ex parte Milligan*'s "'actual and present' necessity" requirement—however, he failed to actually apply this standard to his decision to join O'Connor's novel *Mathews* balancing plurality that appeared to be the result of divination rather than objective legal and jurisprudential analysis, which mystifies the question of why they joined O'Connor rather than Scalia's dissent). *Cf.* Boumediene v. Bush, 553 U.S. 723, 733 (2008) (finding that § 7 of the MCA, 28 U.S.C. § 2241(e) "operates as an unconstitutional suspension of the writ"—there are no magic words required, as long as a law or ultimately an executive action operates as a suspension of the writ, then the Court's jurisdiction must ride over the executive's unconstitutional acts of force and fraud, wherever they exist) (emphasis added).

713. *See Hamdi*, 542 U.S. at 535–36 (plurality opinion) (requiring a meaningful role for the courts).

714. *Id.* at 537–39 (Remanding the case to the Fourth Circuit to conduct a review of the military tribunal's "process," which is absurd because the Court already decided that Hamdi was given "no process" saying, "Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause." The answer is release pending charges and a trial—not *Mathews* balancing.).

715. *See id.* at 537–38 ("Hamdi has received no process. . . . Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause." And yet in the very next sentence, O'Connor paradoxically found, "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."—this is the very essence of an impermissible advisory statement that leaves the objective facts and circumstances of the case in an attempt to tell the executive what it ought to do in an imaginary situation where there is a "properly constituted military tribunal"—a novel phrase the Court attempted to define with *Mathews*.). *See also* Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST (Oct. 12, 2004), https://www.washingtonpost.com/wp-dyn/articles/A23958-2004Oct11.html (Hamdi was deported after he was coerced into renouncing his U.S. citizenship in exchange for release, and as the Post explained, "Hamdi's release also means that the government never had to explain why he was detained in the first place."). *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 614 (1952) (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793) (refusing to make advisory statements at the president's request)).

mode by which Congress may delegate war powers to the president.[716] The Supreme Court also sidestepped this question in *United States v. Holmes* and *United States v. Hart* regarding conscription.[717] The Court refused to review the declaration of war question again in *United States v. O'Brien* regarding burning draft cards and again in *Sarnoff v. Schultz*, a taxpayer suit.[718]

If the Supreme Court ever asserted jurisdiction to decide the declaration of war question it may render cases like *O'Brien* or *Hamdi* as "*coram non judice*, and void."[719] For if a declaration of war is essential to the proper delegation of congressional war powers, then the nondelegation doctrine applies.[720] The overriding presumption in *Hamdi*, that the Authorization for Use of Military Force ("AUMF") can delegate war powers without a formal declaration of war, renders it vulnerable to being overruled as an unconstitutional merger of war and peace.[721]

President George Washington and the first U.S. Supreme Court affirmed the requirement of a declaration of war to the delegation of

716. United States v. O'Brien, 391 U.S. 367, 389 (1968) (Douglas, J., dissenting) ("The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.") (citing Arver v. United States, 245 U.S. 366, 390 (1918) (affirming the power of conscription only "as the result of a war declared")).

717. Holmes v. United States, 391 U.S. 936, 938 (1968) (Douglas, J., dissenting); Hart v. United States, 391 U.S. 956, 960 (1968) (Douglas, J., dissenting).

718. *O'Brien*, 391 U.S. at 385–86; Sarnoff v. Shultz, 409 U.S. 929, 930 (1972) (Douglas, J., dissenting).

719. *See, e.g.*, *Ex parte* Randolph, 2 Brock 447, 451 (C.C.D. Va. 1833) (affirming the court's power to find a legal or judicial process void "as if there were none at all"—the court may thus find "the whole proceeding is *coram non judice*, and void"). *Hamdi*, 542 U.S. at 537–39 (plurality opinion) (explaining *Hamdi*'s clear and horrible attempt to respect "no process" as possibly legitimate "due process" fits the textbook definition of *coram non judice*).

720. *Youngstown*, 343 U.S. at 587–88 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States . . . .'") (quoting U.S. CONST. art. I, § 1); *id.* at 642 (Jackson, J., concurring) ("Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress."). *See* Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of government ordained by the Constitution.").

721. *Hamdi*, 542 U.S. at 518 (plurality opinion) (presuming without question that we are at war and that the AUMF is a legitimate delegation of war powers). *See Randolph*, 2 Brock at 451; *O'Brien*, 391 U.S. at 389 (Douglas, J., dissenting); *Field*, 143 U.S. at 692; *Youngstown*, 343 U.S. at 587–88, 642 (Jackson, J., concurring).

war powers during the neutrality crisis of 1793.[722] According to the law of nations and the practice of the first several U.S. presidents, unless or until a war is declared, the president is limited to the use of his or her peace powers.[723] For in the words of Justice Jackson, "nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress."[724]

The purpose of a formal declaration of war is to put its recipient on notice, to define who the enemy is, and to explain the terms by which peace may be reestablished.[725] President Truman was arguably the first president to transcend the terms of an official declaration of war, when he declared his own terms of "unconditional surrender" to justify dropping atomic bombs on Hiroshima and Nagasaki.[726] Presi-

722. Casto, *supra* note 274, at 199–200. *See Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793)).

723. President George Washington, Proclamation 4—Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France (Apr. 22, 1793); President John Adams, Proclamation—Granting Pardon to Certain Persons Engaged in Insurrection Against the United States in the Counties of Northampton, Montgomery, and Bucks, in the States of Pennsylvania (May 21, 1800); President Thomas Jefferson, Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters (July 2, 1807); President James Madison, Proclamation—Announcement of a State of War Between the United States and the United Kingdom (June 19, 1812) ("Whereas the Congress of the United States by virtue of the constitutional authority vested in them, have declared by their act bearing date the 18th day of the present month, that war exists between the United Kingdom of Great Britain and Ireland, and the dependencies thereof, and the United States of America and their Territories. Now therefore, I James Madison, President of the United States of America, do hereby Proclaim the same to all whom it may concern . . . ."). *See* Holmes v. Jennison, 39 U.S. 540, 577 (1840) (Opinion of Taney, C.J.) ("The federal government has also the power to declare war; and whenever it becomes a question whether we are to be at peace or at war, undoubtedly the general government must determine that question. And if Congress decides that the honour and interest of the country does not require war, and, on that account, refuses to declare it, is not this an exercise of its power over the subject? And could it be said that the power was a dormant power, because war had not been declared?").

724. *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring) (Jackson continued: "[o]f course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.").

725. VATTEL, *supra* note 655, at 314–15.

726. U.S. Declaration of War upon Japan, Pub. L. No. 77–328, 55 Stat. 795 (1941) (requiring the President to bring the conflict to a "successful termination"—though not defining the reasons for the war, or how the war could be brought to a conclusion, these functions if unexercised in a declaration of war should be considered nondelegable legislative power); President Harry S. Truman, Statement by the President Announcing the Use of the A-Bomb at Hiroshima (Aug. 6, 1945) ("It was to spare the Japanese people from utter destruction that the ultimatum of July 26 was issued at Potsdam. Their leaders promptly rejected that ultimatum. If they do not now accept our terms they may expect a rain of ruin

dent Truman also went to war in Korea without congressional approval and tried to unilaterally seize all U.S. steel mills among other things.[727]

Now, the AUMF, National Defense Authorization Act ("NDAA"), and other war powers resolutions, accomplish none of the purposes of declaring war.[728] At their worst, these unconstitutional resolutions invite treasons by the presidential administration like the CIA's cyberattacks on Congress in 2014.[729] Presidents at war with their own governments undercut Congress's ability to regulate "intelligence activities or any other government function," and the *Hamdi* Court's *Mathews* balancing test cannot meaningfully contend against it.[730]

The merger of war and peace powers, by applying the laws of peace to regulate the powers of war as Justice O'Connor's plurality attempted to do in *Hamdi*, openned the door to totalitarian abuse.[731] The opinion, then considered most centrist, was actually the most extreme.[732] For once a military tribunal is allowed to administer final

from the air, the like of which has never been seen on this earth. Behind this air attack will follow sea and land forces in such numbers and power as they have not yet seen and with the fighting skill of which they are already well aware.") (citing *The Potsdam Declaration*, July 26, 1945 (requiring "unconditional surrender" from Japan)). *See also* President Harry S. Truman, Statement by the President Calling for Unconditional Surrender of Japan (May 8, 1945) (defining the terms of surrender as unconditional—where these terms should be defined by Congress if at all).

727. Fisher, *supra* note 626, at 33–39. *See, e.g.,* Exec. Order No. 10155, 15 Fed. Reg. 5,785 (Aug. 29, 1950) (order to seize the railroads).

728. War Powers Resolution, 50 U.S.C. §§ 1541–1549; AUMF of 2001, Pub. L. No. 107–40, 115 Stat. 224; NDAA for Fiscal Year 2012, Pub. L. No. 112–81, 125 Stat. 1298 (2011). *See* President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (declaring a war against terror—this did not put any person, organization, or sovereign nation on notice that they are an enemy to the United States, nor did it inform anybody of how they might end the war). *Cf.* Jacob Silverman, *The Forever Wars Aren't Ending. They're Just Being Rebranded.*, NEW REPUBLIC (July 28, 2021), https://newrepublic.com/article/163088/forever-wars-arent-ending-theyre-just-rebranded.

729. Feinstein, *Floor Speech*, *supra* note 621.

730. *Id.*; Hamdi v. Rumsfeld, 542 U.S. 507, 575–76 (2004) (Scalia, J., dissenting).

731. *Hamdi* 542 U.S. at 537–38 (plurality opinion).

732. *Id.* (causing the distruction of a U.S. citizen's rights); Coleman v. Thompson, 501 U.S. 722, 759–60 (1991) (Blackmun, J., dissenting) (explaining the fundamental confusions furthered by Justice O'Connor's demolishing of *Fay v. Noia*); Lawrence v. Texas, 539 U.S. 558, 579 (2003) ("The Court today overrules *Bowers v. Hardwick*, 478 U.S. 186 (1986). I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional."). *Compare* Noah Feldman, *Thank You, Justice O'Connor, for the Art of Compromise*, BLOOMBERG (Oct. 24, 2018, 2:55 P.M.) https://www.bloomberg.com/opinion/articles/2018-10-24/sandra-day-o-connor-s-influence-is-missed-at-supreme-court (presenting, without support, that the legacy of Justice O'Connor as one of compromise rather than confusion), *with* Schroeder, *The Body*, *supra* note 121, at 35 (observing how "the Court began to expose the layers of contradiction

due process of the law, before stripping a person of their life, liberty, and property, with no jury, no public opinion, and no independent judge; all is already lost.[733]

The AUMF, NDAA, Foreign Intelligence Surveillance Act ("FISA"), USA Patriot Act, and other laws enable the president to wage war against whoever he or she deems a terrorist, including U.S. citizens.[734] In 2004, the executive branch concluded that "the justification for action and spending seem limitless" and defined global counterinsurgency as a war against "an omnipotent, unslayable, hydra of destruction."[735] This statement epitomizes the reasons why the framers did not entrust the executive with emergency war powers,

> They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that *emergency powers would tend to kindle emergencies*.[736]

When executive officials get creative and declare unending wars against omnipotent hydras of destruction, Americans have reason to believe that executive officials are trying to kindle sham emergencies.[737] For when U.S. citizens and the U.S. Congress itself are treated as enemies of the state, there seems to be little difference between American presidents waging a war on terror and the French *Terroriste,* Saint-Just, declaring France "revolutionary until the peace."[738]

Congressional waivers of war powers are incentivized by money.[739] Trillions of U.S. taxpayer dollars have been paid to private contractors to accomplish any number of jobs that facilitate U.S. wars.[740] A money pit of perks, payouts, and congressional shareholder

started by Part II of Justice O'Connor's opinion in *Williams v. Taylor*, as reveled through O'Connor's contradictory opinion in *Wiggins v. Smith*").

733. Feinstein, *Floor Speech*, *supra* note 621; *Hamdi*, 542 U.S. at 575–76 (Scalia, J., dissenting).

734. Feinstein, *Floor Speech*, *supra* note 621; Solomon, *supra* note 640.

735. THOMAS H. KEAN ET AL., THE 9/11 COMMISSION REPORT 364 (2004).

736. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649 (1952) (Jackson, J., concurring) (emphasis added), *extended in* Sierra Club v. Trump, 977 F.3d 853, 888–90 (9th Cir. 2020).

737. KEAN ET AL., *supra* note 735, at 367.

738. *Compare* Louis Antoine de Saint-Just, *Rapport sur la Nécessité de Declarer le Gouvernement Révolutionnaire Jusqu'à la Paix*, Oct. 10, 1793, *in* 2 ŒVRES COMPLÈTES DE SAINT-JUST 88 (1908), *with* President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *and* KEAN ET AL., *supra* note 735, at 364.

739. *See, e.g.*, NDAA for Fiscal Year 2018, Pub. L. 115–91, 131 Stat. 1287 (2017).

740. *Id.* (the defense budget was just under $700 billion for one year). *Cf. The 10th Annual BGOV200: The top government contractors in 2020*, BLOOMBERG GOVERNMENT (last visited Aug. 11, 2021), https://about.bgov.com/bgov200/ (stating that in 2020, 682 billion

status in these companies (making hundreds of billions of dollars on wars), the sale of arms, and the facilitation of intelligence gathering, keep the military industrial complex grinding on.[741]

Only a few whistleblowers managed to curb the toll on human life caused by the military industrial complex.[742] Unfortunately, when reporters fail to protect their sources, these whistleblowers are exposed and abused mercilessly by the executive department.[743] In spite of the dangers, natural human love stages her resistance to the tyranny of greed in America usually at a great personal cost to the whistle blowers brave enough to carry the banner of love for country and for fellow citizens over us.[744]

American judges may allow the final word on the hydra of terror and greed to go to the revolutionary poets and preachers of

contracting dollars were presumably spent—this website updates every year and makes information on government contractors semi-public).

741. David R. Baker, *Army contract for Feinstein's husband / Blum is a director of firm that will get up to $600 million*, SFGATE (Jan. 18, 2012, 11:00 PM), https://www.sfgate.com/news/article/Army-contract-for-Feinstein-s-husband-Blum-is-a-2621196.php; Oliver Burkeman & Julian Borger, *The Ex-presidents' Club*, THE GUARDIAN (Oct. 31, 2001, 11:31 PM), https://www.theguardian.com/world/2001/oct/31/september11.usa4 (both the Bush family and the bin Laden family were investors in the Carlyle Group when 9/11 happened—both likely made money based upon the increased U.S. military spending as a result of the 9/11 attack).

742. *See, e.g.,* Anna Ruby, *How Deepwater whistleblower Michael DeKort used YouTube to save lives*, YOUTUBE (May 23, 2016), https://www.youtube.com/watch?v=VOF5GArVHCo; Tom Vanden Brook, *Marine whistle-blower vindicated after seven-year fight*, USA TODAY (Sept. 25, 2014, 6:11 PM), https://www.usatoday.com/story/news/nation/2014/09/25/franz-gayl-mraps-marine/16225499/; Michael Hastings, *The Runaway General: The Profile that Brought down McChrystal*, ROLLING STONE (June 22, 2010, 2:00 PM), https://www.rollingstone.com/politics/politics-news/the-runaway-general-the-profile-that-brought-down-mcchrystal-192609/; Sarah Stillman, *The Invisible Army*, NEW YORKER (May 30, 2011), https://www.newyorker.com/magazine/2011/06/06/the-invisible-army; A GOOD AMERICAN (El Ride Productions 2015) (documentary following William Binney's whistleblowing on Thin Thread—noting the U.S. intelligence community had the information to stop the 9/11 attacks); CITIZENFOUR (Praxis Films 2014) (Laura Poitras's award winning documentary film about Edward Snowden's reveal of the U.S. Government's dragnet surveillance programs).

743. *See* Michael M. Grynbaum & John Koblin, *After Reality Winner's Arrest, Media Asks: Did 'Intercept' Expose a Source?*, N.Y. TIMES (June 6, 2017), https://www.nytimes.com/2017/06/06/business/media/intercept-reality-winner-russia-trump-leak.html; WAR ON WHISTLEBLOWERS (Brave New Foundation 2013).

744. WAR ON WHISTLEBLOWERS (Brave New Foundation 2013). *See, e.g.*, Carole Cadwalladr, *'I spent seven years fighting to survive': Chelsea Manning on whistleblowing and WikiLeaks*, THE GUARDIAN (Oct. 7, 2018, 4:30 PM), https://www.theguardian.com/us-news/2018/oct/07/chelsea-manning-wikileaks-whistleblowing-interview-carole-cadwalladr; Gina Cherelus, *Reality Winner sentenced for leaking top secret U.S. report*, REUTERS (Aug. 23, 2018, 8:49 AM), https://www.reuters.com/article/us-usa-trump-russia-leaks/reality-winner-sentenced-for-leaking-top-secret-u-s-report-idUSKCN1L81FD. *Cf. Song of Solomon* 2:4 ("his banner over me is love").

America.[745] For the poets and preachers of the American Revolution were moved by the siren call of love to face their own mortality in order to denounce the hydra of human greed.[746] The first to lead the charge was the humble Phillis Wheatley, who exhorted the sons of Harvard to "suppress the sable monster in its growth."[747]

The Americans unanimously regarded Wheatley's call as a mystery of heaven on earth; her voice, it seemed to them, broke out of the darkness like the creation of light.[748] Therefore, a marvelous throng of artists and preachers sprang forth in response to her call.[749] For example, the African American pastor in the North, Lemuel Haynes, lifted his voice to proclaim upon the very knife's edge of the Revolution the fundamental principle in *Dr. Bonham's Case*,

> It cannot be thought impertinent for us to turn one eye into our own breast, for a little moment, to see, whether through some inadvertency, or a self-contracted spirit, we do not find the same monster [of tyranny] lurking in our own bosom. . . . Every privilege that mankind enjoy have their origin from god; and whatever acts are passed in any Earthly Court, which are derogatory to those edicts that are passed in the Courts of Heaven, the act is *void*.[750]

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745. MERCY OTIS WARREN, *To a Young Gentleman, residing in France* [1782]; Phillis Wheatley, *To the University of Cambridge in New-England* [1773]; Ann Bleecker, *A Pastoral Dialogue* [1780], *in* BLEECKER, *supra* note 652, at 253–59; Lemuel Haynes, *Liberty Further Extended* [1776], *in* Bogin, *supra* note 64, at 94.

746. Ann Bleecker, *A Pastoral Dialogue* [1780], *in* BLEECKER, *supra* note 652, at 253–59; Mercy Otis Warren, *To a Young Gentleman residing in France* [1782]; Phillis Wheatley, *To the University of Cambridge* [1767].

747. Phillis Wheatley, *To the University of Cambridge* [1767]; Phillis Wheatley, *To the University of Cambridge in New-England* [1773] (advising her fellow American patriots to "suppress the deadly serpent in its egg," updating the sable monster language) (quoting William Shakespeare, *Julius Caesar* II.I.32 (1599)).

748. Joseph Ladd, *The Prospects of America* [1785], *in* THE LITERARY REMAINS OF JOSEPH BROWN LADD, M.D. 23, 35 (H.C. Sleight, Clinton Hall 1832) [hereinafter LITERARY REMAINS] (speaking of "the far-spread name / Of wondrous WHEATLY [sic], Afric's heir to fame," whose "glowing genius shines / . . . With magic power the grand descriptions roll / Thick on the mind, and agitate the soul."). *See also* Matilda, *On Reading the Poems of Phillis Wheatley, the African Poetess* [1796]; Phillis Wheatley, *A Rebus, by I.B.* [1773] (a witty poem/riddle believed to be written by James Bowdoin to be solved by Phillis Wheatley on the next page).

749. Jennifer Billingsley, *Works of Wonder, Wondering Eyes, and the Wondrous Poet: The Use of Wonder in Phillis Wheatley's Marvelous Poetics*, *in* NEW ESSAYS ON PHILLIS WHEATLEY 174 (John C. Shields & Eric D. Lamore eds., 2011) ("Wheatley realized *before Kant* that the power of the imagination allows the poet not only to recognize other realms of knowledge but to represent those realms in his or her own work." Wheatley not only prefigured the works of Washington Irving and the Fireside Poets, but she also prefigured the German Idealism symbolized by Goethe, which are the foundations to which all Kantians must pay homage.) (emphasis added).

750. Lemuel Haynes, *Liberty Further Extended* [1776], *in* Bogin, *supra* note 64, at 94–95, 99 (emphasis added) (Lemuel Haynes advocated for the principle in *Dr. Bonham's*

In the immediate proceeding years, the music of Wheatley's friend and choral collaborator, William Billings, pealed out of church buildings of every persuasion, "Down with this earthly king!"[751] The Americans began to sing out about the new reality that they made for themselves, "No king but God. / To the King they shall sing, Hallelujah. / And the continent shall sing, / God is our rightful King."[752]

In bright succession, Mercy Otis Warren followed the example of her courageous brother James into the public fray to face down the French Reign of Terror.[753] She boldly refuted John Adams' appeals to French reason, and instead incited French emotion through the imagination, by courageously bearing witness to the monster AVARICE rising out of the sea.[754] She valiantly rallied the men of France to resist their greed in marvelous verse,

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Case to be used to end the greedy practice of slaveholding, calling it a product of mankind's "own carnal avarice.").

751. William Billings, *Independence* [1778].

752. *Id.*

753. 3 WARREN, *supra* note 35, at 392–97 (addressing John Adams' monarchical tendencies) and at 407–08 ("The guillotine was glutted with the blood of innocent victims," because "ambitious, unprincipled, corrupt, and ignorant men," came "forward, under pretense of supporting the rights and liberties of mankind, without any voices but those of disorder and disorganization. . . . Decency, humanity, and every thing else respected in civil society, disappeared, until the outrages of cruelty and licentiousness resembled the regions of pandemonium."); Mercy Otis Warren, *To Mr. Adams* [1773], *enclosed in* Letter from Mercy Otis Warren to John Adams (Oct. 11, 1773) (addressing John Adams' fatalism); *id. in* POEMS, DRAMATIC AND MISCELLANEOUS 195–97 (1790) as *To Mr.* ____ (this version of the poem, though easier to find, is slightly altered and does not indicate who it was addressed to); Letter from Mercy Otis Warren to John Adams (Aug. 27, 1807) (Mercy strongly reasserted "that in a certain portion of his time Mr. Adams was in favor of a monarchic government." Here, she also reminded him of the poem she had written him in 1773.). Examples of John Adams' appeals to French reason include his *Discourses on Davila* and his *Defence of the Constitutions*: ADAMS, DISCOURSES, *supra* note 142, at 84 (declaring that "France, by the same infallible progress of reasoning, will discover the same necessity" of bicameralism—but France decided against bicameralism, the Reign of Terror swept the nation, and Adams' blind faith in rationalism was embarrassed); 3 ADAMS, A DEFENCE, *supra* note 91, at 316–17 (Adams appealed to French reason in this multi-volume tract: "If nations and peoples cannot be brought to a more rational way of thinking, and to judge of things, instead of being intoxicated with prejudice and superstition against words, it cannot be expected that truth, virtue, or liberty, will have much chance in the establishment of governments."). *Cf.* [Thomas Jefferson,] Notes on John Adams and the French Revolution [Jan. 15, 1793], *in* 25 THE PAPERS OF THOMAS JEFFERSON 63–64 (John Catanzariti ed., 1992) ("Mr. Adams declared that 'men could never be governed but *by force*'.").

754. Mercy Otis Warren, *To a Young Gentleman residing in France* [1782], *in* WARREN, POEMS, *supra* note 724, at 221.

His forky fang, and livid lip, reveal'd
The crooked form, a gaudy vest conceal'd;
Large tablets mark'd the monster's gally breast,
And AV'RICE stood conspicuous on his crest[755]

Then Warren publicly testified that southern greed was the illegitimate basis of the preservation of African slavery in the aristocratic (i.e., anti-democratic) South.[756] Addressing her fellow New Yorkers on the same topic, the poetess Anne Eliza Bleecker roared, "Americans! Ye thought your labours o'er, / Ah no! the hydra Envy brings you more."[757] Reverend Samuel Cooper, who at an earlier time presided over Phillis Wheatley's baptism, joined the mighty chorus that Wheatley herself created (according to her call for the cause of the Union), when he stated from the floor of the Massachusetts Legislature that the tyranny of arbitrary power is "the means of gratifying an unbounded avarice and ambition."[758]

The poets and preachers of the revolution moved the founding American statesmen to agree that greed is, as James Madison once wrote, one of the "most dangerous weaknesses of the human breast," and a key conspirator "against the desire and duty of peace."[759] Thus, the American Revolutionaries launched their prayers into heaven for posterity that "our liberty never be justly reproached as licentiousness."[760] Mounting a resistance to greed animates the U.S. social

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755. *Id. See also* Mercy Otis Warren, *Simplicity* [1779] (stating that in the pursuit of happiness "nearest those, who nearest nature live, / Despising all that wealth and power can give").

756. 3 WARREN, *supra* note 35, at 21–22 ("In the southern colonies, it is true, . . . the great number of slaves thought necessary to secure their produce, and the easy acquisition of fortune, nourished more aristocratic principles. . . . Democratic principles are the result of equality of condition. A superfluity of wealth, and a train of domestic slaves, naturally banish a sense of general liberty, and nourish the seeds of that kind of independence that usually terminates in aristocracy.").

757. Ann Bleecker, *A Pastoral Dialogue* [1780], *in* BLEECKER, *supra* note 652, at 253–59.

758. Samuel Cooper, *Sermon on the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 7 [1780].

759. James Madison, *Helvidius No. IV* [Sept. 14, 1793]. *See also* THE FEDERALIST NO. 6 (Alexander Hamilton); ADAMS, DISCOURSES, *supra* note 142, at 61–69 (quoting ADAM SMITH, THEORY OF MORAL SENTIMENTS 80–90 (1892) (1759)).

760. Samuel Cooper, *Sermon on the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 37 [1780]; Nathaniel Niles, *Two Discourses on Liberty*, I. THOMAS & H.W. TINGES, June 5, 1774, at 7–8, 26, 29–30, 58 [1774] ("For who is so blind as not to see that the li[c]e[n]tious cannot be friend to li[be]rty?"); Isaac Backus, *An Appeal to the Public for Religious Liberty* 3–4 [1773] ("those who now speak great *swelling words* about *liberty*, while they *despise government*, are themselves *servants of corruption*"). *Cf.* 3 ADAMS, A DEFENCE, *supra* note 91, at 477–78 (Resolving as a rule of policy "'[t]o use liberty with moderation, lest it turn to licentiousness;' . . . How then is licentiousness to be avoided? By the energy of laws.") (responding to Letter from M. Turgot to Dr. Price (Mar. 22, 1778), *in*

compact's pursuit of peace for "War is . . . the true nurse of executive aggrandizement," and thus Congress was given sole power to declare war.[761]

Twentieth Century warfare in the cause of greed bled into figurative wars against terror, drugs, and crime on American soil that continue to oppress innocent people in the United States.[762] These quasi-wars waged against U.S. citizens expanded until they touched the people's representatives in Congress.[763] To alleviate these horrifying, systemic, and unconstitutional intrusions upon American lives,

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BARNARD, *supra* note 192, at 48 ("We see her [America] irrevocably independent. Will she be happy in her freedom?")).

761. James Madison, *Helvidius No. IV* [Sept. 14, 1793] ("In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them.") (citing THE FEDERALIST NO. 75 (Alexander Hamilton)); U.S. CONST. art. I, § 8, cl. 11. *But see* Darlene Superville, *Barbara Bush saw Trump as a 'symbol of greed'*, AP NEWS (Apr. 2, 2019), https://apnews.com/article/0541030ae2264381a41b4fa9edf07f0c; 1 MUELLER, *supra* note 362, at 67–68 (presenting facts that make it appear that Trump's treasons, if they existed, are tied to his voracious greed as symbolized by his long pursuit of a Trump Tower Moscow deal).

762. Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken [hereinafter Stillman, *Taken*]; David Nakamura, *Trump uses expansive definition of 'emergency'*, L.A. TIMES (Nov. 1, 2018, 9:15 AM), https://www.latimes.com/politics/la-na-pol-trump-national-emergency-20181101-story.html ("President Trump declared a national emergency last week — in a tweet."); Hiba Kahn, *Isis and al-Qaeda are little more than glorified drug cartels, and their motivation is money not religion*, INDEPENDENT (Apr. 16, 2017), https://www.independent.co.uk/voices/isis-al-qaeda-drugs-trafficking-cartels-heroin-terrorism-a7684961.html.

763. Alien Enemies Act, 50 U.S.C. §§ 21–24; War Powers Resolution, 50 U.S.C. §§ 1541–1549; AUMF of 2001, Pub. L. No. 107–40, 115 Stat. 224 (Sept 18, 2001); NDAA for the Year 2012, Pub. L. No. 112–81, 125 Stat. 1298 (Dec. 31, 2011); Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1837 (Oct. 12, 1984); Controlled Substances Act, 21 U.S.C. § 801–904; Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1813; USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272 (Oct. 26, 2001); The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214; Mayfield v. Gonzales, No. 04-1427-AA, 2005 WL 1801679, at *4 (D. Or. 2005); Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) ("Petitioner Yaser Hamdi, a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Brigs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban."); *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 624–25 (FISA Ct. 2002); Gonnerman, *supra* note 160; Nsikan Akpan, *Police militarization fails to protect officers and targets black communities, study finds*, PBS (Aug. 21, 2018, 12:40 PM), https://www.pbs.org/newshour/science/police-militarization-fails-to-protect-officers-and-targets-black-communities-study-finds; James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration; Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc [hereinafter Stillman, *Get Out*]; Sarah Stillman, *Why are Prosecutors Putting Innocent Witnesses in Jail?*, NEW YORKER (Oct. 17, 2017), https://www.newyorker.com/news/news-desk/why-are-prosecutors-putting-innocent-witnesses-in-jail [hereinafter Stillman, *Why are Prosecutors*]; Stillman, *Taken*, *supra* note 762; A GOOD AMERICAN (El Ride Productions 2017); CITIZENFOUR (Praxis Films 2014).

liberty, and property, it is in the interest of every American to demand and reassert the declaration of war requirement once more.[764]

The Empire Strikes Back: On the Laws of Land and Sea

The U.S. Constitution grants Congress the power, "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."[765] Following this language, Article VI states that federal laws, treaties, and the U.S. Constitution itself "shall be the supreme law of the land."[766] Therefore, the U.S. Constitution expressly authorizes, as a matter of supremacy, that laws of the land shall be preemptive upon the arbitrary laws of the sea.[767]

Under this express authority, Congress outlawed the slave trade by making the trade a violation to the law of nations and a piracy punishable by death.[768] In order to continue trading in flesh, the South cried federalism and state's rights, extorted the Eleventh Amendment from the Union, and terrorized local federal judges.[769] It took the

764. U.S. CONST. art. I, § 8, cl. 11; United States v. O'Brien, 391 U.S. 367, 389 (1968) (Douglas, J., dissenting).

765. U.S. CONST. art. I, § 8, cl. 10.

766. U.S. CONST. art. VI, cl. 2. Other laws of the land though not supreme include those made by the fifty states including their constitutions, statutes, and common law. Erie R. Co. v. Tompkins, 304 U.S. 64, 71 (1938) ("'The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'") (quoting Judiciary Act of 1789, 1 Stat. 73, § 34).

767. U.S. CONST. art. I, § 8, cl. 10; *id.* art. VI, cl. 2.

768. Act to Protect the Commerce of the United States and Punish the Crime of Piracy of 1819, Pub. L. No. 15–17, 3 Stat. 510; Act to Protect the Commerce of the United States and Punish the Crime of Piracy of 1820, Pub. L. No. 16–13, 3 Stat. 600; Act to Protect the Commerce of the United States and Punish the Crime of Piracy of 1823, Pub. L. No. 17–8, 3 Stat. 721 (making the prohibition of the slave trade perpetual). *See* U.S. Const. art. I, § 8, cl. 10; *id.* art. VI, cl. 2.

769. QUINCY ADAMS, ARGUMENT *supra* note 114, at 96 ("Upon this plain and simple statement of facts, can we choose but exclaim, if ever [a] soul of an American citizen was polluted with the blackest and largest participation in the African slave-trade, when the laws of his country had pronounced it piracy, punishable with death, it was that of the same John Smith. He had renounced and violated those rights, by taking a commission from Artigas to plunder the merchants of mariners of nations in friendship with his own; and yet he claimed the protection of that same country which he had abandoned and betrayed. Why was he not indicted upon the act of May 15, 1820, so recently enacted before the commission of his last and most atrocious crime?") (citing Pub. L. 16–13, 3 Stat. 600); The Antelope, 23 U.S. 66, 81, 126 (1825) (the circuit court in Georgia casted lots to determine which African people would go free and set the pirate free rather than following the supreme law of the land that required the Africans to all go free and the pirate to be hanged—the whole thing was such a debacle that the U.S. Supreme Court faltered and decided "no principle is settled"); Frank v. Mangum, 237 U.S. 309, 335–37 (1915) ("We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so

Union winning a Civil War before federal anti-slavery laws would be applied with anything approaching uniformity in the South.[770]

Though Americans did not overcome the Jeffersonian Terror,[771] the founders took many anti-slavery stands on behalf of all Americans, black and white, man and woman.[772] In 1807, when England dishonorably kidnapped four naval officers from the *U.S.S. Chesapeake* (three of which were black), President Jefferson himself went on the international stage to claim them as natural citizens of the United States, born free and equal.[773] In the words of war historian Joseph T. Wilson,

> The forcible capture and imprisonment of Ware, Martin and Strachan, the three negroes taken from the Chesapeake, and who were recognized by the United States authorities as citizens of the republic, was sounded as the keynote and rallying cry of the war; the outrage served greatly to arouse the people.[774]

In 1812, President James Madison spoke of these men as representatives among the thousands of U.S. citizens "torn from their country and everything dear to them" by British impressment "to risk their lives in

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that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term.").

770. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. IX (reserving unenumerated and preexisting natural human rights to every person and acknowledging independent jurisdictional grounds for enforcing them in the natural law); *id.* amend. IV. *See, e.g.,* Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 309 (1795) ("Could the Legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people themselves.").

771. Thomas Jefferson was the only founder to support the French Reign of Terror, and his support inspired many instances of terrorism in America. *See* Letter from Thomas Jefferson to William Smith (Nov. 13, 1787) ("the tree of liberty must be refreshed from time to time with the blood of patriots & tyrants"); Tolson, *supra* note 151 (the insurrectionists "evidently felt that no saction would be forthcoming" for ransacking the Capitol Building on January 6, 2021 "because, as Thomas Jefferson famously wrote, 'the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants'"). *See also* Andrew Cohen, *Tyranny, from Tim McVeigh to Ginny Thomas*, THE ATLANTIC (Mar. 18, 2010), https://www.theatlantic.com/national/archive/2010/03/tyranny-from-tim-mcveigh-to-ginny-thomas/37637/ (noting that Timothy McVeigh was inspired by Jefferson's support of terrorism to murder "168 innocents at the Alfred P. Murrah federal building on April 19, 1995").

772. *See, e.g.*, OTIS, *supra* note 18, at 120, 140–41, 147. *But see* Letter from Thomas Jefferson to Albert Gallatin (Aug. 2, 1823) (Jefferson encouraged his Democratic Republican comrades to flout the orders of federal judges, which he saw as an attempt to "monarchize this nation," saying "The judges, as before, are at their head, and are their entering wedge.").

773. President Thomas Jefferson, Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters (July 2, 1807); *Cf.* JOSEPH T. WILSON, *supra* note 400, at 76 ("That the outrage did not end in immediate war, was due partly to the fact that the Americans had no Navy to fight with.") (internal quotation marks omitted).

774. JOSEPH T. WILSON, *supra* note 400, at 68.

the battles of their oppressors."[775] The American victory in the War of 1812 was not glorious, for Washington, D.C. was burned to the ground; all Americans were able to do was to shout back at their oppressors *we exist!*, but that was their right.[776]

Despite American wars fought to vindicate the laws of the land over the laws of the sea, the rule of arbitrary British sea dominion keeps rising up against Americans like tsunamis.[777] The English Empire orchestrated many victories in the United States by appealing to the vanity of the South.[778] Feudal systems, which the U.S. Constitution officially expelled from the land, keep defying the U.S. social compact to assert control over America, including an unchecked civil forfeiture regime and a dragnet surveillance program.[779]

These royal influences in America culminated in *Ex parte Quirin*, where the Court eroded *Ex parte Milligan* based upon the laws of the sea, i.e., civil forfeiture.[780] It is no surprise, therefore, that *Quirin*

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775. President James Madison, Special Message [to Congress asking it to declare war on Great Britain], (June 1, 1812). *See* Act declaring War between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories, ch. 102, 2 Stat. 755 (1812); Robert E. Cray Jr., *Remembering the USS Chesapeake: The Politics of Maritime Death and Impressment*, 25 J. OF THE EARLY REPUBLIC 445, 472–73 (2005) ("Both sides had been fighting for a month before the men were returned.").

776. *See* Whitney Houston, *The Star-Spangled Banner* (1991) (performed at Super Bowl XXV); Cray Jr., *supra* note 775, at 472 (Francis Scott Key wasn't the only songwriter in the land during the War of 1812: "You all remember well, I guess / The Chesapeake disaster, / When Britons dared to kill and press / To please their royal master. / That day did murder'd freemen fall, / Their graves are cold and sandy; / Their funeral dirge was sung by all, / Nor yankee doodle dandy.").

777. Samuel Cooper et al., *Pietas et Gratulatio* 43–44 [1761] ("As, on her white-clift, sea-girt shore, / With head reclined, Britannia sat, / Her ocean dashing on her rocks"). *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 844–45 (2008) (Scalia, J., dissenting) (arguing that the U.S. Supreme Court should have applied an arbitrary geographic barrier on habeas corpus based on feudal law—as if the Suspension Clause, and indeed the U.S. social compact itself, did not overrule, reverse, or otherwise totally undo feudal law in America) (citing Rex v. Cowle [1759] 2 Burr. 834, 855–56 (Eng.)). *Cf.* Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775), *reprinted in* JOHN ADAMS & JONATHAN SEWALL, NOVANGLUS AND MASSACHUSETTENSIS 129–30 (1819) (Adams perceived that the basis of British injustice to its colonies laid in part upon the earlier habeas corpus case also written by Lord Mansfield *Rex v. Cowle*—a case the Americans rejected during the revolution as an example of "feudal law.").

778. Robert Hayne, *Speech of Mr. Hayne in the Senate, on Mr. Foote's Resolution* (1830), *reprinted in* ROBERT HAYNE & DANIEL WEBSTER, THE GREAT DEBATE 51–52 (Lindsay Swift ed., 1898) (Robert Hayne rose up on behalf of the South and was inspired by Edmund Burke's romanticizing and ennobling of the Southern enslavement of Africans as the same as English style feudalism.) (quoting Edmund Burke, *The Speech . . . [for] Conciliation with the Colonies*, J. DODSLEY, Mar. 22, 1775, at 18–19 [1775]).

779. *See* Stillman, *Taken*, *supra* note 762; Donohue, *National Security*, *supra* note 31.

780. *Ex parte* Quirin, 317 U.S. 1, 29–30 (1942) (departing from *Milligan* based on the arbitrary laws of the sea by allowing a U.S. citizen to be tried and executed by military

became Justice O'Connor's inspiration in *Hamdi* to disregard the rights of U.S. citizens.[781] The O'Connor plurality in *Hamdi* turned a blind eye to the government's violations of the Eighth Amendment to strip Yaser Esam Hamdi of his U.S. citizenship, and to banish him to Saudi Arabia without due process of law.[782]

How much the United States did, or did not do, to tip the scales toward the freedom of the seas is debatable.[783] However, it is clear that the United States vindicated the freedom of the seas and Great Britain opposed America in all her naval power and lost, twice.[784] America did not contradict Wheatley's prophesy of a "heaven defended line," nor did America intend to disappoint her declarations, "To every Realm shall

tribunal based upon his classification as an enemy combatant (i.e., pirate) for violation of a law of war—the Court did this by applying prize law, which until then was only applicable on the high seas) (citing U.S. CONST. art. I, § 8, cl. 10; United States v. Smith, 18 U.S. 153 (1820); United States v. The Brig Malek Adhel, 43 U.S. 210 (1844); The Marianna Flora, 24 U.S. 1 (1826)).

781. Hamdi v. Rumsfeld, 542 U.S. 507, 523 (2004) (plurality opinion) (citing *Ex parte* Quirin, 317 U.S. 1, 21 (1942)).

782. Markon, *supra* note 715; Trop v. Dulles, 356 U.S. 86, 103 (1958) (this Court was inspired by Hannah Arendt to decide that "denationalization" is forbidden by the Eighth Amendment); *Hamdi*, 542 U.S. at 539 (plurality opinion) (Hamdi's case was emphatically *not* remanded for further proceedings as O'Connor ordered—Hamdi was stripped of his U.S. citizenship, placed on a no fly list, and deported to Saudi Arabia without consulting a federal court).

783. QUINCY ADAMS, ARGUMENT, *supra* note 114, at 62–63 (arguments in a case where the President attempted to comply with the Queen of Spain's request to deliver up the Africans of the Amistad up to be tried and killed in Cuba); Ron Soodalter, *The Limits of Lincoln's Mercy*, N.Y. TIMES (Feb. 23, 2012, 12:30 PM), https://opinionator.blogs.nytimes.com/2012/02/23/the-limits-of-lincolns-mercy/ (quoting Lincoln regarding Nathaniel Gordon's request for pardon after being sentenced to death for carrying on the slave trade, "I believe I am kindly enough in nature, and can be moved to pity and to pardon the perpetrator of almost the worst crime that the mind of man can conceive or the arm of man can execute; but any man, who, for paltry gain and stimulated by avarice, can rob Africa of her children to sell into interminable bondage, *I will never pardon*.") (emphasis added).

784. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); President Thomas Jefferson, Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters (July 2, 1807); President James Madison, Special Message [to Congress asking it to declare war on Great Britain], (June 1, 1812); President Abraham Lincoln, Proclamation 95–Regarding the Status of Slaves in States Engaged in Rebellion Against the United States [Emancipation Proclamation] (Jan. 1, 1863); Anon., *Early Washington: An Old Resident's Recollections of the War of 1812*, WASHINGTON EVENING STAR, Mar. 31, 1888, at 2 ("'Great God! Madam,' cried Gen. Cockburn, 'is this the kind of storm you are accustomed to in this infernal country?' 'No, sir,' was the reply. 'This is a special interposition of Providence to drive our enemies from our city.' 'Not so, madam,' he answered, 'it is rather to aid your enemies in the destruction of your city.'").

Peace her Charms display, / And Heavenly *Freedom* spread her golden Ray."[785]

Professor Laura K. Donohue's writings and speeches on privacy and security faithfully traced the root of the reasonableness requirement of the Fourth Amendment in the common law back to the American reversal of England's attempts to rule all the oceans through accident, fraud, and force.[786] Her newer works addressed Otis's *Paxton's Case*.[787] As she recounted, Otis's stand in *Paxton's Case* was not only the origin of the Fourth Amendment, but was the beginning of American independence itself.[788]

Otis's arguments in *Paxton's Case* were against a peculiar type of general warrant known as a writ of assistance.[789] The defining characteristics of general warrants are that: (1) they lack particularity about the person or place to be searched or seized, and (2) they are not supported by evidence of probable cause.[790] General warrants were rejected by the law of the land in England, however, they were allowed in the American Colonies as a matter of admiralty law, i.e., the law of the sea, by writ of assistance.[791]

The writ of assistance, likely invented by Oliver Cromwell to oppress the English people, is particularly degrading because it requires the person who is being searched or seized to *assist* the police.[792]

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785. Phillis Wheatley, *Liberty & Peace* [1784]; Phillis Wheatley, *On the Capture of General Lee* [1776]; Phillis Wheatley, *To His Excellency General Washington* [1775] (Putting into words our existence as a part and parcel of all humanity, which is "freedom's heaven-defended race!").

786. Donohue, *National Security*, *supra* note 31; Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1194 (2016) [hereinafter Donohue, *The Original*].

787. Donohue, *The Original*, *supra* note 786, at 1194.

788. *Id.*; SIMMONS, *supra* note 31, at 13.

789. SIMMONS, *supra* note 31, at 13.

790. *See* Donohue, *The Original*, *supra* note 786, at 1194.

791. *See id.* at 1196; SIMMONS, *supra* note 31, at 13.

792. *See* Letter from John Adams to Hezekiah Niles (Jan. 14, 1818); *The Death Warrant of King Charles I* (Jan. 29, 1648/49) ("requir[ing] [a]ll [o]fficers[,][s]oldiers, and other[s,] the good people of this Nation of England[,] to be assistinge unto *you* in this service") (emphasis added); *An Ordinance For raising of Twenty thousand pounds a Moneth for the Relief of Ireland* (Feb. 16, 1647/8), *in* 1 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642–1660, at 1072, 1099–1100 (C.H. Firth & R.S. Rait eds., 1911) [hereinafter ACTS . . . OF THE INTERREGNUM] (allowing tax collectors to require the assistance of "any persons Authorized to assist . . . or any other person or persons whatsoever, dwelling in or near the place" "to break open any House, Shop, or other thing," to pay off Oliver Cromwell's mercenary soldiers to invade Ireland—i.e., it appears that the Puritans invented writs of assistance to plunder England in order to pay Cromwell to pillage Ireland); Oliver Cromwell, *Underneath—Writ of Assistance* (May 9, 1648), *in* 3 THOMAS CARLYLE, THE LETTERS AND SPEECHES OF OLIVER CROMWELL 385 (S. C. Lomas ed., 1904); Letter from Oliver Cromwell to General Desbrowe

The suspicionless seizures by writ of assistance were not exclusive to investigations for crime.[793] Writs of assistance were often issued for the impressment of innocent English and American boys into involuntary naval servitude and the civil forfeiture of colonial resources over land, i.e., what the U.S. Constitution calls a taking.[794]

The chief advocate of Cromwell's Navigation Acts and writs of assistance was George Downing—an American Puritan.[795] Downing graduated from Harvard, became a spy for Cromwell during the English Civil War, and when the Crown was restored he betrayed his revolutionary friends by torture and death, and sponsored the passage of the Navigation Acts in Parliament.[796] Otis and Adams had choice

(Mar. 11, 1654–55), *in* 3 CARLYLE, *supra* note 792 at 462–63 (authorizing "[w]ith *writ of assistance*" the violent suppression of speech, the impressment (i.e., theft and enslavement) of property and people into Cromwell's service, and the violent quelling and capture of those politically unaligned with the ascension of Cromwell) (emphasis added). *Cf.* TUDOR, *supra* note 34, at 60 n.*, 65 n.*, 78–79 ("The form of this writ [of assistance], was nowhere to be found; in no statute, no law book, no volume of entries . . . ." At the time of the American Revolution, the Puritan sources involving writs of assistance were suppressed by the crown.); Letter from John Adams to William Tudor (June 17, 1818).

793. *See, e.g.*, Oliver Cromwell, *Underneath—Writ of Assistance* (May 9, 1648), *in* 3 CARLYLE, *supra* note 792, at 385; Letter from Oliver Cromwell to General Desbrowe (Mar. 11, 1654–55), *in* 3 CARLYLE, *supra* note 792, at 462–63.

794. U.S. CONST. amend. V (takings must be for a public use and purchased with "just compensation"); THE CASE OF THE KING AGAINST ALEXANDER BROADFOOT 11 (1758) [1743] (Opinion of Sir Michael Foster) [hereinafter THE CASE . . . AGAINST ALEXANDER BROADFOOT] (writs of assistance were issued "to the Customers and other Officers of almost all the Port-Towns in the Kingdom," which stated that "all Sheriffs, Mayors and other Officers are requir'd to be assisting" the Crown, "requiring them to arrest and take up for the King's Service All and Singular Ships, Barges and other Vessels"); Benjamin Franklin, *Franklin's Remarks on Judge Foster's Argument in Favor of the Right of Impressing Seamen* [before Sept. 17, 1781], *in* 35 THE PAPERS OF BENJAMIN FRANKLIN 158 (Barbara B. Oberg ed., Princeton University Press 2008) ("Inconvenience to the whole trade of a nation will not justify injustice to a single seaman."); President James Madison, Special Message [to Congress asking it to declare war on Great Britain], (June 1, 1812) ("British cruisers have been in the continued practice of violating the American flag on the great highway of nations, and of seizing and carrying off persons sailing under it."); John Adams, *Minutes of the Argument, Surveyor General v. Loggs, Court of Vice Admiralty, Boston, March 8, 1773*, *in* 2 ADAMS, LEGAL PAPERS, *supra* note 22, at 267, 269 (the English Crown was impressing or civil forfeiting timber from America to build warships). *See also* Letter from John Adams to William Tudor (Sept. 23, 1818) (Adams noted that the English colonists considered the rights to the natural resources, as well as "the immense regions of uncultivated wilderness" of America to lie with the Native Americans: The colonists did not have "any confidence in their charter, as conveying any right, except the king, who signed it. They considered the right to be in the native Indians. And in truth all the right there was in the case, lay there.").

795. SIMMONS, *supra* note 31, at 22.

796. Letter from John Adams to William Tudor (July 14, 1818) ("To borrow the language of the great Dr. Johnson, this '[d]og' Downing must have had a head and [b]rains, or, in other [w]ords, [g]enius and [a]ddress: but, if [w]e may believe [h]istory, he was a [s]coundrel. To ingratiate himself with Charles the Second[,] he probably not only pleaded his [m]erit in

words for this horrible betrayer of America, and thus, America began its repentance from Puritanism during the American Revolution.[797]

Shortly thereafter, Jeremy Bentham raised the fundamentals of Puritan legal practice to contest the legitimacy of the Declaration of Independence on behalf of his conquering crown.[798] Indeed, ever since the Puritan Revolution sank England into "the great depth . . . hell's profound domain,"[799] the English Crown came to embody the political realism espoused by Cromwell.[800] Puritanical legal practice is a conspicuous growth of Cromwellian realism founded upon American legal positivism that resulted in the Puritan genocide of the Pequots.[801]

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inventing the [n]avigation [a]ct, but he betrayed to the [b]lock some of his old [r]epublican and [r]evolutionary [f]riends.").

797. *See id.* ("George Downing! Far from boasting of thee as my countryman, or of thy statute as an American invention, if it were lawful to wish for any thing past, that has not happened, I should wish that thou hadst been hanged, drawn, and quartered, instead of Hugh Peters and Sir Henry Vane."); SIMMONS, *supra* note 31, at 22.

798. Jeremy Bentham, *Short Review of the Declaration* [1776], *in* BENTHAM & LIND, *supra* note 38, at 120.

799. Phillis Wheatley, *Phillis's Reply to the Answer* [1774] (Wheatley's characterization of the failures of the Puritan experiment).

800. BENTHAM, A FRAGMENT, *supra* note 39, at xxxiv–xxxv n. s; Letter from Jeremy Bentham to the Citizens of the United States, July 1817 [*Letter VII*], *in* 4 BENTHAM, THE WORKS, *supra* note 42, 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."); DUMONT, *supra* note 38, at 120, 231–36 ("If it be better for the happiness of the greatest number that a man should die . . . *cut him [down] without mercy*.").

801. Letter from Oliver Cromwell to Captain John Leverett (Apr. 3, 1655), *in* 3 CARLYLE, *supra* note 792, at 300–01; *id.* at 409–10; JOHN MASON, A BRIEF HISTORY OF THE PEQUOT WAR 9 (Paul Royster, ed. 1736) [1637] (predating Cromwell's military career, and a possible inspiration of his heinous treatment of Irish Catholics); THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSET'S BAY 190–95 (1765) [hereinafter HUTCHINSON, 1765 THE HISTORY]; THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETS-BAY 3 (1767) [hereinafter HUTCHINSON, 1767 THE HISTORY]; L.D. Samuel Highland, *An Exact Relation of the Proceedings and Transactions of the late Parliament* 18 [1654] (expressing a hope that England might repeat the legal positivism of the American Puritans so that "the great volumes of Law would come to be reduced into the bigness of a pocket book, as it is proportionable in *New England* and elsewhere"); SELDEN, TABLE-TALK, *supra* note 28, at 61 (as the Puritan Revolution unfolded, and as Cromwell administered an arbitrary and tyrannical government by legal positivism, Selden's argument that the Courts of Equity were as arbitrary as the "chancellor's foot" fell flat, and lost all objective credibility); WORTHINGTON CHAUNCY FORD, JOHN COTTON'S MOSES HIS JUDICIALLS AND ABSTRACT OF THE LAWS OF NEW ENGLAND 10–11 (Cambridge University Press 1902) (Admitting that in his study of this first Puritan code "that only a few grains of wheat are found in this bushel of chaff."); *Massachusetts Body of Liberties* 94.2 [1641] ("If any man or woman be a witch, . . . they shall be put to death."); *The Lawes and Liberties of Massachusetts* [1648] (largely a reproduction of the original *Body of Liberties*, updated and revised from time to time and published as *Laws and Liberties*). *See* AUSTIN WOOLRYCH, COMMONWEALTH TO PROTECTORATE 271–73, 300 (1982). *Cf.* BENTHAM, A FRAGMENT, *supra* note 39, at xxxv n. s (successfully fending off Sir William Blackstone's attacks on the Puritan use of Legal Positivism); *id.* at 141 (urging

The nature of Cromwellian oppressions by writ of assistance in England and America drew their supposed legitimacy from the law of the sea.[802] The idea that the seas symbolized the uncontrollable power of the all-conquering rulers of the earth was a feudal aberration that existed in English law ever since the Viking conquest was instituted under William the Bastard.[803] The idea of British sea dominion, first conceived by William the Bastard, was perfected by Oliver Cromwell's conquest of Jamaica, reified by Charles II's conquest of New York, and affirmed by English jurists in *Campbell v. Hall* and *Ex parte Bancoult* respectively.[804]

The origin of Cromwellian legal realism is the Puritan propagandist Marchamont Nedham's translation of John Selden's Latin treatise, *The Sea is Closed*, into English.[805] Selden claimed an English right to own all the seas, drawn from the mad Emperor Caligula's claim of conquering Neptune, by collecting sea shells from what is pre-

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legislators to take up the Puritan project of "transforming, by a digest, the body of the common law thus completed, into statute-law").

802. *See* Letter from John Adams to James Lovell (Oct. 4, 1779) ("What is at stake for Britannia? What will be the Consequence to her of American Independence? Is not the Empire of the Sea at stake?"). *See* Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.); 20 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 283, 289 (1816) ("'Jamaica was conquered by Oliver Cromwell'") (statement of Lord Mansfield during the trial of *Campbell*); Thomas Hutchinson, *Diary*, Nov. 28, 1774, *in* 1 Thomas Hutchinson, The Diary and Letters of His Excellency Thomas Hutchinson 307–09 (Peter Orlando Hutchinson ed., 1884) [hereinafter HUTCHINSON, THE DIARY]; THE CASE . . . AGAINST ALEXANDER BROADFOOT, supra note 794, at 11.

803. HOBBES, *supra* note 6, at 119,132, 231, 246, 522–23 ("This is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that *mortal god*, to which we owe under the *immortal God*, our peace and defence." This state of affairs in England stretched back at least to William the Conqueror, who Hobbes associated with "the great power of *Leviathan*, . . . King of the Proud. *There is nothing . . . on earth to be compared with him. He is made so as not to be afraid, He seeth every high thing below him; and is king of all the children of pride*.").

804. *Id.* at 178, 192 (claiming an absolute right of the English sovereign to distribute "Lands at home; so also to assigne in what places, and for what commodities, the subject shall traffique abroad"); OTIS, *supra* note 18, at 244 (noting that the English spoke of the colonists in terms of "*yokeing* and *curbing* the *cattle*"); [John Mein,] *Sagittarius's Letters and Political Speculations* 98, 100, 109–10 [1775]; Campbell v. Hall [1774] 1 Cowp. 206, 211–12 (Eng.) (tracing the right of conquest symbolized by New York back to Cromwell's conquest of Jamaica); R (On the Application of Bancoult) v. Sec'y of State for Foreign & Commonwealth Affairs, [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.) (affirming Campbell v. Hall [1774] 1 Cowp. 206 (Eng.)) *See* 20 HOWELL, *supra* note 802, at 283, 289 ("'Jamaica was conquered by Oliver Cromwell'") (statement of Lord Mansfield during the trial of *Campbell*); HUTCHINSON, THE DIARY, *supra* note 802, at 307–09.

805. *See generally* 2 JOHN SELDEN, OF THE DOMINION OR, OWNERSHIP OF THE SEA, WRITTEN AT FIRST IN LATIN, AND ENTITLED, MARE CLAUSUM (Marchamont Nedham trans., 1652) [hereinafter SELDEN, OF THE DOMINION].

sent day Holland.[806] Thus, Cromwell began the project of English empire building with an attempt to get Holland on board with his quest of conquering the sea.[807]

Holland, however, decided to defend Hugo Grotius' tract, *The Sea is Free*, entered into the law of nations on behalf of Holland's policies of free trade. Thus, Holland resisted Cromwell and disputed his claims.[808] Cromwell subsequently waged the First Anglo-Dutch War over the fate of all the seas, which ended as a stalemate.[809] Then Cromwell's sights turned to the Spanish Empire, from whom he conquered the island colony of Jamaica.[810]

The English claim of a right to impress, tax, and enslave the whole world eventually drove America to declare independence.[811] England's voracious hunger for conquest grew from the "Madnesse" of men recorded by Thomas Hobbes, as a strange confluence of pride and dejection in humanity; such that they bow to *Leviathan*.[812] King Charles II claimed his right of *Leviathan* over the people in the style of Oliver Cromwell, the regicide, which only intensified the oxymoronic spectacle of English realism.[813]

After Cromwell's untimely death, Holland issued a complaint into the law of nations.[814] In response, the great betrayer, George Downing, at the behest of his King Charles II fomented a second war with Holland.[815] This war England won, resulting in a treaty at Breda; where New Amsterdam was ceded to England and renamed for the

806. *Id.* at 202–03 (claiming Caligula's collection of seashells taken from the shores of Holland as "Tokens of Sea-Dominion, and as a most sure pledge of the British Empire").

807. CHARLES FIRTH, OLIVER CROMWELL AND THE RULE OF THE PURITANS IN ENGLAND 312–13 (1908).

808. *Id.; see generally* HUGO GROTIUS, MARE LIBERUM (David Armitage ed., Richard Hakluyt & William Welwod trans., 2004) (1609).

809. The Treaty of Westminster, Eng.-Neth., Apr. 5–15, 1654.

810. FIRTH, *supra* note 807, at 401–02.

811. Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.). *See* King George III, *The King's Speech of Nov. 30, 1774* [1775]; HUTCHINSON, THE DIARY, *supra* note 802, at 307–09 (confirming the timing of King's Speech was contemporaneous with the ruling of *Campbell v. Hall*, and that the *Campbell* case and the King's Speech harkened back to Cromwell's conquest of Jamaica).

812. HOBBES, *supra* note 6, at 46–48.

813. The Navigation Act 1660, 12 Car. 2 c. 18 (Eng.).

814. SIR GEORGE DOWNING, A REPLY OF SIR GEORGE DOWNING, KNIGHT AND BARONET, ENVOY EXTRAORDINARY FROM HIS MAJESTY OF GREAT BRITAIN, & TO THE REMARKS OF THE DEPUTIES OF THE ESTATES GENERAL, UPON HIS MEMORIAL OF THE 20TH OF DECEMBER, 1664, at 80, 94 (1665) ("And whereas the Deputies would have it thought no indignity or affront to his Majesty, for that Fleet to have passed, for that, say they, *The Sea is open to all the World*.").

815. *Id.* at 93, 104 ("*[T]hey might as well have spared the labour of making their Complaint, and the King his Master will hold himself obliged to oppose Force to Force*.").

Duke of York (who would later become King James II of England).[816] This land of New York became known throughout the world as "the seat of the Empire."[817]

Prior to the conquest of New York, the crown's most fundamental power to tax was limited to England.[818] Up to this point, the original Virginia and Plymouth Colonies, which were the first English Colonies in the world, maintained their liberties through social compacts that they reified through royal charter.[819] After the conquest of New York, however, a succession of English monarchs consolidated power over all New England without the consent of the Americans.[820]

In response, the American colonies declared as one *obsta principiis!* (resist beginnings) and maintained the rights of the En-

816. Treaty of Breda, Eng.-Neth., July 31, 1667 (ceding the New Netherlands territories to England, which became what is today New York, New Jersey, Pennsylvania, and Delaware).

817. Letter from George Washington to James Duane (Apr. 10, 1785).

818. Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.) (finding for the first time that due to the Cromwellian conquests of Jamaica and New York, that the King could tax the whole world without representation); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 282 (1856) (the barons are the King's tax collectors based upon William the Bastard's conquest of the people of England—in the moment in history *Murray's Lessee* cited to, only the people of England were conquered, and thus the original Massachusetts Bay Colonists made their escape based upon their physically leaving conquered England to a land still naturally free from English conquest—the use of this insular English taxation law in *Murray's Lessee* based on the Bastard's illegitimate conquest, defies the very roots of American society as an opposition to the rights of conquest, and a vindication of the freedom of the seas) (citing 4 EDWARD COKE, INSTITUTES *115), *affirmation noted in* Stern v. Marshall, 131 S. Ct. 2594, 2597 (2011). *See also* 4 EDWARD COKE, INSTITUTES *269 (The U.S. Supreme Court continues to dogmatically draw from what is a quintessentially feudal structure of tax collection involving William the Bastard's Domesday Book, as if the Taney Court's decision in *Murray's Lessee* to affirm this feudalism was reasonable and did not contribute to the nation falling into Civil War shortly thereafter.).

819. JOHN BUTMAN & SIMON TARGETT, NEW WORLD INC. 303–04 (2018) (revealing that in 1691, Plymouth Colony, which was established around the same time as Virginia, was merged with Massachusetts Bay); *The Mayflower Compact* [1620]; *The Portsmouth Compact* [1638]; *Rhode Island Parliamentary Patent* [1643]; *Rhode Island Royal Charter* [1663]. *See* Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 JOHN WINTHROP, WINTHROP'S JOURNAL "HISTORY OF NEW ENGLAND" 116–17 (James Kendall Hosmer ed., 1908) [hereinafter WINTHROP'S JOURNAL] (The Puritans destroyed all copies of this tract, and no known copy survives.). *See also* Letter from John Adams to William Tudor (Sept. 23, 1818); JEFFERSON, NOTES, *supra* note 263, at 163–64; Jeremiah Drummer, *A Defence of the New-England Charters* 8 [1715].

820. *The Charter of the Dominion of New England* [1686] (This was an attempted merger of Connecticut, Massachusetts, New Hampshire, Rhode Island, New York, and New Jersey, abandoned and officially dissolved in 1689, because of the resistance. The Connecticut Charter Oak and the Great Boston Revolt of 1689 signaled its downfall.). *See* OTIS, *supra* note 18, at 161–62 (quoting Jeremiah Dummer, *A Defence of the New-England Charters* 29 [1715]).

glishman by compact; as established in their charters.[821] The colonies upheld the common law as the law of the land, symbolized by Connecticut's Charter Oak; rejecting the English government of the sea.[822] The American idea that the law of the land should apply outside of England

821. Jeremiah Dummer, *A Defence of the New-England Charters* 23, 49, 88 [1715] ("And to comple[te] the oppression, when they upon their trial claimed the rights of Englishmen, they were scoffingly told, those things would not follow them to the ends of the earth. Unnatural insult; must the brave adventurer, who with the hazard of his life and fortune, seeks out new climates to enrich his mother country, be denied those common rights, which his countrymen enjoy at home in ease and indolence? Is he to be made miserable, and a slave by his own acquisitions? Is the laborer alone unworthy of his hire, and shall they only reap, who have neither sowed nor planted? Monstrous absurdity! Horrid inverted order!"—"Burnt houses may rise again out of their ashes, and even more beautiful than before, but 'tis to be feared that liberty once lost, is lost forever."); The Riverbends Channel, *James Baldwin Debates William F. Buckley (1965)*, YouTube (Oct. 27, 2012), https://www.youtube.com/watch?v=ofeoS41xe7w (Baldwin's claims were strikingly similar to Dummer's in regard to the creation of property rights later adopted by James Otis to justify our revolution in the maxim *qui sentit commodum sentire debet et onus*, meaning those who get the benefit should also carry the burden: "I am stating very seriously, and this is not an overstatement: That I picked the cotton, and I carried to market, and I built the railroads under someone else's whip, for nothing. For nothing. The Southern oligarchy, which has until today so much power in Washington, and therefore some power in the world, was created by my labor and my sweat, and the violation of my women, and the murder of my children."); CNN, *Community organizer [DeRay McKesson] speaks to CNN about Baltimore protests*, YouTube (July 23, 2015), https://www.youtube.com/watch?v=J8]NxbjJUP8 (McKesson's statements on air are strikingly similar to Dummer's statements in 1715 in the spirit of *obsta principiis*, "I know that Freddie Gray will never be back, but those windows will be. . . . Broken windows are not broken spines."). The resistance of Jeremiah Dummer inspired the founders beginning with James Otis and Phillis Wheatley. Otis, *supra* note 18, at 331 ("It is my countrymen of the utmost consequence that we boldly oppose the least infraction of our charter, and rights as men. *Obsta Principiis* is a maxim never to be forgot: If we do not resist at the first attack, it may soon be too late; and where such a prize as the liberties and privileges of British subjects is at stake, who dares say it is not better to be too jealous, than too secure, and begin too early rather than suffer all to be lost by inattention and neglect."); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772], *in* Phillis Wheatley, Poems on Various Subjects, Religious and Moral 7 (1773) (claiming a property right to reap what she had sown, as Dummer said all British colonial subjects should). *Cf.* Letter from John Adams to James Lovell (Oct. 4, 1779) ("What is at stake for Britannia? What will be the Consequence to her of American Independence? Is not the Empire of the Sea at stake?"); [John Mein,] *Sagittarius's Letters and Political Speculations* 98, 100, 109–10 [1775]; Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.).

822. William Tudor, *An Oration Delivered March 5th, 1779*, Edes & Gill, Mar. 5, 1779, at 11 [1779] (according to this ancient wisdom, the American Revolutionaries generally recited the maxim *obsta principiis* meaning "resist beginnings"); Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Feb. 6, 1775), *reprinted in* Adams & Sewall, *supra* note 777, at 34 ("*Obsta principiis*—Nip the shoots of arbitrary power in the bud, is the only maxim which can ever preserve the liberties of any people."); Letter from W.H. Sumner to John Adams (May 3, 1823) ("*Obsta principiis*, was the motto of our fathers."). *See* Jeremiah Dummer, *A Defence of the New-England Charters* 88 [1715] ("Burnt houses may rise again out of their ashes, and even more beautiful than before, but 'tis to be feared that liberty *once lost, is lost forever*.").

was diametrically opposed to Oliver Cromwell's claims arising from Caligula's sea dominion.[823]

In 2008 the House of Lords expressly affirmed the imperial powers of the crown upon absurd Cromwellian sources in the 1774 case *Campbell v. Hall*.[824] Lord Mansfield officially unbounded the crown from the law of the land to unilaterally tax the colonies and to write, and rewrite, the constitutions of British colonies at will.[825] The *Campbell* case promised that English impressment, civil forfeiture, and writs of assistance would flourish across the empire despite the American resistance led by James Otis.[826]

After reading King George III's speech issued contemporaneously with *Campbell* and published in Massachusetts, Abigail Adams indelibly remarked, "The die is cast."[827] To King George III's disappointment, the American Colonies did not betray Massachusetts Bay,

823. *Rhode Island Royal Charter* [1663]. *See* Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 WINTHROP'S JOURNAL, *supra* note 819, at 116–17 (though in his day, he was attacked by his own people, Roger Williams' view that the common law and the rights of the Englishman should be extended to all people, including women and Native Americans, was eventually adopted universally by the Colonies as a fact fully and finally moved beyond question by the Declaration of Independence); United States ex rel. Toth v. Quarles, 350 U.S. 11, 27 n.9 (1955) ("A declaration of rights adopted by nine colonies in 1765 contained this statement: 'That trial by jury, is the inherent and invaluable right of every British subject in these colonies.' The Declaration of Independence stated as one of the grievances of the colonies that the King of Great Britain had deprived the colonists of the benefits of trial by jury in many cases and that he had 'affected to render the Military independent of and superior to the Civil power.' Another charge was that he had transported colonials 'beyond the Seas to be tried for pretended offences.'") (quoting THE DECLARATION OF INDEPENDENCE paras. 2, 14, 20, 21 (U.S. 1776)).

824. R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.) (affirming Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.)).

825. Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.).

826. *Id.* ("An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives."); Samuel Johnson, *Taxation No Tyranny* 30 [1775] (England thereby claimed "a right to bind them [the Colonists] by statutes, and *to bind them in all cases whatsoever*") (emphasis added); THOMAS HUTCHINSON & ANDREW OLIVER, COPY OF LETTERS SENT TO GREAT-BRITAIN 16 (1773) ("There must be an abridgement of what are called English liberties." Lord Mansfield in *Campbell* officially created Governor Hutchinson's secret petitions to the Lords of England into undoubted law.) (statement of Thomas Hutchinson).

827. Letter from Abigail Adams (draft) to Mercy Otis Warren (Feb. [3?], 1775); Hannah Griffitts, *The Patriotic Minority in Both Houses of the British Parliament.—1775*, *in* Milcah, *supra* note 77, at 130–32; King George III, *The King's Speech of Nov. 30, 1774* [1775]; Thomas Hutchinson, *Diary*, Nov. 28, 1774, *in* 1 Hutchinson, The Diary, *supra* note 802, at 307–09 (confirming the timing of the King's Speech in England was contemporaneous with the ruling of *Campbell v. Hall*, and that the *Campbell* case and the King's Speech ironically harkened back to Cromwell's conquest of Jamaica as the bases for their decisions).

they united against the crown.[828] At this, England lost its imperial seat of New York and the Americans were a phoenix reborn *e pluribus unum*; the American Union glowed like Moses' vision of "a bush burning and yet not consumed."[829]

The purpose of establishing American independence was to perpetually quarantine, oust, and overrule arbitrary feudal law and martial law, which are the laws of Caligula's sea conquest.[830] Thomas Hobbes rendered the authoritative text on the laws and principles of arbitrary, feudal government in his *Leviathan*.[831] Hobbes believed that men's "Madnesse," that he characterized as a strange confluence of pride and dejection in all human beings, required them to bow to their conquering rulers, but the Americans did not agree.[832]

The Americans disputed Hobbes and his idea that humankind was irrevocably mad; such that they must inevitably bow to their rulers and make themselves slaves.[833] Thus, they courageously resolved "to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice."[834] For over two centuries the United States managed to disprove Hobbes by their "conduct and example" under the separation of powers.[835]

James Otis was the first among us to issue the fiery American rebuttal to the Hobbesian theory of human madness in *Paxton's Case*.[836] Otis rose up on behalf of all English Colonists, black and white, man and woman, living in America, India, or Africa, to publish

828. THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776) (this was the first time they called themselves "United States").

829. Samuel Cooper, *Sermon on the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 2 [1780] (internal quotation marks omitted) (quoting *Exodus* 3:2).

830. United States ex rel. Toth v. Quarles, 350 U.S. 11, 27 n.9 (1955) (quoting THE DECLARATION OF INDEPENDENCE paras. 2, 14, 20, 21 (U.S. 1776)); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1335 ("the common law was deemed by our ancestors as part of the law of the land, brought with them upon their emigration").

831. HOBBES, *supra* note 6, at 119, 231, 522–23.

832. *Id.* at 46–48; OTIS, *supra* note 18, at 241 (fraud and force were rejected as "*Hobbesian* maxims," i.e., illegitimate bases of government).

833. Letter from John Adams to John Quincy Adams (Aug. 11, 1777) (giving his son "the Works of Mr. Hobbes" to study, calling it for the most part "a great deal of mischievous Philosophy"); QUINCY ADAMS, ARGUMENT, *supra* note 114, at 89 (Comparing the Southern cause of slavery to Hobbes' wicked attempt "to prove that government and despotism are synonymous words.").

834. THE FEDERALIST NO. 1 (Alexander Hamilton).

835. *Id.*; John Adams, *Thoughts on Government* 10–11 [1776]; U.S. CONST. arts. I, II, III.

836. OTIS, *supra* note 18, at 175 (stating "that *acts of parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*").

the cause of all British colonists in pamphlets in England; directly refuting Hobbesian pride and fatalism.[837] In Otis's words,

> Some favourite modern systems must be given up or maintained by a clear open avowal of these *Hobbesian* maxims, viz. That dominion is rightfully founded on force and fraud.—That power universally confers right.—That war, bloody war, is the real and natural state of man—and that he who can find means to buy, sell, enslave, or destroy, the greatest number of his own species, is right worthy to be dubbed a modern politician and an hero.[838]

It did not matter if at some point or another, through fraud or force, some king or emperor tricked colonists in America, India, or Africa like a serpent of Eden into servitude; because fraud and force are illegitimate bases of power.[839] In order to make our case against the tyrants of the world, Otis wrote that every person has "a natural right to be *free*, and they have it ordinarily in their power to make themselves so if they please."[840] America followed Otis's lead on July 4, 1776, by declaring its independence.[841]

So too, Phillis Wheatley rose up among the Americans like an angel of light and "shook the dazzling glories of [her] head" to vindicate the cause of British colonists all over the world against Hobbesian fa-

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837. *Id.* at 3 ("mankind seem at this day to be in a great measure cured of their madness in this"); *id.* at 4 ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?"); *id.* at 29 ("The Colonists are by the law of nature free born, as indeed all men are, white or black. No better reasons can be given, for enslaving those of any color than such as baron Montesquieu has humorously given, as the foundation of that cruel slavery exercised over the poor Ethiopians; which threatens one day to reduce both Europe and America to the ignorance and barbarity of the dark ages."); *id.* at 250 ("That I may not appear too paradoxical, I affirm, and that on the best information, the Sun rises and sets every day in the sight of five millions of his majesty's American subjects, white, brown and black."); *id.* at 199 (Otis argued that "the dominions should be in *fact* represented. Else it will follow, that the provincials in Europe, Asia, Africa and America, ought to all generations to content themselves with having no more share, weight, or influence even in the provincial government of their respective countries, than the Hotentots have in that of China, or the Ethiopians in that of Great-Britain.").

838. *Id.* at 241.

839. *Id.*; SIMMONS, *supra* note 31 ("To suppose them [i.e., the people] SURPRISED BY FRAUD, OR COMPELLED BY FORCE into any other compact, such fraud and such force could confer no obligation. Every man had a right to trample it under foot whenever he pleased.") (emphasis added); Cicero, *De Officiis* 1.13.41 ("But let us remember we must have regard for justice even towards the humblest. Now the humblest station and the poorest fortune are those of slaves . . . . While wrong may be done, then, in either of two ways, that is, BY FORCE OR BY FRAUD, both are bestial . . . .") (emphasis added). *See* United States v. The Amistad, 40 U.S. 518, 520 (1841) (public documents that signify the enslavement of people "are always open to be impugned for fraud").

840. OTIS, *supra* note 18, at 126–27.

841. *Id.*; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

talism.[842] Wheatley's mighty poems dared to help the American imagination soar boldly through the night of terrors; as if riding a chariot of stars.[843] Like Otis, Wheatley candidly refuted the Hobbesian idea, that human beings are inevitably slaves to pride and dejection, and therefore their physical enslavement is inevitable; instead, she fully faced the horrors of death with faith in God and hope in the world to come.[844]

Accordingly, Wheatley proclaimed the reversal of English sea dominion in her poems, drawing upon the ancient poetics of Ovid.[845] She declared America's side on that of Mount Parnassus and the God of Creation against the sire of ocean, chaos, and arbitrary government.[846] Wheatley wondrously vindicated the newborn United States with her poems that rivaled John Milton; with insights into the human imagination that conspicuously prefigured and outwitted those of German idealism.[847]

Wheatley's poetic pronouncements needed *no man* to affirm them, for she spoke directly back to what the German idealists later called *chaoskampf*.[848] John Adams and John Hancock agreed with

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842. Phillis Wheatley, *Isaiah lxiii* [1773] (this poem stands out among the others to demonstrate the mightiness of Phillis Wheatley's poems); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7.

843. 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] ("On death's domain intent I fix my eyes, / where human nature in vast ruin lies.").

844. Phillis Wheatley, *An Elegy, to Miss Mary Moorhead, on the Death of her Father, the Rev. Mr. John Moorhead* [1773]. *See* Letter from Phillis Wheatley to Sir John Thornton (Mar. 29, 1774) ("Had not Christ taken away the envenom'd sting [of death], where had been our hopes? What might we not have fear'd, what might we not have expected from the dreadful King of Terrors?").

845. Phillis Wheatley, *Liberty & Peace* [1784]; Phillis Wheatley, *Ocean*, [1773?].

846. In Ovid's account of the flood story, like the Bible's story of Noah, the ark lands on Mount Parnassus, and the symbolism embraced by Wheatley drawn from Ovid refuted the Puritanical endorsement of Caligula's conquests of the seas by defeating Poseidon. Ovid, *Metamorphoses* 1.312 (describing Parnassus as the place where humanity received a second chance after the flood); Phillis Wheatley, To Maecenas [1773] ("So long, great Sir, the muse thy praise shall sing, / So long thy praise shall make *Parnassus* ring"); Phillis Wheatley, *Ocean* [1773] (at Wheatley's celebration that creation defeated "old Chaos of tyrannic soul," and when God separated the land from the sea, "the mighty Sire of Ocean frownd / 'His awful trident shook the solid ground'").

847. Phillis Wheatley, *America* [1768]; Phillis Wheatley, *To His Excellency General Washington* [1775]; Phillis Wheatley, *On Imagination* [1773]; Phillis Wheatley, *Thoughts on the Works of Providence* [1773]. *Cf.* Goethe, *Prometheus* [1785, 1789] (the widespread fame of Wheatley's ideas and writings prefigured Goethe's rise to prominence; Wheatley and Goethe later became co-inspirers of the famed fireside poet Henry Wadsworth Longfellow).

848. WHEATLEY, *supra* note 821, at 3 (the dedication page of her book is to Selina Hastings the Countess of Huntingdon who was the primary patron of her works—she was *no man*). *See* Phillis Wheatley, *Ocean* [1773?]. Phillis Wheatley, *On Messrs. Hussey and Coffin*

Wheatley when they endeavored to dispute the arbitrary force of the feudal imagination that animated English despotism in America.[849] The founding lawyers, thus, joined Wheatley's transformation of Milton's reveries of doom into a new song of hope.[850]

Some of the lost works of the founding poetess, Phillis Wheatley, are being rediscovered.[851] In one recently recovered work entitled *Ocean*, Wheatley recorded a grand distinction about how the human imagination worked to create the materials by which human beings could change the course of human events.[852] By comparing our creative capacities with God's creation of the world, Phillis Wheatley claimed her place as Ciceronian poet and primary defender of the American Dream,

When first old Chaos of tyrannic soul
Wav'd his dread Sceptre o'er the boundless whole,
Confusion reign'd till the divine Command
On floating azure fix'd the Solid Land,
Till first he call'd the latent seeds of light,
And gave dominion o'er eternal Night.
From deepest glooms he rais'd this ample Ball,
And round its wall he bade the surges roll;
With instant haste the new made seas complyd,
And the globe rolls impervious to the Tide;

[1767]; 2 JOSEPH LAVALÉE & PHILLIS WHEATLEY, THE NEGRO EQUALLED BY FEW EUROPEANS 167–248 (J. Trapp trans., 1790) (Wheatley's book of poems was reprinted in America with Lavalée's book); Letter from Voltaire to A M. Le Baron Constant de Rebecque (Apr. 11, 1774), *in* 16 VOLTAIRE, *supra* note 268, at 594–95 (praising Wheatley's work); HENRI GRÉGOIRE, AN ENQUIRY CONCERNING THE INTELLECTUAL AND MORAL FACULTIES, AND LITERATURE, OF NEGROES 44–45, 234–41 (D.B. Warden trans., 1810). *Compare* Phillis Wheatley, *Ocean* [1773?] *with* Rosanna Rackley, *Kingship, Struggle, and Creation: The Story of Chaoskampf* 5 (2015) (Master's thesis) (available at the University of Birmingham eThesis Repository).

849. John Adams, *Adams' Copy of the Information and Draft of His Argument, Court of Vice Admiralty, Boston, Oct. 1768–Mar. 1769, Jonathan Sewall v. John Hancock* [1768–69], *in* 2 ADAMS, LEGAL PAPERS, *supra* note 22, at 194–210.

850. Phillis Wheatley, *To a Gentleman of the Navy* [1774]; Phillis Wheatley, *Phillis's Reply to the Answer* [1774]; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

851. Henry Louis Gates, Jr., *Thomas Jefferson and The Trials of Phillis Wheatley*, C-SPAN (Mar. 22, 2002), https://www.c-span.org/video/?169288-1/thomas-jefferson-trials-phillis-wheatley (Phillis Wheatley's husband "John Peters, a fast-talking small businessman who affected the airs and dress of a gentleman and who would later sell off Phillis's proposed second volume of poetry—the one to have been dedicated to Franklin—which has never been recovered. Am I the only scholar who dreams of finding this lost manuscript?"); *see, e.g.,* Phillis Wheatley, *Ocean* [1773?].

852. Phillis Wheatley, *Ocean* [1773?].

Yet when the mighty Sire of Ocean frownd

"His awful trident shook the solid Ground."[853]

John Adams similarly wrote in his diary of God's creation of this world, "He had no preexisting matter to work upon or to change from a chaos into a world. But he produced a world into being by his almighty fiat, perhaps in a manner analogous to the production of resolutions in our minds."[854] According to the sublime poetics of Phillis Wheatley, the Americans rose up, faced the arbitrary British government of the seas, and sought to create a new government, a good government, out of the chaos.[855]

Remembering these birth pangs of the United States, Frederick Douglass looked into the present horrors of the nation and sang out among us, "The fiat of the Almighty *Let there be Light!* has not yet spent its force."[856] Almost a quarter of a millennium after the United States was born, however, a curtain of forgetfulness is drawn over the "magic power" of Phillis Wheatley's verses.[857] A renewed movement to fold the United States back into the British Empire is showing its ugly face.[858]

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853. *Id.*

854. John Adams, *Diary no. 1*, May 22 [i.e., 23], 1756, at 17.

855. U.S. CONST. art. I, § 8, cl. 8; Letter from Thomas Jefferson to Isaac McPherson (Aug, 13, 1813) ("Inventions then cannot, in nature, be a subject to property").

856. Frederick Douglass, What to the Slave is the 4th of July? (July 5, 1852), *in* 1 AMERICAN SPEECHES 551 (Ted Widmer ed., 2006).

857. Joseph Ladd, *The Prospects of America* [1785], *in* LITERARY REMAINS, *supra* note 748, at 23, 35 (speaking of "the far-spread name / Of wondrous Wheatly [sic], Afric's heir to fame," whose "glowing genius shines / . . . With magic power the grand descriptions roll / Thick on the mind, and agitate the soul").

858. Donald Trump, *Speech in Fort Worth, Texas*, Feb. 26, 2016, https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 (last visited Nov. 6, 2020) ("I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money"); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2018, 7:33 AM), searchable on https://www.thetrumparchive.com ("Someone can write an article or book, totally make up stories and form a picture of a person that is literally the exact opposite of the fact, and get away with it without retribution or cost. Don't know why Washington politicians don't change libel laws?"); Clifford v. Trump, 339 F. Supp. 3d 915, 921, 925, 928, 929 (C.D. Cal. 2018) (protecting Trump's "rhetorical hyperbole" that is almost certainly false from suit under an anti-SLAPP statute); *see* Donohue, *The Original*, *supra* note 786, at 1189 ("Some of the most well-known search cases at the time, for instance, centered on seditious libel, not stolen goods—even as other statutes provided for such disparate objects as counterfeit coins and indigents wanted for service on the high seas."); Brendan O'Neill, *The return of seditious libel*, SP!KED (Feb. 26, 2018), https://www.spiked-online.com/2018/02/26/the-return-of-seditious-libel/ ("When you use this legal tool of aristocratic vengeance, this chilling feudalistic hangover, this law beloved of Holocaust deniers, Saudi plutocrats and other enemies of the open society, you forfeit every right to call yourself radical."). *Cf.* John Adams, *V. "A Dissertation on the Canon and the Feudal Law," No. 3* (Sept. 30, 1765) ("The stale, impudent

In 2008, the English House of Lords reaffirmed *Campbell v. Hall* and the Cromwellian version of British Empire, based upon the mad Emperor Caligula; as if the American Revolution never happened.[859] In the same year, the U.S. Supreme Court firmly distinguished the same feudal doctrines from legitimate U.S. common law in *Boumediene v. Bush*.[860] The *Boumediene* Court adopted the views of John Adams; who vigorously lambasted *Cowle* in the papers during the American Revolution.[861]

The U.S. Supreme Court's references to the feudal law in *Cowle*, that almost infiltrated *Boumediene*, began as dicta in *Rasul v. Bush*; but *Cowle's* foundation upon territorial wars between Scotland and En-

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insinuations of slander and sedition, with which the gormandizers of power have endeavor'd to discredit your paper, are so much the more to your honour; for the jaws of power are always opened to devour, and her arm is always stretched out if possible to destroy, the freedom of thinking, speaking and writing. And if the public interest, liberty and happiness have been in danger, from the ambition or avarice of any great man or number of great men, whatever may be their politeness, address, learning, ingenuity and in other respects integrity and humanity, you have done yourselves honour and your country service, by publishing and pointing out that avarice and ambition."); Millar v. Taylor [1769] 4 Burr. 2303, 2311–12 (Eng.). (Copyright, i.e., the right to copy books in the printing press, existed before 1640 in "the power of the Crown." These copyrights were granted by the Queen in Council and enforced by the Star Chamber—which was like putting the CIA and the FISA Courts in charge of creating and enforcing copyrights, to censor speech and punish any speech against the government).

859. R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.) (affirming Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.)). *See* 20 HOWELL, *supra* note 802, at 213 ("In the king and Cowle, 2 Burr. 858, your lordship, speaking of Calvin's case, said, 'the question was, whether the plaintiff Calvin, born in Scotland after the descent of the crown of England to king James the first, was an alien born, and consequently disabled to bring any real or personal action for any land within the realm of England;' and your lordship added, 'but it never was a doubt whether a person born in the conquered dominions of a country is subject to the king of the conquering country.'") (statement of Mr. Alleyne speaking to Lord Mansfield in the case of *Campbell v. Hall*) (quoting Rex v. Cowle [1759] 2 Burr. 834, 835 (Eng.)).

860. Brief for Respondents at 28, Boumediene v. Bush, 553 U.S. 723 (2008) (Nos. 06–1195, 06–1196) (The government rested its case on the rule from *Cowle*, that the limitation on English habeas jurisdiction "was drawn at formal sovereignty, not at *de facto* control." *Cowle* is feudal law that can no longer legitimately apply in American courts after 1776.) (citing Rex v. Cowle [1759] 2 Burr. 834, 855–56 (Eng.)).

861. *Id.*; Brief for Boumediene Petitioners at 11, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06–1195) (citing Rex v. Cowle [1759] 2 Burr. 834, 898–99 (Eng.)); Novanglus, Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775), *reprinted in* ADAMS & SEWALL, *supra* note 777, at 129–30 (directly stating that Cowle was "feudal law" and illegitimate—Adams would be shocked if he were alive to see the Boumediene respondents comparing the United States to a conquering crown in Cuba so that the President can keep an illegitimate and unconstitutional foreign prison to punish people for indefinite periods of time, incommunicado, without due process) (citing Rex v. Cowle [1759] 2 Burr. 834, 898–99 (Eng.).

gland was held illegitimate in America.[862] The decisions to extend U.S. habeas jurisdiction over prisoners in Guantanamo Bay in *Rasul* and *Boumediene* were based upon "the District Court's jurisdiction over petitioners' custodians."[863] The basis for federal jurisdiction under the Suspension Clause is therefore *not* territorial.[864]

The feudal basis of English sovereignty over foreign lands abolished English common law in Scotland and introduced territorial barriers to English habeas jurisdiction.[865] Unfortunately, Justice Scalia defended *Cowle* as if it were legitimate U.S. common law.[866] However, the supremacy of the crown's laws in foreign lands in *Cowle* directly contradict the supremacy of federal law in the United States that must be inferred from the "very great force . . . arising from the federal compact."[867]

As the Honorable James Duane decided from the bench of New York City, federal supremacy in the United States is meant even for the protection of the natural human rights of our enemies.[868] The

862. Rasul v. Bush, 542 U.S. 466, 482–84 (2004) (noting that the English Courts have since changed course, determining that habeas cases now "the writ depend[s] not on formal notions of territorial sovereignty") (citing Rex v. Cowle [1759] 2 Burr. 834, 854–55 (Eng.); *Ex parte* Mwenya, [1960] 1 Q.B. 241, 303 (Eng.)).

863. *Id.* at 483–84*; Boumediene,* 553 U.S. at 748, 750.

864. *Boumediene,* 553 U.S. at 745 ("The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.").

865. Rex v. Cowle [1759] 2 Burr. 834, 835 (Eng.) ("Berwick . . . was ours only by conquest . . . . A conquered country retains its own laws, till others are given by the conquerors. No certiorari therefore lies, to Berwick"); Novanglus, Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775), *reprinted in* ADAMS & SEWALL, *supra* note 777, at 129–30 (*Cowle* is an application of "feudal law"). *See also* HUTCHINSON & OLIVER, *supra* note 826, at 16 ("There must be an abridgement of what are called English liberties"); Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.) (This case created Hutchinson's requested abridgement of English liberties by saying, "An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives").

866. *Boumediene,* 553 U.S. at 844 (Scalia, J., dissenting) (defending Cowle's feudal basis for the supremacy of English law, which is the backdrop of English choice of law principles in foreign territories—including Wales and Scotland).

867. THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 28; Rex v. Cowle [1759] 2 Burr. 834, 850–51 (Eng.) ("The consequence of this doctrine was, that, by the FEUDAL LAW, supreme jurisdiction resulted to him, in right of his Crown, as Sovereign Lord, in many cases, which he might lay hold of; and when the said territories should come into his hands and possession, they would come back as parcel of the realm of England, from which, (by fiction of law at least,) they had been originally severed.") (emphasis added).

868. THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 28 (the treaty of peace with England, which was struck before the Supremacy Clause was ratified, derived federal supremacy from the U.S. social compact of 1776 itself). *Cf.* John Adams, *Diary no. 19*, [Dec. 16, 1772—Dec. 18, 1773], at 16 (noting that if U.S. law did not defend the equal rights of our enemies as well as our friends, that we would necessarily fall back into injustice of prosecuting witches). This basic, backdrop reality of U.S. law was affirmed in a whole host of later

founding opinions on federal compact were woven into the very lifeforce of American law, which refutes the dissents in *Boumediene*.[869] As Joseph Story wrote, "The Declaration of Independence has accordingly always been treated as an act of paramount and sovereign authority, complete and perfect *per se*."[870]

The U.S. social compact is considered a paramount law "not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice."[871] Justice Scalia and his fellow dissenters in *Boumediene* missed this indubitable reality that is synonymous with American law, and absurdly applied English feudal devolution as expounded in *Cowle*.[872] By doing so, Justice Scalia betrayed his own dissent in *Hamdi*; where he defended the habeas common law required under the U.S. social compact.[873]

For instance, the earliest federal habeas cases issued the writ as a matter of course directly into the U.S. newly purchased, unincorporated, foreign Louisiana Territory.[874] The federal courts also issued the Great Writ on behalf of black prisoners of slaveholders, in the antebellum South, to free them before the Civil War.[875] Finally, in the wake

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cases involving what is known today as the constitutional avoidance doctrine. INS v. St. Cyr, 533 U.S. 289, 300–02 (2001); Ashwander v. TVA, 297 U. S. 288, 341, 345–48 (1936) (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62 (1932); *Ex parte* Randolph 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C.J.); Vanhorne's Lessee v. Dorrance 2 U.S. 304, 304–05 (1795).

869. THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 28

870. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 211.

871. *Id. See* THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 28.

872. *Boumediene*, 553 U.S. at 844 (Scalia, J., dissenting). *See Vanhorne's Lessee*, 2 U.S. at 308–11 (consulting the "social compact" of Pennsylvania to decide property claims under Pennsylvania law—the social compact set forth during the American Revolution was meant to be consulted as the baseline of American law in federal courts rather than English feudal law).

873. *Boumediene*, 553 U.S. at 844 (Scalia, J., dissenting) (scandalously advocating an abandonment of the common law in favor of *Cowle* feudalism); Hamdi v. Rumsfeld, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) ("The gist of the Due Process Clause, as understood at the founding and since, was to force Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty or property.").

874. *Ex parte* Bollman, 8 U.S. 75, 100–01 (1807) (requiring release or a new trial for Bollman and Swartwout's alleged involvement in Aaron Burr's alleged conspiracy to revolutionize Mexico). *Cf.* Ahrens v. Clark, 335 U.S. 188, 189–93 (1948) (a very short and vague opinion appearing to decide the federal courts have no jurisdiction on Ellis Island to issue a writ of habeas corpus to "some 120 Germans who are being held at Ellis Island, New York, for deportation to Germany" during World War II), *overruled by* Braden v. 30th Jud. Cir. Ct. Ky., 410 U.S. 484, 495 (1973) (emphasizing that habeas jurisdiction runs to the custodian, not the prisoner).

875. Habeas Corpus for Fugitive Slaves Cases, 1820–1843, *microformed on* Habeas Corpus Case Records of the U.S. Circuit Court for the District of Columbia, Microcopy No. 434, 1820–1863, roll no. 1–2 (Nat'l Archives Microfilm Publ'ns), http://www.ccharity.com/

of Mary Surratt's execution, without due process of law, the Court decided *Ex parte Milligan*, to extend habeas jurisdiction to the most hideous enemy combatants imaginable.[876]

There is a longstanding dispute over whether the laws of land or laws of the sea will finally prevail in England and America; and "the conflict is irreconcilable."[877] The unwritten English Constitution was

contents/petitions-writs-habeas-corpus-persons-alleged-be-fugitive-slaves/; Letter from George Washington to Robert Morris (Apr. 12, 1786) ("I hope it will not be conceived from these observations, that it is my wish to hold the unhappy people who are the subject of this letter [i.e., black folk suing for their freedom under the privilege of *habeas corpus*], in slavery. I can only say that there is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of it . . . ."). *But see* Ableman v. Booth, 62 U.S. 506, 526 (1858) (finding that "the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States," including its suspension of the privilege of habeas corpus to African Americans arrested as fugitive slaves—Wisconsin refused to acknowledge that *Ableman* comported with the U.S. Constitution and continued releasing slaves—the fact that the Fugitive Slave Law of 1850 was needed in order to suspend the writ of habeas corpus on a racial basis is also evidence that the writ was being issued on behalf of black folks—two years later this case and the Fugitive Slave law was overruled by the Civil War and repealed by the Thirteenth, Fourteenth, and Fifteenth Amendments).

876. THE CONSPIRATOR (The American Film Company 2010) (giving the story of Mary Surratt's military execution, and revealing how the likely guilty party went free because the court's writs of habeas corpus were ignored); *Ex parte* Milligan, 71 U.S. 2, 6–7, 124–25 (1866) (Milligan was a part of what would later become the KKK, "a secret society known as the Order of American Knights or Sons of Liberty," who gathered "for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war, etc."). *But see Ex parte* Quirin, 317 U.S. 1, 29–30 (1942) (departing from *Milligan* based on the arbitrary laws of the sea by allowing a U.S. citizen to be tried and executed by military tribunal based upon his classification as an enemy combatant (i.e., pirate) for violation of a law of war—the Court did this by applying prize law, which until then was only applicable on the high seas) (citing U.S. CONST. art. I, § 8, cl. 10; United States v. Smith, 18 U.S. 153 (1820); United States v. The Brig Malek Adhel, 43 U.S. 210 (1844); The Marianna Flora, 24 U.S. 1 (1826)).

877. *Milligan*, 71 U.S. at 124–25 ("the antagonism is irreconcilable, and, in the conflict, one or the other must perish"); *Quirin*, 317 U.S. at 29–30 (this case scandalously used the law of the seas to work around *Milligan*'s requirement that the law of the land apply even to enemy combatants, and it had a heavy influence on Justice O'Connor's plurality opinion in *Hamdi*). *Compare* Rex v. Cowle [1759] 2 Burr. 834, 850–51 (Eng.) (Under feudal law, however, habeas does not extend to any territory other than England (even excluding Scotland and Wales) unless there is a positive law—this feudal law is exactly what cut off *Somerset*'s common law requirement in America), *with* Somerset v. Stewart [1772] 98 ER 499, 510 (Eng.) (At common law, geographically *within* English borders, slavery is said to be "so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." As *Quirin* is an exception to *Milligan* in the United States, *Somerset* is an exception to *Cowle* in England. What is the basis of law, and what is the exception is almost the perfect constitutional opposite in the United States from what it was in England.). *Cf.* The Amistad, 40 U.S. 518, 594 (1841) (overruling The Antelope, 23 U.S. 66, 188 (1825) (relying on the presumption of slavery in the English case *Le Louis*) (citing Le Louis [1817] 2 Dodson 238, 255 (Eng.) (Opinion of Sir

compromised by the Conquest of William the Bastard, where the Viking laws of the sea spilled over onto English soil.[878] The American written U.S. Constitution and state constitutions, however, are free from this feudal corruption—a reversal that took place over nearly a century as recounted by James Otis,

> 'It has ever been boasted,' says Mr. Dummer in his defence of the charters, 'as the peculiar privilege of an Englishman, and the security of his property, to be tried by his country, and the laws of the land: Whereas the admiralty method deprives him of both, as it puts his estate in the disposal of a single person, and makes the civil law the rule of judgment; which tho' it may not properly be called foreign being the law of nations, yet 'tis what he has not consented to himself, nor his representative for him.'[879]

Soon after this "peculiar privilege of an Englishman" was universally denied to the American Colonists, the U.S. Constitution was written in order to secure the people under the promises of our social compact, to expel the law of the seas from our land.[880] One of the very purposes of waging the American Revolution was to ensure that military law would never overtake civil law; as it so often did under the English Crown, out of the feudal, Viking conquest of William the Bastard that arose from the sea.[881]

William Scott) (presuming slavery according to the English oxymoron of the free trade in human flesh)).

878. HOBBES, *supra* note 6, at 317 ("the right of the kings of England did depend on the goodness of the cause of William the Conqueror, upon their lineal and directest descent from him"); Sir Henry Vane the Younger, *A Healing Question* 4–5 [1656]. *See* THE CASE . . . AGAINST ALEXANDER BROADFOOT, supra note 794, at 11.

879. OTIS, *supra* note 18, at 162 (quoting Jeremiah Dummer, *A Defence of the New-England Charters* 29 [1715]).

880. *Id.*; HUTCHINSON & OLIVER, *supra* note 826, at 16 ("There must be an abridg[e]ment of what are called English liberties."); Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.) ("An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amends. I–X. *See Boumediene*, 553 U.S. at 746–47 (citing Somerset v. Stewart [1772] 20 How. St. Tr. 1, 80–82 (Eng.)).

881. United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 n.9 (1955) ("The Declaration of Independence stated as one of the grievances of the colonies that the King of Great Britain had deprived the colonists of the benefits of trial by jury in many cases and that he had 'affected to render the Military independent of and superior to the Civil power.' Another charge was that he had transported colonials 'beyond Seas to be tried for pretended offences.'") (quoting and citing THE DECLARATION OF INDEPENDENCE paras. 2, 14, 20, 21 (U.S. 1776)); *Milligan*, 71 U.S. at 124–25 (The English government's rendering of "the 'military independent of and superior to the civil power' . . . was deemed by our fathers such an offence that they assigned it to the world as one of the causes which impelled them to declare their independence.") (quoting THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776)). *Cf. Boumediene*, 553 U.S. at 843 (citing U.S. CONST. art. I, § 9, cl. 2).

Thus, *Boumediene* ought to have unanimously invalidated the feudal law in *Cowle*, which is the essence of military law as laid down by the Bastard King, i.e., sovereignty by conquest.[882] The U.S. Supreme Court should have clearly turned on its own motion, *sua sponte*, to the U.S. social compact as embodied in the Declaration of Independence; as it excellently did in *United States ex rel. Toth v. Quarles*.[883] The majority of the *Boumediene* Court managed to distinguish *Cowle*, but this was not enough to fully preclude the Court's future use of geographic limitations set forth in *Cowle*.[884]

The U.S. social compact as embodied by the Declaration of Independence requires that the laws of legitimate governments must safeguard natural human rights.[885] This requirement is boldly written throughout the annals of the heroic acts performed during the American Revolution.[886] The American reversal, brought about by the laws of land, the common law, and the rights of the Englishman against arbitrary, feudal, martial laws that rise out of British sea dominion, is the beating heart of American Revolution.[887]

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882. *Boumediene*, 553 U.S. at 748 (distinguishing Rex v. Cowle [1759] 2 Burr. 834, 854–56 (Eng.)); Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775), *reprinted in* ADAMS & SEWALL, *supra* note 777, at 129–30 (*Cowle* is an application of "feudal law," rejected as illegitimate in America); 1 WILSON, THE WORKS, *supra* note 113, at 22 (wisely noting the English jurists like Blackstone "deserve[ ] to be much admired; but . . . ought not to be implicitly followed").

883. *See Quarles*, 350 U.S. at 17 n.9 (In just such a question, the U.S. Supreme Court is meant to look to the U.S. social compact embodied in the Declaration of Independence under *Quarles*, which requires that it refute every form of feudal law.) (quoting THE DECLARATION OF INDEPENDENCE paras. 2, 14, 20, 21 (U.S. 1776)).

884. *Boumediene*, 553 U.S. at 748 (distinguishing Rex v. Cowle [1759] 2 Burr. 834, 854–56 (Eng.)); *id.* at 850 (Scalia, J., dissenting) (Scalia characterized the Court's distinguishing of *Cowle* as the breaking of "a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization." Then he wrote rather harshly and absurdly, "The Nation will live to regret what the Court has done today. I dissent.").

885. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

886. *Id.*; Phillis Wheatley, *On the Death of General Wooster* [1778] (Wheatley told the hero's story of how white American Revolutionaries laid down their lives defending the sentiment that, "'But how, presumptuous shall we hope to find / Divine acceptance with the Almighty mind— / While yet (O deed Ungenerous!) they disgrace / And hold in bondage Africa's blameless race / Let Virtue reign—And those accord our prayers / Be victory our's, and generous freedom theirs.'"); OTIS, *supra* note 18, at 119–20, 129, 140–41 ("The Colonists are by the law of nature free born, as indeed all men are, white or black. . . . Nothing better can be said in favor of a trade, that is the most shocking violation of the law of nature, has a direct tendency to diminish the idea of the inestimable value of liberty, and makes every dealer in it a tyrant from the director of an African company to the petty chapman in needles and pins on the unhappy coast. It is a clear truth, that those who everyday barter away other men[']s liberty will soon care little for their own.").

887. *See* OTIS, *supra* note 18, at 162 (quoting Jeremiah Dummer, *A Defence of the New-England Charters* 29 [1715]). *See supra* note 61 (noting many resolves that the American

For if there is anything the U.S. social compact stands for, it is the natural rights of all humankind that extend equally to every person.[888] The American Revolution on the side of English common law and against English feudalism was paid for in the blood of multiple generations of Americans in the field of battle.[889] The U.S. Judiciary should rise up to say, as President Lincoln said in a similarly politically polarized moment in American history, "that these dead shall not have died in vain . . . that government of the people, by the people, for the people shall not perish from this earth."[890]

The Trial of Phillis Wheatley: On the Freedom of Mind

In 1634, John Milton published *Comus*, a play in which an unnamed lady mounts a successful resistance against Comus, a god of anarchy and chaos, by praying to the sea nymph Sabrina for her release from Comus's enchanted chair.[891] In this early work, Milton appropriated women as his champions of the freedom of mind.[892] In-

Revolutionaries made asserting their claim to the Rights of Englishmen imported to America by their immigration).

888. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

889. *Id.*; President George Washington, Proclamation 4—Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France (Apr. 22, 1793); President Thomas Jefferson, Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters (July 2, 1807); President James Madison, Special Message [to Congress asking it to declare war on Great Britain], (June 1, 1812); President Abraham Lincoln, Proclamation 95–Regarding the Status of Slaves in States Engaged in Rebellion Against the United States [Emancipation Proclamation] (Jan. 1, 1863).

890. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863); *See, e.g., Ex parte* Milligan, 71 U.S. 2, 124–25 (1866) (If an absolute government of the executive is to be endured without checks and balances, "republican government is a failure, and there is an end of liberty regulated by law.").

891. John Milton, *Comus* 664–65, 859–66 [1634].

892. *Id.*; 1 WILSON, THE WORKS, *supra* note 113, at 35 (arriving at a problematic view of women by paraphrasing Milton: "'Those thousand decencies that daily flow / From all her words and actions, mixed with love / And sweet compliance . . .'") (paraphrasing John Milton, *Paradise Lost* IV.298, VIII.488–89, VIII.601–03 [1667]); QUINCY ADAMS, SOCIAL, *supra* note 113, at 7–9, 24–25 ("The woman therefore can have no direct agency in the formation of the social compact which constitutes the body politic. Nor had the women of Massachusetts any direct agency in forming the Constitution of the Commonwealth.") (quoting John Milton, *Paradise Lost* IV.304–11 [1667]). *But see* Catherine Sedgwick, *Slavery in New England* [1853], *in* 34 BENTLEY'S MISCELLANY 421–22 (1853) (relaying the fact that the first application of the Declaration of Independence in Massachusetts State Court was to free Elizabeth Freeman from slavery); *Mumbet's Case* [also known as *Brom & Bett v. Ashley*], Court Decision, Aug. 1781, *reprinted in* BRUNS, *supra* note 111, at 468–70 (a black woman vindicated the rights of all black folk in Massachusetts under the overriding law of the Declaration of Independence).

deed, Milton's legacy of free thought is inextricably tied to these words spoken by his imaginary, virginal lady,

> *"Fool! do not boast;*
> *Thou canst not touch the freedom of mind . . .*
> *I hate when Vice can bolt her arguments,*
> *And Virtue has no tongue to check her pride"*[893]

John Milton's writings became larger than life, outshining the contemporaneous struggles of his friends Roger Williams and Anne Hutchinson in Massachusetts, and so his portrayals of women (especially his portrayal of Eve in *Paradise Lost*) became the primary basis of anti-feminist thought throughout the world.[894] In direct response, Phillis Wheatley staged her revolution on Miltonic poetics, and she placed a key in the sands of time to unlock Americans from the prison that Milton's ideas made for them.[895]

John Adams, for example, moved to exclude women from politics, and John Quincy Adams cited directly to John Milton to justify continuing female disfranchisement in Massachusetts.[896] James Wilson also approvingly quoted Milton's problematic view of women in his famed lectures on the law.[897] Against the blindness of these men, Phillis Wheatley revolutionized Milton and became a better champion for

893. John Milton, *Comus* 662–63, 760–61 [1634]. *See* LOSCOCCO, *supra* note 113, at 54 ("Hearing Milton's Lady in Wheatley's *POEMS* transforms how readers understand her first several verses."); Phillis Wheatley, *To the Rev. Mr. Pitkin, on the Death of His Lady* [1772] (Wheatley's Lady speaking, "'To Him, who died, dread Justice to appease, / Which reconcil'd, holds Mercy in Embrace; / Creation too, her MAKER'S Death bemoan'd, / He in his Death slew ours, and as he rose, / He crush'd the Empire of our hated Foes. / How vain their Hopes to put the God to flight, / And render Vengeance to the Sons of Light!'").

894. Joyce E. Chaplin, *Roger Williams: The Great Separationist*, N.Y. TIMES, Dec. 30, 2011 (Williams "attracted the powerful and the intelligent. The jurist Edward Coke had been his patron during his youth; the poet John Milton was a later friend. Even his critics found him an appealing personality."); J.F. Maclear, *Anne Hutchinson and the Mortalist Heresy*, 54 NEW ENG. Q. 74, 74–77 (1981) ("This neglect of the 'American Jezebel's' mortalism is somewhat difficult to understand, especially since students of seventeenth-century England have paid such close attention to the idea in Overton, Milton, and Hobbes.").

895. Phillis Wheatley, *Phillis's Reply to the Answer* [1774] (speaking directly of Milton "But, lo! in him Britannia's prophet dies."). *Compare* John Milton, *Paradise Lost* I.663–69 [1667], *with* Phillis Wheatley, *An Hymn to Humanity* [1773]. *Cf.* LOSCOCCO, *supra* note 113, at 54.

896. Letter from John Adams to James Sullivan (May 26, 1776) (John Adams even betrayed his own wife in the presence of others when he advocated the destruction of the rights of women based upon the idea that women do not have any opinions of their own.); QUINCY ADAMS, SOCIAL, *supra* note 113, at 7–89, 25 (quoting John Milton, *Paradise Lost* IV.304–11 [1667]). *Cf.* Letter from John Quincy Adams to John Adams (July 7, 1814) (discussing Milton's *Paradise Lost*).

897. 1 WILSON, THE WORKS, *supra* note 113, at 35 (paraphrasing John Milton, *Paradise Lost* IV.298, VIII.488–89, VIII.601–03 [1667]).

the freedom of mind than Milton's lady ever was, abolishing any reason why Miltonic thought should disfranchise her sex.[898]

Shortly before Phillis Wheatley took her mighty stand in the autumn of 1772, her artistic collaborator and first American choral composer, William Billings, rose up to claim his rights as author of a popular book of music.[899] In response and for the first time in American history, a colonial legislature passed a law to give an author a copyright.[900] Billings' legal victory was empty, however, because then Governor and Chief Justice, Thomas Hutchinson, refused to allow Billings' copyright bill to become law.[901]

898. Wheatley focused directly upon the Puritan funeral elegy and redeemed it in the present moment to support the revolution with a unique song of hope for the world to come. Phillis Wheatley, *An Elegiac Poem, on the Death of that Celebrated Divine, and Eminent Servant of Jesus Christ, the Late Reverent, and Pious George Whitefield* [1770] (this poem gave Wheatley instant renown in both Europe and America). *See* Phillis Wheatley, *Phillis's Reply to the Answer* [1774] (speaking directly of Milton "But, lo! in him Britannia's prophet dies"). *Compare* John Milton, *Paradise Lost* I.663–69 [1667], *with* Phillis Wheatley, *An Hymn to Humanity* [1773]. *Cf.* LOSCOCCO, *supra* note 113, at 54.

899. William Billings' Second Petition, Massachusetts, May 27, 1772 (Praying for a remedy for the "unfair advantage is about to be taken against him & that others are endeavoring to reap the Fruits of his great Labour & Cost," according to a proof that Billings was "the real Author of the Book."); Phillis Wheatley & William Billings, *An Elegy, Sacred to the Memory of that Great Divine, the Reverend and Learned Dr. Samuel Cooper*, E. RUSSELL, Jan. 2, 1784, at 3–8 [1784] (appended to this elegy by Wheatley, was the lyrics to William Billings' hymn written for Samuel Cooper's funeral that is known by its first line *Samuel the Priest Gave Up the Ghost*). *Cf.* FRÉDÉRIC LOUIS RITTER, MUSIC IN AMERICA 60 (1884) (Describing that "when the War of Independence broke out, he [Billings] gave vent to his patriotism in strains of the wildest enthusiasm and fervor. He was altogether a very original being, and, in some sense, the prototype of the Yankee psalm-tune music-teacher as he existed at the end of the last century. Billings was a mixture of ludicrous, eccentric, commonplace, smart, active, patriotic, and religious elements, with a slight touch of musical and poetical talent. To this side of the tanner-composer's moral nature his personal appearance and habit formed a harmonious sequel. He was somewhat deformed, blind of one eye, one leg shorter than the other, one arm somewhat withered; and he was given to the habit of continually taking snuff. He accrued this precious article in his coat-pocket made of leather, and every few minutes would take a pinch, holding the snuff between the thumb and clinched hand. To this picture we must add his stentorian voice, made, no doubt, rough as a saw by the effects of the quantity of snuff that was continually rasping his throat.").

900. William Billings' Printing Privilege, Massachusetts, July 14, 1772 ("Be it enacted by the Governour Council & House of Representatives—That the said William Billings be and hereby is impower'd solely to print and vend his said Compositions consisting of Psalm-tunes, Anthems and Canons & have and receive the whole and only benefit and [endowment?] Arising therefrom for and during the full term of seven years . . . ."); JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 124, 131, 135 (1980) ("The engross'd Bill *for granting to* William Billings, *the Sole Privilege of printing and vending a certain Book of Music, by him compos'd*. Read and *Resolved*, That this Bill pass to be enacted.").

901. JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 131, 134–35 (1980) (Governor Thomas Hutchinson refused to give his assent to Billings' copyright saying, "By your Charter the Legislative Power consists of three Branches, and

In order to debate the propriety of Hutchinson's refusal to assent to Billings' copyright bill, the Massachusetts Legislature entered into a silent period from July 14, 1772, to January 6, 1773, when the Legislature convened "a Great and General Court or Assembly of His Majesty's Province of the *Massachusetts-Bay* in *New England*. Begun and held at *Harvard*-College in Cambridge."[902] Phillis Wheatley was tried during this silent period where it was adjudged that she was the author of her poems.[903] Loyalist and revolutionary miraculously united to secure Phillis Wheatley a right of attribution to the works of her hands.[904]

A black woman slave of Boston thereby became the first "rose that grew from concrete" in America.[905] Seeming to "prov[e] nature's laws wrong," she "learned to walk without having feet," and thus, her marvelous gambit shined so magnificently that some today question whether she had a trial at all.[906] The recent rediscovery of the revolutionary figure of Phillis Wheatley, though inspiring, is terribly

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the Consent of the Governor is expressly declared to be essential to every valid Act of Government." There was then a dispute between Hutchinson and the Legislature over whether the ultimate legislative power arose from the consent of the people or whether it was granted from the power of the crown.). *Cf.* SIMMONS, *supra* note 31, at 9.

902. JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 137 (1980). *Cf.* MASS. CONST. pt. 1, art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.").

903. HENRY LOUIS GATES, JR., THE TRIALS OF PHILLIS WHEATLEY 2 (2003); JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 135, 137–43 (1980) (The journals of the House in Massachusetts ended on July 14, 1772 with a prorogue until Sept. 30, 1772 at which time it said beginning on May 7, 1772 and ending on January 6, 1773, there was "a Great and General Court or Assembly of His Majesty's Province of the *Massachusetts-Bay* in *New England*"—the journals pick up again with a message from Governor Hutchinson espousing the same opinion as before, according to which he killed Billings' copyright, however also during this time he and many of the most illustrious characters in Boston including John Hancock, Cotton Mather, and James Bowdoin tried Phillis Wheatley and according to her success in proving her attribution by demonstrating her marvelous talents they signed an attestation to her attribution to the works of her hands. This puts Phillis Wheatley's right of attribution confirmed by trial and attestation at the center of the fundamental disputes in Massachusetts regarding the separation of powers before the revolution that would later become the cornerstone of the United States.). *See also* QUINCY, JR., *supra* note 32, at 340–42 (1865) (describing that the ordinary courts of judicature in Massachusetts were finally ended in Oct. of 1774 "by reason of the difficulty of the times").

904. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7.

905. Tupac Shakur, *The Rose that Grew from Concrete* [1999].

906. *Id.*

incomplete; none of us yet captured the legal significance of Wheatley's marvelous feat.[907]

For Phillis Wheatley was the origin of U.S. copyright and patent common law—and it was and is the racial biases of the bench that continue to cause America's failure to respect the common law rights of attribution for authors that she sought to secure.[908] The historical facts are clear, where white men failed to secure their own literary rights in America, a black woman wondrously prevailed.[909] Americans can no longer afford to miss the legal gambit Wheatley made to secure her own literary property.[910]

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907. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; HOBBES, *supra* note 6, at 46–48 (Hobbes described human pride and dejection as a sort of psychological madness, a natural law, that keeps humanity enslaved to absolute rulers, but like Tupac's poem Wheatley proved these laws wrong). *See* Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 58, 78 (1988) [hereinafter Mark Rose] ("[T]he problem of how the legal-economic and the aesthetic levels of discourse interact is one that literary historians—and, I would add, legal historians as well—have barely explored . . . . Much work remains to be done in the construction of what Foucault would have called a 'genealogy' of literary property.").

908. The first case in England to recognize copyright common law was *Millar v. Taylor* in 1769 based, in part, on an author's rights rather than the crown; then Phillis Wheatley won her trial for attribution in 1772 and published an attestation of this trial's judgment in her book printed in London and distributed across the world in 1773, leaving the original attestation document on file with her publisher in England, which facilitated her book's official registration at the Stationers Company under *her name*; then in *Donaldson v. Becket* the House of Lords put *Millar*'s common law basis into doubt; and finally, James Madison and James Wilson claimed the English common law as the basis of the Patent & Copyright Clause referring to *Millar* in THE FEDERALIST NO. 43 (James Madison), and in 2 WILSON, THE WORKS, *supra* note 113, at 105. Phillis Wheatley's trial and attestation is a precedent of the American Revolution like James Otis's *Paxton's Case* that secures the common law for the United States unadulterated by the corruptions of the crown and lords who threw it into confusion and doubt in *Donaldson*.

909. Phillis Wheatley, *To the Right Honorable William, Earl of Dartmouth* [1773] ("Should you, my lord, while you peruse my song, / Wonder from when my love of Freedom sprung, / Whence flow these wishes for the *common good*, / By feeling hearts alone best understood, ...") (emphasis added). *See* 2 WILLIAM LEGGE, THE MANUSCRIPTS OF THE EARL OF DARTMOUTH 107–08 (1895) (receiving this poem).

910. Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773) (This is perhaps the first cease and desist letter in American history, "I expect my Books which are publish'd in London at Capt. Hall, who will be here I believe in 8 or 10 days. I beg the favour that you would honour the enclos'd Proposals, & use your interest with Gentlemen & Ladies of your acquaintance to subscribe also, for the more subscribers there are, the more it will be for my advantage as I am to have half the Sale of the Books. This I am the more solicitous for, as I am now upon my own footing and whatever I get by this is entirely mine, & it is the Chief I have to depend upon. *I must also request you would desire the Printers in New Haven, not to reprint that Book, as it would be a great hurt to me, preventing any further Benefit that I might receive from the Sale of my Copies from England*.") (emphasis added). *See* Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 817, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies

Henry Louis Gates, Jr., the most accomplished of Wheatley's advocates, placed Wheatley at the beginning of the African American literary tradition, however, it appears Wheatley was actually the beginning of much more.[911] The cause of white male authors was also wondrously vindicated by an enslaved black woman for the common good, so the literary tradition of Washington Irving could finally take root in America.[912] The origin of American copyright and patent laws

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1746–1773. Other letters involving the broad sale of Wheatley's books in America as the primary source of her living include: Letter from Phillis Wheatley to Obour Tanner (Oct. 30, 1773) ("I enclose proposals for my book"); Letter from Phillis Wheatley to Samuel Hopkins (Feb. 9, 1774); Letter from Phillis Wheatley to Miss Obour Tanner (Mar. 21, 1774) ("Pray excuse my not writing to you so long before, for I have been so busy lately, that I could not find liezure [sic]. I shall send the 5 Books you wrote for . . . ."); Letter from Phillis Wheatley to Miss Obour Tanner (May 6, 1774) ("I have recd. the money you sent . . . I have recd by some of the last ships 300 more of my Poems."); Letter from Phillis Wheatley to Samuel Hopkins (May 6, 1774); Letter from Phillis Wheatley to Mary Wooster (July 15, 1778).

911. GATES, JR., *supra* note 903, at 18 (writing that Wheatley's book marks "the beginning of an African American literary tradition"—this statement appears to be a gross understatement). *See* Letter from George Washington to Phillis Wheatley (Feb. 28, 1776); Letter from George Washington to Joseph Reed (Feb. 10, 1776) (expressing his "view of doing justice to her great poetical genius"); 1 BENSON J. LOSSING, THE PICTORIAL FIELD-BOOK OF THE REVOLUTION 556 (1860) (Lossing stated that Wheatley did meet with Washington in Cambridge; historians posit that it was Lossing's friend the famous poet Henry Wadsworth Longfellow who purchased Washington's old house learned of first hand knowledge of the meeting and passed it to Lossing.). *See generally* HENRY WADSWORTH LONGFELLOW, VOICES OF THE NIGHT (1839) (the poetic symbols in this book of poems seem to have been affectionately lifted from Phillis Wheatley's works).

912. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7. *See* DICKSON D. BRUCE, JR., THE ORIGINS OF AFRICAN AMERICAN LITERATURE, 1680–1865, at x (2001). Washington Irving was previously referred to by many as the first man of letters, because we thought he was the first to make his entire income from writing—but that was before we had Wheatley's letter to David Wooster where she states that profits from her book made up her primary income. *See* Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773) (It appears that Washington Irving, as important as he was in his time, was not the first American to make a living as an author: "Since my return to America my Master, has at the desire of my friends in England given me my freedom. . . . I am now upon my own footing and whatever I get by this [sale of books] is entirely mine, & it is the Chief I have to depend upon." Accordingly, the first man of letters in America appears to have been a black woman.); AMERICAN FICTION 267 (William Allan Neilson ed., 1917) ("Whether we agree or not with the judgment that Washington Irving was the first American man of letters, it is not to be questioned that he was the first American author whose work was received abroad as a permanent contribution to English literature."—this was not so, for Wheatley had her book entered into the Stationer's Company register long before Irving arrived on the scene, and her poetry was published across the world and was taken seriously and commented on by the likes of the men of the Enlightenment like Voltaire, Jefferson, and others. As for permanently contributing to English literature, Wheatley's ideas were directly influential upon Henry Wadsworth Longfellow and perhaps upon Irving himself.); JANE G. LANDERS, ATLANTIC CREOLES IN THE AGE OF REVOLUTIONS 217 (2010) (citing evidence of the widespread effect of Phillis Wheatley's works in Latin America—noting that her poems were found among the possessions of Jorge Davidson, a free person of color and abolitionist in Cuba); Letter from Voltaire to A M. Le Baron Constant de Rebecque

must be the trial and attestation of Phillis Wheatley.[913]

The trial of Phillis Wheatley occurred during a Great Court of Massachusetts Bay held at Harvard, and it was a highly consequential affair.[914] Indeed, there is more contemporaneous evidence of Wheatley's trial than James Otis's speech in *Paxton's Case*, which is considered to have breathed life into the American Revolution.[915]

(Apr. 11, 1774), *in* 16 VOLTAIRE, *supra* note 266, at 594–95 (praising Wheatley's work); JEFFERSON, NOTES, *supra* note 268, at 208 (criticizing Wheatley's work).

913. William Billings' Second Petition, Massachusetts, May 27, 1772 (Praying for a remedy for the "unfair advantage is about to be taken against him & that others are endeavoring to reap the Fruits of his great Labour & Cost," according to a proof that Billings was "the real Author of the Book."); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7 (where Billings was denied, Wheatley was not denied—from the vivid descriptions of Billings' startling appearance and mannerisms given by the history books, it is hard not to imagine him roaring his support for Phillis Wheatley in her own cause out of empathy for a fellow author and revolutionary); Phillis Wheatley & William Billings, *An Elegy, Sacred to the Memory of that Great Divine, the Reverend and Learned Dr. Samuel Cooper*, E. RUSSELL, Jan. 2, 1784, at 3–8 [1784] (appended to this elegy by Wheatley, was the lyrics to William Billings' hymn written for Samuel Cooper's funeral that is known by its first line *Samuel the Priest Gave Up the Ghost*).

914. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7 (this attestation that references the existence of and determination of a trial in Wheatley's favor is more evidence than we have of most other trials of the founding era, including James Otis's riveting arguments in *Paxton's Case*, and Joseph Hawley's call to fight in 1774 that historians do not doubt occurred). *See* JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 134–35, 137 (1980) (the date of Wheatley's trial fell during the silent court period of Massachusetts Bay after Governor Hutchinson vetoed William Billings' copyright bill to debate the separation of powers issues that arose from Hutchinson's refusal to assent—the record book was prorogued during this period, thus Wheatley's attestation was published in her book and the original was kept in the bookshop of Archibald Bell in London, England for safe keeping and for public viewing upon request); Letter from Benjamin Franklin to Jonathan Williams, Sr. (July 7, 1773) (After her trial Benjamin Franklin was bid to visit Phillis Wheatley, who was likely turned away by her loyalist masters, but he said, "Upon your Recommendation I went to see the black Poetess and offer'd her any Services I could do her.").

915. Letter from John Andrews to William Barrell (Feb. 24, 1773) (describing Phillis Wheatley's book and the attestation she received in the previous months confirming that she was the book's genuine author); TUDOR, *supra* note 34, at xviii ("The reader will be disappointed, if he expects to find in this volume, more than mere fragments of the life of James Otis. After a diligent and widely extended search, but little comparatively has been recovered of his private life, or of his public services; yet before the year 1770, no American, Dr. Franklin only excepted, was so much known, and so often named in the other colonies, and in England. His papers have all perished, none of his speeches were recorded, and he himself having been cut off before the revolution actually commenced, his name is connected with none of the public documents that are familiar to the nation."). *See* Letter from John Adams to Hezekiah Niles (Jan. 14, 1818) ("Mr. Otis's oration, against Writts of Assistance, breathed into the Nation the Breath of Life."); Letter from John Adams to William Tudor (June 1, 1818) ("And as I sincerely believe Mr. Otis to have been the earliest and the principle founder of one of the greatest political revolutions that ever occurred among men, it seems to me of some importance that his name and character should not be forgotten."); Letter from John Adams to William Wirt (Jan. 5, 1818) (Very gently calling Wirt's attention

Thus, the precedent of Wheatley's attribution rights must still sound in the U.S. social compact to guide the construction of the Patent & Copyright Clause.[916]

Phillis Wheatley preserved common law copyright in the wake of Billings' legal failure, by establishing a common law case in her own name.[917] She did not seek a perpetual copyright, but she sought to share her works with the public for a reasonable living.[918] Her right of attribution, snatched from "the best Judges" of Boston, like a laurel from Mæcenas honored head, unlocked the possibility of Wheatley's career by securing her copyright through the Stationers Company in England.[919]

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to his overemphasis of Patrick Henry's role saying: "I envy none of the well merited glories of Virginia or nay of her sages or heroes; but I am jealous, very jealous of the honour of Massachusetts. The resistance to the British system for subjugating the Colonies began in 1760 and in 1761 in the month of February when James Otis electrified the town of Boston the province of Massachusetts Bay and the whole Continent more than Patrick Henry ever did in the whole course of his life."); Letter from John Adams to William Wirt (Mar. 7, 1818) (John Adams kindly informed Patrick Henry's biographer William Wirt that Otis's principal tract *The Rights of the British Colonies* "was published more than a year before Mr. Henry's Resolutions were moved."). *See generally* SIMMONS, *supra* note 31 (a cobbled together remembrance of what was the most important oration in American history is all that remains—and yet we honor it and reverence it and interpret the U.S. Constitution according to it).

916. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); MASS. CONST. pt. 1, art. I (1780) (like many others of the original constitutions of the states, Massachusetts, under the direction of John Adams. reiterated the principles of Union expounded in paragraph two of the Declaration of Independence); THE FEDERALIST NO. 43 (James Madison) ("The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law."); U.S. CONST. art. I, § 8, cl. 8.

917. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; William Billings' Second Petition, Massachusetts, May 27, 1772. *See* JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 134–35, 137 (1980) (Wheatley's trial commenced on or around Octobor, 1772, directly after William Billings' legal failure to secure a copyright because of Governor Hutchinson's violation of the colonial separation of powers, and during an unrecorded, turbulent debate presumably at Harvard College, where the silent Great Court was convened.). *Cf.* Millar v. Taylor [1769] 4 Burr. 2303, 2314, 2337–38 (Eng.) (Just as the Americans were inspired by Phillis Wheatley, the English inferred the proper authorial attribution as a fundamental requirement of copyright from the writings of John Milton, which was recognized in *Millar* as a right to stop non-authors from passing off an author's work "as his, when they are not his, in contradiction to truth," by virtue of a sale by the author as opposed to an arbitrary grant from the crown.) (citing MILTON, AREOPAGITICA, *supra* note 259, at 187; John Milton's Publishing Contract for Paradise Lost, Apr. 27, 1667 (the literary proprietor derived a right to print from Milton, through common law contract, rather than from the crown)).

918. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773).

919. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773,

With courageous humility, Phillis Wheatley marked out the basis of every legitimate copyright and patent thereafter upon the right of attribution to the works of her hands.[920] The basis of a common law cause of action to protect literary property upon authorial attribution, which is common law copyright, was affirmed by the King's Bench in *Millar v. Taylor*.[921] According to Judge Ashurst, the matters of *Millar* and *Donaldson* were almost decided in favor of the rights of Phillis Wheatley,

> It had been said, that when the bird was once out of the hand, it was become common, and the property of whoever caught it; this was not wholly true, for there was a case upon the law books, where a hawk with bells about its neck had flown away; a person detained it, and an action was brought at common law against the person who did detain it; a book *with an author's name to it* was the hawk, with the bells about its neck, and an action might be brought against whoever pirated it.[922]

The lynch pin of William Billings' second copyright petition, was also that he was "the real Author of the Book" and it would be unjust for

at 137 (1980); Phillis Wheatley, *To Mæcenas* [1773] ("I'll snatch a laurel from thine honour'd head.").

920. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7. *Cf.* Mark Rose, *supra* note 907, at 53–54, 58 ("Copyright had traditionally been a publisher's not an author's right. Under the Stationers' Company regulations only members of the guild could hold copyright. Authors had no explicitly recognized place in the scheme." Furthermore, any determinations made in England before and after Phillis Wheatley's trial and attestation regarding authorial rights were all mere dicta because, "Ironically, authors themselves were conspicuously absent from the formal proceedings in which this process of elaboration occurred. Tonson, Collins, Millar, Taylor, Donaldson, and Becket—all the principals in 'the great cause concerning literary property' were booksellers." Therefore, though unacknowledged in this article, Phillis Wheatley is the origin of the sentiment that, "Every man was entitled to the fruits of his labor . . . and therefore it was self-evident that authors had an absolute property in their own works." This property is not so absolute in the sense meant by its advocates in England who were mostly booksellers intending to weaponize it to preserve their perpetual right to monetize creative works, for it is properly delineated and defined by Phillis Wheatley's trial and attestation to help her make a career in America as a poet and to make a living upon her original genius.).

921. Millar v. Taylor [1769] 4 Burr. 2303, 2314, 2337–38 (Eng.) (Just as the Americans were inspired by Phillis Wheatley, the English inferred the proper authorial attribution as a fundamental requirement of copyright from the writings of John Milton, which was recognized in *Millar* as a right to stop non-authors from passing off an author's work "as his, when they are not his, in contradiction to truth," by virtue of a sale by the author as opposed to an arbitrary grant from the crown.) (citing MILTON, AREOPAGITICA, *supra* note 259, at 187); John Milton's Publishing Contract for Paradise Lost, Apr. 27, 1667 (deriving a right to print from Milton rather than from the Crown)).

922. Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 977 (Opinion of Ashurst, J.) (emphasis added).

others to reap profits where he had sown.[923] However, the House of Lords arbitrarily reversed Judge Ashurst and denied common law copyright saying, "when once the bird is out of the cage—*volat irrevocabile*—Ireland, Scotland, America, will afford her shelter."[924] In 1774 as Lord Camden vied for the ruling in *Donaldson*, his peer Lord Mansfield established the Cromwellian oppression of America in *Campbell v. Hall*.[925]

The perfection of feudal, arbitrary powers disconnected from constitutions, and void of natural equity through legal positivism, began for the very first time in western society in the Puritan colony of Massachusetts Bay.[926] Thus, on the eve of the American Revolution, it may be said that the Lords of *Donaldson* oxymoronically copied an American idea.[927] It may also be said that the *Donaldson* Lords

923. William Billings' Second Petition, Massachusetts, May 27, 1772.

924. Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 1001 (Argument of Lord Camden).

925. Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.); 20 HOWELL, *supra* note 802, at 283, 289 ("'Jamaica was conquered by Oliver Cromwell'") (statement of Lord Mansfield during the trial of *Campbell*); Thomas Hutchinson, *Diary*, Nov. 28, 1774, *in* 1 Hutchinson, The Diary, *supra* note 802, at 307–09 (confirming that Lord Mansfield justified his decision in *Campbell v. Hall* upon Cromwell's conquest of Jamaica—*Campbell* attempted to legitimize England's power to tax the whole world without representation); SIMMONS, *supra* note 31, at 20–22 (James Otis "gave a history of the navigation act of the first of Charles II., a plagiarism from Oliver Cromwell."); William Tudor, *An Oration Delivered March 5th, 1779*, EDES & GILL, Mar. 5, 1779, at 9 [1779] (reminding Americans that we should resist tyranny, and not merely the arbitrary titles of "Dictator, King, Protector," because "Cromwell under the name of Protector, was as absolute a despot as he could have been with any other title"); Arthur Lee et al., *The American Commissioners: Memorandum for the Dutch*, [before Mar. 31, 1778] (this memo traced the beginning of this collusion between crown and Cromwell against the common law in America all the way to the American Revolution, recounting that the monopoly on American commerce began in 1652 just prior to Cromwell's ascension to absolute power in 1653); [John Mein,] *Sagittarius's Letters and Political Speculations* 98, 100, 109–10 [1775] (Mein, a rabid loyalist, confirmed the conflation of crown and Crowell in the minds of loyalists by celebrating Cromwell, and blaming the early Massachusetts Bay Puritans for resisting the political suicide that he invited); Letter from Thomas Hutchinson to Elisha Hutchinson (July 28, 1774), *in* 1 HUTCHINSON, THE DIARY, *supra* note 802, at 199 ("We seem to be copying Cromwell's times . . . .").

926. FORD, *supra* note 801, at 7–11 (explaining a bit of how the first codes of Massachusetts were written, beginning with John Cotton's tract *Moses Judicialls*); WOOLRYCH, *supra* note 801, at 271–73, 300 (calling the Massachusetts Bay *Lawes and Liberties* "the first modern code of the western world," which became an "exemplar" for the Parliament of Saints in England who attempted and failed to produce a legal code to "cram . . . all the complexities . . . distilled in its common law during nearly half a millennium").

927. Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 992–1001 (Argument of Lord Camden) (arguing that common law copyright is taken away and not secured by the positive laws—this was a direct departure of the ordinary common law maxim of statutory construction in *Dr. Foster's Case* and the basis of the Statute of Monopolies in the common

thereby abdicated their House's seat of supreme judicial authority to Phillis Wheatley, a revolutionary, writer, and former slave.[928]

Phillis Wheatley left behind a key for the proper interpretation of U.S. copyright and patent laws, the freedoms of speech, assembly, and religion, and privacy law by expounding upon the laws of land and sea.[929] She exposed the way the human mind works in her pieces entitled *Thoughts on the Works of Providence*, *On Imagination*, and *On Recollection* and their variants.[930] Then she made a prophesy correlating the freedom of the seas, the freedom of mind, and the U.S. Patent & Copyright Clause in her poem *Liberty & Peace* which reads in part,

For now kind Heaven, indulgent to our Prayer,
In smiling Peace resolves the Din of War.
Fix'd in Columbia her illustrious Line,
And bids in thee her future Councils shine.
To every Realm her Portals open'd wide,
Receives from each the full commercial Tide.
Each Art and Science now with rising Charms,

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law, which was passed at a time when copy-rights and patents were conceptually the same thing, the distinction between patent and copyright was not yet developed); 9 BENTHAM, THE WORKS, *supra* note 43, at 196 (Bentham impliedly approved of *Donaldson* writing of literary property "wherever by the name of *Common Law, Judge-made law reigns*,—security is an empty name"); WOOLRYCH, *supra* note 801, at 271–73, 300 (Benthamite legal positivism was inspired by the Puritanical legal positivism first experimented with in Massachusetts Bay).

928. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7. *See* Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 992–1001 (Lord Camden expressly departed from his Lord Coke's common law rules of statutory interpretation expounded by Coke in *Dr. Foster's Case*, to imply that the common law right of authors acknowledged in *Millar* was taken away by statute in *Donaldson*—this was an abdication of his high seat to the Americans who agreed with him on this statement, "[i]f there be such a right at common law, the crown is a usurper," because the Americans held there to be a common law copyright and that the crown is a usurper.); Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.) (basing English Empire on the conquest of New York, a land they no longer held at the conclusion of the American Revolution—this too is an abdication by the pride of the conquering English Lords of international law, which is a branch of the common law, to the U.S. judiciary).

929. Phillis Wheatley, *Liberty & Peace* [1784]; Phillis Wheatley, *An Hymn to Humanity* [1773]; Phillis Wheatley, *On Messrs. Hussey and Coffin* [1767]; Phillis Wheatley, *Ocean* [1773?]; Phillis Wheatley, *An Elegy to Miss Mary Moorhead, on the Death of her Father, the Rev. Mr. John Moorhead* [1773]; Phillis Wheatley, *America* [1768] ("Turn, O Brittania claim thy child again"); Phillis Wheatley, *To the King's Most Excellent Majesty* n.* [1768]. *See also* Phillis Wheatley, *To the University of Cambridge, Wrote in 1767* [1767]; Phillis Wheatley, *To the University of Cambridge, in New England* [1773]; Phillis Wheatley, *To S. M. a young* African *Painter, on seeing his Works* [1773].

930. Phillis Wheatley, *Thoughts on the Works of Providence* [1773]; Phillis Wheatley, *On Imagination* [1773]; Phillis Wheatley, *On Recollection* [1773]. *See also* Phillis Wheatley, *An Hymn to Humanity* [1773].

Th' expanding Heart with Emulation warms.
E'en great Britannia sees with dread Surprize,
And from the dazzl'ing splendor turns her Eyes![931]

The freedom of mind championed throughout Wheatley's poems, involves the capacity of human beings to imagine, to remember, and to pray as part and parcel of the human capacity of action.[932] Under Wheatley's cause and on behalf of all authors and free thinkers, the American Revolutionaries resolved to create a free copyright and patent system for authors and inventors for limited times, which does not violate the freedoms of speech, assembly, and religion of others.[933]

The trial and attestation of Phillis Wheatley composes the basis of all other legitimate copyright and patent rights under the right of attribution.[934] At the time of her trial this right was wholly original,

931. Phillis Wheatley, *Liberty & Peace* [1784] (emphasis added). *See also* John Adams, *Fragmentary notes for "A Dissertation on the Canon and the Feudal Law"*, May–August 1765; Letter from John Adams to Abigail Adams (May 12, 1780).

932. *See, e.g.,* Phillis Wheatley, *Thoughts on the Works of Providence* [1773].

933. U.S. CONST. art. I, § 8, cl. 8; *id.* amend. I. *See* THE FEDERALIST NO. 43 (James Madison) (referring to *Millar v. Taylor* and appearing not to accept the determination of the Lords in *Donaldson* as applying to America, "The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law."—this makes perfect sense, because the American Revolutionaries rejected the determinations in *Cowle*, *Donaldson*, and *Campbell v. Hall* that denied the common law rights of all Americans). *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994) ("Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story's summary is discernible.") (citing Folsom v. Marsh, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841)).

934. Attribution is the only possible way to legitimize common law copyright in authors rather than through arbitrary decrees of Crown in Council. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 817, at 7 (Phillis Wheatley accomplished what John Milton could only dream of, and what William Billings attempted and failed at—thereby, she became the originator of a precedent that allowed her to become the master of her own works through a right of attribution). The fact that no authors were previously given copyright such that they could become proprietor over their own works is an area with not enough research done. Scholars like Mark Rose merely note that at some point during the Eighteenth Century the shift from booksellers to authors finally occurred broadly in the Western World. Scholars also note that John Milton was the first to make the claim of literary property, and that the Statute of Anne was the first positive law to support the legal fiction, that authors rather than the Crown are the legitimate origin of copyrights. However, in the English copyright cases that first recognized a common law copyright arising from the authorship of a work directly before the American Revolution, all the litigants were booksellers. William Billings attempted and failed to gain his proprietary rights over his own works by a positive law, and it was Phillis Wheatley that successfully acquired them through trial and attestation in Boston, Massachusetts in 1772. Mark Rose, *supra* note 907, at 53–54, 58 (noting these realities in English and European law); Oren Bracha, *Early American Printing Privileges. The Ambivalent Origins of Authors' Copyright in America*, *in* PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 89–114 (Ronan Deazley et al. eds., 2013), https://books.openedition.org/obp/1068?lang=en#ftn50 (noting Billings' pivotal bill for copyright, and that before him there was no legal contemplation of

not vindicated for any person before Wheatley; thus, she was undoubtedly a mother to the rights of all those who would later develop the American artform itself.[935] In response to Wheatley's powerful unchaining of American minds, other American poets began to write,

> *A PHILLIS rises, and the world no more*
>
> *Denies the sacred right to mental pow'r;*
>
> *While, Heav'n-inspir'd, she proves her Country's claim*
>
> *To Freedom, and her own to deathless Fame.*[936]

Thereby, Phillis Wheatley completed a revolution begun by Edward Coke and John Milton in England to create copyright and patent law into a common law of the land in America.[937] The perfection of the common law right to attribution as to the whole world in Wheatley's trial and attestation against the crown and Puritan alike was a final, legal masterstroke, accomplished by heaven on behalf of all Americans to establish patent and copyright law as a common law of the land in the United States.[938]

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author's rights in America, but not acknowledging Phillis Wheatley's trial and attestation.Indeed, Bracha's thesis of an "ambivalent" beginning of author's copyright in the U.S. only exists because he ignored the cause of Phillis Wheatley; who was *not* ambivalent about her rights); Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 977 (Opinion of Ashurst, J.) (noting that the author's name, i.e., attribution, is what creates the literary property in the books, like bells around an eagle's neck).

935. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7.

936. Matilda, *On Reading the Poems of Phillis Wheatley, the African Poetess* [1796]. *See also* Jupiter Hammon, *An Address to Miss Phillis Wheatley* [1779]; Joseph Ladd, *The Prospects of America* [1785], *in* LITERARY REMAINS, *supra* note 748, at 23, 35 (speaking of "the far-spread name / Of wondrous WHEATLY (sic), Afric's heir to fame," whose "glowing genius shines / . . . With magic power the grand descriptions roll / Thick on the mind, and agitate the soul."); Mary Deverell, *On Reading the Poems of Phillis Wheatley* [1781]; Anon., *Palinode to Phillis Wheatley* [1777] (somewhat tongue in cheek, and yet demonstrating the extent of Wheatley's fame in England).

937. Phillis Wheatley, *Phillis's Reply to the Answer* [1774] (speaking of how John Milton sank England into "hell's profound domain"); MILTON, AREOPAGITICA, *supra* note 259, at 187; 3 EDWARD COKE, INSTITUTES *182–83 (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)).

938. Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.); Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.); Statute of Anne 1710, 8 Ann., c. 21 (Eng.); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7. *But see* Licensing of the Press Act 1662, 14 Car. II, c. 33 (Eng.) (This law reenacted the censorship previously enforced through the Star Chamber. John Milton's *Paradise Lost* was censored by then acting licensor the Arch Bishop of Canterbury—eventually this act expired, and the crown enforced its copyright licenses through seditious libel law.); Stamp Act 1765, 5 Geo. III, c. 12 (Eng.) (whatever gains were made in the law of land on behalf of authors and the free press, they were all precluded in America forcing the freedom of authors to become a leading cause of the American Revolution).

The revolutionary precedent of Phillis Wheatley's trial holds the power to secure us from the former abuses of feudal patent and copyright oppressions of the English crown.[939] Indeed, Wheatley's trial and attestation not only exist at the center of the most heated separation of powers disputes of America, but also those of England.[940] The freedom of thought that Phillis Wheatley represented was intended to be available to every person throughout the world.[941]

As Wheatley and her revolutionary compatriots knew, every positive, manmade law is woven into a preexisting fabric of law that guides judicial construction.[942] The common law is one such fabric; feudal and canon law is another.[943] The common law provides Americans with staples of judicial process, such as jury trials, stare decisis, habeas corpus, international law, federal supremacy, and the idea of an overriding constitution.[944] Feudal law is established by accident,

939. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7.

940. *Id.*; JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 135, 137–43 (1980) (Governor Hutchinson vetoed William Billings' copyright bill); Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 992–1001 (reversing the King's Bench in *Millar v. Taylor*).

941. Phillis Wheatley, *To His Excellency General Washington* [1775]; Phillis Wheatley, *On the Capture of General Lee* [1776] ("Believ'st thou chief, that armies such as thine / Can stretch in dust that heaven-defended line?"); Phillis Wheatley, *On the Death of General Wooster* [1778]; Phillis Wheatley, *Phillis's Reply to the Answer* [1774] (inviting an English poet and sailor to join her cause against arbitrary government, on the side of freedom).

942. John Adams, *III. "A Dissertation on the Canon and Feudal Law," No. 1*, Aug. 12, 1765 (Feudal law "was originally, a code of laws, for a vast army, in a perpetual encampment" by which "the first rank" of the general's "great officers held the lands" by which "the common people were held together, in herds and clans, in a state of servile dependence upon their lords." The settlements in colonial America were populated by those who wanted to escape and oppose this feudal slavery. It was by this "love of *universal Liberty*" and a hatred for feudalism that first "accomplished the settlement of America."); John Adams, *II. Draft of "A Dissertation on the Canon and the Feudal Law*, Aug. 1765 (The opposition to canon and feudal slavery was the "struggle that peopled America. It is commonly said that these colonies were peopled by Religion—But I should rather say that the Love of Liberty, projected conducted and accomplished the settlement of America."). *See, e.g.*, 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."); Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.) ("when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void").

943. John Adams, *III. "A Dissertation on the Canon and Feudal Law," No. 1*, Aug. 12, 1765.

944. Rasul v. Bush, 542 U.S. 466, 473–74 (2004) ("Habeas corpus is, however, 'a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.'") (quoting Williams v. Kaiser 323 U.S. 471, 484, n.2 (1945)); MD. CONST. OF 1776 pt. 1, art. 3 (including a Declaration of Rights that secures in its third article to "the inhabitants of Maryland" an entitlement "to the common law of England, and the trial by Jury, according

fraud, and force; and is a font of arbitrary domination, brutality, and violence.[945]

In America, the common law is applicable based upon a determination of the people of the United States "to resist in blood, rather than become the slaves of arbitrary power."[946] Thus, Joseph Story observed the American reliance upon common law principles for the construction of the U.S. Constitution.[947] As James Madison believed, common law was the basis of the Patent & Copyright Clause according to England's original affirmation of common law copyright in *Millar v. Taylor*.[948]

The common law rules of statutory construction dictate that laws should not be interpreted to destroy, preempt, or repeal preexisting laws, absent the clearly stated legislative intention to do so.[949] This rule of statutory construction, as originally set forth in Lord Coke's *Dr.*

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to that law"); OTIS, *supra* note 18, at 175 (Repeating Otis's argument from *Paxton's Case*, the citizens of Massachusetts Bay expounded the basis of all American written constitutions to come.) (extending Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)); Thomas Burns, *The Doctrine of Stare Decisis* 3 (1893), *in* Historical Theses and Dissertations Collection at Cornell Law School. Paper 270. ("The doctrine of Stare Decisis is generally characterized by law-writers as a product or principles of the Common Law."); THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 23 (drawing principles of federal supremacy from the common law *jus gentium*).

945. Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775), *reprinted in* ADAMS & SEWALL, *supra* note 777, at 129–31 (citing Rex v. Cowle [1759] 2 Burr. 834, 835 (Eng.)).

946. 1 WARREN, *supra* note 35, at 177.

947. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459 (lifting the common law maxim given in *Dr. Foster's Case* for statutory construction saying "it has a foundation in the expression of every code of written law, from the universal principle of interpretation, that the will and intention of the legislature are to be regarded and followed," and concluding that it also applies to constitutional construction, writing that a construction "leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble" should not be permitted.).

948. THE FEDERALIST NO. 43 (James Madison) ("The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law."—the first case to recognize a common law copyright in authors was *Millar v. Taylor*, the case Madison was probably referring to); Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773; 3 EDWARD COKE, INSTITUTES *182–83 (the common law was the source of limiting patents for numbers of years) (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)); Millar v. Taylor [1769] 4 Burr. 2303, 2351 (Eng.) ("For, if a statute gives a remedy in the affirmative, (without a negative, expressed or implied,) for a matter which was actionable before by common law; the party may sue at common law, and wave his remedy by statute, if he pleases."—the finding in this case that the common law can give a perpetual copyright is mere dicta, and on doubtful footing because the perpetual copyright comes from feudal law).

949. Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62a–64b (Eng.).

Foster's Case, was expressly adopted in the United States.[950] The feudal oxymoron administered by the House of Lords in *Donaldson v. Becket*, was unanimously rejected in the United States.[951]

Nevertheless, the U.S. Supreme Court appeared to adopt *Donaldson*, in *Wheaton v. Peters*, to abolish common law copyright in America.[952] However, *Wheaton*'s holding was not clear or unambigu-

950. Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy"*, 45 GONZAGA L. REV. 437, 460–62 (2009) (quoting THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 127 (1857)) (citing Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.)) ("'So in this country, on the same principle [as *Dr. Foster's Case*], it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence, a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together.'"); Harford v. United States, 12 U.S. 109, 109–10 (1814); Cope v. Cope, 137 U.S. 682, 686 (1891). *See also* Case v. Humphrey, 6 Conn. 130, 141 (1826) (citing Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.)).

951. During the drafting of the U.S. Constitution, James Madison and James Wilson agreed to ratify the Patent & Copyright Clause upon an understanding of the preexisting common law as set forth by Lord Coke and vindicated by John Milton. THE FEDERALIST NO. 43 (James Madison); 2 WILSON, THE WORKS, *supra* note 113, at 105. *See* 17 THE PARLIAMENTARY, *supra* note 579, at 992–1001 (*Donaldson's* apparent rejection of common law copyright was a result of an extremely blustrous political argument given by Lord Camden on the floor of Parliament; in which Camden reasoned that the possible extension of common law copyright to America was a reason to destroy the common law rights of English authors as well: "What diversity of judgments! What confusion in opinion must they fall into! Without a trace or line of law to direct their determination! . . . Knowledge and science are not things to be bound in such cobweb chains; when once a bird is out of the cage—*volat irrevocabile*—Ireland, Scotland, America, will afford her shelter, and what, then, becomes of your action?"); 3 EDWARD COKE, INSTITUTES *182–83 (asserting that IP statutes are enacted to affirm the common law, not to repeal it); Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.), *adopted in Harford*, 12 U.S. at 109–10 (implicitly construing U.S. statutes not to repeal the preexisting common law).

952. Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1375 (2018) (denying Article III review based on the idea that patents are not a common law property right, but are only a creature of statute based in part upon the holding in *Wheaton*) (citing Wheaton v. Peters, 33 U.S. 591, 663–64 (1834)); L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 442 (1998) (attempting to proclaim common law copyright undone or overruled by *Wheaton*). *Cf.* H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1, 25–33 (2014) (Professor Gómez-Arostegui, reflecting the distraction among his colleagues with regard to the question of whether copyrights are perpetual, appears only to be concerned about whether a perpetual copyright is reversed, but nothing is written here about whether a limited copyright as envisioned by the founders, especially regarding Phillis Wheatley's attribution right, is viable at common law.). *But see* 3 EDWARD COKE, INSTITUTES *182–83 (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)) (limited patents granted to inventors rather than the favorites of the crown or head of state are most certainly creatures of the common law).

ously adoptive of *Donaldson*.[953] For *Wheaton* held that, "an author at common law has a property in his manuscript, and may obtain redress against anyone who deprives him of it or by improperly obtaining a copy endeavors to realize a profit by its publication."[954]

Common law is the root of "the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void."[955] The common law is also the root of federal supremacy, "By our excellent constitution, THE COMMON LAW IS DECLARED TO BE A PART OF THE LAW OF THE LAND; and the *jus gentium* [i.e., international law] is a branch of the common law."[956] The *Rutgers v. Waddington* Court, therefore, noted that to oppose common law would be "dangerous to the union itself."[957]

Contrary as it may seem to some, the formation of the United States was not the culmination of European philosophy, but rather a product of over two centuries of American experience.[958] The United

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953. *Wheaton*, 33 U.S., at 656, 661–62, 668 (citing Lord Camden's argument in *Donaldson*, but the entire court was of the opinion that the law reporters in question were not subject to copyright, whether by positive or common law). *Cf.* Rex v. Cowle [1759] 97 Eng. Rep. 587, 587–88, 2 Burr. 834, 835 (Eng.), *distinguished by* Boumediene v. Bush, 553 U.S. 723, 748 (2008) (denying that English limits on the common law apply in America).

954. *Wheaton*, 33 U.S., at 657–58, 668 (not defining common law rights because the Court unanimously agreed that the content of the Wheaton law reporter at issue in *Wheaton* was not subject to copyright under common or statutory law saying, "the Court is unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this Court, and that the judges thereof cannot confer on any reporter any such right"). Indeed, secondary copyright liability comes directly from the common law and it is applied regularly and forcefully by the federal courts. *See* Schroeder, *Choosing*, *supra* note 485, at 57, 64 ("Copyright law loosely draws its theories of secondary liability from common law sources.") (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984) ("The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.")).

955. Marbury v. Madison, 5 U.S. 137, 180 (1803). *See* OTIS, *supra* note 18, at 175 (citing Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)); William Wetmore, *Wetmore's Minutes of the Trial, Essex Inferior Court, Newburyport, Oct. 1773*, *in* 2 ADAMS, LEGAL PAPERS, *supra* note 22, at 67 (extending Day v. Savadge [1614] Hob. 85, 87 (Eng.); Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.) (opinion of Lord Coke)).

956. THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 23 (emphasis added). *See* N.Y. CONST. OF 1777 art. 35 (continuing "the common law of England" in New York); Alien Tort Statute, 28 U.S.C. § 1350.

957. THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 29.

958. *See, e.g.*, *supra* note 61; JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 112 (1980) ("The Right of Defence, which is necessary to guard and preserve every other Right, is founded in natural Justice and COMMON LAW; which do not suffer any one to be condemned without being first heard, and their Defence considered:

States rose from long struggles to preserve the common law rights of all people represented by the causes of Roger Williams and Anne Hutchinson.[959] The people of the United States began their journey by lodging a Declaration of Independence within the *jus gentium*, a branch of the preexisting common law ingeniously imported into America with Wheatley's books.[960]

Even under *Wheaton*, common law copyright interests—whether pecuniary or moral—are and must be retained by authors their heirs and assigns prior to first publication.[961] After publication, common law rights exist, whether express or implied, as a condition of

And of this Right they cannot be depriv'd, without being deprived at the same Time of their political Existence.") (emphasis added). *But see* 1 NATHANIEL PARKER WILLIS, AMERICAN SCENERY 1 (1840) (presenting a popular but unsupported idea that the "Minerva-like birth of the republic of the United States" was the product of European brilliance, as if the United States occurred automatically, without struggle, as a natural extension of European philosophies).

959. Isaac Backus, *An Appeal to the Public for Religious Liberty* 15–16, 25 [1773] (examining and rejecting the Puritanical combination of church and state, advocating for a separation of church and state based on Roger Williams' teachings about free speech and the sword of spirit) (quoting ROGER WILLIAMS, THE BLOODY TENENT MADE YET MORE BLOODY 192 (1652)). The collusion between the Puritans and the crown to destroy human rights recognized in the common law are marked throughout history in inhumane and dastardly scenes that finally resulted in the separation of the United States from its mother country. *Id.* They are symbolized by the Puritan censorship and destruction of Roger William's book that advocated the common law rights of Native Americans. Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 WINTHROP'S JOURNAL, *supra* note 819, at 116–17 (The Puritans destroyed all copies of this tract, and no known copy survives.).

960. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See* THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 23; Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795) ("The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law.").

961. *Wheaton*, 33 U.S. at 657–58 (affirming the common law property right in an author's manuscript, but limiting its determination based on its difficulty in finding an affirmation that the common law had been adopted by Pennsylvania as a condition of its joining the Union); James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820 ("Monopolies tho' in certain cases useful, ought to be granted with caution, and guarded with strictness agst. abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community, as a purchase of property which the owner might otherwise withhold from public use."). The *Wheaton* Court might have come down differently if it had considered *Vanhorne's Lessee*, a case that asserted federal jurisdiction to review common law property rights under the U.S. social compact according to the first constitution of Pennsylvania. *Vanhorne's Lessee*, 2 U.S. at 309 (citing PA. CONST. OF 1776 pt. 1, arts. I, VIII, XI ("That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.")).

first publication.[962] Indeed, Phillis Wheatley's common law basis for attribution rights to the works of her hands, inspired by John Milton, is the entire theory of U.S. copyright and patent law as well as a possible origin of the well known phrase *no taxation without representation*.[963]

The question of whether our statutes impliedly destroy common law rights (originally a matter of plaintiff's choice) derives from the deeper question of whether the common law rules of statutory construction still apply.[964] This was the real dispute between the judges in *Millar v. Taylor* and the Lords in *Donaldson v. Beckett*.[965] In *Millar*

962. *Wheaton*, 33 U.S. at 657–58. *See* John Milton's Publishing Contract for Paradise Lost, Apr. 27, 1667; John Milton, *Eikonoklastes* 13 (2d ed. 1650) (referring to the monarch's stealing of the property of "every author" as an illegitimate taxation saying "any King heretofore that made a levy upon their wit, and seized it as his own legitimate" is an illegitimate taxation that was "a trespass also more than usual against human right"); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7 (Wheatley included the condition of her attribution in the first publication of her book, an attestation of her successful trial for attribution in 1772, something John Milton and every man after him until Wheatley's success failed to recieve as a right).

963. William Billings' Second Petition, Massachusetts, May 27, 1772 (praying for a remedy for the "unfair advantage is about to be taken against him & that others are endeavoring to reap the Fruits of his great Labour & Cost," according to a proof that Billings was "the real Author of the Book") (implying reference to 2 JOHN LOCKE, TWO TREATISES ON GOVERNMENT § 27); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7 (where Billings' legal struggles ended in failure, Wheatley's ended in success, she was the first author to benefit from copyright); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *But see* 17 THE PARLIAMENTARY, *supra* note 579, at 992–1001.

964. *Wheaton*, 33 U.S. at 696 (Thompson, J., dissenting) ("If there be a common law right, there certainly must be a common law remedy. The statute contains nothing in terms, having any reference to the common law right, and if such right is considered abrogated, limited or modified by the acts of Congress, it must be by implication; and to so construe these acts is in violation of the established rules of construction that where a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable at common law, the party may sue at common law, as well as upon the statute. This is a well settled principle, and fully recognized and adopted in the case of *Almy v. Harris*.") (citing Almy v. Harris, 5 Johns. 175 (N.Y., 1809) (per curiam) ("If Harris had possessed a right, at the common law, to the exclusive enjoyment of this ferry, then, the statute giving a remedy in the affirmative, without a negative expressed or implied, for a matter authorized by the common law, he might, notwithstanding the statute, have this remedy by action at the common law.")). *Cf. Ex parte* Yerger, 75 U.S. 85, 96–97 (1869) (emphasis added) (applying a common law rule of statutory construction: "Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act.") (rule repeated and extended in *Felker v. Turpin*).

965. Millar v. Taylor [1769] 98 Eng. Rep. 201, 227, 4 Burr. 2303, 2351 (Eng.) ("For, if a statute gives a remedy in the affirmative, (without a negative, expressed or implied,) for a matter which was actionable before by common law; the party may sue at common law, and wave his remedy by statute, if he pleases."); *id.* at 2409 (noting the House of Lords considered the question of whether to depart from the common law rules of statutory construction in order to impliedly take away the common law right).

and *Donaldson*, the English Courts could have applied common law construction to assuage the the political ruptures occurring in the American colonies, the American colonies were then being led by Phillis Wheatley and James Otis in a cause for securing every colonists' common law rights.[966]

Therefore, in America it was firmly decided in *Rutgers v. Waddington*, after the revolution swept New York, that under the U.S. social compact the common law *must* apply to our statutes.[967] Where the common law was challenged in American courts, the rule in *Dr. Foster's Case* prevailed.[968] The common law maxims of statutory construction required the implicit preservation and enlargement of common law rights under positive laws by judicial presumptions of legislative grace.[969]

The presumption at common law assumes that legislators are aware of preexisting common law rights and the legislators do not ordi-

966. The English Court in *Millar* and *Donaldson* could have preserved the common law under the common law rule of construction that if a statute does not contain a negative then ordinarily it should not be construed as an implied repeal of other statutes or the common law. Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7 (maintaining Wheatley's right of attribution, the denial of which was named by John Milton in his tract *Eikonoclastes* as an illegitimate and unjust tax on authors—Milton's cause for authorial rights was literally completed by Wheatley for the first time in history with this document); OTIS, *supra* note 18, at 166 (the right to be free from taxes without representation "is part of the common law, part of a British subjects birthright, and as inherent and perpetual, as the duty of allegiance"); HUTCHINSON & OLIVER, *supra* note 826, at 16 (around the time Governor Hutchinson denied William Billings' his copyright bill, Hutchinson was making plans with the Lords Mansfield, North, and Bute to put an end to all American rights, "There must be an abridgement of what are called English liberties.").

967. THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 14–15 (while considering the first question of "how far the common law is to be consulted, in the construction of statutes" Judge Duane emphatically affirmed the use of the common law to determine statutory construction under the U.S. social compact, thereby establishing the original basis of federal preemption as the application of common law principles upon state laws).

968. *Id.*; Almy v. Harris, 5 Johns 175, 175–76 (N.Y. 1809); Harford v. United States, 12 U.S. 109, 109–10 (1814); Case v. Humphrey, 6 Conn. 130, 141 (1826) (citing Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.)); Cope v. Cope, 137 U.S. 682, 686 (1891).

969. Markham, Jr., *supra* note 950, at 460–62 (citing Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.)) ("The presumption . . . often pays (probably) false homage to the legislature by pretending that it must have thought its enactments through more carefully than it really did. . . . Presuming [the legislature] had paid full attention to all of its earlier enactments is by no means mandated by raw logic, but instead reflects the court's determination to pay respect to the legislative branch."). *See, e.g.*, *Almy*, 5 Johns at 175; *Yerger*, 75 U.S. at 96–97; Millar v. Taylor [1769] 4 Burr. 2303, 2351 (Eng.); THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 37, 46 (this case argued by Alexander Hamilton preempted a state law that attempted to strip the property rights of loyalist Joshua Waddington according to an implication that the Treaty of Paris (1783) is an act of amnesty, which is an act of perfect oblivion, and thus it cannot justify the total destruction of Waddington's property rights at common law, effectively limiting the statutory laws of New York).

narily intend to revoke the rights absent an express negative.[970] Furthermore, where a statute does contain a negative, the negative is construed narrowly by the court as a matter of grace.[971] Where judges opine that if copyright did not exist at feudal law then copyright should not exist at all, American lawyers may rightfully invoke the common law cause of Phillis Wheatley.[972]

For the *Wheaton* Court's apparent departure from the rule in *Dr. Foster's Case* inspired by *Donaldson*, also contained Lord Camden's

970. *Almy*, 5 Johns at 175; Millar v. Taylor [1769] 4 Burr. 2303, 2351 (Eng.); Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.). *See* POM Wonderful v. Coca-Cola, 573 U.S. 102, 113–14 (2014).

971. Ashwander v. TVA, 297 U.S. 288, 348 (1936) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); Griswold v. Connecticut, 381 U.S. 479, 487–91 (1965) (Goldberg, J., concurring). *See also* Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.); Markham, Jr., *supra* note 950, at 455–57 n.133 (the U.S. Supreme Court traditionally requires narrowness in order to preserve as much of both statutes as possible).

972. *Wheaton*, 33 U.S. at 656–57 (citing Millar v. Taylor [1769] 4 Burr. 2303, 2351 (Eng.)) (relying upon the false count of the eleven judges given in the Burrows report, when a majority of the eleven judges decided that the common law right was *not* taken away by the statute, and therefore the House of Lords undoubtedly reversed them); *id.* at 661 ("Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it."). *See* Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7 (published before Lord Camden's eyes); 17 THE PARLIAMENTARY, *supra* note 579, at 992–1001 (Argument of Lord Camden) (the two main misrepresentations of copyright law perpetuated by Lord Camden and others in *Millar* and *Donaldson*, was (1) that the common law was the origin of *perpetual* copyright, when the origin of perpetual copyright was feudal law, and (2) that if common law copyright was not taken away by the Statute of Anne or otherwise thrown out as if it never existed that a parade of horribles would occur arising from the claims of perpetual copyrights made by authors and their proprietors that would ultimately arrest knowledge and learning in England—the absurdity of this second point consists in the American Revolution that took place but two years after *Donaldson* that represents the English loss of the seat of the Empire, to which, as Phillis Wheatley wrote in her poem *Liberty & Peace*, England can thank the Revolutionaries for the broad expansion of knowledge and learning in both England and America); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *Cf.* Mark Rose, *supra* note 907, at 53 (showing that booksellers tried to claim perpetual copyright under the common law in order to keep treating famous "works of Shakespeare, Bacon, Milton, Bunyan, and others" as "private landed estates" perpetual by virtue of feudal law, not the common law); RIVINGTON, *supra* note 269, at 33–36 (demonstrating how customs of keeping perpetual rights over literary works arose from the feudal copyright and letters patent of the crown, and not the common law by including a list of book burned, seized, banned, erased, or otherwise suppressed by feudal copyright law—thus it was feudal law that arrested knowledge and learning, and it was by proprietors of literary works attempting to copy this law that proprietors also arrested knowledge and learning according to their attempts to acquire the perpetual copyrights of the crown); 3 EDWARD COKE, INSTITUTES *182–83 (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)) (the common law was the source of limiting patents for numbers of years—at the time this was written the idea of copyright inhered with patents for the use of printing presses and thus this limit for years also applies to copyright as it began to develop as a separate idea in the law).

ironic affirmation of common law copyright.[973] Common law copyright was finally expounded in *Folsom v. Marsh*, to allow a descendible and assignable common law right of first publication in letters private and official.[974] It was, after all, to common law copyright that "we owe, not merely, the publication of the writings of Washington, but of Franklin, and Jay, and Jefferson and Madison, and other distinguished statesmen of our own country."[975]

Lord Camden demonstrated ignorance of the common law basis of the Statute of Monopolies when he argued in *Donaldson*, "With respect to inventors, I can see no real and capital difference between them and authors."[976] The similarity of copyright and patent law referenced by Lord Camden, which he thought to be a good reason to preclude the common law, was actually a reason to apply common law; over a century prior to Lord Camden's *Donaldson* argument, Sir Edward Coke vindicated the common law basis of the Statute of Monopolies here,

> This Act having declared all monopolies to be void BY THE COMMON LAW, hath provided by this clause, that they shall be examined, heard, tried, and determined IN THE COURTS OF THE COMMON LAW ACCORDING TO THE COMMON LAW, and not at the Council Table, Star-Chamber, Chancery, Exchequer chamber, or any other court of like

973. *Wheaton*, 33 U.S. at 657 ("That an author at common law has a property in his manuscript, and may obtain redress against anyone who deprives him of it or by improperly obtaining a copy endeavors to realize a profit by its publication cannot be doubted . . . . The argument that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted. And the answer is that he realizes this product by the transfer of his manuscripts or in the sale of his works when first published."); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7 (Wheatley placed bells upon her work, by placing her name upon it with an attestation of the most respected characters of Boston that she was the author. The attribution of the author is in the first publication, and upon the literary contract for publication, is the font of all other interests pecuniary or moral at copyright law.). *Cf.* 17 THE PARLIAMENTARY, *supra* note 579, at 997 (in the middle of appearing to lambaste common law copyright in a blustrous argument on the floor of Parliament, Lord Camden also stated "an action I allow will lie for ink and paper," admitting that authors have a common law right to "the ideas . . . marked in black and white, on paper or parchment").

974. Folsom v. Marsh, 9 F. Cas. 342, 346–47 (C.C.D. Mass. 1841) (No. 4,901). *Cf.* John Milton, *Eikonoklastes* 13 (2d ed. 1650) ("every author should have the property of his own work reserved to him after death as well as living").

975. *Folsom*, 9 F. Cas. at 347.

976. 17 THE PARLIAMENTARY, *supra* note 579, at 999 (Argument of Lord Camden); *id.* at 982 (Opinion of Perrott, J.) (Judge Perrott misrepresented that "The right of exclusively making any mechanical invention was taken away from the author or inventor by the Act against monopolies . . . ." This is exactly the opposite of what Lord Coke stated in his *Institutes*, which held that the Statute of Monopolies vindicated common law rights against those of the crown.).

> nature, but ONLY ACCORDING TO THE COMMON LAWS OF THE REALM, with words negative, and not otherwise.[977]

That a "true and first inventor" should be granted a patent, and the crown should not otherwise be able to grant any patents whatsoever, was a reversal born out of common law and codified by Parliament's passage of the Statute of Monopolies.[978] Though this legislation was intended to defend the common law by stripping the crown of its feudal power to grant monopolies through letters patent, the ascendant King Charles I defied common law by continuing to issue patents by Privy Council, and enforcing patents arbitrarily through the Star Chamber.[979]

In response, Lord Coke drew up the Petition of Right, which was begrudgingly accepted by the king.[980] However, the Council of the North paradoxically used the Petition of Right as a pretext to continue administering odious monopolies.[981] In defense of the Statute of Monopolies, Parliament passed the Habeas Corpus Statute 1640, to abolish the Star Chamber and regulate the Privy Council according to "the Common Law of the Land and in the ordinary course of Justice."[982]

Shortly thereafter the English Civil War began, in which the Crown and Parliament went to war with one another.[983] Parliament defended the common law and Charles I defended his feudal power.[984] The eventual result of this conflict was the rise of the absolute military dictator, Oliver Cromwell, who was the original asserter of absolute English sovereignty over the seas, conqueror of Jamaica, copycat of the

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977. 3 EDWARD COKE, INSTITUTES *182–83 (emphasis added) (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)).

978. *Id.*; Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.).

979. 17 THE PARLIAMENTARY, *supra* note 579, at 959.

980. Petition of Right 1628, 3 Car. I, c. 1 (Eng.).

981. *See* Sir Thomas Wentworth, First Earl of Stafford, Speech to the Council of the North (Dec. 30, 1628) ("The authority of a king is the keystone which closeth up the arch of order and government . . . ."). *Cf.* RACHEL ROBERTSON REID, THE KING'S COUNCIL IN THE NORTH 372, 380, 383, 394–95, 406–08 (1921) [hereinafter ROBERTSON REID] (the Council of the North was opposed "if only as the protector of monopolies").

982. Habeas Corpus Act 1640, 16 Car. I, c. 10, pmbl. (Eng.).

983. Monty Python [i.e., John Cleese], *Oliver Cromwell* [1980/89] (this is a good place to start for a common American, because it contains the proper disgust and disagreement with Cromwell's rise to power along with some historical facts—this disgust for Cromwell, while it may be popular among ordinary English people, is not usually shared by English elitists like John Maynard Keynes or Jeremy Bentham who reveled in Cromwell's exploits).

984. Habeas Corpus Act 1640, 16 Car. I, c. 10, pmbl. (Eng.) (attempting to bring the King and his Councils into the ambit of the common law); William R. Stacy, *Matter of Fact, Matter of Law, and the Attainder of the Earl of Stafford*, 29 THE AM. J. OF L. HIST. 323, 325 (1985).

legal positivism earlier asserted in Massachusetts Bay to commit genocide and other crimes against humanity, and the chief oppressor of Holland and America.[985]

King Charles I was beheaded, in part, for his crimes of royal appropriation of the author's copyrights, which were an illegitimate taxation "lev[ied] upon their wit."[986] Then Oliver Cromwell ironically unleashed the worst taxation of all—the Navigation Acts.[987] Therefore, Phillis Wheatley's trial and attestation was none other than the very same struggle started by Coke and Milton contemporaneously emblazoned by Otis's motto *no taxation without representation*.[988]

As James Otis was fighting for the rights of privacy in the papers and other effects of the colonists, Wheatley vindicated the colonists' legal interests in the content of those same papers; under the common law attribution right to claim one's papers as her own.[989] Where Otis engaged in the physical, Wheatley vindicated the metaphysical or spiritual, complex, and the mysterious legal maxims of copyright often hidden from human understanding.[990] For as Justice Story later wrote from the bench,

985. 20 HOWELL, *supra* note 802, at 283, 289 ("'Jamaica was conquered by Oliver Cromwell'") (statement of Lord Mansfield during the trial of *Campbell v. Hall*); Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.); Arthur Lee et al., *The American Commissioners: Memorandum for the Dutch*, [before Mar. 31, 1778]; Letter from John Adams to William Tudor (June 1, 1818) (during *Paxton's Case*, James Otis "gave a history of the navigation act of the First of Charles II., a plagiarism from Oliver Cromwell"); Letter from John Adams to William Tudor (July 14, 1818) (the Navigation Act "has ruined Holland, and would have ruined America, if she had not resisted"); 2 SELDEN, OF THE DOMINION, *supra* note 805, at 202–03 (claiming Caligula's conquest of the seas as the basis of English sea dominion—the most important name for purposes of connecting the English domination of the seas to Oliver Cromwell is Marchamont Nedham, who translated this from Latin into English for propaganda purposes); GEORGE LOUIS BEER, CROMWELL'S POLICY IN ITS ECONOMIC ASPECTS 47 (1902); GEORGE LOUIS BEER, THE ORIGINS OF THE BRITISH COLONIAL SYSTEM, 1578–1660, at 377 (1908).

986. John Milton, *Eikonoklastes* 13 (2d ed. 1650).

987. *An Act for increase of Shipping, and Encouragement of the Navigation of this Nation*, [Oct. 9, 1651], *in* 2 ACTS . . . OF THE INTERREGNUM, *supra* note 792, at 559–62; The Navigation Act 1660, 12 Car. 2 c. 18 (Eng.) (Cromwell's Navigation Act reenacted under Charles II).

988. SIMMONS, *supra* note 31, at 23 ("From the navigation act the advocate [James Otis] passed to the Acts of Trade, and these, he contended, imposed taxes, enormous, burthensome, intolerable taxes; and on this topic he gave full scope to his talent for powerful declamation and invective against the tyranny of taxation without representation. From the energy with which he urged this position, that taxation without representation is tyranny, it came to be a common maxim in the mouth of every one.").

989. RIVINGTON, *supra* note 269, at 33 (noting the general warrants frequently issued "to enter any house at any time to search for unlicensed presses or books").

990. *See, e.g.*, Phillis Wheatley, *To the Rev. Dr. Thomas Amory on Reading his Sermons on Daily Devotion, in which that Duty is Recommended and Assisted* [1773] ("In vain would Vice her works in night conceal, / For Wisdom's eye pervades the sable veil.").

> Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.[991]

Wheatley's 1772 trial and attestation are marvelous companions to James Otis's arguments in *Paxton's Case*.[992] It is fortunate that the effects and nuances of other legal realities can be extrapolated reliably from Wheatley's metaphysical explorations of the capacities of human thought.[993] For where Otis's arguments vindicated the private property in curtilage of the home, Wheatley's writings vindicated the underlying *value* of private property as essential to the human capacities of thought and creativity.[994]

The strength of Otis's defense of curtilage depended upon Phillis Wheatley's success in her trial, attestation, and her final claim of copyright protection in England and America.[995] For if Americans held no valuable property in the papers kept in their homes, then it may be reasonable for police to break in and search them.[996] Phillis Wheatley

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991. Folsom v. Marsh, 9 F. Cas. 342, 344 (No. 4,901) (C.C.D. Mass. 1841).

992. *Compare* Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7, *and* Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773, *with* SIMMONS, *supra* note 31, at 9. Phillis Wheatley's attestation, her copyright, and her importation of prints of her book for sale in Boston, Massachusetts took a combined effort of international proportions—and thus her proprietorship over her own works required the freedom of the seas and the abolishment of the Navigation Acts, as well as a trial and attestation to confirm that she was the original author of her poems. *See* Letter from John Andrews to William Barrell (Feb. 24, 1773); Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773); Wheatley, *Liberty & Peace* [1784] (noting the requirement of the freedom of the seas to the development, sharing, and learning of science and the arts).

993. Letter from Phillis Wheatley to Samson Occom (Feb. 11, 1774); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See* Phillis Wheatley, *Thoughts on the Works of Providence* [1773]; Phillis Wheatley, *On Imagination* [1773]; Phillis Wheatley, *On Recollection* [1773]; Phillis Wheatley, *An Hymn to Humanity* [1773].

994. *See, e.g.*, Phillis Wheatley, *Thoughts on the Works of Providence* [1773]; Phillis Wheatley, *To the Rev. Dr. Thomas Amory on Reading his Sermons on Daily Devotion, in which that Duty is Recommended and Assisted* [1773].

995. SIMMONS, *supra* note 31, at 4, 17 ("A Man, who is quiet, is as secure in his House, as a Prince in his Castle.") (referencing Semayne's Case [1604] 5 Co. Rep. 91a, 91b (Eng.) ("the house of every one is to him as his castle")). Phillis Wheatley answered the inevitable question of what is actually secure in one's house, by showing the property value individuals have in their own ideas, writings, thoughts, etc. vindicated through her hard fought legal gambit. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773.

996. *See* Arnold v. Mundy, 6 N.J.L. 1, 29 (1821) (tracing the origin of New Jersey's right to regulate fisheries within three leagues from its shore to a public trust doctrine that derived from the Declaration of Independence, and so the court concluded of the revolution, "*It was not intended to take away, but to secure rights*.") (emphasis added); Phillis Wheatley,

was the beginning of a unanimous shift in the Western World toward the adoption of Lockean property creation, for she was the first to demonstrate that it could be done.[997]

In 1774, the year after Wheatley successfully imported her books into America, the House of Lords decided *Donaldson* denying common law copyright, and then Lord Mansfield decided *Campbell v. Hall* denying all common law rights in America.[998]The *Campbell* Court determined that Englishmen who depart from England have *no rights!*[999] Thus, as an existential matter, the *Boumediene* and *Kirt-*

Liberty & Peace [1784] (in this poem Wheatley most directly expounds the founding ideals of liberty and peace as ultimately governing of the oceans in the public interest); Phillis Wheatley, *On Imagination* [1773] (in this and others of Wheatley's poems she expounded the creative abilities of the human mind, of how we draw our dreams from the realm of imagination into reality, as symbolized by the ocean and land as indicative of the epitome of public trust law to the law of private property, this composes not only the theory of copyright and patent law, but is also the origin of property law itself arising from the Lockean idea of mixing oneself with the elements of nature to acquire a personal property in something outside oneself). *Compare* Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7, *and* Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773, *with* SIMMONS, *supra* note 31, at 9. *Cf.* Carol Rose, *supra* note 244, at 727–30.

997. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7 (proving that a person can create private property through their own work). *See* William Billings' Second Petition, Massachusetts, May 27, 1772 (those who came before her failed to get their private property rights legally recognized); Mark Rose, *supra* note 907, at 58, 78 (noting a seizmic shift toward author owned copyrights in the entire Western World around the time Phillis Wheatley earned her copyright, but not examining Wheatley); 2 WILSON, THE WORKS, *supra* note 113, at 105 (after the revolution, asserting the authors like Phillis Wheatley should own their own copyrights according to Lockean property creation through work, "On one hand the time which an author employs, the pains which he takes, and the industry which he exerts, in the production of his literary performance, bear the nearest and the most marked resemblance to the industry exerted, to the pains taken, and to the time employed, in the acquisition of property of every other kind. This resemblance, so striking and so strong, between the labour bestowed in this, and the labor bestowed in any other way, justifies the inference and the claim, that he, who bestowed the labour in this way, should be entitled to the same perpetual, assignable, and exclusive right in the production of the labour thus bestowed; and should receive the same protection of the law in the enjoyment of this perpetual, assignable, and exclusive right, as is given and decreed to those who bestow their labour in any other manner.").

998. 20 HOWELL, *supra* note 802, at 270 (citing Rex v. Cowle [1759] 2 Burr. 834, 835 (Eng.)) (in statement of Mr. Alleyne before the King's Bench in support of Lord Mansfield's determination in *Campbell*); King George III, *The King's Speech of Nov. 30, 1774* [1775]; Thomas Hutchinson, *Diary*, Nov. 28, 1774, *in* 1 Hutchinson, The Diary, *supra* note 802, at 307–09 (confirming the timing of King's Speech was contemporaneous with the ruling of *Campbell v. Hall*, and that the *Campbell* case and the King's Speech harkened back to Cromwell's conquest of Jamaica).

999. Campbell v. Hall [1774] 1 Cowp. 206, 208 (Eng.) ("An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives."); 20 HOWELL, *supra* note 802, at 289 ("'It is absurd, that in the colonies they should carry all the laws of England with them . . . .'") (statement of Lord Mansfield during the trial of *Campbell*). It was *exactly* the cause of the American Revolution to overrule the feudal sentiment of

saeng courts strictly distinguished *Cowle*, *Donaldson*, and *Campbell;* and affirmed U.S. common law rights.[1000] Phillis Wheatley did not become the origin of American antitrust law and public property trusts in a vacuum, for as John Adams argued, "Knowledge monopolized, or in the possession of a few, is a curse to mankind. We should dispense it among all ranks. We should educate our children. Equality should be

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Lord Mansfield in *Campbell* regarding the Americans. [James Otis,] *Essay on the Writs of Assistance Case*, BOSTON GAZETTE, Jan. 4, 1762, *reprinted in* OTIS, *supra* note 18, at 16 ("The people of this province formerly upon a *particular occasion* asserted the rights of *englishmen*; and they did it with a *sober*, *manly* spirit: they were *then* in an insulting manner asked 'whether english rights were to follow them to the ends of the earth'—we are *now* told, that the rights we contend for 'do not belong to the English'—these writs, it is said, 'are frequently issued from the exchequer at home, and executed, and the people do not complain of it—and why should we desire more freedom than they have in the mother country[.]") (quoting Jeremiah Dummer, *A Defence of the New-England Charters* 8, 23 [1715]). *See also* OTIS, *supra* note 18, at 173–74 (The Massachusetts Legislature published a Memorial appended to Otis's tract that stated that "The absolute rights of Englishmen, as frequently declared in parliament, from Magna Charta, to this time, are the rights of *personal security*, *personal liberty*, and of *private property*. . . . By the laws of nature and of nations, the voice of universal reason, and of God, when a nation takes possession of a desert, uncultivated, and uninhabited country, or purchases . . . the colonists transplanting themselves, and their posterity, tho' separated from the principal establishment, or mother country, natural become part of the state with its ancient possessions, and intitled to all the essential rights of the mother country."); Patrick Henry et al., *The Virginia Resolves* (May 30, 1765) ("[T]he first adventurers and settlers of His Majesty's colony and dominion of Virginia brought with them and transmitted to their posterity [and to all later settlers] . . . all the liberties, privileges, franchises, and immunities that have at any time been held, enjoyed, and possessed by the people of Great Britain."); 2 WILSON, THE WORKS, *supra* note 113, at 4, 46–49 (giving a defense of the common law and concluding, "And therefore it is utterly untrue that the law of England cannot operate, but only within the bounds of the dominion of England.") (citing 1 EDWARD COKE, INSTITUTES *97). *But see* Johnson v. M'Intosh, 21 U.S. 543, 597 (1823) (citing to *Campbell v. Hall* approvingly saying, "The correctness of this decision cannot be questioned, but its application to the case at bar cannot be admitted.").

1000. *See* Rex v. Cowle [1759] 2 Burr. 834, 835 (Eng.), *distinguished by* Boumediene v. Bush, 553 U.S. 723, 748 (2008) (The facts of *Cowle* and *Donaldson* are similar in that both decided that respective common law rights to habeas corpus and to literary property do not extend to Scotland. *Boumediene* denied extending *Cowle*'s denial of common law rights to cases arising in Guantanamo Bay and other territories controlled or operated within by the United States.); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538 (2013) (The Court applied common law copyright rather than positive or feudal laws to international law, requiring limits on the restraint of alienation of chattels in international trade, impliedly distinguishing *Donaldson*.) (quoting 1 EDWARD COKE, INSTITUTES *223). *Cf.* Donohue, *National Security*, *supra* note 31 (Donohue quoted Winston Churchill, who perhaps unwittingly confirmed this reality saying, "'But we must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence.'") (quoting Winston Churchill, *Sinews of Peace* [1946]).

preserved in knowledge."[1001] John Adams expanded this idea to *all* property at common law because, "Property monopolized or in the possession of a few is a curse to mankind."[1002]

John Adams also attacked the basis of *Campbell v. Hall* when he protested "the instruments of arbitrary power."[1003] He observed the fruits of arbitrary civil forfeiture laws, including "arbitrary distinctions" and treasonous constructions made by the British Admiralty Court in Massachusetts Bay against his client, John Hancock.[1004] Therefore, Adams vigorously argued for the principle of *Dr. Foster's Case* to be applied in America,

> Here is the contrast that stares us in the face! The Parliament in one clause guarding the people of the realm, and securing to them the benefit of a trial by the law of the land, and by the next clause, depriving all Americans of that privilege. . . . Is it not directly, a repeal of Magna Charta, as far as America is concerned[?][1005]

Then Adams proclaimed it was a wonder "that [such cases taken up as civil forfeiture actions] are not confined to courts of common law here."[1006] The Massachusetts Bay Admiralty Court's departure from the common law to establish arbitrary constructions of feudal law rising out of the sea were, in Adams' words, "lost in the wild regions of imagination and possibility, where arbitrary power sits upon her brazen throne and governs with an iron scepter."[1007]

The question of common law statutory construction in federal courts is an existential one in the United States.[1008] For the principle of *Marbury v. Madison* derives from Lord Coke's common law decision in *Dr. Bonham's Case*, which first galvanized the American resistance

1001. John Adams, *I. Fragmentary Notes for "A Dissertation on the Canon and the Feudal Law"*, May–Aug. 1765.

1002. *Id.* (indeed, the origin of absolute and perpetual property including perpetual copyrights and patents is the feudal law of the crown, which used copyright and patent law to arbitrarily censor speech and religious practice).

1003. John Adams, Copy of the Information and Draft of His Argument, Court of Vice Admiralty, Boston, Oct. 1768—Mar. 1769, *in* 2 ADAMS, LEGAL PAPERS, *supra* note 22, at 198–99.

1004. *Id.*

1005. *Id.* at 200.

1006. *Id.*

1007. *Id.* at 199.

1008. *Id.* at 208, n.54 ("If therefore the court is to adopt the common law, because the jurisdiction was created by Act of Parliament; it ought to adopt it as a system.") (internal quotation marks omitted); THE DECLARATION OF INDEPENDENCE, para. 20 (U.S. 1776) (separating from England, in part, "for depriving us in many cases, of the benefit of Trial by Jury"); MD. CONST. OF 1776 pt. 1, art. 3 (securing to "the inhabitants of Maryland" an entitlement "to the common law of England, and the trial by Jury, according to that law").

to British tyranny.[1009] Without the ordinary common law principles of statutory construction, the very idea of an overruling written constitution in America as "the sun of the political system" can only be a delusion.[1010]

Thus, it is a concern that in *Dastar Corp. v. Twentieth Century Fox*, the U.S. Supreme Court impliedly repealed the same attribution rights Phillis Wheatley enjoyed in 1772.[1011] The *Dastar* Court knew not what it did when it absurdly distinguished "origin of goods" from "originality."[1012] For by this arbitrary distinction, the Supreme Court accidentally unraveled the origin of antitrust law, as if Phillis Wheat-

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1009. OTIS, *supra* note 18, at 175 (stating "that acts of parliament against natural equity are void. That acts against the fundamental principles of the British constitution are void.") (extending Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)); Marbury v. Madison, 5 U.S. 137, 180 (1803). *See* SIMMONS, *supra* note 31, at 2 (the remedy for disposing of unjust laws adopted by the Americans from *Paxton's Case* going forward was, in part, "to confer on the judiciary the power to declare unconstitutional statutes void").

1010. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 308 (1795) ("The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void."—applying the federal general common law against Pennsylvania, according to the first Pennsylvania Constitution.) (citing PENN. CONST. OF 1776 pt. 1, arts. I, VIII, XI); Millar v. Taylor [1769] 4 Burr. 2303, 2351 (Eng.) ("For, if a statute gives a remedy in the affirmative, (without a negative, expressed or implied,) for a matter which was actionable before by common law; the party may sue at common law, and wave his remedy by statute, if he pleases.").

1011. *Dastar* interpreted the Visual Artist Rights Act (VARA) (an act made to secure author's rights) to strip authors of their ability to sue for attribution under the Lanham Act. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34–36 (2003) (implying the repeal of a previously existing cause of action for authors for attribution) (citing VARA, 17 U.S.C. § 106(a)(1)(A); Lanham Act, 15 U.S.C. § 1125(a)(1)); Felker v. Turpin, 518 U.S. 651, 660 (1996) ("[r]epeals by implication are not favored") (citing *Ex parte* Yerger, 75 U.S. 85, 105 (1869) ("Repeals by implication are not favored.")). The rule that repeals by implication are not favored appears to have a common root with the rule cited in *Millar*, that statutes do not impliedly take away common law rights. Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.) ("This act . . . is all in the affirmative, and therefore shall not repeal or abrogate a precedent affirmative law before it is but a statute of addition to give a more speedy remedy . . . yet the plaintiff may take which process he will, either at the common law, or upon the said statute, because both are in the affirmative . . . ."); Millar v. Taylor [1769] 4 Burr. 2303, 2351 (Eng.) ("For, if a statute gives a remedy in the affirmative, (without a negative, expressed or implied,) for a matter which was actionable before by common law; the party may sue at common law, and wave his remedy by statute, if he pleases.").

1012. *Dastar,* 539 U.S., at 37; Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7. *Cf.* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538 (2013) (Wheatley's right of attribution could be extended under *Kirtsaeng* to distinguish or overrule *Dastar*) (quoting 1 EDWARD COKE, INSTITUTES *223).

ley never existed, the subject of which the remainder of this article is dedicated.[1013]

PART III: THE PUBLIC INTEREST IN FEDERAL JURISDICTION

The U.S. social compact mandates the rights of public property inviolable, denominated by the term "public good."[1014] The U.S. Constitution secures the objects of the U.S. social compact set forth in its preamble and creates the U.S. Government as a public trust.[1015] All inherently public properties may, therefore, be highly regulated for the

1013. *Dastar,* 539 U.S., at 37; Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley *Liberty & Peace* [1784]; 3 EDWARD COKE, INSTITUTES *182–83 (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)); U.S. CONST. art. I, § 8, cls. 3, 8; *id.* art. IV, § 2, cl. 8; United States v. E.C. Knight Co., 156 U.S. 1, 9–10 (1895) (citing 3 EDWARD COKE, INSTITUTES *181; Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.); The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.)), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942); Standard Oil Co. v. United States, 221 U.S. 1, 51, 60 (1911) (quoting 3 EDWARD COKE, INSTITUTES *181); United States v. Am. Bell Telephone Co., 128 U.S. 315, 355, 357–58 (1888), *declined to extend by* Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1371 (2018).

1014. THE DECLARATION OF INDEPENDENCE, para. 3 (U.S. 1776).

1015. U.S. CONST. pmbl. & art. VI, § 3 (noting that the oath of office is a sign that government offices are held in "public trust"). *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 348, 602 ("They deemed that the Constitution was immortal, and could not be forfeited; for it was prescribed by and for the benefit of the people. But they deemed, and wisely deemed, that the magistracy is a trust, a solemn public trust; and he who violates his duties forfeits his own right to office, but cannot forfeit the rights of the people." Story lifted this idea from English law as a fundamental principle in America in accordance with our written constitutions, "The aim of every political constitution is . . . to take the most effectual precautions for keeping them [our rulers] virtuous whilst they continue to hold their public trust."); THE FEDERALIST NO. 55 (Alexander Hamilton or James Madison) (advocating for frequent elections in the House of Representatives so as to convince Representatives not "to betray the solemn trust committed to them"); PENN. CONST. OF 1776 pt. 1, art. IV ("That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, *are their trustees and servants, and at all times accountable to them*.") (emphasis added); VA. CONST. OF 1776 pt. 1, § 2 ("That all power is vested in, and consequently derived from, the people; the magistrates *are their trustees and servants, and at all times amenable to them*.") (emphasis added); MD. CONST. OF 1776 pt. 1, art. 4 ("That all persons invested with the legislative or executive powers of government *are the trustees of the public, and, as such, accountable for their conduct*; wherefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government. The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.") (emphasis added); VT. CONST. OF 1777 pt. 1, art. 5 ("That all power being originally inherent in, and consequently derived from, the people; therefore, all officers of government, whether legislative or executive, *are their trustees and servants, and at all times accountable to them*.") (emphasis added).

public good and in the public interest according to provisions written throughout the U.S. Constitution.[1016]

Where the positive laws are implied to countenance such public rights and interests, as in *Folsom v. Marsh*, no resort to the U.S. Constitution is necessary.[1017] Indeed, *Folsom* is the first case to punish the invasion of the privacy of writings sent and received over a public network as an infringement of common law copyright.[1018] Implying common law rights into the positive laws can shine a light into the darkened penumbra of the post-*Griswold* Court; and avoid arbitrary dismissal under *Murray's Lessee*.[1019]

However, the dogmas of legal positivism are so strong on the federal bench that our judges often shirk all prudence, ignore constitutional avoidance doctrine, and refuse to admit the existence of natural

1016. U.S. CONST. art. I, § 8, cl. 3, 8; *id.* art. I, § 10, cl. 1; *id.* amends. I–X. *See* Carol Rose, *supra* note 244, at 770 ("The great commerce clause cases of the Marshall court reflect the same view: a state cannot 'privatize' commerce for the benefit of its own citizens, but must leave commerce open to the entire nation."); Gibbons v. Ogden, 22 U.S. 1, 233–34 (1824) (Johnson, J., concurring) ("The practice of our Government certainly has been, on many subjects, to occupy so much only of the field opened to them as they think the public interests require."); Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813); James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820; Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 386 (1969). *Cf.* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 985–86, 1005, 1016–26 (2013).

1017. Folsom v. Marsh, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901); THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 38, 45–46 (applying the rule from *Dr. Foster's Case* that "repeals by implication are disfavoured by law," but still found "every such treaty in its very nature implying a general amnesty" and according the federal compact Congress is vested "with full and exclusive powers to make peace and war" and therefore "we are clearly of opinion, that no state in this union can alter or abdridge, in a single point, the federal articles or the treaty").

1018. *Folsom*, 9 F. Cas., at 346.

1019. U.S. CONST. amend. IX; THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776). The best way of implying broad, common law rights into positive laws in U.S. federal courts is through constitutitonal avoidance doctrine. *Compare* Ashwander v. T.V.A., 297 U.S. 288, 348 (1936) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)), *with* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("the First Amendment has a penumbra where privacy is protected from government intrusion"), *and* Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1371 (U.S. 2018) (denying federal jurisdiction over patents because they are a "'matte[r] of public rights'") (quoting Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855)). *Cf.* OTIS, *supra* note 18, at 126, 142 ("There can be no prescription old enough to supersede the law of nature, and the grant of God almighty; who has given to all men a natural right to be *free*, and they have it ordinarily in their power to make themselves so, if they please."); Matilda Joslyn Gage, *The United States on Trial, not Susan B. Anthony* [1873], *in* ANON., AN ACCOUNT, *supra* note 80, at 179 ("The first principles of government are founded on the natural rights of individuals; in order to secure the exercise of these natural, individual rights our government professed to be founded.").

law.[1020] It is often feigned by the federal bench that cases trying human rights must be brought directly under the U.S. Constitution or not at all.[1021] This idea was initially brought about by judicial activism in the U.S. Supreme Court; not merely by, as some presume, an "orgy of statute making" in Congress.[1022]

The U.S. Supreme Court demonstrated its activism when it departed from *Dr. Foster's Case* in *Buckman* and *Dastar*.[1023] The Court again departed from *Dr. Foster* in *Credit Suisse*, right before the 2008 market crisis, immunizing banks from antitrust liability.[1024] Then, in

1020. *Compare* Scalia, *supra* note 567, at 89 (Scalia was clearly unaware of his radical, Benthamite departure from common law principles of statutory construction when he rose like a member of the late French Aristocracy in the days leading up to the French Reign of Terror that would soon devour them whole, "Thus, the subject of statutory interpretation deserves study and attention in its own right, as the principal business of lawyers and judges. It will not do to treat the enterprise as simply an inconvenient modern add-on to the judges' primary role of common-law lawmak[ing]. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation."), *with* Jeremy Bentham, *Anarchical Fallacies* [1796], *reprinted in* 2 BENTHAM, THE WORKS, *supra* note 43, at 501 (Bentham encouraged the French Reign of Terror to swiftly destroy the French people, for as he wrote, their rights are "rhetorical nonsense,—nonsense upon stilts").

1021. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 386 (1969) (broadcasting corporations, being unnatural and artificial persons, cannot rely upon natural law and must challenge FCC determinations under the public interest upon a very thin standard under the First Amendment—this challenge failed); Citizens United v. FEC, 558 U.S. 310, 339 (2010) (deciding that corporate money donations are free speech—a flimsy analogy that could never exist in the natural law, because God did not create money). *See* Scalia, *supra* note 567, at 89 (taking for granted there is no natural law, and sporting the unsupported view that whenever a judge infers protection for a preexisting right of any kind, he is *per se* usurping and violating the U.S. Constitution).

1022. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 73 (2009). *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Oil States Energy Servs. v. Greene's Energy Group, No. 16–712, 138 S. Ct. 1365, 1371–72 (2018) (citing Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855); Wheaton v. Peters, 33 U.S. 591, 663–64 (1834)). *See also* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78–79 (1938) (repeating dicta similar to *Wheaton*'s that there is "no federal general common law" to an equally destructive end, malforming the Court's construction of federal statutes and the U.S. Constitution itself with judicial activism rather than implying legislative grace). *Cf.* 2 WILSON, THE WORKS, *supra* note 113, at 442 (noting that orgies in statute making are nothing new to Republican governments, "The very best constitutions are liable to some complaints. What may be called the rage of legislation is a distemper prevalent and epidemical among republican governments.").

1023. Buckman v. Plaintiff's Legal Comm., 531 U.S. 341, 352–53 (2001); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34–37 (2003) (Justice Scalia authored a departure from *Dr. Foster's Case* common law rule of statutory interpretation without acknowledging the departure—the *Dastar* Court determined that the Visual Artists Rights Act (an act created to grant artists rights) to repeal or limit formally recognized, overlapping rights cognizable under Trademark Law).

1024. Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 276 (2007) ("the securities law impliedly precludes the application of the antitrust laws"). *See* Markham, Jr.,

POM Wonderful, the Supreme Court refused to impliedly repeal previously existing legal grounds for action as the Court did in *Buckman* and *Dastar*; appearing to realign the Court with *Dr. Foster's Case* again.[1025]

All four of these cases *Buckman*, *Dastar*, *Credit Suisse*, and *POM Wonderful*, appear to be as unaware of each other as they were of *Dr. Foster's Case*; feigning a dearth of guidance from the law books.[1026] Thus, these cases give future courts a pretext to depart from the common law rule of *stare decisis* and to destabilize the predictability of the law with *ad hoc* rulings.[1027] For when compared to each other, *Buck-*

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supra note 950, at 439 (explaining that *Credit Suisse* "lurched past the traditional narrow confines of the doctrine" of implied repeal given in *Dr. Foster's Case*). *Cf.* Alan Cowell, *UBS and Credit Suisse get urgent bailout funds*, N.Y. TIMES (Oct. 16, 2008), https://www.nytimes.com/2008/10/16/business/worldbusiness/16iht-17swiss.17006058.html.

1025. POM Wonderful v. Coca-Cola, 573 U.S. 102, 113–14 (2014) ("No textual provision in either statute discloses a purpose to bar unfair competition claims like POM's. This absence is of special significance because the Lanham Act and the FDCA have coexisted since the passage of the Lanham Act in 1946. If Congress had concluded, in light of experience, that Lanham Act suits could interfere with the FDCA, it might well have enacted a provision addressing the issue during these 70 years. . . . Congress enacted amendments to the FDCA and the Lanham Act including an amendment that added to the FDCA an express pre-emption provision with respect to state laws addressing food and beverage misbranding. Yet Congress did not enact a provision addressing the preclusion of other federal laws that might bear on food and beverage labeling.") (citing Wyeth v. Levine, 555 U.S. 555, 574 (2009) (applying implied preemptions of state law narrowly)). There is no intelligible way to make sense of *Dastar* after *POM Wonderful* applied the traditional rule to the same Lanham Act provision. *Dastar,* 539 U.S. at 37 (The Court claims there is a meaningful difference between origin of goods and originality that is so strong that it destroyed the most fundamental artist right of attribution under the Lanham Act while ignoring the presumption against implied repeals and failing consider whether the laws have an irreconcilable conflict.). *Buckman* must be at the very least be called into doubt by *POM Wonderful*. *Buckman*, 531 U.S., at 352–53.

1026. *POM Wonderful*, 573 U.S. at 113–14; *Credit Suisse*, 551 U.S. at 276; *Dastar,* 539 U.S. at 37; *Buckman*, 531 U.S. at 352–53.

1027. Order Granting Def.'s Mot. to Dismiss, Schroeder v. Trader Joe's Company, No. 3:17–cv–00184–DMS–BGS, Doc. 42, at 4 (S.D. Cal. 2018) (the contradiction between *POM Wonderful* and *Buckman* gave enough wiggle room for this court to dismiss without prejudice under *Iqbal*, requiring, ad hoc, that plaintiff refile his claim in such a way that disclaims all equitable relief; there is nothing in the law repealing equitable relief and courts are supposed to consider what kind of relief to grant at the *end* of a case; requiring a plaintiff to disclaim relief that may granted at the end of a case in his complaint literally cuts off the ability of the courts to keep developing precedent—appeal was denied by the Ninth Circuit, in part, because the dismissal was not technically final); LULAC v. Wheeler, 899 F.3d 814, 817–18 (9th Cir. 2018) *vacated on reh'g en banc*, 914 F.3d 1189 (9th Cir. 2019) (The Ninth Circuit nevertheless confirmed the arbitrariness of the dismissal in *Schroeder* by granting an equitable order against the EPA, directly under the FDCA, in a case brought by private parties saying, "If Congress's statutory mandates are to mean anything, the time has come to put a stop to this patent evasion."); LULAC v. Regan, 996 F.3d 673, 677 (9th Cir. 2021) (agreeing with the rationale for the 2018 order). The U.S. caselaw that condones this departure from *stare decisis* is as follows: Michigan v. Bay Mills Indian Community,

man, *Dastar*, *Credit Suisse*, and *POM Wonderful*, appear wholly arbitrary.[1028]

Furthermore, after *Iqbal/Twombly* the Rule 8 standard of "a short and plain statement of a claim" is still good law, such that precedent applying this standard is untouched despite the fact that the Court appears no longer bound by Rule 8 *stare decisis.*[1029] Controversy looms over the fate of *Roe v. Wade* under *Casey*'s vindication of *stare decisis*, but it appears that the Court already chose its direction.[1030] *Stare decisis*, which was "a foundation stone of the rule of law," is on its way out.[1031]

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572 U.S. 782, 798 (2014) ("stare decisis is a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion'"); Harris v. Quinn, 571 U.S. 661, 669 (2014) (Kagan, J., dissenting) (Only weeks after *Bay Mills*, Kagan was forced to quote her majority ruling about *stare decisis* as a foundation of the rule of law in her dissent, "That doctrine, we have stated, is a 'foundation of the rule of law.'") (quoting *Bay Mills*, 572 U.S., at 276); Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting) (Finally, when *Abood* was overruled directly in *Janus*, Kagan was forced to cite once more to her battered and disregarded *stare decisis* holding in *Bay Mills*, which in the end held no weight as a *stare decisis* case on *stare decisis* itself, "But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. . . . Consider first why these principles about precedent are so important. *Stare decisis*—'the idea that today's Court should stand by yesterday's decisions'—is 'a foundation stone of the rule of law.'") (quoting *Bay Mills*, 572 U.S., at 276). *Cf.* Schroeder, *America's*, *supra* note 212, at 884–85 (giving other examples of the U.S. Supreme Court's departure from *stare decisis*).

1028. *See POM Wonderful*, 573 U.S., at 113–14; *Credit Suisse*, 551 U.S., at 276; *Dastar,* 539 U.S., at 37; *Buckman*, 531 U.S., at 352–53. *Cf.* Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting) (in the face of a similar arbitrary determination, Justice Sotomayor dissented, "Those who are bound by our decisions usually believe they can take us at our word. Not so today.").

1029. It would be strange to make any other explanation of these cases, when defendants still move for dismissal under Rule 12(b)(6) but the standard of *Iqbal/Twombly* is given directly by the Court rather than by the Rules. Bell Atl. Co. v. Twombly, 550 U.S. 544, 563 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (The dicta overruled by *Twombly* and *Iqbal* is actually in the rule statement that that attempted to interpret Rule 8 & 12 that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts," i.e., the claim must be possible. *Iqbal* and *Twombly* overruled this dicta and required plausible facts instead—a judge made rule—and it required this new rule to be applied as an evidentiary proceeding before discovery which is out of order and awkward for litigators—but the underlying rule from the Civil Rules was not touched—Rules 8 & 12 require the Court to decide on the face of the complaint, without evidence, whether plaintiff failed to state a claim—that rule, even as applied in *Conley* is not actually overruled by *Iqbal* or *Twombly*, it is only disregarded and ignored.).

1030. Aaron Blake, *Trump makes clear Roe v. Wade is on the chopping block*, WASH. POST (July 2, 2018, 12:23 PM), https://www.washingtonpost.com/news/the-fix/wp/2018/07/02/trump-makes-clear-roe-v-wade-is-on-the-chopping-block/; Roe v. Wade, 410 U.S. 113 (1973), *modified and aff'd by* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992). *See* Whole Woman's Health v. Jackson, No. 21A24, slip op. at 2 (2021).

1031. *Bay Mills*, 572 U.S., at 798. *See supra* note 1027 and accompanying text.

The justice centered intentions of the Civil Rules in abolishing arbitrary dismissals under the forms are being abandoned by the Court whenever it uses the Rules to dismiss cases like the forms once did.[1032] This situation becomes even more glaring as Americans find the Court arbitrarily dismissing more cases under *Iqbal*, than the official forms ever did prior to their closure under the Rules.[1033] The informality, ushered in by the federal rules, is not enjoyed by litigants, but it is arbitrarily administered by judges.[1034]

For even the power to join cases under the Civil Rules, i.e., *the* major change made by abolishing the forms, is so hated and discouraged by federal judges that joining cases is rarely done.[1035] Judges no

1032. FED. R. CIV. P. 2 (abolishing the forms); FED. R. CIV. P. 8(e) ("Pleadings must be construed so as to do justice."); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. REV. 1, 5 (2010) [hereinafter Miller, *From Conley*] ("The Rules were intended to support a central philosophical principle: the procedural system of the federal courts should be premised on equality of treatment of all parties and claims in the civil adjudication process. It should abjure technical decision making and 'promote the ends of justice.' The simple but ambitious notion was that the legal rights of citizens should be enforced. This idea was a baseline democratic tenet of the 1930s and then of postwar America with regard to such matters as civil rights, the distribution of social and political power, marketplace status, and equality of opportunity."). *Cf.* SØREN KIERKEGAARD, WORKS OF LOVE: KIERKEGAARD'S WRITINGS, XVI, at 94 (Howard V. Hong & Edna H. Hong eds. & trans., 1995) (stating that the road to hell is paved on good intentions).

1033. Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2171 (2015) ("*Iqbal* and *Twombly* are associated with a pleading regime in which plaintiffs do worse at nearly every stage. They are more likely to have their case dismissed, and less likely to proceed to discovery and adjudication of the merits of their claims. Even if they survive dismissal, the cases are less likely to be successful in 2010 than in 2006. In this light, it is difficult to see what value the new pleading standards have added to our civil justice system."). *See* BAKER, *supra* note 7, at 61–64, 67, 83 (the forms have an ancient history, but when they existed even when they were inflexible and frustrating, the form of trespass on the case acted as a release valve that resulted in the development of most causes of action we know about; the new strategy under *Iqbal* and *Twombly* also creates inflexible and frustrating formalistic reasons for dismissing cases but without a release valve). *See also* Rattlesdene v. Grunestone [1317] YB 10 Edw II (54 SS) 140 (Eng.) (even prior to the English Court's development of trespass on the case, it feigned facts and circumstances that did not actually exist in order to maintain its jurisdiction in cases that should have been dismissed under the forms to develop the implied warranty of merchantability starting with a purchaser's right to wholesome food and drink—showing that the forms did not uniformly cause dismissals as *Iqbal* and *Twombly* may) *Cf.* Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) (this is a very well known trespass on the case decision in the United States, revealing the flexibility of the Court to determine property rights under this form).

1034. *See* Miller, *From Conley*, *supra* note 1032, at 24 (Noting that in *Iqbal* Justice Souter "and three other dissenters argued that the majority's classification was entirely arbitrary and failed to guide the lower courts on how to draw the fact-conclusion distinction.").

1035. FED. R. CIV. P. 18(a) ("A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party."). Judges who don't like complicated multi-pronged joinders of claims can dismiss them and require a plaintiff to refile under one without guidance about which

longer engage in the ordinary course of deciding in which form a case ought to lie, but under *Iqbal/Twombly* litigants must still name the correct form without judicial guidance that once clarified how to avoid dismissal.[1036] Present day litigants must plead under medieval forms that are hidden, rigid, and frozen in the past; forms that our judges refuse to clarify, because according to the Civil Rules the forms *are not supposed to exist*.[1037]

The power expressly given to federal judges to correct simple mistakes and proceed under ulterior causes of action for parties that pleaded under the wrong form, is almost never asserted.[1038] 12(b) motions are granted in medieval fashion.[1039] In every civil action, plaintiffs are blindfolded by the plausibility standard and must "pin the tail on a donkey" at the end of a complex maze of formalities that is codified by every possible origin, including by clerks, judges, courthouses, districts, and circuits.[1040]

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one; this could be worse than the pre-Rules forms, because at least the forms changed and developed in a uniform way unlike ad hoc, judge-by-judge dismissals under the Rules. *See, e.g.,* United Mine Workers of America v. Gibbs, 383 U.S. 715, 725–26 (1966) ("It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.").

1036. Joshua J. Schroeder, *Bringing America Back to the Future: Reclaiming a Principle of Honesty in Property and IP Law*, 35 HAMLINE J. PUB. L. & POL'Y 1, 96–97 (2014) [hereinafter Schroeder, *Bringing*] (even though procedurally there is supposed to be only one form of action after the Civil Rules were established, federal courts must still have jurisdiction to properly discuss where a case ought to lie for purposes of the cases themselves which still apply the elements of the forms) (citing The Shepherd's Case Y.B. 2 Hen. 7, Hil. F. 11, pl. 9, *in* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 86–87 (1949)).

1037. BAKER, *supra* note 7, at 68 (the forms "'still rule us from their graves'") (quoting FREDERIC WILLIAM MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1936)).

1038. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (citing FED. R. CIV. P. 8). *See also* FED. R. CIV. P. 60(a).

1039. BAKER & MILSOM, *supra* note 15, at 567 ("*Rolf* challenged the writ in the case of corrupt wine because *one word had a letter too many*.") (emphasis added); BAKER, *supra* note 7, at 63 ("Suing by the wrong writ was fatal; and so different did trespass and case become in the legal mind that they could not even be joined in one action."); Miller, *From Conley*, *supra* note 1032, at 24; Michelle Yeary, *Plaintiff Loses in a Game of "What If . . ."*, LEXOLOGY: DRUG AND DEVICE LAW BLOG (Mar. 15, 2019), https://www.lexology.com/library/detail.aspx?g=37460d47-0fad-410e-9e67-8fdb038dc9f9 (citing McDonald v. Schriner, No. 2:18-cv-02084-JFT-dkv, 2019 WL 1040978 (W.D. Tenn. 2019)).

1040. At any given level of authority, members may not agree about the formalities promulgated by the whole—the situation for those trying to bring their cases before a single district judge is highly confusing. *See, e.g.*, Joe Patrice, *The Seventh Circuit's War With Judge Posner Really Escalated Quickly: I mean, this really got out of hand fast*, ABOVE THE LAW (Oct. 31, 2017, 1:35 PM), https://abovethelaw.com/2017/10/the-seventh-circuits-war-with-judge-posner-really-escalated-quickly/ (explaining how Judge Posner resigned and published his tell all book *Reforming the Federal Judiciary* over internal politics over the very sort of memos and orders ordinary litigators have to read through in matters involving pleadings and other matters the Court wants to organize on their own).

This arbitrary system is facilitated through boldfaced judicial relativism.[1041] When the Westboro Baptist Church was sued for shouting obscenities at a soldier's funeral, the Supreme Court held it was legitimate, i.e., non-licentious, free speech.[1042] This line of precedent symbolized by *Virginia v. Black*, binds courts not to see a legal difference between hate speech of Neo-Nazis, who murdered Heather Heyer, and the performances of the choir who sang: *This Little Light of Mine* against the hatred of Neo-Nazi protesters.[1043]

Relativism pervades First Amendment precedent so completely, that a federal district judge decided an anti-SLAPP statute immunized President Donald Trump's speech threatening Stormy Daniels as presumptively protected speech under the First Amendment.[1044] The most shocking part of this case was not the substance of the case itself, but that the court did not find a waiver of anti-SLAPP statute in Trump's political diatribes against state anti-SLAPP statutes.[1045] For the Court

1041. *See* R. A. V. v. St. Paul, 505 U.S. 377, 393 (1992).

1042. Snyder v. Phelps, 562 U.S. 443, 460 (2011).

1043. Virginia v. Black, 538 U.S. 343, 356–57 (2003); Heim, *supra* note 150 ("At 9:30 am, about 30 clergy members clasped arms and began singing 'This Little Light of Mine.' Twenty feet away, the white nationalists roared back, 'Our blood, our soil!'"). *See* Tess Owen, *Neo-Nazi who killed Heather Heyer in Charlottesville was just charged with 29 hate crimes*, VICE NEWS (June 27, 2018, 12:55 PM), https://www.vice.com/en/article/evkeza/neo-nazi-who-killed-heather-heyer-in-charlottesville-was-just-charged-with-29-hate-crimes. *Cf.* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

1044. Order Granting Defendant Donald J. Trump's Special Motion to Dismiss/Strike Complaint at 11, Clifford v. Trump, 2:18-cv-06893-SJO-FFM, Doc. 36, at 11 (C.D. Cal. 2018) ("If this Court were to prevent Mr. Trump from engaging in this type of 'rhetorical hyperbole' against a political adversary, it would significantly hamper the office of the President.") (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990)). *Cf.* Biden v. Knight First Amendment Institute, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) (defending Donald J. Trump's use of Twitter and suggesting that Congress should require Twitter to give Trump back his account even after Trump's speech, including Trump's legendary use of Twitter, had at least some sort of role in causing a violent insurrection across the street from Justice Thomas's office at the Capitol Building).

1045. Luis Gomez, *Libel laws: What are they and why is Trump talking about them, again?*, SAN DIEGO TRIBUNE (Jan. 10, 2018, 12:03 PM), https://www.sandiegouniontribune.com/opinion/the-conversation/sd-what-are-libel-laws-and-why-trump-talking-about-them-20180110-htmlstory.html (Trump called limitations on libel laws, including anti-SLAPP statutes, a "sham and a disgrace" among other things). Collectively his many statements in public life against such limitations should be legally interpreted as (1) a waiver of the use of anti-SLAPP statutes in his favor and (2) consent to be sued directly under libel law by individuals like Stormy Daniels. *See id.*

to interpret State anti-SLAPP statutes to ignore all legally significant speech as irrelevant is a recipe for chaos.[1046]

When former President Donald Trump, for example, declared a national emergency, in violation of the separation of powers, to use public funds for construction of a border wall without congressional approval; such words hold legal significance.[1047] Within his words and deeds is a potential waiver, express or implied, of judicial grace for-

1046. Ollman v. Evans, 750 F.2d 970, 993–95 (D.C. Cir. 1984) (Bork, J., concurring) ("Any such rigid doctrinal framework is inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press."). The Courts cannot justly ignore all legally significant speech. *See, e.g.,* Adam Forrest, *Trump 'directed me' to pay Stormy Daniels hush money and knew it was wrong, Michael Cohen claims*, INDEPENDENT (Dec. 14, 2018, 12:31 PM), https://www.independent.co.uk/news/world/americas/us-politics/trump-michael-cohen-stormy-daniels-hush-money-payment-prison-sentence-lawyer-court-a8683186.html; *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html; Danny Cevalos, *If the latest report is true, which crimes might Trump have committed?*, NBC NEWS (Jan. 18, 2019, 4:27 PM) (perjury is perjury—so is solicitation, attempt, and conspiracy with a perjury); Chris Riotta, *Trump admits withholding aid to Ukraine while asking country's leader to investigate 2020 rival Joe Biden*, INDEPENDENT (Sept. 24, 2019, 3:56 PM), https://www.independent.co.uk/news/world/americas/us-politics/trump-ukraine-aid-impeachment-joe-biden-son-2020-election-a9118456.html (a confession is a confession); Justin Wise, *CNN airs montage of Trump saying there was 'no collusion' with Russia after Giuliani comments*, THE HILL (Jan. 17, 2019, 3:05 PM), https://thehill.com/homenews/administration/425894-cnn-airs-montage-of-clips-of-trump-saying-there-was-no-collusion-with (a confession is a confession); Darren Samuelsohn, *The circular firing squad: Mueller targets turn on each other*, POLITICO (Jan. 17, 2019, 8:36 PM), https://www.politico.com/story/2019/01/17/giuliani-mueller-collusion-investigation-1110671.

1047. *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border* (Feb. 15, 2019), https://perma.cc/5SE7-FS7F [hereinafter *Remarks by President Trump*] (Trump admitted that the national emergency was a sham when he announced the emergency: "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster. And I don't have to do it for the election."); Kevin Liptak et al., *Trump threatens he will declare national emergency if shutdown talks crumble*, CNN POLITICS (Jan. 11, 2019, 4:56 AM), https://www.cnn.com/2019/01/10/politics/trump-southern-border-visit/index.html [hereinafter Liptak et al., *Trump*] (President Trump's words here appear to amount to the crime of attempted extortion of public money—just because Congress has the power to deny him the money, and it appears that they will deny him, does not immunize his crime of attempted extortion.). *See* Sierra Club v. Trump, 977 F.3d 853, 862, 888–90 (9th Cir. 2020) (quoting Donald Trump's words "that he was 'not happy' with the amount of border wall funding he had obtained" and declaring his actions to try and get around Congress's "power of the purse" unconstitutional and void) (quoting *Remarks by President Trump*).

merly enjoyed by the executive branch.[1048] For as Richard Nixon discovered, everything a president does is legally significant.[1049]

State courts are also relativizing legally significant words and actions, for example, a New York judge recently ordered that Kesha Sebert's alleged rape at the hands of a Sony record producer would not repudiate her contract.[1050] One conclusion reached from the outcome of Kesha's case, is when rape victims speak out, their underlying employment contracts will not be struck down, or modified, to disgorge an employer's unjust enrichment for crimes the employer oversaw, including but not limited to assault, battery, and rape.[1051] Instead, Kesha is

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1048. *See* Sierra Club v. Trump, 977 F.3d 853, 862, 888–90 (9th Cir. 2020) (quoting *Remarks by President Trump*); *see also Donald Trump's file*, POLITIFACT, https://www.politifact.com/personalities/donald-trump/ (last visited Jan. 18, 2019) (containing many of Trump's statements); *Read Trump's phone conversation with Volodymyr Zelensky*, CNN POLITICS (Sep. 26, 2019, 4:41 AM), https://www.cnn.com/2019/09/25/politics/donald-trump-ukraine-transcript-call/index.html [hereinafter *Read Trump's phone*]; 1 MUELLER, *supra* note 362, at 110, 185; *id.* at 124–26; *id.* at 130 (noting that "a very minor 'wink' (or slight push) from [former president Donald Trump]" could have triggered an international crisis); *id.* at 132–40 (Paul Manafort, who was Chairman of Trump's 2016 Campaign, also led Victor Yanukovych's successful 2010 Presidential campaign in the Ukraine. Yanukovych, who was discovered to be a Russian plant with no loyalty to the Ukrainian people, was ousted during the 2014 Ukrainian Revolution and he now lives in exile in Russia. He is still wanted by Ukraine for high treason. Furthermore, Paul Manafort's longtime employee Konstantin Kilimnik, with whom Manafort shared polling and other Campaign data with throughout his service to Donald Trump, is almost certainly a Russian operative, with direct links into Russian intelligence. Manafort almost certainly knew the data he sent to Kilimnik was also being shared with a Russian oligarch named Oleg Vladimirovich Deripaska, to whom Manafort is legally indebted, for whom he is politically compromised, and with whom he formerly kept a close working relationship.); *id.* at 149 (When Trump won the 2016 election the CEO of the Russian sovereign wealth fund and Putin insider Kirill Dmitriev received a message: "Putin has won."); 2 MUELLER, *supra* note 362, at 12, 100–03 (Trump purposely and knowingly attempted to cover up the subject of the June 9 meeting, "The President told Hicks to say only that Trump Jr. took a brief meeting and it was about Russian adoption."); U.S. CONST. art. III, § 3 (defining treason).

1049. *Sierra Club*, 977 F.3d at 862. *Compare* Richard Sutton, *Frost/Nixon: The Original Watergate Interview*, YOUTUBE (Aug. 12, 2017), https://www.youtube.com/watch?v=9OCOn3yKmwQ ("Well, when the president does it, that means it is not illegal."), *with* David A. Graham, *Trump: When the President Says It, That Means It's True*, THE ATLANTIC (Mar. 23, 2017), https://www.theatlantic.com/politics/archive/2017/03/trump-time-interview-ex-post-facto/520551/.

1050. Gottwald v. Sebert [i.e., Dr. Luke v. Kesha], No. 653118/2014, 2016 WL 1365969, at *4, *9, *11 (N.Y. Sup. Ct. 2016) (Opinion of Shirley Werner Kornreich, J.) (committing clear error by not to allowing Kesha to even attempt to impugn her contract with Dr. Luke, especially if it was possible that the basis of the bargain for Dr. Luke was a contractual pretext to commit a crime against Kesha).

1051. *Id.*; Jen Yamato, *Inside Kesha's Battle Against Dr. Luke: Allegations of Rape, Sketchy Deleted Photos, and More*, THE DAILY BEAST (April 13, 2017, 3:24 AM), https://www.thedailybeast.com/inside-keshas-battle-against-dr-luke-allegations-of-rape-sketchy-deleted-photos-and-more; Suzy Byrne, *Lady Gaga defends Kesha's sexual assault claims in deposition for Dr. Luke lawsuit*, YAHOO! ENTERTAINMENT (Jan. 20, 2019), https://

forced to defend herself in court against her abuser's allegations of defamation and slander.[1052]

In order to resist the prevailing insensitivity of the courts in matters of violence against women, especially in matters involving female artists and creatives, American courts should declare judicial relativism illegitimate and reassert trespass on the case to provide a better definition to existing forms.[1053] The "one form of civil action," required by Civil Rule 2, existed throughout American legal history under the writ of trespass on the case; through which virtually every

www.yahoo.com/now/lady-gaga-defends-keshas-sexual-assault-claims-deposition-dr-luke-lawsuit-150540970.html. *See* KESHA, Praying, *in* RAINBOW (Sony 2017). It offends the most basic sense of human decency, propriety, and justice that profits made from selling and performing this song inspired by Kesha's journey of overcoming criminal abuse should profit the person Kesha says committed the criminal abuse that inspired the song.

1052. *Compare* Gottwald v. Sebert [i.e., Dr. Luke v. Kesha], 2018 WL 4181723, at *2 (N.Y. Sup. Ct. 2016) (Opinion of Jennifer G. Schecter, J.) (Allowing Dr. Luke to amend his claims of defamatory statements against Kesha, when Kesha's case against Dr. Luke was dismissed without leave to amend: "It is well established that leave to amend should be granted freely unless the proposed amendment is palpably devoid of merit or would cause undue prejudice."), *with* Order Granting Defendant Donald J. Trump's Special Motion to Dismiss/Strike Complaint, Clifford v. Trump, 2:18-cv-06893-SJO-FFM, Doc. 36, at 11 (C.D. Cal. 2018). *Cf.* Stillman, *Why are Prosecutors*, *supra* note 763 (in criminal court, a rape victim who refuses to testify may be held in prison until she does).

1053. Gottwald v. Sebert [i.e., Dr. Luke v. Kesha], 2016 WL 1365969, at *4, *9, *11 (N.Y. Sup. Ct. 2016) (Opinion of Shirley Werner Kornreich, J.) (Judge Kornreich's relativistic worldview (a view held by most judges in America) reduces everything—including justice and artistic freedom—to a dollar amount. The judge was, therefore, unable to perceive a problem with an artist being criminally abused by her employer if it makes her a profit at the end of the day. Judge Kornreich's opinion was, therefore, rife with statements indicating why Kesha had nothing to complain about, (1) "Kesha earned millions of dollars."; (2) "Kesha's First Album, and her debut song, *Tik Tok*, went platinum"; (3) "Kesha gained international recognition."; and (4) "[Sony], through Kemosabe, has invested more than $11 million in Kesha's career." The Court ultimately pilfered Kesha's chance to take back her artistic freedom through the courts by making up *ad hoc* formalities to dismiss her case based upon where, when, and why the alleged rape occurred. In reality, none of these considerations are relevant to decide the jurisdiction of the court to review a contract's basis in crime, which is itself ripe for review wherever such a contract persists.). *See, e.g.,* Millar v. Taylor [1769] 4 Burr. 2303, 2305 (Eng.) (Millar's bill against Taylor was "a plea of trespass upon the case" in order to countenance a property right that was "not all at once known to the common law, or to the world . . . yet are now established to be such." The common law copyright was first established in this way, by considering the basis of book contracts.); THE FEDERALIST NO. 43 (James Madison) (implicitly endorsing the finding of a common law right through trespass on the case saying, "The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law."); Pierson v. Post, 3 Cai. R. 175, 182 (1805) (this is probably the most known American trespass on the case action); United States v. Windsor, 570 U.S. 744, 762–64 (2013) (attempting to fashion a way to address "an injustice that they had not earlier known or understood" directly through the U.S. Constitution—which is the style of language formerly used in cases involving trespass on the case).

other common law cause of action was developed.[1054] As symbolized by *Windsor*, it is still within the ambit of federal jurisdiction to review new problems, not previously known to common law, in order to protect the equal rights of women.[1055]

The Supreme Court is not willing to correct past injustices, however, for Chief Justice Roberts remains caught in the gyre of *The Slaughterhouse Cases*.[1056] The travesty of *Slaughterhouse* consists in falsely stating that bad precedent was overruled in the past, when it was not, and then paradoxically reasserting the rationale of the very case the Supreme Court pretended was overruled.[1057] The Court re-

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1054. FED. R. CIV. P. 2; BAKER, *supra* note 7, at 61–64, 67, 83 ("The expansion of trespass, and especially of the flexible action on the case, provided the common law with a temporary escape from the formulary system, an opportunity to melt down the medieval law and recast it in new moulds. Most of the law as we know it was shaped by this process. After the redistribution, the commonest types of trespass and case became the basis of a new scheme of actions: *assumpsit* (for breach of parol contracts and restitutionary claims), trover (for interference with personal property), actions on the case for torts (such as defamation and negligence), and ejectment (to recover real property). But the flexibility inherent in trespass and case prevented any recurrence of the restrictiveness and procedural nicety which beset the *praecipe* actions. For most purposes the new remedies were but subdivisions of ONE FORM OF ACTION.") (emphasis added).

1055. *Windsor*, 570 U.S., at 762–64; FED. R. CIV. P. 2; BAKER, *supra* note 7, at 61–64, 67, 83 (noting the language "one form of action," that appears in Civil Rule 2, was originally a reference to trespass on the case).

1056. *Compare* Obergefell v. Hodges, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting) ("*Dred Scott*'s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared." The Chief Justice then identified *Lochner v. New York* as the most prominent example of the reemergence of *Dred Scott*—a doubtful comparison to be sure, for it was not the African American right to contract that was vindicated in *Dred Scott*, but the property rights of slaveholders to force African American labor without contract express or implied.) (citing Dred Scott v. Sandford, 60 U.S. 393, 432 (1857); Lochner v. New York, 198 U.S. 45 (1905)), *and* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'") (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)), *with* The Slaughterhouse Cases, 83 U.S. 36, 73 (1872) (deciding that the Fourteenth Amendment "overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States," but in the very same breath making a travesty of the Fourteenth Amendment by interpreting it to affirm *Dred Scott*'s reading of the U.S. social compact, which was that prior to the Fourteenth Amendment black people were justly considered non-citizens, that the removal or degradation of their citizenship was not unconstitutional or illegal but for the Fourteenth Amendment, and therefore concluding that the U.S. social compact holds *no power* to secure the fundamental rights of Louisiana butchers through the U.S. Constitution).

1057. The Slaughterhouse Cases, 83 U.S. 36, 73, 80 (1872) (This case was a "celebrat[ion of] *Dred Scott*" in spite of its acknowledgement that the Fourteenth Amendment "overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States."). *See* Civil Rights Act of 1866, 14 Stat. 27–30, *gutted by* Blyew v. United States, 80 U.S. 581, 595 (1871) (the Court gutted the Civil Rights

cently created new travesties, like *Slaughterhouse*, in *Busk*, *Shelby County*, and *Trump v. Hawaii*; to flourish, this sort of judicial travesty needs only that the Supreme Court depart from the common law principle of *stare decisis*.[1058]

The fate of *Hensley v. Municipal Court* revealed why it is important to overrule bad precedent as wrongly decided at common law.[1059] For after the *Hensley* Court expressly decided that *Wales v. Whitney* was outdated and "may no longer be deemed controlling" without affirmatively overruling it at common law, the *Rumsfeld v. Padilla* Court resurrected *Wales* from the grave.[1060] Other unjust decisions *not* af-

Act to let an ax murderer loose, because the only witnesses were black folk), *and Slaughterhouse*, 83 U.S. at 82–83 (*Slaughterhouse* gutted the Civil Rights Act regarding the very rights of life, i.e., the right to make a living, which is the primary right enjoyed by free people no longer enslaved or indentured to work for no pay); *id.* at 96–97 (Field, J., dissenting) (quoting Civil Rights Act of 1866, 14 Stat. 27–30, § 1).

1058. Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 514–15 (2014) ("respondents' claim that the screenings are compensable because Integrity Staffing could have reduced the time to a de minimis amount is properly presented at the bargaining table, not to a court in an FLSA [Fair Labor Standards Act] claim"—this opinion effectively reversed the presumption in all free societies that all work must be paid work, i.e., that one cannot by contract or by lack of contract subject themselves to indentured servitude); *Trump v. Hawaii*, 138 S. Ct., at 2423 (this case could only overrule *Korematsu* if the Court was willing to admit that it was touching on the same subject—the Court refused to admit this, and so it held that *Korematsu* "has been overruled in the court of history"—this is itself a strange holding, and a departure from *stare decisis* which would have held the case as overruled in the United States Court and not an imaginary court of history); *id.* at 2447 (Sotomayor, J., dissenting) ("Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu*."); Shelby County v. Holder, 570 U.S. 529, 544 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States. . . . The Voting Rights Act sharply departs from these basic principles.") (citing Pollard v. Hagan, 44 U.S. 212 n.6 (1845)). Like *Shelby County*, slavery cases like *Dred Scott* and *The Antelope* were also based in part upon "the equal rank and rights" of each state with those "possessed by the others." *See* Dred Scott v. Sandford, 60 U.S. 393, 490–92 (1857) (Opinion of Daniel, J.); The Antelope, 23 U.S. 66, 122 (1825) ("No principle of general law is more universally acknowledged than the perfect equality of nations.").

1059. Hensley v. Municipal Court, San Jose, 411 U.S. 345, 350–51, n.8 (1973) ("Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." The Court thus decided that *Wales v. Whitney* could be disregarded, without overruling it.)—the strategy of disregarding without overruling did not work, because *Wales* was resurrected in *Padilla v. Rumsfeld*.

1060. *Hensley*, 411 U.S. at 350–51, n.8 ("Insofar as former decisions [including *Wales v. Whitney*], may indicate a narrower reading of the custody requirement, they may no longer be deemed controlling. In none of the decisions on which we today rely . . . are these earlier cases even cited in the opinions of the Court."); Rumsfeld v. Padilla, 542 U.S. 426, 437 (2004) ("Padilla seems to contend, and the dissent agrees, that because we no longer require physical detention as a prerequisite to habeas relief, the immediate custodian rule, too, must no longer bind us, even in challenges to physical custody. That argument, as the Seventh Circuit aptly concluded, is a 'non sequitur.' That our understanding of custody has

firmatively overruled by common law *stare decisis* and awaiting release from the underworld of U.S. history include: *Minor*, *Plessy*, and *Buck v. Bell*.[1061]

The Supreme Court dogmatically vindicates the rights of corporations and disdains the rights of natural human beings; failing to remember that King George III's tyranny was based on the former and the cause of the American Revolution was built on the latter.[1062] Therefore, the the Roberts Court forgot that the first U.S. Supreme Court refused to erode human rights with corporate rights by saying a corporation is a "feigned and artificial person," such that "we should never forget that, in truth and nature, those who think and speak and act are men."[1063] *Citizens United* and *Hobby Lobby* wantonly disowned

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broadened to include restraints short of physical confinement does nothing to undermine the rationale or statutory foundation of *Wales'* immediate custodian rule where physical custody *is* at issue.").

1061. Buck v. Bell, 274 U.S. 200, 205–08 (1927); Minor v. Happersett, 88 U.S. 162, 165–66, 178 (1875); Tuaua v. United States, 788 F.3d 300, 304 (D.C. Cir. 2015) (demonstrating how to resurrect the dead past from its grave to destroy the rights of the American Samoans) (citing Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857)). *Cf.* O'CONNOR, THE MAJESTY, *supra* note 704, at 105 (strongly defending Oliver Wendell Holmes despite his totalitarian opinion in *Buck v. Bell* saying, "But this is the part of Holmes's jurisprudence that exerts the least influence today. The Court has never cited *Buck v. Bell*, for instance, as support for any important proposition. In this sense, then, this part of Holmes's jurisprudence has indeed become 'obscure'; it may still be recalled, but it no longer possesses any vitality."—This is not only a lie, but it is advocacy for the Court to choose the vindication of a dead man's legacy rather than overruling his opinions in cases presently arising before the Court where the common law doctrine of *stare decisis* requires them to be overruled as unjust and violative of the rights of humankind.).

1062. *Compare* BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208–09 (2014), *and* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2255 (2014), *with* Daimler v. Bauman, 571 U.S. 117, 141–42 (2014). *Compare* Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2760 (2014), *and* Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting), *with* Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990). *Cf.* 2 WILSON, THE WORKS, *supra* note 113, at 426 ("A corporation is described to be a person in a political capacity created by the law, to endure in perpetual succession. Of these artificial persons a great variety is known to the law. They have been formed to promote and to perpetuate the interests of commerce, of learning, and of religion. It must be admitted, however, that, in too many instances, those bodies politick have, in their progress, counteracted the design of their original formation.").

1063. Chisholm v. Georgia, 2 U.S. 419, 455–56 (1793) (Opinion of Wilson, J.) (Finding that a corporation, even one that embodies the State itself, "is an artificial person. It has its affairs and its interests; it has its rules; it has its rights; and it has its obligations. It may acquire property distinct from that of its members. It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts, and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget that, in truth and nature, those who think and speak and act are men."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

this wisdom of *Chisholm*, the Supreme Court's oldest constitutional precedent, in favor of judicial relativism.[1064]

These and other violations of the public trust by federal judges, reflect the failure of even America's highest federal jurists to understand the public interest origin of the powers of Congress, president, and court.[1065] For example, few remember that U.S. telecom law began in response to the sinking of the RMS Titanic.[1066] In the era the Titanic sank, Congress recognized its duty to vindicate the public interest in protecting mail delivery ships, and so Congress founded telecom law upon a robust public interest standard to protect both domestic and foreign postal administrators.[1067]

As telecom law and technology continued to flux and converge, Congress imported terms from the common law of navigable waterways; specifically drawing the term "common carrier" from it.[1068] Telecom companies are common carriers when they offer their services

1064. Citizens United v. FEC, 558 U.S. 310, 351 (2010) (analogizing corporate money to natural human speech—since money funds the speech in question, the Court decided the money itself has First Amendment protections attached to it); *id.* at 335 (going so far as to compare FEC regulations to the royal copyright licenses of England circa the Sixteenth and Seventeenth Centuries); *Hobby Lobby*, 573 U.S. at 692–93 (where a natural person may face federal charges under *Smith* for completing religious rites that involve controlled substances, *Hobby Lobby* allows private for-profit corporations to violate federal laws without consequence).

1065. THE DECLARATION OF INDEPENDENCE paras. 2–3 (U.S. 1776) (requiring that our laws tend to secure each member of the public in their pursuit of happiness and to assent to laws for "the public good"); U.S. CONST. pmbl. & art. VI, § 3 (noting that the oath of office is a sign that government offices are held in "public trust"). Government seats in the United States were always held in public trust. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 348, 602; THE FEDERALIST NO. 55 (Alexander Hamilton or James Madison) (noting that government seats are held in public trust); PA. CONST. OF 1776, pt. 1, art. IV; VA. CONST. OF 1776, pt. 1, § 2; MD. CONST. OF 1776, pt. 1, art. 4; VT. CONST. OF 1777, pt. 1, art. 5.

1066. Radio Act of 1912, Pub. L. No. 264, 37 Stat. 302 (repealed 1927). *See* Mathew Lasar, *How the Titanic Disaster Pushed Uncle Sam to Rule the Air*, ARSTECHNICA (July 7, 2011, 5:00 AM), https://arstechnica.com/tech-policy/2011/07/did-the-titanic-disaster-let-uncle-sam-take-over-the-airwaves/.

1067. Radio Act of 1912, Pub. L. No. 264, 37 Stat. 302 (repealed 1927); Communications Act of 1934, ch. 652, 48 Stat. 1064; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. *See* Smithsonian: National Postal Museum, *Fire & Ice: Hindenburg and Titanic: Titanic's Mail Clerks*, https://postalmuseum.si.edu/exhibition/fire-ice-hindenburg-and-titanic-exhibition-ice-the-titanic-disaster/titanic%E2%80%99s-mail-clerks (last visited Aug. 8, 2021) ("*Titanic* had five sea post clerks aboard: three Americans and two British.").

1068. 47 U.S.C. §§ 201–76 (1938); Bukton v. Tounesende or The Humber Ferry Case [1348] KB 27/354, m. 85 (Eng.), *in* BAKER & MILSOM, *supra* note 15, at 399. *See* Munn v. Illinois, 94 U.S. 113, 130 (1876) (expounding common carrier common law to justify state regulations); Carol Rose, *supra* note 244, at 771 n.284 (Professor Rose indicated that *Munn* was an example of the Court's acknowledgement and adjudication over what she termed inherently public property—Rose's groundbreaking work reliably set forth the principles by which such inherently public property operates).

to the public and are thus subject to robust, national regulation in the public interest.[1069] As the U.S. Supreme Court explained in *Munn v. Illinois*,

> Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated. But we need go no further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation.[1070]

National and international telecommunication companies including internet services are, as a matter of fact, common carriers covered by federal law.[1071] Under common carrier common law discussed in *Brand X*, a court may require that internet service providers adhere to net neutrality principles as a matter of public interest under the First Amendment, Equal Protection Clause, and other portions of the U.S. Constitution.[1072]

The court may also strike down, override, or ignore the FCC's recent classification of internet services, as non-common carrier ser-

1069. 47 U.S.C. §§ 201–76 (1938); Bukton v. Tounesende or The Humber Ferry Case [1348] KB 27/354, m. 85 (Eng.), *in* BAKER & MILSOM, *supra* note 15, at 399 (this case appears to be the beginning of common carrier law); *id.* at 304 (*Humber Ferry Case* was extended in Southcote's Case [1601] 4 Co. Rep. 83b (Eng.)); *id.* at 416 (*Southcote's Case* was cited in Coggs v. Barnard [1703] KB 122/5, m. 435 (Eng.)); Gibbons v. Ogden, 22 U.S. 1, 208–09 (1824) (invalidating a monopoly on the use of a steam engine in ferry boats operating in interstate commerce).

1070. *Munn*, 94 U.S. at 130.

1071. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383–84 (D.C. Cir. 2017); *Munn*, 94 U.S. at 130; 47 U.S.C. §§ 201–76.

1072. *U.S. Telecom Ass'n*, 855 F.3d at 383–84 ("The Act requires treating telecommunications providers as common carriers presumptively subject to the substantial regulatory obligations attending that status. Common carriers, for instance, generally must afford neutral, nondiscriminatory access to their services, and must avoid unjust and unreasonable practices in that connection.") (citing National Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975–76 (2005)); *id.* at 388 ("An ISP has no First Amendment right to engage in those kinds of practices" that violate net neutrality principles.); *Munn*, 94 U.S. at 130; 47 U.S.C. §§ 201–76. *See* U.S. Const. amends. I, V, XIV; Schroeder, *Choosing*, *supra* note 485, at 50 (the three basic net neutrality principles are (1) transparency, (2) no blocking, and (3) no unreasonable discrimination against websites and content—these simple principles could be adopted by the court in the public interest); Brodkin, *supra* note 585. *Cf.* Congressional Review Act, Pub. L. No.104–121, 110 Stat. 847 (1996) (the Senate voted to undo the FCC reversal of net neutrality, but there were not enough votes in the House); Harper Neidig, *FCC chairman applauds Congress for not reinstating net neutrality*, THE HILL (Jan. 2, 2019, 2:05 PM), https://thehill.com/policy/technology/423533-fcc-chair-applauds-congress-for-not-reinstating-net-neutrality.

vices; according to a *de novo* review of the facts.[1073] Indeed, the Supreme Court recently preserved a role for the States in regulating the internet in lieu of the federal government; whenever the federal government fails to regulate.[1074] Under *cy pres* doctrine, courts may seek to divest telecom networks from corporations that violate the public trust upon which private corporate interests in public communications networks were originally granted.[1075]

Private rights of telecom companies to monopolize and monetize U.S. telecom networks originally sprang from the public trust for the security of our mail sent and received over the Atlantic.[1076] Unlike the old copyright and patent systems of England, that were all choked by the weeds of feudal power, U.S. telecom law was never besieged by any sort of feudal pretense.[1077] The public interest in common law copyright must, therefore, also sound in the regulation of telecom networks.[1078]

Even so, most valid public interest suits will not survive the arbitrary legal theories of *Griswold* and *Murray's Lessee*.[1079] For

1073. FCC Restoring Internet Freedom, 83 Fed. Reg. 7852–7922 (Feb. 22, 2018) (to be codified at 47 C.F.R. pts 1, 8, and 20) (repealing FCC net neutrality rules); *U.S. Telecom Ass'n*, 855 F.3d at 383–84, 388–89 (refusing to interpret the First Amendment as a full bar to net neutrality rules); Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 387–88 (1969) (demonstrating how First Amendment rights to access broadcasts can be extended to networks like the internet, which may include a form of equitably administered net neutrality rules); Folsom v. Marsh, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901) (common law copyright protection of letters sent through the postal service can be extended to emails and other internet communications); Crowell v. Benson, 285 U.S. 22, 62 (1932) (this case calls for a *de novo* review of agency rules and adjudications wherever fundamental rights depend).

1074. Mozilla v. FCC, 940 F.3d 1, 57 (D.C. Cir. 2019) ("in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law," striking down the FCC's attempt to preempt state net neutrality laws for being *ultra vires*).

1075. *See infra* note 1084 and accompanying text.

1076. Radio Act of 1912, Pub. L. No. 264, 37 Stat. 302 (repealed 1927) (this law, which became the standard for telecommunication laws, was enacted after the sinking of the RMS Titanic, because life saving ships were in radio distance from the Titanic but there were no regulations to facilitate distress calls at the time).

1077. *Id.*; Millar v. Taylor [1769] 4 Burr. 2303, 2314 (Eng.).

1078. *Folsom*, 9 F. Cas. at 346 (protecting the privacy interests of George Washington in his letters official and private as a descendible and assignable right, individually suable, and implied into federal law); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 992–1001 (Argument of Lord Camden) (the reason Lord Camden argued that the Statute of Anne took away common law copyright was because in England copyright was besieged by feudal law—this logic simply cannot work in the United States).

1079. Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855).

Murray's Lessee requires that public rights be secured solely through congressional law, and *Griswold* snuffed out the light of the Ninth Amendment in favor of its penumbra.[1080] The general result is a court that conflates fact and law and abandons *stare decisis*; all to appease the liberal cowards of *Griswold* and the slaveholding rebels of *Murray's Lessee*.[1081]

The public interests of every individual person's fullest possible access and participation in telecom networks is a public good intended to be secured through the courts.[1082] The court is meant to secure common law common carrier goals of minimizing barriers to access, ensuring universal service, and preserving net neutrality.[1083] Wherever private owners of properties created in public trust violate the

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1080. *Griswold*, 381 U.S. at 487–91 (Goldberg, J., concurring); *Murray's Lessee*, 59 U.S. at 284.

1081. *Griswold*, 381 U.S. at 483; *Murray's Lessee*, 59 U.S. at 282–84. *See, e.g.*, Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1371–72, 1375 (2018) (denying its jurisdiction over patent invalidation suits due to the America Invents Act—ensuring that there will be potentially no patent invalidation case that will go to a jury again) (citing *Murray's Lessee*, 59 U.S. at 284); Teva Pharm.'s USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 323–28 (2015) (the Seventh Amendment concern in *Markman* hearings regarding the judiciary's decision to make judges rather than juries factfinder regarding the metes and bounds of patents, though swatted away by this Court like a mosquito, was the most important concern at issue in *Teva*—it was similarly swatted away like a pest in *Oil States*—the Court's impatience with attempts to claim a right to a jury over facts involving patents is likely due to the court's knowing decision not to respect an express constitutional right—this inspires the court to create a scattershot of bad precedent that refuses to admit any association with other similar precedents so that there is no clear line of precedent to overrule, consider, or to even discuss).

1082. Carol Rose, *supra* note 244, at 770 (citing Gibbons v. Ogden, 22 U.S. 1 (1824); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 953–54 (1982)); Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 387–88 (1969); Folsom v. Marsh, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901).

1083. *See Red Lion*, 395 U.S. at 387–88; Susan Crawford, *America Needs More Fiber*, WIRED (Feb. 8, 2018, 8:00 AM), https://www.wired.com/story/america-needs-more-fiber. (making the case for nationalizing telecommunications without calling it "nationalization"); Matt Stevens, *Verizon Throttled California Firefighters' Internet Speeds Amid Blaze (They Were Out of Data)*, N.Y. TIMES (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/us/verizon-throttling-california-fire-net-neutrality.html; Josh Horwitz, *The Trump Team's Idea to Counter China with Nationalized 5G is Just what China Would Do*, QUARTZ (Jan. 28, 2018), https://qz.com/1191154/the-trump-teams-idea-to-counter-china-with-nationalized-5g-is-just-what-china-would-do/ (citing a Trump Administration memo suggesting a nationalized telecommunications system). *Cf. The Kingsbury Commitment* [Dec. 19, 1913] (to avoid antitrust suit, AT&T abdicated its attempts to monopolize without regard to the public trust protected by the U.S. Government, including a guarantee of universal service); Communications Act of 1934, 47 U.S.C. §§ 151, 214(e), 254(e) (creating the Universal Service Fund to subsidize telecommunications companies for extending basic telephone service "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges").

public trust, the court may reform the public trust under *cy pres* doctrine to better serve the public.[1084]

The nature of government regulation of property held in the public trust should modulate on a case by case basis, with the public interest in the property at issue.[1085] If a private property right is suffered in inherently public property, it ought to be subject to strong antitrust regulation.[1086] Violations of antitrust law are punishable concurrently under both common and positive laws and are justiciable to protect most members of the public who can show that they are the intended beneficiaries of public property rights.[1087]

1084. *See* James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820 (Noting that the plans for a national bank were objected to as a monopoly, and that it would therefore be held in public trust, revocable, and highly regulated by the government: "As a remedial *Plan of a Bank* the Directors might be . . . disabled from holding Bank Stock & from borrowing directly or indirectly from the Institution, and *might* take a customary Oath of Office. Under these regulations, they might without bias, at least without the temptations before them, exercise the functions required from them & *fulfill the ends of the Institution*."). The Court has a wide latitude to safeguard property held in public trust, including telecom networks, patents, and copyrights. Perin v. Carey, 65 U.S. 465, 497, 506–08 (1860) ("All property held for public purposes is held as a charitable use, in the legal sense of the term charity."); Jennifer Anglim Kreder, *The "Public Trust"*, 18 J. OF CONST. L. 1425, 1463 (2016) ("The cy pres doctrine 'allows the court to change the terms for the gift while remaining as close as possible to the donor's original charitable purpose.'") (quoting Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 421–22 (2003)); Edith L. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 375–77, 388 (1953) (giving a history of cy pres from Justinian all the way through to the time when the Courts started applying the doctrine frequently); Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393 (2009) ("Despite continuing hostility towards the public trust doctrine because of its potential to defeat private property rights and the will of elected representatives, the doctrine refuses to die."); U.S. CONST. pmbl. (stating that the entire government is created by the people for the protection, tranquility, social justice, welfare, and freedom of the people); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459 (noting that the entire U.S. Constitution should be interpreted in the light of the preamble, such that an interpretation that runs against it should not be permitted); U.S. CONST. amend. IX.

1085. *See, e.g.*, *Red Lion*, 395 U.S. at 394 ("differences in the characteristics of new media justify differences in the First Amendment standards applied to them").

1086. Public property exists in our town squares, roads, bridges, railroads, airways, sewer systems, garbage dumps, energy, water, telecommunications networks including the air, access routes to navigable waterways. Carol Rose, *supra* note 244, at 770 (citing *Gibbons*, 22 U.S.; Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 953–54 (1982)). *But see* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1256 (10th Cir. 2005) (this decision defies the entire idea of public property, which cannot be purchased away from the public by paying a city for it if the city's sale is against the public interest—Salt Lake City's sale of its historic town square to the Mormon Church was emphatically against the public's interest and it clearly violates their First Amendment rights of the public, which the city is bound to protect.).

1087. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341, 343 (1989) (This article discusses the False Claims Act as part of the "trend towards policing

To find the proper line between the realms of public and private property, Americans must repair once more to the marvelous song of Phillis Wheatley.[1088] For knowledge and learning in science and the arts are inherently public goods, of which Wheatley was the chief advocate in her day.[1089] Phillis Wheatley was *the first* to create private property out of a public commons; something John Locke dreamed of but never himself accomplished.[1090]

The ways in which matters of race, gender, and religion touch upon the rights and interests of authorship and copyright, were wondrously expounded by Phillis Wheatley on behalf of each American.[1091] Americans are the fortunate beneficiaries of her work; undertaken in

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the public interest through citizens' suits."); 1 WILSON, THE WORKS, *supra* note 113, at 50 ("Property is of two kinds; publick and private. Under publick property, common highways, common bridges, common rivers, common ports are included. In the United States, and in the states composing the Union, there is much land belonging to the publick."). *But see* Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 276 (2007) ("the securities law impliedly precludes the application of the antitrust laws"). *See generally* 3 EDWARD COKE, INSTITUTES *181 (explaining that antitrust is a robust common law, that is and should be concurrently secured by the positive laws); The Sherman Act, Pub. L. No. 51-647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–15); The Clayton Act, Pub. L.No. 63-323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27); The False Claims Act, Pub. L. No. 37-67, 12 Stat. 696 (1863) (codified as amended at 31 U.S.C. §§ 3729–33); McCulloch v. Maryland, 17 U.S. 316, 317, 322 (1819) (this case was essentially brought as an action of debt under a Maryland qui tam statute, but John James' standing to sue in federal court was entirely implied by the federal courts into the Judiciary Act, and this ground for standing must still exist).

1088. John Rochfort, *The Answer [by the Gentleman of the Navy]* [1774] ("For softer strains we quickly must repair / To Wheatly's [sic] song, for Wheatly [sic] is the fair; / That has the art, which art could ne'er acquire: / To dress each sentence with seraphic fire.").

1089. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773. *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813). *Cf.* Schroeder, *Choosing*, *supra* note 485, at 56–57.

1090. 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27; Justin Hughes, *Locke's 1694 Memorandum (and more incomplete copyright historiographies)*, 27 CARDOZO ARTS & ENT. L.J. 555, 559–63 (2010); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773. *See* 2 WILSON, THE WORKS, *supra* note 113, at 105 (Commenting upon precisely the type of work that Phillis Wheatley undertook, bringing Locke's vision into completion for the first time for literary property, and concluding that the same principle applies "in the acquisition of property of every other kind" such that it should be given an "exclusive right, as is given and decreed to those who bestow their labour in any other manner.").

1091. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773 (Phillis Wheatley's copyright was thus secured through English law, unlike William Billings or anyone else in America, because no author in America had access to a legal process for copyrighting their works at that time).

the wake of William Billings' legal failures.[1092] By Wheatley's marvelous successes in securing her rights, American laws were held to grant "by implication to the author, or legal proprietor of any manuscript whatever, the sole right to print and publish the same."[1093]

As James Wilson wrote, the copyright vindicated by Phillis Wheatley during the American Revolution applies "in the acquisition of property of every other kind."[1094] The work undertaken by such an author confers the same "exclusive right, as is given and decreed to those who bestow their labour in any other manner."[1095] Without Phillis Wheatley, the Americans, and perhaps the entire world, would have no example of pure Lockean property creation to aspire to.[1096]

Therefore, if Americans are to continue as a nation of individuals that create private property out of the public weal, Americans should submit to the conditions upon creating private property set out by the founder who established it, i.e., Phillis Wheatley[1097] The public

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1092. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 134–35, 137 (1980); SIMMONS, *supra* note 31, at 9; Millar v. Taylor [1769] 4 Burr. 2303, 2314, 2337–38 (Eng.) (citing MILTON, AREOPAGITICA, *supra* note 259, at 187); John Milton's Publishing Contract for Paradise Lost, Apr. 27, 1667.

1093. Folsom v. Marsh, 9 F. Cas. 342, 347 (No. 4,901) (C.C.D. Mass. 1841). *See* Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773) ("Since my return to America my Master, has at the desire of my friends in England given me my freedom. . . . I am now upon my own footing and whatever I get by this [sale of books] is entirely mine, & it is the Chief I have to depend upon."—Wheatley was made free to be the proprietor of her own works! No one including privileged, white men in America had this freedom when she first acheived it.).

1094. 2 WILSON, THE WORKS, *supra* note 113, at 105.

1095. *Id. See* Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773.

1096. *Compare* 2 JOHN LOCKE, TWO TREATISES ON GOVERNMENT § 27, *with* Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7, *and* Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773. *Cf.* LANDERS, *supra* note 912, at 217 (noting her influence extended into Latin America).

1097. 2 JOHN LOCKE, TWO TREATISES ON GOVERNMENT § 27; Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773. *See* Schroeder, *The Body*, *supra* note 121, at 28–30 (noting that prior to the American Revolution, "The people of Britannia, who were not granted titles and land, were owned incident to the land as trees and rocks are owned."); *id.* at 9 (noting Phillis Wheatley's precient leadership in America to help the entire English empire resist slavery). *Cf.* 2 WILSON, THE WORKS, *supra* note 113, at 105 (by placing literary property as the prime example of Lockean property creation Wilson revealed that Wheatley accomplished the deed that established the beginning of property law in America); Mark Rose, *supra* note 907, at 54 ("'It was not for Gain, that *Bacon*, *Newton*, *Milton*, *Locke*, instructed and delighted the World; it would be unworthy such Men to traffic with a dirty Bookseller for so much as a Sheet of Letter-press.

interest objects of property creation set forth by Phillis Wheatley include: the expansion of our minds and souls, the rights of life to earn a living wage, to engage in free trade and travel, and the freedoms of speech and worship.[1098] Her goals echoed those of Coke, Milton, and Locke, but Wheatley added her own twist on their earlier expositions.[1099]

When the Bookseller offered *Milton* Five Pounds for his Paradise Lost, he did not reject it, and commit his Poem to the Flames, nor did he accept the miserable Pittance as the Reward of his Labor; he knew that the real price of his Work was Immortality, and that Posterity woudl pay it.'") (quoting Lord Camden in *Donaldson v. Becket*, confirming that the law of England did not give authors literary property in their own works; the quote Professor Rose repeated is here: 17 THE PARLIAMENTARY, *supra* note 579, at 1000).

1098. Wheatley's causes of creating literary property in her poems are found in her letters and the poems themselves; a nonexhaustive showing follows: Phillis Wheatley, *To the Right Honorable William, Earl of Dartmouth* [1773] (the Earl of Dartmouth was made English Secretary of State in 1772, which put him in charge of running all the English American colonies, and Wheatley successfully delivered this poem to him through a man named Thomas Wooldridge—in the poem that was delivered to the top government official over America at the time, Wheatley placed her primary purposes for writing poetry, because at the time she sought to vindicate her right and ability to publish her forthcoming book, her writing this poem directly in front of Wooldridge occurred directly prior to her trial and was published about in the papers—in this poem she basically puts words in the Earl of Dartmouth's mouth stating how he would end slavery "[n]o longer shalt thou dread the iron chain," and then she explained "[w]hence flow these wishes for the common good" and stated that it came from her experience being kidnapped and enslaved and that by writing her poetry she hoped that "[o]thers may never feel tyrannic sway"—she vitally connected the idea that her free speech and expression would be part of what unchained American slaves from their slavery, and that through it the top leaders of either English or American government would comply and establish justice); Phillis Wheatley, *An Hymn to Humanity* [1773] (exercising her own freedom of worship to witness a message from God the father to Christ or Prometheus stating "Descend to earth, there place thy throne / To succour man's afflicted son / Each human heart inspire"—the ingeniousness of this verse, which is vague enough to read into it both Christian and ancient Greek symbolism of fire coming down from heaven to fill humanity with inspiration, contemporaneously revealed that the poetry Wheatley was writing was this fire from heaven—Wheatley herself is Christ-like or Prometheus-like and is inspiring humanity); Phillis Wheatley, *To the University of Cambridge* [1767] (Wheatley exhorted Harvard students to "[i]mprove your privileges while they stay"—she wrote at length about how "sons of science" should keep studying and learning, and her poetry cheered them on to new discoveries); Phillis Wheatley, *On Being Brought from Africa to America* [1773] (presenting her belief that the possibility of the salvation of any human being proved the equality of all humans); Phillis Wheatley, *Liberty & Peace* [1784] (celebrating free trade and the expansion of knowledge and learning brought about by the American Revolution); Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773) (noting her existence as an author whose entire subsistence was based upon the sale of her books).

1099. *Compare* Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773), *with* 3 EDWARD COKE, INSTITUTES *181, *and* MILTON, AREOPAGITICA, *supra* note 259, at 187. *See* Karla V. Zelaya, *Sweat the Technique: Visible-izing Praxis Through Mimicry in Phillis Wheatley's "On Being Brought from Africa to America"* 51 (2015) (Ph.D. dissertation) (available on Scholarworks of University of Massachusetts, Amherst) ("Phillis Wheatley actively illustrated in her poems—particularly in 'On Being Brought from Africa to America'—that 'it ain't about what you cop, it's about what you keep' ('Final Hour'). Her poems were not blind and unquestioning acts of absorption and regurgitation of 'white bourgeois sentiment

The property rights enjoyed by Phillis Wheatley extended to her in her capacity as a working woman, mother, wife, African, former slave, and a person who spoke English as a second language.[1100] It is a wonder that she imported the rights expounded in the Case and Statute of Monopolies into the United States for the benefit of all.[1101] For she did this on behalf of the individual and against the rights of the monopolist so Americans might make something of their own to enjoy.[1102]

Phillis Wheatley wondrously convinced the English speaking world that the author, rather than the government or proprietor, is the font of all copyrights.[1103] Constitutional avoidance doctrine and the rule in *Dr. Foster's Case* overlap in the construction of copyright and patent laws to ensure the correct application of the "authors and inven-

and understanding' but dexterous sleights of hand that made it appear as if she had uncritically 'copped' or taken the literary 'hand-me-downs' of her age. She knew that 'the captors owned the masters of what [she was] writing' but with each act of copping—with each 'sip' from the literary chalice of whiteness that she took, she '[baptized] her lips'—making everything anew. Her poetic mask may have grinned, but it also bared lies.") (quoting from Lauryn Hill, *Final Hour* (1998)).

1100. WHEATLEY, *supra* note 821, at 5–7; Phillis Wheatley, *On Being Brought from Africa to America* [1773].

1101. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773; The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.); Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.). *See* 3 EDWARD COKE, INSTITUTES *181–83.

1102. Wheatley stood up against the worst monopolists—the slave traders—whom she called "our modern Egyptians" in reference to the Israelite Exodus. Letter from Phillis Wheatley to Samson Occom (Feb. 11, 1774). These are the same rights of life that Coke vindicated for the English people. 3 EDWARD COKE, INSTITUTES *181. James Otis and the American Revolutionaries conspicuously agreed with Wheatley about this. OTIS, *supra* note 18, at 147 ("That the colonists, black and white, born here, are free born British subjects, and entitled to all the essential civil rights of such, is a truth not only manifest from the provincial charters, from the principles of the common law, and acts of parliament; but from the British constitution, which was reestablished at the revolution [i.e., the so called Glorious Revolution of 1688], with a professed design to lecture the liberties of all the subjects to all generations."—Soon after Otis said this it became clear that England did not agree that these common law rights were meant for all British subjects in the world, and the founders reasserted that the purpose of immigrating to America was to preserve them against British abuse.).

1103. Matilda, *On Reading the Poems of Phillis Wheatley, the African Poetess* [1796]. *See* Zach Petrea, *An Untangled Web: Mapping Phillis Wheatley's Network of Support in America and Great Britain*, *in* NEW ESSAYS ON PHILLIS WHEATLEY 297 (John C. Shields & Eric D. Lamore eds., 2011) (attesting that Wheatley's "work also appeared in Ireland, Scotland, Sweden, Germany, England, and even France"—and we are still peicing together the full extent of Wheatley's influence abroad, but we know she had a worldwide effect); LANDERS, *supra* note 912, at 217 (appearing to show that Professor Petrea's estimation of Wheatley's global effect was also too conservative, citing evidence of Wheatley's book in Latin America as well).

tors" requirement of the Patent & Copyright Clause.[1104] Thus, the inherent authorial and inventor's rights, as opposed to those of the proprietor or head of state, was strongly vindicated by implication into the federal laws by Justice Story in *Folsom*.[1105]

The inherent, preexisting rights of inventors and authors to the works of their own hands remain, as regarded in Coke's *Institutes*, the common root of IP and antitrust law.[1106] The right of authorial attribution *is* Phillis Wheatley's right to make a living; i.e., the very right of life and the primary policy goal defended by Coke's vision of antitrust law.[1107] Preexisting literary property rights are like any other private property right, because they sound in the common law and are secured by the Fourth and Fifth Amendments; and ultimately by the separation of powers, which are examined below.[1108]

Federal Antitrust Common Law

The foundations of the Republic are fixed upon the principles of "the consent of the governed" and *no taxation without representation* that were derived from common law.[1109] The common law that formed

1104. 3 EDWARD COKE, INSTITUTES *181; THE FEDERALIST NO. 43 (James Madison) ("The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law."). *See* Ashwander v. TVA, 297 U.S. 288, 346–48 (1936); Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.).

1105. Folsom v. Marsh, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4,901).

1106. 3 EDWARD COKE, INSTITUTES *181; *Folsom*, 9 F. Cas., at 347. The spirit of both Constitutional Avoidance and the rule against implied repeals in *Dr. Foster's Case* is essentially the same—in each, the Judiciary is presuming that the Legislature would not unwittingly or accidentally destroy preexisting rights. The only significant difference is that if the Legislature did repeal a common law right under *Dr. Foster's Case* the Legislature would repeal the law or right, but under Constitutional Avoidance the Court must finally overrule the law in favor of the preexisting right protected by the overriding constitution. *Compare* Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.), *with Ashwander*, 297 U.S. at 346–48.

1107. *Compare* Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773) (noting that she was a fully-fledged author expecting to make her living solely on her works), *with* 3 EDWARD COKE, INSTITUTES *181 (noting it is a fundamental right of life to be able to earn a living). This right can be extended in future cases under the international common law affirmed in *Kirtsaeng*, because Wheatley's right was applied to books imported from England to which she firmly requested that others not violate to protect her rights to life, and to our knowledge the printing presses of America respected her request for a limited time so that she could monetize her work. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538–39 (2013) (quoting 1 EDWARD COKE, INSTITUTES *223).

1108. U.S. CONST. amends. IV, V.

1109. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (all just laws arise from the consent of the governed); SIMMONS, *supra* note 31, at 2 (the remedy for disposing of unjust laws adopted by the Americans from *Paxton's Case* going forward was, in part, "to confer on the judiciary the power to declare unconstitutional statutes void"); U.S. CONST.

the basis of the legitimacy of *all law* in the United States may also be referred to as federal antitrust common law.[1110] For common law of antitrust in the United States was borne of the revolution as a rejection of English monarchy,

> King George III, like James I, imposed a double burden on his people by both taxing his people directly and by indirectly taxing them through the issuance of royal monopolies. The colonists were both taxed on imports and subjected to British control over foreign trade without representation in Parliament.[1111]

Thus, even while the American colonists contended common law was transplanted by the first colonists to America as "the 'palladium of their civil liberties,'" they nevertheless created their own bases of American antitrust common law that inhered in the principle of *no taxation without representation*.[1112] For it was by any means necessary that American Revolutionaries ultimately secured their natural rights and extended them to posterity by common, positive, and natural laws.[1113]

As Justice Story wrote in his *Commentaries*, the Declaration was treated as paramount law and accordingly the first U.S. Supreme Court overruled feudal law in America.[1114] The Marshall Court af-

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pmbl.; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 158 (noting that the common law "protected our infant liberties, it has watched over our mature growth, it has expanded with our wants, it has nurtured that spirit of independence which checked the first approaches of arbitrary power, it has enabled us to triumph in the midst of difficulties and dangers threatening our political existence; and, by the goodness of God, we are now enjoying, under its bold and manly principles, the blessings of a free, independent, and united government.").

1110. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); SIMMONS, *supra* note 31, at 2; U.S. CONST. pmbl.

1111. Calabresi & Leibowitz, *supra* note 1016, at 1008.

1112. *Id.* at 1005 (quoting Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 62 (1926)); Eric M. Freedman, *Milestones in Habeas Corpus: Part I*, 51 ALA. L. REV. 531, 587 (2000) ("As William R. Casto accurately states, the Judiciary Act was written in a world in which all lawyers 'believed [that] the common law existed independently from the state. Neither kings nor legislators nor even judges were necessary to create the common law. Instead, it was part of the law of nature. . . . [having] existence outside and independent of the court.'") (quoting WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 34–35 (1995)).

1113. Markham, Jr., *supra* note 950, at 460–62; THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 14–15; Almy v. Harris, 5 Johns 175, 175–76 (N.Y., 1809); Harford v. United States, 12 U.S. 109, 109–10 (1814); Case v. Humphrey, 6 Conn. 130, 141 (1826) (citing Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.)); SEDGWICK, *supra* note 950, at 127; Cope v. Cope, 137 U.S. 682, 686 (1891). *Cf.* Ashwander v. T.V.A., 297 U.S. 288, 348 (1936) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

1114. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 211; The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.), *distinguished and delegitimized by*

firmed this common law in *Marbury v. Madison*,[1115] but controversially issued doubts of federal common law in *Johnson v. McIntosh*;[1116] followed by *Wheaton v. Peters*.[1117] Building on these doubts, the Taney Court attempted to redefine property *without* common law; ultimately triggering the Civil War.[1118]

The Taney Court attempt to administer general federal law devoid of common law rights was a feudal reversion.[1119] Indeed, shortly

Chisholm v. Georgia, 2 U.S. 419, 470 (1793) (Opinion of Jay, C.J.) (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

1115. Marbury v. Madison, 5 U.S. 137, 180 (1803) (applying the common law from *Dr. Bonham's Case* as the lynch pin in our system of constitutional law). *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459, 2477 (2020) (extending *Worcester* to find, "On the far end of the Trail of Tears was a promise.") (citing Worcester v. Georgia, 31 U.S. 515, 557 (1832)); Ramos v. Louisiana, 140 S. Ct. 1390, 1400 (2020).

1116. Johnson v. McIntosh, 21 U.S. 543, 594–600 (1823) (relying upon *Campbell v. Hall*—a case overruled by the U.S. social compact under the maxim *no taxation without representation*, a holding disputed on the field of battle during the American Revolution for blocking potentially all common law rights outside of the physical borders of England; the shameful implications of *Johnson*, which essentially sided with the English understanding of American rights rather than the American understanding, were soon felt when the Court decided *Cherokee Nation v. Georgia*, allowing greedy Georgians to steal federally appropriated Cherokee lands, to force them down the Trail of Tears to what is present day Oklahoma. Regret was, perhaps, felt when Georgia started locking up white, male missionaries among the Cherokee people, but once it decided *Worcester v. Georgia*, which finally readopted the American conception of rights, it was too little, too late.).

1117. Wheaton v. Peters, 33 U.S. 591, 658 (1834) (expressing doubts in *obiter dictum* as to whether common law copyright exists in the United States by virtue of its crossing the Atlantic with the original Colonists—the Court nevertheless held that there was an assignable and descendible literary property right in an author's manuscript).

1118. Dred Scott v. Sandford, 60 U.S. 393, 401, 430 (1856) (Opinion of Taney, C.J.) ("But, in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned from those which regulate courts of common law in England and in the different States of the Union which have adopted the common law rules. . . . The case of *Capron v. Van Noorden* strikingly illustrates the difference between a common law court and a court of the United States." Then, citing to *Capron*, which dismissed for lack of jurisdiction the Court ordered Dred Scott's case reversed because Dred Scott was a slave and not a citizen and thus could not fit into the jurisdiction provided by the Judiciary Act, which required diversity jurisdiction between two *citizens*.).

1119. *Id.* at 485–86 (Opinion of Daniel, J.) (denying the rule from *Somerset's Case* because it only applied to slaves within the realm of England—this is exactly the holding the English applied to deny American rights during the revolution, and the American Revolutionaries vigorously asserted that common law rights did extend to America by virtue of Magna Charta—*Dred Scott* thus ironically matched the feudal holdings from *Cowle* and *Donaldson*, which denied common law copyright and the privilege of habeas corpus to Scotland because it is outside the realm of England, and *Campbell*, which asserted England's right of conquest on Grenada to justify taxing it without representation). *Cf.* Campbell v. Hall [1774] 1 Cowp. 206, 208 (Eng.) ("An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives."); 20 HOWELL, *supra* note 802, at 289 ("'It is absurd, that in the colonies they should carry all the laws of England with

before the Civil War broke out, Chief Justice Taney applied a feudal pretext in *Ex parte Merryman*, while ironically chastising Lincoln; and comparing Lincoln to the King of England.[1120] Chief Justice Taney's boldness in asserting the judicial power was not wrong, but his interpretations of the U.S. Constitution were so affected with feudalism that they cannot be trusted as legitimate.[1121]

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them . . . .'") (statement of Lord Mansfield during the trial of *Campbell*). *But see* OTIS, *supra* note 18, at 16 ("The people of this province formerly upon a *particular occasion* asserted the rights of *englishmen*; and they did it with a *sober*, *manly* spirit: they were *then* in an insulting manner asked 'whether english rights were to follow them to the ends of the earth'—we are *now* told, that the rights we contend for 'do not belong to the English'—these writs, it is said, 'are frequently issued from the exchequer at home, and executed, and the people do not complain of it—and why should we desire more freedom than they have in the mother country . . . .") (quoting Jeremiah Dummer, *A Defence of the New-England Charters* 8, 23 [1715] (Speaking of English oppressors of America: "And to complete the oppression, when they upon their trial claimed the rights of Englishmen, they were scoffingly told, *those things would not follow them to the ends of the earth*. Unnatural insult; must the brave adventurer, who with the hazard of his life and fortune, seeks out new climates to enrich his mother country, be denied those common rights, which his countrymen enjoy at home in ease and indolence? Is he to be made miserable, and a slave by his own acquisitions? Is the laborer alone unworthy of his hire, and shall they only reap, who have neither sowed nor planted? Monstrous absurdity! Horrid inverted order!")).

1120. *Ex parte* Merryman, 17 F. Cas. 144, 150 (C.C.D. Md. 1861) (No. 9,487) (Opinion of Taney, C.J.) (following habeas corpus law as provided by Sir William Blackstone saying, "The great and inestimable value of the [Habeas Corpus Act 1679] is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute," and finding that the Fifth Amendment "is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the declaration of independence") (citing Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.); 1 WILLIAM BLACKSTONE, COMMENTARIES *137)); *id.* at 152 n.3 (in *Merryman*, Chief Justice Taney stated that "the people of the United States are no longer living under a government of laws," because President Lincoln like "'(the king) had affected to render the military independent of, and superior to, the civil power'").

1121. *Dred Scott*, 60 U.S., at 423 (Taney attempted to rewrite the U.S. social compact so that "the African race were not included . . . and were not in the contemplation of the framers of the Constitution."). *See* OTIS, *supra* note 18, at 147 ("That the colonists, black and white, born here, are free born British subjects, and entitled to all the essential civil rights of such, is a truth not only manifest from the provincial charters, from the principles of the common law, and acts of parliament; but from the British constitution, which was reestablished at the revolution [i.e., the so called Glorious Revolution of 1688], with a professed design to lecture the liberties of all the subjects to all generations."); Letter from George Washington to Phillis Wheatley (Feb. 28, 1776) ("If you should ever come to Cambridge, or near Head Quarters, I shall be happy to see a person so favored by the Muses, and to whom nature has been so liberal and beneficent in her dispensations. I am, with great Respect, Your obedt humble servant."); FOR LOVE OF LIBERTY: THE STORY OF AMERICA'S BLACK PATRIOTS, part 1 (PBS 2010) (Southern slaveholders did not seem to mind when they avoided the requirements of fighting in the Revolutionary War by allowing their slaves to fight for them in exchange for their freedom—the idea that those who fought in the American Revolution to free themselves from slavery were not included in the minds of the founders and that the cowards who would not fight were included simply because they were white is about one of the most horrible and contracted opinions that one could have, but that was Taney's opinion and the South attempted to secede based upon it.).

This does not mean that all Taney Court opinions are wrong, nor does it mean that there is nothing to learn from reading these opinions.[1122] For example, the opinion of Chief Justice Taney in *Holmes v. Jennison* helped inspire *The Amistad* and *Ex parte Milligan*.[1123] Indeed, Taney's rationale from *Holmes* could be extended to invalidate the U.K. – U.S.A. Communication Intelligence Agreement ("UKUSA Agreement"), also known as the "five eyes" agreement, for selling out U.S. communications to foreign nations without a treaty.[1124]

That said, the Taney Court's restriction of the U.S. social compact in *Dred Scott* inspired *The Slaughterhouse Cases* to subvert and misconstrue federal antitrust common law under the consent of the governed and *no taxation without representation*.[1125] The *Slaughterhouse* Court, thus, upheld a monopoly merely because it was made by a State legislature in which the plaintiffs were represented.[1126] The U.S. social compact was meant to be the floor of antitrust common law, but *Slaughterhouse* made it into a limitation; a ceiling,

> But it is to be observed that all such references are to monopolies established by the monarch in derogation of the rights of his sub-

1122. However, there are things that the Taney Court got objectively and provably wrong, including that in *Dred Scott* it overruled the Missouri Compromise after it was already repealed by Congress, and it misrepresented Justice Chase's words in *Ware v. Hylton* to insinuate that there was not real Union established by the Declaration of Independence—and that's just *Dred Scott*. Taney's reading of the law as full of obvious mistakes as his colleagues readings were, which is a simple but worthy reason why his opinions should not be trusted as legitimate, especially his opinions regarding the U.S. social compact. Dred Scott v. Sandford, 60 U.S. 393, 455 (1857) (Opinion of Wayne, J.) (announcing that six of the justices "declare that [the Missouri Compromise] was unconstitutional," including Chief Justice Taney); *id.* at 502 (Opinion of Campbell, J.) (misquoting Ware v. Hylton, 3 U.S. 199, 224 (1796) (Opinion of Chase, J.)).

1123. United States v. The Amistad, 40 U.S. 518, 552–53 (1814) (quoting Holmes v. Jennison, 39 U.S. 540, 569 (1840) (Opinion of Taney, C.J.)); *Ex parte* Milligan, 71 U.S. 2, 113 (1866) (quoting *Holmes*, 39 U.S., at 564 (Opinion of Taney, C.J.)).

1124. *Holmes*, 39 U.S., at 574 (Opinion of Taney, C.J.) ("the general government has entered into no treaty stipulations upon this subject since the one above mentioned [which was expired], and in every instance where there was no engagement by treaty to deliver and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty and no law of Congress to authorize it"). *See* UKUSA Agreement Release 1940–1956, NSA: DECLASSIFIED DOCUMENTS, https://www.nsa.gov/news-features/declassified-documents/ukusa/ (last visited Mar. 12, 2019) (this agreement does not have an official name, because it was never formalized into law by treaty and remains a secret agreement that the public was never supposed to know about—the unofficial name is as noted above, the U.K. – U.S.A. Communication Intelligence Agreement); *Newly released GCHQ files: UKUSA Agreement*, THE NATIONAL ARCHIVES, https://www.nationalarchives.gov.uk/ukusa/ (last visited Mar. 12, 2019) ("Files released in June 2010").

1125. The Slaughterhouse Cases, 83 U.S. 36, 42–43, 65–66 (1872) (adopting Chief Justice Taney's view of the U.S. social compact as a compact of only white men *after* the Civil War).

1126. *Id.* at 65–66.

> jects, or arise out of transaction in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies*, reported by Coke and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. . . . But we think it may be safely affirmed that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have, from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration, and that the power to do this has never been questioned or denied.[1127]

Make no mistake, one can legitimize the despotisms of King George III, Robespierre, and Adolf Hitler upon this upside down interpretation of the U.S. social compact.[1128] The *Slaughterhouse* Court derogated American common law rights of life, that are expressly protected by the U.S. Constitution; then, it proceeded to gut the application of the Civil Rights Act under the Thirteenth and Fourteenth Amendments against the states.[1129] Among other betrayals of trust, *Slaughterhouse* departed from the intention of the founders that antitrust common law must apply to state governments.[1130]

1127. *Id.*

1128. *Id.*; King George III, *The King's Speech of Nov. 30, 1774* [1775] (Parliament affirmed and called forth the King's unbounded, royal powers in America); 1 WILLIAM BLACKSTONE, COMMENTARIES *156–57; Gesetz zur Behebung der Not von Volk und Reich [Ermächtigungsgesetz] [Enabling Act of 1933], Mar. 23, 1933, RGB? I at 141 (Ger.) (a monopoly in power was made in Hitler by the legislature of Germany, i.e., the Reichstag, in whom the people's interests were presumably cared for). The *Slaughterhouse* Court not only degraded the U.S. social compact, but it also disrespected the English people, because it is a fact that British Parliament does not and never did care for the English people, as noted by the first U.S. Suprem Court. Chisholm v. Georgia, 2 U.S. 419, 462 (1793) (Opinion of Wilson, J.) ("The Parliament form the great body politic of England! What, then, or where, are the People? Nothing! Nowhere! They are not so much as even the 'baseless fabric of a vision!' From legal contemplation they totally disappear! Am I not warranted in saying that, if this is a just description, a government, so and justly so described, is a despotic government?"); OTIS, *supra* note 18, at 240 (strongly rebuking Englishmen who argued that no representation for Americans in Parliament was permissible because large portions of England in Manchester, Birmingham, and Sheffield did not have representation in Parliament saying: "No good reason can, however, be given in any country, why every man of a sound mind, should not have a vote in the election of a representative. If a man has but little property to protect and defend, yet his life and liberty are things of some importance.").

1129. *Slaughterhouse*, 83 U.S., at 72, 78–83.

1130. U.S. CONST. art. IV, § 4. The process of granting and enforcing monopolies through the Council Table, Exchequer Chamber, or the Star Chamber, were quintessentially not Republican because they were administered outside of the common law. *See id.*; RIVINGTON, *supra* note 269, at 33. Monopolies outside of the common law were intended to be ousted in America at the state level by the Guarantee Clause as was originally affirmed under the original state constitutions themselves—these same monopolies were not legitimately issued by Parliament except for by the common law, which included only limited patents for

A silver lining of *Slaughterhouse* is that it recognized and asserted a robust antitrust jurisdiction to review monopolies for restraint "if exercised so as to produce a public mischief."[1131] The Supreme Court, thus, did not dismiss the *Slaughterhouse* case and similarly situated cases, and continued reviewing state granted monopolies.[1132] However, even after the Supreme Court severely cut back on *Gibbons'* basis for invalidating monopolies (which would not be revived until *Wickard v. Filburn*), the Court found a separate strategy for invalidating state granted monopolies in *Ex parte Young* through *habeas corpus*,

> [The Eleventh Amendment] was adopted after the decision of this court in *Chisholm v. Georgia*, where it was held that a State might be sued by a citizen of another State. Since that time, there have been many cases decided in this court involving the Eleventh Amendment, among them being *Osborn v. United States Bank*, which held that the Amendment applied only to those suits in which the State was a party on the record. In the subsequent case of *Governor of Georgia v. Madrazo*, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn*, said that, where the claim was made, as in the case then before the court, against the Governor of Georgia as Governor, and the demand was made upon him not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the State government), the State might be considered as the party on the record, and therefore the suit could not be maintained.[1133]

Under this rule, the Supreme Court dismissed the habeas petitions of the Minnesota Attorney General, Edward T. Young, for lack of jurisdiction, ultimately refusing to immunize state violations of federal railroad regulations.[1134] Therefore, *Slaughterhouse* could not preclude

inventors. U.S. CONST. art. IV, § 4. *See* James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820, (hoping that "judges of the highest grade might perhaps be relied on for the control on these local legislatures" when they violate the common law of monopolies) (citing U.S. CONST. art. I, § 8, cl. 8); 2 WILSON, THE WORKS, *supra* note 113, at 492 ("the common law abhors all monopolies, which forbid any from working in any lawful trade") (paraphrasing The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.)). *Slaughterhouse* embarrassed the American idea that Republics are a superior form of government by stating that the U.S. Congress, and our State Legislatures regularly pass monopolies like the English Monarchy did, making American Republics seem no different than Constitutional Monarchies and threatening to render the Guarantee Clause meaningless. *Slaughterhouse*, 83 U.S., at 66 (equating the Republican governments of the states with the Parliament of Great Britain).

1131. Gibbons v. Ogden, 22 U.S. 1, 208–09 (1824); *Slaughterhouse*, 83 U.S., at 63 (quoting *Gibbons*, 22 U.S. at 203).

1132. Munn v. Illinois, 94 U.S. 113, 127–28 (1876).

1133. *Ex parte* Young, 209 U.S. 123, 150 (1908).

1134. *Id.* at 168 (the "cause is discharged and the petition for writs of habeas corpus and certiorari is dismissed").

"prospective injunctive relief" for federal antitrust common law.[1135] *Slaughterhouse*, however, prefigured and paralleled Judge Robert Bork's activist views on antitrust policy that ultimately derogated American common law rights of life, including enforcement through *Ex parte Young* equitable relief.[1136]

In the shadow of *Slaughterhouse*, Congress passed the Sherman Act of 1890, expressing doubt that there was any U.S. common law on the subject of monopolies.[1137] In response, the Supreme Court affirmed that there was U.S. common law on the subject.[1138] The contemporane-

1135. Green v. Mansour, 474 U.S. 64, 68 (1985) ("*Ex parte Young* gives life to the Supremacy Clause.").

1136. The Slaughterhouse Cases, 83 U.S. 36, 60–75 (1872) (even though the Thirteenth and Fourteenth Amendments abolished slavery and established our federal rights of life even against the states, that does not mean we have a right to make a living at a lawful trade—under this ruling that appeared to outright overrule the *Case of Monopolies* in America, Black Codes flourished in the Southern States such that black folk were targeted by reason of their race to be practically reenslaved for idleness and other non-criminal behavior); *id.* at 119–20 (Bradley, J., dissenting) ("The keeping of a slaughterhouse is part of, and incidental to, the trade of a butcher—one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughterhouse and pay him a toll therefor is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary, and unjust. . . . The granting of monopolies, or exclusive privileges to individuals or corporations is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty."); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 54, 110, 145, 405–07 (1978) [hereinafter BORK, THE ANTITRUST] (arguing that the right to earn a living is not a proper antitrust policy without even acknowledging the existence of the common law *Case of Monopolies* that extended the law of God from Deuteronomy to decide that human beings have a right to life, i.e., to make a living). *See* Matsushita v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (quoting BORK, THE ANTITRUST, *supra* note 1136, at 145), *aff'd and extended in* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560–61 (2007) (adopting the plausibility standard from *Matsushita* that is now applied in potentially all federal 12(b)(6) motions). *Cf.* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019) (invalidating Black Codes or potentially any other such product of judicial infidelity arising from *The Slaughterhouse Cases*).

1137. *Slaughterhouse*, 83 U.S., at 65 (limiting antitrust common law to "monopolies established by the monarch in derogation of the rights of his subjects, or . . . transactions in which the people were unrepresented, and their interests uncared for"—but this is too narrow because it does not contemplate our rejection of the writ of assistance program that was administered by local governments prior to the revolution in support of monopolies in America). *Slaughterhouse* caused the very existence of antitrust common law to be doubted because it failed to extend the *Case of Monopolies* vindication of our rights to life and liberty against the states. Standard Oil Co. v. United States, 221 U.S. 1, 2, 50 (1911) (From the syllabus: "The debates in Congress on the Anti-Trust Act of 1890 show that one of the influences leading to the enactment of the statute was doubt as to whether there is a common law of the United States which governed that subject in the absence of legislation was among the influences leading to the passage of the act governing the making of contracts in restraint of trade and the creation and maintenance of monopolies in the absences of legislation.").

1138. *Standard Oil Co.*, 221 U.S., at 51 (quoting 3 EDWARD COKE, INSTITUTES *181); United States v. E.C. Knight Co., 156 U.S. 1, 9–10 (1895) (citing 3 EDWARD COKE, INSTI-

ous, widespread dicta that there was no general common law copyright in America, however, created a schism in legal thought between antitrust law and IP law for the first time in U.S. history.[1139]

Another change occurred in the post-*Slaughterhouse* Court that was ironically inspired by Taney Court feudalism, i.e., the Supreme Court no longer considered *Chisholm v. Georgia* a rightly decided case.[1140] In *Hans v. Louisiana,* the Supreme Court began to characterize *Chisholm* as overruled by the Eleventh Amendment, which is a reading expressly refuted by many Marshall Court cases.[1141] The Su-

TUTES *181; 8 Statute of Monopolies of 1623, 21 Jac. 1, c. 3 (Eng.); The Case of Monopolies [Darcy v. Allen] [1602] 11 Co. Rep. 84b (Eng.)), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942).

1139. Copyright cases arising around the same time as *Standard Oil* and *Knight* regularly affirmed *Wheaton v. Peters'* dicta regarding the House of Lords' decision in *Donaldson v. Becket* that the Statute of Anne took away Scottish common law rights as reason to believe that there is no federal general common law, which explicitly conflicted the ordinary practice exemplified in antitrust cases like *Standard Oil* and *Knight* that applied the common law and statute law concurrently. *See* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 15 (1908) ("In the last analysis this case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory.") (citing Wheaton v. Peters, 33 U.S. 591 (1834)); Thompson v. Hubbard, 131 U.S. 123, 151 (1889) ("This right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action in Hubbard are only those prescribed by Congress.") (citing *Wheaton*, 33 U.S. at 591). When the Patent & Copyright Clause was drafted these rights were considered as a direct consequence of antitrust common law by the father of the U.S. Constitution James Madison. James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820 ("Monopolies tho' in certain cases useful, ought to be granted with caution, and guarded with strictness agst. abuse. The Constitution of the U.S. has limited them in two cases, the authors of Books, and of useful inventions . . . ."); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788); THE FEDERALIST NO. 43 (James Madison) ("The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law.").

1140. Hans v. Louisiana, 134 U.S. 1, 12, 17 (1890) (neither *Hans*, nor *Beers*, the Taney Court case that *Hans* relied upon, explained the Court's departure from Marshall Court cases like *Cohens v. Virginia* and *Martin v. Hunter's Lessee* that strongly asserted jurisdiction over state matters—also, the holding in *Beers* was extremely doubtful, because without precedent it removed federal jurisdiction from belligerent and rebellious states right before the Civil War so that what might have been resolved peacefully in the federal courts had to be decided on the field of battle) (citing Beers v. Arkansas, 61 U.S. 527, 529 (1857)).

1141. *Id.* at 11–12, 21 (refusing to "subject[ ] sovereign States to actions at the suit of individuals," saying "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. It is enough for us to declare its existence."); Cohens v. Virginia, 19 U.S. 264, 406 (1821) (The Eleventh Amendment's "motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation.") (emphasis added) (quoting U.S. CONST. amend. XI); Martin v. Hunter's Lessee, 14 U.S. 304, 374 (1816) (The sovereignty of the States is submitted to a central compact of Union "to remove all ground for jealousy and complaint, they [i.e., the States] relinquish the privilege of being any longer the exclusive arbiters of their own justice where the rights of others come in question or the great interests of the whole may be affected by those feelings, partialities, or prejudices, which they meant to put down forever.").

preme Court found against *Hans* in *Nevada v. Hall*, but *Hall* was overruled by *Franchise Tax Board of California v. Hyatt*, which confused the role of *Chisholm* even more than *Hans*.[1142]

Under the Sherman Act, the Supreme Court reengaged with common law and affirmed earlier cases, applying the common law "rule of reason" standard to antitrust cases.[1143] The Supreme Court was, however, weighed down once more by the Taney Court's pro-slavery determinations when reevaluating the Court's common law jurisdiction in *United States v. E. C. Knight*.[1144] The *Knight* Court initially bowed out of its duty to invalidate state granted patents according to, in part, a faulty interpretation of the common law.[1145]

Around this time, the state police power idea was so preclusive that the national railroad program almost failed but for *Ex parte Young*.[1146] Some states attempted to enact their own railroad standards, which conflicted with federal law.[1147] The federal courts only upheld federal laws as preemptive against conflicting state statutes after the federal government jailed a state attorney general for contempt and forced the state to file a writ of habeas corpus.[1148]

As Carol Rose observed, "Nineteenth-century jurists had a propensity to slide easily between police power and public property terminology."[1149] This sliding, that may have provided pretext to dismiss public interest cases, finally subsided when *Wickard v. Filburn*

1142. Nevada v. Hall, 440 U.S. 410, 415 (1979) (Distinguishing *Hans* by saying, "The King's immunity [which is the origin of state sovereign immunity doctrine] rested primarily on the structure of the feudal system, and secondarily on a fiction that the King could do no wrong. We must, of course, reject the fiction. It was rejected by the colonists when they declared their independence from the Crown, and the record in this case discloses an actual wrong committed by Nevada." Thus, according to California's sovereign choice *not* to extend immunity to Nevada a suit in tort lied in California Court—this choice is incident to California's sovereign "'right to govern'" as defined by Chief Justice Jay in *Chisholm*.) (quoting Chisholm v. Georgia, 2 U.S. 419, 472 (1793) (Opinion of Jay, C.J.)), *overruled on other grounds by* Franchise Tax Board of California v. Hyatt, 139 S.Ct. 1485, 1492, 1499 (2019) (the opinion in this case is extremely unclear; it begs many questions and answers none; if fully reinstating *Hans*' dicta was as easy as waiving the Court's wand to overrule *Nevada v. Hall* then the Court might have done so, but it could not).

1143. Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911).

1144. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (citing The License Cases, 46 U.S. 504 (1847)), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942).

1145. *Id.* ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.").

1146. *See Ex parte* Young, 209 U.S. 123, 150 (1908). *See* Green v. Mansour, 474 U.S. 64, 68 (1985).

1147. *See Young*, 209 U.S. at 126.

1148. *Id.*

1149. Carol Rose, *supra* note 244, at 773.

expressly abrogated *Knight* and expanded federal jurisdiction to every blade of grass.[1150] Thus, *Wickard* officially ended *Slaughterhouse*'s skirting of federal jurisdiction to disband monopolies.[1151]

From here those in favor of the states' rights rationale from *Slaughterhouse* were put on the defensive; civil rights legislation successfully moved forward for the first time and the Court began to dismantle longstanding injustices involving racism and misogyny.[1152] Those opposed to national legislation for social justice shifted strategies, resolving to accomplish by judicial activism what they failed to accomplish by law.[1153] Their two most vocal leaders in the effort to justify activism from the bench to reach their goals were Robert Bork and Paul M. Bator.[1154]

Bork managed to influence the Court to adopt the "plausibility standard" for dismissal; first applying only in antitrust law, and later to all civil suits in *Twombly* and *Iqbal*.[1155] Bator wrote an article that eventually convinced the Court to maximize federal habeas dismissals for cases that review state courts.[1156] Bork and Bator's rationalist strategies for dismissing cases on grounds ulterior to the law had a profound effect on U.S. judicial practice.[1157] Perhaps fittingly, their strategy of supplanting the common law with rationalism *is* the infa-

1150. *See Knight*, 156 U.S. at 21, *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942).

1151. *Id.*

1152. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 9–12 (1967); Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §1983.

1153. *See, e.g.,* Adam Cohen, *Psst . . . Justice Scalia . . . You Know, You're an Activist Judge, Too*, N.Y. TIMES (Apr. 19, 2005), https://www.nytimes.com/2005/04/19/opinion/psst-justice-scalia-you-know-youre-an-activist-judge-too.html; Reuters Staff, *Factbox: Robert Bork – judge, activist and verb*, REUTERS (Dec. 19, 2012, 8:04 AM), https://www.reuters.com/article/us-usa-bork-facts/factbox-robert-bork-judge-activist-and-verb-idUSBRE8BI10620121219.

1154. *Bork Nomination Day 10, Part 5*, C-SPAN (Sept. 28, 1987), https://www.c-span.org/video/?10184-1/bork-nomination-day-10-part-5 (Bator firmly defended his ally before Congress).

1155. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 728 (2018) ("Citing to Bork's *The Antitrust Paradox*, the Court concluded that predatory pricing schemes were implausible and therefore could not justify a reasonable assumption in favor of Zenith.") (citing Matsushita v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (quoting BORK, THE ANTITRUST, *supra* note 1136, at 145)).

1156. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452–53 (1963) [hereinafter Bator, *Finality*].

1157. *See, e.g.,* Matsushita v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (quoting BORK, THE ANTITRUST, *supra* note 1136, at 145)); Coleman v. Thompson, 501 U.S. 722, 754 (1991) (making the determination to abrogate *Fay* not on the law or to vindicate justice, but deciding upon an "allocation of costs"—this is Bator's theories in action).

mous strategy employed in the Salem Witch Trials of Massachusetts Bay.[1158]

As things now stand, the ultimate success or failure of public interest suits usually depend on whether a judge rationally recognizes the public interest as a fundamental object of government or as a mere drain on judicial resources.[1159] Although federal courts retain the power to defend individual rights, it is difficult to convince federal judges to assert their power.[1160] Even after prevailing over a motion to dismiss, the court is known to create new reasons to dismiss cases even after a jury has already spoken.[1161]

1158. The Puritan witch hunters were proud Rationalists. JOSEPH GLANVILL [& HENRY MORE], SADUCISMUS TRIUMPHATUS 45 (4th ed. 1726) ("considering *Man* in the *general*, as a *rational* Creature"); Samuel Willard, *Some Miscellany Observations on our Present Debates Respecting Witchcrafts* 2, 11 [1692] ("We are willing to hearken to reason."); Cotton Mather, *The Wonders of the Invisible World* 7, 68 [1693] ("It is not irrational, to ascribe the late stupendous growth of witches among us, partly to the bitter discontents, which affliction and poverty has fill'd us with" – "A Devil is a spiritual and a rational substance"). From Puritan Rationalism came the Puritan theory of legal positivism, which began in Massachusetts Bay and was copied unsuccessfully by Cromwell's Parliament of Saints. *Massachusetts Body of Liberties* 94.2 [1641] ("If any man or woman be a witch, . . . they shall be put to death."); *The Lawes and Liberties of Massachusetts* [1648] (largely a reproduction of the original *Body of Liberties*, updated and revised from time to time and published as *Laws and Liberties*); WOOLRYCH, *supra* note 801, at 271–73, 300. *See also* John Maynard Keynes, *Newton, the Man* [1946], *in* JMK/PP/60, The Papers of John Maynard Keynes, King's College, Cambridge (unveiling a revelation after purchasing Newton's private papers at auction that Newton the world renowned rationalist to be a magician and occultist). Finally, legal positivism was transmitted into the secular world through Jeremy Bentham who was deeply inspired by Cromwell. BENTHAM, A FRAGMENT, *supra* note 39, at 141.

1159. *See, e.g.*, Maryland v. United States, 460 U.S. 1001, 1005–06 (1983) (Rehnquist, J., dissenting) (arguing against the breakup of Ma Bell for reasons of "the availability of the Department's resources for other cases") (citing Baker v. Carr, 369 U.S. 186, 217 (1961) (*Baker* is the most ordinary way the U.S. Courts justify avoiding the assertion their powers in public interest suits)).

1160. Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting) ("Those who are bound by our decisions usually believe they can take us at our word. Not so today."). *See* Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2760 (2014) (in granting the *Wheaton Injunction*, the Court defied the ruling it made in *Hobby Lobby*). *See also* Shelby County v. Holder, 570 U.S. 529, 556–57 (2013) (essentially finding that old laws are unconstitutional merely for being old according to O'Connor's utopian race prophesy and in defiance to the better lights given off by the American people in Michelle Alexander's work *The New Jim Crow*, and in the confession of Harper Lee in her first and last work *Go Set a Watchman* that refuted O'Connor's race theory as mere fatalism—it would behoove the Court to pick up on the sea changes in American culture brought about by women like Alexander and Lee).

1161. Bixby v. KBR, Inc., 748 F. Supp. 1224, 1246 (D. Or. 2010) (denying motion to dismiss for lack of subject matter jurisdiction under the nonjusticiable political question doctrine, the government contractor exemption (i.e., sovereign immunity for contractors), and the combat operations exception to the Federal Tort Claims Act); Bixby v. KBR, Inc., 893 F. Supp. 2d 1067, 1096 (D. Or. 2012) (denying motion for summary judgment); Bixby v. KBR, Inc., No. 3:09–CV–632–PK, 2012 WL 6616987, at *2 (D. Or. 2012) (not reported) (jury verdict was in favor of Bixby, and KBR's request to review was denied); Bixby v. KBR, Inc.,

The doubtfulness of rationalism as a proper basis for decision-making was recently featured in the 2008 market crisis.[1162] After the crisis, Mother Jones ran an article entitled *Alan Shrugged*, quoting Alan Greenspan's testimony before Congress; where he asserted his shock at the failure of self-interested rationalism to secure the economy in 2008.[1163] The 2008 market crisis, therefore, confirmed the Nobel prize winning work of Daniel Kahneman, which tends to show that people are not inherently rational as was long presumed by the rationalists that doomed us.[1164]

The Rise of Dead Hand Rationalism

Daniel Kahneman's studies support the position of American Revolutionaries who revolted against Rationalism, and who argued that the fountain of justice is common sense, i.e., human emotion.[1165]

No. 653118/2014, 2013 WL 12319909, at *10 (D. Or. 2013) (despite the jury determination, defense attorneys were successful in their suit for sanctions against plaintiff's attorneys to the tune of $15,031.72); Bixby v. KBR, Inc., 603 Fed. Appx. 605, 606 (9th Cir. 2015) (after all the litigation that went on in *Bixby*, KBR got the case kicked out based on a new SCOTUS precedent that appeared to modify federal jurisdiction) (quoting Walden v. Fiore, 571 U.S. 277, 285–86 (2014)). *See also* Hosana-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 190–91 (2012) (the unanimous court invented a ministerial exception under the First Amendment to dismiss employment law claims), *extended in* Our Lady of Guadalupe School v. Morrissey-Berru, 140 S.Ct. 2049, 2055 (2020); Integrity Staffing Solutions v. Busk, 574 U.S. 27, 37 (2014). *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 696 (2009).

1162. Alan Greenspan, Address to the Committee of Oversight and Reform (Oct. 23, 2008) (transcript available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/migrated/20081023100438.pdf) ("those of us who have looked to the self-interest of lending institutions to protect shareholder's equity (myself especially) are in a state of shocked disbelief").

1163. David Corn, *Alan Shrugged*, MOTHER JONES (Oct. 24, 2008), https://www.motherjones.com/politics/2008/10/alan-shrugged/.

1164. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 377–78, 381 (2011) (debunking Bentham's theory that human beings are capable of rationally pursuing happiness and avoiding pain, and giving strong evidence that what we call Rationalism is based upon "the tyranny of the remembering self").

1165. *Id*; Isaac Backus, *Truth is Great, and Will Prevail* 3–5 [1781] ("Unassisted reason could never go any farther in this respect, than to move men to imbue their hands in the blood of their own children, by offering the fruit of their body for the sin of their soul . . . . And it is a common thing for these reasoners, to claim a power for themselves which they deny to JEHOVAH; and daily to practice that, under his name, which, with reverence be it spoken, was never in HIS POWER to do!"); 1 WILSON, THE WORKS, *supra* note 113, at 119 ("I can only say, I *feel* that such is my duty. Here investigation must stop; reasoning can go no faurther."); ADAMS, DISCOURSES, *supra* note 142, at 61–69 (quoting SMITH, *supra* note 759, at 80–90); Nathaniel Niles, *Two Discourses on Liberty*, I. THOMAS & H.W. TINGES, June 5, 1774, at 44 [1774] (We are "incapable of tracing the heart through all its dark and intricate labyrinths."); Susanna Wright, *[Untitled]*, *in* Milcah, *supra* note 77, at 130–32 ("Then trembling reason shall confess thy pow'r / And low in dust, lie prostrate, & adore, / Shall in thy

When Thomas Paine abandoned his *Common Sense* and published his *Age of Reason* in France, the Americans to whom he dedicated that piece answered back.[1166] From Phillis Wheatley's 1773 poem *Thoughts on the Works of Providence*, they learned counter-rationalist principles that later helped bring about their revolution:

Among the mental pow'rs a question rose,
"What most the image of th' Eternal shows?"
When thus to Reason (so let Fancy rove)
Her great companion spoke immortal Love.
"Say, mighty pow'r, how long shall strife prevail,
And with its murmurs load the wisp'ring gale?
Refer the cause to Recollection's shrine,
Who loud proclaims my origin divine,
The cause whence heav'n and earth began to be,
And is not man immortaliz'd by me?
Reason let this most causeless strife subside."
Thus Love pronounc'd, and Reason thus reply'd.
"Thy birth, celestial queen! 'tis mine to own,
In thee resplendent is the Godhead shown;
Thy words persuade, my soul enraptur'd feels
Resistless beauty which thy smile reveals."
Ardent she spoke, and, kindling at her charms,
She clasp'd the blooming goddess in her arms.[1167]

light her narrow limits see, / And own that none art great & wise but Thee.—"); Ann Bleecker, *On the Immensity of Creation* [before 1783], *in* BLEECKER, *supra* note 652, at 210–11 ("The greatest seraph in his bright abode / Can't comprehend the labours of a God. / Proud reason fails, and is confounded here; / —Man how contemptible thou dost appear!").

1166. Thomas Paine, *Common Sense* 2 [1776] (laying the foundation of his argument upon "the power of feeling," saying that a people cannot love a ruler who lays their "country desolate with fire and sword"); Letter from Thomas Paine to his Fellow Citizens of the United States of America, Pulvoise 8, 1794, *in* THOMAS PAINE, THE AGE OF REASON 3 (1877) (arguing that reason is "the weapon against errors of every kind"); *id.* at 86 (declaring his allegiance to the rationalism of Newton and Descartes).

1167. Phillis Wheatley, *Thoughts on the Works of Providence* [1773]. Sources that answered Thomas Paine's *Age of Reason* directly in defense of the American position first set out by Wheatley include: G.W. SNYDER, THE AGE OF REASON UNREASONABLE 8 (1798) ("Passions are not given to man in vain; they are useful and salutary when guided by reason. What reason would be, without being blended with passions, is, I believe, not easily to be determined. Reason, abstractedly considered, could scarcely ever attempt anything with activity, nor, when begun, complete it with any success. The deistical writers in general, but especially Shaftsbury, Hume, Voltaire and Gibbon, have exerted themselves to strip reason of all passions, and thus to lead men to indifference and coldness of heart. What is reason without the feelings of heart; without compassion, benevolence and love, which, when prop-

Wheatley argued that the proper place of human reason is as an obedient servant to the saving commands of natural human love.[1168] Therefore, the common law rule of reason that ordinarily governs antitrust law must consult human emotion as a compass; a worthy struggle for the bench requiring a *de novo* review of the facts.[1169] When applied properly on a case-by-case basis, antitrust law may give momentary shelter to the rights of individuals from the voracious greed of the monopolist.[1170]

The proper heads of federal jurisdiction trace back through the U.S. Constitution and Judiciary Act to Lord Coke's vindication of the antitrust common law of England.[1171] Bator and Bork's unoriginal expositions of pride and fatalism, ultimately, also trace back to the feudalism established by the sycophants of the king.[1172] For the ratio-

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erly directed by reason (for this is reason's province) constitute the most essential part of human happiness? But what is truly paradox, is, that they themselves, at the same time they extolled reason, are governed by such passions, as commonly fail to the lot of frail mortals, from the number of whom it appears, the most refined deists cannot be excepted."); Anon., *The Folly of Reason* 8, 20, 23 [1794] ("the pretense of the *absolute perfection* of human reason is absurd"—"he who is made the most positive of the sufficiency of his own reason, will be the most likely to be governed by the blindness of his own passions"); ELIAS BOUDINOT, THE AGE OF REVELATION 30 (1801).

1168. Phillis Wheatley, *Thoughts on the Works of Providence* [1773].

1169. *Id.*; SNYDER, *supra* note 1167, at 8; Anon., *The Folly of Reason* 8, 20, 23 [1794]; BOUDINOT, supra note 1167 at 30.

1170. Standard Oil Co. v. United States, 221 U.S. 1, 68 (1911).

1171. Gibbons v. Ogden, 22 U.S. 1, 233 (1824) (Johnson, J., concurring) (invalidating a New York State granted Livingston-Fulton steamboat patent saying "the abstract right of commercial intercourse . . . is common to all"); *Standard Oil Co.*, 221 U.S. at 60 (quoting 3 EDWARD COKE, INSTITUTES *181); U.S. CONST. art. I, § 8, cl. 8 (the origin of U.S. antitrust law, besides arising from the common law and in conjunction with the Commerce Clause may also be observed in cases arising under the express limitations of Patent & Copyright Clause). *See* 1 CAMPBELL, *supra* note 24, at 282–86, 292, 294 (presenting a showdown between the king and Coke regarding the king's prerogative use of commendams twelve sycophants to crown "threw themselves on their knees and prayed for pardon," but Lord Coke remained on his feet and answered, "WHEN THE CASE HAPPENS, I SHALL DO THAT WHICH SHALL BE FIT FOR A JUDGE TO DO." This "sublime answer" caused the sycophants to become "ashamed of their servility" and even commanded the respect of the king himself.). Justice Jackson was inspired by Lord Coke when he wrote his iconic defense of the separation of powers in *Youngstown* saying, "Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 n.27 (1952) (Jackson, J., concurring) ("We follow the judicial tradition" that was started by Lord Coke, when he resisted the King's influence on his independent judgment.); *id.* at 614 (Frankfurter, J., concurring) (quoting Letter from the Justices of the U.S. Supreme Court to George Washington (Aug. 8, 1793) (refusing to make advisory statements at the President's request)).

1172. Bator, *Finality*, *supra* note 1156, at 448 n.12, 452, 487; Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 620 (1981) [hereinafter Bator, *The State*]; BORK, THE ANTITRUST, *supra* note 1136, at 50–51; 1 CAMPBELL, *supra* note 24, at 282–86; *see* Jim Powell, *Edward Coke: Common Law Protection for Lib-*

nalists dismissed the common law as mere relativism and boldly asserted their novel views on jurisdiction and antitrust law; as the Hobbesian "children of pride" that they were.[1173]

Thomas Hobbes theorized that men were so full of pride and dejection—an oxymoron he labeled "Madnesse"—that they must by their natures bow to an absolute monarch.[1174] There are certain characters like Bork and Bator that seemed to be character examples of Hobbesian madness—Bork tending toward pride, and Bator tending toward dejection.[1175] However, as revealed by Flannery O'Connor, Hobbes's focus on pride and dejection may be too simple.[1176]

The irony of Hobbesian feudalism is that its attempt to establish the crown's irrebuttable legitimacy by forbidding challenges to the crown in court actually destroys the legitimacy of the crown.[1177] Similarly, Bork and Bator attempted to make efficiency the chief concern of the federal courts by fashioning bases to dismiss cases and ironically

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erty: Coke Contributed to America's Independent Judiciary and Judicial Review, FOUNDATION FOR ECONOMIC EDUCATION (Nov. 1, 1997), https://fee.org/articles/edward-coke-common-law-protection-for-liberty/; Letter from Thomas Hutchinson to Richard Jackson (Sept. 12, 1765), *in* QUINCY, JR., *supra* note 32, at 441 ("[O]ur friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is *ipso facto* void.").

1173. HOBBES, *supra* note 6, at 231 (quoting *Job* 41:34); Bator, *Finality*, *supra* note 1156, at 448 n.12, 452, 487; Bator, *The State*, *supra* note 1172, at 620; BORK, THE ANTITRUST, *supra* note 1136, at 50–51 (his opinions are based on exactly the relativism he claims to "dispute"). *Cf.* HUTCHINSON & OLIVER, *supra* note 826, at 16 (Governor Hutchinson scandalized America by saying, "There must be an abridgement of what are called English liberties.").

1174. HOBBES, *supra* note 6, at 46–48.

1175. *See, e.g.*, Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1372 (1990) ("Although Bork derides scholars who try to found constitutional doctrine on moral philosophy, it should be apparent by now that he is himself under the sway of a moral philosopher. His name is Hobbes, and he too thought that the only source of political legitimacy was a contract among people who died long ago."); Wythe Holt, *Introduction: Law vs. Order, or Habeas vs. Hobbes*, 51 ALA. L. REV. 525, 527 (2000) (When introducing Eric M. Freedman's research that refuted Bator's fatalistic attacks on habeas corpus, Professor Holt wrote, "Thus, habeas (in the United States) is one of those few evidences that democracy in civilization has benefitted the average human being—that Hobbes is wrong.").

1176. The Hobbesian framework of humanity simultaneously prideful and dejected may be supplemented with Flannery O'Connor's observations of mental instability as a struggle with vice generally. FLANNERY O'CONNOR, A PRAYER JOURNAL 22 (2013) ("I will always be staggering between Despair & Presumption, facing first one & then the other, deciding which makes me look the best, which fits most comfortably, most conveniently.").

1177. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776); Nevada v. Hall, 440 U.S. 410, 415 (1979), *overruled on other grounds by* Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485, 1492 (2019)). *See, e.g.*, 1 CAMPBELL, *supra* note 24, at 282–86; Powell, *supra* note 1172.

maximized judicial inefficiency.[1178] Bork's inspiration of the plausibility standard caused the rise of arguably the biggest, unchecked monopolies in U.S. history,[1179] and Bator's ideas about finality arguably contributed to the over-incarceration of criminals that increased the workload of federal habeas courts in sorting out the numerous claims of the incarcerated masses.[1180]

Professor Paul M. Bator enjoyed chastising judges who dared exercise federal jurisdiction in pursuit of justice or truth.[1181] He imagined that overtaxing judicial resources with highfalutin pursuits, like truth or justice, might drown the entire project of American government in needless work.[1182] Bator reasoned that the pursuit of truth and justice is a waste of resources, because even if truth or justice exist they are beyond human comprehension and thus federal courts can only promulgate an appearance of them.[1183]

Bator's rationalism ironically interpreted prudence to require something less than justice in federal court (i.e., a mere appearance of justice), which ironically leaves judicial resources *vulnerable* to executive attack.[1184] Bator's rationalism advocated the preservation of

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1178. *See, e.g.,* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (observing the argument that dismissals are more efficient than hearing cases long before it was adopted by Bator and Bork and responding, "here is another instance of judicial haste which in the long run creates waste").

1179. Khan, *supra* note 1155, at 728 ("Citing to Bork's *The Antitrust Paradox*, the Court concluded that predatory pricing schemes were implausible and therefore could not justify a reasonable assumption in favor of Zenith.") (citing Matsushita v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (quoting BORK, THE ANTITRUST, *supra* note 1136, at 145)).

1180. Coleman v. Thompson, 501 U.S. 722, 754 (1991) (making the determination to abrogate *Fay* not on the law or to vindicate justice, but deciding upon an "allocation of costs"—this is Bator's theories in action) (citing McCleskey v. Zant, 499 U.S. 467, 491[–92] (1991) (quoting Bator, *Finality*, *supra* note 1156, at 452–53) (abrogating Fay v. Noia, 372 U.S. 391 (1963)); *id.* at 759 (Blackmun, J., dissenting) (justly labeling *Coleman* another addition to "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights" created by the court). *Cf.* Schroeder, *The Body*, *supra* note 121, at 109–10 ("unjustly procured convictions are an *ultimate* waste of everybody's time and resources").

1181. Bator, *Finality*, *supra* note 1156, at 448 n.12, 452, 487 (Bator gave up on the objectivity of truth and justice and gave into what he deemed superior interests of efficiency, saying, "we have tried hard enough and thus may take it that justice has been done.").

1182. *Id.*

1183. Coleman v. Thompson, 501 U.S. 722, 724 (1991) ("The *Fay* standard was based on a conception of federal/state relations that undervalued the important interest in finality served by state procedural rules and the significant harm to the States that results from the failure of federal courts to respect them.") (citing McCleskey v. Zant, 499 U.S. 467, 491[–92] (1991) (quoting Bator, *Finality*, *supra* note 1156, at 452–53)) (abrogating Fay v. Noia, 372 U.S. 391 (1963)).

1184. *Compare* Bator, *Finality*, *supra* note 1156, at 512 (Characterizing federal habeas review in civil court as a "waste of resources, strain in federal-state relations and damage to

judicial resources by relinquishing the very jurisdiction the court may have asserted in *NTEU v. United States* to defend its basic judicial resources.[1185] For the federal courts were recently on the verge of losing funding due to the 2019 Trump Border Wall shut down.[1186]

Bator infected the bench with a fatalism that swept out the legs of federal habeas corpus jurisdiction.[1187] In *Fay v. Noia*, Bator's article on finality was cited disapprovingly, but in proceeding cases it ultimately justified the overruling of *Fay* in piecemeal fashion.[1188] The

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the fabric of criminal law which bear so acutely on the decision whether we should superimpose collateral review on the Supreme Court's direct supervisory jurisdiction."), *and* Bator, *The State*, *supra* note 1172, at 620 (Arguing that asserting federal jurisdiction over affirmative action cases "appears presumptively inefficient and wasteful—even unaesthetic—to carve up what seems like a single controversy between the state and its citizen, and to have two lawsuits, rather than one, devoted to its resolution."), *with* NTEU v. United States, Nos. 19–50, 19–51, 19–62, 2019 U.S. Dist. LEXIS 9305, at *3 (D.D.C. 2019), *aff'd*, 444 F. Supp. 3d 108 (D.D.C. 2020). Bator's fatalism was preempted by the founder that breathed life into the American Revolution, James Otis. *See* OTIS, *supra* note 18, at 142 ("Neither the riches of Jamaica, nor the luxury of a metropolis, should ever have weight enough to break the balance of truth and justice.").

1185. Bator, *The State*, *supra* note 1172, at 620 (arguing for the expansion of political question doctrine to destroy federal jurisdiction, "it is obvious that especially sensitive political nerve are likely to be touched if federal judges are free to enjoin—or to declare unconstitutional—state court enforcement proceedings on the basis of claims which could be adjudicated in those proceedings"). *See* NTEU v. United States, Nos. 19–50, 19–51, 19–62, 2019 U.S. Dist. LEXIS 9305, at *3 (D.D.C. 2019), *aff'd*, 444 F. Supp. 3d 108 (D.D.C. 2020) (characterizing the necessity of keeping the courthouse lights on and the use of unpaid labor in essential positions in the federal government including courthouses as a nonjusticiable political question).

1186. NTEU v. United States, Nos. 19–50, 19–51, 19–62, 2019 U.S. Dist. LEXIS 9305, at *3 (D.D.C. 2019), *aff'd*, 444 F. Supp. 3d 108 (D.D.C. 2020) (A District Court denied jurisdiction to review claims that certain employees were being forced to work without pay in violation of the Thirteenth Amendment saying that the president can do whatever he wants without any consequences. It was extremely ironic for the Court to state, "But I want and need to make something very clear: the Judiciary is not just another source of leverage to be tapped in the ongoing internal squabble between the political branches. We are an independent, co-equal branch of government, and whether or not we can afford to keep our lights on, our oath is to the Constitution and the faithful application of the law. In the final analysis, the shutdown is a political problem. It does NOT, and can NOT, change this Court's limited role. Of that I am very certain." The failure of the court to act here is also a political act especially if the court's failure to assert jurisdiction helped the political branches undermine the court's power to stop political squabbles from ending the independent judiciary.).

1187. Coleman v. Thompson, 501 U.S. 722, 724 (1991) (citing McCleskey v. Zant, 499 U.S. 467, 491[–92] (1991) (quoting Bator, *Finality*, *supra* note 1156, at 452–53)) (abrogating Fay v. Noia, 372 U.S. 391 (1963)). *See Ex parte* Young, 209 U.S. 123, 150–51 (1908) (abrogating Hans v. Louisiana, 134 U.S. 1 (1890); *In re* Ayers, 123 U.S. 443 (1887)) (citing Osborn v. U.S. Bank, 22 U.S. 738, 846, 857 (1824); Governor of Ga. v. Madrazo, 26 U.S. 110, 122–23 (1828)).

1188. *Fay*, 372 U.S., at 421–22 n.30 (noting that Bator's advocacy for the finality of state court proceedings was a departure from the norm) (citing Bator, *Finality*, *supra* note 1156, at 450); *id.* at 449 n.1 (Harlan, J., dissenting) (citing Bator, *Finality*, *supra* note 1156, at 441).

oxymoron of Bator's defense of efficiency was that it attacked the habeas jurisdiction that made American national railroads, highways, postal service, telephone and cable networks, and other efficiency enhancing services possible.[1189]

Judge Robert Bork paralleled Bator's irony in his acclaimed book *The Antitrust Paradox*, writing that predatory pricing was so beneficial to consumer welfare and so implausible a basis for a monopoly, that it should not be reviewed by federal courts.[1190] This idea, which now contradicts the obvious realities beheld in Lina Khan's note *Amazon's Antitrust Paradox*, was adopted as a rule in *Matsushita v. Zenith Radio Corp.*[1191] It was then repurposed as the plausibility standard for dismissal in *Twombly* and *Iqbal*.[1192]

The *Iqbal/Twombly* plausibility standard is a pretended law crafted out of reversed *Conley* dicta; it is an inference on an inference, a dream upon a dream.[1193] *Iqbal* and *Twombly* are perhaps the worst departures from *Dr. Foster's Case* and *stare decisis* made by the U.S. Supreme Court to date.[1194] This fact is demonstrated by the frayed precedent of Rule 8 cases left behind, including *Dioguardi v. Durning* and pre-rules cases like *Maty v. Grasselli Chemical Co.*; all of which remain good law.[1195]

1189. *Young*, 209 U.S. at 150–51. *See* Green v. Mansour, 474 U.S. 64, 68 (1985) ("*Ex parte Young* gives life to the Supremacy Clause.").

1190. Khan, *supra* note 1155, at 728 ("Citing to Bork's *The Antitrust Paradox*, the Court concluded that predatory pricing schemes were implausible and therefore could not justify a reasonable assumption in favor of Zenith.") (citing Matsushita v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (quoting BORK, THE ANTITRUST, *supra* note 1136, at 145)).

1191. *Id.*

1192. *Matsushita*, 475 U.S., at 589 (quoting BORK, THE ANTITRUST, *supra* note 1136, at 145), *aff'd and extended in* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560–61 (2007), *aff'd and extended in* Ashcroft v. Iqbal, 556 U.S. 662, 696 (2009).

1193. *Twombly*, 550 U.S., at 562–63; *Iqbal*, 556 U.S., at 679.

1194. *Twombly*, 550 U.S., at 563; *Iqbal*, 556 U.S., at 679. *See* FED. R. CIV. P. 2, 8.

1195. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (citing FED. R. CIV. P. 8); Maty v. Grasselli Chem. Co., 303 U.S. 197, 200 (1938) ("Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end."). *See* Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., 108 F.2d 302, 306 (8th Cir. 1940) ("Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.") (quoting Myers v. Bethlehem Corp., 303 U.S. 41, 51 (1938)); Continental Collieries v. Shober, 130 F.2d 631, 635 (3d Cir. 1942) (quoting *Leimer*, 108 F.2d, at 305–06)); Sparks v. England, 113 F.2d 579, 581–82 (1940) ("This Court has consistently disapproved of the practice of terminating litigation, believed to be without merit, by the dismissal of complaints for informality or insufficiency of statement. If it is conceivable that, a plaintiff can, upon a trial, establish a case which would entitle him to the relieved prayed for a motion to dismiss for insufficiency of statement ought not to be granted.") (citing *Leimer*, 108 F.2d, at 305); Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865, 869 (4th Cir. 1941) (citing Karl Kiefer Mach. Co. v. U. S. Bottlers Mach.

The Court also managed to decide *Twombly* according to Borkian rationalism right before it was revealed to be almost certainly wrongheaded.[1196] The predation of wide swathes of businesses that Judge Bork argued implausible by companies such as Amazon, Google, and Facebook, are now painfully obvious.[1197] In the struggle over the plausibility standard between the young Ms. Lina Khan and the dead hand control of Robert Bork, the courts should declare Ms. Khan the winner and overrule *Matsushita* and *Twombly*.[1198]

For as Coke declared in his *Institutes*, violations of the public trust that were protected and even required by the qualified immunities accompanied by the letters patent of the crown were punishable at common law.[1199] The crown as representative of the English State could not resist this punishment or shield any other person from it.[1200] For the basic premise of antitrust law is that the people are sovereign

Co., 113 F.2d 356, 357 (7th Cir. 1940). *See also* Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515 (2002) ("Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint."—Deciding whether a factual allegation is plausible is the same as determining the likelihood that it will be shown to be true at trial, so it is a departure from the ordinary standard that all factual allegations should be taken as true. Yet, these cases are still good law—untouched and disregarded by *Twombly* and *Iqbal*.) (citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993)).

1196. Examples of the threat of Antitrust principles posed by Amazon that were declared implausible by the *Twombly* Court are no longer hard to find. Benny Evangelista, *How 'Amazon factor' killed retailers like Borders, Circuit City*, SF GATE (July 13, 2015, 11:20 AM), https://www.sfgate.com/business/article/How-Amazon-factor-killed-retailers-like-6378619.php (Borders went out of business in 2011, and Circuit City went out of business in 2008—this article was written before Toys 'R Us went out of business—*Twombly* was decided in 2007); Alina Selyukh, *Game Over For Toys R Us: Chain Going Out Of Business*, NPR (Mar. 14, 2018, 6:17 PM), https://news.wbfo.org/post/game-over-toys-r-us-chain-going-out-business; Mary Hanbury, *Sears, once the largest retailer in the world, has narrowly avoided liquidation. Here's how its downfall played out.*, BUSINESS INSIDER (Feb. 7, 2019, 5:31 PM), https://www.businessinsider.nl/sears-bankruptcy-reports-downfall-photos-2018-10/?international=true&r=us. *See* Khan, *supra* note 1155, at 716; David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html; *Dioguardi*, 139 F.2d, at 775 (According to the simple fact that online market players like Amazon are laying waste to old market fixtures, it may also be said of *Twombly*, "here is another instance of judicial haste which in the long run makes waste.").

1197. Khan, *supra* note 1155, at 762.

1198. *Id.* at 728; Streitfeld, *supra* note 1196. *Cf.* KAHNEMAN, *supra* note 1164, at 377–78, 381.

1199. 3 EDWARD COKE, INSTITUTES *181–83.

1200. *Id.*; JOHN MILTON, A DEFENSE OF THE PEOPLE OF ENGLAND 194–95 (Joseph Washington trans., 1692) [hereinafter MILTON, A DEFENSE].

and that each individual holds an equal share of the state's right to control public property.[1201]

Antitrust common law vindicates the equal sovereignty of each person individually, which is a fundamental ingredient in the United States form of government.[1202] Equal sovereignty is the "*vis vitae* of power" in the United States, i.e., "the *vital* principle" according to James Wilson, which is implicated in any suit over the origins, ends, limitations, and powers arising from public trusts.[1203] The law of public trusts traces back to Carta Foresta, i.e., the Charter of the Forest in England, which was expanded in America to include what Carol Rose termed "inherently public property."[1204]

Accordingly, the Americans adopted Lord Coke's decision in *Dr. Bonham's Case* under bold new written constitutions as a matter of the U.S. social compact of July 4, 1776.[1205] The movement of creating a

1201. Chisholm v. Georgia, 2 U.S. 419, 455–56 (1793); Nevada v. Hall, 440 U.S. 410, 415 n.8 (1979) (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

1202. 3 EDWARD COKE, INSTITUTES *181–83 ("the monopolist that taketh away a mans trade, taketh away his life"); 1 WILSON, THE WORKS, *supra* note 113, at 13 ("In the United States the doors of publick honours and publick offices are, on the broad principles of equal liberty, thrown open to all."). *See* Carol Rose, *supra* note 244, at 714; McCulloch v. Maryland, 17 U.S. 316, 317 (1819). *Cf. Chisholm*, 2 U.S., at 462 (Opinion of Wilson, J.) ("The Parliament form the great body politic of England! What, then, or where, are the People? Nothing! Nowhere!").

1203. Gibbons v. Ogden, 22 U.S. 1, 233–34 (1824) (Johnson, J., Concurring) ("The practice of our Government certainly has been, on many subjects, to occupy so much only of the field opened to them as they think the public interests require."); 1 WILSON, THE WORKS, *supra* note 113, at 17–19, 50 (naming the public trust "the *vital* principle"); OTIS, *supra* note 18, at 320–21 (arguing that the government is held in trust for the people, and that it is to the people that the government should be answerable for abuses of that trust, and arguing that the freedom of speech goes far in securing this end). *See* Martin v. Hunter's Lessee, 14 U.S. 304, 324–25 (1816) (asserting federal jurisdiction to secure the "public welfare" over "pride of opinion").

1204. Carol Rose, *supra* note 244, at 770 ("The great commerce clause cases of the Marshall court reflect the same view: a state cannot 'privatize' commerce for the benefit of its own citizens, but must leave commerce open to the entire nation."); *Carta de Foresta* [1217]; 2 EDWARD COKE, INSTITUTES *a proeme* ("a King cannot avoid his charter"). *Cf.* 3 EDWARD COKE, INSTITUTES *181–83 (It was according to these principles that Coke was able to cry out against the favorites of the crown: "Against these inventors and propounders of evil things, the holy ghost hath spoken, *inventores malorum, digni sunt morte* [inventors of evil things deserve death].") (quoting *Romans* 1:29–32); 2 WILSON, THE WORKS, *supra* note 113, at 6–7, 29–32 ("The very idea of a traditionary law, transmitted from generation to generation merely by custom and memory, may be considered as derived, in part at least, from the practice of the Druids, who considered it as unlawful to commit their religious instructions to writing." This common law was besieged and "disfigured" by the feudalism of the Normans.).

1205. OTIS, *supra* note 18, at 175 (citing Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)); SIMMONS, *supra* note 31, at 2–3 (quoting QUINCY, JR., *supra* note 32, at 540); William Wetmore, *Wetmore's Minutes of the Trial, Essex Inferior Court, Newburyport, Oct. 1773, Caesar v. Greenleaf*, *in* 2 ADAMS, LEGAL PAPERS, *supra* note 22, at 64–67 ("An act of

robust judicial branch in America, invested with the power to say what the law is and to declare unconstitutional laws void as a check in the balance of powers, began in the courthouses of Massachusetts Bay; where James Otis first made his stand.[1206] It was therefore recorded that, "The remedy adopted by the Colonies was to throw off the yoke of Parliament; to confer on the judiciary the power to declare unconstitutional statutes void; to declare general warrants unconstitutional in express terms; and thus to put an end here to general Writs of Assistance."[1207]

This remedy was later advocated in John Adams' *Thoughts on Government*, as a check in the separation of powers according to which the separation of powers was adopted in the first written constitutions of America.[1208] The power of the court to overrule unjust laws and to equitably roll back unjust executive interpretations of law, as an independent check in the separation of powers, was finally established by the U.S. Supreme Court in the iconic case *Marbury v. Madison*.[1209] This common law principle, taken for granted in the United States today, is the lynch pin in the U.S. separation of powers system.[1210]

Ever thereafter, general warrants were ruled unconstitutional for departing from the ordinary practice of investigating individuals for

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parliament against natural Equity, as to make one Judge in his own cause is void.") (quoting Day v. Savadge [1614] Hob. 85, 87 (Eng.)).

1206. SIMMONS, *supra* note 31, at 2–3 (quoting QUINCY, JR., *supra* note 32, at 540). *See* George P. Smith, II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 314 (1966).

1207. SIMMONS, *supra* note 31, at 2–3 (quoting QUINCY, JR., *supra* note 32, at 540).

1208. John Adams, *Thoughts on Government* 21 [1776]; THE FEDERALIST NO. 47 (James Madison) (drawing support from the constitutions of a number of the states including Virginia, Maryland, and Massachusetts requiring a separation of powers); VA. CONST. OF 1776, § 5 ("That the legislative and executive powers of the States should be separate and distinct from the judiciary. . . ."); *id.* at para. 24 ("The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time . . . ."); MASS. CONST. art. XXX; U.S. CONST. arts. I, II, III; MD. CONST. OF 1776 art. 6 ("That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other.").

1209. *See* Marbury v. Madison, 5 U.S. 137, 180 (1803).

1210. *Id.*; *Gibbons*, 22 U.S. 1 at 233–34 (1824) (Johnson, J., concurring) (noting the "*vis vitae* of power" to vindicate the public interest including by asserting jurisdiction to overrule unjust laws, interpreting the laws so that they are justly subservient to the public interest, saying, "[t]he practice of our Government certainly has been, on many subjects, to occupy so much only of the field opened to them as they think the public interests require."); Carol Rose, *supra* note 244, at 770. *See also* Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310–11, 319–20 (1795) (referring to the U.S. social compact as accepted by Pennsylvania to assert jurisdiction to declare a state law void for violating rights of property).

known crimes committed in the past.[1211] For the warrants inappropriately open the field of investigation to include any person, for any reason.[1212] General warrants also facilitate police harassment according to the prejudices of individual officers; a reality observed by the American Revolutionaries in their annual commemorations of the death of Crispus Attucks on King's Street.[1213]

Even in the context of ordinary criminal law, there is no method of issuing warrants that can successfully rein in the military or police if no one plans on charging a suspect.[1214] Beginning with *Mapp v. Ohio*, Fourth Amendment judicial restraint of reasonable searches and seizures depended upon the exclusionary rule alone.[1215] In *Mapp* and its progeny, the Supreme Court regrettably presumed the rational self-interest of the police to get convictions in court was so strong, that it may be treated as absolute.[1216]

1211. Laura K. Donohue, *Laura Donohue on NSA Surveillance*, C-SPAN (Dec. 22, 2015), https://www.c-span.org/video/?c4569637/laura-donohue-nsa-surveillance.

1212. *Id.*

1213. *Id.*; SIMMONS, *supra* note 31, at 18; John Hancock, *An Oration . . . to Commemorate the Bloody Tragedy of the Fifth of March 1770*, EDES & GILL, Mar. 5, 1774, at 11 ("Tell me this, you bloody butchers . . . . Do not the injured shades of *Maverick*, *Gray*, *Caldwell*, *Attucks* and *Carr* . . . fill even your dreams with terror?"); HEZEKIAH NILES, REPUBLICATION OF THE PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 15 (1876) (In 1770, an anonymous black man lit the spark that fanned into a revolutionary flame in Boston when he called an occupying British red coat a "Lobster," and was beaten for it. A common white man (who is thought to be Samuel Gray) stepped in and defended the unknown black man's honor by beating up the soldier. Then the British soldiers revenged their wounded pride by murdering Attucks, Gray, Caldwell, Carr, and Maverick in the street. This incident became known as the Boston Massacre.).

1214. Mapp v. Ohio, 367 U.S. 643, 659–60 (1961). *Cf.* San Francisco v. Sheehan, 135 S. Ct. 1765, 1773–75 (2015) (the police used deadly force and violence here without any probable cause for a crime—the exclusionary rule does not carry any weight in the police decision to nearly kill Sheehan); Tolan v. Cotton, 572 U.S. 650 (2014) (per curiam) (the police used deadly force and violence here without any probable cause for a crime—the exclusionary rule, once again, does not encourage the police to abstain in such a case); ABC News (Australia), *WARNING: Graphic violence – real-time events of Walter Scott shooting*, YOUTUBE (Apr. 9, 2015), https://www.youtube.com/watch?v=YM4tE0SQCZY.

1215. *Mapp*, 367 U.S. at 659–60; Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016) (interpreting the discovery of an outstanding warrant to be an intervening circumstance sufficient to cut off the exclusionary rule—the easy digitization and searchability of these outstanding warrants make them easily accessible).

1216. *Mapp*, 367 U.S. at 656 (affirming that the exclusionary rule was "'the only effectively available way'" to maintain police compliance with the Fourth Amendment). *See, e.g.*, Heien v. North Carolina, 135 S. Ct. 530, 537–39 (2014) (holding that the police may violate the written letter of the law as long as they do so reasonably, as a matter not only under the exclusionary rule, but as a matter of the Fourth Amendment itself).

Then, under the exclusionary rule in *Smith v. Maryland*, a massive, global, dragnet surveillance apparatus grew in darkness.[1217] Before Edward Snowden unveiled this spy machine, Americans did not know that the government was using *Smith* as a pretext to pull in massive amounts of user data.[1218] Nor did Americans know that government contractors, including Booz Allen Hamilton and AT&T, were making billions of dollars selling out the public to the government without their consent.[1219]

Interestingly, a previous opinion of Judge Robert Bork provides support in justifying a broader scope of judicial involvement in the protection of civil liberties following these disclosures.[1220] Even Robert Bork recognized the need for judicial expansion of constitutional rights to rein in police abuses during his tenure as a judge on the Court of Appeals for the D.C. Circuit.[1221] In fact, then Judge Ruth Bader Gins-

1217. Smith v. Maryland, 442 U.S. 735, 745–46 (1979) (finding that a telephone user has no reasonable expectation of privacy from a pen register, and therefore that it is not a "search" under the Fourth Amendment for exclusionary rule purposes).

1218. CITIZENFOUR (Praxis Films Nov. 28, 2014). *See In re* Application of the FBI for an Ord. Requiring the Prod. of Tangible Things from [Redacted], No. 13-109, 2013 WL 5741573, at *2 (FISA Ct. 2013) ("production of telephone service provider metadata is squarely controlled by the U.S. Supreme Court decision *Smith v. Maryland*").

1219. A GOOD AMERICAN (El Ride Productions Feb. 3, 2017) (we knew following the 9/11 attacks that the U.S. Government was developing technology for spying called Thin Thread—we did not know that the Government would contract this work to companies like Booz Allen and AT&T); EUR. PARL. DOC. (A5–0264/2001) 147 (2001) ("No effective public control mechanism of secret services and their undemocratic practices exists globally. It is in the nature of secret services that they cannot be controlled. They must therefore be abolished. . . . Every society must make a fundamental decision whether or not to live under permanent control."); Lesley Stahl, *CEO of Israeli Spyware-Maker NSO on Fighting Terror, Khashoggi Murder, and Saudi Arabia*, CBS NEWS (Mar. 24, 2019, 11:54 AM), https://www.cbsnews.com/news/interview-with-ceo-of-nso-group-israeli-spyware-maker-on-fighting-terror-khashoggi-murder-and-saudi-arabia-60-minutes/ (prior to this report we did not know how, or who, was providing the technology to hack connected devices—the spyware is called Pegasus—our tax dollars go to support this kind of controversial technology linked to the death of Jamal Khashoggi and working around the U.S. Judiciary in San Bernardino, California).

1220. Ollman v. Evans, 750 F.2d 970, 993–95 (D.C. Cir. 1984) (Bork, J., concurring) ("[U]nless we continue to develop doctrine to fit first amendment concerns, we are remitted to old categories which, applied woodenly, do not address modern problems. . . . Thus, we have a judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment. . . . Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next.").

1221. *Id.* at 996 (Bork, J., concurring) ("But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? Why is it different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interest motor carriage, or the first

burg concurred with Judge Bork in this opinion that would foreshadow the *Kyllo* rule,

> The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy. The commerce power was established by men who did not foresee the scope and intricate interdependence of today's economic activities. But that does not make it wrong for judges to forbid states the power to impose burdensome regulations on the interstate movement of trailer trucks. The first amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting.[1222]

Here Judge Bork clearly applied the idea of a living constitution to a question of constitutional law.[1223] Thus, Bork advocated in *Ollman* that the court ought to apply the original intent, i.e., the "first principles," of the Commerce Clause, First Amendment, and Fourth Amendment to the present problems of the day.[1224] This perspective, if reaffirmed today, would require the Court to update the judicial opinions of the bench, especially regarding its exclusionary rule precedent.[1225]

The prevailing attitude of telecom companies regarding the public interest took central stage in the context of the ongoing crisis of California wildfires.[1226] As California's firemen were attempting to use cell phones to access real time data, Verizon violated net neutrality

amendment to encompass the electronic media? I do not believe there is a difference. To say that such matters must be left to the legislature is to say that changes in circumstances must be permitted to render constitutional guarantees meaningless.").

1222. *Id.* at 995–96 (Bork, J., concurring). Though Scalia dissented from this evolving idea of the provisions of the constitution in *Ollman,* he eventually adopted it, albeit impliedly, in *Kyllo* in regard to the Fourth Amendment on the U.S. Supreme Court. Kyllo v. United States, 533 U.S. 27, 34–40 (2001) (opinion authored by Justice Scaila).

1223. *Ollman*, 750 F.2d at 993–96 (Bork, J., concurring). *But see* ROBERT BORK, SLOUCHING TOWARDS GOMORRAH 123–53 (1996) [hereinafter BORK, SLOUCHING] (calling for censorship of all musicians saying, "Sooner or later censorship is going to have to be considered as popular culture continues plunging to ever more sickening lows.").

1224. *Ollman*, 750 F.2d at 993–96 (Bork, J., concurring).

1225. *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Brown v. Board of Education, 347 U.S. 483, 492–95 (1954)) ("We must never hesitate to apply old values to new circumstances, whether those circumstances are changes in technology or changes in the impact of traditional common law actions Sullivan was an instance of the Supreme Court doing precisely this, as *Brown v. Board of Education*, was more generally an example of the Court applying an old principle according to a new understanding of a social situation.").

1226. Brodkin, *supra* note 585; Stevens, *supra* note 1083.

principles, common carrier common law, and their own unlimited data contracts, by throttling the cell phone data access of the firemen.[1227] Thus, it is very unsurprising that Verizon and other telecom companies regularly sell their customer's private data to the government.[1228]

In light of recent events, it appears the exclusionary rule alone cannot possibly be effective to contain the executive branch within the bounds of the Fourth Amendment.[1229] Cases for equitable orders must now be entertained to dismantle unconstitutional executive programs.[1230] It can no longer be reasonably presumed, merely because the exclusionary rule is upheld in Court, that police and military investigations are adhering to the U.S. Constitution under *Kyllo v. United States*.[1231]

1227. Brodkin, *supra* note 585; Stevens, *supra* note 1083. *See* Schroeder, *Choosing*, *supra* note 485, at 50 (explaining the three basic principles of net neutrality).

1228. Kenneth Lipp, *AT&T is Spying on Americans for Profit*, DAILY BEAST (Oct. 25, 2016, 1:13 AM), https://www.thedailybeast.com/atandt-is-spying-on-americans-for-profit (describing the Hemisphere Project, which is a system AT&T uses to sell out its customers to state and local police authorities and perhaps other private entities); Ryan Gallagher & Henrik Moltke, *The Wiretap Rooms: The NSA's Hidden Spy Hubs in Eight U.S. Cities*, THE INTERCEPT (June 25, 2018, 8:00 AM), https://theintercept.com/2018/06/25/att-internet-nsa-spy-hubs/ ("The NSA considers AT&T to be one of its most trusted partners and has lauded the company's 'extreme willingness to help.' It is a collaboration that dates back decades."). *See also* Kim Zetter, *Yahoo Publishes National Security Letters After FBI Drops Gag Orders*, WIRED (June 1, 2016, 4:41 PM), https://www.wired.com/2016/06/yahoo-publishes-national-security-letters-fbi-drops-gag-orders/ (NSLs usually come with a payoff as well). *Cf.* Kashmir Hill, *Lavabit's Ladar Levison: 'If You Knew What I Know About Email, You Might Not Use It'*, FORBES (Aug. 9, 2013, 5:35 PM), https://www.forbes.com/sites/kashmirhill/2013/08/09/lavabits-ladar-levison-if-you-knew-what-i-know-about-email-you-might-not-use-it/?sh=196b9ea4648a.

1229. *Snowden Archive – The SIDtoday Files*, THE INTERCEPT, https://theintercept.com/snowden-sidtoday/ (last visited Jan. 8, 2019) [hereinafter *Snowden Archive*]; Feinstein, *Floor Speech*, *supra* note 621; Exec. Order No. 13,841, 50 Fed. Reg. 29,435 (June 20, 2018); Executive Grant of Clemency for Joe Arpaio (Aug. 25, 2017).

1230. *See* Melendres v. Arpaio, 989 F. Supp. 2d 822, 910–12 (D. Ariz. 2016) (declaring Sherriff Arpaio's concentration camp for immigrants unconstitutional); Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018) (ordering that separated children be reunited with their parents). United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072, at *1–3 (2017) (the acceptance of a pardon is also acceptance of guilt). *See also* LULAC v. Wheeler, 899 F.3d 814, 817 (9th Cir. 2018), *vacated on reh'g en banc*, 914 F.3d 1189 (9th Cir. 2019) ("If Congress's statutory mandates are to mean anything, the time has come to put a stop to this patent evasion."); LULAC v. Regan, 996 F.3d 673, 677 (9th Cir. 2021) (agreeing with the rationale for the 2018 order).

1231. Staks Studios, *"I Can't Breathe" – Eric Garner Dies After NYPD Chokehold (Full Video Compilation)*, YOUTUBE (Dec. 3, 2014), https://www.youtube.com/watch?v=OWoZ4Mj9028; Utah v. Strieff, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting) ("no one can breathe in this atmosphere"); Mapp v. Ohio, 367 U.S. 643, 659–60 (1961). *But see* Heien v. North Carolina, 135 S. Ct. 530, 537–39 (2014) (finding that unreasonable searches and seizures are constitutional as long as they are a reasonable mistake—whatever that means). *Cf. Snowden Archive*, *supra* note 1229; Feinstein, *Floor Speech*,

The mass suspicionless and warrantless surveillance of U.S. citizens that was only yesterday covered up, is now common knowledge; abuses such as the one overruled in *Kyllo* can no longer be reasonably characterized as exceptions.[1232] Whatever deterrence the exclusionary rule was supposed to accomplish, it has unequivocally failed.[1233] Americans are surrounded by rampant, undeniable Fourth Amendment violations and abuses that demand equitable action by the Supreme Court far more robust than mere exclusion.[1234]

The failure of the exclusionary rule was revealed in 2002, the year after *Kyllo* was decided, when the Foreign Intelligence Surveillance Court ("FISC") broke its silence, after twenty-four years of operation in near-absolute secrecy, to respond to the 2002 FISA

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supra note 621; Exec. Order No. 13,841, 50 Fed. Reg. at 29,435; *Executive Grant of Clemency for Joe Arpaio* (Aug. 25, 2017).

1232. Thomas Brewster, *Cartapping: How Feds Have Spied On Connected Cars For 15 Years*, FORBES (Jan. 15, 2017, 1:10 PM), https://www.forbes.com/sites/thomasbrewster/2017/01/15/police-spying-on-car-conversations-location-siriusxm-gm-chevrolet-toyota-privacy/?sh=438aa5c32ef8; Erin Biba, *How connected car tech is eroding personal privacy*, BBC (Aug. 9, 2016), http://www.bbc.com/autos/story/20160809-your-car-is-not-your-friend ("just like your mobile phone, which has been spying on you for years, your car is not your friend"). The government ordinarily lies to the court in order to preserve its use of technology that violates *Kyllo* from judicial challenge. Cale Guthrie Weissman, *How an obsessive recluse blew the lid off the secret technology authorities use to spy on people's cellphones*, BUSINESS INSIDER (June 19, 2015, 5:04 PM), https://www.businessinsider.com/how-daniel-rigmaiden-discovered-stingray-spying-technology-2015-6?utm_source=reddit.com (telling the story of Daniel Rigmaiden). The result is a lot of judicial beating around the bush, and a failure of the court to create rules to deal with what is really going on. *See, e.g.,* United States v. Jones, 565 U.S. 400, 414–15 (2012) (Sotomayor, J., concurring) ("Nonetheless, as Justice Alito notes, physical intrusion is now unnecessary to many forms of surveillance. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones."); *id.* at 429–30 (Alito, J., concurring) ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly, and therefore rarely undertaken. The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance. Only an investigation of unusual importance could have justified such an expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap."); Utah v. Strieff, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting) ("We must not pretend that the countless people who are routinely targeted by police are 'isolated.'").

1233. *Mapp*, 367 U.S. at 656; *In re* Application of the FBI for an Ord. Requiring the Prod. of Tangible Things from [Redacted], No. 13-109, 2013 WL 5741573, at *2 (FISA Ct. 2013) ("The production of telephone service provider metadata is squarely controlled by the U.S. Supreme Court decision *Smith v. Maryland*"—using exclusionary rule case law to justify, not deter, unconstitutional government searches and seizures); United States v. Moalin, 973 F.3d 977, 1000 (9th Cir. 2020).

1234. CNN, *Combined videos show fatal Castile shooting*, YOUTUBE (June 21, 2017), https://www.youtube.com/watch?v=85Y_yOm9IhA; *Snowden Archive*, *supra* note 1229.

Amendments.[1235] FISC revealed that the wall between international and domestic FBI enforcement had broken down, and thus ordered that the wall be rebuilt.[1236] Not long after, however, FISC abrogated its first public opinion and reversed its position.[1237]

The very existence of FISC is a violation of the separation of powers, for it is the chief of American Star Chambers.[1238] It is *only* by FISC's decision to break its silence that Americans even know it exists.[1239] It is also only by FISC's decision to publish an opinion that Americans know that a fairly innocuous amendment to FISA allowed the FBI to treat U.S. citizens as foreign enemies by investigating domestic crime in the same fashion as foreign war crimes.[1240]

There is nothing in the U.S. Constitution that allows Congress to create an Article I FISC to work around the rule in *Kyllo*.[1241] Nor is the FISC beholden to *Crowell v. Benson*, or any of the foundations of administrative law that allow adjudicative agencies to exist; and it is therefore presumptively unconstitutional.[1242] It is unconstitutional on its face because it embodies a secret convergence of judicial, executive, and legislative powers that is totally prohibited by the U.S. Constitution.[1243]

1235. *In re* All Matters Submitted to the Foreign Intel. Surveillance Ct., 218 F. Supp. 2d 611, 624–25 (FISA Ct. 2002).

1236. *Id.*

1237. *In re* Sealed Case, 310 F.3d 717, 733 (FISA Ct. Rev. 2002). *See also In re* Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted], No. 13-109, 2013 WL 5741573, at *17 (FISA Ct. 2013) (saying that the FISA Court minimization procedure "comports well with the Fourth Amendment").

1238. Kyllo v. United States, 533 U.S. 27, 34–40 (2001); Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 524–25 (2012) [hereinafter Donohue, *Technological*].

1239. *In re All Matters Submitted to the Foreign Intel. Surveillance Ct.*, 218 F. Supp. 2d at 624–25.

1240. *See* Donohue, *Technological*, *supra* note 1238, at 524–25 (recounting all the drama); *In re* All Matters Submitted to the Foreign Intel Surveillance Ct., 218 F. Supp. 2d 611, 624–25 (FISA Ct. 2002); *Kyllo*, 533 U.S. at 34–40 (the FISC grants licenses, not official Article III warrants, to use technology not in general public use to spy on U.S. citizens in their homes—thus its powers and its authorities are all *presumptively* unconstitutional under *Kyllo*.).

1241. U.S. CONST. arts. I, II, III.

1242. Crowell v. Benson, 285 U.S. 22, 58–65 (1932). *See* Donohue, *National Security*, *supra* note 31. *Cf.* Stern v. Marshall, 564 U.S. 462, 504 (2011) (citing generally Crowell v. Benson, 285 U.S. 22 (1932)); *id.* at 506 (Breyer, J., dissenting) (noting that *Crowell* was a watershed opinion, and fearing the majority underestimated it).

1243. 50 U.S.C. §§ 1801–1813; USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272 (2001); *In re All Matters Submitted to the Foreign Intel. Surveillance Ct.*, 218 F. Supp. 2d at 624–25; U.S. CONST. art. III (vesting the Congress with the power to delegate the Article III power to "one Supreme Court"—not to multiple conflicting federal jurisdictions).

The Mueller Report was a product of secret FISC orders and warrants.[1244] By design, the Report appeared to cover for President Trump's bad behavior in two fundamental ways:[1245] (1) it did not investigate for the treason of President Donald Trump, his campaign personnel, or his family;[1246] and (2) it failed to hold that an act of presidential obstruction of justice is an abandonment of Article II duties to be the chief administrator of justice, and is *per se* illegitimate and impeachable presidential behavior.[1247]

The Mueller Report did not ask or answer the question of whether President Trump was legitimately elected; his legitimacy was presumed by feudal law.[1248] By design, feudalism is poison and will

1244. 1 MUELLER, *supra* note 362, at 1–3, 13. *See* OFFICE OF INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION xiii (2019).

1245. *Cf.* Jeffrey Toobin, *Why the Mueller Investigation Failed*, NEW YORKER (June 29, 2020), https://www.newyorker.com/magazine/2020/07/06/why-the-mueller-investigation-failed ("Mueller did not use the F.B.I. information as a catalyst for a deeper examination of Trump's history and personal finances. Nor did he demand to see Trump's taxes, or examine the roots of his special affinity for Putin's Russia. Most important, Mueller declined to issue a grand-jury subpoena for Trump's testimony, and excluded from his report a conclusion that Trump had committed crimes. These two decisions are the most revealing, and defining, failures of Mueller's tenure as a special counsel.").

1246. 1 MUELLER, *supra* note 362, at 2 ("the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities," and implicit exhonoration).

1247. 2 MUELLER, *supra* note 362, at 159–81 (citing Nixon v. Fitzgerald, 457 U.S. 731, at 752–53 n.32 (1982)) (refusing to argue that presidential obstruction of justice is an abandonment of the President's Article II duties, an abdication of his office, and an implicit request for impeachment—adopting *Nixon v. Fitzgerald's* dicta likely proffered by the president's counsel that executive immunity should be generally granted wherever an investigation would "hinder his ability to perform his Article II duties," impliedly adopting the view that stopping the President from obstructing the government could cause a "chilling effect" on the President's ability to carry out his Article II duties to administer the government.).

1248. 2 MUELLER, *supra* note 362, at 159–81 (citing *Nixon v. Fitzgerald*, 457 U.S., at 752–53 n.32) (distinguishing *Youngstown Sheet & Tube Co.* from the feudal balancing test in the *Fitzgerald* cases saying, "Only in a few instances has the Court applied a different framework."); Nixon v. Adm'r Gen. Servs., 433 U.S. 425, 443–45, 451–55 (1977) (the proper question in this case was not whether Nixon had the power, but whether he had the right to block congressional production and archival of the Nixon Tapes). *See* Nixon v. Fitzgerald, 457 U.S. at 766 (White, J., dissenting) ("Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity."); *Nixon v. Adm'r Gen. Servs.*, 433 U.S. at 443 ("Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.*") (emphasis added); *id.* at 516 n.12 (Burger, C.J., dissenting) (arguing that *United States v. Nixon* could not be distinguished, that circum-

obstruct any future attempts to secure the nation from foreign attacks upon our elections, past or future.[1249] The Mueller Report was written under the influence of the feudal law expressed in *The Fitzgerald Cases* that the president can do no wrong, and thus in so far as it was influenced by those cases it may be considered an unqualified endorsement of those in power.[1250]

The holes in the Mueller Report became conspicuous when a whistleblower outed the president's solicitation of Ukraine for dirt on Joe Biden to the House as an impeachable crime.[1251] The Mueller Report did not consider the supposed solicitation of Russia for dirt on Hillary Clinton as a viable "underlying crime related to Russian election interference."[1252] The absolute and qualified immunity set forth in

stances were not sufficiently different in this case, and that it should be applied in full). *Cf.* OTIS, *supra* note 18, at 166 ("'the question here is not about *power*, but *right*'") (quoting Jeremiah Dummer, *A Defence of the New-England Charters* 43 [1715].

1249. Schroeder, *The Body*, *supra* note 121, at 18 (noting the distinct relationship between the *Nixon v. Fitzgerald* and *Harlow v. Fitzgerald* and the English feudal case known as *The Bankers Case*, in which the well known phrase "the king can do no wrong" was established); Nixon v. Fitzgerald, 457 U.S. 731, 766–67 (1982) (White, J., dissenting) ("It is a reversion to the old notion that the King can do no wrong."); The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.) (stating the king can do no wrong), *distinguished and delegitimized by* Chisholm v. Georgia, 2 U.S. 419, 470 (1793) (Opinion of Jay, C.J.) (*The Bankers Case* is not valid law in the United States, nor is any sort of feudalism). *See* 1–2 MUELLER, *supra* note 362, *passim* (citing the qualified and absolute immunity theories of the *Fitzgerald Cases* to justify not fully investigating the president, while failing to defend the Report's limited nature, perhaps unintentionally allowing Trump's defenders to characterize it as a full exhoneration); Barr's "Principle Conclusions", *supra* note 355 ("In making this determination, we noted that the Special Counsel recognized that 'the evidence does not establish that the President was involved in an underlying crime related to Russian election interference,' and that, while not determinative, the absence of such evidence bears upon the President's intent with respect to obstruction.") (quoting 2 MUELLER, *supra* note 362, at 157).

1250. 1–2 MUELLER, *supra* note 362, *passim*; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (asserting that all "just powers come from the consent of the governed"). *Cf.* WINTER ON FIRE: UKRAINE'S FIGHT FOR FREEDOM (Netflix 2015).

1251. Steve Benen, *Why this Trump scandal sparked an impeachment push (and Mueller didn't)*, MADDOWBLOG MSNBC (Sept. 25, 2019, 7:42 AM), http://www.msnbc.com/rachel-maddow-show/why-trump-scandal-sparked-impeachment-push-and-mueller-didnt ("Trump Ukraine solicitation forces Pelosi's hand on impeachment"); *Read Trump's phone*, *supra* note 1048 (President Trump said "I would like you to do us a favor though . . ." "There's a lot of talk about Biden's son, that Biden stopped the prosecution and a lot of people want to find out about that so whatever you can do with the Attorney General would be great. Biden went around bragging that he stopped the prosecution so if you can look into it . . . . It sounds horrible to me." Then Zelenskyy promised that he, "will look into the situation, specifically to the company that you mentioned in this issue."); U.S. CONST. art. II, § 4 (defining impeachment as including "Treason, Bribery, or other high Crimes and Misdemeanors").

1252. 1 MUELLER, *supra* note 362, at 180 ("Schemes involving the solicitation or receipt of assistance from foreign sources raise difficult statutory and constitutional questions. . . . The Office ultimately concluded that, even if the principal legal questions were resolved favorably to the government, a prosecution would encounter difficulties proving that Cam-

The Fitzgerald Cases logically facilitated this brand of duplicity within the government to throw public focus off the legal violations of corrupt government officials.[1253]

In order to overcome the arbitrary, feudal measures used in the federal courts to dismiss all manner of public interest cases, Americans should begin by tracing the roots of U.S. antitrust law.[1254] Antitrust law has a dual basis; it grows concurrently from the common law and statutory jurisdiction.[1255] It cleaves between the Commerce Clause, the Patent & Copyright Clause, and the Privileges and Immunities Clause, as it throws its root deep into the rights "claimed by Americans from the sacred sanctions of compact."[1256]

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paign officials or individuals connected to the Campaign willfully violated the law."); 2 MUELLER, *supra* note 362, at 7.

1253. Schroeder, *The Body*, *supra* note 121, at 18. *Compare* The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.) (add explanatory parenthetical explaining what the author is comparing here), *with* Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Opinion of Wilson, J.) (disagreeing with *The Bankers Case*); *id.*at 451 (Opinion of Blair, J.) (disagreeing with *The Bankers Case*); *id.* at 468 (Opinion of Cushing, J.) (disagreeing with *The Bankers Case*); *id.* at 475–78 (Opinion of Jay, C.J.) (disagreeing with *The Bankers Case*); *id.* at 437–45 (Iredell, J., dissenting) (Iredell vigorously defended *The Bankers Case*, but it was refuted by the other justices). Despite *Chisholm*'s overturning of the feudal law under *the Bankers Case*, this law was reasserted in the *Fitzgerald* Cases that the Mueller Report expressly relied upon in coming to its charging decision. 2 MUELLER, *supra* note 362, at 159–81 (citing Nixon v. Fitzgerald, 457 U.S. 731, 752–53 n.32 (1982)).

1254. Gibbons v. Ogden, 22 U.S. 1, 208–09 (1824). *See* United States v. E.C. Knight Co., 156 U.S. 1, 9–10 (1895) (citing 3 EDWARD COKE, INSTITUTES *181; Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942) (citing *Gibbons*, 22 U.S. at 210) (unleashing the Commerce Power from *Knight*'s limitations, such that it now applies to potentially every blade of grass); Standard Oil Co. v. United States, 221 U.S. 1, 51, 60 (1911) (quoting 3 EDWARD COKE, INSTITUTES *181); Carol Rose, *supra* note 244, at 770. *Cf.* Thurlow v. Commonwealth (*License Cases*), 46 U.S. 504, 602 (1847) (citing *Gibbons*, 22 U.S. at 199–200) ("In [*Gibbons*], a monopoly had been granted to the inventors of machinery propelled by steam which, when applied to vessels, forced them through the water. The law of monopoly of New York extended to the tidewaters, and for navigating these with two steamboats belonging to Gibbons, a bill was filed against him, and he was enjoined by the state courts of New York, and in his answer he relied on licenses granted under the [New York law] . . . for enrolling and licensing ships and vessels to be employed in the coasting trade, and for regulating the same. This was the sole defense. The Court first held that the power to regulate commerce included the power to regulate navigation also, as an incident to and part of commerce. . . . And then the state law is declared void as repugnant to the Constitution and laws of the United States.").

1255. *Knight*, 156 U.S. at 9–10 (citing 3 EDWARD COKE, INSTITUTES *181; Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942).

1256. 1 WARREN, *supra* note 35, at 136, 149; THE DECLARATION OF INDEPENDENCE paras. 2–3 (U.S. 1776); U.S. CONST. art. I, § 8, cl. 3, 8; *id.* art. IV, § 2, cl. 1. *See* 3 EDWARD COKE, INSTITUTES *181; OTIS, *supra* note 18, at 276 (calling for "the demolition of all monopolies great and small").

Federal antitrust jurisdiction exists to answer every sort of claim a monopolist might raise to justify prior restraint on trade, travel, and speech by ordinary American people.[1257] The seminal case, *Gibbons v. Ogden,* did not impliedly preempt state patent law, but it expounded a plenary power idea regarding the Commerce Clause to limit states or individuals engaged in interstate commerce.[1258] While *Gibbons'* plenary power ideology all but passed away in the Twentieth Century for its role in creating a chaotic system of conflicting state and federal plenary powers,[1259] federal grants of monopoly are still limited by the Patent & Copyright Clause, and state grants of monopoly are limited by the dormant Commerce Clause.[1260]

The room for states to continue granting monopolies under an intrastate commerce idea was shrunk in *Wickard v. Filburn*, which applied the Commerce Clause to every blade of grass.[1261] Even where a case does not trigger the dormant Commerce Clause, the Privileges and Immunities Clause still applies.[1262] Under the Privileges and Immunities Clause, and similar terms in State constitutions, attorneys

1257. United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–83 (6th Cir. 1898), *modified & aff'd*, 175 U.S. 211 (1899). *But see* BORK, THE ANTITRUST, *supra* note 1136, at 424 (arguing that the First Amendment favors monopolies because he did not understand that free speech requires a free and open forum or medium for speech to occur that might be destroyed by monopolists).

1258. *Gibbons*, 22 U.S. at 199–200 (showing how limiting the states can be done by reference to the Commerce Power, but it is unfortunate that the *Gibbons* Court named this power "plenary" when it is not—for a more accurate example of proper, non-plenary dormant Commerce Clause jurisprudence one must look to the 1940's, especially the case *Edwards v. California*). *See* Martin v. Hunter's Lessee, 14 U.S. 304, 355, 373–74 (1816) (interpreting the state's exclusive jurisdiction over these national matters as part of that realm of power that states "meant to put down forever" in order to "prevent dissention and collision, [because] each [state] surrendered those powers which might make them dangerous to each other").

1259. *See, e.g.,* Edwards v. California, 314 U.S. 160, 177 (1941) (rejecting the old plenary power ideology expressed in *New York v. Miln* in favor of a dormant commerce clause rationale). *Cf. Gibbons*, 22 U.S. at 199–200.

1260. U.S. CONST. art. I, § 8, cl. 3, 8; Patent Act of 1790, 1 Stat. 109; Copyright Act of 1790, 1 Stat. 124. *See* United States v. Am. Bell Telephone Co., 128 U.S. 315, 355, 357–58 (1888), *declined to extend in* Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1374 (2018).

1261. Wickard v. Filburn, 317 U.S. 111, 127 (1942) (Congress can regulate "a nurse crop of grass seedling"); *id.* at 121–22 (cutting off the Commerce Clause atrophy caused by the Taney Court in cases like the *License Cases* to support slavery, which caused *Knight* to stumble at first by interpreting its inherent antitrust jurisdiction too narrowly). *But see* Mozilla v. FCC, 940 F.3d 1, 98 (D.C. Cir. 2019) ("in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law").

1262. U.S. CONST. art. IV, § 2, cl. 1; United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221–23 (1984).

may raise the common law abolition of monopolies under *The Case of Monopolies*; as vindicated in Lord Coke's *Institutes*.[1263]

Constitutional grounds for maintaining the common law abolition of monopolies in America were expressly retained by the old Congress of 1774.[1264] The prior colonial grounds for maintaining common law jurisdiction to abolish monopolies was lifted into the Resolves of Virginia and Massachusetts, the Declaration of Independence, many of the original State constitutions, and the U.S. Constitution.[1265] The common law rationale for resisting monopolies was also expressly proclaimed by James Otis as a basis of the legal cause of Otis's oration in *Paxton's Case* against writs of assistance under the English Navigation Acts.[1266]

1263. U.S. CONST. art. IV, § 2, cl. 1; *United Bldg. & Constr. Trades Council*, 465 U.S. at 221–23; 3 EDWARD COKE, INSTITUTES *181–83 (a right at common law to restrict speech or trade of others cannot be raised when the common law abolishes and punishes such rights); Dyer's Case [1414] 2 Hen. V, f. 5, pl. 26 (Eng.); The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.) (determining that monopolies are void at common law).

1264. Wheaton v. Peters, 33 U.S. 591, 592 (1834) ("[i]t is presumed that the copyright recognized in the act of Congress and which was intended to be protected by its provisions was the property which an author has by the common law in his manuscript"); *id.* at 688 (Thompson, J., dissenting) ("The old Congress, in the year 1774, unanimously resolved, that the respective colonies are entitled to the common law of England.") (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 140).

1265. *See supra* note 61 (naming several of the resolves that claimed the rights of Englishmen in the colonies that became a context for understanding the rights addressed in the Declaration of Independence); THE DECLARATION OF INDEPENDENCE paras. 2–3 (U.S. 1776); *see also supra* note 63 (naming many of the constitutional provisions ratified around 1776 to secure the rights announced as the bases of American government in the Declaration). *Cf.* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 62, 70 (Telling of how in the past Massachusetts surrendered "the odious extent of the monopolies granted to them," which "infused new life into the colonies which sprung from it, by freeing them from all restraint and supervisions by a superior power, to which they might perhaps have been held accountable."); *id.* at § 475 (noting that the preamble's object of creating a "'more perfect union'" is meant to combat monopolies of trade); *id.* at §§ 962, 965 (Noting that taxation should be limited by trust "'to provide for the common defence and general welfare,'" to avoid its use as "a prerogative power to destroy competition, and secure a monopoly to the government!").

1266. OTIS, *supra* note 18, at 276 (advocating "the demolition of all monopolies great and small, and throwing open all the ports of the world to the colonists, under proper restrictions"); SIMMONS, *supra* note 31, at 21 (England's power to monopolize American resources was exactly the matter at hand in *Paxton's Case* and proceeding matters litigated by John Adams and others on behalf of the colonists and against the crown.). *See also* Letter from Joseph Reed to John Glover (Oct. 20, 1775) ("What do you think of a flag with a white ground, a tree in the middle, the motto 'Appeal to Heaven?' This is the flag of our floating batteries."); Letter from John Adams, Second President of the U.S., to Marquis De Castries, Marshal of France (Dec. 9, 1784) (Before the revolution, the colonies' white "pine trees were reserved to the crown," and there were "a number of families, whose whole occupation has been to cut, draw, and prepare, these kinds of trees, for the royal navy of England.").

If the federal courts firmly reassume this jurisdiction, copyright and patent misuse actions may be opened for review under antitrust principles, and unfair competition suits under trademark law (which perhaps should be called trademark misuse colloquially) may be expanded.[1267] The feet of internet companies may be held to the fire through misuse and unfair competition actions as bases of antitrust litigation under the writ of *trespass on the case*, or by an extension of fraud upon the public actions, or by an application of *Dr. Foster's Case* to IP law.[1268] State compacts may be established wherever the federal government attempts to deregulate federal antitrust provisions; for in the wake of the FCC repeal of net neutrality rules, the California Net Neutrality Act of 2018 still lives.[1269]

1267. Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917); Morton Salt Co. v. G.S. Suppiger, 314 U.S. 488 (1942); Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 976 (4th Cir. 1990); Smith v. Montoro, 648 F.2d 602, 603–04 (9th Cir. 1981) (the broad language of § 43(a) of the Lanham Act extends to "'any person'"—any limitations on this statute to matters of unfair competition are inferred into the statute by the court) (quoting 15 U.S.C. 1125(a)). *See also* Ilan Charnelle, *The Justification and Scope of the Copyright Misuse Doctrine and Its Independence of the Antitrust Laws*, 9 UCLA ENT. L. REV. 167, 188–89 (2002) (showing how Copyright misuse is broader than the principles of the Sherman and Clayton Acts and other positive antitrust laws); Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L. J. 865, 927 (2000) ("Software exposes discrete gaps in the Copyright Act and creates a need to coordinate copyright law with patent and antitrust law.").

1268. Khan, *supra* note 1155, at 772; Schroeder, *Choosing*, *supra* note 485, at 51 (reacting to Comcast's purchase of NBC and Universal—a purchase of billions of dollars of copyright portfolio); *id.* at 55 n.44 (noting that major copyright owning associations and internet service providers openly colluded to take down copyrighted content from the internet without going through the takedown measures required by the Digital Millennium Copyright Act); Schroeder, *Bringing*, *supra* note 1036, at 4–6 (noting the rise in popularity among most companies of claiming massive amounts of intangible value); *id.* at 70–71 (examining the problem of internet service providers owning copyright and using it to police the internet); 15 U.S.C. § 1125(a); *Motion Picture Patents Co.*, 243 U.S., at 502; *Ex parte* Young, 209 U.S. 123, 150 (1908) (abrogating Hans v. Louisiana, 134 U.S. 1 (1890); *In re* Ayers, 123 U.S. 443 (1887)). Trespass on the case can be invoked under Civil Rule 2 and James Madison's endorsement of England's use of it in *Millar* to recognize other common law copyright causes of action. FED. R. CIV. P. 2; Millar v. Taylor [1769] 4 Burr. 2303, 2305 (Eng.) (Millar's bill against Taylor was "a plea of trespass upon the case" in order to countenance a property right that was "not all at once known to the common law, or to the world . . . yet are now established to be such"); THE FEDERALIST NO. 43 (James Madison) (Implicitly endorsing the finding of a common law right through trespass on the case saying, "The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law."). *Cf.* Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MARYLAND L. REV. 140, 187 (2006). *But see* Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 668–69 (1999).

1269. Mozilla v. FCC, 940 F.3d 1, 65 (D.C. Cir. 2019); U.S. CONST. art. I, § 10, cl. 3 (Congress's consent is required for such compacts, but one may argue an implied consent in Congress's inaction and neglect.).

Antitrust Enforcement of the Separation of Powers

Antitrust law is a common law that shares its root and origin with Intellectual Property Law in England and America.[1270] Edward Coke, therefore, addressed the virtues of Parliament's Statute of Monopolies as a vindication of the common law.[1271] He wrote that the Statute of Monopolies conspicuously secured the preexisting rights of the English people by creating a statutory punishment of monopolists; who stole the livelihoods of the English working class saying,

> That monopolies are against the ancient and fundamental laws of the realm (as it is declared by this Act) and that the monopolist was in times past, and is much more now punishable, for obtaining and procuring of them, we will demonstrate it by reason, and provide it by authority. . . . This Act having declared all monopolies to be void by the common law, hath provided by this clause, that they shall be examined, heard, tried, and determined in the Courts of the Common law according to the Common law, and not at the Council Table, Star Chamber, Chancery, Exchequer chamber, or any other Court of like nature, but only according to the Common laws of this Realm, with words negative, and not otherwise: For such boldness the monopolists took, that often at the Council Table, Star-chamber, Chancery, and Exchequer chamber, petitions, informations and bills were preferred in the Star-Chamber, pretending a contempt for not obeying the commandments and clause of the said grants of monopolies and of the proclamations, concerning the same: for the preventing of which mischiefs this branch was added.[1272]

1270. 3 EDWARD COKE, INSTITUTES *181–83; Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.); Standard Oil Co. v. United States, 221 U.S. 1, 51 (1911) (analyzing the Sherman Act: "It is certain that those terms [i.e., regarding monopolies and contracts for restraint of trade], at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question."). *See also* United States v. E.C. Knight Co., 156 U.S. 1, 9 (1895) (noting that the root of U.S. antitrust jurisdiction traces back to English common law: "'It appeareth by the preamble of this act (as a judgment in Parliament) that all grants of monopolies are against the ancient and fundamentall laws of this Kingdome.'" (quoting 3 EDWARD COKE, INSTITUTES *181). However, the Court limited its determination, saying "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the states." *Id.* at 12. This limited view of the Commerce Power was expressly abrogated in *Wickard v. Filburn*, 317 U.S. 111, 122 (1942) (extending the Commerce Power, including the common law principle from the *Case of Monopolies*, to potentially *every blade of grass*, releasing antitrust common law from the limitations asserted in *Knight* saying, "Even while important opinions in this line of restrictive authority [i.e., *Knight*] were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*.").

1271. 3 EDWARD COKE, INSTITUTES *181–83.

1272. *Id.*

The control of antitrust law upon all forms and offices of government power to punish all those that seek to corrupt them were found in these words.[1273] The creation and enforcement of monopolies before the illegitimate Star Chamber and Council Table of the king did not make monopolies legal or just, but it made them ever the more punishable under the common law for violating the public trust.[1274] Therefore, Justice Jackson repeated Coke's vindication of the Rule of Law as a basis of the U.S. Separation of Powers in government by stating, "*The King ought not to be under any man, but he is under God and the Law*."[1275]

Antitrust common law is fundamental to the enforcement of the separation of powers, as expressed in the preamble of the U.S. Constitution, required by Article III, and recognized in "[t]he great commerce clause cases of the Marshall Court."[1276] The ultimate foundation of federal public interest jurisdiction, however, surpasses the U.S. Constitution.[1277] It lies, ultimately, in the most final ground of jurisdiction there is—the compact of 1776—embodied by the Declaration of Independence.[1278]

The Declaration of Independence defines the objects and ends of government the United States must accomplish in order to establish and maintain its legitimacy.[1279] A government in the United States that does not accomplish the objects and ends defined in the compact of July 4, 1776, is at risk of violent unrest and an *Appeal to Heaven*.[1280]

1273. *Id.*

1274. *Id.*

1275. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655, n.27 (1952) (Jackson, J., concurring) ("We follow the judicial tradition instituted on a memorable Sunday in 1612 when King James took offense at the independence of his judges and, in rage, declared: 'Then I am to be *under* the law—which it is treason to affirm.' Chief Justice Coke replied to his King: 'Thus, wrote Bracton, The King ought not to be under any man, but he is under God and the Law.'") (quoting 1 CAMPBELL, *supra* note 24, at 272).

1276. Carol Rose, *supra* note 244, at 770. *See, e.g.*, *Gibbons*, 22 U.S. at 208–09.

1277. *Gibbons*, 22 U.S., at 234 (Johnson, J., concurring) (attempting greater caution for asserting jurisdiction, but still admitting that the Court ordinarily asserts jurisdiction wherever it "think[s] the public interests require"); Calder v. Bull, 3 U.S. 386, 400 (1798) (Iredell, J., concurring).

1278. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (proclaiming it illegitimate to obstruct laws that are "wholesome and necessary for the public good").

1279. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

1280. *Id.*; 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 168 ("And where the body of the people, or any single man, is deprived of their right, or is under the exercise of a power without right, and have no appeal on earth, then they have a liberty to appeal to heaven, whenever they judge the cause of sufficient moment."); Jeremiah Dummer, *A Defence of the New-England Charters* 39, 43 [1715] ("some governors . . . have fallen victims on the spot, not to the fury of a faction or rabble, but to the resentment of the whole body of the people,

The goal of the separation of powers is the same as antitrust law; to break up a monopoly of power.[1281]

Indeed, one way of looking at the original Thirteen Colonies, and perhaps it is the most accurate way of looking at them, is as twelve for-profit corporations and one non-profit corporation.[1282] The first two English Colonies in the world were the Plymouth and Virginia Companies, both founded in 1606 as England's first joint-stock trading companies as well.[1283] Ever thereafter, the crown's charter power was used to incorporate new colonies, until in the American Revolution these former corporations were declared independent states.[1284]

This is why the first seminal case in the United States to vindicate popular sovereignty, *Chisholm v. Georgia*, was also the first seminal case to describe corporate law.[1285] The American Revolution

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rising as one man to revenge their wrongs" – "the question here is not about *power*, but *right*").

1281. In principle, the idea of the separation of powers is that none can have a monopoly on government power. THE FEDERALIST NO. 77 (Alexander Hamilton) (advocating for the separation of powers for the purpose of avoiding "a monopoly of all the principle employments of the government in a few families" that would lead "directly to aristocracy or oligarchy"); 2 WILSON, THE WORKS, *supra* note 113, at 443–44 ("The contracted and debasing spirit of monopoly has not been peculiar to commerce; it has raged, with equal violence, and with equal mischief, in law and politics.").

1282. BUTMAN & TARGETT, *supra* note 819, at 245–52. The only colony established with a charitable purpose was the Colony of Georgia, founded on the *no slavery principle*. *Georgia Charter of 1732*; Bubble Schemes, Colonies, Act 1740, 14 Geo. II, c. 37 (Eng.). *See James* Narron & David Skeie, *Crisis Chronicles: The Mississippi Bubble of 1720 and the European Debt Crisis*, LIBERTY STREET ECONOMICS: BLOG OF THE NY FED. RESERVE BANK (Jan. 10, 2014), https://libertystreeteconomics.newyorkfed.org/2014/01/crisis-chronicles-the-mississippi-bubble-of-1720-and-the-european-debt-crisis.html (last visited on Mar. 15, 2019). New York was a for-profit Dutch Company known as New Amsterdam, which the English Crown claimed in Breda as the seat of its Empire. Treaty of Breda, Eng.-Neth., July 31, 1667. Florida, however, was a Spanish Colony that sought to undermine the English economy and thus offered African American slaves their freedom in giving rise to a precursor to the Under Ground Railroad that ran South and gave rise to the first settlement of freed African slaves in America called Garcia Real de Santa Teresa de Mose. Jane Landers, *Spanish Sanctuary: Fugitives in Florida, 1687–1790*, 62 FLA. HIST. Q. 296, 311 (1984) ("Finally, on May 17, 1790, even the possibility of limited freedom was denied new fugitives, for the king bowed to pressure from the United States government and abandoned the century-old policy of sanctuary for fugitive slaves."); Jane Landers, *Garcia Real de Santa Teresa de Mose: A Free Black Town in Spanish Colonial Florida*, in 95 AM. HIST. REV. 9, 9–10 (1990).

1283. *Virginia Company of London*, ENCYCLOPEDIA VIRGINIA, https://encyclopediavirginia.org/entries/virginia-company-of-london/ (last visited Aug. 13, 2021); *Plymouth Company*, BRITANNICA, https://www.britannica.com/topic/Plymouth-Company (last visited Aug. 13, 2021); BUTMAN & TARGETT, *supra* note 819, at 245–52.

1284. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

1285. Chisholm v. Georgia, 2 U.S. 419, 462–63 (1793) (Wilson, J., opinion) (All the justices applied corporate law to the question of State sovereignty saying things like: "A state I cheerfully admit, is the noblest work of Man. But, Man himself, free and honest, is, I speak as to this world, the noblest work of God."); *id.* at 446 (Iredell, J., dissenting) ("There is no

was, therefore, fought against monopolies as a double-tax on the inhabitants of the thirteen original colonies.[1286] Following James Otis's lead, the founders looked to the strategies of Edward Coke for the abolition of unjust monopolies (i.e., those that serve private interests rather than the public interest) in America.[1287]

Federal courts have jurisdiction to secure their own legitimacy under the separation of powers by reviewing private property wherever it is used to make "public mischief."[1288] As James Madison wrote, "Perpetual monopolies of every sort, are forbidden not only by the genius of free Govts: but by the imperfection of human foresight. . . . [J]udges of the highest grade might perhaps be relied on for the control on these local legislatures" to limit state and local government grants of monopoly.[1289]

James Madison directly linked this antitrust power to "the noble merit of first unshackling the conscience from persecuting laws," later embodied by the First Amendment freedoms of religion and speech.[1290] Similarly, James Wilson engaged in free thought on the very existence of human ideas and remarked, "Monopoly and exclusive privilege are the bane of every thing—of science as well as of commerce."[1291] Wilson continued,

> The citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning public men, public bodies, and public measures. . . . The contracted and debasing spirit of monopoly[, however,] has not been peculiar to commerce; it has raged, with equal violence, and with equal mischief, in law and politics.[1292]

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other part of the common law, besides which I have considered, which can by any person be pretended in any manner to apply to this case but that which concerns corporations.").

1286. OTIS, *supra* note 18, at 276 (calling for "the demolition of all monopolies great and small"); *Chisholm*, 2 U.S. at 455 ("Let a state be considered as subordinate to the people. But let everything else be subordinate to the state. The latter part of this position is equally necessary with the former. For in the practice, and even at length, in the science of politics, there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means.").

1287. *Chisholm*, 2 U.S. at 455; *see also* Letter from Thomas Hutchinson to Richard Jackson (Sept. 12, 1765), *in* QUINCY, JR., *supra* note 32, at 441 ("Our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is *ipso facto* void.").

1288. *Gibbons*, 22 U.S., at 208–09. *See also* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 698 (1819) (Story, J., concurring).

1289. James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820.

1290. *Id.*

1291. 1 WILSON, THE WORKS, *supra* note 113, at 265.

1292. 2 WILSON, THE WORKS, *supra* note 113, at 443–44.

Here, James Wilson, like his colleague James Madison, confirmed that the spirit of monopoly must be resisted in government, as well as in commerce.[1293] The spirit of monopoly must be resisted so that First Amendment freedoms to speak, print, and worship, are vindicated throughout the land, for every individual.[1294] Wilson went even further, writing that aliens, as well as citizens, should enjoy these antitrust rights to life, freedoms of speech, and property protections from monopoly.[1295]

James Wilson based his revolutionary reversal of feudal law on a maxim created by Terence, an ancient African artist who wrote "*homo sum; Nihil humani alienum a me puto*" meaning "I am human, I consider nothing human alien to me."[1296] James Otis earlier explained to his fellows how this maxim "was attended with a thunder-clap of applause through the whole Roman theatre."[1297] The founder that most embodied these human rights and liberties, however, was Phillis Wheatley, who wrote:

> *The happier Terence all the choir inspir'd,*
> *His soul replenish'd, and his bosom fir'd;*
> *But say, ye Muses, why this partial grace,*
> *To one alone of Afric's sable race;*
> *From age to age transmitting thus his name*
> *With the finest glory in the rolls of fame?*[1298]

Both Wheatley and Terence were African slaves taken from their native home, and both mastered the cultures and languages of their oppressors.[1299] Thus, as surely as Terence engaged in the Ciceronian discourse to convince his adopted people of ancient Rome that "we are all of one Flesh and Blood,"[1300] Phillis Wheatley followed suit and es-

1293. *Id. See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 475 (noting that the preamble's object of creating a "'more perfect union'" is meant to combat monopolies of trade) (quoting U.S. CONST. pmbl.); *id.* at §§ 965–76 (noting that taxation should be limited by trust "'to provide for the common defence and general welfare,'" to avoid its use as "a prerogative power to destroy competition, and secure a monopoly to the government!") (quoting U.S. CONST. pmbl.).

1294. 2 WILSON, THE WORKS, *supra* note 113, at 443–44.

1295. *Id.*

1296. *Id.* (quoting Terence, *Heauton Timorumenos* I.1.25)

1297. JAMES OTIS, *supra* note 18, at 64 (quoting Terence, *Heauton Timorumenos* I.1.25).

1298. Phillis Wheatley, *To Mæcenas* [1773].

1299. *Id*; Zelaya, *supra* note 1099, at 129.

1300. OTIS, *supra* note 18, at 64 (paraphrazing Terence's ancient anti-slavery wisdom that was given through the medium of theatrical plays: "He who don't consider himself as related to every one of the human Race, is unworthy of the Name *Man*."); *see* Cicero, *De Amicitia* 7.24 (adopting wisdom he observed in ancient Roman plays about the nature of

tablished patent and copyright law upon her rights of life and became a voice of the American Revolution, and the primary inspiration of the Patent & Copyright Clause (*see* Part II, *supra*, *The Trial of Phillis Wheatley*).[1301]

The greatest defender of the Patent & Copyright Clause during the framing of the U.S. Constitution was the father of the Constitution himself, James Madison, who impliedly acknowledged that art. I, § 8, cl. 8 embodied the balance earlier struck by the Statute of Monopolies and Statute of Anne in England under the common law.[1302] Therefore, James Madison wrote of the public interest served by patents and copyrights—such that *all* patents and copyrights are held in public trust;

> Monopolies tho' in certain cases useful, ought to be granted with caution, and guarded with strictness agst. abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community, as a purchase of property which the owner might otherwise withhold from public use.[1303]

Accordingly, the antitrust jurisdiction to strike down restraints on alienation of chattels, of free commerce and trade, and any other creation of patents that make "public mischief" was robustly asserted in *Gibbons v. Ogden*.[1304] James Madison also acknowledged that certain corporations like the National Bank should be objectionable in court for their implication of a qualified monopoly.[1305] However, over this objection, the Supreme Court affirmed Congress's choice of means to charter a National Bank in *McCulloch v. Maryland*.[1306]

Thus, natural monopolies and charitable trusts were not meant to be abolished, but are reviewable under *cy pres* doctrine when they

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love and sacrifice); *id.* at 24.89, 25.93, 26.98 (citing and quoting Terence numerous times); Lencha Sanchez, *Dr. Maya Angelou – I Am Human*, YouTube (Mar. 4, 2013), https://www.youtube.com/watch?v=epodNjrVSsk (Dr. Angelou stated: "I would like everbody to think of a statement by Terence. The statement is: 'I am a human being, nothing human can be alien to me.'"). *Cf.* Kastely, *supra* note 186, at 7–9 (noting that the Ciceronian discourse is still happening today, and naming why it is so essential to the U.S. system of laws).

1301. Otis, *supra* note 18, at 64; Wheatley, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773.

1302. James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820; Letter from James Madison to Thomas Jefferson (Oct. 17, 1788); The Federalist No. 43 (James Madison).

1303. James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820.

1304. Gibbons v. Ogden, 22 U.S. 1, 208–09 (1824).

1305. James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820.

1306. McCulloch v. Maryland, 17 U.S. 316, 409–25 (1819).

violate the public interest upon which they were instituted.[1307] Accordingly, Americans established their state and local governments as natural corporations founded in public trust; such that antitrust law applies to them as well.[1308] This principle was vindicated in *Chisholm v. Georgia*, the very first U.S. Supreme Court case to oust feudal sovereignty in America.[1309]

The Eleventh Amendment limited the jurisdiction the federal courts may exercise over the states, making it impossible to reverse or overrule *Chisholm* at common law.[1310] The principles of *Chisholm* regarding the extent of federal review of corporate violations of the public trust, nevertheless, remain part of the backbone of antitrust law in America.[1311] The principles of *Chisholm* were preserved in *Ex parte Young*, unleashed in *Wickard v. Filburn*, reaffirmed in *Nevada v. Hall*, and nearly used to overrule Obamacare in *Sebelius*.[1312]

The federal court, therefore, has a robust and fundamental antitrust power to review, reform, break up, and even to abolish private property, where private property makes public mischief tending to-

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1307. James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820 ("Among such [objectional] monopolies, cannot be included the grants in perpetuity of public lands to individuals, the grants being made according to rules of impartiality, for a valuable consideration; and all lands being held equally by that tenure from the public, the vital principle of monopoly is lost."); Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 698 (1819) (Story, J., concurring); Perin v. Carey, 65 U.S. 465, 497, 506–08 (1860) ("All property held for public purposes is held as a charitable use, in the legal sense of the term charity.").

1308. U.S. CONST. arts. I, II, III. *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 348, 602.

1309. *Chisholm*, 2 U.S. at 462–63.

1310. *Ex parte* Young, 209 U.S. 123, 150 (1908) (the Court is literally powerless under the Eleventh Amendment to hear another case on the same facts as *Chisholm*, which is a requirement for overruling it at common law and establishing a new precedent. Unless the Eleventh Amendment is repealed, overruling *Chisholm* and creating a new *stare decisis* in its place is something that the Court can never do) (citing U.S. CONST. amend XI; *Chisholm*, 2 U.S., at 419).

1311. Nevada v. Hall, 440 U.S. 410, 419–20 (1979) (citing *Chisholm*, 2 U.S. at 419), *overruled on other grounds by* Franchise Tax Board of California v. Hyatt, 139 S.Ct. 1485, 1492 (2019).

1312. *Young*, 209 U.S. at 150; United States v. E.C. Knight Co., 156 U.S. 1, 9–12 (1895), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942) (expressly extending the Commerce Power including the common law principle from the *Case of Monopolies* to potentially *every blade of grass*) (citing Gibbons v. Ogden, 22 U.S. 1, 210 (1824)); *Hall*, 440 U.S. at 419–20; NFIB v. Sebelius, 567 U.S. 519, 647–50 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ. dissenting) (citing Wickard v. Filburn, 317 U.S. 111 (1942) and *Gibbons*, 22 U.S. at 196); *id.* at 660 (Opinion of Roberts, C.J.) (arguing that if he required the states to enter into the healthcare mandate that "the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us—in which case . . . moving against those inactivities will also come within the Federal Government's unenumerated problem-solving powers").

ward monopolistic practices.[1313] There is nowhere else to turn, because not even Congress or the president can revoke public moneys or property federally granted to private individuals to be used in public trust.[1314] In the words of Justice Story,

> The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration, through the means of equitable tribunals, in cases where there would otherwise be a failure of justice.[1315]

This puts special weight on the Court's decision to hear cases brought in the public interest to vindicate our rights to life, liberty, and property, against the monopolist or tyrant; whether in commerce or in politics.[1316] This jurisdiction is the very foundation of judicial legitimacy and is retained at common law.[1317] Asserting federal antitrust jurisdiction in the public interest comes down to the three elements: (1) the prudent (2) use of power (3) in pursuit of justice under the U.S. Constitution.[1318]

This jurisdiction is often asserted in federal court; however, lately it was turned against the public interest for the benefit of the monopolist.[1319] The hubris on the federal bench is so pervasive that the judiciary regularly vindicates the private rights of monopolists that do not serve public interest.[1320] The delusive oxymoron behind such a be-

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1313. *Gibbons*, 22 U.S. at 208–10. This power ultimately inheres in the judicial power at common law to define property. Schroeder, *Bringing*, *supra* note 1036, at 66 (courts have the power to strip claims of intangible property of the legal attribute of property when they are based upon fraud, whether accidental or intentional).

1314. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 698 (1819) (Story, J., concurring).

1315. *Id.*

1316. *Id.*

1317. *See Id.*; *Gibbons*, 22 U.S. at 208–10; Schroeder, *Bringing*, *supra* note 1036, at 66.

1318. Schroeder, *The Body*, *supra* note 121, at 71 ("[T]raditional jurisdictional analysis . . . considers whether the Court is prudently exercising its powers in pursuit of justice.").

1319. Schroeder, *Bringing*, *supra* note 1036, at 13 (commenting on the Ginsburg concurrence in *Sebelius* "[t]he federal government . . . should be accorded the authority to coerce lower class, impoverished Americans to purchase insurance to ensure that doctors always get paid. With this cart before the horse view, poor people that depend on free medical services from licensed professionals are seen as trespassers.") (citing NFIB v. Sebelius, 567 U.S. 519, 593 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[T]he uninsured 'free ride' on those who pay for health insurance.")).

1320. *See* Matsushita v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (quoting BORK, THE ANTITRUST, *supra* note 1136, at 145); Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 451 (2014) (oxymoronically using copyright common law to destroy a new and emerging business to arbitrarily preserve cable monopolies).

trayal of public trust on the bench arises directly from the sort of embarrassments symbolized by the Salem Witch Trials.[1321]

For example, in *Citizens United v. FEC*, the Supreme Court characterized money as speech in order to invalidate anti-corruption election laws as a violation of free speech.[1322] Then in *Burwell v. Hobby Lobby*, owners of a large for-profit corporation were granted a religious liberty exemption from the Affordable Care Act.[1323] Then, Wheaton College was granted a preliminary injunction from the U.S. Supreme Court to flout duly enacted federal law to control its employees from receiving health coverage for contraception.[1324]

Emboldened, Wheaton College fired its first female African American tenured professor, Larycia Hawkins, for asserting her rights of life and freedom of speech, confirming the reemergence of the Puritan right to destroy the rights of others in American Christian Colleges.[1325] The Puritans of Boston similarly declared it their corpo-

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1321. *See* HUTCHINSON, 1767 THE HISTORY, *supra* note 801, at 11–61 (giving a history of the progression of the Salem Witch Trials). The Puritans of Massachusetts Bay interpreted religious liberty as the liberty of the strong man to take away the liberty of the weak, as exemplified in the *Trial of Anne Hutchinson*. HUTCHINSON, 1765 THE HISTORY, *supra* note 801, at 70–77, 190–95 ("The other side were deluded also by a zeal, for the punishment, for the honour of God, of such of his creatures as differed in opinion from themselves. It is evident, not only by Mrs. Hutchinson's trial, but by many other public proceedings, that inquisition was made into men's private judgments as well as into their declarations and practice. Toleration was preached against as a sin in rulers which would bring down the judgments of heaven upon the land." This zeal brought about the genocide of the Pequot Nation of Mystic.); EVE LAPLANTE, AMERICAN JEZEBEL 192 (2004) [hereinafter LAPLANTE, AMERICAN] ("Her [Anne Hutchinson's] fundamentally Calvinist doctrine—that in a sinful world Christ redeems people without their merit and then in some way joins with them—challenged colonial society at its very foundation."); JOHN WINTHROP, A SHORT STORY OF THE RISE, REIGN, AND RUINE OF THE ANTINOMIANS 57 (1692) (Hutchinson argued that salvation could not come from being sanctified by good works, and that none were born sinless, vigorously arguing that "Christ is our sanctification."); *Romans* 3:23. *Cf.* Schroeder, *America's*, *supra* note 212, at 882–83.

1322. Citizens United v. FEC, 558 U.S. 310, 351 (2010).

1323. Burwell v. Hobby Lobby, 573 U.S. 682, 692 (2014).

1324. Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting) ("Those who are bound by our decisions usually believe they can take us at our word. Not so today.").

1325. Ruth Graham, *The Professor Wore a Hijab in Solidarity—Then Lost Her Job*, N.Y. TIMES (Oct. 13, 2016), https://www.nytimes.com/2016/10/16/magazine/the-professor-wore-a-hijab-in-solidarity-then-lost-her-job.html. *See also* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 181 (2012) (giving churches and religious schools the First Amendment freedom to break their promises and their contracts with employees without consequence—this First Amendment right to avoid contractual damages for fraud, i.e., a right for churches to lie with impunity, runs directly against the First Amendment purposes of encouraging truth telling as laid out by Judges Bork and Ginsburg in *Ollman*—it also runs against the stated purposes of the Christian religion, which is likely a pretext by which to review such firing decisions under the stated goals of nonprofit charters); Ollman v. Evans, 750 F.2d 970, 1002 (D.C. Cir. 1984) (Bork, J., concurring) ("It is common ground

rate religious right to banish infidels including Roger Williams and Anne Hutchinson.[1326] Then they marched an army to Mystic and committed genocide upon the Pequot Nation.[1327]

The colony unrepentant then murdered many of its own people as witches, after which only Judge Sewall repented.[1328] The Mason family litigated for their property rights in the case *Mohegan Indians v. Connecticut* all the way up to the time of the American Revolution when their property by conquest claims were invalidated.[1329] Mason's strategy in *Mohegan Indians* appears to be the proto-guardianship case that black and Native Americans struggled against in Oklahoma many genations later.[1330] However, the American Revolution was a re-

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that the core function of the first amendment is the preservation of that freedom to think and speak as one pleases which is the 'means indispensable to the discovery and spread of political truth.'") (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). Along with the agreement between loyalists and revolutionaries that Phillis Wheatley was the rightful author of her poems, there was also agreement about the illegitimacy of the Salem Witch Trials and the Puritan genocide of the Pequots of Mystic. *See* HUTCHINSON, 1765 THE HISTORY, *supra* note 801, at 70–77, 190–95 (calling the Puritan zeal against witches and Native Americans a delusion); John Adams, *Diary no. 19*, [Dec. 16, 1772—Dec. 18, 1773], at 16 (in his entry for March 5, 1773 after defending the Boston red coats at trial, John Adams wrote that he defended his enemies in open court because not to do so would "have been as foul a stain upon this country as the executions of the Quakers or Witches, anciently.").

1326. HUTCHINSON, 1765 THE HISTORY, *supra* note 801, at 70–77.

1327. *Id.*; MASON, *supra* note 801, *passim*.

1328. HUTCHINSON, 1767 THE HISTORY, *supra* note 801, at 61 ("Mr. Sewall, at a public fast, gave in to the minister a bill, acknowledging his error in the late proceedings, and desiring to humble himself in the sight of God and his people."); LAPLANTE, SALEM, *supra* note 113, *passim* (telling the story of the repentant Witch Judge Samuel Sewall, and reprinting his antislavery tract *The Selling of Joseph* and his anti-misogyny tract *Talitha Cumi* an Aramaic phrase meaning "Woman Rise").

1329. Roger Sherman, *Remarks on a Pamphlet Entitled, "A Dissertation on the political Union and Constitution of the Thirteen States of* NORTH-AMERICA." 16–17, 40–42 [1784] (The founder Roger Sherman of Connecticut made clear that the Native American title to property is where the American Colonists got all their legitimate rights in America. Sherman was a drafter and signatory of the Declaration of Independence.); Mohegan Indians v. Connecticut (1705–1773); Letter from Roger Williams to Major [John] Mason (June 22, 1670), *in* ROGER WILLIAMS, THE LETTERS OF ROGER WILLIAMS 342 (John Russell Bartlett ed., 1874) [hereinafter WILLIAMS, THE LETTERS] (Roger Williams revealed that the Mohegan Indians were a straw purchaser to justify their sale of the land to the Mason family, who committed genocide against the actual owners, the Pequots.). *Cf.* Johnson v. McIntosh, 21 U.S. 543, 598–99 (1823) (applying John Mason's case before the Star Chamber *Mohegan Indians v. Connecticut* to steal the Pequot lands as if it were a legitimate case in the United States).

1330. *Memorial Detailing Conveyance of Mohegan Land to Major John Mason* (May 3, 1715). After stealing the Pequot land in Mystic by absolute conquest in 1637–38, John Mason later had the Pequot land conveyed to him in a series of deeds dated Aug. 15, 1659, May 20, 1661, and Dec. 14, 1669 by straw purchasers Sachem Uncas and the Mohegan Tribe so that Mason could legitimize his ownership of the stolen Pequot land in English Court. *Id.* It appears that *Mohegan Indians* was a precursor to other guardianship cases in Oklahoma and elsewhere. *See* David Remnick, *The Newspaperman Who Championed Black Tulsa*,

pentance from the horrible Puritan oxymoron of asserting a human right to destroy the rights of others; it was abolished in *Chisholm v. Georgia*, and reversed again in *The Amistad*.[1331]

Massachusetts Bay neighbored and eventually merged with Plymouth Colony; one of the two original joint stock corporations in the world.[1332] As it turned out, while Roger Williams was contending for the common law rights of Native Americans, his friend Edward Coke was in a heated struggle to secure the rights of Williams and others among the new English working class.[1333] Lord Coke made his cause against the very corporate, monopolistic censorship Williams experienced in Massachusetts Bay.[1334]

NEW YORKER RADIO HOUR (June 18, 2021), https://www.newyorker.com/podcast/the-new-yorker-radio-hour/the-newspaperman-who-championed-black-tulsa. *Cf.* Mark D. Walters, *Mohegan Indians v. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America*, 33 OSGOODE HALL L.J. 785, 804 (1995) (defending the jurisdiction of Mason's appeals to the Star Chamber and Privy Council as the guardian of the Mohegans).

1331. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Opinion of Wilson, J.) (quoting U.S. CONST. pmbl. and U.S. CONST. art. I. § 10, cl. 1); Le Louis [1817] 2 Dodson 210, 255 (Eng.) (Opinion of Sir William Scott) (affirming the legality of slavery according the oxymoron of the free trade in human flesh—a later version of the original Puritan oxymoron), *aff'd and extended by* The Antelope, 23 U.S. 66, 118 (1825) (showing the lower court's flouting of federal law requiring the slave trader to be hanged as pirate and the slaves to go free and instead made his own law requiring the casting of lots to decide who should go free—the U.S. Supreme Court cited directly *Le Louis* and decided "[i]t was not piracy," flouting federal law that says it was. The speech of John Quincy Adams before the U.S. Supreme Court on behalf of the Africans of *The Amistad* vigorously showed that this was so), *overruled by* The Amistad, 40 U.S. 518, 561, 594 (1841) (overruling *The Antelope*'s reliance upon *Le Louis*; the Court agreed with John Quincy Adams). *Cf.* QUINCY ADAMS, ARGUMENT, *supra* note 114, at 123 (in his review of *The Antelope*, John Quincy Adams wrote that the Court "leaned almost entirely upon a decision of Sir William Scott in the case of the Louis"—Scott was "the most fervent champion of the slave trade and of the unqualified exemption of all merchant vessels from visitation or search by the armed ships of every nation other than their own").

1332. BUTMAN & TARGETT, *supra* note 819, at 245–52, 303–04, 308 (distinguishing the Pilgrims of Plymouth and the Puritans of Massachusetts Bay, though in 1691 the provinces of Plymouth and Massachusetts Bay were merged as one colony of Massachusetts Bay by royal charter—the idea of a working class with interests in the corporations for which they worked, rather than a mere serfdom, began in the Colonies of Plymouth and Virginia).

1333. Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 WINTHROP'S JOURNAL, *supra* note 819, at 116–17; Letter from Roger Williams to Major [John] Mason (June 22, 1670), *in* WILLIAMS, THE LETTERS, *supra* note 1329, at 342; 3 EDWARD COKE, INSTITUTES *181–83. *See also* 1 WINTHROP'S JOURNAL, *supra* note 819, at 57 n.1 (Roger Williams "was connected as a boy with Sir Edward Coke, a great lawyer, through whom he became a scholar at the Charterhouse and afterwards of Pembroke College, Cambridge.").

1334. 3 EDWARD COKE, INSTITUTES *181–83; Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 WINTHROP'S JOURNAL, *supra* note 819, at 116–17 (Williams' book was burned or otherwise destroyed for violating the Colony's strict censorship of the press—this is the exact sort of state run monopoly that the Case of Monop-

It is an understatement to say that Coke's struggle to secure the wellbeing of the working class through antitrust law merely implicated the separation of powers.[1335] For making his successive stands on the side of the people, the crown censored *Coke's Reports* by crown copyright, removed Lord Coke from the bench, and made him prisoner in the Tower to be tried in the Star Chamber.[1336] In defiance, Coke arose like a phoenix giving off fiery bursts of light before his people.[1337]

By the time Parliament passed its first Habeas Corpus Statute 1640, Coke was already proven a worthy advocate of the English common law, the overriding British Constitution, and the rights of the English people.[1338] Therefore, when Judge Hobart became Chief Justice in Coke's place, he reaffirmed Lord Coke's principle from *Dr. Bonham's Case* several times.[1339] Then Parliament and crown went to war with each other, King Charles I lost his head, and Oliver Cromwell rose to absolute power.[1340]

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olies, the Statute of Monopolies, the Statute of Anne, and finally Phillis Wheatley's Trial and Attestation were accomplished to abolish).

1335. *See* 3 EDWARD COKE, INSTITUTES *181–83; The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.); Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.). *See also* 1 CAMPBELL, *supra* note 24, at 273 ("'That the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment. Also the law of England is divided into three parts: common law, statute law, and custom; but the King's proclamation is none of them.'") (quoting Case of Proclamations [1610] 12 Coke Rep. 74 (Eng.)); *id.* at 285–86. *Cf.* Max Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PENN. L. REV. 1842, 848–50 (1938).

1336. 1 CAMPBELL, *supra* note 24, at 289–302 ("'A thunderbolt has fallen upon my Lord Coke in the King's Bench, which has overthrown him from the roots.'") (statement of John Castle).

1337. *Id.* at 295 ("Coke was supposed by mankind and by himself to be disgraced and ruined. Nevertheless, his story is more interesting, and he added more to his own fame as well as conferred greater benefits on his country, than if he had quietly continued to go through the routine of his judicial duties till his faculties decayed." Coke successfully defended his life against the crown and so we are happy to read that "Coke's energy and integrity triumphed.").

1338. *Id.*

1339. *See, e.g.*, Day v. Savadge [1614] 80 ER 235 (Eng.). *Cf.* QUINCY, JR., *supra* note 32, at 524–25.

1340. Unlike in American history, the history of written constitutions in England was short, violent, and ridden with contradiction. *See Instrument of Government* [Dec. 16, 1653], *in* 2 ACTS . . . OF THE INTERREGNUM, *supra* note 792, at 813–822 (England's first written constitution, installing Oliver Cromwell as Lord Protector with supreme legislative and executive powers); *Humble Petition and Advice* [May 25, 1657], *in* 2 ACTS . . . OF THE INTERREGNUM, *supra* note 792, at 1049–57 (England's last written constitution granted Oliver Cromwell absolute power for life, like a king though attempting unsuccessfully to control the Lord Protector to abide by the precedents of English Monarchy set forth by Lord Coke to limit the executive power of the crown).

Oliver Cromwell attempted to abort the nascent ideal of a separation of powers in England by investing all power within himself, inventing the Navigation Acts and writs of assistance, and establishing the British Empire by the conquest of Jamaica.[1341] The Americans contended against Cromwellian madness; first in open court, then in open battle.[1342] The Americans strongly reasserted the principles of Coke and Milton, England reaffirmed Cromwell and Hobbes, and the Americans marvelously prevailed.[1343]

The English people abandoned Lord Coke's most glowing decisions and followed Sir William Blackstone's banal declaration of parliamentary omnipotence.[1344] Blackstone's *Commentaries* were published after and refuted by James Otis's arguments in *Paxton's Case*, as well as Otis's tracts published in England and America.[1345] There-

1341. *An Act for increase of Shipping, and Encouragement of the Navigation of this Nation*, [Oct. 9, 1651], *in* 2 ACTS . . . OF THE INTERREGNUM, *supra* note 792, at 559–62 (the original navigation act); Oliver Cromwell, *Underneath—Writ of Assistance* [May 9, 1648] & Letter from Oliver Cromwell to General Desbrowe (Mar. 11, 1654–55), *in* 3 CARLYLE, *supra* note 792, at 385, 462–64; *Instrument of Government* [Dec. 16, 1653], and *Humble Petition and Advice* [May 25, 1657], *in* 2 ACTS . . . OF THE INTERREGNUM, *supra* note 792, at 813–822, 1048–56; The Navigation Act 1660, 12 Car. 2 c. 18 (Eng.) (Cromwell's Navigation Act reenacted under Charles II). *See* 20 HOWELL, *supra* note 802, at 283, 289 ("'Jamaica was conquered by Oliver Cromwell'") (statement of Lord Mansfield during the trial of *Campbell v. Hall*); SIMMONS, *supra* note 31, at 20 (noting that the Navigation Act was "a plagiarism from Oliver Cromwell").

1342. SIMMONS, *supra* note 31, at 2–3 (quoting QUINCY, JR., *supra* note 32, at 540); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also* Letter from John Adams to William Tudor (June 1, 1818) (During *Paxton's Case*, James Otis "gave a history of the navigation act of the First of Charles II., a plagiarism from Oliver Cromwell."); John Adams, *Letter from John Adams to William Tudor* (July 14, 1818) (the Navigation Act "has ruined Holland, and would have ruined America, if she had not resisted"). During the time of the American Revolution, the precedents of the interregnum were all suppressed, but had they been open knowledge the Americans may have found the origin of English writs of assistance were the same as that of the Navigations Acts. Oliver Cromwell, *Underneath—Writ of Assistance* [May 9, 1648] & Letter from Oliver Cromwell to General Desbrowe (Mar. 11, 1654–55), *in* 3 CARLYLE, *supra* note 792, at 385, 462–64.

1343. OTIS, *supra* note 18, at 175 (The Americans vindicated the rule "that acts of parliament against natural equity are void. That acts against the fundamental principles of the British constitution are void.") (citing Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)); Phillis Wheatley, *To a Gentleman of the Navy* [1774] (directly addressing the Miltonic influence over her work); Campbell v. Hall [1774] 1 Cowp. 204, 208, 211–12 (Eng.) (basing English Empire ultimately upon Cromwell's conquest of Jamaica, which was later emulated in King Charles II's conquest of New York at Breda), *aff'd and extended in* R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

1344. King George III, *The King's Speech of Nov. 30, 1774* [1775]; 1 WILLIAM BLACKSTONE, COMMENTARIES *156–57.

1345. SIMMONS, *supra* note 31, at 2–3 (quoting QUINCY, JR., *supra* note 32, at 540); OTIS, *supra* note 18, at 124–25 (refuting the omnipotence of any government official based upon

fore, founder James Wilson charitably said of Blackstone, "He deserves to be much admired; but he ought not to be implicitly followed."[1346]

The theories of Coke and Milton represented in America by Otis and Wheatley were put to the test on July 4, 1776.[1347] It cannot be denied that from this day forward Wheatley and Otis prevailed over the many sycophants of the king, including Bentham and Blackstone.[1348] For the American Revolutionaries so embarrassed Blackstone's theory of parliamentary omnipotence that in its place Bentham was able to champion his *Panopticon* as the new seat of government omnipotence writ large.[1349]

As Bentham inevitably realized, the sheer reality of the American Revolution destroyed any pretention throughout the entire world that the English Parliament was inherently omnipotent.[1350] So too, the

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the idea that only God is omnipotent—this directly rebukes Blackstone's idea of parliamentary omnipotence before the American Revolution proved parliamentary impotence on the field of battle and by an undoubted, permanent separation from the English Empire).

1346. 1 WILSON, THE WORKS, *supra* note 113, at 22.

1347. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.); MILTON, A DEFENSE, *supra* note 1200, at 194–95 (Milton invoked the same "fundamental maxim in our law, which I have formerly mentioned, by which nothing is to be accounted a law, that is contrary to the laws of God, or of reason."). *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *156–57; [Jeremy Bentham,] *Short Review of the Declaration* [1776], *in* BENTHAM & LIND, *supra* note 38, at 132 ("[T]he nation will unite as one man, and teach this rebellious people, that it is one thing for them to *say*, the connection, which bound them to us, is *dissolved*, another to *dissolve* it; that to *accomplish* their *independence* is not quite so easy as to *declare* it: *that there is no peace with them, but the peace of the King: no war with them, but that war, which offended justice wages against criminals*.—We too, I hope, shall acquiesce in the necessity of submitting to whatever burdens, of making whatever efforts may be necessary, to bring this ungrateful and rebellious people back to that allegiance they have long had it in contemplation to renounce, and have now at last so daringly renounced."); OTIS, *supra* note 18, at 124–25; Phillis Wheatley, *To His Excellency General Washington* [1775].

1348. Berger, *supra* note 30, at 522–26 n.10 (noting that the omnipotence of parliament was first formally adopted in Blackstone's *Commentaries* and that the Americans successfully refuted this doctrine).

1349. Bentham's prison project possessed a hideous strength on the side of despotism in Russia, Mexico, Cuba, and other Latin American nations where they hailed Bentham as "the light of Westminster." WILLIFORD, *supra* note 44, at 30 (In a letter from José de Valle to Jeremy Bentham, de Valle wrote: "'How I envy my cousin—with how much delight would I change my fate with his, that I might dwell in the abode of the best legislator of the world! I shall take care to give circulation to your Constitutional Code. The light from Westminster shall illumine these lands.'"); 1 BENTHAM, PANOPTICON, *supra* note 42, at i, 139–40; Letter from Jeremy Bentham to the Duke of Wellington (Mar. 23, 1829), *in* 11 BENTHAM, THE WORKS, *supra* note 43, at 14 ("I want to make you do what Cromwell tried at, and found it was too much for him.").

1350. King George III, *The King's Speech of Nov. 30, 1774* [1775] (in this speech, the King and Parliament united in its decision to force Massachusetts Bay into submission); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (the colonies united in common defense of Massachusetts Bay).

pretension that the king can do no wrong was refuted by the American Revolutionaries; who sounded their testimony that the king did wrong in America.[1351] Thereby the oldest Crown Colonies in the world separated themselves from the English Empire under a new social compact.[1352]

The Borkian myth that there is no federal IP and antitrust common law to punish monopolists today did not come from a principled look at the roots of U.S. constitutional law.[1353] For the only American union that tried to reverse the common law was the feudal Dominion of New England.[1354] Against the English attempts to strip American Colonists of their common law rights under the *Charter of Dominion* in 1680–90, Jeremiah Dummer stood forth to defend Americans' common law rights.[1355]

Dummer rejected the patents of the crown and stated that the only "fair and just" title to property in America is "derived from the native lords of the soil," i.e., the Native Americans.[1356] The Native American title "is what the honest New-England planters rely on, hav-

1351. OTIS, *supra* note 18, at 124–25.

1352. THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776).

1353. Wheaton v. Peters, 33 U.S. 591, 660 (1834). *See also* Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Cost Revolution*, 79 ANTITRUST L.J. 953, 965–66 (2014) ("Unlike Taft, who borrowed the list of ancillary restraints from the common law, however, Bork asserted that the line between naked agreements and ancillary restraints turned on the probable impact of a restraint on 'consumer welfare.'"); 2 WILSON, THE WORKS, *supra* note 113, at 492 (Borkian rationalism is a departure from the antitrust common law, which not only sought to protect consumers, but also sought to protect those "who formerly maintained themselves and their families by the same profession or trade," because they "are impoverished, and reduced to a state of beggary and idleness.") (paraphrasing The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.)).

1354. *The Charter of the Dominion of New England* [1686] (This was an attempted merger of Connecticut, Massachusetts, New Hampshire, Rhode Island, New York, and New Jersey, abandoned and officially dissolved in 1689, because of the resistance. The Connecticut Charter Oak and the Great Boston Revolt of 1689 signaled its downfall.). *See* OTIS, *supra* note 18, at 162 (quoting Jeremiah Dummer, *A Defence of the New-England Charters* 29 [1715]).

1355. Jeremiah Dummer, *A Defence of the New-England Charters* 28–29 [1715] ("The right of the courts of common law within the province of the Massachusetts, to restrain the excesses of the admiralty jurisdiction, are not derived from their charter, but from subsequent laws of the province, confirmed afterwards by the crown; which power therefore, whether the charters stand or fall, will remain unhurt, and still the same.").

1356. Jeremiah Dummer, *A Defence of the New-England Charters* 8 [1715] ("The Indian title therefore, as it is decried and undervalued here, seems the only fair and just one; and neither Queen Elizabeth by *her* patents, or King James by *his* afterwards, could give any more than a bare *right of preemption*."). *See also* Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 WINTHROP'S JOURNAL, *supra* note 819, at 116–17.

ing purchased it with their money."[1357] This became the accepted basis of common law property rights in America and the foundation of American Independence.[1358] In the words of founder Roger Sherman,

> [Let]*North-America*, be considered as the property of the aboriginal natives, who were the first discoverers and have the right of *prime occupancy*. . . . North-America was distributed to them [the Na-

1357. Jeremiah Dummer, *A Defence of the New-England Charters* 8 [1715]. *See also* Letter from John Adams to William Tudor (Sept. 23, 1818); 1 ISAAC BACKUS, A HISTORY OF NEW ENGLAND 58–60 (1777). *Cf.* Samuel Cooper, *Sermon on the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 14–15 [1780] ("one internal mark of their divine original, and that they come from him 'who hath made of one blood all nations to dwell upon the face of the earth,' whose authority sanctifies those governments that instead of oppressing any part of his family, vindicate the oppressed, and restrain and punish the oppressor") (quoting *Acts* 17:26).

1358. *See* Letter from John Adams to William Tudor (Sept. 23, 1818) (The founders of Massachusetts Bay Colony "do not seem to have had any confidence in their charter, as conveying any right, except against the king, who signed it. They considered the right to be in the native Indians. And in truth all the right there was in the case, lay there. They accordingly respected the Indian wigwams and poor plantations; their clambanks and musclebanks and oysterbanks, and all their property. . . . Our ancestors . . . considered the Indians as having rights; and they entered into negotiations with them, purchased and paid for their rights and claims, whatever they were, and procured deeds, grants, and quit claims of all their lands, leaving them their habitations, arms, utensils, fishings, huntings and plantations. There is scarcely a litigation at law concerning a title to land, that may not be traced to an Indian deed. I have in my possession, somewhere, a parchment copy of a deed of Massasoit of the township of Braintree, incorporated by the legislature in one thousand six hundred and thirty nine. And this was the general practice through the country, and has been to this day through the continent."); 1 BACKUS, *supra* note 1357, at 58–60. *See also* Letter from Roger Williams to Major [John] Mason (June 22, 1670), *in* WILLIAMS, THE LETTERS, *supra* note 1329, at 342 (Roger Williams roared like Jesus Christ with a whip in hand overturning tables in the outer courts of the Temple, "Your selves pretend liberty of Conscience, but alas, it is but self (the great God Self) only to Your Selves." From Rhode Island, Williams protested John Mason's illegitimate theft of Native American lands and his attempts to legitimize this land through the feudal laws of England in the longstanding legal disputes denoted under the case title *Mohegan Indians v. Connecticut*. The Mohegans in this case were certainly a straw purchaser to legitimize the Mason's seizure of lands from the Pequots they took when they committed genocide on them. The final determination of *Mohegan Indians v. Connecticut*, which should hold no weight in American law today, came from the King's Privy Council in 1773 right before the American Revolution.); MASON, *supra* note 801, at 14, 21 (witnessing his men "burning them [the Pequots] up in the Fire of His Wrath, and dunging the ground with their Flesh: It was the Lord's Doings, and it is marvelous in our Eyes! It is He that hath made his Work wonderful, and therefore ought to be remembered. . . . Thus the Lord was pleased to smite our Enemies in the hinder Parts, and to give us their Land for an Inheritance."). The general antislavery and pro-Native American rights tenor of the American Revolutionaries was undeniable; their revolution was repentance from the former and present horrors of America. *Compare* Samuel Cooper, *A Sermon Preached before his Excellency John Hancock . . . [on] the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 14 [1780] (quoting *Acts* 17:26), *and* Lemuel Haynes, *Liberty Further Extended* [1776], *in* Bogin, *supra* note 64, at 95 (quoting *Acts* 17:26), *with* OLAUDAH EQUIANO, THE INTERESTING NARRATIVE 29 (9th ed., 1794) (quoting *Acts* 17:26).

> tives], "*when the Most High divided unto the* NATIONS *their* INHERITANCE *when he separated the sons of* ADAM."[1359]

The U.S. Supreme Court horribly damaged these revolutionary principles, built upon centuries of American custom, by falsely claiming that Europeans were the first discoverers of America in *Johnson v. McIntosh* and *Cherokee Nation v. Georgia*.[1360] For the common law is *common* to all human beings in America and preexisted the English crossing the Atlantic.[1361] If the U.S. Supreme Court simply required

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1359. Roger Sherman, *Remarks on a Pamphlet Entitled, "A Dissertation on the political Union and Constitution of the Thirteen States of* NORTH-AMERICA." 16–17, 40–42 [1784] (Sherman further concluded, "*That God hath made of one blood, all nations of the earth, and hath determined the bounds of their habitation*.") (quoting *Deuteronomy* 32:8; *Acts* 17:26). *See also* John Adams, *Minutes of the Argument, Surveyor General v. Loggs, Court of Vice Admiralty, Boston, March 8, 1773*, *in* 2 ADAMS, LEGAL PAPERS, *supra* note 22, at 267, 269 (John Adams argued in open colonial court that "Indian Natives had under God a right to the soil," and "that no good title could be acquired by sovereign or subject, without obtaining it from the Natives.").

1360. Johnson v. M'Intosh, 21 U.S. 543, 597–98 (1823) (citing *Campbell v. Hall* [1774] 1 Cowp. 206, 208, 211–12 (Eng.) (approvingly as if taxation without representation is constitutional,This horrible, terrible case, made a lie of the U.S. social compact. Thus, it should be overruled because the ruling misrepresents *Mohegan Indians v. Connecticut*, as if that were a legitimate case, when it was a case of a straw purchase made by the Mohegans to cover up the Puritan crime of genocide against the Pequots) () (overruled by the American Revolution)); Walters, *supra* note 1330, at 787; *see also* Cherokee Nation v. Georgia, 30 U.S. 1, 22 (1831) (falsely representing that property law came from European discovery rather than the Native American title; as if the American Revolution never reversed it: "It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation in which the right of sovereignty is mentioned as a part of the matter ceded." This is a horrible, terrible and false aggrandizement of European rights in America. Justices Story and Thompson dissented.). *But see* Worcester v. Georgia, 31 U.S. 515, 546 (1832) (upholding the correct American law: "The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces 'at present waste and desolate.' . . . These motives for planting a new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a titled against Europeans only, and were considered *as blank paper so far as the rights of the natives were concerned*. The power of war was giving only for defense, not for conquest.") (emphasis added). *Cf.* Thomas Hutchinson, *Diary*, Nov. 28, 1774, *in* 1 Hutchinson, The Diary, *supra* note 802, at 307–09 (confirming the timing of the King's Speech was contemporaneous with the ruling of *Campbell v. Hall*, and that the *Campbell* case and the King's Speech harkened back to the conquest of Jamaica); King George III, *The King's Speech of Nov. 30, 1774* [1775] (this speech, published in the colonies, declared parliamentary omnipotence and Parliament's support of the king's efforts to bring the Americans to heel); THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

1361. *Johnson*, 21 U.S. at 600–04 (1823) (deciding the question of "whether the King's subjects carry with them the common law wherever they may form settlements" in favor of the crown and against the Native American title as if the American Revolution never happened); Jeremiah Dummer, *A Defence of the New-England Charters* 8, 23 [1715] ("And to complete the oppression, when they upon their trial claimed the rights of Englishmen, they

the State of Georgia to abide by these founding principles, the inherent rights of the Cherokee people would have precluded their forced departure down the Trail of Tears.[1362]

The *Wheaton* Court was perhaps the first to raise a full throated doubt of the existence of U.S. common law, but it was not the last.[1363] Decades later, in the seminal antitrust case *Standard Oil*, the Supreme Court acknowledged that "doubt as to whether there is a

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were scoffingly told, *those things would not follow them to the ends of the earth*. Unnatural insult; must the brave adventurer, who with the hazard of his life and fortune, seeks out new climates to enrich his mother country, be denied those common rights, which his countrymen enjoy at home in ease and indolence? Is he to be made miserable, and a slave by his own acquisitions? Is the laborer alone unworthy of his hire, and shall they only reap, who have neither sowed nor planted? Monstrous absurdity! Horrid inverted order!"); Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 WINTHROP'S JOURNAL, *supra* note 819, at 116–17 (Roger Williams firmly vindicated the preexisting Native American rights to property, and their freedoms of speech, religion, and assembly. Williams' cause began as a resistance, but eventually became adopted unanimously in America.).

1362. The U.S. Supreme Court certainly gave in to the political goals of the president and the injustice of selfish Georgian buffoons based on a sham gold rush and thus allowed them to transgress the federal apportionment of lands to the Cherokee Nation in violation of the supremacy of the U.S. Constitution. *See Cherokee*, 30 U.S. at 22. *See also* Brian Hicks, *The Cherokees vs. Andrew Jackson*, SMITHSONIAN MAGAZINE, (Mar. 2011), https://www.smithsonianmag.com/history/the-cherokees-vs-andrew-jackson-277394/. The gold rushes in America—especially the one in Georgia that infused illiterate white Georgians with the political will to banish their bilingually literate neighbors the Cherokee—were shams driven by magicians known as treasure diviners. *Id.* In *Cherokee Nation* the U.S. Supreme Court bowed the nation's sovereignty to these selfish magic men of Georgia. David Williams, *Gold Rush*, NEW GEORGIA ENCYCLOPEDIA, (Jan. 21, 2003), https://www.georgiaencyclopedia.org/articles/history-archaeology/gold-rush; JOHN L. BROOKE, THE REFINER'S FIRE 28, 272, 282–83 (1996) (a very clear and evenhanded look into the origins and activities of treasure diviners in the United States, especially its connection with the Mormon Cosmology and the founding of Utah, and the "discovery" of gold at Sutter's Mill in California—which was actually iron pyrite, known as false gold); 1 WILSON LUMPKIN, THE REMOVAL OF THE CHEROKEE INDIANS FROM GEORGIA 96, 107, 128 (1907) (Senator Lumpkin and those like him took advantage of the sham for political gain: "The existence alone of the rich gold mines utterly forbids the idea of a state of quiescence on this all engrossing subject."); *id.* at 193–94 (telling President Andrew Jackson that Georgia was rightly extending its "laws and jurisdiction over the Cherokees" in order to take advantage of their "land, abounding in rich gold mines"); *id.* at 311 (noting measures taken to force white people into compliance with the removal of the Cherokee—for which the missionary Samuel Worcester was convicted as a criminal in Georgia).

1363. Wheaton v. Peters, 33 U.S. 591, 660 (1834); *Johnson*, 21 U.S. at 600–04 (this case only impliedly found there was no U.S. common law in order to degrade the property rights of Native Americans—this implied doubt was repeated by *Cherokee Nation* and *Worcester* leading up to the Court's doubts in *Wheaton v. Peters*—the idea that Native Americans did not have inherent common law rights was demonstrably violative of the U.S. social compact and the centuries of American custom of purchasing, rather than conquering, Native American lands according to which the American Revolutionaries unanimously disputed the English title over their property). *See also* Globe Newspaper Co. v. Walker, 210 U.S. 356, 362–63 (1908) (citing *Wheaton*, 33 U.S. at 591).

common law of the United States governing the making of contracts in restraint of trade" led to the enactment of the Sherman Act.[1364] Then in *Erie*, the Supreme Court stated that there is "no federal general common law," while ironically making a new federal *stare decisis*.[1365]

Judge Robert Bork was in favor of this sort of irony when he presented the Sherman Act of 1890 as the beginning of antitrust law.[1366] But the beginning of antitrust law in the United States was the Patent & Copyright Clause according to which "fraud upon the public" antitrust claims could be raised.[1367] Thus, it appears the first

1364. Standard Oil Co. v. United States, 221 U.S. 1, 2, 50 (1911).

1365. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78–79 (1938). *See also* Craig Green, *Can Erie Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813, 843–44 (2013).

1366. BORK, THE ANTITRUST, *supra* note 1136, at 15–16, 19–20. Bork directly mischaracterized the law as given in *Standard Oil*, misconstruing the common law previously used to determine antitrust cases as itself a form of judicial activism, which is ironic because he was advocating judicial activism in the very same breath. *Id.*; *Standard Oil Co.*, 221 U.S. at 50–51 (antitrust common law "took [its] origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question"); *id.* at 59–60 ("Let us consider the language of the first and section sections [of the Sherman Act], guided by the principle that, where words are employed in a statute which had at the time a well known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels the contrary. . . . Thus, not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law, and in this country, in dealing with subject of the character embraced by the statute, was intended to be the measure used . . . .").

1367. United States v. Am. Bell Tel. Co., 128 U.S. 315, 355–58, 373 (1888) (prior to the Sherman Act concerns of monopoly sounded in "fraud upon the public" patent litigation, stating, "It would be a strange anomaly in a government organized upon a system which rigidly separates the powers to be exercised by its executive, its legislative, and its judicial branches, and which in this emphatic language defines the jurisdiction of the judicial department, to hold that in that department there should be no remedy for such a wrong. . . . There is nothing in these provisions expressing an intention of limiting the power of the government of the United States to get rid of a patent obtained from it by fraud and deceit, and although the legislature may have given to private individuals a more limited form of relief by way of defense to an action by the patentee, we think the argument that this was intended to supersede the affirmative relief to which the United States is entitled, to obtain a cancellation or vacation of an instrument obtained from it by fraud, an instrument which affects the hole public, whose protection from such a fraud is eminently the duty of the United States, is not sound."), *declined to extend by* Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1371 (2018); *see also* James Madison, *Detatched Memoranda, ca.*, Jan. 31, 1820 ("Monopolies tho' in certain cases useful, ought to be granted with caution, and guarded with strictness agst. abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained by the community, as a purchase of property which the owner might otherwise withheld from public use."); Patent Act of 1790, 1 Stat. 109, § 1 (allowing "letters patent to be made out in the name of the United States" if an invention is deemed "sufficiently useful and important"); Copyright Act of 1790, 1 Stat. 124, § 6 (not defining the damages, but simply that an infringer will "suffer and pay . . . all damages occasioned by such injury"). *Cf.* John D. Gordan, III, *Morse v. Reid: The First Reported Federal Copyright Case*, 11 AM. SOC. FOR L. HIST. 21, 21–23 (1993).

real antitrust paradox in America arose in the Taney Court, when it atrophied its antitrust jurisdiction to the point where the Union was nearly destroyed in the Civil War.[1368]

Professor Bork ignored all U.S. history prior to 1890 and expected his readers to believe that the common law prior offered no protection for restraints of alienation of chattels.[1369] He, thus, presented the common law interpretation of the Sherman Act in *Standard Oil* as anomalous relativism and judicial activism, and obscured the line of restraint of trade cases that trace back to *Gibbons v. Ogden*.[1370] Bork also blinded himself to the rights of life vindicated by Edward Coke and Phillis Wheatley.[1371]

Bork's arbitrary policy shifts in federal antitrust law are not only glaring, they are now on the verge of overcoming all individual rights.[1372] Our rights to life, our civil rights, our rights to access justice

1368. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (limiting the Court's jurisdiction to hear antitrust through the Taney Court's former police powers rationale, which was then used to preserve slavery) (citing The License Cases, 46 U.S. 504 (1847)), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942). *See also* Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855); Beers v. Arkansas, 61 U.S. 527, 529 (1857).

1369. BORK, THE ANTITRUST, *supra* note 1136, at 10, 20, 405–07, 418–19 (positioning the application of antitrust law as a question of the separation of powers saying, "At issue is the question central to democracy: Who governs?" and lamenting courts' use of common law rather than deferring entirely to Congress even though abandoning the common law would also destroy the courts' ordinary imputation of legislative grace from *Dr. Foster's Case* and other common law rules for statutory construction). *Cf.* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538–39 (2013) ("The 'first sale' doctrine is a common-law doctrine with an impeccable historic pedigree. In the early 17th century Lord Coke explained the common law's refusal to permit restraints on the alienation of chattels. . . . A law that permits a copyright holder to control the resale or other disposition of a chattel once sold is similarly 'against Trade and Traffi[c], and bargaining and contracting.'") (quoting 1 EDWARD COKE, INSTITUTES *223).

1370. BORK, THE ANTITRUST, *supra* note 1136, at 38–47, 405–06; *Knight*, 156 U.S. at 12 (citing Gibbons v. Ogden, 22 U.S. 1, 210 (1824)), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122, 127 (1942) ("Even while important opinions in this line of restrictive authority [i.e., *Knight*] were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in Gibbons v. Ogden.") (citing *Knight*, 156 U.S. at 1; *Gibbons*, 22 U.S. at 210).

1371. BORK, THE ANTITRUST, *supra* note 1136, at 46, 405–07 (arguing against a "case-by-case resolution" of antitrust disputes because a judge might side with the idea that worker/laborer rights ought to be vindicated); 3 EDWARD COKE, INSTITUTES *181–83 (a right at common law to restrict speech or trade of others cannot be raised when the common law abolishes and punishes such rights); Dyers Case [1414] 2 Hen. 5 f. 5, pl. 26 (Eng.); The Case of Monopolies [Darcy v. Allen] [1602] 11 Co. Rep. 84b (Eng.) (determining that monopolies are void at common law); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773.

1372. BORK, THE ANTITRUST, *supra* note 1136, at 54, 110, 145, 405–07; Khan, *supra* note 1155, at 740.

and participate meaningfully in society, are all on the line.[1373] For the Borkian departure from antitrust common law adopted by the federal courts allowed the patient strategy of Amazon, and similar players in the online marketplace, to establish unchecked dominance.[1374]

The government and the U.S. Supreme Court is specifically endowed with the power to assert its jurisdiction to control such actors as Amazon, AT&T, Comcast, Google, and similarly situated companies, from restraining the speech and trade of ordinary American people.[1375] It is the same power the court may assert against state governments and individuals alike; as was done in *Gibbons v. Ogden*.[1376] Thus, the court extended a similar principle in *Red Lion* regarding equal access to public telecom networks.[1377]

Indeed, it is possible to petition the U.S. Courts under *Red Lion* to fashion common law net neutrality out of federal antitrust common law principles regardless of FCC rules.[1378] For under *Crowell v. Benson*, Congress is not permitted to block the courts from making *de novo* determinations of fact "wherever fundamental rights depend."[1379] Such a common law net neutrality ruling, would preserve the very network benefits whence internet broadcast networks draw their entire value.[1380]

1373. *See* Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 514–15 (2014) (appearing to unanimously overrule our rights to life as defined by Lord Coke on behalf of Amazon contractors); Calabresi & Leibowitz, *supra* note 1016, at 1042–56 (explaining how *Lochner*-type right to work cases like *Busk* destroy antitrust jurisdiction).

1374. Matsushita v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (quoting BORK, THE ANTITRUST, *supra* note 1136, at 145); *id.* at 604 (White, J., dissenting) ("The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth."). *See* Khan, *supra* note 1155, at 753 (noting that Amazon established its dominance by preferring growth to profit maximization, which is the very thing that allows it to forgo antitrust scrutiny under the Borkian theory adopted in *Matsushita*).

1375. *Am. Bell Tel. Co.*, 128 U.S. at 355–58, 373; Red Lion Broadcasting. Co., Inc. v. FCC, 395 U.S. 367, 386 (1969).

1376. *Gibbons*, 22 U.S. at 208–09.

1377. *Red Lion*, 395 U.S. at 386.

1378. *Id.* at 383–86. *See also* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383–84 (D.C. Cir. 2017).

1379. Crowell v. Benson, 285 U.S. 22, 57 (1932).

1380. *Red Lion*, 395 U.S. at 383–86 n.14 (quoting The Proxmire Amendment, 105 Cong. Rec. 14457) (turning to legislative history to define the Telecom Act's public interest standard: "'[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and *radio frequencies are in the public domain*, that the license to operate in such frequencies requires operation in the public interest, and that, in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, *all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible*.'") (emphasis added). *Cf. U.S. Telecom Ass'n*, 855 F.3d at 383–86, 393 ("For all of

As in Carol Rose's article *The Comedy of the Commons*, these networks and the air itself which carries the spectrum we use to talk on cell phones and access the internet are inherently public goods.[1381] So too the copyrighted content distributed over these networks are inherently public goods.[1382] The costs to accessing them, therefore, were meant to be minimized according to antitrust principles arising from custom, prescription, and trust so that their value might be maximized for the benefit of all.[1383]

The separation of powers is implicated in the efforts of telecom giants to skirt such jurisdiction of federal courts.[1384] From high technology companies to ordinary retail stores to nonprofits—corporations are behind the most controversial and illegal activities of the government.[1385] Indeed, Edward Snowden was allowed into the deepest

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those reasons, broadband ISPs have no First Amendment entitlement to hold themselves out as indiscriminate conduits but then to act as something different. The net neutrality rule assures that broadband ISPs live up to their promise to consumers of affording them neutral access to internet content of their own choosing. The rule, in doing so, does not infringe the First Amendment.").

1381. *Red Lion*, 395 U.S. at 383–86 n.14; Carol Rose, *supra* note 244, at 720; *U.S. Telecom Ass'n*, 855 F.3d at 383–89, 393 (broadband ISPs literally hold themselves out as common carriers as a factual matter, they hold themselves out as "a 'neutral, indiscriminate conduit'—i.e., as a pathway to 'all content on the Internet, without alteration, blocking, or editorial intervention,'" and net neutrality rules merely "requires the ISP to abide by its representation and honor its customers' ensuing expectations"—in the absence of FCC rules the federal courts can and should enforce them at common law.).

1382. *Red Lion*, 395 U.S., at 383–86 n.14. Telecom companies want to overrule *Red Lion*, and the latest attempt was *Minority Television*. *See Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1201 (9th Cir. 2013) (en banc). *Cf. U.S. Telecom Ass'n*, 855 F.3d, at 383–84.

1383. *Red Lion*, 395 U.S., at 383–86 n.14; Carol Rose, *supra* note 244, at 724; *U.S. Telecom Ass'n*, 855 F.3d, at 383–84; *The Kingsbury Commitment* [Dec. 19, 1913] (to avoid antitrust suit, AT&T abdicated its attempts to monopolize without regard to the public trust protected by the U.S. Government, including a guarantee of universal service); Communications Act of 1934, 47 U.S.C. §§ 151, 214(e), 254(e) (creating the Universal Service Fund to subsidize telecom companies for extending basic telephone service "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges").

1384. Schroeder, *Choosing*, *supra* note 485, at 55 n.44 (noting that major content owning companies are openly colluding with major telecom giants to create their own copyright takedown procedures, flouting the safe harbor procedures required by the Digital Millennium Copyright Act).

1385. *In re* National Sec. Letter, 930 F. Supp. 2d 1064, 1068 (N.D. Cal. 2013); *In re* National Sec. Letter, 863 F.3d 1110, 1130 (9th Cir. 2017). *See also* Donohue, *The Shadow*, *supra* note 416, at 92; Stillman, *Get Out*, *supra* note 763; Lipp, *supra* note 1228; Gallagher & Moltke, *supra* note 1228; Twitter, Inc., v. Sessions, 263 F. Supp. 3d 803, 808–09 (N.D. Cal. 2017); Donohue, *Technological*, *supra* note 1238, at 435–36; Michael Corkery, *Walmart 'Surprised' Old Store Is a Migrant Shelter. Records Hinted at the Possibility.*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/business/walmart-migrant-children-shelter.html ("A Walmart executive signed a document that indicated the buyer was purchasing

bowels of national security clearance from a position at Booz Allen Hamilton, where he developed many of the programs that we are now suffering under.[1386]

The secret U.S. Government contracts and NSLs binding companies like Booz Allen Hamilton, Microsoft, AT&T, and others resemble the very sort of odious monopolies that were formerly granted at the Council Table.[1387] While pampered with billions of U.S. dollars, Booz Allen declared all nation states passé and boldly drew up a manifesto proposing a silent coup against all nations, including the United States.[1388] Then the U.S. Government prosecuted Booz Allen's whistleblowers and destroyed Aaron Swartz, especially making an example of Swartz by treating him as a foreign enemy for downloading too many scholarly articles from JSTOR.[1389]

If it were not for sovereign immunity, the misuse of patents and copyrights to profit from spying on the American people might be punished in court.[1390] Judicial reluctance to review copyright and patent

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the property with a $4.5 million loan from a nonprofit [Southwest Key Programs] that runs shelters for migrant children."); Stahl, *supra* note 1219.

1386. SNOWDEN (Open Road Films 2016) (this movie showcases the fact that Snowden himself created many of the programs he exposed to the public).

1387. *BGov List of 2018*, BLOMBERG GOVERNMENT, https://about.bgov.com/bgov200/ (last visited Nov. 8, 2018). *See* Stahl, *supra* note 1219 (Booz Allen types likely subcontract to foreign intelligence companies like NSO Group—a highly controversial practice).

1388. Mark Gerencser, Reginald Van Lee, Fernando Napolitano, & Christopher Kelly, *The Megacommunity Manifesto* 12, 14 [2008], published online by BOOZ ALLEN HAMILTON ("Nations and companies alike have undergone an irreversible shift toward what management theorist Charles Hampden-Turner calls 'universalism.' They move away from reliance on connections and loyalty (typical of societies with selective law enforcement) and toward such principles as merit and universal law.") Thus, these megacommunity aficionados offer governments a chance to allow big international corporations that they call a "megacommunity" to do the governing for them: "A megacommunity is a public sphere in which organizations and people deliberately join together around a compelling issue of mutual importance, following a set of practices and principles that will make it easier for them to achieve results." This is exactly what governments are, *or should we say what governments were?*.

1389. Aaron Swartz, *Guerilla Open Access Manifesto* [2008], uploaded by Aaron Swartz in Eremo, Italy; THE INTERNET'S OWN BOY (Participant Media 2014); CITIZENFOUR (Praxis Films Nov. 28, 2014); IS THIS A ROOM: REALITY WINNER VERBATIM TRANSCRIPTION (Tina Satter/Half Straddle 2018). *See also* Schroeder, *Choosing*, *supra* note 485, at 48–49 (tracing the movement Swartz led against SOPA, PIPA, ACTA).

1390. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001); Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest. Therefore, in a criminal prosecution is not that it shall win a case, but *that justice shall be done*. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, *while he may strike hard blows, he is not at liberty to strike foul*

misuse as a fraud upon the public is the only thing preserving the claimed IP licensing rights behind dragnet surveillance programs.[1391] Contract good faith and fair dealing principles provide proper jurisdiction to review these misuses according to *Kyllo*.[1392]

The best way to overcome the court's reluctance, is to assert strong prudential grounds for exercising jurisdiction.[1393] It is the job of plaintiff's counsel to see past the smoke screen of prudential self-limitation, usually asserted on sovereign immunity or federalism grounds, to explain why judicial review is prudent.[1394] As Justice Story wrote in his opinion in *Martin v. Hunter's Lessee*, it is wise in most cases to

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ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.") (emphasis added).

1391. Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1371 (2018) (*Oil States*' reluctance to review fraud on the public suits under Patent Law is emphatically a prudential matter, wholly in the power of the U.S. Supreme Court to undo without offending the America Invents Act's creation of Article I *inter partes* review), *declining to extend* United States v. Am. Bell Telephone Co., 128 U.S. 315 (1888). *See also* Michael E. Rubinstein, *Extending Copyright Misuse to an Affirmative Cause of Action*, 5 AKRON INTELL. PROP. J. 111, 132–34 (2011); Calabresi & Leibowitz, *supra* note 1016, at 1097 (noting the judicial surrender to corporate interests); Schroeder, *Choosing*, *supra* note 485, at 55 n.44 (noting that if copyright owner initiated suits are required for misuse to apply, big copyright owners may, and in some cases are already, working around the courts altogether).

1392. *Kyllo*, 533 U.S., at 40; Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538–39 (2013) ("A law that permits a copyright holder to control the resale or other disposition of a chattel once sold is similarly 'against Trade and Traffi[c], and bargaining and contracting.'") (quoting 1 EDWARD COKE, INSTITUTES *223); United States v. Am. Bell Telephone Co., 128 U.S. 315, 355 (1888) (holding patent review to determine whether Bell "was guilty of such a fraud upon the public that the monopoly which these patents grant him ought to be revoked or annulled"); Schroeder, *Bringing*, *supra* note 1036, at 96–97 (discussing grounds to review the honesty in property and IP law, and the proper remedy of stripping property rights from dishonest or fraudulent claims of intangible value). It is becoming commonplace for corporations to assert copyright and patent rights to the extent of restraining their customers' ability to freely use the products they purchase outright from the corporations; copyright and patent misuse could become an affirmative cause of action through trespass on the case as a stick in the bundle of the property rights of owners of physical property to use and repair their property. *See* Chamberlain Grp. v. Skylink Technologies, Inc., 381 F.3d 1178, 1204 (Fed. Cir. 2004); Lexmark Int'l v. Static Control Components, Inc., 387 F.3d 522, 550 (6th Cir. 2004); Kyle Wiens & Elizabeth Chamberlain, *John Deere Just Swindled Farmers Out of Their Right to Repair*, WIRED (Sept. 19, 2018), https://www.wired.com/story/john-deere-farmers-right-to-repair/.

1393. *See, e.g.,* Pennsylvania v. Union Gas, Co., 491 U.S. 1, 27–28 (1989) (Stevens, J., concurring) (explaining that cases that test the boundary of federal versus state judicial power are best "understood as simply invoking the comity and federalism concerns discussed in our abstention cases," i.e., that they actually test a question of judicial prudence rather than judicial power even if they speak in terms of power).

1394. *Id.*

remind the Court of its duty to humbly accept and to firmly assert its vested federal powers.[1395]

There is much to be gleaned from the prudential opinion of Justice Story in *Martin*.[1396] For the reluctant Chief Justice Marshall was so moved by the opinion of Joseph Story in *Martin,* that he characterized prudential dismissal in *Cohens v. Virginia* as an exception to the rule, which now entails a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them."[1397] Marshall confirmed that the framers did not intend to create, in the words of Alexander Hamilton, "'a hydra in government from which nothing but contradiction and confusion can proceed.'"[1398]

Such a hydra would exist if there was not power in the federal courts to review state interpretations of federal laws, treaties, and the U.S. Constitution.[1399] A hydra would also exist if the Court was unable to review fundamental rights effected by the administrative state.[1400] Article III *de novo* review is thus required, under the seminal case *Crowell v. Benson*, wherever agencies attempt "to establish a govern-

1395. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. 304, 364–65 (1816) ("[I]n this Court, every State in the Union is represented; we are constituted by the voice of the Union, and when decisions take place which nothing but a spirit to give ground and harmonize can reconcile, ours is the superior claim upon the comity of the State tribunals. It is the nature of the human mind to press a favourite hypothesis too far, but magnanimity will always be ready to sacrifice the pride of opinion to public welfare.").

1396. *Id.* at 347–48 ("A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two states. The public mischiefs that would attend such a state of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution.").

1397. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976) (citing Cohens v. Virginia, 19 U.S. 404 (1821)); *Cohens*, 19 U.S. at 264, 404, 423 ("To this argument, in all its forms, the same answer may be given. Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands be examined; and we think the result must be that there is nothing so extravagantly absurd in giving to the Court of the nation the power of revising the decisions of local tribunals on questions which affect the nation as to require that words which import this power should be restricted by a forced construction.") (citing *Martin*, 14 U.S. at 304).

1398. *Cohens*, 19 U.S. at 415–16, 423 (citing *Martin*, 14 U.S. at 304; THE FEDERALIST NO. 80 (Alexander Hamilton)).

1399. *Id.*

1400. Crowell v. Benson, 285 U.S. 22, 50–51 (1932) (citing *Ex parte* Bakelite Corporation, 279 U.S. 438, 451 (1929)).

ment of a bureaucratic character alien to the United States our system wherever fundamental rights depend."[1401]

Prudence can be difficult to raise in support of asserting federal jurisdiction after the U.S. Supreme Court's recent prudential decisions that appear to administer the very hydra in government the Court is supposed to abolish.[1402] In *Sebelius*, Chief Justice Roberts argued that Congress could not put "a gun to the head" of the states, and thus he turned his back on the Court's prudential interest in uniformity and "let fifty flowers bloom."[1403] The Court also instituted a sovereignty-by-sovereignty version of personal jurisdiction in *Walden v. Fiore*, and state by state corporate barriers to jurisdiction in *Daimler v. Bauman*.[1404]

Perhaps the most horrible prudential basis cited for destroying federal jurisdiction over public interest suits is judicial creep stemming from *Murray's Lessee*.[1405] The decision in *Murray's Lessee* is doubtful because shortly after it was decided the nation fell into Civil War, and as *Dred Scott* revealed it was arbitrary in its jurisdictional aspects.[1406] Nevertheless, judicial creep under *Murray's Lessee* created a mass of arbitrary barriers to public interest suits that unduly supplant ordinary standing requirements.[1407]

1401. *Id.* at 57.

1402. *See, e.g.,* NFIB v. Sebelius, 567 U.S. 519, 581 (2012) (Opinion of Roberts, C.J.).

1403. *Id.*; Ann Marie Marciarille, *Let Fifty Flowers Bloom: Health Care Federalism after National Federation of Independent Business v. Sebelius*, 81 U.M.K.C. L. REV. 314, 343 (2012) (speaking of federal healthcare regulation as a "hydra-headed government funded health insurance beast").

1404. Walden v. Fiore, 571 U.S. 277, 285–86 (2014); Daimler v. Bauman, 571 U.S. 117, 134–35 (2014).

1405. *See* Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1371 (2018) (quoting Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855)).

1406. *Murray's Lessee*, 59 U.S. at 285 (deciding that "of this necessity, Congress alone is the judge," to destroy federal jurisdiction); Dred Scott v. Sandford, 60 U.S. 393, 455 (1857) (the Court appeared only to care about respecting Congress when it could use it as a pretense to destroy federal jurisdiction, because this Court decided that "the eighth section of the act of 1820, known commonly as the Missouri Compromise law, . . . was unconstitutional"—also to destroy federal jurisdiction). The standard that should have been applied in *Murray's Lessee* was James Otis's maxim of no taxation without representation and the prohibition on general warrants that lack particularity and probable cause—when these maxims were at issue the *Murray's Lessee* Court alarmingly did not even mention them. SIMMONS, *supra* note 31, at 23.

1407. *See, e.g.*, Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1371 (2018) (quoting Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855)); Stern v. Marshall, 564 U.S. 462, 484 (2011) (distinguishing *Murray's Lessee*, but not overruling it as it might have under *Crowell*); Wellness Intern. Network, Ltd. V. Sharif, 135 S. Ct. 1932, 1963–64 (2015) (expounding the difference between public and private rights, a distinction that originated in *Murray's Lessee* to dismiss cases).

For example, in 2018 the *Oil States* Court found antitrust common law unreviewable under *Murray's Lessee*.[1408] *Inter partes* patent review proceedings were immunized in *Oil States* because they need not "'from its nature'" be reviewed by a court.[1409] Thus, the Court ignored the separation of powers and reversed patent common law with feudal law by approvingly citing "petition[s] to the Privy Council to vacate a patent," as if the Patent & Copyright Clause was not inspired by common law; as if the USPTO was not categorically different from an English Privy Council; as if the U.S. Supreme Court were not tasked with the paramount duty of defending its constitutionally mandated common law jurisdiction against any such feudal intrusion.[1410]

The idea that when private property rights become "public rights" they are unsuable without Congress's consent, is simply another version of feudal immunity.[1411] Such an avoidance of interbranch dispute can only be administered as a prudential holding in U.S. Courts, as "discussed in our abstention cases, although admittedly in a slightly different voice."[1412] Thus, *Murray's Lessee* should be over-

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1408. *Oil States*, 138 S. Ct. at 1371.

1409. *Id.* at 1372–73 (quoting *Stern*, 564 U.S. at 484 (citing *Murray's Lessee*, 59 U.S. at 284)).

1410. *Id.*; THE FEDERALIST NO. 43 (James Madison). This irony is all the more unbearable, because *Murray's Lessee* was at least nominally derived from Lord Coke's *Institutes*. *Murray's Lessee*, 59 U.S. at 276 (citing 2 EDWARD COKE, INSTITUTES *50). *See* Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 5 (1966) ("The clause is both a grant of power and a limitation. . . . It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.") (citing U.S. CONST. art. I, § 8, cl. 8); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 552 (2013) (citing U.S. CONST. art. I, § 8, cl. 8; Letter from Thomas Jefferson to James Madison (July 31, 1788) (arguing the U.S. Constitution should read "there shall be no monopolies"); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) (Defending the Patent & Copyright Clause saying, "With regard to monopolies they are justly classed among the greatest nuisances in Government. But it is clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?")).

1411. *Compare Murray's Lessee*, 59 U.S. at 283–85 ("no suit can be brought against the United States without the consent of Congress"—but it is not so, for the United States was sued without its consent by a private party in *McCulloch v. Maryland*—or else, one might say in the style of Justice Story's opinion in *Martin*, that Congress is constitutionally mandated to consent to the Court's jurisdiction wherever the judicial power exists expressly or impliedly through the Judiciary Act—for as *Gibbons* said, the Court has jurisdiction to hear such cases wherever the public interest requires), *with* Beers v. Arkansas, 61 U.S. 527, 529 (1857) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or in any other without its consent and permission . . . ."—again, it is not so for the reasons explained in *Chisholm v. Georgia* and *Nevada v. Hall*, and because *Beers* was a contributory cause of the Civil War by making the Southern States immune from any legal challenge to their evil pro-slavery laws.).

1412. Pennsylvania v. Union Gas Co., 491 U.S. 1, 27 (1989) (Stevens, J., concurring).

turned as imprudently decided because it, like *Beers v. Arkansas*, precipitated the Civil War.[1413]

There are also strong, general reasons to loosen other cumbersome prudential standing requirements placed upon the shoulders of most public interest litigants today.[1414] For example, federal courts can no longer reasonably presume that any federal agency is faithfully administering the law as former President Trump demonstrated, under Executive Orders 13771 & 13777, executive policy can force agencies to resist executing the law.[1415] These arbitrary and capricious orders directed *all* administrative agencies to act *ultra vires* by violating the agencies mandates.[1416]

The Ninth Circuit recently lessened prudential barriers for review under the Food, Drug & Cosmetic Act, by directly reversing a FDA determination.[1417] In so doing, the Court admitted that courts can

1413. *Murray's Lessee*, 59 U.S. at 283–85; *Beers*, 61 U.S. at 529. *See* U.S. CONST. pmbl. (avoiding war is one of the vital purposes of the Union, and peaceful resolution of conflict is one of the central purposes for courts); Martin v. Hunter's Lessee, 14 U.S. 304, 325 (1816). *Cf.* PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT *passim* (2018) (what might have been resolved peacefully in the courts had to be resolved by war).

1414. *See Martin*, 14 U.S. at 325 (this case explains many prudential reasons for asserting a robust federal jurisdiction). The prudential reasons for asserting jurisdiction explained in *Martin* are only expanded today, as decisions made in the federal government intimately touch all our lives. LULAC v. Wheeler, 899 F.3d 814, 826–27 (9th Cir. 2018) *vacated on reh'g en banc*, 914 F.3d 1189 (9th Cir. 2019); LULAC v. Regan, 996 F.3d 673, 677 (9th Cir. 2021) (agreeing with the rationale for the 2018 order); WATER & POWER: A CALIFORNIA HEIST (National Geographic 2017).

1415. Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017), *revoked by* Exec. Order No. 13,992, 86 Fed. Reg. 35391 (Jan. 20, 2021) (original order requiring any executive department or agency that plans to publicly announce a new regulation to propose at least two regulations that will in turn be repealed); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017), *revoked by* Exec. Order No. 13,992, 86 Fed. Reg. 35391 (Jan. 20, 2021) (original order mandating all federal agencies to begin arbitrary deregulation processes, which is a direct violation of the executive duty to faithfully execute the laws that is *ultra vires* his power unless the laws grant him power to deregulate the very regulations they require the Executive Administration to make), *flouting and violating* U.S. CONST. art. II, § 3 (known as the Take Care Clause); Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (requiring federal courts to invalidate all agency action, findings, or rulings that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). *Cf.* FDA, Regulatory Reform Report: Completed Actions for Fiscal Year 2018.

1416. Executive Orders 13771 & 13777 directed all federal agencies to take action and make findings and rulings that are arbitrary and capricious, and may be considered as *ultra vires per se* if the agency appears to rely on these rules to take an action or make findings or rulings. *See* APA, 5 U.S.C. § 706(2)(A) (requiring federal courts to invalidate all agency action, findings, or rulings that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). If an agency does not expressly rely upon these Orders 13771, 13777, or other arbitrary or capricious statements of the President, the agency action can be tested for the *ultra vires* limitation by comparing it with the scope of the enabling law.

1417. *LULAC*, 899 F.3d at 817–18, *vacated on reh'g en banc*, 914 F.3d 1189 (9th Cir. 2019) ("If Congress's statutory mandates are to mean anything, the time has come to put a

no longer reasonably presume that Congress intended to repeal Article III grounds for relief under administrative law.[1418] For even *Chevron* and *Auer* deference cannot be considered prudent, when the president flouts his duties of faithful execution of the laws of Congress.[1419]

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stop to this patent evasion."); *LULAC*, 996 F.3d at 677 (agreeing with the rationale for the 2018 order). *See also* U.S. EPA, *Pesticide Program Dialogue Committee Meeting*, Day Two: May 4, 2017, at 2 (dedicating the morning to public input to Executive Order 13777 requiring the EPA to deregulate); *id.* at 76–77 ("First, I want to address President Trump's Executive Order 13771, which was in the materials. . . . That's the one that proposes elimination of two existing regulations for each new regulation adopted. . . . I [don't] think there's been . . . support for that from any speaker. . . . There's no place for it in the FIFRA pesticide context. For example, the tolerances for pesticides on foods are adopted by regulation. It's absurd to suggest that you should eliminate two tolerances for each new tolerance adopted. So, we hope that your agency recognizes that the two for one idea is inherently arbitrary and capricious, would violated underlying statutory standards and is going to lead to unnecessary litigation.") (statements of Peter Jenkins with the Center for Food and Safety); *id.* at 81 (noting that the use of chlorpyrifos as a pesticide will contribute to adverse effects on 1,800 protected species).

1418. *See* Sierra Club v. Trump, 977 F.3d 853, 876, 888–90 (9th Cir. 2020); Proclamation No. 9,844, 84 Fed. Reg. 4,949–50 (Feb. 15, 2019) (Interestingly, this proclamation does not even mention the border wall, barrier, or fence, nor does it expressly direct the executive branch to take money to build the wall, but it cites vaguely to the construction authority in 10 U.S.C. § 2808 and it is generally known and Trump himself said he is planning on taking billions of dollars from other places to build his wall without Congressional approval according to this proclamation.); Jonathan Allen, *Trump: I'll 'probably' declare a national emergency over border—just not yet*, NBC NEWS (Jan. 10, 2019), https://www.nbcnews.com/politics/white-house/trump-says-he-probably-will-declare-national-emergency-over-border-n957161; Jordain Carney, *McConnell: Senate Won't Override Trump Veto on Shutdown Fight*, THE HILL (Jan. 15, 2019), https://thehill.com/homenews/senate/425469-mcconnell-senate-wont-override-trump-veto-on-shutdown-fight. *See* Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 276 (2007) (using the SEC as an excuse to impliedly repeal banks that were too big to fail—the stakes are even higher than they were right before the 2008 market crisis).

1419. Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) ("The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. . . . [I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."). *See* Kisor v. Wilkie 139 S. Ct. 2400, 2422–23 (2019) (Opinion of Kagan, J.) (attempting to deny that *Auer* and *Seminole Rock* violate the separation of powers, but not speaking for the Court) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945); Auer v. Robbins, 519 U.S. 452 (1997)); *id.* at 2424–25 (Roberts, C.J., concurring in part) (only concurring with Justice Kagan in portions of her opinion that did not consider whether *Auer* and *Seminole Rock* violate the separation of powers, making those portions only an opinion); McCarthy v. Madigan, 503 U.S. 140, 146 (1992) ("'Administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.'") (quoting West v. Bergland, 611 F.2d 710, 715, *cert. denied*, 449 U.S. 821 (1980)).

Over the centuries, Congress stepped in to secure our rights of life when the federal courts failed to properly defend our rights.[1420] Relevant laws passed to secure our rights of life and liberty include: the Patent & Copyright Acts, the False Claims Act, the Sherman & Clayton Acts, § 43(a) of the Lanham Act, and the RICO Statute, among others.[1421] Wherever a court is reluctant to assert its power on behalf of the people directly under the U.S. Constitution, it may be pressured into vindicating the common law under various statutes according to the rules of statutory construction and legislative grace.[1422] These grounds are set forth in *Ashwander v. TVA* and *Funk v. United States*, which were derived from *Dr. Foster's Case* and *Milborn's Case* respectively.[1423]

1420. Civil Rights Act of 1866, 14 Stat. 27–30, *gutted by* Blyew v. United States, 80 U.S. 581, 595 (1871) (the Court gutted the Civil Rights Act to let an ax murderer loose, because the only witnesses were black folk), *and* The Slaughterhouse Cases, 83 U.S. 36, 82–83 (1872) (*Slaughterhouse* gutted the Civil Rights Act regarding the very rights of life, i.e., the right to make a living, which is the primary right enjoyed by free people no longer enslaved or indentured to work for no pay); *id.* at 96–97 (Field, J., dissenting) (quoting Civil Rights Act of 1866, 14 Stat. 27–30, § 1).

1421. U.S. Patent Act, 35 U.S.C. §§ 1 *et seq.*; U.S. Copyright Act, 17 U.S.C. §§ 101 *et seq.*; False Claims Act, 31 U.S.C. § 3729; Sherman & Clayton Acts, 15 U.S.C. §§ 1 *et seq.*; Lanham Act § 43(a), 15 U.S.C. § 1125(a)(1)(A–B); RICO, 18 U.S.C. §§ 1961 *et seq.*—note for litigators and researchers that there are numerous complicated prudential barriers to suit under these laws, and I cannot cite to or explain them all here, but to say that though they are many and though they are confusing and though they pretend to interpret the laws or the intent of the laws, they are not insurmountable and once they are identified as prudential, they may be rebutted with prudential reasons for asserting jurisdiction as exemplified by Joseph Story's opinion in *Martin*. Martin v. Hunter's Lessee, 14 U.S. 304, 325, 347, 373–74 (1816). *See, e.g.,* Pennsylvania v. Union Gas, Co., 491 U.S. 1, 27–28 (1989) (Stevens, J., concurring).

1422. *See, e.g.,* Crowell v. Benson, 285 U.S. 22, 62 (1932).

1423. Ashwander v. T.V.A., 297 U.S. 288, 348 (1936) (quoting *Crowell*, 285 U.S. at 62); Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.); Funk v. United States, 290 U.S. 371, 385 (1933) (The maxim that *cessante ratione legis, cessat ipsa lex* "means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself.") (internal quotation marks omitted) (referring to Milborn's Case [1572] 7 Co. Rep. 6b, 7a (Eng.) ("*ratio legis est anima legis, et mutata legis ratione, mutatur et lex*" (the reason for a law is the soul of the law, and if the reason for a law has changed, the law is changed)). *See* Markham, Jr., *supra* note 950, at 460–62; THE CASE OF ELIZABETH RUTGERS, *supra* note 131, at 14–15; Almy v. Harris, 5 Johns 175 (N.Y., 1809); Harford v. United States, 12 U.S. 109, 109–10 (1814); Case v. Humphrey, 6 Conn. 130, 141 (1826) (citing Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62b–63a (Eng.)); SEDGWICK, *supra* note 950, at 127; Cope v. Cope, 137 U.S. 682, 686 (1891); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–60.

The Pursuit of Justice and the Rights of Life

The pursuit of justice and the removal of barriers to the access of justice are the foundations of federal antitrust common law.[1424] However, Lord Coke's remark that "monopolies in times past were ever without law, but never without friends," remains a present reality in America.[1425] America has yet to establish the fullness of Coke's common law in favor of the rights of ordinary working people as a right of life,

> And the law of the Realm in this point is grounded upon the law of God, which saith, *Non accipies loco pignoris inferiorem & superiorem molam, quia animam suam apposuit tibi*. Thou shalt not take the nether or upper milstone to pledge, for he taketh a mans life to pledge: Whereby it appeareth that a mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans trade, taketh away his life, and therefore is so much more odious, because he is *vir sanguinis*. Against these Inventers and Propounders of evill things, the holy ghost hath spoken, *Inventores malorum, digni sunt morte*.[1426]

1424. Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Opinion of Wilson, J.) ("Another declared object is, 'to establish justice.' This points, in a particular manner, to the judicial authority. And when we view this object in conjunction with the declaration, 'that no [s]tate shall pass a law impairing the obligation of contracts,' we shall probably think that this object points, in a particular manner, to the jurisdiction of the court over the several [s]tates.") (quoting U.S. CONST. pmbl., art. I. § 10, cl. 1); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 475 (noting that the preamble's object of creating a "'more perfect union'" is meant to combat monopolies of trade) (quoting U.S. CONST. pmbl.); *id.* at §§ 965–76 (noting that taxation should be limited by trust to "'provide for the common defence and general welfare,'" to avoid its use as "a prerogative power to destroy competition, and secure a monopoly to the government!") (quoting U.S. CONST. pmbl.).

1425. 3 EDWARD COKE, INSTITUTES *182.

1426. *Id.* at *181 (quoting *Deuteronomy* 24:6; *Romans* 1:29–32); The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.) ("This same leadeth to the impoverishing of divers Artificers and others, who before by labor of their hands in their Art or Trade had kept themselves and their families, who now of necessity shall be constrained to live in idleness and beggary. . . . And the Common Law in this point agreeth with the equity of the Law of God, as appeareth in Deuteronomy 24:6, *Non accipies loco pignoris inferiorem et superiorem molam, quia animam suam apposuit tibi;* You shall not take in pledge the nether and upper milstone, for the same is his life; by which it appeareth, That every mans Trade doth maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life."). *See* 2 WILSON, THE WORKS, *supra* note 113, at 492 ("we are informed in one of the reports of my Lord Coke, that, at the common law, no man can be prohibited from exercising his industry in any lawful trade" and that therefore "the common law abhors all monopolies, which forbid any from working in any lawful trade"—this is exactly the opposite of the antitrust policies pushed by Robert Bork. Thus, originally, the abolition of monopolies now known as antitrust law in America was not merely consumer protection but was made to protect the laborers and workers "who formerly maintained themselves and their families by the same profession or trade," because they "are impoverished, and reduced to a state of

This is the common law, the law of nature, and the law of God that points to the proper policy of antitrust law.[1427] As the government continues under the pretense that it was legitimate to unconditionally subsidize corporate corruption with public funds in 2008; and as the Supreme Court practically remade *Lochner* in the Court's unanimous opinion *Integrity Staffing Solutions v. Busk*, the opportunities for the assertion of antitrust jurisdiction must rise in equal measure to correct these blunders.[1428]

After Lord Coke's pronouncement above, King Charles I's arbitrary assertion of copyright and letters patent in contravention to the law cost him his head.[1429] The Americans overruled the qualified and sovereign immunity asserted by Charles I & II in *Chisholm v. Georgia*.[1430] The principle of *Chisholm* was reaffirmed after the Eleventh Amendment and became the embattled heart of antitrust jurisdiction asserted by every court thereafter.[1431]

The right of each person to make a living is not relative or arbitrary, but it goes down to the very root of the law itself.[1432] As Edward Coke believed, antitrust law is not merely a policy for consumer welfare, but for the rights of the common workers whose livelihoods are

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beggary and idleness.") (citing and paraphrasing The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.)).

1427. 3 EDWARD COKE, INSTITUTES *181.

1428. *Id.*; Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. 27, 30–31 (2014).

1429. John Milton, *Eikonoklastes* 2–3 (2d ed. 1650) ("Whereupon such illegal actions, and especially to get vast sums of money, were put in practice by the King . . . it must necessarily be his undoing.").

1430. The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.), *distinguished and delegitimized by* Chisholm v. Georgia, 2 U.S. 419, 465 (1793) (Opinion of Wilson, J.); *id.* at 451 (Opinion of Blair, J.); *id.* at 468 (Opinion of Cushing, J.); *id.* at 475–78 (Opinion of Jay, C.J.); *id.* at 437–45 (Iredell, J., dissenting) (defending *The Bankers Case*, as it was delegitimized by the other justices). *Cf.* Schroeder, *The Body*, *supra* note 121, at 24.

1431. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. 738, 857–58 (1824); *Ex parte* Young, 209 U.S. 123, 150 (1908) (The Eleventh Amendment "was adopted after the decision of this court in *Chisholm v. Georgia* . . . . Since that time, there have been many cases decided in this court involving the Eleventh Amendment, among them being *Osborn v. United States Bank*, which held that the Amendment applied only to those suits in which the State was a party on the record.").

1432. 3 EDWARD COKE, INSTITUTES *181; Calabresi & Leibowitz, *supra* note 1016, at 1073–97 ("The right to compete, and, more fundamentally, the right to earn an honest living, is a basic right embodied in U.S. constitutional law. There is substantial evidence, from the English and colonial history, from debates on the federal Constitution and its ratification, from the history of the Fourteenth Amendment, and from state constitutional law, to support this thesis." However, noting that "the courts have too often surrendered to a legislative process that is dominated by well-entrenched interest groups seeking monopoly rents from the state.").

put in jeopardy by monopolies.[1433] The monopolists suable under the Case and Statute of Monopolies by ordinary workers in courts of common law were comparable to KBR in *Bixby*, who managed to escape from justice through a technicality.[1434]

Americans should not despair in the face of horrible abuses of judicial power; like the denial of justice in *Bixby*.[1435] For Americans may yet repair to Phillis Wheatley, whose position as a mother of our patent and copyright systems, secures the special weight of her voice in matters of U.S. Antitrust Law.[1436] Under Wheatley's auspices and as a matter of principle, the U.S. Judiciary should remember the mistakes of its past and endeavor to correct them by allowing memory's counsels to shine in its opinions.[1437]

In order to help the federal bench respect the sovereignty of the people, the founding poetess, Phillis Wheatley, rose up on mighty wings of faith.[1438] She took flight into the very eye of the world to make her cause for the public good known to all.[1439] For those, she wrote in

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1433. 3 EDWARD COKE, INSTITUTES *181. *See* John Milton, *Eikonoklastes* 2–3 (2d ed. 1650). *See also* 2 WILSON, THE WORKS, *supra* note 113, at 492 (citing and paraphrasing The Case of Monopolies [Darcy v. Allen] [1602] 11 Co. Rep. 84b (Eng.)).

1434. Bixby v. KBR, Inc., 603 F. App'x 605, 606 (9th Cir. 2015).

1435. *Id.*

1436. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773.

1437. Phillis Wheatley, *On Recollection* [1773]. *Cf.* E. Thomas Sullivan, *The Confluence of Antitrust and Intellectual Property at the New Century*, 1 MINN. INTELL. PROP. REV. 1, 5–7 (2000) (noting that copyright and patents laws have the same legal origin as antitrust law, i.e., that historically they are technically the same law).

1438. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7. You can hear her strong influence over Henry Wadsworth Longfellow, indeed, she may be the woman that Longfellow was thinking of when he personified the night itself in sable skirts, "I heard the trailing garments of the Night / Sweep through her marble halls! / I saw her sable skirts all fringed with light / From the celestial walls! / I felt her presence, by its spell of might, / Stoop o'er me from above; / The calm, majestic presence of the Night, / As of the one I love." Henry Wadsworth Longfellow, *Hymn to the Night* [1839]. *Cf.* Phillis Wheatley, *An Hymn to the Evening* [1773].

1439. Phillis Wheatley became a champion of the movement taken up by others across the globe, leading enlightenment thinkers such as George Washington, James Wilson, James Beattie, Gilbert Imlay, and Henri Grégoire. *See, e.g.*, GRÉGOIRE, *supra* note 823, at 44–45, 131, 230–41 (Wheatley's racist enemies including Jefferson, Hume, and Kant unanimously argued that Africans were subhuman because they could not feel; that they did not have very developed emotions. Men like Grégoire, Imlay, and Beattie disputed these horrible claims by remembering that "The sentimental Phillis . . . died of a broken heart."); JAMES BEATTIE, AN ESSAY ON THE NATURE AND IMMUTABILITY OF TRUTH 479–81 (1770) (Wheatley was the answer to James Beattie's prayers, because her poetry was irrefutable proof that David Hume was absolutely incorrect when he said there were "*no* arts" among the black folk, which was the basis of his fatalistic racism; thus, Wheatley's existence strongly bolstered Beattie's refutation of Hume when he said "[t]he Africans and Americans are known

her poem *On Recollection*, who "repent[ ] too late" only secure their own doom, "But, O! what peace, what joys are hers t'impart / To ev'ry holy, ev'ry upright heart!"[1440] For humanity's capacity of memory enables us to choose a better road by the light of experience.[1441]

For example, humans have the power to remember the time when printing presses were treated as a newfangled and dangerous technology.[1442] The King's Bench wrote of this saying, "it is certain, that down to the year 1640, copies were protected and secured from piracy, by a much speedier and more effectual remedy, than actions at law, or bills in equity."[1443] The crown thus continued granting patents

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to have many ingenious manufactures and arts among them") (quoting David Hume, *Of National Characters* [1748], *reprinted in* DAVID HUME, ESSAYS MORAL, POLITICAL, LITERARY 213 n.1 (1987) (1777)). Wheatley notoriously won Voltaire onto her side. Letter from Voltaire to A M. Le Baron Constant de Rebecque (Apr. 11, 1774), *in* 16 VOLTAIRE, *supra* note 268, at 594–95 (praising Wheatley's work). Wheatley captured the hearts of Latin America as well. LANDERS, *supra* note 912, at 217. Wheatley was a fellow heir of Terence with James Otis and combatted racial hatred with him throughout the globe. OTIS, *supra* note 18, at 64 (Otis confirmed that the origin of U.S. liberty and peace is natural human love, referring to Terence's verse "*homo sum: humani nihil ane alienum puto*" to justify his comments: "Let not the Poor envy the Rich, nor the Rich despise the Poor: But let us remember we are all of one Flesh and Blood: and that the Good of the whole is closely and intimately connected with the Welfare and Prosperity of each Individual. The Love of our Neighbour is an evident Principle of natural as well as revealed Religion.") (quoting Terence, *Heauton Timorumenos* I.1.25); Phillis Wheatley, *To Mæcenas* [1773] (referring to herself as the heir and friend of the ancient African writer Terence) (quoting Terence, *Heauton Timorumenos* I.1.25). Then as this movement eventually reverberated around the world and filtered back into the United States through the conduit of Thomas Reid, it was vindicated in the first major U.S. Supreme Court opinion. Chisholm v. Georgia, 2 U.S. 419, 462 (1793) (Opinion of Wilson, J.) (Accordingly, the Americans never stopped advocating for the people of England: "The Parliament form the great body politic of England! What, then, or where, are the People? Nothing! Nowhere! They are not so much as even the 'baseless fabric of a vision!' From legal contemplation they totally disappear! Am I not warranted in saying that, if this is a just description, a government, so and justly so described, is a despotic government?") (quoting THOMAS REID, *supra* note 1179, at vi (paraphrasing Shakespeare, *The Tempest* IV.1 [1611])).

1440. Phillis Wheatley, *On Recollection* [1773].

1441. *Id. See also* Letter from Phillis Wheatley to Samson Occom (Feb. 11, 1774); Letter from George Washington to Phillis Wheatley (Feb. 28, 1776) (declaring himself Phillis Wheatley's "humble servant," inviting her to his headquarters in Cambridge, Massachusetts for a meeting); 1 BENSON J. LOSSING, THE PICTORIAL FIELD-BOOK OF THE REVOLUTION 556 (1860).

1442. Millar v. Taylor [1769] 4 Burr. 2303, 2314 (Eng.) ("in 1640, the Star-Chamber was abolished"); Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.) (legally abolishing the Star Chamber); Wheaton v. Peters, 33 U.S. 591, 670 (1834) ("The Stationers Company was incorporated in the year 1556, and from that time to the year 1640, the Crown exercised an unlimited authority over the press which was enforced by the summary process of search, confiscation, and imprisonment given to the Stationers Company and executed by the then supreme jurisdiction of the Star Chamber.").

1443. RIVINGTON, *supra* note 269, at 2–3, 26, 33–36 (The first charter of the Stationers Company "prohibits any person from printing within the realm without the license of the Company, except patentees, and grants to the Company power to search, seize, and destroy

and copyrights for the use of printing presses in contradiction to the common law policy of abolishing monopolies.[1444] The policies behind the general abolishment of monopolies were set forth by Lord Coke in *The Case of Monopolies* as follows,

> There are three inseparable incidents to every monopoly against the commonwealth: (i) that the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases . . . ; (ii) after the monopoly granted, the commodity is not so good and so merchantable as it was before, for the patentee, having the sole trade, regards only his private benefit and not the common wealth; (iii) it tends to the impoverishment of various workmen and others, who had previously maintained themselves and their families by the labour of their hands in their art or trade, and who will now of necessity be constrained to live in idleness and beggary . . . .[1445]

The crown's letters patent and copyrights vested in the Stationers Company were unnatural, feudal monopolies that violated common law.[1446] The royal policy, furthered by feudal copyright and patent systems, stemmed from pretextual national security concerns; feudal

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or appropriate all unlicensed books" and "to search for heretical books which had come from abroad" – "The original Search Warrants . . . empowering the master and wardens to enter any house at any time to search for unlicensed presses or books, and upon which they frequently acted, are preserved at Stationers' Hall." The seized books were either destroyed, sold for profit, or distributed to the members of the Stationers Company.). *See* Millar v. Taylor [1769] 4 Burr. 2303, 2313–15 (Eng.) (noting that civil forfeiture was used to enforce copyright infringement as piracy during the Long Parliament—this was the time when Cromwell's Navigation Acts were invented—civil forfeiture was reenacted by Charles II's Parliament).

1444. RIVINGTON, *supra* note 269, at 33–36. *Cf.* Leach v. Money [1765] 19 How. St. Tr. 1021, 1009–10 (Eng.); Entick v. Carrington [1765] 19 How. St. Tr. 1029, 1035 (Eng.).

1445. The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.) (the Court thereby determined that Queen Elizabeth was mistaken in her grant because it was granted in the public interest and it was clearly not in the public's interest, thus the patent on playing cards here was revoked—the Court also foreshadowed the inventor requirement by reasoning that it would be a particularly dangerous precedent to grant a descendible monopoly right in playing cards to individuals that have no expertise in the creation or manufacture of play cards). *See* Millar v. Taylor [1769] 4 Burr. 2303, 2311–12 (Eng.). *See also* Kerry MacLennan, *John Milton's Contract for "Paradise Lost": A Commercial Reading*, 44 MILTON Q. 221, 227 (2010) ("authors were neither recognized as the originators of property rights at large, nor vested in the copyright of their work, and could not convey its underlying ownership"). *Cf.* Royal Charter of the Company of Stationers [1557] ("In witness of which thing we have caused to be made these our letters patent."); Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 959 (the first copyrights were "created by patent" in the Stationers Company, and claimed by members of that company as proprietary rights).

1446. Millar v. Taylor [1769] 4 Burr. 2303, 2313–16 (Eng.); Royal Charter of the Company of Stationers [1557]; MILTON, AREOPAGITICA, *supra* note 259, *passim*. *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813).

copyright and patent laws had nothing at all to do with securing the proper public policy of intellectual property, i.e., progress in knowledge and learning.[1447] All patents and copyrights originated from the crown, not authors or inventors.[1448]

Feudal law appears to be the origin of the words "patent" and "copyright."[1449] The crown and lords of England viewed infringers of copyright and patents as pirates, and so infringers were vigorously censored as pirates at the English border.[1450] According to the practice of prosecuting civil forfeitures in court, the rights of the owner were ignored and the physical property itself (the books or papers) was damasked as guilty of piracy, seized, and sold or destroyed, by the government without due process of law.[1451]

The common law in America was officially stripped of all such feudalism.[1452] America was never "conquered into the enjoyment of true liberty," like Wales, nor was America united to England by the union of crowns and Act of Union like Scotland.[1453] It was, by great contrast, a universal holding of the American Revolution that "our an-

1447. RIVINGTON, *supra* note 269, at 2–3, 26, 33–36. *See also* Millar v. Taylor [1769] 4 Burr. 2303, 2394–95 (Eng.) (this policy goal appears to arise from the common law principle of statutory construction that the purpose of a law is the spirit of the law and that a statute's title or preamble usually provides its purpose such that any statutory provisions that violate the statute's spirit or purpose abrogate themselves—this rationale was used by Judge Yates to dispute the existence of a perpetual copyright at common law). *Cf.* Funk v. United States, 290 U.S. 371, 385 (1933) (The maxim that *cessante ratione legis, cessat ipsa lex* "means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself.") (internal quotation marks omitted); Milborn's Case [1572] 7 Co. Rep. 6b, 7a (Eng.) ("*ratio legis est anima legis, et mutata legis ratione, mutatur et lex*" (the reason for a law is the soul of the law, and if the reason for a law has changed, the law is changed)).

1448. Millar v. Taylor [1769] 4 Burr. 2303, 2316 (Eng.); RIVINGTON, *supra* note 269, at 2–3, 26, 33–36.

1449. Millar v. Taylor [1769] 4 Burr. 2303, 2313 (Eng.); Sir Henry Vane the Younger, *A Healing Question* 4 [1656] ("The root and bottom upon which it stood, was not public interest, but the private lust and will of the Conqueror, who by force of arms did at first detain the right and freedom which was, and is, due to the whole body of the people.").

1450. RIVINGTON, *supra* note 269, at 2–3, 26, 33–36.

1451. *Id.*; Millar v. Taylor [1769] 4 Burr. 2303, 2313 (Eng.).

1452. Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 1003 (the House of Lords (a political body somewhat like the U.S. Senate with a peerage requirement) reversed *Millar* upon its overriding feudal power); R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.) (in 2008 the House of Lords arbitrarily reversed the English Courts that decided in favor of the Chagossians, emphasizing the lack of an independent, supreme judiciary in England).

1453. 1 WILLIAM BLACKSTONE, COMMENTARIES *94–95, 97–98 ("notwithstanding the union of crowns on the accession of their King James VI to that of England," the Kingdom of Scotland remained separate until the act of union was passed, which held as a condition that the common law of England would not apply in Scotland).

cestors, when they migrated to this country, brought with them the English common law as part of their heritage."[1454]

The Star Chamber was legally abolished in 1640, but the Star Chamber did not finally fall into disuse until after the crown was restored by Charles II in 1660.[1455] The Privy Council was never abolished and as Parliament later recorded, "After the Star Chamber was abolished . . . its authority indeed ceased, but its maxims subsisted and survived it."[1456] For after feudal copyrights and patents were abol-

1454. Wheaton v. Peters, 33 U.S. 591, 658–59 (1834); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 157 ("That the universal principle has been (and the practice has conformed to it) that the common law is our birthright and inheritance, and that our ancestors brought hither with them, upon their immigration, all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law.") (emphasis added). *Donaldson* should be distinguished in America for the same reason that *Cowle* was distinguished, for arising under the feudal law that subjected Scotland to feudal enslavement under the English Crown. *See* Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775), *reprinted in* ADAMS & SEWALL, *supra* note 777, at 129–31 (exposing *Cowle* as illegitimate feudal law, according to which the King of England established the union of Scotland, Ireland, and Wales by holding them to the "imperial crown" while not respecting their independent systems of law, and while not annexing them to "the realm" for the purpose of securing their independent rights) (citing Rex v. Cowle [1759] 2 Burr. 834, 835 (Eng.) ("Berwick, they said, was formerly part of Scotland, and was ours only by conquest, and remains unincorporated with England, and is governed by its own former laws. It is in the very same situation as Ireland was, immediately after its being conquered.")); 2 WILSON, THE WORKS, *supra* note 113, at 4, 49. *See* Rex v. Cowle [1759] 2 Burr. 834, 835 (Eng.), *distinguished by* Boumediene v. Bush, 553 U.S. 723, 748 (2008).

1455. Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.) (abolishing the Star Chamber); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1341 (noting that despite the Habeas Corpus Act of 1640, the writ of habeas corpus was "eluded prior to the reign of Charles the Second; and especially during the reign of Charles the First." The Habeas Corpus Act of 1679 enacted under Charles II, is often considered "another magna charta in that kingdom."). *See* ROBERTSON REID, *supra* note 981, at 411, 431–60 (One cannot miss the reality, that the legal abolishment of the Star Chamber was not accomplished in reality until after the English Civil War, and such books as this should be consulted to understand the mechanizations of feudalism at work during that time such as the Council in the North, which was itself a secret feudal court. Wresting the Star Chamber from the hands of the crown, if that is what happened in 1640 onward, took more than passing a single law in 1640.). *But see* Debate in the Commons on the Bill for explaining the Powers of Juries in the Prosecutions for Libels, Mar. 7, 1771, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 47–48 (statement of Edmund Burke) (saying that the "spirit of the Star Chamber has transmigrated and lived again").

1456. Walters, *supra* note 1330, at 808 (noting that even though the Star Chamber was abolished in England, "the original jurisdiction of the Crown-in-council" was narrowed but not abolished in the colonies and though it was not called a Star Chamber it "was an *imperial* court applying *imperial* law"). *See* Debate in the Commons on the Bill for explaining the Powers of Juries in the Prosecutions for Libels, Mar. 7, 1771, *in* 17 THE PARLIAMENTARY, *supra* note 579, at 47–48 (statement of Edmund Burke) ("The spirit of the Star Chamber has transmigrated and lived again; and Westminster-hall was obliged to borrow from the Star Chamber . . . .").

ished in England, causing the English Civil War, seditious libel law took its place.[1457]

In the years leading up to the American Revolution, Feudal libel law became symbolized by the case *Wilkes v. Wood* in England.[1458] The American Revolutionaries declared support for John Wilkes and defended the right of the press to divulge embarrassing missteps and corruptions of government leaders for the common good.[1459] The liberty of the press defended during the American Revolution was expressly extended under the protections of the First Amendment under the U.S. Constitution.[1460]

Little is known about how printing presses were regulated in America during the time of Roger Williams and Lord Coke, but the presses were strictly censored, according to corporate law, in Virginia and Massachusetts.[1461] Roger Williams, who was an early proponent of the free press, published a tract advocating the common law rights of Native Americans entitled: *A Just and Generous Assertion of Indian Rights*.[1462] His book was censored by local religious copyright authorities for challenging the English crown's doctrine of discovery, similar to

1457. Walters, *supra* note 1330, at 808; 17 THE PARLIAMENTARY, *supra* note 579, at 47–48.

1458. Donohue, *The Original*, *supra* note 786, at 1199, 1259, 1319 (analyzing and giving an American perspective on the *Wilkes v. Wood* trial) (citing Wilkes v. Wood [1763] 19 How. St. Tr. 1153 (Eng.) (a highly publicized seditious libel case occurring right before the American Revolution)).

1459. Letter from the Committee of the Boston Sons of Liberty to John Wilkes (June 6, 1768); Letter from the Committee of the Boston Sons of Liberty to John Wilkes (Nov. 4, 1769); John Adams, *I. Fragmentary Notes for "A Dissertation on the Canon and the Feudal Law"*, May–Aug. 1765 (In the same breath, the founders denounced feudal copyright and patent decrees as odious monopolies, saying, "Knowledge monopolized, or in the possession of a few, is a curse to mankind.").

1460. U.S. CONST. amend. I. *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994) ("Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story's summary is discernible.") (citing Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901)); Gertz v. Robert Welch, Inc., 418 U.S. 323, 332, 341 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 267, 279 (1964). *Cf.* DENIAL (Bleecker Street 2016) (this film showcases the trial of Deborah Lipstadt, who was sued by holocaust denier David Irving for libel in England where truth is not a defense for libel tort). *But see* Clifford v. Trump, 339 F. Supp. 3d 915, 921, 925, 928, 929 (C.D. Cal. 2018) (protecting Trump's "rhetorical hyperbole" that is almost certainly false from suit under an anti-SLAPP statute—despite the First Amendment truth defense, the U.S. Courts appear to have created a new way to make the truth meaningless in libel/slander law).

1461. Bracha, *supra* note 934, at 89–114. *See, e.g.*, HUTCHINSON, 1765 THE HISTORY, *supra* note 801, at 257–58, 355.

1462. Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 WINTHROP'S JOURNAL, *supra* note 819, at 116–17.

the way the Star Chamber would have censored it if Williams attempted to publish it in England.[1463]

The Rhode Island colony was established upon the dissents of Anne Hutchinson and Roger Williams to Puritanical censorship, and so became the first haven in America for freedoms of speech, assembly, press, and religion.[1464] Hutchinson and Williams' suffering for the cause of Christ gave rise to the resistance of Jeremiah Dummer against Governor Andros, and the First Amendment freedoms championed by Isaac Backus during the American Revolution.[1465] The American Revolutionaries joined together to vindicate these rights on July 4, 1776.[1466]

The English Star Chamber likely never had proper jurisdiction in Colonial America, but similar abuses were accomplished in America by the English Admiralty Court.[1467] English impressment was officially abolished by the Americans in 1776.[1468] Nevertheless, in the same way the crown caused the English Civil War, by flouting Parlia-

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1463. *Id.* at 116–17; RIVINGTON, *supra* note 269, at 33–34.

1464. *The Portsmouth Compact* [1638]; *Rhode Island Parliamentary Patent* [1643]; *Rhode Island Royal Charter* [1663]. *See* LAPLANTE, AMERICAN, *supra* note 1321, at 192; Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633?], *mentioned in* 1 WINTHROP'S JOURNAL, *supra* note 819, at 116–17 (advocating that all the colonist's property rights in America came from purchase from the original Native American title); WILLIAMS, THE HIRELING, *supra* note 52, at 23–25 ("[It is] against the testimony of Christ Jesus, for the civil state to impose upon the souls of the people, a religion . . . . Christ Jesus never called for the sword of steel to help the sword of spirit."); Letter from Roger Williams to John Winthrop (Nov. 10, 1637), *in* WILLIAMS, THE LETTERS, *supra* note 1329, at 78 ("I have bought and paid for the Island, and because I desired the best confirmation of the purchase to yourself that I could, I was bold to insert your name in the original here enclosed.").

1465. Jeremiah Dummer, *A Defence of the New-England Charters* 8 [1715] (accepting Williams' banished view as the cornerstone of the Colonial resistance to Governor Andros); 1 BACKUS, *supra* note 1357, at 58–60; Isaac Backus, *An Appeal to the Public for Religious Liberty* 25–26 [1773] (Quoting from Roger Williams and saying, "How weighty are these arguments against confounding church and state together? Yet this author's appearing against such confusion, was the chief cause for which he was banished out of the Massachusetts colony.") (quoting ROGER WILLIAMS, THE BLOODY TENENT MADE YET MORE BLOODY 192 (1652)).

1466. Roger Sherman, *Remarks on a Pamphlet Entitled, "A Dissertation on the political Union and Constitution of the Thirteen States of* NORTH-AMERICA." 16–17, 40–42 [1784] (strongly confirming that Jeremiah Dummer's adoption of Williams' cause for the Native American title purchased by the Colonists was the cornerstone of American common law rights asserted in the American Revolution). *See also* Thomas Jefferson, *Virginia Statute for Religious Freedom* [1777] ("truth is great and will prevail if left to herself"); Isaac Backus, *Truth is Great, and Will Prevail* 3–5 [1781].

1467. *See* SIMMONS, *supra* note 31, at 18 (writs of assistance were issued from the English Courts of Admiralty in America). *Cf.* THE CASE . . . AGAINST ALEXANDER BROADFOOT, supra note 794, at 11–12. *But see* Walters, *supra* note 1330, at 808 (explaining that the Privy Council did assert jurisdiction in America, even after the Star Chamber's demise).

1468. SIMMONS, *supra* note 31, at 18.

ment's abolishment of the Star Chamber a century prior, the crown also caused the War of 1812 by flouting American independence and pressing free born Americans into involuntary servitude for the British Navy.[1469]

The U.S. Constitution abhors feudal laws as a form of slavery, and the United States fought in not one, but two wars to secure the nation from them.[1470] Securing natural rights of human beings from arbitrary feudal abuses, including civil forfeiture laws, was one fundamental purpose of the sacrifices made by the founders in the Revolutionary War and the War of 1812; this fact was vigorously asserted by Mercy Otis Warren in her widely published books,

> Firm and disinterested, intrepid and united, they stood ready to submit to the chances of war, and to sacrifice their devoted lives to preserve inviolate, and to transmit to posterity, the inherent rights of men, conferred on all by the God of nature, and the privileges of Englishmen, claimed by Americans from the sacred sanctions of compact.[1471]

Thus, Americans cannot rightly turn a blind eye to the places where feudal law is subsisting and surviving in the United States, because feudal law defies the social compact of July 4, 1776.[1472] Americans can-

1469. *Id.*; THE CASE . . . AGAINST ALEXANDER BROADFOOT, supra note 794, at 11–12; Benjamin Franklin, *Franklin's Remarks on Judge Foster's Argument in Favor of the Right of Impressing seamen* [before Sept. 17, 1781]; President Thomas Jefferson, Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters (July 2, 1807); President James Madison, Special Message [to Congress asking it to declare war on Great Britain], (June 1, 1812).

1470. The founding generation remembered how each generation before them resisted arbitrary power, and so on behalf of their posterity they refused to bow to the arbitrary dictates of the king. Letter from John Adams to Abigail Adams (Apr. 26, 1777) ("Posterity! You will never know, how much it cost the present Generation, to preserve your Freedom! I hope you will make a good Use of it. If you do not, I shall repent in Heaven, that I ever to half the Pains to preserve it.").

1471. 1 WARREN, *supra* note 35, at 136, 149 (the revolutionaries "determined, from a sense of justice to posterity, and for the honor of human nature, to resist all infringements on the natural rights of men") (emphasis added).

1472. *See, e.g.*, Davis v. Ayala, 135 S. Ct. 2187, 2198–99 (2015); Schroeder, *The Body*, *supra* note 121, at 16–30 (explaining why *Ayala* and other recent decisions of the U.S. Supreme Court are fundamentally feudalistic). The readoption of the near irrebuttable, feudal standards of absolute and qualified immunity originally overruled by *Chisholm v. Georgia*, occured in the *Fitzgerald Cases*: Nixon v. Fitzgerald, 457 U.S. 731, 766–67 (1982) (White, J., dissenting) (commenting on the majority opinion: "It is a reversion to the old notion that the King can do no wrong."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *See, e.g.*, Ashcroft v. Al-Kidd, 563 U.S. 731, 735, 743 (2011) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). *Cf.* Chisholm v. Georgia, 2 U.S. 419, 439 (1793) (Iredell, J., dissenting) (citing The Bankers Case [1696] 14 How. St. Tr. 1, 32–33, 57–58 (Eng.) (holding that "the king can do no wrong" was the basis of both sovereign and qualified immunity)); U.S. CONST. amend. XI (not overruling or reversing *Chisholm* on the matter of sovereign and qualified immunity,

not deny the scene playing out before them of Trumpian loyalists bowing before an arbitrary power of their own imagining.[1473] Americans cannot ignore the *Leviathan* bursting forth from Boomer-led selfishness; for Americans no longer face only one Star Chamber or Admiralty Court—American lawyers now face an entire constellation.[1474]

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and only limiting the U.S. Supreme Court's jurisdiction in future cases); Hans v. Louisiana, 134 U.S. 1, 12 (1890) (bucking the ordinary progression of common law jurisprudence by mere implication, *Hans* decided that the Eleventh Amendment's effect on *Chisholm* was such that the dissent should be treated as a majority opinion).

1473. *House Impeachment Managers' Video Compilation of January 6 Attack on the U.S. Capitol*, C-SPAN (Feb. 9, 2021), https://www.c-span.org/video/?c4944572/house-impeachment-managers-video-compilation-january-6-attack-us-capitol.

1474. *See* Torres v. Madrid, 141 S. Ct. 989, 997 (2021) (openly citing feudal Star Chamber precedent to define Fourth Amendment review of allegedly unconstitutional executive officer behavior); Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1377 (2018) (approvingly comparing the Patent Trial & Appeal Board ("PTAB") to a modern day Privy Council or Star Chamber stating "[t]he Privy Council was composed of the Crown's advisers" and expounding feudal law as the kind of law the PTAB administers in the United States); Stillman, *Taken*, *supra* note 762 (discussing the difficult-to-impossible procedures for attempting to recover property was civilly forfeited unlawfully). Other such American Star Chambers include various military tribunals, FISC, EOIR, sealed Article III Court proceedings, and may include Investor-State Dispute Settlement (ISDS), which has also been called a Global Super Court. Relevant enabling or related laws are here: War Powers Resolution, 50 U.S.C. §§ 1541–1549; AUMF Against Terrorists, Pub. L. No. 107–40, 115 Stat. 224; NDAA for Fiscal Year 2012, Pub. L. No. 112–81, 125 Stat. 1298 (2012); FISA, 50 U.S.C. §§ 1801–1813; USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272; CIPA, 18 U.S.C. §§ 1–16; Immigration & Nationality Act, Pub. L. No. 89–236, 19 Stat. 911. *See* 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, 488–503 (1992) (explaining the non-adversarial, inquisitorial structure of EOIR); Gene Quinn, *USPTO admits to stacking PTAB panels to achieve desired outcomes*, IP WATCHDOG (Aug. 23, 2017), https://www.ipwatchdog.com/2017/08/23/uspto-admits-stacking-ptab-panels-achieve-desired-outcomes/id=87206/; Chris Hamby, *The Secret Threat that makes Corporations More Powerful than Countries*, BUZZFEED (Aug. 30, 2016, 6:00 AM), https://www.buzzfeednews.com/article/chrishamby/the-billion-dollar-ultimatum (reporting on ISDS—see also Hamby's other articles on the subject); Donohue, *The Shadow*, *supra* note 416, at 87–88 (Donohue's far reaching article investigates "disputes related to government contractors" covered up by state secrets doctrine including "Breach of contract, patent disputes, trade secrets, fraud, and employment termination," which "prove remarkable in their frequency, length, and range of technologies involved." They also include "Wrongful death, personal injury, and negligence cases [that] extend beyond product liability and include infrastructure and services, as well as an emerging area perhaps best understood as the conduct of war."). Administrative searches and seizures may also be counted a Star Chamber process—for it is difficult to track whether or when they secretly search or seize without regard to the warrant requirement or in violation of any other constitutional right. *See generally* Jack M. Kress & Carole D. Iannelli, *Administrative Search and Seizure Whither the Warrant*, 31 VILLANOVA L. REV. 706 (1986). Justice O'Connor cited to Administrative Law to justify military tribunals as a legitimate avenue to securing due process; this move unwittingly delegitimized admin law as a kind of Star Chamber rather than a legitimate method of executing Congress's laws by resulting in the total destruction of a U.S. citizen's rights. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). In the U.S., when a generation is blamed for being selfish, the

The freedoms of speech and of the press are attempting to extend across the entire earth to defend humanity; indeed, there was once a time that the freedoms of speech and press shared between the United States and China benefited the citizens of both countries.[1475] In 2012, the New York Times ran an exposé on the Chinese leader Wen Jiabao.[1476] The people of China were shocked and surprised to learn that Wen was a billionaire because Chinese propaganda told the people of China that he was an ordinary man of the people.[1477]

In retaliation, the Chinese government hacked the New York Times, stealing the personal information of most of the personnel at the Times.[1478] In an attempt to respond, American news reporters united to expose China's great fire wall, once again, by characterizing China's internet as a giant cage.[1479] The American news endeavored to expose China's internet as highly censored and lacking ordinary protections for free speech.[1480]

As these news articles were being published, Edward Snowden travelled to Hong Kong and handed a trove of secret government documents to foreign based U.S. reporters Glen Greenwald and Laura Poitras.[1481] These documents, as well as those exposed by other

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rubric of the Boomer generation who are the original "Me" generation, is often used. *Compare* Joel Stein, *Millennials: The Me Me Me Generation*, TIME (May 20, 2013), https://time.com/247/millennials-the-me-me-me-generation/, *with* Tom Wolfe, *The "Me" Decade and the Third Great Awakening*, N.Y. MAG. (Apr. 8, 2008), https://nymag.com/news/features/45938/index1.html (reproduced online from the original Aug. 23, 1976 issue).

1475. U.S. CONST. amend. I; P.R.C. CONST. art. 35 ("citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession, and of demonstration"). *Cf.* Isaac Stanley-Becker, *Top general was so fearful Trump might spark war that he made secret calls to his Chinese counterpart, new book says*, WASH. POST (Sept. 14, 2021), https://www.washingtonpost.com/politics/2021/09/14/peril-woodward-costa-trump-milley-china/; IN THE SAME BREATH (HBO 2021) (demonstrating that free speech is in the interest of both the United States and China, and also something both countries are struggling with in the context of COVID-19).

1476. David Barboza, *Billions in Hidden Riches for Family of Chinese Leader*, N.Y. TIMES (Oct. 25, 2012), https://www.nytimes.com/2012/10/26/business/global/family-of-wen-jiabao-holds-a-hidden-fortune-in-china.html.

1477. The author was in China at this time, interning at Jun He, and can attest to the general feeling expressed by his coworkers and other Chinese folks in Shanghai in response to the exposé.

1478. Nicole Perlroth, *Hackers in China Attacked The Times for Last 4 Months*, N.Y. TIMES (Jan. 30, 2013), https://www.nytimes.com/2013/01/31/technology/chinese-hackers-infiltrate-new-york-times-computers.html.

1479. Special Report, *China's Internet: A Giant Cage*, THE ECONOMIST (Apr. 6, 2013), https://www.economist.com/special-report/2013/04/06/a-giant-cage.

1480. Special Report, *The Machinery of Control: Cat and Mouse*, THE ECONOMIST (Apr. 6, 2013), https://www.economist.com/special-report/2013/04/06/cat-and-mouse.

1481. Glenn Greenwald, Ewen MacAskill, & Laura Poitras, *Edward Snowden: The Whistleblower behind the NSA Surveillance Revelations*, THE GUARDIAN (June 11, 2013),

whistleblowers or by mistake, confirmed that the U.S. internet was not free or open either.[1482] The very same techniques, criticized by U.S. reporters against China, were confirmed by these documents and other leaks as being used to condition American minds.[1483]

In the wake of Edward Snowden's courageous stand the efforts of U.S. news reporters to avenge themselves for the China hack almost entirely failed.[1484] Soon thereafter, relations between China and the United States began to flux and converge.[1485] President Xi traveled to Seattle to explain the importance of cybersecurity to both nations, appearing to back the oppressive regimes proposed in SOPA, PIPA, and ACTA that would cause his own people to suffer even more than the people of the United States.[1486]

After giving President Xi a positive reception, the Obama Administration relinquished control over internet governance to a California nonprofit corporation known as ICANN.[1487] All the while, major Chinese corporations are more open than ever to accepting massive infusions of U.S. capital.[1488] Then, when Donald Trump was voted

https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance.

1482. *Snowden Archive*, *supra* note 1229.

1483. *Id.*

1484. *Id.*

1485. Staff, *President Xi welcomed by Obama as he arrives in Washington DC*, CHINA DAILY (Sept. 25, 2015), https://www.chinadaily.com.cn/world/2015xivisitus/2015-09/25/content_21976699_4.htm; Matt Day, *Internet security a priority, Chinese president tells tech executives*, SEATTLE TIMES (Sept. 23, 2015, updated Sept. 24, 2015), https://www.seattletimes.com/business/technology/china-us-tech-leaders-show-divergent-views-on-internet-interests/.

1486. Taylor Soper, *Full text: China President Xi gives policy speech in Seattle, wants to fight cybercrime with the U.S.*, GEEKWIRE (Sept. 22, 2015), https://www.geekwire.com/2015/full-text-china-president-xi-gives-policy-speech-in-seattle-pledges-to-fight-cybercrime-with-u-s/.

1487. Edward Moyer, *US hands internet control to ICANN*, CNET (Oct. 1, 2016, 5:55 PM), https://www.cnet.com/news/us-internet-control-ted-cruz-free-speech-russia-china-internet-corporation-assigned-names-numbers/; Jody Westby, *7 Days Before Obama Gives Away Internet & National Security*, FORBES (Sept. 24, 2016, 2:44 PM), https://www.forbes.com/sites/jodywestby/2016/09/24/7-days-before-obama-gives-away-internet-national-security/?sh=30343f0830d4 ("In one week, President Obama will allow what remains of the United States' control over the Internet to pass to a California non-profit organization, the Internet Corporation for Assigned Names and Numbers (ICANN)."); Swartz, *Keynote*, *supra* note 599.

1488. Liyan Chen, Ryan Mac, & Brian Solomon, *Alibaba Claims Title for Largest Global IPO Ever with Extra Share Sales*, FORBES (Sept. 22, 2014, 11:51 AM), https://www.forbes.com/sites/ryanmac/2014/09/22/alibaba-claims-title-for-largest-global-ipo-ever-with-extra-share-sales/?sh=79365e348dcc; Martin Choi, *Tesla boss Elon Musk says he loves China, so Premier Li Keqiang offers him a green card*, SOUTH CHINA MORNING POST (Jan. 10, 2019, 8:32 PM), https://www.scmp.com/news/china/diplomacy/article/2181556/tesla-boss-

into the presidency, China gifted him a procession of Chinese trademarks beginning with a trademark in his name "Trump."[1489]

The Trump administration pulled the U.S. out of President Obama's Trans-Pacific Partnership ("TPP") to renegotiate U.S. protections for American IP sold in China.[1490] China never agreed to the TPP, and now it appears the TPP survived but without the trans-Pacific's two biggest players: China and the United States.[1491] Then on Feb. 15, 2019, President Donald Trump declared a national emergency on our Southern Border and said,

> And one of the things that I did with President Xi in China, when I met him in Argentina, at a summit. Before I even started talking about the trade, it was a trade meeting, it went very well, but before I talked about trade I talked about something more important I said, 'listen, we have tremendous amounts of fentanyl coming into our country, kills tens of thousands of people, I think far more than anybody registers, and I-I'd love you declare it, a lethal drug, and put it on your criminal list,' and their criminal list is much tougher than our criminal list. They're criminal list a drug dealer gets a thing called THE DEATH PENALTY. Our criminal list a drug dealer gets a thing called, how 'bout a fine. And when I asked President Xi, I said, 'you have a drug problem,' no, no, no, I said, 'you

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elon-musk-says-he-loves-china-so-premier-li-keqiang. *Cf.* THE CHINA HUSTLE (Magnolia Pictures 2018) (dir. Jed Rothstein).

1489. Jeremy Venook, *The Story Behind Trump's Chinese Trademark*, THE ATLANTIC (Feb. 22, 2017), https://www.theatlantic.com/business/archive/2017/02/trump-chinese-trademark/517458/; Mark Moore, *China's gift to Trump raises constitutional concerns*, NY POST (Mar. 8, 2017, 10:40 AM), https://nypost.com/2017/03/08/china-grants-preliminary-approval-to-38-trump-trademarks/; U.S. CONST. art. I, § 9, cl. 8.

1490. President Donald Trump, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, (Jan. 23, 2017), https://www.federalregister.gov/documents/2017/01/25/2017-01845/withdrawal-of-the-united-states-from-the-trans—pacific-partnership-negotiations-and-agreement;
Charles Riley, *Trump's decision to kill TPP leaves door open for China*, CNN BUSINESS (Jan. 24, 2017), https://money.cnn.com/2017/01/23/news/economy/tpp-trump-china/. *Cf.* America Invents Act, 125 Stat. 284–341 (this statute, signed into law by President Obama, changed the patent law from a first to invent to a first inventor to file system, in part to maximize the amount of filings made for inventions to compete with the explosion in the amount of Chinese patents in existence—it arguably departs from the "first inventor" requirement that traces back to the *Statute of Monopolies*, and may thus be challenged under the limitations of the Patent & Copyright Clause, which requires that patents be granted to *inventors*).

1491. Bala Ramasamy, *Why China could never sign on to the Trans-Pacific Partnership*, THE CONVERSATION (Apr. 13, 2016), https://theconversation.com/why-china-could-never-sign-on-to-the-trans-pacific-partnership-56361; Ian Bremmer, *The Trans-Pacific Trade Deal Survives, But the U.S. and China Matter More*, TIME (Nov. 8, 2018, 6:16 AM), https://time.com/5448808/trans-pacific-trade-deal-china/; Edward Helmore, *Ivanka Trump won China trademarks days before her father's reversal on ZTE*, THE GUARDIAN (May 28, 2018), https://www.theguardian.com/us-news/2018/may/28/ivanka-trump-won-china-trademarks-donald-trump-zte-reversal.

> have 1.4 billion people, what do you mean you have no drug problem, 'no we don't have a drug problem,' I said, 'why?' — 'death penalty, we give death penalty to people that sell drugs.' End of problem. What do we do? We set up a blue ribbon committees. Lovely men and women, they sit around a table, they have lunch, they eat, they dine, and they waste a lot of time. So if we want to get smart, we can get smart, you can end the drug problem, you can end it a lot faster than you think but President Xi's agreed to put fentanyl on his list of deadly, deadly drugs, and it's a criminal penalty, and the penalty is death. So that's frankly one of the things I'm most excited about in our trade deal.[1492]

Here, Donald Trump momentarily set aside his usual angst about China, to use China as an example of why killing drug offenders can cause our society to become better.[1493] The influence of President Xi over President Trump on this topic is further confirmation that policy matters in China and the United States are joined at the hip.[1494] At least since the Nixon era, economists asserted the United States and China will either rise together or fall together, and there are secret forces at work to make sure that both fall under permanent authoritarian rule.[1495]

Americans saw these forces in full vigor when Aaron Swartz took to the national stage and helped us fight against SOPA, PIPA, and ACTA in 2012, for in the next year Swartz was killed and his death was ruled a suicide.[1496] When he died, both China and America lost a

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1492. *Remarks by President Trump*, *supra* note 1047 (emphasis added).

1493. *Id. Cf.* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 48 n.56, 74, 342–43 n.4, 375–76 nn.89–90, 355–56, 443 (2d ed., 1958) (Hitler fashioned the final solution out of a similar utopic sentiment); HANNAH ARENDT, EICHMANN IN JERUSALEM 198 (1994) (apearing to describe the way Trump seemed to regard President Xi: "Brand had been told that 'an idealistic German' was now talking to him, 'an idealistic Jew'—two honorable enemies meeting as equals during a lull in the battle.").

1494. Peter Hayes, *U.S.-China: Joined at the Hip*, NAPSNET POLICY FORUM (June 27, 2013), https://nautilus.org/napsnet/napsnet-policy-forum/us-china-joined-at-the-hip/; Linda Yueh, *As China Rises, the U.S. Will Reap*, N.Y. TIMES (July 25, 2013), https://www.nytimes.com/roomfordebate/2013/07/25/if-china-rises-will-the-us-fall/as-china-rises-the-us-will-reap. *See* Michael Elliot, *West Meets East*, TIME (Oct. 10, 2004), http://content.time.com/time/subscriber/article/0,33009,713163,00.html (remembering "Richard Nixon whose visit to China in 1972 ended Beijing's political isolation").

1495. *See, e.g.*, Feinstein, *Floor Speech*, *supra* note 621 (declaring a violation of the separation of powers); Stanley-Becker, *supra* note 1475 (reviewing allegations made in Bob Woodward and Robert Costa's new book *Peril*, which claimed access to secret government documents that showed that Trump almost decided to go to war with China in hopes that it would help him disrupt the 2020 election).

1496. Swartz, *Keynote*, *supra* note 599; THE INTERNET'S OWN BOY (Participant Media 2014). It is possible that Swartz committed suicide, but when considering all the evidence a government coverup is at least as likely. John Schwartz, *Internet Activist, a Creator of RSS, Is Dead at 26, Apparently a Suicide*, N.Y. TIMES (Jan. 12, 2013), https://www.nytimes.com/2013/01/13/technology/aaron-swartz-internet-activist-dies-at-26.html; Matt Williams,

champion brave enough to fight for them and effective enough to win for them.[1497] Then, as if by clockwork, the U.S. executive branch hacked Congress to protect its illegal and unconstitutional use of torture black cites across the world (discussed in Part II *supra*, *A Message from Senator Dianne Feinstein*).[1498]

The government had motive to kill Swartz in order to save face because he likely would have won his case, which was frivolously and abusively prosecuted.[1499] A distinct, possible outcome of Swartz's case, due to the existence of the separation of powers, was a federal judge declaring the Computer Fraud and Abuse Act unconstitutional.[1500] If Swartz lived long enough to challenge the law in court, the whole trajectory of the war on terror may have shifted.[1501]

Around the same time as Swartz's death, other suspicious deaths occurred.[1502] For example, Michael Hastings published a con-

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Aaron Swartz's Family condemns MIT and US government after his death, THE GUARDIAN (Jan. 13, 2013, 11:08 AM), https://www.theguardian.com/technology/2013/jan/13/aaron-swartz-family-mit-government#comment-20583650.

1497. Swartz, *Keynote*, *supra* note 599.

1498. Feinstein, *Floor Speech*, *supra* note 621.

1499. Kennerly, *Explaining*, *supra* note 576 (a preliminary analysis done in real time before Swartz's death). *See* Berger v. United States, 295 U.S. 78, 88 (1935) (A State's Attorney and U.S. Attorney alike "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

1500. Kennerly, *Explaining*, *supra* note 576; Mayfield v. United States, 504 F. Supp. 2d 1023, 1042–43 (D. Or. 2007) (holding portions of the Patriot Act unconstitutional), *vacated,* Mayfield v. United States, 599 F.3d 964 (9th Cir. 2010) (holding that because Mayfield took a settlement of money that there was no basis for equitably holding any part of the Patriot Act unconstitutional, even though Mayfield believed he had preserved his constitutional claims in his settlement by explicitly requesting and being granted the right to dispute the law in his settlement with the government—this result revealed that if any part of a settlement is accepted the Court may toss out the entire case, even if the settlement itself contained language to preserve constitutional claims for judicial review).

1501. THE INTERNET'S OWN BOY (Participant Media 2014). *Cf.* John Naughton, *Aaron Swartz stood up for freedom and fairness—and was hounded to his death*, THE GUARDIAN (Feb. 7, 2015, 5:00 PM), https://www.theguardian.com/commentisfree/2015/feb/07/aaron-swartz-suicide-internets-own-boy.

1502. *See, e.g.,* Gonnerman, *supra* note 160; Robert Bridge, *Five Years On, Death of Journalist Michael Hastings Remains a Mystery*, STRATEGIC CULTURE FOUNDATION (Aug. 25, 2018), https://www.strategic-culture.org/news/2018/08/25/five-years-death-journalist-michael-hastings-remains-mystery/. Nightcrawlers at the scene of Hastings' death published highly controversial footage of the scene, which was never featured on mainstream news sources. LoudLabs News, *Journalist Michael Hastings Dies in Fiery Crash / Hollywood RAW FOOTAGE*, YOUTUBE (June 18, 2013), https://www.youtube.com/watch?v=3LSY3wVuASg. *Cf.* Philip Bump, *How the first statement from minneapolis police made George Floyd's murder seem like George Floyd's fault*, WASH. POST (Apr. 20, 2021, 9:31 PM), https://www.washingtonpost.com/politics/2021/04/20/how-first-statement-minneapolis-police-made-george-floyds-murder-seem-like-george-floyds-fault/.

troversial exposé on General Stanley McChrystal in Rolling Stone that led to the General's removal.[1503] While working on another exposé, Hastings' car mysteriously exploded and hit a tree in Hollywood; though the explosion was caught on camera and the car was burned down to bare metal, the coroner found that Hastings drove while intoxicated to rule out further investigation.[1504]

The apparent tactics of the government to get Hastings and Swartz to die deaths that cause the public to recoil from their activism and journalism was accomplished.[1505] Their deaths could be considered a play on Michael Walzer's Machiavellian strategy of convincing the nation to dissociate with their deeds.[1506] Protecting their lives may not be worth losing the monopolies that Booz Allen Hamilton, AT&T, and other similarly situated companies enjoy.[1507]

Antitrust law was designed to defend the free speech of Hastings and Swartz.[1508] It was supposed to ensure that there is no monopoly on the press in America, and that no one can lawfully take the means of another person's living, which is the same as taking away

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1503. Hastings, *supra* note 742.

1504. Bridge, *supra* note 1502.

1505. *Id.*; Larissa MacFarquhar, *Requiem for a Dream*, NEW YORKER (Mar. 11, 2013), https://www.newyorker.com/magazine/2013/03/11/requiem-for-a-dream (articles and perspectives like this, which trace the "dark side" of Aaron Swartz, tend to let the government off the hook for possible prosecutorial misconduct, conspiracy, and murder); Glenn Greenwald, *Carmen Ortiz and Stephen Heymann: accountability for prosecutorial misconduct*, THE GUARDIAN (Jan. 16, 2013), https://www.theguardian.com/commentisfree/2013/jan/16/ortiz-heymann-swartz-accountability-abuse (showing, by attempting to make the argument, how much of an uphill battle it can be to prove prosecutorial misconduct when the victim allegedly committed suicide).

1506. MICHAEL WALZER, JUST AND UNJUST WARS 325 (1977) (copping Machiavellian realism and saying "we must look for people who are not good, and use them, and dishonor them").

1507. Kevin Poulsen, *First 100 Pages of Aaron Swartz's Secret Service File Released*, WIRED (Aug. 12, 2013, 5:00 PM), https://www.wired.com/2013/08/swartz-foia-release/ ("'On 1/11/13, Aaron Swartz was found dead in his apartment in Brooklyn, as a result of an apparent suicide,' reads a January 17, 2013 Secret Service memo."). Swartz is not the only one to be smeared with the epithet of suicide, a decision that effectively ends the government investigation. *See, e.g.*, Shawn Cohen & Daniel Prendergast, *Death of judge found in Hudson ruled a suicide*, NY POST (July 26, 2017, 2:49 PM), https://nypost.com/2017/07/26/death-of-judge-found-in-hudson-ruled-a-suicide/ (saying something was "ruled" so makes it sound like there was process—but the police just decided it was, which is exactly what they would do if they carried out the hit or wanted to cover it up for some other reason). *Cf.* Bump, *supra* note 1502.

1508. 3 EDWARD COKE, INSTITUTES *181(1644); John Milton, *Eikonoklastes* 2–3 (2d ed. 1650); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773.

their life.[1509] The connection between the preservation of human life and antitrust law was explicitly confirmed when the government censored Hastings and Swartz, destroyed their work, and literally caused them to die.[1510] American rights of life, to paying jobs and living wages, are too often overlooked by judges that prefer rose colored glasses and legal realism to natural justice and equity.[1511]

In great contrast to the government's damnation of Hastings and Swartz, in spite of their innocence, corporations deemed too big to fail were bailed out by the Obama administration in 2008 despite their crimes.[1512] The U.S. system of trickledown economics, tax incentives, and government bailouts is a failing socialist system for rich people.[1513] It is no surprise that this lopsided socialism for the wealthy, which violates the very public trust that enables the existence of the government, is fraudulently branded as "capitalism."[1514]

1509. 3 EDWARD COKE, INSTITUTES *181.

1510. Letter from Phillis Wheatley to David Wooster (Oct. 18, 1773) (noting that she was a fully-fledged author expecting to make her living solely on her works); 3 EDWARD COKE, INSTITUTES *181 (1644) (noting it is a fundamental right of life to be able to earn a living). *See* LoudLabs News, *supra* note 1503; Poulsen, *supra* note 1507.

1511. Virginia v. Black, 538 U.S. 343, 356–57 (2003); BORK, SLOUCHING, *supra* note 1223, at 154–71 (appearing to pine for the days of eugenic laws which kept those he saw as unfit for society in artificial decline especially in his chapter *The Rise of Crime, Illegitimacy, and Welfare* while ironically comparing *Roe v. Wade* to *Dred Scott* in another chapter dedicated in part to comparing the right to choose abortion to eugenics).

1512. *See generally* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3765. *See* James S. Henry, *Socialism for Bankers, Savage Capitalism for Everyone Else?*, THE NATION (Sept. 23, 2008), https://www.thenation.com/article/archive/socialism-bankers-savage-capitalism-everyone-else/. *See also* Burgess Everett, *'Like a Soviet-type economy': GOP free traders unload on Trump*, POLITICO (July 24, 2018, 2:50 PM), https://www.politico.com/story/2018/07/24/trump-farmers-bailout-reaction-republicans-congress-737517 (Trump proposed a $12 billion bailout for farmers suffering from the tariffs he imposed on China.).

1513. *See* Kamala Kelkar, *When labor laws left farm workers behind—and vulnerable to abuse*, PBS (Sept. 18, 2016, 4:47 PM), https://www.pbs.org/newshour/nation/labor-laws-left-farm-workers-behind-vulnerable-abuse; deck0930, *Reagan Government is not the solution to our problem government IS the problem*, YOUTUBE (Feb. 4, 2009), https://www.youtube.com/watch?v=6ixNPplo-SU (such statements are usually indicative of support for the trickle down, government subsidized capitalist socialism); Patricia Cohen, *Profitable Companies, No Taxes: Here's How They Did It*, N.Y. TIMES (Mar. 9, 2017), https://www.nytimes.com/2017/03/09/business/economy/corporate-tax-report.html. *See* FILIPOVIC, *supra* note 614, at 13–14; GIBNEY, *supra* note 649, at xxv. *Cf.* RUTGER BREGMAN, UTOPIA FOR REALISTS: HOW WE CAN BUILD THE IDEAL WORLD *passim* (2017).

1514. *See* FILIPOVIC, *supra* note 614, at 13–14; GIBNEY, *supra* note 649, at 2–26, 30–31 (noting numerous federal assistance programs that nursed the Boomer generation into existence, and the social engineering sort of attitude of the Greatest Generation that raised them); THE CENTURY OF THE SELF (BBC 2002) (Edward Bernays helped his generation engineer the Baby Boomers to become what they are). *See, e.g.*, Social Security Act, Pub. L. No. 74-271, 49 Stat. 620, *litigated in* King v. Smith, 392 U.S. 309, 318–22 (1968) (States were allowed to allocate New Deal funds according to their own standards, and so many of them

The use of socialist systems as lifesupport for capitalist ideologies pervade the United States and traces at least back to the establishment of eugenics in America.[1515] Eugenic policies, which directly contradicted the free trade capitalism that the United States professed, formed the ideological underpinnings of the post-WWII Baby Boom, for which the entire Boomer generation is named.[1516]

awarded federal aid to only "legitimate" children living in "suitable" homes. The Greatest Generation was social engineering their families through the State into what they wanted them to be—and the racists and misogynists among them were perhaps the most heavy-handed participants in the government experiment. In this case, the "liberal" Warren Court only reversed this Alabama law on the narrowest of grounds, not expressly extending it to other State standards. The white, male adults in the States, here Alabama, were doing the very social experiments to others that they would have decried as communist or socialist if the same experiments were done to them. They even engineered their children to viscerally fear all things communist, socialist, and even the color red—as if that wasn't ironic.); Buck v. Bell, 274 U.S. 200, 207 (1927) (empowering the States to engineer the people of the United States was all the rage, and it is what created the Boomer generation: "It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."). Even Jackson Pollock's success was ironically propped up by the U.S. Government as propaganda against communism. Frances Stonor Saunders, *Modern art was CIA 'weapon,'* INDEPENDENT (Oct. 22, 1995, 3:08 PM), https://www.independent.co.uk/news/world/modern-art-was-cia-weapon-1578808.html.

1515. THE CENTURY OF THE SELF (BBC 2002); FILIPOVIC, *supra* note 614, at 13–14; GIBNEY, *supra* note 649, at 2–26, 30–31; Edward Bernays, *The Engineering of Consent* [1947], *in* 250 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 113, 113–14 (1947) (claiming the constitutional right to manipulate the American public, as if our constitutional system wereas indestructible). *See* Edward Bernays, *Public Relations as Aid to Ethnic Harmony: Hawaii—The Almost Perfect State* [1950], *reprinted in* EDWARD BERNAYS, PUBLIC RELATIONS 308 (1945) ("Hawaii is . . . the melting pot of the Pacific, assimilating people of Oriental ancestry, . . . It is of further significance to the continental United States because it is setting a successful pattern for the working out of maladjustments between people of diverse ethnic backgrounds.") (emphasis added); *id.* at 20–21, 27, 72–75, 78–79 (presenting the methods of Bernays' propaganda system that started as a project under the U.S. Government's Committee of Public Information during World War I); Eleanor Roosevelt, *My Day*, (Dec. 5, 1958), https://www2.gwu.edu/~erpapers//myday/displaydoc.cfm?_y=1958&_f=MD004294 (feigning compassion for colored children that needed to be "adjusted" psychologically to accept their place); EDWARD BERNAYS, BIOGRAPHY OF AN IDEA 652 (1965) [hereinafter BERNAYS, BIOGRAPHY] ("Goebbels, said Wiegand, was using my book *Crystallizing Public Opinion* as a basis for his destructive campaign against the Jews of Germany."); Letter from Justice Felix Frankfurter to President Franklin D. Roosevelt, May 7, 1934, *in* ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 214 (Max Freedman ed., 1968) (Justice Frankfurter called Bernays and other prominent PR counsels "professional poisoners of the public mind."); *Buck*, 274 U.S., at 207.

1516. WENDY KLEIN, BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM 155 (2001) ("Though the baby boom peaked in 1957, the 'cultural imperative for large, planned families' did not lessen until the mid-1960s, when the birthrate began to drop."). *See* DAVID STARR JORDAN, THE HUMAN HARVEST 31, 47 (1907) (advertising to the WWII generation that the decline in birth-rate is connected with the downfall of society). *Cf. American Experience: The Eugenics Crusade* (PBS release Oct. 16, 2018) (noting that the Baby Boom was engineered with federal incentives for white, "fit"

While eugenics is now described as an illegitimate psuedoscientific expression of racism and misogyny, its legal basis in *Buck v. Bell* is still good law.[1517]

Buck v. Bell was reaffirmed in the 1970's Ninth Circuit case *Madrigal v. Quilligan*, which was followed by a eugenic sterilization program in California women's prisons in the early 2000's, revealed by the activism of Kelli Dillon and Cynthia Chandler.[1518] Eugenics ideology hit the limelight of America once again in 2021, when the iconic Millennial superstar Britney Spears contested her conservatorship in California court saying,

> I was told right now in the conservatorship I'm not able to get married or have a baby. I have an (IUD) inside of myself right now so I don't get pregnant. I wanted to take the (IUD) out so I could start trying to have another baby, but this so-called team won't let me go to the doctor to take it out because they don't want me to have children—any more children. So basically, this conservatorship is doing me way more harm than good.[1519]

Britney Spears's struggle to establish independence from her father who received the support of a judge to monetize her image, music, and work until she dies is symbolic of her generation.[1520] Spears's rights of life that were legally stripped from her, for the likely duration of her life, on the basis that she is too insane to manage the profits of her own labor are the same rights that Phillis Wheatley championed and re-

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families to bear more children than they naturally could support); BERNAYS, BIOGRAPHY, *supra* note 1515, at 53–66, 85, 88, 101, 103, 187, 206, 287, 731–32 (The father of the Public Relations industry Edward Bernays began his career representing the eugenics movement by producing a play called *Damaged Goods*, which inspired the rest of his career: "In my first few years on my own I carried out programs for a variety of clients, publicizing . . . the eugenics movement . . . . I had no knowledge of what a press agent was or did before I helped produce *Damaged Goods* in 1913." It is well known that *Damaged Goods* was a pro-eugenics propaganda play that was later reproduced as a movie and book.).

1517. *Buck*, 274 U.S., at 207.

1518. Madrigal v. Quilligan, No. 75–2057, 1978 U.S. Dist. LEXIS 20423, at *1 (9th Cir. 1978) (directly affirming *Buck* without opinion); BELLY OF THE BEAST (PBS 2020) (explaining the activism of Kelli Dillon and Cynthia Chandler).

1519. Hannah Yasharoff, *Read Britney Spears' full statement from her conservatorship hearing: 'I am traumatized'*, USA TODAY (June 24, 2021, 11:16 AM), https://www.usatoday.com/story/entertainment/celebrities/2021/06/24/britney-spears-full-statement-conservatorship-hearing/5333532001/; *G: Unfit*, RADIOLAB (July 15, 2021), https://www.wnycstudios.org/podcasts/radiolab/articles/g-unfit [hereinafter *G: Unfit*] (playing the quoted portion of Spears' court statement and reminding listeners that this "this is way bigger than Britney," noting the estimated 1.3 million people living under conservatorships or guardianships).

1520. *See* Sara Luterman, *For Women Under Conservatorship, Forced Birth Control Is Routine*, THE NATION (July 15, 2021), https://www.thenation.com/article/society/conservatorship-iud-britney-spears/; *G: Unfit*, supra note 1519 (demonstrating how easy it is for guardians to sterilize their wards); Yasharoff, *supra* note 1519.

ceived before 1776.[1521] The failure of the Boomer generation to pass down Wheatley's well known rights to their children, as they might have done to break the cycle of abuse, is perhaps the sole reason why certain Millennials like Britney Spears and Kesha Sebert are presently in a fight for their lives.[1522]

Instead of doing justice for future generations, a majority of Boomers endorsed Donald Trump, who symbolizes the worst selfish tendencies of the Boomer generation.[1523] Donald Trump also quintessentially represents the irony of a false capitalism that is subsidized by unspoken socialism.[1524] Rather than address the issue in light of the Russian support of the former president, prominent members of the Silent Generation remained characteristically silent, for example, "I have to say we're capitalist, that's just the way it is," Nancy Pelosi stated amid the Trump presidency.[1525]

Even after Watergate, the Pentagon Papers, the *Iran-Contra Affair*, and the 2008 market crisis, most Americans still believe that

1521. *Compare* Yasharoff, *supra* note 1519, *with* Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7.

1522. *Compare* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34–37 (2003) (declining to extend Wheatley's attribution rights), *with* Yasharoff, *supra* note 1519 (Britney's father earns the profits of Britney's work), *and* Gottwald v. Sebert [i.e., Dr. Luke v. Kesha], No. 653118/2014, 2016 WL 1365969, at *4, *9, *11 (N.Y. Sup. Ct. 2016) (Kesha's abuser continues earning profits from music inspired by Kesha's survival of his abuse, and his case against Kesha for naming his abuse is moving forward).

1523. John F. Harris, *Donald Trump Is the Perfect Leader of the Worst Generation*, POLITICO MAG. (January 14, 2021), https://www.politico.com/news/magazine/2021/01/14/trump-leader-worst-generation-459244; Ronald Brownstein, *The Most Complete Picture Yet of America's Changing Electorate*, THE ATLANTIC (July 1, 2021), https://www.theatlantic.com/politics/archive/2021/07/2020-voter-demographics/619337/ (noting that Trump got most of his support from the Boomers, but that in 2020 "the preponderantly white Baby Boomer generation, which has aged from its 1960s roots into a Republican-leaning cohort, is receding"); *An examination of the 2016 electorate, based on validated voters*, PEW RSCH. CTR. (Aug. 9, 2018), https://www.pewresearch.org/politics/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/ (showing that a majority of Boomers aged from around 52 to 70 at the time voted for Trump); *Exit Polls*, CNN POLITICS (last visited Setp. 26, 2021), https://www.cnn.com/election/2020/exit-polls/president/national-results. *Cf.* Gabriel Debenedetti, *They Always Wanted Trump*, POLITICO (Nov. 7, 2016), https://www.politico.com/magazine/story/2016/11/hillary-clinton-2016-donald-trump-214428/ ("to take Bush down, Clinton's team drew up a plan to pump Trump up").

1524. *See* Dana Milbank, *Donald Trump, the welfare king*, WASH. POST, (May 23, 2016), https://www.washingtonpost.com/opinions/donald-trump-the-welfare-king/2016/05/23/154310f4-2121-11e6-aa84-42391ba52c91_story.html.

1525. CNN, *Pelosi: Democrats are capitalists*, YOUTUBE (Jan. 31, 2017), https://www.youtube.com/watch?v=MR65ZhO6LGA [hereinafter CNN, *Pelosi*] (here Pelosi actually quoted to or paraphrased the Chairman of Standard Oil, a monopolist, as her example of what capitalism should be).

they are the beneficiaries of simple capitalism.[1526] As Hannah Arendt wrote in her piece *Lying in Politics*, such lies make a brittle foundation for the Republic.[1527] Perhaps the gerontocracy that is now empowered in Congress underestimates the younger generations; who appear not as easily convinced about oversimplified dichotomies that no longer make sense of their world.[1528]

The fraud of a socialist supported capitalism continues facilitating eugenics-based intergenerational theft exemplified by the experiences of Britney Spears, Kesha Sebert, Aaron Swartz, and Michael Hastings.[1529] Younger Americans have every ground to dispute this intergenerational theft in the courts under statutory law, common law, natural law, and the law of God that vindicates their rights of life, but the defense of future generations will not be accomplished without difficulty.[1530] For *Leviathan* went to Washington in the hearts of our elders, and there it will continue transcending the laws of God and man to manifest horrors in American society.[1531]

Conclusion: The Necessity that Knows No Law

In *Youngstown*, Justice Jackson wrote of a "necessity [that] knows no law."[1532] He wrote that executive emergency powers would tend to "kindle emergencies," and thus the federal government has no emergency powers "[a]side from suspension of the privilege of the writ

1526. *Id.*; Nancy Pelosi, *Pelosi Statement on Second Half of TARP Funds*, (Jan. 15, 2009), https://www.speaker.gov/newsroom/pelosi-statement-second-half-tarp-funds/; Sutton, *supra* note 1049; Pentagon Papers, *supra* note 626; *The Contras*, *supra* note 405; Filipovic, *supra* note 614, at 13–14; Gibney, *supra* note 649, at 205, 329–30.

1527. Hannah Arendt, *Lying in Politics* [1972], *in* Arendt, Crises, *supra* note 187, at 7.

1528. CNN, *Pelosi*, *supra* note 1525 (lecturing a Millennial about capitalism); Blake, *More*, *supra* note 618 (Millennials did not care one way or another whether Sanders referred to himself as a "socialist," and that's *all* the Boomers seemed to care about).

1529. Yasharoff, *supra* note 1519; Gottwald v. Sebert [i.e., Dr. Luke v. Kesha], No. 653118/2014, 2016 WL 1365969, at *4, *9, *11 (N.Y. Sup. Ct. 2016); Swartz, *Keynote*, *supra* note 599; LoudLabs News, *supra* note 1503.

1530. 3 Edward Coke, Institutes *181; John Milton, *Eikonoklastes* 2–3 (2d ed. 1650); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* Wheatley, *supra* note 821, at 7; Phillis Wheatley's Registration, Sept. 10, 1773, TSC/1/E/06/09, Register of entries of copies 1746–1773; Otis, *supra* note 18, at 279 (calling for "the demolition of all monopolies great and small").

1531. Hobbes, *supra* note 6, at 46–48, 231. *See* Dan Zak, *A Kraken is Loose in America*, Wash. Post (Dec. 10, 2020, 3:00 AM), https://www.washingtonpost.com/lifestyle/style/kraken-trump-election-powell-giuliani/2020/12/09/6f6944ea-381e-11eb-bc68-96af0daae728_story.html.

1532. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

of habeas corpus in time of rebellion or invasion."[1533] Therefore, President Trump did not have emergency powers under the plethera of sham emergencies he declared to: (1) unilaterally appropriate money to his border wall;[1534] (2) to incite a coup d'etat to topple Congress on January 6, 2021 to change an election result that he felt was unjust;[1535] or (3) to exercise plenary *parens patriae* power to leverage the Court to allow him to unconstitutionally oversee state run federal elections in his favor.[1536]

1533. *Id.* at 650 (citing U.S. CONST. art. I, § 9, cl. 2).

1534. *Id.* (an emergency, as defined under *Milligan* and extended in *Youngstown*, requires an actual invasion or insurrection that renders the courts unable to operate); *Remarks by President Trump*, *supra* note 1047 (Trump admitted that his emergency declaration was a sham, saying: "I didn't need to do this. But I'd rather do it much faster."); Liptak et al., *Trump*, *supra* note 1047; Gloria Borger, *Trump sees the wall as a monument to himself*, CNN (Jan. 22, 2019, 12:27 PM), https://www.cnn.com/2019/01/22/politics/president-trump-border-wall-symbol-monument-legacy/index.html. *See* Proclamation No. 9,844, 84 Fed. Reg. 4,949–50 (Feb. 15, 2019) (the federal courts have the duty and the power to overrule this entire proclamation as a sham under *Ex parte Milligan*) (citing National Emergencies Act, 50 U.S.C. 1631; Construction Authority in the Event of a Declaration of War or National Emergency, 10 U.S.C. § 2808); Sierra Club v. Trump, 977 F.3d 853, 876, 888–90 (9th Cir. 2020) ("The 'power to legislate for emergencies belongs in the hands of Congress.' *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring). We cannon 'keep power in the hands of Congress if it is not wise and timely in meeting its problems,' *id.*, but where, as here, Congress has clung to this power with both hands—by withholding funding for border wall construction at great effort and cost and by attempting to terminate the existence of a national emergency on the southern border on two separate occasions, with majority vote by both houses—we can neither pry it from Congress's grasp. For all 'its defects, delays and inconveniences,' it remains critical in all areas, but particularly with respect to the emergency powers, that 'the Executive be under the law, and that the law be made by parliamentary deliberations.' *Id.* at 655."); *Ex parte* Milligan, 71 U.S. 2, 127 (1866) ("Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration."); 10 U.S.C. § 2808(c) (in the case that a court decides that the presidential attempt to appropriate funds to a border wall is based upon a sham emergency, the Court can hold that the presidential proclamation as dead upon arrival as "terminate[d] with respect to any war or national emergency at the end of the war or national emergency").

1535. *Transcript of Trump's Speech at Rally Before US Capitol Riot*, AP NEWS (Jan. 13, 2021), https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27; Dan Barry et al., *'Our president wants us here': The Mob that Stormed the Capitol*, N.Y. TIMES (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html.

1536. U.S. House of Representatives Committee on Oversight and Reform, *Selected Documents: President Trump Pressure Campaign on Dept. of Justice* (June 2021) (Trump's people relied heavily upon the Hobbesian, patriarchal theory of *parens patriae* given in South Carolina v. Katzenbach, 383 U.S. 301 (1966), and the draft briefs they sent out confirmed an organized plan to legitimize the fake Trump electors that were kept out of each state's official vote). The sham emergency Trump proclaimed in support of his pressure campaign, was based upon a very strange individual who called herself Michelle Roosevelt Edwards, among other aliases, and falsely claimed to represent an Italian Airline company that pretended to have information about spy satellites disrupting the U.S. 2020 election, which appears to have been the primary if not sole basis for Trump's kraken suit challenges. *Id.*; *Transcript:*

The president does, however, possess inherent peace powers under Article II to preserve peace and neutrality in the absence of an official declaration of war.[1537] This means that the federal courts unconstitutionally blocked President Obama's amnesty order for immigrants.[1538] It also means that President Obama unconstitutionally abdicated his peace powers to Congress when he waited for legislation rather than taking action to close military torture cites like Guantanamo Bay on his own.[1539]

The president's powers of peace are meant to be aided by every citizen's "freedom of speech and action."[1540] For wherever a president determines it is in his best interest to repent from his former ways and become an agent of peace and kindness, the people ought to speak out encouragements to him or her.[1541] However, whenever any branch of government betrays its trust with the people, the people are free to speak out and act against it; with virulence if they so choose.[1542]

In the words of the first champion of our freedom, James Otis, the "freedom of speech . . . is what keeps the constitution in health and vigour, and is in a great measure the cause of our preservation as a free people."[1543] Otis continued, "[f]or should it ever be dangerous to exercise this privilege, it is easy to see, without the spirit of prophesy, slavery and bondage would soon be" our portion.[1544] Therefore, Otis marvelously concluded,

> It is as much the duty of a member of society to oppose every encroachment on the subject, as it is to support the prerogative when in danger, from the licentiousness of the people.—Without this check, we should be liable to oppression, whenever a tyrant was in power . . . .[1545]

The Rachel Maddow Show, 6/21/21, MSNBC (June 21, 2021, 6:00 PM), https://www.msnbc.com/transcripts/transcript-rachel-maddow-show-6-21-21-n1271818.

1537. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 311 (1936).

1538. United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (Mem) (The U.S. Supreme Court affirmed a district court's obstruction of President Obama's peace powers with one sentence, "The judgment is affirmed by an equally divided Court.").

1539. Charlie Savage & Julie Hirschfeld Davis, *Obama Sends Plan to Close Guantánamo to Congress*, N.Y. TIMES (Feb. 23, 2016), https://www.nytimes.com/2016/02/24/us/politics/obama-guantanamo-bay.html.

1540. OTIS, *supra* note 18, at 320.

1541. *See, e.g.*, Phillis Wheatley, *To His Excellency General Washington* [1775]; Phillis Wheatley, *To the King's Most Excellent Majesty* [1768].

1542. OTIS, *supra* note 18, at 320–21; Phillis Wheatley, *America* [1768].

1543. OTIS, *supra* note 18, at 320–21.

1544. *Id.*

1545. *Id.*

Otis drew this vindication of the freedom of speech and of the press directly from the natural law of social compact saying, "Mankind never entered into society to aggrandize rulers, but rulers were invested with power for the good of the people; & it is to them alone they ought to be accountable for their conduct."[1546] Therefore, Otis encouraged anyone among us who "nobly undertakes to support an injured people, and oppose the measures of those in power inimical to their rights."[1547]

The moral relativism that now pervades the American society causes most to forget the purposes of the First Amendment, which are twofold: (1) the discovery of truth, and (2) the encouragement of peace.[1548] According to these principles certain types of speech are not protected, including those that constitute fraud, and those that tend to cause violence.[1549] It is no coincidence that unprotected speech is the very same as that which tends toward "*Hobbesian* maxims" of feudalism founded upon "force and fraud."[1550]

1546. *Id.*

1547. *Id.*

1548. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, [June 18, 1779] (The First Amendment purposes of peace and truth are summarized in this bill, though they are more thoroughly written throughout Roger Williams' *Bloudy Tenent* tracts and Isaac Backus' tracts including *Truth is Great and Will Prevail*—quoting to the bill adopted by Virginia here, "truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."); WILLIAMS, THE BLOUDY, *supra* note 52, at 2 ("It is the will and command of God that, since the coming of his Son the Lord Jesus, a permission of the most Paganish, Jewish, Turkish, or anti-christian consciences and worships be granted to all men in all nations and countries: and that they are to be fought against with that sword which is only, in soul matters, able to conquer: to wit, the sword of God's Spirit, the word of God.").

1549. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.") (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)); Ollman v. Evans, 750 F.2d 970, 1002 (D.C. Cir. 1984) (Bork, J., concurring) ("It is common ground that the core function of the first amendment is the preservation of that freedom to think and speak as one pleases which is the 'means indispensable to the discovery and spread of political truth.'") (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). *See also* Natali Wyson, *Defining Fraud as an Unprotected Category of Speech: Why the Ninth Circuit Should Have Upheld the Stolen Valor Act in* United States v. Alvarez, 2012 B.Y.U. L. REV. 671, 673 (2012). *Cf.* JEFFERSON, NOTES, *supra* note 268, at 334 ("Printing-presses shall be subject to no other restraint than liableness to legal prosecution for false facts printed and published.").

1550. OTIS, *supra* note 18, at 241 (expounding on the force and fraud as the illegitimate tenants of feudal law); *see id.* at 141, 157. *Cf.* Cicero, *De Officiis* 1.13.41 ("But let us remem-

The U.S. Supreme Court was deluded when it held that cross burnings did not amount to unprotected, dangerous speech.[1551] The reason for the delusion on the Court, other than actual racism, was the false, intellectual belief that white power and black power are materially the same, when they are not.[1552] For the idea of white power and white supremacy of the type represented by the Nazis and the KKK, is exclusive; it negates the power of every other group and ultimately destroys itself.[1553]

Black power, of the kind championed by the Black Panther Party and especially Fred Hampton and Angela Davis, includes all power to all the people.[1554] The FBI assassinated Fred Hampton, because they were affraid of his ability to unify the masses on an

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ber we must have regard for justice even towards the humblest. Now the humblest station and the poorest fortune are those of slaves . . . . While wrong may be done, then, in either of two ways, that is, by force or by fraud, both are bestial . . . .") (emphasis added).

1551. Virginia v. Black, 538 U.S. 343, 347–48, 356–57 (2003) (overruling a Virginia statute for making cross burning prima facie evidence of intent to intimidate under the First Amendment even though no person, *ever*, burns a cross in the United States other than to intimidate and terrorize black folk—i.e., burning crosses are a terrorist icon of the KKK symbolic for lynching, and it is meant to terrorize people; in this country, if someone burns a cross for some other reason, they should be required to explain themselves to the police—for prima facie evidence may be rebutted—the Virginia law that was overruled was not a violation of legitimate First Amendment rights).

1552. *Id.* at 356–57 (demonstrating a commitment to sheer relativism in this statement "a burning cross does not inevitably convey a message of intimidation" and by presenting the image of two white people getting married under a burning cross in full Klan regalia as evidence that burning crosses can convey a non-terrorist message, as if burning a cross at your wedding does not intimidate and effectively ward off all black people that value their lives).

1553. Racism destroys the people who adopt it, like a slow motion suicide. Tim Folger, *Why Did Greenland's Viking's Vanish*, SMITHSONIAN MAGAZINE (Mar. 2017), https://www.smithsonianmag.com/history/why-greenland-vikings-vanished-180962119/ ("Greenland's Vikings . . . never gave up their old ways. They failed to learn from the Inuit. . . . They kept their livestock, and when their animals starved, so did they. The more flexible Inuit, with a culture focused on hunting marine mammals, thrived."). *See also Black*, 538 U.S. at 347–48 (protecting free speech of statements that advertise the abandonment of people outside of one's racial group, which eventually causes the group to slowly die off like the Greenland Vikings if they don't attempted a violent political suicide like the Civil War); National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977) (per curiam) (protecting the free speech of Nazis to protest and march); Minyvonne Burke & Marianna Sotomayor, *James Alex Fields Found Guilty of Killing Heather Heyer During Violent Charlottesville White Nationalist Rally*, NBC (Dec. 7, 2018, 2:12 PM), https://www.nbcnews.com/news/crime-courts/james-alex-fields-found-guilty-killing-heather-heyer-during-violent-n945186 (the sort of speech defended in *Virginia v. Black* and *Village of Skokie* tends toward self-destructive violence); *Ex parte* Milligan, 71 U.S. 2, 6 (1866) (petitioner was member of a precursor of the KKK known as "the Order of American Knights" and was arrested for aiding an abetting the Confederacy's attempt to demolish the United States—Milligan's speech literally aided and abetted movements to demolish his own country).

1554. BLACKKKLANSMAN (Focus Features 2018); Hampton, Sr., *supra* note 79.

interracial basis known as the Rainbow Coalition.[1555] But for Hampton's assassination, the Black Panther strategy might have worked to electrify a multicultural base, a playbook President Barack Obama made use of on a later date, and on a less radical platform.[1556]

Americans only recently awoke from our longstanding delusion of colorblindness, which peaked during the Obama administration.[1557] With the help of Michelle Alexander, who was the likely agent to bring about the late confession of Harper Lee, it is now possible to unite in one understanding of Christ's words, "For this people's heart has become calloused; they hardly hear with their ears, and they have closed their eyes. Otherwise they might see with their eyes, hear with their ears, understand with their hearts and turn, and I would heal them."[1558]

Despite the fact that American eyes were openned, a willful delusion presses forward through cognitive dissonance into the debate over Black Lives Matter.[1559] For, once again, the movement of Black Lives Matter includes all people, and all lives and blue lives matter responses (which stemmed from the original Black Lives movement) are only an attempt to convince America to be colorblind once more.[1560]

1555. Monique Judge, *Fred Hampton's Death Is Just One Example of the Government's Covert Disruption of Black Lives*, THE ROOT (Dec. 4, 2018, 7:33 PM), https://www.theroot.com/fred-hampton-is-just-one-example-of-the-states-history-1830865895 ("Hampton was considered a uniter . . . [Hampton] was known for uniting poor black, white and Puerto Rican people."); THE FIRST RAINBOW COALITION (PBS 2020). *Cf.* 2 THEODORE ALLEN, THE INVENTION OF THE WHITE RACE 249 (1993) (the actual *first* rainbow coalition was Bacon's Rebellion in 1676, where the black and white working class in Virginia united to overthrow the ruling, slaveholding class).

1556. Hampton, Sr., *supra* note 79. *See* Judge, *supra* note 1555; THE FIRST RAINBOW COALITION (PBS 2020); Simon Tisdall, *Barack Obama Victory Comes Courtesy of Rainbow Coalition*, THE GUARDIAN (Nov. 7, 2012, 9:43 AM), https://www.theguardian.com/world/2012/nov/07/barack-obama-victory-rainbow-coalition.

1557. *See, e.g.,* En Vogue, *Free Your Mind* [1992] (the colorblind era represented by this song is over).

1558. *Matthew* 13:15; ALEXANDER, *supra* note 73, at 228–29 (quoting KING JR., *supra* note 73, at 45–48); LEE, *supra* note 73, at 181–82 ("Blind, that's what I am. I never opened my eyes. I never thought to look into people's hearts, I looked only in their faces. . . . I need a watchman to lead me around and declare what he seeth every hour on the hour.") (referring to *Isaiah* 21:6).

1559. Erin Griffith, *The Black Lives Matter Founders Are Among the World's Greatest Leaders*, FORTUNE (Mar. 24, 2016, 2:00 PM), https://fortune.com/2016/03/24/black-lives-matter-great-leaders/ (explaining that all these "lives matter" movements started with Alicia Garza, Patrisse Cullors, and Opal Tometi).

1560. Andrew Wind, *Speaker: 'Colorblind' ideal inadequate in a Black Lives Matter era*, THE COURIER (Feb. 25, 2017), https://wcfcourier.com/news/local/education/speaker-colorblind-ideal-inadequate-in-black-lives-matter-era/article_b861a58a-816e-5d94-8108-e38566265498.html; David Smith, *The backlash against Black Lives Matter is just more evidence of injustice*, THE CONVERSATION (Oct. 16, 2018), https://wcfcourier.com/news/local/

Now, with eyes wide open, Justice Stevens' earlier refusal to sink into the colorblindness of his colleagues is worth a review,

> There is a cruel irony in The Chief Justice's reliance on our decision in *Brown v. Board of Education*. . . . The Chief Justice fails to note that it was only black schoolchildren who were so ordered [to attend black-only schools]; indeed, the history books do not tell stories of white children struggling to attend black schools.[1561]

Americans cannot afford to fail in understanding how Justice Stevens fought against colorblindness on the Court long before Harper Lee made her confession.[1562] We cannot afford to ignore the absurd race prophesies of Justice Sandra Day O'Connor simply because she was the first woman on the Court.[1563] We can no longer afford to watch, silent, as Chief Justice Roberts continues to whitewash American history in a strange attempt to secure Justice O'Connor's dubious legacy rather than administering real justice.[1564]

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education/speaker-colorblind-ideal-inadequate-in-black-lives-matter-era/article_b861a58a-816e-5d94-8108-e38566265498.html; *White Lives Matter*, SOUTHERN POVERTY LAW CENTER, https://www.splcenter.org/fighting-hate/extremist-files/group/white-lives-matter (last visited Feb. 2, 2019).

1561. Parents Involved Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 798–99 (2007) (Stevens, J., dissenting).

1562. *Id.*

1563. Grutter v. Bollinger, 539 U.S. 306, 310 (2003) ("The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as possible."). It appears, at least for now, that Chief Justice Roberts is committed to blindly affirming Justice O'Connor's worst opinions. *See* Shelby County v. Holder, 570 U.S. 529, 569 (2013) (Ginsburg, J., dissenting) (noting the looming cloud of *Grutter* was part of why Chief Justice Roberts' opinion in the majority overruled vital portions of the Voting Rights Act). *Grutter's* time window will close in 2028, and may, as noted by Justice Ginsburg in *Shelby County*, shut off a wide array of longstanding racial protections dating back to *Brown v. Board of Education* on a theory that race protections like *Brown* violate democracy and thus should be restrained. *Id.*; Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 BOSTON U. L. REV. 937, 951, 978 (2008) (discussing the thought lineage from O'Connor's opinion in *Grutter* to Chief Justice Roberts' opinion in *Parents Involved*, and addressing possible grounds for pushing back against it); Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523, 523–24. *See, e.g.,* Adele M. Stan, *A Feminist Folk Hero?*, CBS (July 5, 2005, 3:39 PM), https://www.cbsnews.com/news/a-feminist-folk-hero/ (expressing the popular view that liberals should lament Justice O'Connor's retirement, because "women will lose a genuine advocate and protector" when her rationale about race and gender in *Grutter* may potentially be the actual ideology that destroys women's legal protections as pointed out by Professor Adams above).

1564. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (the very reason the Court is not willing to overrule cases like *Korematsu* is because Chief Justice Roberts refuses to admit that cases like *Trump v. Hawaii* are materially similar to *Korematsu*—it shows how race blindness inspires the Court to depart from the common law principle of *stare decisis*, which ordinarily would require the Court to overrule similar cases when they no longer hold); Obergefell v. Hodges, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting) (Chief Justice

Unwritten lynch law held sway far too long in America, inspiring the murder and enslavement of those who carried our first revolution into reality.[1565] African American Revolutionaries like John Marrant and Phillis Wheatley had their names for slaveholders calling them, rightly, "modern Cains" and "modern Egyptians."[1566] It was not, however, until recently that these epithets might be finally heard and understood.[1567]

For the black revolutionaries contended for the redemption of white folks.[1568] They distinguished themselves from the future writings of W.E.B. Dubois about the *Souls of White Folk*,[1569] when they observed that white souls may yet be claimed for the side of heaven.[1570] Black revolutionaries, therefore, rose up like the wondrous Cynthia Erivo in *Bad Times at the El Royale* to find their human dignity while everything fell apart around them.[1571] This motion was first marked out by Phillis Wheatley to inspire human revolutions in government.[1572]

Roberts appears to have the same attitude regarding *Lochner* and *Dred Scott*—refusing to consider overruling them because they had already been overruled by history—this mindset causes the court to repeat history—the Court could have used *Obergefell* as an opportunity to officially overrule *Osborn v. Nicholson* as wrongly decided for limiting the fundamental right of marriage to only after the Fourteenth Amendment was passed).

1565. Wells-Barnett, *supra* note 80, at 15; Billie Holiday, *Strange Fruit* [1939]; Dave Chappelle, *8:46*, YOUTUBE (June 11, 2020), https://www.youtube.com/watch?v=3tR6mKcBbT4 (describing and responding to the murder of George Floyd). *See* FOR LOVE OF LIBERTY: THE STORY OF AMERICA'S BLACK PATRIOTS, part 1 (PBS 2010).

1566. John Marrant, *A Sermon Preached on the 24th day of June 1789*, THE BIBLE AND HEART, June 24, 1789, at 9 [1789] (observing the oxymoron of slaveholders, which was that "our modern Cains call us Africans the sons of Cain"); Letter from Phillis Wheatley to Samson Occom (Feb. 11, 1774) ("for in every human breast, God has implanted a principle, which we call love of freedom; it is impatient of oppression, and pants for deliverance; and by the leave of our modern Egyptians I will assert, that the same principle lives in us").

1567. *See, e.g.*, Zelaya, *supra* note 1099, at 113–14.

1568. Letter from Benjamin Banneker to Thomas Jefferson (Aug. 19, 1791); Letter from Phillis Wheatley to Samson Occom (Mar. 11, 1774) ("I desire not for their hurt"); John Marrant, *A Sermon Preached on the 24th day of June 1789*, THE BIBLE AND HEART, June 24, 1789, at 9 [1789].

1569. W.E.B. DuBois, *The Souls of White Folk*, *in* W.E.B. DUBOIS, DARKWATER 32 (1920) ("After this the descent to Hell is easy. On the pale, white faces . . . I see again and again . . . a writing of human hatred, a deep and passionate hatred, vast by the very vagueness of its expressions.").

1570. Phillis Wheatley, *On Being Brought from Africa to America* [1773]; Phillis Wheatley, *To the Right Honorable William, Earl of Dartmouth* [1773] (the cause of the common good is "By feeling hearts best understood").

1571. BAD TIMES AT THE EL ROYALE (20th Century Fox 2018) (This strategy worked in reality just as it had worked for the fictional Darleen Sweet played by Cynthia Erivo.). *Cf.* ON THE BASIS OF SEX (Focus Features 2018).

1572. Phillis Wheatley, *On Being Brought from Africa to America* [1773] ("Some view our sable race with scornful eye, / 'Their colour is a diabolic die.' / Remember, Christians, Ne-

Therefore, the courts should do what they should have done ages ago, and acknowledge the place of Phillis Wheatley, as mother of Patent and Copyright Law.[1573] The ancestors of white men in America, the sons of immigrants themselves, sacrificed greatly to make sure that her star rose above any of those in Europe to vindicate our cause for humanity.[1574] It will only be an act of self-respect for those segments of white America still fooled by ideas of white superiority to recognize the plain facts—that Wheatley loved white people and contended for their rights as if they were her own.[1575]

It is time for the considering minds of the nation to take account of the areas where the U.S. Government is exercising illegitimate powers.[1576] As populism, rage, and confusion continue to vie for our attention, may the people of the United States turn away from it; like Marsha P. Johnson and *pay it no mind*.[1577] May Americans dedicate their hands and hearts to work that will secure justice, liberty, and

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gros, black as Cain, / May be refin'd, and join th' angelic train."—this may be read as a magnanimous invitation written to prejudiced white people so that they may likewise refine themselves and join the angelic train). *See* Flannery O'Connor, *Revelation* [1965], *reprinted in* FLANNERY O'CONNOR, COMPLETE STORIES 508–09 (1989) (showing how even the most ugly and selfish people among us can have the revelation needed to understand who among us is leading the train back to heaven).

1573. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 821, at 7.

1574. *Id. See, e.g.*, Phillis Wheatley & William Billings, *An Elegy, Sacred to the Memory of that Great Divine, the Reverend and Learned Dr. Samuel Cooper*, E. RUSSELL, Jan. 2, 1784, at 3–8 [1784] (appended to this elegy by Wheatley, was the lyrics to William Billings' hymn written for Samuel Cooper's funeral that is known by its first line *Samuel the Priest Gave Up the Ghost*—Cooper himself was known as the preacher that baptized Phillis Wheatley).

1575. William Billings' Second Petition, Massachusetts, May 27, 1772 (for Wheatley globally succeeded where white men failed to protect their rights in America). Like Octavio Paz's ruminations on Sor Juana in his Nobel Prize winning work where he concluded that Mexico should grieve for Sor Juana—so too, in a very similar way, the people of the United States should also grieve for Phillis Wheatley. OCTAVIO PAZ, LABYRINTH OF SOLITUDE 109–16 (Lysander Kemp trans., 1985) ("We often hear reproaches against men who have not fulfilled their destinies. Should we not grieve, however, for the ill fortune of a woman who was superior both to her society and her culture?").

1576. Feinstein, *Floor Speech*, *supra* note 621; Swartz, *Keynote*, *supra* note 599. *Compare* UKUSA Agreement, Aug. 14, 1941, *with* Iran Nuclear Deal, July 14, 2015, *and* Letter from Senator Tom Cotton et al. to Leaders of the Islamic Republic of Iran (Mar. 10, 2015) (signed by a Rump Senate of 47 U.S. Senators, and unconstitutionally addressed to foreign dignitaries on behalf of the United States—the unconstitutionality of this letter does not mean that agreements like the Iran Nuclear Deal or the UKUSA Agreement are constitutional or unconstitutional). *Cf. supra* notes 386–87 and accompanying text regarding the unconstitutionality of Senator Cotton's letter.

1577. THE DEATH AND LIFE OF MARSHA P. JOHNSON (Netflix 2017) (the STAR People of America can still rise up to help save us from our impending doom, and we ought to pray that they do what they can).

equality in the United States and protect the sanctity of American minds from everything else.[1578]

Hold things lightly, endeavor to change what can be changed, forgive others and be kind to oneself, and say a prayer when there is nothing left to do.[1579] Bear witness to constitutional violations when they spring forth, experience each betrayal with a considering mind that is slow to anger, and transform each present crisis into a source of remembered wisdom for the future.[1580] For there is a day coming when we will have a chance to set things right.[1581]

Today is a day for gathering oil, for making preparations, and for observing things as they are with a clear and present mind.[1582] For though a revolutionary moment approaches it is not yet here, and so we wait patiently with hope, faith, and love.[1583] Heaven watches over all of us, our trials cannot last forever; and it remains an ever-present hope in this world God made, that our darkest hours may precede the morning light.[1584]

1578. ALEXANDER, *supra* note 73, at 228–29 (quoting KING JR., *supra* note 73, at 45–48).

1579. Sara Groves, *Say a Prayer* [2007]. Useful prayers include: *Matthew* 6:9–13 (the Lord's Prayer); *Luke* 1:46–55 (Mary's Canticle); 1 *Samuel* 2:1–10 (Hannah's Prayer); Anon., *Serenity Prayer* (attributed to Reinhold Niebuhr); St. Thomas Aquinas, *A Student's Prayer*.

1580. *See, e.g.*, ON THE BASIS OF SEX (Focus Features 2018) (Justice Ginsburg, in her time, gave an excellent example of this sort of demeanor that is required to be an effective contender for justice.).

1581. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

1582. *See Matthew* 25:1–13.

1583. OTIS, *supra* note 18, at 142 ("Truth and faith belong to men as men, from men, and if they are disappointed in their just expectations of them in one society, they will at least wish for them in another. If the love of truth and justice, the only spring of sound policy in any state, is not strong enough to prevent certain causes from taking place, the arts of fraud and force will not prevent the most fatal effects."); John Allen, *The Watchman's Alarm* 10 [1774].

1584. Ann Bleecker, *A Pastoral Dialogue* [1780], *in* BLEECKER, *supra* note 652, at 253–59; William Billings, *Sing praises to the Lord* [1794] (based on *Psalm* 30:4–5); [John Allen,] *The Watchman's Alarm* 10 [1774] ("But be not afraid, for the morning cometh; remember from a night arose all the blessings of creation, the beauties of paradise, and all the happiness of the life that now is, and the hope of that which is to come.").