A COURT OF CHAOS AND WHIMSY: ON THE SELF-DESTRUCTIVE NATURE OF LEGAL POSITIVISM

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Abstract

Each of the four arguably most famous dictators in modern Western history, Adolf Hitler, Porfirio Díaz, Napoleon Bonaparte, and Oliver Cromwell, were legal positivists. This is to say that they rejected both the common law and natural law conceptions of human rights. They furthermore rejected the judiciary's equitable power to enforce human rights independently of politics by characterizing the old Chancery of England as a court of chaos and whimsy, adopting John Selden's religious rejection of equity as a "roguish thing."

As Bertrand Russell recounted in his History of Western Philosophy, the philosophical avatars of German, French, and English despotism, Hegel, Rousseau, and Hobbes, provided the ideological bases for legal positivism in stark realism and relativism. Yet, the United States' legal establishment will not shake off these problematic philosophies as clearly self-destructive and illogical. Rather, inspired by Oliver Wendell Holmes, Jr., the United States presently embraces them by willfully ignoring how Holmes punished Porfirio Díaz's leading critic, Eugene V. Debs.

The road to this state of affairs in American law was paved by an under-emphasis of the majority view of the American Revolution, embodied by the contributions of James Otis and Phillis Wheatley. Professor Adrian Vermeule seemed to realize that real American conservatism may require a defense of liberal Republican values. Thus, he blamed Justice Antonin Scalia's originalism for being "content to play defensively within the

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procedural rules of the liberal order," and that real conservatives should abandon the founding and embrace "illiberal legalism," a form of progressive legal positivism that Vermeule swears "is not legal positivism."

Such defenders of Hobbes' Leviathan *learned from Hobbes to destroy exactly the positions they, in fact, defend. Just as Selden rejected measuring the chancellor's foot only to measure Cromwell's, Vermeule's rejection of Scalia's originalism and legal positivism is 'aufhebung,' rejected, but preserved. This article is dedicated to the illumination of legal positivism, which often destroys itself in these sorts of illogical Hegelianisms.*

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> *You may assume with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found.*
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> Oliver Wendell Holmes, Jr.[1]

> *Delaney watched the faces of the hundred-odd Everyones assembled. She hoped for three waves of reaction, and they came in exactly the order she needed. The first was revulsion, rejection, given they'd heard an idea that would threaten their way of doing things, an idea that was even a bit cruel in its assessment. The second wave was the recognition that they, as Everyones devoted to eternal innovation and boundary-pushing, could not, outright or ever, reject any new notion, no matter how preposterous. The third wave was an earnest head-nodding that conveyed that they recognized the bold anomalation at hand, and that they would never deign to stand in the way of progress—and any new notion was inherently progressive. Satisfied that all three waves had passed through the eyes and minds of the assembled, Delaney turned back to Syl.*
>
> Dave Eggers[2]

INTRODUCTION: THE PROBLEM OF UNHINGED IMAGINARY EXPERIMENTS IN LAW

Perhaps it is futile to attempt a definition for something inherently undefinable.[3] The results of legal positivism, a theory that facilitates a potentially unlimited number of imaginary experiments, cannot be reliably defined.[4] In order to inject maximum imaginary force into a legal system,

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[1] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464–65 (1897) [hereinafter Holmes, *The Path*].

[2] DAVE EGGERS, THE EVERY OR AT LAST A SENSE OF ORDER OR THE FINAL DAYS OF FREE WILL OR LIMITLESS CHOICE IS KILLING THE WORLD 289–90 (2021).

[3] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 234 (1962) (noting the corruptions wrought by "Nineteenth-century positivism and progressivism" that "set out to demonstrate what cannot be demonstrated"); OCTAVIO PAZ, LABYRINTH OF SOLITUDE: LIFE AND THOUGHT IN MEXICO 131 (Lysander Kemp trans., 1961) ("Positivism offered the social hierarchies a new justification. Inequalities were explained, not by race or inheritance or religion, but by science. . . . An abyss opened up between the system and the regime that adopted it."); *see, e.g., Exodus* 3:13–14; *Isaiah* 55:8–9; *Acts* 17:23; *cf.* DON RICHARDSON, ETERNITY IN THEIR HEARTS 13 (1981); *see generally* C.S. LEWIS, TILL WE HAVE FACES (1956).

[4] PAZ, *supra* note 3, at 12 n.1 (noting how Porfirio Díaz established neofeudalism in Mexico by "using positivism . . . to justify itself"); ARENDT, *supra* note 3, at 347 (defining positivism as "the

the ideology of legal positivism ignores or reinterprets any possible limitation in factual reality, scientific proof, democratic polls, constitutional rights, equity, and positive law.[5]

Legal positivists dream of a society where their most whimsical ideas can be enacted without legal limitation,[6] but their dreams often conflict.[7] Some of their passing visions included Bentham's *Panopticon* society with no human privacy;[8] Hobbes' populist vision of a *Leviathan* that rules over all;[9] and Oliver Wendell Holmes, Jr.'s dream that eugenics could create a society of supermen (*übermensch*)—an idea America exported to Nazi Germany.[10]

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evaluation of interest as an all-pervasive force in history and the assumption that objective laws of power can be discovered"); *see* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHIC. L. REV. 545, 562–63 (2018); *see, e.g.,* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [hereinafter Vermeule, *Beyond*]; Adam H. Hines, *Ralph Waldo Emerson and Oliver Wendell Holmes, Jr.: The Subtle Rapture of Postponed Power*, 44 J. SUP. CT. HIST. 39, 45 (2019) (demonstrating how Holmes drew several of his authoritarian legal concepts from "non-legal thinkers such as Emerson," including his survival of the fittest, marketplace of ideas ideology); Anne Dailey, *Holmes and the Romantic Mind*, 48 DUKE L. J. 429, 454 (1998) (firmly dispelling criticisms that Holmes' romantic ideas conflicted with his legal positivism).

[5] PAZ, *supra* note 3, at 132 ("The positivist disguise was not intended to deceive the people but to hide the moral nakedness of the regime from its own leaders and beneficiaries."); *see, e.g.,* THOMAS HOBBES, LEVIATHAN 119 (A. R. Waller ed., 1904) [hereinafter HOBBES, LEVIATHAN] (reinterpreting the sovereignty of the people as the means of their enslavement).

[6] *See, e.g.,* HOBBES, LEVIATHAN, *supra* note 5, at 119; *cf.* ARENDT, *supra* note 3, at 347 (noticing the central "positivists' conviction . . . that the future is eventually scientifically predictable"). Arendt appeared not to fully understand that the prophesies of legal positivists are circular and thus paradoxical, as Hobbes demonstrated; they both justify and manifest themselves through the will of a dictator presupposing that the dictator's will is enough to shape the masses into whatever form he wants—the positivist's version of science is mandated by a survival of the fittest, not discovered through scientific discourse—and as such it "assumes that it is possible 'to transform the nature of man' as totalitarianism indeed tries to do" *and* it paradoxically "assume[s] that human nature is always the same," i.e., supplicant and pliable to the wishes of one ruler or as Oliver Wendell Holmes, Jr. might say: the fittest. *Id.*; Joshua J. Schroeder, *The Dark Side of Due Process: Part I, A Hard Look at Penumbral Rights and Cost/Benefit Balancing Tests*, 53 ST. MARY'S L.J. 323, 336 (2022) [hereinafter Schroeder, *The Dark*]; *see* ELIHU S. RILEY, CORRESPONDENCE OF "FIRST CITIZEN"—CHARLES CARROLL OF CARROLLTON, AND "ANTILON"—DANIEL DULANY, JR., 1773, at 192 (1902) (quoting and translating Cicero, *De Natura Deorum* 2.2.5) (giving the actual basis of the scientific discourse in the test of time: "Groundless opinions are destroyed, but rational judgments, or the judgments of nature, are confirmed by time.").

[7] *See* Carlos S. Nino, *Dworkin and Legal Positivism*, 89 MIND 519, 519–20 (1980) (noting that legal positivism contains "clearly distinguishable and sometimes mutually incompatible theses").

[8] *See generally* JEREMY BENTHAM, PANOPTICON (1791).

[9] *See generally* HOBBES, LEVIATHAN, *supra* note 5.

[10] Buck v. Bell, 274 U.S. 200, 205–06 (1927) (noting that sterilization programs were a "benefit to [the sterilized person] and to society" because "experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc."); VICTORIA NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS 32–35 (2008); *cf.* LULU MILLER, WHY FISH DON'T EXIST 144 (2020) (presenting the eugenicists' idea of "a ladder built into nature. A *Scala Naturae*."); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 462–63 (1899) (claiming that his ideal of a brutal Social Darwinist experiment in the law was included in the

Most recently, the U.S. Supreme Court copped legal positivism to set forth several conflicting dreams for America.[11] We have the right to open carry guns,[12] but no right to abortion;[13] the president can unilaterally violate the U.N. Convention Against Torture,[14] but his agencies cannot follow the Paris Climate Agreement;[15] Native American Tribes are wholly "separate sovereigns,"[16] whose lands are paradoxically subject to concurrent federal and state jurisdiction;[17] hypothetical gay men who request wedding website services are credible threats,[18] while actual stalkers who subjectively think

category of inspiring ideals that "furnish us our perspectives and open glimpses of the infinite"); Ralph Waldo Emerson, *The Over-Soul* (1841), *in* RALPH WALDO EMERSON, ESSAYS, FIRST SERIES 241 (1874) (even the term "over-man" or "*übermensch*" originally came from America, through Emerson's development of the term "over-soul").

[11] *See* Joshua J. Schroeder, *America's Written Constitution: Remembering the Judicial Duty to Say What the Law Is*, 43 CAP. U. L. REV. 833, 834–36, 862–65 (2015) (explaining the court's recent use of feigned legal positivism to fray precedent and abandon *stare decisis*). This article explains the earlier abandonment of *stare decisis* that occurred in the years leading up to *Janus v. AFSCME*, which was then extended in Dobbs v. Jackson Women's Health Org. to overrule *Roe v. Wade*. *Id.*; Dobbs v. Jackson Women's Health 142 S. Ct. 2228, 2264–65 (2022) (extending Janus v. AFSCME, 138 S. Ct. 2448 (2018)).

[12] NYSRPA v. Bruen, 42 S. Ct. 2111, 2143–44 (2022).

[13] *Dobbs*, 142 S. Ct. at 2279 ("*Roe* and *Casey* must be overruled").

[14] U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, G.A. Res. 39/46, at art. 3 ("For the purpose of determining whether there are such grounds [to require releasing immigrants into the United States as refugees protected by CAT], the competent authorities [of the signatories including the United States government] shall take into account all relevant considerations . . ."), *codified by* Refugee Act of 1980, 8 U.S.C. § 1231(b), *and* 8 C.F.R. § 1208.18, *not followed by* Biden v. Texas, 142 U.S. 2528, 2535, 2543 (2022) (noting that "section 1225(b)(2)(C) [did not] authorize[] the District Court to force the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate, and to supervise its continuing negotiations with Mexico to ensure that they are conducted 'in good faith,'" yet still finding that in *obiter dicta* that the Migrant Protection Protocols ("MPP") were legitimately "implemented pursuant to express congressional authorization"), *also disregarding* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), 112 Stat. 2681–801, 2681–822, § 2242 ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."); *but see* Innovation L. Lab v. Wolf, 951 F.3d 1073, 1095 (9th Cir. 2020) (deciding that "the MPP is inconsistent with 8 U.S.C. § 1225(b), and that it is inconsistent in part with 8 U.S.C. § 1231(b)"), *vacated sub. nom.*, Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021); *cf.* Egbert v. Boule, 142 U.S. 1793, 1807–09 (2022) (refusing to allow *Bivens* suits in cases where federal police invade the private property of a U.S. citizen and physically attack them), *extending* Hernandez v. Mesa, 140 S. Ct. 735, 744–45 (2020) (allowing an administrative shooting of Mexican children across the border as uncognizable under *Bivens*, and thus presumptively legal behavior, overriding the sovereign requests of the Republic of Mexico).

[15] Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015), *not followed by* West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

[16] Denezpi v. United States, 142 S. Ct. 1838, 1845 (2022).

[17] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2404–05 (2022); *see also* Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023).

[18] 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308–09 (2023); *cf.* Melissa Gira Grant, *The Supreme Court Doesn't Care That the Gay Wedding Website Case Is Based on Fiction*, THE NEW REPUBLIC (June

that stalking women over the internet is a form of love are not;[19] and while state legislatures do not have the plenary power to end democracy,[20] it is unclear whether the Supreme Court has the will to stop them if they tried.[21] All of this and more is made possible by a Supreme Court that outwardly rejects *Plessy v. Ferguson* as a heinous mistake,[22] while paradoxically extending *Plessy's* "slavery argument" taken from *The Slaughterhouse Cases* to end affirmative action in higher education admissions decisions.[23] As Oliver Cromwell did in his day, Viktor Orbán copped this ordered chaos from America, which is now known as legal positivism,[24] as the basis of Hungarian autocratic legalism.[25]

Legal positivists can appear as characters in *Alice in Wonderland*, presenting several beautiful and terrible dreams that conflict with each other and may eventually leave the people at the mercy of a tyrannical Queen of Hearts.[26] Not everybody in wonderland screamed: *Off with their heads!*[27] But the whimsical, unbounded nature of dreams leaves enough room for a homicidal nightmare to boldly assert herself in a public role.[28]

30, 2023), https://newrepublic.com/article/174048/supreme-court-doesnt-care-gay-wedding-website-case-based-fiction.

[19] Counterman v. Colorado, 143 S. Ct. 2106, 2119 (2023); *cf.* DEATH CAB FOR CUTIE, *I Will Possess Your Heart*, *in* NARROW STAIRS (Atlantic 2008) (demonstrating how stalkers can think of their stalking as love).

[20] Moore v. Harper, 143 S. Ct. 2065, 2081 (2023).

[21] Allen v. Milligan, 143 S. Ct. 1487, 1516–17 (2023); *see* Ian Millhiser, *How Alabama Could Get Away With Defying the Supreme Court*, VOX (July 26, 2023), https://www.vox.com/scotus/2023/7/26/23806856/supreme-court-voting-rights-act-allen-milligan-defiance-brett-kavanaugh.

[22] Students for Fair Admissions, Inc. v. Harvard College, 143 S. Ct. 2141, 2175 (2023) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[23] *Id.* at 2184–86 (Thomas, J., concurring), *embracing the "slavery argument" of* The Slaughterhouse Cases, 83 U.S. 36, 67–72 (1872), *originally dubbed as the "slavery argument" and extended in Plessy*, 163 U.S. at 542–43 (quoting Civil Rights Cases, 109 U.S. 3, 24 (1883)); *cf. 303 Creative LLC*, 143 S. Ct. at 2336 (Sotomayor, J., dissenting) (characterizing the majority's decision as a reincarnation of *Plessy's* separate but equal regime).

[24] PAZ, *supra* note 3, at 132; CHRISTOPHER HILL, GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 171, 273 (1970); AUSTIN WOOLRYCH, COMMONWEALTH TO PROTECTORATE 271–73, 300 (1982) (noting that Cromwell's Puritanical legal positivism originated in America); *see* David Smith, *Viktor Orbán Turns Texas Conference Into Transatlantic Far-Right Love-In*, THE GUARDIAN (Aug. 6, 2022), https://www.theguardian.com/us-news/2022/aug/06/viktor-orban-cpac-far-right-us-trump.

[25] Scheppele, *supra* note 4, at 562–63.

[26] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 122–23 (John Tenniel ill., 1869); *see, e.g.,* EGGERS, *supra* note 2, at 573 (demonstrating how a homicidal maniac appears among the many good intentions of San Francisco's tech world, which is run by legal positivists); DANIEL KAHNEMAN, OLIVIER SIBONY & CASS R. SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT 340–41 (2021) (disagreeing with the Shakespearean defense of mercy by advocating that decisions should be made through computer algorithms devoid of mercy).

[27] CARROLL, *supra* note 26, at 124 ("'How do you like the Queen?' said the Cat in a low voice.").

[28] *Id.* at 122.

Thus, legal positivism had a prominent role manifesting the nightmares of Oliver Cromwell,[29] Napoleon Bonaparte,[30] Porfirio Díaz,[31] and Adolf Hitler into reality.[32] These tyrants were known for wringing destruction by unhinging the human imagination from reason.[33] The unhinging of the human imagination, in legal positivist ideology at least, appeared to depend upon the unsubstantiated dogma of inherent human rationality.[34]

Despite claiming to be absolutely rational, the views of legal positivists often conflicted with each other indicating a lack of rational form.[35] Not every arbitrary idea would manifest directly into the kind of whimsical despotisms represented by Lewis Carroll's Queen of Hearts.[36] However, the legal positivists' promises of utopia always appear as the leprechaun's pot of

[29] HILL, *supra* note 24, at 171, 273; *cf.* WOOLRYCH, *supra* note 24, at 271–73, 300 (noting the legal positivist inspiration English Puritans took from Massachusetts Bay).

[30] M. C. Mirow, *The* Code Napoléon*: Buried but Ruling in Latin America*, 33 DENV. J. INT'L L. & POL'Y 179, 191 (2005) ("The *Code [Napoléon]* is emblematic of principles of law and justice within the positivist legal tradition."); *see* E. T. Merrick, *The Laws of Louisiana and Their Sources*, 38 U. PA. L. REV. 1, 4, 6, 19 (1890); *cf.* HILL, *supra* note 24, at 273 (noting that Jeremy Bentham wished that Cromwell had also succeeded in creating a "Code Cromwell" like Napoleon's); *see generally* AUGUSTE COMTE, COURSE OF POSITIVE PHILOSOPHY (1830).

[31] PAZ, *supra* note 3, at 131–32.

[32] Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUM. L. REV. 1807, 1809 (1993) (noting "the role of . . . legal positivism in particular, in maintaining the Nazi legal system").

[33] Peter Baehr, *Debating Totalitarianism: An Exchange of Letters Between Hannah Arendt and Eric Voegelin*, 51 HIST. & THEORY 364, 377 (2012) (Arendt described the logicality of legal positivism in totalitarian regimes writing: "There is something truly crazy about this, i.e., not only the premises, which may be, and are, untenable, but a form of *real* logic that refuses to be deterred by any reality." Arendt further described that "this reliance on the logic that is inherent in a concept, eliminating any judgment, is new and cannot be derived from the ideologies themselves."); *id.* at 365 (noting that Arendt and Voegelin were outliers as they had "as little time for positivism as they did for German neo-Kantianism"); *see, e.g.,* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311, 319, 326 (1988) (paradoxically maintaining that "Field worked for 'scientific law reform, international peace, feminism, and abolition of slavery,'" while defending "whites who had apparently murdered newly freed blacks in violation of enforcement acts designed to thwart Ku Klux Klan attempts to deny blacks the rights of free citizens").

[34] *See* John M. Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1599 (2000) (noting that legal positivism derives from Hobbes' theory of "our practical reasoning as all in the service of motivating sub-rational passions"); WOOLRYCH, *supra* note 24, at 271–73, 300; JOSEPH GLANVILL, SADUCISMUS TRIUMPHATUS 78 (1681) ("considering *man* in the general, as a *rational* Creature").

[35] *See supra* notes 6–10 and accompanying text; *cf.* Finnis, *supra* note 34, at 1606 ("Law's 'positivity' was first articulated, embraced, and explained, as I have noted, by the classical natural law theorists. Legal positivism identifies itself as a challenge to natural law theories. It has had, say, 225 years to make its challenge intelligible. The best its contemporary exponents can offer to state its challenge is, 'there is no necessary connection between law and morality.' But classic law theory has always enthusiastically affirmed that sentiment.").

[36] *See supra* notes 26–34 and accompanying text.

gold: never to be found, because the end always shifts if ever it is approached.[37]

After unrealistic expectations of a manmade utopia are fully embraced by a people,[38] it is always a shock when legal positivism gives rise to the opposite.[39] Like Robespierre's sanguinary calls to glut his fellow citizens in their own blood,[40] legal positivism cops the ironic-victorious tone of Edna St. Vincent Millay's wondrous poem *The Suicide*.[41] When citizens celebrate their own destruction as if it were the key to paradise, it can be expected that a raucous dictator will follow closely in their wake.[42]

In preparation for this possibility in the United States, the contents of this article will flow in this order: (1) remembering the women that rejected mother-country utopias; (2) how the law of love disrupted Hobbesian visions of utopia; (3) legal positivism as a placeholder for resurgent-insurgent

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[37] *Cf.* EGGERS, *supra* note 2, at 289–90 (demonstrating how quickly a crowd of legal positivists can shift from rejecting to supporting an idea for supposed ideals that shift each time they adopt new ideas); *id.* at 573 (demonstrating how ideologues of the same stripe can destroy each other in order to control the direction of their legal and political projects).

[38] PAZ, *supra* note 3, at 133 (noting that false "utopian dreams" were "the only psychological bases of Mexican positivism"); ARENDT, *supra* note 3, at 433 (noting "the utopian goal of the totalitarian secret police"); *compare* Gertrude Himmelfarb, *Bentham's Utopia: The National Charity Company*, 10 J. BRIT. STUD. 80, 82–83 (1970) (commenting on Bentham's utopic piece *Pauper Management*), *with* M. DUMONT, PRINCIPLES OF LEGISLATION: FROM THE MS. OF JEREMY BENTHAM 120 (John Neal trans., 1830) ("If it be better for the greatest happiness of the greatest number that a man should die, whoever he may be, and whatever he may be, *cut him [down] without mercy*. And so with his liberty, and so with his property."), *and* KAHNEMAN, SIBONY & SUNSTEIN, *supra* note 26, at 340–41 (arguing for a similar utopic society run by merciless computer algorithms).

[39] *See supra* notes 26–34 and accompanying text; *compare* United States v. The Amistad, 40 U.S. 518, 597 (1841) (releasing African slaves into the United States as free men and women kidnapped in contravention of an Act of Congress of March 3, 1819 that empowered the president to enforce Congress's laws criminalizing the slave trade by making it a hanging offense), *with* Prigg v. Pennsylvania, 41 U.S. 539, 615 (1842) (citing the bedrock principle of legal positivism that the ends justify the means in order to enforce the recapture of escaped slaves in contravention of a Pennsylvania sanctuary statute: "The fundamental principle, applicable to all cases of this sort, would seem to be that, where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted."); *compare* THE MASSACHUSETTS BODY OF LIBERTIES (1641), https://history.hanover.edu/texts/masslib.html (the first recognized legal positivist code), *with* JOHN MASON, A BRIEF HISTORY OF THE PEQUOT WAR (1736) (Paul Royster ed., 2007) (in part a result of the codification of a legal code that did not include the rights of the Native Americans).

[40] Maximilien Robespierre, *Second Discours*, *in RECUEIL D'HYMNES RÉPUBLICAINES* 8–9 (1793), *translation available at* https://www.marxists.org/history/france/revolution/robespierre/1794/festival.htm ("Our blood flows for the cause of humanity. This is our prayer, these are our sacrifices. This is the cult we offer you.").

[41] EDNA ST. VINCENT MILLAY, *The Suicide*, *in* COLLECTED POEMS 25 (Norma Millay ed., 1956).

[42] *See* sources cited *supra* notes 40–41; MERCY OTIS WARREN, *Simplicity* (1779), *in* POEMS, DRAMATIC AND MISCELLANEOUS 232 (1790) ("Empires are from their lofty summits rent, / And kingdoms down to swift perdition sent, / By soft, corrupt, refinements of the heart, / Wrought up to vice by each deceptive art."); *cf.* EGGERS, *supra* note 2, at 573; LORRAINE HANSBERRY, THE SIGN IN SIDNEY BRUSTEIN'S WINDOW 110–13 (1964) (demonstrating the commonplace nature of suicide driven by selfishness in America).

Hobbesianism; (4) how legal positivists helped Trump convert chaos into opportunity; (5) early twentieth century lessons about the flaws of (legal) positivism; and (6) how to avoid the pitfalls of (legal) positivism in the early twenty-first century. In conclusion, this article will explain how to assert the preexisting right of free thought and speech to assert legal positivism.

I. REMEMBERING THE WOMEN THAT REJECTED MOTHER-COUNTRY UTOPIAS

Cass R. Sunstein and Adrian Vermeule,[43] H.L.A. Hart,[44] Oliver Wendell Holmes, Jr.,[45] and Jeremy Bentham,[46] are all heirs of Hobbesian utopia.[47] In order to justify a strong centralized government, Hobbes objectified love, and theorized that men would be politically willing to trade out their wives and children for titles, property, or money.[48] Thus, he premised absolute monarchy upon courtly love, i.e., what C.S. Lewis properly disparaged as the "'feudalization' of love."[49]

Over the past two centuries, so much focus was given to the male founders of the United States that the female rejection of Hobbesian mother-country utopias was all but forgotten.[50] While English authorities claimed a

[43] CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 97 (2020) (noting Fuller's "aspiration of perfect legality"), *following* LON L. FULLER, THE MORALITY OF LAW 41 (1977) (noting that we may "imagine a utopia of legality in which all rules are perfectly clear, consistent with one another, known to every citizen, and never retroactive. . . . [wherein] the rules remain constant through time, demand only what is possible, and are scrupulously observed by courts, police, and everyone else charged with their administration"); LON L. FULLER, THE LAW IN QUEST OF ITSELF 1–2 (1999) [hereinafter FULLER, THE LAW] (quoting HOBBES, LEVIATHAN, *supra* note 5, at 9–10); *cf.* CASS R. SUNSTEIN, INFOTOPIA 126 (2006).

[44] H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 71 (2001) [hereinafter HART, ESSAYS ON] (noting "praise of American democracy as a kind of Utopia of utilitarianism"); *id.* at 27, 252–53 (noting ways in which Hobbes anticipated Bentham).

[45] Buck v. Bell, 274 U.S. 200, 207 (1927).

[46] Himmelfarb, *supra* note 38, at 82–83; MIRIAM WILLIFORD, JEREMY BENTHAM ON SPANISH AMERICA: AN ACCOUNT OF HIS LETTERS AND PROPOSALS TO THE NEW WORLD xiii (1980).

[47] Richard Tuck, *The Utopianism of Leviathan, in* LEVIATHAN AFTER 350 YEARS 136 (Tom Sorell & Luc Foisneau eds., 2004).

[48] HOBBES, LEVIATHAN, *supra* note 5, at 55–56; *cf.* E. Jane Burns, *Courtly Love: Who Needs It? Recent Feminist Work in the Medieval French Tradition*, 27 SIGNS 23, 38 (2001) (noting that though medieval women were often depicted as if they were equals to feudal lords doling out titles and wealth, and presiding over trials of love, courtly love "mask[ed] sexual violence against women" with few benefits if any to women); *but see* Edna St. Vincent Millay, *XXVI*, *in* MILLAY, *supra* note 41, at 655 (writing of a time "When treacherous queens, with death upon the tread, / Heedless and willful, took their knights to bed").

[49] HOBBES, LEVIATHAN, *supra* note 5, at 56 (defining love and fear in terms of honoring and dishonoring others by how valuable they are to the sovereign); C.S. LEWIS, THE ALLEGORY OF LOVE: A STUDY IN MEDIEVAL TRADITION 11 (1936).

[50] *See, e.g.,* MILCAH MARTHA MOORE'S BOOK: A COMMONPLACE BOOK FROM REVOLUTIONARY AMERICA 24–25 (Catherine La Courreye Blecki & Karin A Wulf eds., 1997) [hereinafter MOORE'S BOOK].

female form of love as a justification for their tyranny, the female poets and artists in the salons of Pennsylvania, New York, and Massachusetts caused several male founders to turn their heads and hearts, like John Jay here, to speak in "mystic measures,"

> The ways of men, you know, are as circular as the orbit through which our planet moves, and the centre to which they gravitate is *self:* round this we move in mystic measures, dancing to every tune that is loudest played by heaven or hell. Some, indeed, that happen to be jostled out of place, may fly off in tangents like wandering stars, and either lose themselves in the trackless void, or find another way to happiness; but for the most part, we continue to frolic till we are out of breath; then the music ceases, and we fall asleep.[51]

John Adams tended to agree with Jay, though reluctantly: "A contest, a combat between reason and passion is unequal. A struggle between reflection upon law and reflection upon love . . . is likely to be followed by victory on the side of trifles."[52] Adams did not adequately conceive of the law of love, calling it a mere trifle, perhaps because he did not love his wife enough to respect her rights.[53] Instead, Adams piteously wrote that human emotion, unchecked by rational systems, "would break the strongest cords of our Constitution as a Whale goes through a Net."[54]

In 1773, Mercy Otis Warren foresaw Adams' rejection of passion, and she wisely "smile[d] at the Deluded Man, / Wrap'd in Extaticks, by imagine'd fame, / When the next Moment, Will Blot out his Name."[55] She explicitly warned Adams of the dangers of the imagination: "That aeiry queen, who Guides the Helm of hope."[56] While Adams would not be wrested from his lifelong rationalistic belief that human emotions needed to be dominated by

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[51] Letter from John Jay to Benjamin Kissam (Aug. 12, 1766).

[52] John Adams, *Diary* [Summer 1759], https://www.masshist.org/digitaladams/archive/doc?id=D3.

[53] Letter from John Adams to Abigail Adams (Apr. 14, 1776) (denying his wife's plea for rights by stating his belief that if women were given equal rights that the government would fall under "the Despotism of the Peticoat [sic]"); *see* Daniel I. O'Neill, *John Adams versus Mary Wollstonecraft on the French Revolution and Democracy*, 68 J. HIST. IDEAS 451, 469 (2007) (discussing Adams' attacks on Wollstonecraft that were weakened by *ad hominem* statements about Wollstonecraft made apparently for daring to speak as a woman). Unfortunately, John Adams passed down his crabbed view of the "law of love" to his most famous son John Quincy Adams. JOHN QUINCY ADAMS, THE SOCIAL COMPACT 24 (1842) [hereinafter QUINCY ADAMS] (corrupting "the law of love" to exclude women from their rights, writing that "[t]he authority of the husband over the wife is itself the result of a *compact* preceding in its nature that of the body politic").

[54] Letter from John Adams to Massachusetts Militia (Oct. 11, 1798).

[55] Letter from Mercy Otis Warren to John Adams (Oct. 11, 1773) (enclosing the first known draft of her poem *To John Adams*).

[56] *Id.*

reason,[57] the Shakespearian attempt to reach out to the loveless with love is full of purpose.[58]

Accordingly, the sermons of Jonathan Edwards, Sr. sheltered a successful defense of love in 1776 that was lodged most stridently by the female revolutionaries.[59] More immediately, perhaps, the women of the American Revolution were inspired by Elizabeth Montagu's *On the Writings and Genius of Shakespeare* to move according to the laws of love.[60] Montagu's bold critiques of Voltaire earned Mercy's acclamation: "A sister's hand may wrest a female pen, / From the bold outrage of imperious men."[61] And, thus, the women of America rose up as fellow revolutionaries, as modestly described in the biography of Mercy's brother James Otis:

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[57] O'Neill, *supra* note 53, at 464.

[58] *Id.* at 457 (noting how Wollstonecraft, unlike Adams, proposed a rational, dynamic way that "reason could educate, tame, and control natural affect" and "also determine which passions were natural and which were the artificial products of historical circumstance"); Mercy Otis Warren, *To a Young Gentleman, residing in France* (1782), *in* WARREN, *supra* note 42, at 224, 227 (seeking to guide France to a time when "Fraternal love in every bosom burns" rather than letting it fall to "the monster[s] . . . AV'RICE" and "dissipation"); *see, e.g.*, ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 80–90, 165 (1892) ("What so great happiness as to be beloved, and to know that we deserve to be beloved? What so great misery as to be hated, and to know that we deserve to be hated?"), *followed and quoted by* JOHN ADAMS, DISCOURSES ON DAVILA 61–69 (1790) (demonstrating that Adams was not impervious to the influence of non-Rationalist writings about human emotion).

[59] JONATHAN EDWARDS, CHARITY AND ITS FRUITS 39, 50–72 (1852) (noting that the grandest gifts of spirituality are reserved "to all sorts, old and young, men and women," the highest of which is the power to "'dream dreams,'" because in the end times God will pour out his "'Spirit upon *all* flesh: and your sons and your daughters shall prophesy, your young men shall see visions, and your old men shall dream dreams: and on my servants, and on my handmaidens I will pour out, in those days, of my Spirit, and they shall prophesy,'" however, Edwards contended that the most excellent gift of the spirit was charity, a kind of love); *cf.* Letter from Abigail Adams to John Quincy Adams (Mar. 20, 1780) (attempting to teach her son to love and respect women: "Thus has the Supreme Being made the good will of Man towards his fellow creatures an Evidence of his regard to him, and to this purpose has constituted him a Dependant Being, and made his happiness to consist in Society." And further concluding "Man early discovered this propensity of his Nature and found 'Eden was tasteless till an Eve was there.'"), *agreeing with* JAMES OTIS, COLLECTED POLITICAL WRITINGS OF JAMES OTIS 123 (2015) ("The same omniscient, omnipotent, infinitely good and gracious Creator of the universe, who has been pleased to make it necessary that what we call matter should *gravitate* . . . . has made it equally necessary that from *Adam* and *Eve* to these degenerate days, that different sexes should sweetly *attract* each other, form societies . . . as the dew of Heaven and the soft distilling rain is collected by the all enliv'ning heat of the sun.").

[60] Letter from Abigail Adams to Mercy Otis Warren (May 14, 1787) ("I have lately been reading Mrs. Montague's essays upon the Genious and writings of shakspear, and I am so well pleased with them; that I take the Liberty of presenting them to you." (citing ELIZABETH MONTAGU, AN ESSAY ON THE WRITINGS AND GENIUS OF SHAKESPEARE (1764))); *see, e.g.,* PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), *in* THE COLLECTED WORKS OF PHILLIS WHEATLEY 48–49 (John C. Shields ed., 1988) (depicting a dispute between reason and love, which is settled when reason bowed reverently to "immortal Love" announcing: "In thee resplendent is the Godhead shown"); *cf.* Michael Dobson, *Fairly Brave New World: Shakespeare, the American Colonies, and the American Revolution*, 23 RENAISSANCE DRAMA 189, 193–96 (1992).

[61] Mercy Otis Warren, *To Mrs. MONTAGUE, Author of "OBSERVATIONS on the GENIUS and WRITINGS of SHAKESPEARE."* (1790), *in* WARREN, *supra* note 42, at 181.

> It is at epochs like that of the American revolution, when the opinions of women, secluded as they are from the struggle of political life, become of importance to a cause. . . . Such was the virtuous course, such the benign influence of American women, at this momentous period. Their conduct shewed, that their country and themselves were worth defending; their national sympathy gave a glow to all the charities of kindred, stimulated patriotism by its applause, and rewarded it with their affection.[62]

Examples of those who composed the female phalanx of the American Revolution included Deborah Sampson who was among the women who disguised themselves as men to serve in the Continental Army,[63] Patience Wright who used her skill in wax sculpting to enlist as a well-placed spy in English Court,[64] and Ann Eliza Bleecker who wielded her mighty voice to inspire her contemporaries with a vision of King George III upon "*Oppression's* iron chair."[65] Others like Phoebe Townsend successfully enlisted the help of men like Jupiter Hammon, an enslaved preacher, to pay a tribute to Anne Hutchinson, "a woman who also had a belief that she was equal in God's eyes."[66] And Hannah Griffitts memorably wrote of all these women: "If the Sons (so degenerate) the Blessing despise, / Let the Daughters of Liberty nobly arise."[67]

Phillis Wheatley, the most famous and potent of all the female patriots of 1776, vexed Thomas Jefferson in a way that Sally Hemings might have

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62 WILLIAM TUDOR, THE LIFE OF JAMES OTIS 341 (1823).

63 Letter from Paul Revere to William Eustis (Feb. 20, 1804); Paul Aron, *'Fighting as a Common Soldier'*, COLONIAL WILLIAMSBURG (Oct. 2, 2020), https://www.colonialwilliamsburg.org/trend-tradition-magazine/spring-2017/fighting-common-soldier/.

64 Letter from Patience Wright to Benjamin Franklin [after Mar. 7, 1777].

65 ANN ELIZA BLEECKER, *A Pastoral Dialogue* (1780), *in* THE POSTHUMOUS WORKS OF ANN ELIZA BLEECKER, IN PROSE AND VERSE 255 (1793). Bleecker's vision of the king deluded by "*Oppression*" personified as a female "fury" pouring awful advice into the king's ear predates and correlates with the later vision of J.R.R. Tolkein's memorable character Gríma Wormtongue, a correlation that would make Bleecker's role in the American Revolution something like Gandalf, attempting to dispel oppression's hold upon King George III with poetic verse. *Compare id.*, *with* J.R.R. TOLKIEN, THE TWO TOWERS 125–26 (1965).

66 J. L. Bell, *Another Newly Discovered Poem by Jupiter Hammon*, BLOGSPOT: BOSTON 1775 (Apr. 4, 2015), https://boston1775.blogspot.com/2015/04/another-newly-discovered-poem-by.html.

67 Hannah Griffitts, *The Female Patriots* (1768), *in* MOORE'S BOOK, *supra* note 50, at 172.

appreciated,[68] and yet she also won the hearts of George Washington,[69] Gilbert Imlay,[70] Voltaire,[71] and several others.[72] Stealing from Hobbesian visions of a paternalistic utopia,[73] Wheatley wrote that "Sometimes by Simile, a victory's won."[74] She continued by feminizing Hobbes and then reversing him with these words:

> *[America] weeps afresh to feel this Iron chain*
> *Turn, O Brittania claim thy child again*
> *Riecho Love drive by thy powerful charms*
> *Indolence Slumbering in forgetful arms*[75]

This simile was repeated throughout the colonies, noting the neglect of actual maternal love that Great Britain claimed to have for its colonies.[76]

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[68] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 234 (1787) ("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 Phyllis Whately [sic]; but it could not produce a poet." Jefferson then concluded that "[t]he compositions published under her name are below the dignity of criticism."). Jefferson detected that if Wheatley could prove that black people are capable of sublime art it would demonstrate that black people were capable of feeling as deeply as white people, thereby undermining the philosophical-ethical basis of keeping black people enslaved as given by Kant and Hume, i.e., that black people could not feel the torment of being enslaved, or the difficulty of the tasks they were forced to perform. *Id.*; David Hume, *Of National Characters* [1748], *in* DAVID HUME, ESSAYS MORAL, POLITICAL, LITERARY 213 n.1 (1987) (arguing there was "no arts" among the black people, because that would indicate that they could actually feel the torment of being enslaved and prove white people barbaric for enslaving Africans); IMMANUEL KANT, OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME 110 (1764) (similarly arguing: "The Negroes of Africa have by nature no feeling that rises above the trifling."); *cf.* Jennifer Billingsley, *Works of Wonder, Wondering Eyes, and the Wondrous Poet: The Use of Wonder in Phillis Wheatley's Marvelous Poetics*, *in* NEW ESSAYS ON PHILLIS WHEATLEY 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.").

[69] Letter from George Washington to Phillis Wheatley (Feb. 28, 1776).

[70] GILBERT IMLAY, *A TOPOGRAPHICAL DESCRIPTION OF THE WESTERN TERRITORY OF NORTH AMERICA, CONTAINING A SUCCINCT ACCOUNT OF ITS CLIMATE, NATURAL HISTORY, POPULATION, AGRICULTURE, MANNERS AND CUSTOMS, WITH AN AMPLE DESCRIPTION OF THE SEVERAL DIVISIONS INTO WHICH THAT COUNTRY IS PARTITIONED 229–30 (1797) (quoting Phillis Wheatley, On Imagination (1773), in* WHEATLEY, *supra* note 60, at 65–68*) (perusing the works of Jefferson and Wheatley and concluding "without any disparagement to him [Jefferson], that, by comparison, Phyllis [sic] appears much the superior").*

[71] Letter from Voltaire, to A.M. Le Baron Constant de Rebecque (Apr. 11, 1774).

[72] *See generally* Zach Petrea, *An Untangled Web: Mapping Phillis Wheatley's Network of Support in America and Great Britain*, *in* NEW ESSAYS ON PHILLIS WHEATLEY (Eric D. Lamore & John C. Shields eds., 2011).

[73] HOBBES, LEVIATHAN, *supra* note 5, at 119 ("The attaining of this Soveraigne Power, is by two wayes. One, by Naturall force; as when a man maketh his children, to submit themselves, and their children to his government, as being able to destroy them if they refuse . . . .").

[74] Phillis Wheatley, *America* (1768), *in* WHEATLEY, *supra* note 60, at 134–35.

[75] *Id.*

[76] Letter from John Adams to Hezekiah Niles (Feb. 13, 1818) ("The people of America had been educated in an habitual affection for England as their mother country, and while they thought her a kind and tender parent (erroneously enough, however, for she never was such a mother), no affection could be

Despite her decision to support the American Revolution, Wheatley managed to pierce the hearts of several English aristocrats,[77] including Selena Hastings, the Countess of Huntingdon, who invested in Wheatley's career as she had previously invested in George Whitefield's preaching tour in America.[78] In fact, without Hastings' generous investments in the education and enlightenment of the Americans, it is possible that the American Revolution may not have occurred.[79]

Alongside James Otis, and with the help of several American preachers who sought to end the tyranny of Puritanical reason, Phillis Wheatley rose to global prominence.[80] She used her international platform to show the founders how to prevail against the rational advocates of royal expansion with soft poetic strains inspired by love.[81] Like Moses in the desert wild, she boldly struck the dry rock of Puritanical elegiac poetry, causing it to gush hope and love to nourish even her worst enemies, including the Miltonic Puritans who hated women.[82]

Long before Wheatley's revolution of the Puritan elegy and reversal of Milton himself,[83] Benjamin Franklin noticed "*[t]hat good Poetry is not to be expected in New-England*."[84] The general reason that the Americans failed

more sincere. But when they found her a cruel beldam, willing like Lady Macbeth, to 'dash their brains out,' it is no wonder if their filial affections ceased, and were changed into indignation and horror.").

[77] *See, e.g.*, Letter from Phillis Wheatley to Lord Dartmouth (Oct. 10, 1772), *in* WHEATLEY, *supra* note 60, at 166–67, *enclosing a poem addressed to Lord Dartmouth that was printed here:* WHEATLEY, *supra* note 60, at 73–75.

[78] Patricia C. Willis, *Phillis Wheatley, George Whitefield, and the Countess of Huntingdon in the Beinecke Library*, 80 YALE U. LIBRARY GAZETTE 161, 164 (2006).

[79] *Id.*; *see generally* FAITH COOK, SELINA: COUNTESS OF HUNTINGDON: HER PIVOTAL ROLE IN THE 18TH CENTURY EVANGELICAL AWAKENING (2001).

[80] PHILLIS WHEATLEY, AN ELEGIAC POEM, ON THE DEATH OF THAT CELEBRATED DIVINE, AND EMINENT SERVANT OF JESUS CHRIST, THE LATE REVEREND, AND PIOUS GEORGE WHITEFIELD (1770), *reprinted in* WHEATLEY, *supra* note 60, at 73–75. Wheatley's reverence for George Whitefield earned her the support of the Countess of Huntingdon as well as worldwide fame. *Id.* ("Great COUNTESS! We *Americans* revere / Thy name, and thus condole thy grief sincere"); *see generally* Willis, *supra* note 78.

[81] *See, e.g.,* Phillis Wheatley, *To the Right Honorable William, Earl of Dartmouth* (1772), *in* WHEATLEY, *supra* note 60, at 73–75 (writing to the Earl of Dartmouth who had authority over all the American Colonies at the time, that her story is "By feeling hearts alone best understood" and that "Such, such my case. And can I then by pray / Others may never feel tyrannic sway?"—using her platform to advocate for general freedom in America that included freedom for herself and those like her).

[82] *See, e.g.,* Phillis Wheatley, *To His Honour the Lieutenant-Governor, on the Death of His Lady* (1773), *in* WHEATLEY, *supra* note 60, at 116–18 (comforting her enemy the loyalist Lieutenant-Governor Andrew Oliver, who was in league with Governor Thomas Hutchinson in opposition of American rights); *cf.* QUINCY ADAMS, *supra* note 53, at 13, 25 (exemplifying Milton's role in perpetuating misogyny in America through his depiction of Eve in *Paradise Lost*); *see generally* JOHN MILTON, SAMSON AGONISTES (C.S. Jerram ed., 1890) (1671) (a misogynistic, sex-negative reverie).

[83] Phillis Wheatley, *Phillis's Reply to the Answer* (1774), *in* WHEATLEY, *supra* note 60, at 144 (observing that "in [Milton] Britania's prophet dies").

[84] Benjamin Franklin, Silence Dogood, No. 7 (June 25, 1722), https://founders.archives.gov/documents/Franklin/01-01-02-0014.

to produce sublime poetry in the 1600s through the mid to late 1700s was that the topics of death and suffering overwhelmed the minds of the Puritan poets.[85] Death and suffering caused the Puritans to falter in such a way that they followed John Milton as he turned away from legitimate art and "joined the Devil's party"[86] by, among other things, authoring a deeply misogynistic tract *Samson Agonistes*, which demonized women, glorified the genocide of foreigners, and attacked the act of sex itself through the worst kind of manipulation.[87] Milton passed down his reveries of willful despair and dejection according to his apparent experiences of loveless sex to the time of the American Revolution where his depiction of Eve in *Paradise Lost* was cited to preclude women from public life,[88] and though this oppression continued long after it should have been ended in America,[89] Wheatley lodged a redemptive counter-cause in poetry and placed it at the very root of the American Revolution starting from her public trial in the autumn of 1772 through the summer of 1776.[90]

Wheatley's success in America, by which she was freed from slavery, caused a permanent rupture between what is now called legal positivism and the natural and common laws.[91] Prior to Wheatley, Thomas Hobbes appropriated the example of the Massachusetts Bay Puritans to twist the

[85] *Id.*; *see, e.g.,* ELEGY BY THE REVEREND COTTON MATHER ON THE DEATH OF THE REVEREND NATHANIEL COLLINS 20 (Holdridge Ozro Collins ed., 1909) (1684) (admitting a lack of inspiration in the face of death: "confused *I* / Now quite *alone*, have nothing else to do.").

[86] WILLIAM BLAKE, THE MARRIAGE OF HEAVEN AND HELL 10 (1906) (writing that Milton was "of the Devil's party without knowing it"); *see* Benjamin Ramm, *Why You Should Re-read Paradise Lost*, BBC (Apr. 19, 2017), https://www.bbc.com/culture/article/20170419-why-paradise-lost-is-one-of-the-worlds-most-important-poems; Edward Simon, *What's So 'American' About John Milton's Lucifer?*, THE ATLANTIC (Mar. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/03/whats-so-american-about-john-miltons-lucifer/519624/.

[87] MILTON, *supra* note 82, at 10, 20, 28, *analyzed by* YaleCourses, *23. Samson Agonistes*, YOUTUBE (Nov. 23, 2008), https://www.youtube.com/watch?v=JBYnHy6YxOU (lecture by John Rogers: "For me what's most troubling is this fact, and this is an undeniable, unquestionable fact: *Samson Agonists* is the intensest . . . expression of misogyny that you will find in the Miltonic canon.").

[88] *See, e.g.,* 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 452–53 (Kermit L. Hall & Mark David Hall eds., 2007) (appearing to quote Milton to justify women's "'mild compliance'" to the will of men).

[89] *See, e.g.,* QUINCY ADAMS, *supra* note 53, at 13, 25.

[90] Joshua J. Schroeder, *Leviathan Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations*, 15 FLA. A&M U.L. REV. 1, 159–60 (2021) [hereinafter Schroeder, *Leviathan*] ("Against the blindness of these men, Phillis Wheatley revolutionized Milton and became a better champion for the freedom of mind than Milton's lady ever was, abolishing any reason why Miltonic thought should disfranchise her sex.").

[91] *See id.* at 163–65 (telling the story of how "Phillis Wheatley preserved common law copyright in the wake of Billings' legal failure, by establishing a common law case in her own name"); *id.* at 167–68 (noting how by attempting to perfect "feudal, arbitrary powers disconnected from constitutions, and void of natural equity through legal positivism," the English House of Lords "thereby abdicated their House's seat of supreme judicial authority to Phillis Wheatley, a revolutionary, writer, and former slave").

natural law, common law, and equity into the utopic vision of *Leviathan*.[92] Hobbes, an absolute royalist, exemplified the paradoxes of utopic thought by opening a way for Cromwell, a despot in republican clothing, to behead the king and force the absolute obedience of the English people to Lord Protector Cromwell, as a king in all but name.[93]

According to Wheatley's vindication of love over reason, which was roundly confirmed by James Otis and several other male founders, the state of affairs enjoyed by Hobbes and Cromwell dissipated.[94] God and nature, informed by natural human love as defined in more recent times by Bertrand Russell, required "the consent of the governed,"[95] not blind supplication.[96] Human reason, when serving love (the law of which *is* natural law), safeguards the free choice of each person without surrendering the people's sovereign capacity to decide again, for as many times as necessary over the

[92] MASON, *supra* note 39, at 20–21 (a justification of the annihilation of the Pequot Nation by the Puritans of Massachusetts Bay by claiming they were complete savages), *followed by* HOBBES, LEVIATHAN, *supra* note 5, at 85 (using "the savage people in many places of *America*" as proof positive of his draconian state of nature of a "warre of every man against every man" by claiming that Native Americans "dependeth on naturall lust, have no government at all; and live at this day in that brutish manner, as I said before"); *cf.* ALFRED A. CAVE, THE PEQUOT WAR 39 (1996) (noting that Hobbes' portrayal of "primitive peoples living in a state of constant warfare, with 'every man against every other man'" was a mere "stereotype," because "the actual level of violence in most pre-Columbian America was quite low").

[93] HOBBES, LEVIATHAN, *supra* note 5, at 122, 252 (noting that his consent theory, derived from natural law, was a populist tyranny-of-the-majority ideology, writing: "he that dissented must now consent with the rest . . . or else be destroyed by the rest," because "no law can be unjust. The Law is made by the Soveraign Power, and all that is done by such Power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust."), *agreeing with* MASON, *supra* note 39, at 20–21, *and enabling John Cotton's defense of regicide examined here* Francis J. Bremer, *In Defense of Regicide: John Cotton on the Execution of Charles I*, 37 W&M Q. 103, 114 (1980) [hereinafter Bremer, *In Defense*] (stating Hobbesian consent theory in Cotton's sermon that justified the beheading of Charles I: "Truely Brethren in that wherein we varie our Service is Not acepted of God, But in that wherein all these Doe Center & Consent together, theire it is aceptable"); *cf.* James J. Hamilton, *Hobbes the Royalist, Hobbes the Republican*, 30 HIST. POL. THOUGHT 411, 431 (2009) (noting how the ideas Hobbes promoted justified the Puritan argument that "Charles I ceased to be sovereign in 1642 and the victors might have been justified in executing him as an enemy," however, Hobbes later refused to accept the results of his own ideas and "chose to sacrifice consistency instead").

[94] Schroeder, *Leviathan*, *supra* note 90, at 222–25.

[95] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see* 2 JOHN ADAMS, LEGAL PAPERS OF JOHN ADAMS 198–99 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) [hereinafter ADAMS, LEGAL PAPERS] (debunking Hobbesian "virtual consent" theory by writing that it "is only deluding Men with Shadows instead of Substances").

[96] HOBBES, LEVIATHAN, *supra* note 5, at 122 (requiring minorities to either obey or be destroyed).

sum of ages to secure the liberty and happiness of the individual.[97] This, according to Wheatley and Otis, was God's plan for humanity.[98]

II. HOW THE LAW OF LOVE DISRUPTED HOBBESIAN VISIONS OF UTOPIA

Phillis Wheatley led the Americans to find in Shakespeare, Terence, and Cicero the vindication of dreams and the laws of love.[99] In pursuit of Wheatley's poetic ideal, which caused her to constantly reach out to her enemies with the transforming power of loving kindness, James Otis established the law of love as the "everlasting foundation" of human societies.[100] Thus, Otis concluded that "*Government* is most evidently founded *on the necessities of our nature*."[101]

Debunking Hobbes, Otis wrote that government is not "an *arbitrary* thing, depending merely on *compact* or *human will* for its existence."[102] Rather, human sovereignty, while valuable and important, is *not* the foundation of human societies as Hobbes contended.[103] Social compacts, while extremely vital, are not the foundation of governments; rather,

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[97] Schroeder, *Leviathan*, *supra* note 90, at 222–25; OTIS, *supra* note 59, at 46, 123, 126 (noting that love, including friendship, familial love, and sexual love are the origins of society, and natural human love requires the freedom of choice to precede, limit, and inform society and law, which is where Otis derived his idea that: "all men a natural right to be *free*, and they have it ordinarily in their power to make themselves so, if they please"); *see* 1 WILSON, *supra* note 88, at 445 ("The dread and redoubtable sovereign, when traced to his ultimate and genuine source, has been found, as he ought to have been found, in the free and independent man.").

[98] Phillis Wheatley, *Thoughts on the Works of Providence* (1773), *in* WHEATLEY, *supra* note 60, at 48–49; OTIS, *supra* note 59, at 64, 123.

[99] *See* Phillis Wheatley, *To the University of Cambridge, in New England* (1773), *in* WHEATLEY, *supra* note 60, at 16 ("Suppress the deadly serpent in its egg."), *paraphrasing* WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc. 1, ls. 32–34; Phillis Wheatley, *To Mæcenas* (1773), *in* WHEATLEY, *supra* note 60, at 11 ("The happier *Terence* all the choir inspir'd, / His soul replenish'd, and his bosom fir'd; / Bus 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 first glory in the rolls of fame?"); OTIS, *supra* note 59, at 64, 123; *compare* Phillis Wheatley, *On Imagination* (1773), *in* WHEATLEY, *supra* note 60, at 65–68, *with* Cicero, *De Re Publica* 6 [*Scipio's Dream*].

[100] OTIS, *supra* note 59, at 123; *id.* at 64 (quoting TERENCE, HEAUTON TIMORUMENOS act 1, sc. 1, l. 25).

[101] *Id.* at 123–24.

[102] *Id.* at 124. This was not merely a figurative or accidental disagreement with Hobbes, but a direct attack as shown by Otis's words here:

> 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 [sic] hero.

Id. at 241.

[103] *Id.*

governments would exist whether or not people consented to them, agreed about them, or even fully comprehended them.[104]

Otis, again disagreeing with Hobbes, wrote that whether or not the people originally consented to their government, a "supreme Sovereign, absolute, and uncontroulable, *earthly* power" is "*originally* and *ultimately* in the people," and that the people "never did in fact *freely*, nor can they *rightfully* make an absolute, unlimited renunciation of this divine right."[105] Responding to and lifting up the female power to draw men out of their solitude and into a useful community, Otis wrote:

> *Salus populi supreme lex esto*, is the law of nature, and part of that grand charter given the human race, (tho' too many of them are afraid to assert it,) by the only monarch in the universe, who has a clear and indisputable right to *absolute* power; because he is the *only* One who is *omniscient* as well as *omnipotent*.[106]

Therefore, all governments are "given in *trust*, and on a condition . . . that the person or persons on whom the sovereignty is confer'd by the people, shall *incessantly* consult *their* good."[107] Otis concluded, according to the Ciceronian account of natural law, "let the origin of government be placed where it may, the *end* of it is manifestly the good of *the whole*."[108] Otis's natural law theory refuted the Hobbesian concept, common to all legal positivist theories, that the sovereign defines whatever is good or bad for the people as the final determiner of human law, justice, and right.[109]

In order to create a society where a despot can reign according to whatever dark terrors his imagination invents, Hobbes imagined a utopia called *Leviathan*.[110] In *Leviathan*, the people's power is maximized through their mighty rulers, by combining the sword of state and the staff of the church under one crown.[111] The synergies created by the combination of

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104 *Id.* at 123–24.

105 *Id.* at 124.

106 *Id.* at 125.

107 *Id.* at 124.

108 *Id.* at 125.

109 *Compare id.* at 124–25 (rejecting the idea that society is established upon human sovereignty rather than nature), *with* HOBBES, LEVIATHAN, *supra* note 5, at 119–27 ("This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence."); *cf.* David Dyzenhaus, *Positivism and the Pesky Sovereign*, 22 EURO. J. INT. L. 363, 371 (2011) (arguing that the sovereign is the origin of international societies rather than nature).

110 HOBBES, LEVIATHAN, *supra* note 5, at 119, 122 (imagining a government of "*One Person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.*").

111 *Id.* at frontispiece, 119.

power in the hands of one man, the visible sovereign, would far outweigh the costs—or so Hobbes argued.[112]

In *Leviathan*, individuals surrender themselves to the State, body and soul, to become literally (not figuratively) one man, represented by the visible sovereign.[113] Once the magical and irrevocable creation of one man out of the general populace originates the government, according to Hobbes, individual dissenters and rebels should be put to death according to the very will of the dissenters and rebels themselves.[114] As Hobbes wrote:

> Thirdly, because the major part [i.e., the majority of the people] hath by consenting voices declared a Soveraigne; he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else justly be destroyed by the rest. . . . And whether he be to the Congregation, or not; and whether his consent be asked, or not, he must either submit to their decrees, or be left in the condition of warre he was in before; wherein he might without injustice be destroyed by any man whatsoever.[115]

It is, perhaps, the height of gaslighting for Hobbes to tell those oppressed by a majority that they themselves necessarily consented to and essentially willed their own obliteration.[116] The German Jews, the Irish, the Rwandan Tutsis, and the African American slaves all caused their own destruction according to Hobbes, *and* it was right for them to be destroyed.[117] The Hobbesian utopia rejects all attempts to bring justice for such minority groups, because their destruction is right and just as defined by the general will of the whole people, the *Leviathan*, who may at any time choose to sacrifice a minority group for the good of the whole.[118]

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[112] *Id.* at 119 (noting that combining the powers of the multitude "in one Person" that "by terror, thereof, he is inabled to forme the wills of them all, to Peace at home, and mutuall ayd against their enemies abroad").

[113] *Id.* at frontispiece, 119.

[114] *Id.* at 122.

[115] *Id.*

[116] *Id.* at 120 (noting that "every one, as well he that *Voted for it*, as he that *Voted against it*, shall Authorise all the Actions and Judgements, of that Man" that they name the sovereign, which Hobbes called "the Person of them all"); *see* Schroeder, *The Dark*, supra note 6, at 328 n.21 (noting how "Hobbes appeared to be the proto-gaslighter").

[117] HOBBES, LEVIATHAN, *supra* note 5, at 122 ("[H]e that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else justly be destroyed by the rest. For if he voluntarily entered into the Congregation of them that were assembled, he sufficiently declared thereby his will (and therefore tacitely covenanted) to stand to what the major part should ordayne: and therefore if he refuse to stand thereto, or make Protestation against any of their Decrees, he does contrary to his Covenant, and therfore unjustly. And whether he be of the Congregation, or not; and whether his consent be asked, or not, he must either submit to their decrees, or be left in the condition of warre he was in before; wherein he might without injustice be destroyed by any man whatsoever."); Schroeder, *The Dark*, *supra* note 6, at 336; *cf.* HANNAH ARENDT, ON VIOLENCE 5–6 (1970).

[118] HOBBES, LEVIATHAN, *supra* note 5, at 122; Schroeder, *The Dark*, *supra* note 6, at 336.

Furthermore, international law according to Hobbes is in a constant state of absolute world war.[119] Hobbesian thought justified World Wars I and II, as well as the War of 1812, Napoleon's conquests, the Puritans' genocidal invasions of Ireland and the Pequot Nation, and Cromwell's wars against Holland and Spain.[120] In fact, it appears that Hobbes derived his beliefs of an absolutely cruel state of nature, ruled by total war and slavery, from international affairs:

> But though there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Soveraigne authority, because of their Independence, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours; which is a posture of War.[121]

Hobbes's utopian thought seems to end in a global super-state ruled by one despotic man that runs both church and state, wears a crown, and owns other bobbles that represent a sovereignty that requires an absolute dictatorship over all people.[122] In Hobbes's utopia, the one despotic man (a visual representation of the one man that the populace creates) will cruelly commit genocide against all people groups that resist him.[123] The result, according to Hobbes, is the good or welfare of the people (even the so-called good or welfare of people who are cruelly murdered or oppressed) and, thus, Hobbes's utopia falsely claims to satisfy natural law without conforming to reality.[124]

Hobbesian utopia, where the individuality of each human being is completely surrendered to the whole and destroyed, was tried in Cromwell's

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[119] HOBBES, LEVIATHAN, *supra* note 5, at 85; Schroeder, *The Dark*, *supra* note 6, at 336; *cf.* ARENDT, *supra* note 117, at 5–6 (identifying Hobbes's *Leviathan* as the origin, or at least the poster child, of the idea "[t]hat war is still the *ultima ratio*, the old continuation of politics by means of violence" (quoting HOBBES, LEVIATHAN, *supra* note 5, at 115)).

[120] HOBBES, LEVIATHAN, *supra* note 5, at 85; Schroeder, *The Dark*, *supra* note 6, at 336; ARENDT, *supra* note 117, at 5–6.

[121] HOBBES, LEVIATHAN, *supra* note 5, at 85; Schroeder, *The Dark*, *supra* note 6, at 336.

[122] HOBBES, LEVIATHAN, *supra* note 5, at frontispiece; Schroeder, *The Dark*, supra note 6, at 336.

[123] HOBBES, LEVIATHAN, *supra* note 5, at 119, 122; Schroeder, *The Dark*, supra note 6, at 336.

[124] HOBBES, LEVIATHAN, *supra* note 5, at 119, 122; Schroeder, *The Dark*, supra note 6, at 336.

Protectorate and Parliament of Saints,[125] Winthrop's Massachusetts,[126] Robespierre's France,[127] Lenin's Russia,[128] Díaz's Mexico,[129] Hitler's

[125] *See* Eleanor Curran, *A Very Peculiar Royalist: Hobbes in the Context of His Political Contemporaries*, 10 BRIT. J. HIST. PHIL. 167 (2002) (pin cite at page 11 on the unpublished version available online) (noting that Hobbes himself seems to have made an "admission (in 1662) of having, (in *Leviathan*), justified a switch in allegiance to Cromwell's regime"); *cf.* MARCHAMONT NEDHAM, THE CASE OF THE COMMON-WEALTH OF ENGLAND, STATED 103–11 (1650) (praising and quoting THOMAS HOBBES, DE CORPORE (1655)); THEODORE ROOSEVELT, OLIVER CROMWELL 136–37 (1920) (celebrating Pride's Purge, and demonstrating how quickly one utopian vision for England can give way to another).

[126] *See* sources cited *supra* note 93; 1 JOHN WINTHROP, WINTHROP'S JOURNAL "HISTORY OF NEW ENGLAND" 1630-1649, at 194, 229 n.1 (James Kendall Hosmer ed., 1908). Whether Hobbes originated or copied what we now call Hobbesian or Hobbesianism from the American Puritans, and whether or not the American Puritans were the originators of Hobbesian philosophy or Hobbes's closest acolytes, is beside the point. *See* WOOLRYCH, *supra* note 24, at 271–73, 300 (offering strong evidence that the Massachusetts Bay Puritans were the originators of legal positivism, a philosophy usually traced back to Thomas Hobbes); *see also* Bremer, *In Defense*, *supra* note 93, at 114 (justifying the rise of Cromwell through Hobbesian consent theory without clearly citing to Hobbes); MASON, *supra* note 39, at 20–21 (applying Hobbesian war of all against all to conquer and decimate the Pequot Nation, without clearly citing to Hobbes and also predating Cromwell's genocidal conquests in Ireland that also harkened back to Hobbesian theory).

[127] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 208–09 (Rose M. Harrington trans., 1893) (1762) ("Of all Christian authors the philosopher Hobbes is the only one who has seen the evil and the remedy, and who has dared to propose uniting the two heads of the eagle, and so bring everything into political union, without which neither state nor government will ever be well constituted."). It does not matter whether or not Rousseau fully embodied the Hobbesian thought that Robespierre later sought to perfect during the Reign of Terror, or that several commentators have wrongly assumed that Robespierre added something wholly new to political thought. Andrew Levine, *Robespierre: Critic of Rousseau*, 8 CANADIAN J. PHIL. 543, 556–57 (1978) (noting how "Robespierre *shows* Rousseau's fundamental error: Rousseau radically misconstrues the nature and extent of social divisions" that obstruct Rousseau's "utopian program," and that "on a practical level, Robespierre corrects Rousseau" by "combining virtue and terror"—which is a Hobbesian paradox, to be sure, that "denegates [i.e., the Hegelian *'aufhebung'*]—simultaneously affirms *and* denies"); *cf.* HOBBES, LEVIATHAN, *supra* note 5, at 46 (defining Hobbesian theory as a product of collective human "Madnesse" defined as the paradoxical adoption of both pride and dejection, Aristotelian vices, which Hobbes both affirms and denies); *id.* at 119 (arguing that out of the collective madness of humankind the sovereign ruler should use terror "to forme the wills of them all").

[128] Lars T. Lih, *Not Marx, Not Locke, But Hobbes: The Meaning of the Russian Revolution*, 4 CRISIS & CRITIQUE 211, 214 (2017) (noting how Hobbes helped Lenin and the Bolsheviks "preadapt" to the trials of revolutionary government overthrow in order to replace the Romanovs with their favored system); *cf.* Levine, *supra* note 127, at 556 (noting Lenin's debt to Robespierre, who "corrected" Rousseau by making Rousseau even more Hobbesian).

[129] Joshua Lund & Alejandro Sánchez Lopera, *Revolutionary Mexico, the Sovereign People and the Problem of Men with Guns*, 7 POLÍTICA COMÚN (2015), https://quod.lib.umich.edu/p/pc/12322227.0007.003?view=text;rgn=main (see notes 16–19 and accompanying text). It does not matter whether commentators accept the Hobbesian view that the Mexican Revolutionaries were a "problem" that legitimized Díaz's reign, as this is exactly Hobbes's argument to legitimize all absolute dictators as potentially the only alternative to the absolute war of all against all. *Compare id.*, *with* HOBBES, LEVIATHAN, *supra* note 5, at 119.

Germany,[130] and throughout Latin America,[131] among other places.[132] The suffering of millions, and perhaps billions, of people under the oppressions wrought by Hobbesian thought is all worth it for the benefits of the absolute sovereign to come, says Hobbes, which can be measured by weighing the costs and benefits.[133] The alternative to absolute monarchical rule, Hobbes contended, was total destruction and painful death.[134]

However, when King George III tried to invoke the *Leviathan* of his colonies to destroy Massachusetts as a rebel horde, the other twelve colonies joined Massachusetts to resist the crown.[135] The sovereign, according to Otis and the Americans, exists in the individual man or woman and is not surrendered to a central authority of any kind—royal or republican.[136] Furthermore, the sovereign does not invent societies like a *Leviathan* as if

[130] *See generally* Doreen Lustig, *The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials*, 43 N.Y.U. J. INT'L L. & POL. 965 (2011). It does not matter if several commentators Americanized Hitler's reliance on Hobbes in order to discuss potential problems with domestic figures like Justice Oliver Wendell Holmes, Jr., as this further demonstrates the point. *See, e.g.,* Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 AM. BAR ASS'N. J. 569, 572–73 (1945). It also does not matter, according to sources cited *supra* note 10, whether or not the Americans provided Hitler with a completely independent or parallel path to the Hobbesian *übermensch*/*Leviathan* arising from purely American roots, as it is possible that what we call Hobbesian thought itself was merely a copy of the original developed by Rev. John Cotton, Captain John Mason, and the Massachusetts Bay Puritans as discussed by sources cited *supra* notes 92–93. *See generally* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL (2017); TOMMY ORANGE, THERE THERE (2018).

[131] Mirow, *supra* note 30, at 191; Atilio A. Boron, *Latin America: Between Hobbes and Friedman*, 130 NEW LEFT REV. (1981), https://newleftreview.org/issues/i130/articles/atilio-a-boron-latin-america-between-hobbes-and-friedman.pdf (noting how several Latin American countries "assum[ed] the unmistakable outline of Hobbes's apocalyptic sovereign"). It does not matter that the Hobbesian concept of absolute sovereignty was largely passed down to South American and Caribbean dictators by Jeremy Bentham, a disciple of Hobbes. *See, e.g.*, WILLIFORD, *supra* note 46, at 41, 100–01; Tod Seelie, *Inside an Abandoned Panopticon Prison in Cuba*, ATLAS OBSCURA (June 19, 2017), https://www.atlasobscura.com/articles/panopticon-prison-cuba.

[132] *See, e.g.,* Kerry Brown, *Leviathan comes to Beijing*, OPENDEMOCRACY (Aug. 27, 2015), https://www.opendemocracy.net/en/leviathan-comes-to-beijing/; Shigekazu Yamashita, *The First Japanese Translation of Thomas Hobbes' "Leviathan", 1883*, 1981 HIST. ENG. STUD. JAP. 75, 90 (1980); *see generally* Vappu Helmisaari, *Thomas Hobbes and Contemporary Italian Thinkers* (Oct. 30, 2020) (Ph.D. dissertation, University of Helsinki), https://helda.helsinki.fi/items/81966e61-c9a2-43a0-8d37-8995c645c066.

[133] HOBBES, LEVIATHAN, *supra* note 5, at 62–63, 99, 119 (defining reason itself as a cost/benefit analysis of every man regarding the ways he can benefit himself through selfish actions); THOMAS HOBBES, THE ELEMENTS OF LAW 30 (1888) (1650) (defining his proto-utilitarian ideology as one that both sets up utopian visions before men to encourage their obedience, while also acknowledging that men's felicity is only momentary, and not achievable in perpetuity, and therefore that utopias are impossible).

[134] HOBBES, LEVIATHAN, *supra* note 5, at 119.

[135] Schroeder, *Leviathan*, *supra* note 90, at 146–47.

[136] OTIS, *supra* note 59, at 124–25.

they are "mortall God[s],"[137] rather, societies are founded upon natural sexual desire, motherly love, and friendship.[138]

Sovereignty itself is created by God or nature, and is coeval with the existence of societies and governments.[139] The sovereign's consent is necessary to the ongoing legitimacy of government and thus the sovereign can judge a government illegitimate under their preexisting natural rights including *salus populi suprema lex esto*.[140] To do this, Cicero prescribed a discourse between those governed, i.e., "the people," to determine the justice, or injustice, in the laws.[141]

The people's good is not defined or confirmed by their consent alone, because if it were, the government would be the "*arbitrary* thing" Otis rejected.[142] The people's consent is necessary, but not sufficient to maintain government legitimacy.[143] A government that does not regard the people's consent is a basic sort of tyranny,[144] but a government that manages to game democracy and engineer the consent of the people through force or fraud is also a tyranny.[145]

The Hobbesian project of engineering a virtual consent by "force and fraud" simultaneously violates and appropriates the Ciceronian maxim: *salus populi suprema lex esto*.[146] The people are not God or gods, and they do not

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137 HOBBES, LEVIATHAN, *supra* note 5, at 119.

138 OTIS, *supra* note 59, at 124–25.

139 *Id.*

140 *Id.* at 125.

141 Amy H. Kastely, *Cicero's* De Legibus*: Law and Talking Justly Toward a Just Community*, 3 YALE J. L. & HUMAN. 1, 3 (1991) ("the dialogue argues for a view of law as public discourse about justice"); *id.* at 10 ("The very essence of law thus involves a practice of justification.").

142 OTIS, *supra* note 59, at 124.

143 *Id.* at 141 (noting that if the people's "natural liberty" is "taken from them without their consent, they are so far enslaved"); *id.* at 124–25 (noting that whether or not people consent to living in society, they do live in society, and thus the existence of society and government itself does not turn upon their consent alone).

144 *Id.* at 141 (noting that taking natural liberty without consent is basic slavery); *id.* at 147 ("*The supreme power cannot take from any man any part of his property,* without his consent in *person, or by representation.*").

145 *Id.* at 241 (rejecting Hobbesian "force and fraud"); 2 ADAMS, LEGAL PAPERS, *supra* note 95, at 198–99 (naming Hobbes's "virtual consent" theory a delusion, writing "so many Cries to deceive a Mob have always been the Instruments of arbitrary power, the means of lulling and ensnaring Men into their own Servitude"); *see generally* Edward Bernays, *The Engineering of Consent*, 250 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 113 (1947).

146 OTIS, *supra* note 59, at 241; HOBBES, LEVIATHAN, *supra* note 5, at 119 (writing that the sovereign *Leviathan* should terrorize the people for their own benefit); *id.* at xviii (using Ciceronian Latin to describe the business of the sovereign as "*Salus Populi* (the *peoples safety*)"); *cf.* Schroeder, *The Dark*, *supra* note 6, at 329–30 n.27 (explaining Hegelian sublation and the term "*aufhebung*" meaning to both reject and preserve a concept at the same time, which Hegel fraudulently labeled a form of logic).

automatically know how the government should secure their welfare.[147] Nevertheless, God (or the gods, or nature) gave the people minds and voices for language, to discuss and confirm through a Ciceronian discourse whether any particular government act is legitimate.[148]

Misgovernment, even if unintended and accomplished through measures that were at one time popularly supported, may later be punished by the people without irony or hypocrisy.[149] For example, the American Revolutionaries did everything conceivable they could do to remain in the British Commonwealth, because they believed that the English proclamations of liberty under their unwritten constitution included the Americans.[150] Reverend Samuel Cooper commemorated this before the Massachusetts Legislature, relying upon Wheatley's simile of our indolent mother:

> Upon our present independence, sweet and valuable as the blessing is, we may read the inscription, I am found of them that sought me not. Be it to our praise or blame, we cannot deny, that when we were not searching for it, it happily found us. . . . It is certain, however, that we did not seek an independence; and it is equally certain that Britain, though she meant to oppose it with all her power, has by a strange infatuation, taken the most direct, and perhaps the only methods that could have established it. Her oppressions, her unrelenting cruelty, have driven us out from the family of which we were a part. . . .151

147 OTIS, *supra* note 59, at 63–64 (calling on Boston's leaders to ignore public expressions of prejudice or animosity wherever they exist: "Let us keep the public Good only in View. Should any Prejudices or Animosities exist, this is a proper Season for their Burial in everlasting Oblivion. Let not the Poor envy the Rich, nor the Rich despise the Poor: But let us remember we are all of one Flesh and one 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. 'Tis recorded much to the Honor of the Ancients, that this Sentiment. *Homo sum: humani nihil âne alienum puto*, was attended with a Thunder-Clap of Applause through the whole Roman Theatre. 'He who don't consider himself as related to every one of the human Race, is unworthy the Name Man,' A Christian should be able sincerely to declare, that he had rather be the meanest Friend of a Free People and of Mankind, than the Tyrant of the Universe.").

148 *See* Kastely, *supra* note 141, at 8–9 (distinguishing "the rhetorical discovery of justice" from mere "majority will" (quoting Cicero, *De Legibus* 1.15.42)).

149 *Id.* at 8 (noting that even if the Athenians unanimously supported tyranny, "'that would not entitle such laws to be regarded as just, would it?'" (quoting Cicero, *De Legibus* 1.15.42)).

150 *See, e.g.,* OTIS, *supra* note 59, at 63 ("The true Interests of Great Britain and her Plantations are mutual; and what God in his Providence has united, let no man dare attempt to pull asunder."); Letter from John Adams to William Wirt (Jan. 23, 1818) (noting that as late as November of 1774, Richard Henry Lee was hopeful to preserve the British Empire in America as he told John Adams: "'We shall infallibly carry all our Points. You will be compleatly relieved; all the offensive Acts will be repealed, the Army and Fleet will be recalled and Britain will give up her foolish Project.'").

151 SAMUEL COOPER, A SERMON PREACHED BEFORE HIS EXCELLENCY JOHN HANCOCK, ESQ.; GOVERNOUR, THE HOUNOURABLE THE SENATE, AND HOUSE OF REPRESENTATIVES OF THE

Once Great Britain transgressed the good of the people by abridging the rights of Englishmen in America, the consent of the governed was properly revoked.[152] It did not matter that in the years immediately prior to 1776 that a majority of Americans passionately consented to British rule.[153] What mattered was that the *trust* between the peoples of America and the British government was broken when British red coats occupied Boston,[154] beat James Otis into mental incompetency,[155] reduced Charlestown to ashes,[156] and then New York City itself,[157] all the while jailing people in their prison ships as if they had no rights,[158] among other things.[159]

In England, James Otis was accused of chasing a utopia when he advocated for American representation in British Parliament.[160] Otis countered by advocating the suffrage of "every other county and borough" in England for representation in the House of Commons.[161] Far from utopian, Otis's vision for consent by suffrage throughout England, Ireland, Scotland,

COMMONWEALTH OF MASSACHUSETTS, OCTOBER 25, 1780. BEING THE DAY OF THE COMMENCEMENT OF THE CONSTITUTION, AND INAUGURATION OF THE NEW GOVERNMENT 16–17 (1780).

152 *Id.*; OTIS, *supra* note 59, at 124; King George III, *The King's Speech to Both Houses of Parliament, on the 30th of November 1774* (1775); *see* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (speaking of the people of the United States: "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security").

153 *See* Letter from John Adams to William Wirt (Jan. 23, 1818) (reporting that as late as November, 1774 a majority of Virginians, including Richard Henry Lee who later put forward the motion to separate from England in 1776 and Patrick Henry whose *Liberty or Death* speech inspired many, were still of the opinion that, in Lee's words: "'British will give up her foolish Project.'").

154 JOHN HANCOCK, ORATIONS DELIVERED AT THE REQUEST OF THE INHABITANTS OF THE TOWN OF BOSTON, TO COMMEMORATE THE EVENING OF THE FIFTH OF MARCH, 1770, at 39, 41 (1807) (noting how King George III broke trust with "[t]he town of *Boston*, ever faithful to the British crown").

155 TUDOR, *supra* note 62, at 363.

156 *See* Letter from Abigail Adams to John Adams (June 18–20, 1775) ("God is a refuge for us. – Charlstown is laid in ashes. The Battle began upon our intrenchments upon Bunkers Hill . . . .").

157 *See* Ann Eliza Bleecker, *A Pastoral Dialogue* (1780), *in* BLEECKER, *supra* note 65, at 257 (observing the destruction of New York City by fire: "Now Britain's marine thunders shake the ground, / New Albian's [i.e., New England's] structures fall in ruins round; / The mournful fires extend along the strand, / And ocean blushes as the fires expand; / The flames still rise, till quench'd with human blood, / The sanguine stream commixes with the flood; / Then ocean blushes deeper still with gore, / And *Desolation* shrieks along the shore"); *but see* Benjamin L. Carp, *The Night the Yankees Burned Broadway: The New York City Fire of 1776*, 4 EARLY AM. STUD. 471, 473 (2006) (concluding, against the advice of the revolutionary patriot Ann Eliza Bleecker, that it would have been in the interest of the Americans to take credit for burning down New York City, and thusly concluding so in this article).

158 *See* PHILIP FRENEAU, *The British Prison Ship* (1780), *in* 2 POEMS OF PHILIP FRENEAU: POET OF THE AMERICAN REVOLUTION 18 (1903).

159 THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776) (noting several faults and breaches of public trust caused by King George III in America).

160 OTIS, *supra* note 59, at 198 (addressing the opposing argument "that 'the right of being represented in parliament' is 'an *Utopian privilege*,' a 'phantom,' a 'cloud in the shape of Juno'").

161 *Id.*

and Wales eventually became a reality that the Americans envisioned, but would never share a part in.[162]

Tories like Blackstone, Mansfield, and Bentham successfully aborted the potential glory of the British Empire by limiting potentially all human rights to the boundaries of England.[163] They demolished any possibility that the English Parliament could possibly be considered an international government, suitable for jurisdiction over the plural interests of humanity.[164] Instead, they claimed the heinous rights of conquest, to either enslave or murder all others—including their neighbors the Scots, the Welsh, and the Irish.[165]

The basis of this claim was actually a Hobbesian vision of utopia that is captured on the frontispieces of both *Leviathan* and *De Cive*.[166] Accordingly, Bentham harkened to Hobbes when he wrote that Great Britain should "unite as one man" to punish the Americans for choosing to cut the ties that bound them to the Empire;[167] Mansfield relied upon Cromwell's conquest of Jamaica for the crown's right to possess all the world as a Hobbesian global super-state;[168] and Blackstone prematurely declared "parliamentary omnipotence" as if there was and could be no other source of governmental legitimacy throughout the globe than English government.[169]

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[162] *Id.* at 198, 240 (addressing the poor British argument that Americans should have no representation in Parliament, because "Manchester, Birmingham and Sheffield" did not); *see generally* PETERLOO (Entertainment One 2018) (noting the struggle for suffrage that the people of England were required to wage in Manchester after the American Revolution).

[163] *See* ANON., THE LETTERS OF GOVERNOR HUTCHINSON, AND LIEUTENANT GOVERNOR OLIVER 13 (1774) ("There must be an abridgement of what are called English liberties [in America]."), *request granted by* 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.").

[164] *See* Letter from Novanglus to Massachusettensis (Apr. 10, 1775) (explaining the English attempt to destroy the rights of Americans under *Rex v. Cowle*, based on the idea that the rights of England are confined within the borders of England).

[165] Campbell v. Hall (1774) 1 Cowp. 206, 209 (Eng.) ("It is left by the constitution to the King's authority to refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him."); Rex v. Cowle (1759) 2 Burr. 834, 854–56 (Eng.) (applying the feudal rights of conquest to people in Berwick, just outside the borders of England, but within Great Britain); OTIS, *supra* note 59, at 198 (asking "why might not Wales" be treated the same as the Americans?).

[166] HOBBES, LEVIATHAN, *supra* note 5, at frontispiece; HOBBES, DE CIVE frontispiece (1642); *see* Sarah Mortimer & David Scott, Leviathan *and the Wars of the Three Kingdoms*, 46 J. HIST. IDEAS 259, 267 (2015) ("Throughout *Leviathan*, Hobbes sought to close down the space for diversity between a sovereign's different territories, as we have already seen in his discussion of conquest.").

[167] [Jeremy Bentham,] *Short Review of the Declaration*, *in* [JEREMY BENTHAM & JOHN LIND,] AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 131 (1776) [hereinafter Bentham, *Short Review*]; *cf.* HANNAH ARENDT, ON REVOLUTION 78 (1990) ("In Rousseau's construction, the nation need not wait for an enemy to threaten its borders in order rise 'like one man' and to bring about the *union sacrée*; the oneness of the nation is guaranteed in so far as each citizen carries within himself the common enemy as well as the general interest which the common enemy brings into existence.").

[168] Campbell v. Hall [1774] 1 Cowp. 206, 211–12 (Eng.).

[169] 1 WILLIAM BLACKSTONE, COMMENTARIES *156–57.

The reality of the American Revolution obliviated all three of these conflicting visions of Hobbesian utopia represented by Bentham, Mansfield, and Blackstone.[170] However, the Americans could not hope and did not try to scourge the minds of all the world of utopias wrought by strong centralized government powers.[171] In fact, America's French allies freely disagreed with John Adams' defenses of the separation of powers taken from Montesquieu, and established Hobbes's unity of powers to chop off their own heads.[172]

Observing the Hobbesian trick of justifying the absolute slavery of the governed through the "free" choice of the governed to surrender their natural rights to *Leviathan*,[173] Phillis Wheatley once wrote: "[L]et us not sell our Birthrights for a thousand worlds, which indeed would be as dust upon the Ballance."[174] She observed that "all mankind[, if] left to themselves[,] would sell their heavenly Birth Rights for a few moments of sensual pleasure."[175] Assisting Wheatley's revolutionary sentiments and confirming her prophesies, Mercy Otis Warren wrote that "[n]o son of Eve has ever won the prize" of "happiness unmix'd" as it existed in Eden,

> *But nearest those, who nearest nature live,*
> *Despising all that wealth or power can give,*
> *Or glittering grandeur, whose false optics place,*
> *The summum bonum on the frailest base; . . .*
> *Ocean rebounds, and earth reverberates,*
> *And heaven confirms the independent states;*
> *While time rolls on, and mighty kingdoms fail,*
> *They, peace and freedom on their heirs entail,*
> *Till virtue sinks, and in far distant times,*
> *Dies in the vortex of European crimes.*[176]

Wheatley repeated Mercy Otis Warren's vindication of Montesquieu's natural "peace and freedom,"[177] in her 1784 poem *Liberty and Peace*, also

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

171 *See, e.g.,* Schroeder, *Leviathan*, *supra* note 90, at 26 nn.142–43 (noting Adams' responses to Condorcet and Turgot's advocacy of a unity of power rather than a separation of powers).

172 *Id.* The United States has always fostered and continues to foster several famous Hobbesians, some who are students of the French Revolution, including Justice Scalia and his followers. *See, e.g.,* Joshua J. Schroeder, *We Will All Be Free or None Will Be: Why Federal Power is Not Plenary, but Limited and Supreme*, 27 TEX. HISP. J. L. & POL'Y 1, 3 (2021) [hereinafter Schroeder, *We Will*].

173 HOBBES, LEVIATHAN, *supra* note 5, at 199 ("This is the Generation of that great Leviathan, or rather (to speake more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence."); *cf.* OTIS, *supra* note 59, at 241.

174 Letter from Phillis Wheatley to Obour Tanner (Oct. 30, 1773).

175 *Id.*

176 Mercy Otis Warren, *Simplicity* (1779), *in* WARREN, *supra* note 42, at 231, 234.

177 *Id.* (noting that the Americans secured "peace and freedom" for their posterity), *following and agreeing with* 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 5 (1777) (defending liberty and peace as "the first law[s] of nature," by disputing Hobbes's previous claim that natural law is war and

referring to her earlier poem to General George Washington as a fulfilled prophecy.[178] Wheatley and her revolutionary female friends convinced most American Revolutionaries not to repeat Esau's mistake of selling out their future for lunch.[179] The American men that followed the guidance of these female fire starters not only saved themselves from disaster,[180] but they and their posterity experienced far more happiness near the gates of Eden than in the false utopias of *Leviathan*.[181]

III. LEGAL POSITIVISM AS A PLACEHOLDER FOR RESURGENT-INSURGENT HOBBESIANISM

After the American Revolution rooted out Hobbesian definitions of natural law, common law, and equity from the English system,[182] the Hobbesians needed a new channel to arbitrary power.[183] They could no longer count on Hobbes's old methods of corrupting natural law,[184] common law,[185] or equity.[186] Thus, Jeremy Bentham's plan, later dubbed "legal

property: "Hobbes enquires, 'For what reason men go armed, and have locks and keys to fasten their doors, if they be not naturally in a state of war?' But is it not obvious, that he 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?").

178 Phillis Wheatley, *Liberty and Peace* (1784), *in* WHEATLEY, *supra* note 60, at 154 ("LO! Freedom comes. Th' prescient Muse foretold, / All Eyes th' accomplish'd Prophecy behold: / Her Port describ'd, '*She moves divinely fair, / Olive and Laurel bind her golden Hair.*'" (quoting Phillis Wheatley, *To His Excellency George Washington* (1775), *in* WHEATLEY, *supra* note 60, at 145 ("The goddess comes, she moves divinely fair, / Olive and laurel bind her golden hair"))).

179 Letter from Phillis Wheatley to Obour Tanner (Oct. 30, 1773).

180 *See, e.g.*, Letter from George Washington to Phillis Wheatley (Feb. 28, 1776) ("I thank you most sincerely for your polite notice of me . . . . If you should ever come to Cambridge, or near Head Quarters, I shall be happy to see a person so favourd 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.").

181 Mercy Otis Warren, *Simplicity* (1779), *in* WARREN, *supra* note 42, at 231, 234.

182 OTIS, *supra* note 59, at 241; *see* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

183 It is ordinary for scholars to ignore the existence of the American Revolution's decimating effect on Blackstone's theory of a global, omnipotent parliamentary power, and thus they usually do not know how to make sense of Bentham's abandonment of "Hobbes's 'vocabulary' (laws of nature, natural rights, covenant, and so forth)," because if you "eliminate the troublesome phrases from Hobbes's writing and what remains, save for Hobbes's extravagant fear of anarchy, is strikingly similar to the fundamental political doctrines of Bentham." James E. Crimmins, *Bentham and Hobbes: An Issue of Influence*, 63 J. HIST. IDEAS 677, 678 (2002) [hereinafter Crimmins, *Bentham and Hobbes*].

184 HOBBES, LEVIATHAN, *supra* note 5, at 97 ("[I]n this law of Nature, consisteth the Fountain and Originall of JUSTICE.").

185 *Id.* at 193 ("That Law can never be against Reason, our Lawyers are agreed . . . but the doubt is, of whose Reason it is, that shall be received for Law.").

186 *Id.* at 252 ("[N]o law can be unjust. The Law is made by the Soveraign Power, and all that is done by such Power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust."), *adopted by* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 275 (Robert Campbell ed., 1869).

positivism,"[187] entailed a total, radical rejection of natural law,[188] common law,[189] and equity.[190]

The apparent reason for the Benthamite rejections of natural law, common law, and equity was that Hobbes's corrupting definitions of natural law, common law, and equity all derived from his idea that the state of human nature is absolute war and slavery.[191] This idea, in turn, derived from Hobbes's idea that all humans were inherently insane, i.e., possessed with pride and dejection, and thereby devoid of humility.[192] Thus, when Alexander Hamilton resolved "to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice," he was putting Hobbes on trial, and by accomplishing something more than total chaos and anarchy, the Americans appeared to disprove Hobbes.[193]

Were Hobbes alive in 1776, he might have called America's bluff by arguing that "the people" did not establish the United States, and rather, that the United States was established by an extremely insular group of rich white men—i.e., the visible sovereign.[194] In fact, Bentham developed legal

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[187] *See, e.g.,* Philip Schofield, *Jeremy Bentham and the Origins of Legal Positivism*, *in* THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM 203–04 (Torben Spaak & Patricia Mindus eds., 2021).

[188] *Id.* at 207 (noting Bentham's claim that Blackstone's natural law theory would lead to either ultra-conservatism or to anarchy). Bentham also thought that the American and French Revolutionary Declarations of Natural Rights would lead to anarchy. JEREMY BENTHAM, *Anarchical Fallacies*, *in* 2 THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., 1843) [hereinafter BENTHAM, THE WORKS] (referring to the French Declaration of Rights: "*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonesense upon stilts."); Bentham, *Short Review*, *supra* note 167, at 120 (accusing the American Revolutionaries "of subverting a lawful Government" with "a cloud of words, to throw a veil over their design").

[189] *See, e.g.,* Xiabo Zhai, *Bentham's Exposition of Common Law*, 36 LAW & PHIL. 525, 525–26 (2017) (noting several of Bentham's extremely strong rejections of the common law as common law and explaining Bentham's interest in replacing the common law with positive law).

[190] Chris Riley, *Jeremy Bentham and Equity: the Court of Chancery, Lord Eldon, and the Dispatch Court Plan*, 39 J. OF LEGAL HIST. 1, 2, 5 (unpublished version, 2018) (arguing that "the man whom Bentham viewed as the 'mightiest and most mischievous of all the opponents of law reform'—and whom he 'hated as much as it was possible [in] his benevolent nature of hate'—was not in fact Blackstone, but John Scott, first earl of Eldon, who served as lord chancellor in 1801–6 and again in 1807–27"—noting that Bentham envisioned "the abolition of the procedural distinction between law and equity" in order to place the practice of equity, if it can still be called equity, directly under "his Civil Code"); *see id.* at 14 (quoting Bentham: "'The ruffian thief is common law; the hypocrite thief is equity.'").

[191] Crimmins, *Bentham and Hobbes*, *supra* note 183, at 680–81 (describing several strategies developed by "Bentham scholars . . . . to put as much liberal and democratic daylight as possible between their man and the long forbidding shadow of Hobbes's 'Leviathan.'"); *see* sources cited *supra* notes 182–90 and accompanying text.

[192] HOBBES, LEVIATHAN, *supra* note 5, at 46, 119 (prescribing government sponsored terrorism to wrest control of the inherently insane human race).

[193] THE FEDERALIST NO. 1 (Alexander Hamilton).

[194] *See, e.g.,* Steven F. Hayward, *Two Kinds of Originalism*, 52 NAT'L AFFAIRS (2022), https://www.nationalaffairs.com/publications/detail/two-kinds-of-originalism (noting how later

positivism to make this exact point.[195] Thus, Americans continue to struggle with Hegel's derivative accusation that "as yet, there is no real State in America."[196]

This struggle took central stage in the 1619 Project's Pulitzer Prize winning attempt to change the year of the United States' founding from 1776 to 1619, which the project eventually backtracked without admission of error.[197] Heirs of Comte's positivism, including those at the 1619 Project

Hobbesian scholars and jurists like Walter Berns and Antonin Scalia interpreted the Declaration of Independence as an affirmation rather than a refutation of Hobbesian ideology); *cf.* Crimmins, *Bentham and Hobbes*, *supra* note 183, at 688 (noting Hobbes's similar calling of England's bluff about the common law being "the perfection of reason" when he argued that all law "is the natural reason of the sovereign, the 'king's reason'; this 'is all that is, or ever was Law in England'" (quoting THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 62 (Joseph Cropsey ed., 1971) [hereinafter HOBBES, A DIALOGUE])).

[195] Crimmins, *Bentham and Hobbes*, *supra* note 183, at 689; *see* sources cited *supra* notes 182–90.

[196] BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 739 (1945) [hereinafter RUSSELL, A HISTORY] (dismissing this accusation as absurd). Hegel envisioned a Hobbesian utopia arising out of a war between the North and South in the United States, and thus his antebellum writing can appear prophetic about the impending American Civil War, but in the end the wrong side, according to Hegel, won the Civil War and the North reestablished the principles of 1776 as embodied by President Lincoln's *Gettysburg Address* to which Hegel believed was not a legitimate basis of government. *Id.*

[197] *See* Conor Friedersdorf, *1776 Honors America's Diversity in a Way 1619 Does Not*, THE ATLANTIC (Jan. 6, 2020), https://www.theatlantic.com/ideas/archive/2020/01/inclusive-case-1776-not-1619/604435/ (quoting text from the 1619 Project that was since taken down as a mistake without acknowledgement of the error: "More controversially, the project explicitly aims to reframe American history, rejecting the centrality of 1776 and instead 'understanding 1619 as our true founding, and placing the consequences of slavery and the contributions of black Americans at the very center of the story we tell ourselves about who we are.'"); THE 1619 PROJECT: A NEW ORIGIN STORY xxix (Nikole Hannah-Jones ed., 2021) [hereinafter THE 1619 PROJECT] (softening its earlier attempt to actually replace 1776 with 1619 as the founding year of the United States, which was historically absurd, with a more nuanced attempt to ignore "the ideals of 1776" in favor of "the realities of 1619," which is like admitting intellectual bias from the outset about two things (reality and ideals) that have always coexisted, and without actually doing the work of uncovering the realities of 1619 that led to the ideals of 1776); Leslie M. Harris, *I Helped Fact-Check the 1619 Project. The Times Ignored Me.*, POLITICO MAG. (Mar. 6, 2020), https://www.politico.com/news/magazine/2020/03/06/1619-project-new-york-times-mistake-122248 ("Far from being fought to preserve slavery, the Revolutionary War became a primary *disrupter* of slavery in the North American Colonies."); *cf.* Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, THE ATLANTIC (Dec. 23, 2019), https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/ (noting that for sociologists like Hannah-Jones the historical facts matter less than the psychological motivations in present day readers, and appearing to validate this as a legitimate way of reading American history even though it seems to cover-up both (1) the hypocrisies of the American South who signed the Declaration of Independence when they did not keep its promises, and (2) the anti-slavery contributions of several black American Revolutionaries in the American Revolution, especially those of Phillis Wheatley and her followers). The 1619 Project, furthermore, suffers from an anachronism borne from its cynicism about the inevitability of racism in the white population, which N.K. Jemisin recently refuted in her marvelous *Broken Earth* series. *See generally* N.K. JEMISIN, THE STONE SKY (2017) (vindicating the role of human choice in the justice or injustice of human societies, and specifically that racism was chosen and therefore *not* inevitable). Prior to Jemisin, Theodore Allen forcefully disproved the inevitability of white racism in his life's work, a two volume treatise entitled *The Invention of the White Race*, which convincingly places the origins of American racism toward the end of seventeenth century as a thoughtful reaction against the threat of Bacon's Rebellion in Virginia, which

and, perhaps, W.E.B. DuBois before them,[198] demonstrated how Hobbesianism can, in a way, be both multi-racial and gender inclusive.[199] Nevertheless, the reason why Hobbesianism needed to be rebranded, renamed, repackaged, and sold by Jeremy Bentham as if it were a new theory was the successes of the Declarations of Rights beginning in 1776 that Comte and Bentham mistakenly neglected and ignored.[200]

What is today called legal positivism, is the legal ideology that Jeremy Bentham developed to call America's bluff on behalf of Hobbes.[201] The

took several decades to spread through the South, and only overcoming Georgia's founding no slavery principle a few years prior to the American Revolution. 1 THEODORE ALLEN, THE INVENTION OF THE WHITE RACE back cover (1994) ("When the first Africans arrived in Virginia in 1619, there were no white people there.").

198 *See, e.g.,* Ainsworth Clarke, *W.E.B. Du Bois's Fugitive Writing, or Sociology at the Turn of the Twentieth Century*, 15 CR: NEW CENT. REV. 171, 203–04 (2015) (addressing links between Comte and W.E.B. DuBois's explorations of sociology); THE 1619 PROJECT, *supra* note 187, at 183 (failing, as W.E.B. DuBois failed, to fully grasp the role of elitism in the continual perpetuation of racial division among "'white and black workers that there probably are not today in the world two groups of workers with practically identical interests who hate and fear each other so deeply and persistently and who are kept so far apart that neither sees anything of common interest'" (quoting W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 700 (2013))), *apparently ignorant of* Letter from William Gooch to Alured Popple (May 18, 1736) (proposing "to fix a perpetual Brand upon Free-Negros & Mulattos by excluding them from the great Priviledge [sic] of a Freeman"—implicitly acknowledging the existence of free black people in Virginia circa 1736, as well as the fact that the perpetual brand known as race-based chattel slavery was not yet fully unleashed in America), *examined by* 1 ALLEN, *supra* note 187, at 242.

199 *See, e.g.,* Nikole Hannah-Jones, *The Idea of America*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html (since edited to avoid critiques without acknowledging the errors edited) ("The United States is a nation founded on both an ideal and a lie. Our Declaration of Independence, signed on July 4, 1776, proclaims that 'all men are created equal' and 'endowed by their Creator with certain unalienable rights.' But the white men who drafted those words did not believe them to be true for the hundreds of thousands of black people in their midst."); UChicago Institute of Politics, *The 1619 Project with Nikole Hannah-Jones*, YOUTUBE 35:05 (Oct. 7, 2019), https://www.youtube.com/watch?v=QwvyRSJLoYU (responding to a quote about Phillis Wheatley, a black woman who inspired the *Declaration of Independence* and the abolition of slavery in Massachusetts with sheer cynicism that: "[I]n general I'm not optimistic about whether we will ever resolve our original sin, because how do you purge something that's in your DNA."). Hannah-Jones's cynical response to Phillis Wheatley literally knocked the wind out of Hannah-Jones's moderator Jenn White, to which Hannah-Jones remarked that crying and emoting about this apparent reality of foreordained doom for all black people in America is the real point of her work. *Id.*

200 Crimmins, *Bentham and Hobbes*, *supra* note 183, at 685–86 (noting that Bentham considered Hobbes's writings no "better than a useless heap of words," likely because it failed to anticipate the success of the American Revolution and near-success of the French under natural law, and thus Bentham believed "natural law is the 'alloy of falsehood' which has led Hobbes astray" (quoting Letter from Jeremy Bentham to Étienne Dumont (May 14, 1802))); Carolina Armenteros, *The Counterrevolutionary Comte: Theorist of the Two Powers and Enthusiastic Medievalist*, *in* THE ANTHEM COMPANION TO AUGUSTE COMTE 91, 98 (Andrew Wernick ed., 2017) (linking Comte to Maistre's conservative rejection of the individual, rather than to the socialism of Saint-Simon); *see* Graeme Garrard, *Joseph de Maistre's Civilization and Its Discontents*, 57 J. HIST. OF IDEAS 429, 430, 445 (1996) (noting that Maistre's rejection of the individual as both social and evil came from Hobbes); MAUREEN HENRY, THE INTOXICATION OF POWER 175–76 (1979) (characterizing Saint-Simon as a new phase of Hobbesian ideology).

201 *See, e.g.,* Letter from Jeremy Bentham to President Andrew Jackson (Jan. 10, 1830), *in* 11 BENTHAM, THE WORKS, *supra* note 188, at 42 (apparently advocating that the President overthrow the

central premise of Bentham's theory, that all law is manmade, implicitly required that "the people" did not establish the United States under god or nature-made law as the U.S. Constitution maintains.[202] After Bentham loudly decried America as traitors in 1776, he eventually softened his tone and began to look for other ways to sell Hobbesian dogma to America.[203]

For example, Bentham marketed the slogan "emancipate your colonies" to European rulers.[204] Doing this would avoid other opportunities for the colonies to prove, as the United States did, that European governments are not omnipotent over their far flung empires.[205] It also gave more evidence that appeared to demonstrate that "the people" were not involved in the government independence created in America or anywhere else in the world, including in Europe.[206]

In the 1940s, Lon L. Fuller looked back through the works of John Austin and dubbed Bentham's approach "legal positivism" as a pejorative tantamount to Nazism.[207] In defense of legal positivism, H.L.A. Hart

Senate and perhaps also the federal judiciary based on his apparent belief that the limits imposed on the President by the U.S. Constitution were a mere ruse, writing: "If I do not mistake you, you are embarked, or about to embark, in a civil enterprise, which Cromwell, notwithstanding all his military power, failed in,—I mean the delivery of the people from the thraldom in which, everywhere, from the earliest recorded days, they have been held by the harpies of the law.").

202 *Compare id.*, *with* U.S. CONST. pmbl ("We the people . . . ."), *and* Chisholm v. Georgia, 2 U.S. 419, 462 (1793) (maintaining a stark distinction between England and the United States, based on the sovereignty of the people noted in the preamble of the U.S. Constitution).

203 *Compare* sources cited *supra* notes 187–90, *with* Letter from Jeremy Bentham to President James Madison (Oct. 30, 1811) (advocating the adoption of legal positivism directly preceding the War of 1812, when President Madison likely had bigger things on his mind).

204 WILLIFORD, *supra* note 46, at 52 n.17, 59, 61, 67.

205 *See id.*

206 *But see id.* at 59 (noting that Bentham's comments about emancipating colonies "were addressed not to the Spanish rulers but to the Spanish people, because the people themselves held the supreme constitutive power"). Bentham may have addressed the people of Spain in order to get the attention of Spanish royalty, but he never genuinely addressed the peoples of America who he hoped, according to Aaron Burr's prompting, that we "would all follow, like a flock of sheep," as Bentham already had the attention of Simón Bolívar and other so-called liberators who seemed to follow Bentham like sheep, though the people in Latin America themselves were less compliant and likely incognizant of Bentham's role in their lives. *Id.* at 4, 14.

207 FULLER, THE LAW, *supra* note 43, at 4–5 (distinguishing "*natural law* and *legal positivism*," and defining the latter as "that direction of legal thought which insists on drawing a sharp distinction between the law *that is* and the law *that ought to be*"); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648–50 (1958). Hart and others that Fuller labeled legal positivists did not originally claim or define the term legal positivism until after Fuller's scholarship. HART, ESSAYS ON, *supra* note 44, at 28, 59 (citing to John Austin as "an echo" of "the legal positivism of which Bentham may be regarded as the founder"); HANS KELSEN, A NEW SCIENCE OF POLITICS 76, 91–92 (2004) (defending Auguste Comte's legal positivism from Eric Voegelin's criticism); *see* LETTRES D'AUGUSTE COMTE A JOHN STUART MILL: 1841–1846, at 4 (2012) (expressing that Comte provided a more perfect version of Bentham's method); *cf.* Schofield, *supra* note 187, at 203–04.

responded that, in comparison with the Nazis, Bentham was moderate,[208] and benign towards women and non-white people.[209] Hart wrote: "Bentham was a sober reformer who . . . contemplated no radical change . . . and . . . envisaged . . . no utopia."[210]

Had Fuller focused more on Bentham's radical utopian ideas than he did the horrors of the Nazis, he might have refuted Hart more effectively.[211] For example, Fuller might have easily noted that Hart's treatment of Bentham was paradoxical.[212] Bentham's clear admiration for Cromwell,[213] his role inspiring the French Reign of Terror,[214] his panoptic-utopian projects in Russia and Latin America,[215] and his open avowal of populist radicalism over sober democratic reform,[216] made Hart's treatment of Bentham as a "sober reformer" a basic oxymoron.[217]

In fact, Étienne Dumont characterized Bentham's philosophy as a license to adopt terrorism as a legitimate government policy.[218] Dumont, the person most responsible for introducing France to Bentham's work, also

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208 Schofield, *supra* note 187, at 207 (presenting Bentham as moderate and his detractors as tending "either to ultra-conservatism or to anarchy").

209 H.L.A. HART, THE CONCEPT OF LAW 163 (1994) (arguing that the protection of women and non-white people is rationally "obvious" and taking for granted that others will see this); *see, e.g.,* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618–19 (1958) (presenting a story of a woman that turned her husband in to the Nazis that was later prosecuted under principles of natural law for this crime, arguing that the natural law's failure to meet "the merits of candour" invalidated the legitimacy of this prosecution unless we, the populist and amorphous *we*, decide that it is okay to punish people *ex post facto*); *but see* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); WILLIFORD, *supra* note 46, at xiv ("Believing that men everywhere were alike, *i.e.*, rational, [Bentham] did not bother to acquaint himself with the traditions, customs, or life-styles of the people for whom he made these plans. In actuality, he virtually ignored the existence of the indigenous peoples in Spanish America.").

210 WILLIFORD, *supra* note 46, at xiii; HART, ESSAYS ON, *supra* note 44, at 24.

211 *See generally* Fuller, *supra* note 207.

212 *See, e.g.,* HART, ESSAYS ON, *supra* note 44, at 69 (addressing Bentham's overt support for radicalism in "his later more elaborate arguments in *Radicalism not Dangerous*" as if Bentham's radicalism was sober and in some sense not actually radical).

213 11 BENTHAM, THE WORKS, *supra* note 188, at 42 (celebrating Cromwell).

214 DUMONT, *supra* note 38, at 120 ("If it be better for the greatest happiness of the greatest number that a man should die, whoever he may be, and whatever he may be, *cut him off without mercy*. And so with his liberty, and so with his property."); *id.* at 153–57, 267 n.40; *see also* James E. Crimmins, *Bentham's Political Radicalism Reexamined*, 55 J. HIST. IDEAS 259, 264–67 (1994) [hereinafter Crimmins, *Bentham's*] (properly tying back Bentham's radicalism to his participation in the French Revolution).

215 WILLIFORD, *supra* note 46, at xiii; 3 BENTHAM, THE WORKS, *supra* note 188, at 3 (writing to "Chrichoff, in White Russia").

216 Jeremy Bentham, *Radicalism Not Dangerous*, *in* 3 BENTHAM, THE WORKS, *supra* note 188, at 599; *cf.* Crimmins, *Bentham's*, *supra* note 214, at 267–69 (noting that the regicidal chaos of the French Revolution in conjunction with its preoccupation with declarations of natural human rights apparently caused Bentham to waffle on his radical views).

217 HART, ESSAYS ON, *supra* note 44, at 24, 69.

218 DUMONT, *supra* note 38, at 120 ("*cut him off without mercy*").

introduced Aaron Burr in exile to Jeremy Bentham after Burr's attempt to revolutionize Mexico was violently quashed by Jefferson.[219] Upon Dumont's introduction, Bentham appeared enamored that Burr shot and killed Alexander Hamilton in a duel.[220]

Intrigued by this violent, exiled American, Bentham invited Burr to stay with him on August 11, 1808.[221] During his stay with Bentham, "Burr was still hopeful of carrying his Mexican dreams into reality and evidently talked enthusiastically with Bentham about them."[222] Burr invited Bentham to share in his dream of establishing a Mexican utopia:

> Bentham stated, "He (Burr) came here expecting this government to assist his endeavours in Mexico; but the government had just then made up their quarrel with Spain. . . . He meant really to make himself Emperor of Mexico. He told me, I should be the legislator, and he would send a ship of war for me. . . . He said, the Mexicans would all follow like a flock of sheep."[223]

Bentham took this dream much farther than Burr was able, and spent several years steeping Latin American dictators in panoptic legal positivism, especially Simón Bolívar.[224] Bentham's votaries in Latin America referred to him endearingly as "the 'light of Westminster.'"[225] The culling of Native American populations in South and Central America and several cycles of Latin American dictatorships including that of Porfirio Díaz in Mexico were established directly under the influence of Bentham's particular version of legal positivism.[226]

To confirm these facts, Fuller might have used his extensive influence at Harvard College to seek an audience with Octavio Paz who studied at his *alma mater* U.C. Berkeley in the 1940s.[227] Paz later won the Nobel Prize in literature, in part, for his collection of essays entitled *The Labyrinth of Solitude*, which exposed Porfirio Díaz's dictatorship as an extension of

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219 WILLIFORD, *supra* note 46, at 3.

220 *Id.*; 10 BENTHAM, THE WORKS, *supra* note 188, at 432.

221 WILLIFORD, *supra* note 46, at 4.

222 *Id.*

223 *Id.*

224 *Id.* at 14.

225 *Id.* at 29.

226 *Id.* at 119 (noting Bentham's "hopes for seeing his panopticon plans adopted"); *see* sources cited *supra* note 121 regarding the adoption of Bentham's panopticon in Latin America; *see also* Álvaro Enrigue, *Mexico's Marxist Prophet*, THE PARIS REVIEW (Nov. 7, 2018), https://www.theparisreview.org/blog/2018/11/07/mexicos-marxist-prophet/ (reviewing *The Hole*, a book set at the Palace of Lecumberri, a panopticon prison built by the Porfirio Díaz regime).

227 *See Octavio Paz: Nobel Prize winner for literature*, SFGATE (Apr. 20, 1998), https://www.sfgate.com/news/article/Octavio-Paz-Nobel-Prize-winner-for-literature-3094596.php (noting how "he accepted a scholarship to study at UC-Berkeley").

Comte's positivism.[228] Apparently ignorant of Paz's expression of the Mexican experience, Fuller believed "the sociological 'positivism' of Comte, Durkheim, and Duguit . . . has never been wholly respectable in the eyes of the legal positivists."[229]

Fuller was wrong.[230] In Latin America, just to the South, all the evidence went against Fuller's distinction of Comte and others.[231] The Díaz regime was influenced by both Comte and Bentham, as Díaz modeled the Black Palace of Lecumberri in Mexico City after Bentham's *Panopticon*.[232] Contradicting both Fuller and Hart, Professor Miriam Williford patiently explained that "Spanish America was to be Jeremy Bentham's utopia."[233]

Whatever political ideas that Aaron Burr might have had regarding Mexico, it is highly unclear whether he intended to follow or betray the principles of the American Revolution in his intrigues in the Southwest.[234] Burr was certainly desperate by the time he fawned over Bentham's *Panopticon*, as he was likely hoping to receive a political life raft from Bentham.[235] However, Burr's character as an early feminist admirer of Mary Wollstonecraft seems to distinguish his aims from either Bentham or Hobbes—both of whom were stained with Puritan misogyny.[236]

Rather, Burr's presence in Bentham's home said a lot more about Bentham's character, as he was willing to use a politically damaged figure like Burr to weasel his way into American politics after publicly denouncing the American Revolution.[237] For Bentham, it was a classic Hobbesian power play to use Burr, the man who killed Hamilton, to gain influence in America.[238] Burr, to Bentham, was probably an example of Hobbes's war of

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228 *Id.*; PAZ, *supra* note 3, at 12 n.1, 131–33.

229 FULLER, THE LAW, *supra* note 43, at 17 (distinguishing Comte's "sociological 'positivism,'" because it "has never insisted on a rigid separation of *is* and *ought*").

230 *Compare id.*, *with* PAZ, *supra* note 3, at 12 n.1, 131–33.

231 PAZ, *supra* note 3, at 12 n.1, 131–33; WILLIFORD, *supra* note 46, at 41, 100–01.

232 *Compare* PAZ, *supra* note 3, at 12 n.1, 131–33, *with* Enrigue, *supra* note 226, *and* WILLIFORD, *supra* note 46, at 41, 100–01.

233 WILLIFORD, *supra* note 46, at xiii.

234 *See generally* ROGER G. KENNEDY, BURR, HAMILTON, AND JEFFERSON: A STUDY IN CHARACTER (2000).

235 *Id.* at 156.

236 *Id.* at 21, 382 ("What if the Founders had actually remembered the ladies—the women, in general—and followed Aaron Burr's lead toward at least some of the reforms advocated by his wife and Mary Wollstonecraft? Theodosia Burr died before she could press her husband further, and their daughter died before she could take up the work. But women were there, all along. Let us heed what they had to say.").

237 *Id.* at 156; WILLIFORD, *supra* note 46, at 4.

238 DUMONT, *supra* note 38, at 128–29 (noting how Rousseau followed Hobbes, but arguing: "Nothing however was made of it [i.e., Rousseau's take on Hobbes], till Mr. Bentham gave it power and plausibility, and applied it, by the help of a perfect law, to all the business of life."); *see* 10 BENTHAM, THE WORKS,

all against all, and was perhaps seen, for a small time at least, as a fitting avatar for Bentham's philosophies to win the minds and hearts of the Americans.[239]

Heralding a real Queen of Hearts, the Geneva-born French Revolutionary Étienne Dumont espoused Jeremy Bentham's greatest happiness principle and roared approximately: *off with their heads!*[240] For his role inspiring the bloody course of the First French Republic, Bentham was made a French citizen.[241] Almost two centuries later, H.L.A Hart managed to paint Jeremy Bentham as a liberal progressive figure, and as a straight faced friend of France and America.[242]

Hart demonstrated that even the most radical people can appear as facially neutral if they adopt legal positivism.[243] Indeed, legal positivists can appear neutral even as they attempt to replace the Declaration of Independence with new, sometimes theocratic, social compacts.[244] To be

supra note 188, at 432 (noting that despite Burr's flaws: "We met: he was pregnant with interesting facts.").

239 10 BENTHAM, THE WORKS, *supra* note 188, at 432; *cf.* WILLIFORD, *supra* note 46, at 4.

240 DUMONT, *supra* note 38, at 120.

241 *Id.* at 30 (noting that the National Assembly of France "made [Bentham] a French citizen").

242 H.L.A. Hart, *Bentham and the United States of America*, 19 J. L. & ECON. 547, 552–53 (1976) (giving Bentham credit for presaging *Marbury v. Madison*); *id.* at 559 (giving Bentham credit for trying to halt the violence of the French Revolution, when that Revolution conspicuously carried out Bentham's principles when it unleashed the Terror); *see* John Mikhail, *'Plucking the Mask of Mystery from its Face': Jurisprudence and H.L.A. Hart*, 95 GEO. L.J. 733, 772–73 (2007) (quoting JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 113 (1891)).

243 *See, e.g.,* Christopher N. Warren, *Leviathan and the Airway: Black Lives Matter and Hobbes with the History Put Back*, MEDIUM: THE SUNDIAL (June 26, 2020), https://medium.com/the-sundial-acmrs/leviathan-and-the-airway-black-lives-matter-and-hobbes-with-the-history-put-back-3d2f809769c5; ARENDT, *supra* note 3, at 182, 347 (stressing that the racism of "English nationalists . . . were not more harmful than, for example, Auguste Comte in France when he expressed the hope for a united, organized, regenerated humanity under the leadership—*présidence*—of France."—in the same breath seeming to link racist, fascist elements with Comte's positivism and distinguishing them from her definition of totalitarianism, which she apparently considered more extreme).

244 Conor Friedersdorf, *1776 Honors America's Diversity in a Way 1619 Does Not*, THE ATLANTIC (Jan. 6, 2020), https://www.theatlantic.com/ideas/archive/2020/01/inclusive-case-1776-not-1619/604435/ (noting how the 1619 Project initially "aim[ed] to reframe American history, rejecting the centrality of 1776 and instead 'understanding 1619 as our true founding, and placing the consequences of slavery and the contributions of black Americans at the very center of the story we tell ourselves about who we are'"—quoting the original version of the 1619 Project's website that was taken down); JEAN M. YARBROUGH, THEODORE ROOSEVELT AND THE AMERICAN POLITICAL TRADITION 12, 207, 252, 257, 265 (2012) (explaining, for example, Theodore Roosevelt's facial neutrality toward the American Ideals by observing "his esteem for the valiant deeds of the men of 1776," and yet how, eventually, "Roosevelt's subordination of rights to duty, along with his idealization of the state, [that] owed more to German political theory and practice" compelled him to support a new Progressive Party platform that was "overwhelmingly Protestant . . . saturated with its hymn-singing moral revivalism," in support of which he made "his unofficial call for a new Declaration of Independence"); *see* GILLIS J. HARP, POSITIVIST REPUBLIC: AUGUSTE COMTE AND THE RECONSTRUCTION OF AMERICAN LIBERALISM, 1865–1920, at 70, 107 n.99 (1995) (noting Roosevelt amongst a list of "American Comtists," and that "American Comtists were attracted to Roosevelt's 'New Nationalism'"); *cf.* THEODORE ROOSEVELT, OLIVER CROMWELL 1

fair, it appears that before Hart, it was actually Lon L. Fuller that followed Hobbes's perfected strategies to enable the proverbial Queen of Hearts while swearing he was not a legal positivist.[245]

Hart's Benthamism,[246] Scalia's originalism,[247] and Fuller's "integrative jurisprudence school"[248] sought to redefine natural law, common law, and equity *through* legal positivism.[249] As confirmed by Cass R. Sunstein and Adrian Vermeule's new work *Law and Leviathan*, each of these schools simultaneously criticize and arise from the Hobbesian pursuit of reason.[250] At the most, they "see philosophy and natural law only as something to fill lacunae in the positive law."[251]

For example, Fuller's famed rejection of legal positivism was apparently based upon its "failure . . . to give meaningful answers to the problems of life in society."[252] Thus, after he completed his *tour de force* rejection of legal positivism, blaming it for enabling "totalitarian dictatorships like Adolph Hitler's," he proceeded to *posit* the meaningful answers he was looking for.[253] That is, Fuller asserted legal positivism after outwardly rejecting it.[254]

(1920) (calling Cromwell "the greatest Englishman of the seventeenth century"); YARBROUGH, *supra* note 244, at 80 ("In Roosevelt's romantic imagination, [the frontier leaders of America] were the heirs of Cromwell; the West was won by 'the Roundheads of the South.'"); ORANGE, *supra* note 130, at 51 ("Teddy's Bear became teddy bear. What they didn't say was that he slit that old bear's throat.").

245 FULLER, THE LAW, *supra* note 43, at 1–2 (speaking of Hobbesian rationalism, Fuller argued that "there is no one who stands in greater need of it than the legal philosopher").

246 HART, ESSAYS ON, *supra* note 44, at 27–28 (noting how Hobbes anticipated Bentham); *see* DUMONT, *supra* note 38, at 128–29 (arguing that Bentham perfected Hobbesian thought).

247 Schroeder, *We Will*, *supra* note 172, at 3 (examining Scalia's "Hobbesian tract *Common-Law Courts in a Civil-Law System*").

248 Charles L. Palms, *The Natural Law Philosophy of Lon L. Fuller*, 11 CATH. LAW. 94, 116 (1965).

249 *See* sources cited *supra* notes 245–48, regarding their following of Hobbes's original adoption of legal positivism defined as the idea that there exists only manmade law summed up in this passage of *Leviathan*:

> I define Civill Law in this manner. Civill Law, Is to every Subject, those Rules, which the Common-wealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule.

HOBBES, LEVIATHAN, *supra* note 5, at 189.

250 SUNSTEIN & VERMEULE, *supra* note 43, at 97, *reviewed by* Richard Epstein, *Leviathan's Apologists*, LAW & LIBERTY (Sept. 16, 2020), https://lawliberty.org/book-review/leviathan-administrative-state-sunstein-vermeule/, *and* Jason Blakely, *Cass Sunstein and Adrian Vermeule's Technocratic Despotism*, CHRON. OF HIGHER EDUC. (Feb. 1, 2021), https://www.chronicle.com/article/cass-sunstein-and-adrian-vermeules-technocratic-despotism?cid2=gen_login_refresh&cid=gen_sign_in.

251 Linus J. McManaman, *The Legal Philosophy of Roscoe Pound*, 13 CATH. LAW. 98 (1967).

252 Palms, *supra* note 248, at 94.

253 *Id.*

254 Frederick Schauer, *Fuller and Kelsen – Fuller on Kelsen*, *in* 163 HANS KELSEN'S PURE THEORY OF LAW: CONCEPTIONS & MISCONCEPTIONS 18–19 (2020) (unpublished version) ("Fuller was at least

Fuller's definition of legal positivism as the law that *is* as opposed to the law that *ought* to be was incorrect for two reasons.[255] First, legal positivists do not limit the law to what *is*, rather, they limit the law to the will, or command, of the sovereign.[256] Like Hobbes's concept of the sovereign-as-*Leviathan*,[257] legal positivists passionately maintain imaginative albeit contradictory conceptions of what the law *ought* to be according to their concepts of sovereignty—the focal point of their theories.[258]

Second, Fuller's definition of law as an uncomfortable mixture of the law as it is and the law as it ought to be fails to escape his own definition of legal positivism.[259] While Fuller accepted that perhaps he should listen to sources outside of the law to help him shape the law, he clearly believed these natural sources of legal inspiration are not law.[260] This concept of law is no different from any of the legal positivists he spent reams of paper criticizing as Nazi enablers.[261]

Thus, as Fuller demonstrated, legal positivists: (1) eat their own, and (2) gild the lily of those they disagree with most.[262] Hobbes himself started this tradition by gilding the lily of Cicero and scorching Aristotle without mercy, only to extend Aristotle and undermine Cicero.[263] Learning from

enough of a legal positivist to recognize that there could be and was immoral positive or human law, he wanted lawyers and judges, in their professional activities, and in the name of the law, to . . . improve the defects in the existing positive human law."); H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 50–51 (1983) [hereinafter HART, ESSAYS IN] (blaming the fluidity of "legal positivism" on Fuller for inventing the term as a pejorative that "has come to stand for a baffling multitude of sins"); *id.* at 86–87 (appearing to say that Fuller's theories could be included as a form of legal positivism, because Fuller's definition of "ought" has "nothing to do with morals"); *see* Anthony D'Amato, *Lon Fuller and Substantive Natural Law*, 26 AM J. JURIS. 202–218, at 2, 10 (1981) (unpublished version) ("Fuller was somewhat a prisoner of the age of relativism. . . . [And] went too far in trying to label a relativistic and utilitarian system as 'morality'—despite his use of the qualifying adjectives 'procedural' and 'inner.'").

255 FULLER, THE LAW, *supra* note 43, at 4–5, 17 (providing Fuller's definition).

256 HOBBES, LEVIATHAN, *supra* note 5, at 189; *see* Dyzenhaus, *supra* note 109, at 368.

257 HOBBES, LEVIATHAN, *supra* note 5, at 119.

258 *See, e.g.,* DUMONT, *supra* note 38, at 128–29 (noting how Rousseau followed, but disagreed with Hobbes, and then how Bentham followed but disagreed with Rousseau).

259 I.e., Fuller's ideology itself appears to be of "that direction of legal thought which insists on drawing a sharp distinction between the law *that is* and the law *that ought to be*." FULLER, THE LAW, *supra* note 43, at 4–5.

260 Schauer, *supra* note 254, at 18–19.

261 *Id.*; *see also* D'Amato, *supra* note 254, at 2.

262 *Compare* Fuller, *supra* note 207, at 672 (implying that his philosophy could provide the "ethical neutrality" that Hart's positivism failed to provide, though, failing to completely acknowledge that providing a feeling of neutrality or relativism toward the treatment of law is a positivist trait), *with* FULLER, THE LAW, *supra* note 43, at 100–01 (gilding the lily of Ciceronian natural law, while admitting: "I am not advocating the doctrine of natural rights. . . . Not only am I not proposing to re-fight the philosophic battles of the American and French Revolutions, but I am not attempting to set myself up as sponsor for any of the various systems of natural law which have been advocated in the past.").

263 *Compare* HOBBES, LEVIATHAN, *supra* note 5, at 46, 62 (vigorously rejecting Aristotle's virtue theory, but embracing the Aristotelian framework of virtues and vices), *with id.* at 252 (repeating Cicero's

Hobbes, Fuller and almost every other legal positivist did the same, and on some level they appeared to "know not what they do."[264]

When Fuller defined natural law as what the law *ought* to be, rather than what the law *is*, he necessarily implied that the natural law *does not exist*.[265] That is, Fuller strongly maintained, like any basic legal positivist, that natural and common law do not exist until it becomes a part of the positive or *posited* law.[266] According to Fuller, all that exists is the positive law, the law that men and women posit, and natural law (and common law) is and can only be aspirational.[267]

Legal positivists include anyone who thinks that the law is manmade only.[268] Legal positivism, which may be used interchangeably with mere positivism as a lesser included sub-category, is any system that excludes nature, God (or the gods), and the Ciceronian discourse of the governed from the role of lawmakers under their pre-existing, natural rights to free thought and speech.[269] It includes several more scholars and jurists than merely those that outwardly defended the term "legal positivism," as H.L.A. Hart had done.[270]

In fact, the most famous legal positivist of the founding era was not Jeremy Bentham, but was the U.S. Supreme Court Justice Samuel Chase who was impeached for imposing his positivism on juries.[271] Chase became a subject of controversy when he began telling juries to enforce John Adams' Alien and Sedition Acts against citizens that spoke out politically against

maxim that a law that is not just is no law, in order to twist it into the opposite that "no Law can be Unjust").

264 *Luke* 23:34; *see* sources cited *supra* notes 258–59, 262–63.

265 FULLER, THE LAW, *supra* note 43, at 100–01.

266 *Id.*; Schauer, *supra* note 254, at 18–19.

267 FULLER, THE LAW, *supra* note 43, at 100–01; D'Amato, *supra* note 254, at 5–6 (noting that Fuller "sharply departs from natural law on such matters" as "Cicero's example [of] the rape of Lucretia").

268 *Legal Positivism*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://iep.utm.edu/legalpos/ (last visited on Sept. 4, 2022) ("Legal positivism is a philosophy of law that emphasizes the conventional nature of law—that it is socially constructed.").

269 *Id.*

270 *Id.*; HART, ESSAYS IN, *supra* note 254, at 50–51; DUMONT, *supra* note 38, at 128–29 (observing a particular thought lineage from Hobbes to Rousseau and Bentham during a time when the term legal positivism did not yet exist).

271 2 SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE, AN ASSOCIATE OF THE SUPREME COURT OF THE UNITED STATES, IMPEACHED vii–viii (1805). Chase was not consistently a legal positivist, but he was one in the years surrounding his impeachment likely for political reasons. *See* Jason M. Breslow, *Why Justices Reject*, CHRON. OF HIGHER EDUC. (Nov. 7, 2006), https://www.chronicle.com/article/why-justices-reject/ (noting Chase's defense of "natural justice" in *Calder v. Bull*).

Adams.[272] During an attempted prosecution of the Alien and Sedition Acts, Chase told a Baltimore jury:

> Our people are taught as a political creed, that men living under an established government, are nevertheless entitled to exercise certain rights which they possessed in a state of nature; and also, that every member of this government is entitled to enjoy an equality of liberty and rights.
> I have long since subscribed to the opinion, that there could be no rights of man in a state of nature, previous to the institution of society; and that liberty properly speaking could not exist in a state of nature, I do not believe that any number of men ever existed together in a state of nature, without some head, leader or chief, whose advice they followed, and whose precepts they obeyed.[273]

Justice Chase was one of the signatories of the Declaration of Independence, and yet here he breached faith with his original compact to preserve the natural rights and equality of humankind.[274] He strongly expressed an opinion similar to that of Hobbes that the preexisting natural rights declared on July 4, 1776 "have brought this mighty mischief upon us; and I fear that it will rapidly progress, until peace and order, freedom and property shall be destroyed."[275]

Chase made his legal positivism explicit: "I hold the position clear and safe, that all the rights of man can be derived only from the *conventions* of society, and may with propriety be called social rights."[276] He repeatedly expressed legal positivism, i.e., the idea that no law exists except for the laws made by men, to a jury.[277] Thereby he told them society might self-destruct if they did not support political prosecutions under the Alien and Sedition Acts.[278]

As Fuller would later do, Chase gilded the lily of Ciceronian natural law only to put forward a Hobbesian concept of the law.[279] As a signatory of the Declaration of Independence, Chase was not always partial to legal positivism, and there is some evidence that his impeachment softened Chase's cynicism in later years.[280] However, Chase's example is much more

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[272] *See* Robert R. Bair & Robin D. Coblentz, *The Trials of Mr. Justice Samuel Chase*, 27 MD. L. REV. 365, 376–78 (1967).

[273] 2 SMITH & LLOYD, *supra* note 271, at vii–viii.

[274] *Id.*; THE DECLARATION OF INDEPENDENCE (U.S. 1776) (Samuel Chase signed for Maryland).

[275] 2 SMITH & LLOYD, *supra* note 271, at vii.

[276] *Id.* at viii.

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.*; Breslow, *supra* note 271; *see*, *e.g.,* Calder v. Bull, 3 U.S. 386, 388 (1789) (Chase, J.) ("The obligation of a law in governments established on express compact and on republican principles must be determined by the nature of the power on which it is founded.").

in keeping with the sort of legal positivism at play in the United States than Bentham, Hart, or Fuller.[281]

Hobbes demonstrated how to gild the lily of those whom he most disagreed.[282] For example, Hobbes repeated a maxim of common law and equity that traced back to ancient Rome that "no law can be unjust."[283] However, where Cicero explained a process of justifying the law in which the law could be undermined as unjust or unconstitutional through community discussions and declared "not law," Hobbes meant that the community had no role.[284]

Hobbes knew what Cicero meant regarding the people's role in justifying law, but he disagreed with Cicero that the sovereignty of the people survived the social compacts that create societies.[285] For Hobbes, once individuals enter into society they necessarily surrender their preexisting rights and liberties to the mass of the people known as *Leviathan* who is represented by the ruler.[286] The ruler, for Hobbes, is the sovereign, and the people become slaves as they already surrendered their sovereignty in exchange for security and property at the outset of a society.[287]

Whether they believe the sovereign is cruel or benevolent, every legal positivist starts from the same point as Hobbes, which is the sovereign.[288] Neither Justice Chase,[289] nor Justice Holmes,[290] nor Lon L. Fuller,[291] transcended the ultimate basis of their own theories in the surrendered sovereignty of the people to a king, emperor, or assembly.[292] Therefore, legal positivism becomes a meeting place for resurgent, insurgent Hobbesianism

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281 2 SMITH & LLOYD, *supra* note 271, at vii–viii.

282 *See* sources cited *supra* note 263 and accompanying text.

283 HOBBES, LEVIATHAN, *supra* note 5, at 252.

284 *Compare id.*, *with* Kastely, *supra* note 141, at 10 ("The very essence of law thus involves a practice of justification.").

285 HOBBES, LEVIATHAN, *supra* note 5, at 119 (describing the generation of societies through compacts where the people lose their inherent sovereignty).

286 *Id.*

287 *Id.*

288 Matthew Lewans, *Applied Jurisprudence?*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 20, 2021), https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-07/ (noting that Fuller, Sunstein, and Vermeule take the less accepted view of Hobbes's sovereign "as the more humane Dr. Jekyll"); HOBBES, LEVIATHAN, *supra* note 5, at 189; *see* Dyzenhaus, *supra* note 109, at 368.

289 2 SMITH & LLOYD, *supra* note 271, at vii–viii.

290 C. Berry Patterson, *Jurisprudence of Oliver Wendell Holmes*, 31 MINN. L. REV. 355, 360–61, 366 (1947).

291 Palms, *supra* note 248, at 95–96.

292 HOBBES, LEVIATHAN, *supra* note 5, at 189.

that assaults the "heaven-defended race" represented by Wheatley, Otis, and the Declaration of Independence.[293]

IV. HOW LEGAL POSITIVISTS HELPED DONALD TRUMP CONVERT CHAOS INTO OPPORTUNITY

In the United States, legal positivists are especially chaotic because they have no way of making sense of the separation of powers or federalism.[294] They cannot easily see where the people of the United States surrendered their sovereign powers, and thus they propose exceedingly conflicting visions of sovereignty.[295] For example, John Yoo's unitary executive and Michael Ramsey's unitary Congress both arose from Scalia's legal positivism.[296]

Ramsey and Yoo center their entire concept of law on the people's surrender of their sovereignty upon a visible unitary sovereign.[297] Both of them have Hobbesian anxieties about the chaos that will unfold if the other wins the argument.[298] Scalia appeared to presuppose that as long as men like Ramsey and Yoo kept up the pageantry of public debates that Scalia could

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[293] Phillis Wheatley, *To His Excellency George Washington* (1775), *in* WHEATLEY, *supra* note 60, at 146 (describing the human race as "freedom's heaven-defended race!"); OTIS, *supra* note 59, at 140–41; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[294] Schroeder, *Leviathan*, *supra* note 90, at 26 (noting how French positivists "Condorcet and Turgot, opposed the American separation of powers, favoring a Unity of Powers in France," and noting also that "[t]hey expressly disputed American bicameralism and federalism"); *see* HOBBES, LEVIATHAN, *supra* note 5, at 126–27 (rejecting the separation of powers "between the King, and the Lords, and the House of Commons"); *cf.* Louis Belrose Jr., *Comte and Turgot*, 3 THE MONIST 118, 118–20 (1892) (linking Turgot and Condorcet to Comte, who was credited with creating the term positivism).

[295] *See* sources cited *supra* note 294; *see, e.g.,* Captain Richard K. Sala, *The Illusory Unitary Executive: A Presidential Penchant for Jackson's* Youngstown *Concurrence*, 38 VT. L. REV. 155, 156 (2013) (noting that disagreement in the highly specific camp of unitary executive ideologues "has transcended customary bifurcation along ideological lines . . . manifest[ing] itself in an intra-ideological divide among conservative legal scholars"); *cf.* Otto Pfersmann, András Jakab, & Jürgen Busch, *Preface—The Many Fates of Legal Positivism*, 12 GERMAN L.J. 499 (2019) (noting that "there are so many different strands of legal positivism[] that the mere denotation of a legal theorist as positivist does not say much about him or her").

[296] *See, e.g.,* Edward A. Purcell Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1501 (2014) (noting how legal positivism facilitated both progressive and conservative agendas for expanding and/or limiting the power of their favored branches of government); *compare* John Yoo, *Unitary, Executive, or Both?*, 76 U. CHIC. L. REV. 1935, 1951–52 (2009) [hereinafter Yoo, *Unitary*] (quoting Morison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting)), *with* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHIC. L. REV. 1543, 1554 (2002) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997)).

[297] Ramsey, *supra* note 296, at 1571 (seeking "to make plain the sovereign authority by which war was made"); Yoo, *Unitary*, *supra* note 296, at 1978 (explaining the adjustments the founders made to limit the unity of the Congress's sovereign powers, and to—according to Yoo—place unitary, sovereign power in the executive instead).

[298] *See, e.g.,* Ramsey, *supra* note 296, at 1588 n.176 (criticizing Yoo); John Yoo, *Trump at War*, 45 VT. L. REV. 641, 661 n.129 (2021) (criticizing Ramsey).

continue to facilitate both camps with equal bravado, without reconciling their obvious contradictions.[299]

Disgraced former President Donald J. Trump converted this planned chaos into political will, broadly following a strategy exemplified by Scalia of attacking those on his side of the political aisle most vociferously.[300] For example, when Trump was being investigated by the Mueller team—a cadre of Bush-era Republicans—for colluding with Russian efforts to undermine the validity of the 2016 election, Trump's minion John C. Eastman cited the "unitary executive" as a reason that such investigations should be impossible, because:

> The Special Prosecutor, the Department of Justice itself, the Attorney General have no powers under our Constitution that aren't derived from the President. The notion that the President can't determine the course of an investigation is the most basic violation of the separation of [powers]. We have a unitary executive.[301]

Again, in 2020 Eastman backed Trump's pressure campaign against Vice President Mike Pence and led a federal attempt to send the electors back to the states.[302] Then, on January 6, 2021, Eastman stood before the Trump rally at the ellipse and spouted known conspiracy theories in order to convince a mob of armed Trump supporters to march on the Capitol Building

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[299] *War Power Debate: Architect of the Patriot Act, John Yoo, and USD Law Professor Michael D. Ramsey Debate About the War*, USD (Feb. 12, 2007), https://www.sandiego.edu/events/law/detail.php?_focus=46104. Scalia consciously embraced both Yoo and Ramsey's opposing positions. *Compare* Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting), *with* Ramsey, *supra* note 296, at 1554 n.41.

[300] Joshua J. Schroeder, *The Boomer Interregnum: How Conservative Thought Dressed Up as Memory Will Shape an American that the Founders Never Intended*, 49 OHIO N.U.L. REV. 355, 381, 388 (2023) [hereinafter Schroeder, *The Boomer*] ("Scalia reserved his most cutting statements of sheer bluster for his conservative colleagues, preferring to sport his friendship with Justice Ginsburg as a token of liberality."); *see, e.g.,* John Wagner & Abby Phillip, *The Chaos Theory of Donald Trump: Sowing Confusion Through Tweets*, WASH. POST (Dec. 23, 2016), https://www.washingtonpost.com/politics/the-chaos-theory-of-donald-trump-sowing-confusion-through-tweets/2016/12/23/11e1315c-c928-11e6-85b5-76616a33048d_story.html; Ben Jacobs, *Donald Trump Is Now Fully At War With the Republican Party's Past*, VOX (Mar. 4, 2023), https://www.vox.com/2023/3/4/23625697/donald-trump-cpac-republican-party.

[301] *Dr. John Eastman Says Robert Mueller's Report Presumes Guilt Unless Trump Can Prove Otherwise*, FOX NEWS (May 12, 2019), https://www.foxnews.com/transcript/dr-john-eastman-says-robert-muellers-report-presumes-guilt-unless-trump-can-prove-otherwise.

[302] Eastman v. Thompson, 2022 U.S. Dist. LEXIS 59283, at *47–48, *57–58, *63–64 (C.D. Cal. 2022) ("Dr. Eastman and President Trump launched a campaign to overturn a democratic election, an action unprecedented in American history. Their campaign was not fined to the ivory tower—it was a coup in search of a legal theory. The plan spurred violent attacks on the seat of our nation's government, led to the deaths of several law enforcement officers, and deepened public distrust in our political process.").

while the entire Congress was present to certify the 2020 election results.[303] The mob threatened Pence's life if he did not cast doubt on the 2020 election, with the intent of giving the Trump-Eastman team a workable pretext for issuing emergency orders to establish martial law and to potentially seize voting machines.[304]

The 'January 6 Committee' confirmed that Trump knew that the mob was carrying guns including AR-15's to the Capitol Building, and that he ordered them not to be confiscated because "they're not here to hurt me."[305] The Committee also confirmed that Trump wanted to join the mob, but was blocked by a member of the Secret Service.[306] In fact, Trump had a violent moment in his car ride back to the White House where he physically confronted his security detail when they defied his orders to follow the mob to the Capitol Building.[307]

Once back at the White House, as Trump's pressure campaign against Mike Pence and Congress slowly fizzled out, Trump threw his dishes at the wall, smearing ketchup everywhere as he spewed profanities out of his mouth.[308] Several top officials in Trump's administration resigned once they saw where Eastman's plan was going, including AG William Barr, who also adheres to the unitary executive.[309] John Yoo also agreed that Eastman's plan was ill conceived.[310]

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303 Andrea Salcedo, *Law professor John Eastman spoke at rally before Capitol riots. Facing outrage, he won't return to his university*, WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/nation/2021/01/14/john-eastman-chapman-university-departure/.

304 Betsy Woodruff Swan, *Read the never-issued Trump order that would have seized voting machines*, POLITICO (Jan. 21, 2022), https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572.

305 Brett Samuels, *Hutchinson says Trump knew Jan. 6 attendees had weapons: 'They're not here to hurt me'*, THE HILL (June 28, 2022), https://thehill.com/homenews/house/3539911-aide-says-trump-knew-jan-6-attendees-had-weapons-theyre-not-here-to-hurt-me/.

306 Allan Smith & Peter Alexander, *Former Meadows aide: Trump lunged at Secret Service agent, tried to grab steering wheel on Jan. 6*, NBC NEWS (June 28, 2022), https://www.nbcnews.com/politics/donald-trump/cassidy-hutchinson-trump-lunged-secret-service-agent-tried-grab-steeri-rcna35775.

307 *Id.*

308 Lydia O'Connor, *Trump Broke Dishes, Splattered Wall With Ketchup During Election Fit, Aide Says*, HUFFPOST (June 28, 2022), https://www.huffpost.com/entry/trump-broken-dishes-ketchup_n_62bb428ae4b0565316393a8f.

309 Meridith McGraw & Daniel Lippman, *They resigned in protest over Jan. 6—then never went after Trump again*, POLITICO (Jan. 3, 2022), https://www.politico.com/news/2022/01/03/trumpworld-jan-6-526291; Caroline Fredrickson, *Bill Barr: No Lap Dog, Just Defending His Idea of the Top Dog*, JUST SECURITY (July 6, 2020), https://www.justsecurity.org/71230/bill-barr-no-lap-dog-just-defending-his-idea-of-the-top-dog/.

310 Melanie Mason, *John Eastman's long, strange trip to the heart of the Jan. 6 investigation*, L.A. TIMES (June 26, 2022), https://www.latimes.com/politics/story/2022-06-26/trump-lawyer-john-eastman-jan-6-notoriety ("'Unfortunately, he drank the Kool-Aid that President Trump was selling—that the election was a fraud,' Yoo said.").

However, in 2022, Yoo and his *Torture Memo* coauthor Robert Delahunty, reviewed Eastman's attempt to perfect his plan in future elections.[311] In their new law review article, Yoo and Delahunty wrote that the Republican halves of the state legislatures, or Republican governors, might have submitted official slates of alternate electors.[312] If *official* alternate slates of electors were sent, they said, then Pence would have been legally able to call the election for Trump.[313]

Legal positivists almost never agree amongst themselves regarding the particulars of their theories, even if they occupy a particular subset of legal positivism together.[314] However, they are each capable of converting violence and chaos into political cover for legally dubious, outright tyrannical, or even treasonous behavior under the pretext that any theory that can be posited is valid to consider.[315] Their power plays depend upon the facial assumption that people are rational and would naturally take actions to block proposed policies that are obviously illegitimate, tyrannical, or treasonous.[316]

But that is not how things tend to work out.[317] Yoo wrote his *Torture Memos*;[318] Barr spearheaded Trump's international pressure campaign to dig

311 Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, CASE W. L. REV. 27, 31, 43 (2022), *reviewed by* James Larock, *How Conservative Law Professors Are Creating a Roadmap For Stealing an Election*, BALLS AND STRIKES (May 18, 2022), https://ballsandstrikes.org/legal-culture/john-yoo-rob-delahunty-12th-amendment-paper/; Memorandum from John Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice Off. of Legal Couns., & Robert J. Delabunty, Deputy Assistant Att'y Gen., U.S. Dep't of Justice Off. of Legal Couns., to William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002), https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020109.pdf.

312 Delahunty & Yoo, *supra* note 311, at 43, 48, 55.

313 *Id.* at 135.

314 *See, e.g.,* Sala, *supra* note 295, at 156.

315 *See, e.g.*, Holmes, *The Path*, *supra* note 1, at 464–65 (commending totalitarian systems to American study); Buck v. Bell, 274 U.S. 200, 207 (1927).

316 *See, e.g.,* Holmes, *The Path*, *supra* note 1, at 465 (noting that we may still discover "some order, some rational explanation, and some principle of growth for the rules which [a despotic, whimsical dictator] laid down"); *Buck*, 274 U.S. at 207.

317 MICHAEL LEWIS, THE UNDOING PROJECT 261, 267, 272–78, 324–27 (2021) [hereinafter LEWIS, THE UNDOING] (summarizing the research of Daniel Kahneman and Amos Tversky that disproved the supposed inherent rationality of human beings); *see, e.g.*, Victoria Nourse, Buck v. Bell*: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 1, 102–03 (2011) [hereinafter Nourse, *Buck*] (noting that, in an irrational twist, *Buck* reversed a majority of the states that would have "held sterilization laws unconstitutional on federal and state grounds," setting the states' trajectory back in line with the eugenics movement); HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 252 (1963) (noting "the fearsome, word-and-thought-defying *banality of evil*"); THE STANFORD PRISON EXPERIMENT (IFC Films, 2015); EXPERIMENTER (Magnolia Pictures 2015) (explaining the Milgram experiments).

318 John C. Yoo, *Memorandum for William J. Haynes II, General Counsel of the Department of Defense*, U.S. DEP'T. OF JUST. (Mar. 14, 2003), https://www.aclu.org/other/memo-regarding-torture-and-military-interrogation-alien-unlawful-combatants-held-outside.

up dirt on his political rivals,[319] personally corrupted the United States District Court for the Southern District of New York ("SDNY") charging documents in the Cohen case to avoid implicating Trump for his hush money payments to Stormy Daniels—a known crime,[320] and caused SDNY to issue frivolous charges against Trump's political enemies;[321] and Eastman actually staged a *coup d'état* with few if any immediate consequences.[322] Yoo is still a well-respected professor at U.C. Berkeley,[323] Barr resigned with his name and career intact,[324] and, probably most harrowing of all, Eastman was able to write amicus briefs for his employer the Claremont Institute that the U.S. Supreme Court appeared to follow in *Dobbs* and *Bruen*.[325]

It was not rational for the U.S. Supreme Court to follow Eastman's scholarship after he helped Trump attempt to burn down the Capitol Building,

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319 The Trump-Ukraine Impeachment Inquiry Report, H. REP. 116-335, at 102 (2019).

320 Grand Jury Indictment at 1–15, New York v. Trump, IND-71543-23 (N.Y. Sup. Ct. 2023); Igor Derysch, *"Trump turned DOJ into his personal law firm": Senate probes prosecutor's claim of Trump corruption*, SALON (Sept. 13, 2022), https://www.salon.com/2022/09/13/trump-turned-doj-into-his-personal-law-firm-senate-probes-prosecutors-claim-of-corruption/.

321 Jonathan Chait, *Trump and Barr's Corruption of the Justice Department Was Worse Than We Knew: Trump demanded his enemies be charged, and they were*, INTELLIGENCER (Sept. 8, 2022), https://nymag.com/intelligencer/2022/09/trump-and-barr-corrupted-justice-even-more-than-we-knew.html (citing GEOFFREY BERMAN, HOLDING THE LINE (2022)) ("The truly novel revelations brought forward by Berman is that Trump's pressure campaign [against the Justice Department in SDNY] frequently *succeeded*.").

322 Eastman v. Thompson, 2022 U.S. Dist. LEXIS 59283, at *47–48, *57–58, *63–64 (C.D. Cal. 2022); *see, e.g.,* Brief of Amicus Curiae the Claremont Institute's Center for Constitutional Jurisprudence in Support of Petitioners at 5, NYSRPA v. Bruen, 142 S. Ct. 333 (2022) (No. 20–843) (quoting HOBBES, LEVIATHAN, *supra* note 5, at 94) (ever since January 6, 2020, Eastman was allowed to continue filing highly persuasive amicus briefs in extremely consequential, era-defining cases); *cf.* Eastman's Legal Defense Fund, GIVESENDGO, https://www.givesendgo.com/Eastman (earning hundreds of thousands of dollars in donations for his defense); *but see* Devan Cole & Katelyn Polantz, *Judge Preliminarily Finds Ex-Trump Attorney John Eastman Culpable in California Bar Disciplinary Case*, CNN: POLITICS (Nov. 3, 2023), https://www.cnn.com/2023/11/03/politics/eastman-california-bar-disciplinary-case/index.html; Indictment at 15, Georgia v. Trump, No. 23SC188947 (Ga. Superior Ct. 2023) (charging Eastman as a co-conspirator in Trump's election fraud trial).

323 John Yoo, *Faculty Profiles*, BERKLEY LAW, https://www.law.berkeley.edu/our-faculty/faculty-profiles/john-yoo/#tab_profile (last visited Sept. 5, 2022).

324 Noah Feldman, *Bill Barr Quit. What Finally Spooked Him?*, BLOOMBERG (Dec. 15, 2020), https://www.bloomberg.com/opinion/articles/2020-12-15/william-barr-has-resigned-what-finally-spooked-him.

325 Brief of Amicus Curiae the Claremont Institute's Center for Constitutional Jurisprudence in Support of Petitioners at 5, NYSRPA v. Bruen, 142 S. Ct. 333 (2022) (No. 20–843) (quoting HOBBES, LEVIATHAN, *supra* note 5, at 94), *apparently followed by* NYSRPA v. Bruen, 142 S. Ct. 2111, 2131 (2022); Brief of Amicus Curiae the Claremont Institute's Center for Constitutional Jurisprudence in Support of Petitioners at 10, 12, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19–1392) ("*Janus* provides some guidance for when stare decisis should not bind future courts"), *apparently followed by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2264–79 (2022) (overruling *Roe* and *Casey's* interest-balancing test with *Janus'* anti-*stare decisis* balancing test).

but the Court did.[326] Thus, perhaps it actually *does* matter what our institutions and legal scholars allow as a valid or worthwhile posited view.[327] It appears that pernicious ideologies can grow unchecked in the 'you-do-you,' 'live-your-best-life' Petri dish of legal positivism until they are large enough to cause a catastrophe.[328]

Experiments proposed in Holmes's marketplace of ideas and carried out in Brandeis's laboratory of the states are *not* "without risk to the rest of the country."[329] Some justice-centered prejudices against racism, sexism, xenophobia, fascism, and despotism should be "erect[ed] . . . into legal principles" by the federal court.[330] Had the court managed to accomplish such safeguards in *Buck v. Bell*, both Hitler and Trump may not have been as successful as they were.[331]

After World War II, the court finally began to enforce civil rights under the U.S. Constitution.[332] In *Dobbs v. Jackson Women's Health, Org.* the court openly avowed their chosen journey back to a time prior to World War

[326] *See* sources cited *supra* note 325; *but see Dobbs*, 142 S. Ct., at 2332 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("logic and principle are not one-way ratchets"); John C. Eastman, *Stare Decisis: Conservatism's One–Way Ratchet Problem*, *in* COURTS AND THE CULTURE WARS 133 (Bradley C. S. Watson ed., 2002) (cited in Eastman's *Dobbs* amicus authored for his employer the Claremont Institute).

[327] This is to say, simply, that Justice Oliver Wendell Holmes, Jr. was wrong when he said we should be interested in learning the law from dictators. Holmes, Jr., *The Path*, *supra* note 1, at 465.

[328] *Id.*; DAVID PEPPER, LABORATORIES OF AUTOCRACY 7 (2021) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) (noting that Brandeis was wrong when he said that the states laboratories of democracy)); MARY L. TRUMP, TOO MUCH AND NEVER ENOUGH 42, 211 (2020) (noting how Norman V. Peele helped cause the country's "suffering from the same toxic positivity that my grandfather deployed specifically to drown out his ailing wife, torment his dying son, and damage past healing the psyche of his favorite child, Donald J. Trump"); *see generally* REECE JONES, NOBODY IS PROTECTED: HOW THE BORDER PATROL BECAME THE MOST DANGEROUS POLICE FORCE IN THE UNITED STATES (2022).

[329] *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes J. dissenting).

[330] *See, e.g.,* Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."); *cf.* THE FEDERALIST NO. 51 (James Madison) ("Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure." Thus, Madison concluded that "the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.").

[331] Buck v. Bell, 274 U.S. 200, 207 (1927); *cf.* WHITMAN, *supra* note 130, at 200; Nourse, *Buck*, *supra* note 317, at 103; Adam Cohen, *Op-Ed: Eugenics is making a comeback. Stop it in its tracks*, L.A. TIMES (Oct. 14, 2020), https://www.latimes.com/opinion/story/2020-10-14/trump-eugenics-politics-history.

[332] *See, e.g.,* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (openly repenting from the mistake in *Buck*: "In evil or reckless hands, it [i.e., eugenics] can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.").

II, when cases like *Plessy*, *Lochner*, and *Buck* ruled.[333] Only one generation out of World War II, and the court no longer wants to secure the human rights that preclude unnecessary experimentations in fascism inspired by American eugenics.[334]

Two of the most prominent, self-destructive legal positivists today are the "academic odd couple" Cass R. Sunstein and Adrian Vermeule.[335] This powerful duo defends government paternalism and censorship similar to Viktor Orbán's authoritarian program in Hungary.[336] Though Sunstein and Vermeule have what has been referred to as "diametrically opposed political

[333] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022) ("Nor does the right to obtain an abortion have a sound basis in precedent."), *distinguishing* Loving v. Virginia, 388 U.S. 1 (1967), Turner v. Safley, 482 U.S. 78 (1987), Griswold v. Connecticut, 381 U.S. 494 (1965), Carey v. Population Services Int'l, 431 U.S. 78 (1977), Moore v. East Cleveland, 431 U.S. 494 (1977), Pierce v. Society of Sisters, 268 U.S. 390 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923), *Skinner*, 316 U.S. at 535, Winston v. Lee, 470 U.S. 753 (1985), Washington v. Harper, 494 U.S. 210 (1990), *and* Rochin v. California, 342 U.S. 165 (1952); Roe v. Wade, 410 U.S. 133 (1973), *overruled by Dobbs*, 142 S. Ct., at 2279; *cf.* Henry P. David, Jochen Fleischhacker & Charlotte Hohn,, *Abortion and Eugenics in Nazi Germany*, 14 POPULATION & DEVELOPMENT REV. 81, 90–91 (1988) (noting how Nazi Germany outlawed abortion).

[334] *Dobbs*, 142 S. Ct., at 2257–58; David et al., *supra* note 333, at 90–91; WHITMAN, *supra* note 130, at 200; *see* Victoria Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 757 (2009) [hereinafter Nourse, *A Tale*] ("one does not need to accept *Lochner* to accept *Roe* or any of *Lochner*'s supposed children, because *Lochner* could have no children after 1937"—noting that the idea of "right-as-trump" arose during the WWII era in "response to fears of fascism"). The Court is headed straight back to what Professor Nourse labeled a "lost world." Nourse, *Buck*, *supra* note 317, at 107 (noting that *Buck v. Bell* "is not taught because it cannot be understood without appreciating what I will call a 'lost world' of constitutional thought").

[335] Blakely, *supra* note 250; Epstein, *supra* note 250; Emily Bremer, *The APA, Due Process, and the Limits of Textualist Positivism*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 16, 2021), https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-05/ (correctly identifying Sunstein and Vermeule's facially anti-legal positivism position in *Law and Leviathan* as ironic writing that their "overly rigid formulation of *Vermont Yankee's* textualist positivism conflicts with Congress's decision in the APA to *partially* codify a rich and continuing constitutional common law"); Lewans, *supra* note 288 ("The problem here is not so much about what Sunstein and Vermeule say in Law & Leviathan, but that they cannot reconcile their jurisprudential argument about law's inner morality with their penchant for governance strategies that corrode fidelity to law," in the same way that "Hart's attempt to rehabilitate Austinian positivism was deeply flawed, because it failed to account for law's legitimacy from an internal perspective or 'fidelity to law'.").

[336] *Compare* Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202, 224–25 (2009) (suggesting that government agents should "enter chat rooms, online social networks, or even real-space groups and attempt to undermine percolating conspiracy theories"), RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: THE FINAL EDITION 7 (2021) (introducing the oxymoronic idea of "libertarian paternalism"), *and* James Chappel, *Nudging Toward Theocracy: Adrian Vermeule's War on Liberalism*, DISSENT MAG. (Spring 2020), https://www.dissentmagazine.org/article/nudging-towards-theocracy, *with* Jennifer Rankin & Flora Garamvolgyi, *Hungary: where editors tell reporters to disregard facts before their eyes*, THE GUARDIAN (Apr. 2, 2022), https://www.theguardian.com/world/2022/apr/02/hungary-independent-media-editors-reporters-orban.

commitments,"[337] they both are often pilloried for their extreme views,[338] and both clearly reject Scalia's originalism.[339]

However, Scalia was also a legal positivist.[340] Thus, as fellow legal positivists, the rejections made by both Sunstein and Vermeule were not of a categorical or principled basis but were politically driven and self-destructive.[341] So too, all those who follow Scalia's particular form of originalism must also be legal positivists, including Justice Barrett, who promised the Senate that she would continue Scalia's legacy on the Court.[342]

Something like Professors Frost and Wither in C.S. Lewis's *That Hideous Strength*, Sunstein and Vermeule may be "locked in an embrace from which each seemed to be struggling to escape."[343] And Justice Barrett may be something of a Miss Hardcastle for overruling *Roe v. Wade* with pleasure.[344] However, the views of this trio also appear to be as simple as *Goldilocks and the Three Bears*: Sunstein found Scalia's originalism too

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337 Blakely, *supra* note 250; Epstein, *supra* note 250.

338 *See, e.g.,* Glenn Greenwald, *Obama Confidant's Spine-Chilling Proposal*, SALON (Jan. 15, 2010), https://www.salon.com/2010/01/15/sunstein_2/; Andrew Marantz, *How a Liberal Scholar of Conspiracy Theories Became the Subject of a Right-Wing Conspiracy Theory*, THE NEW YORKER (Dec. 27, 2017), https://www.newyorker.com/culture/persons-of-interest/how-a-liberal-scholar-of-conspiracy-theories-became-the-subject-of-a-right-wing-conspiracy-theory; Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, THE ATLANTIC (Apr. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/ (writing of Vermeule: "This wolf comes as a wolf."); Emmy M. Cho & Isabella B. Cho, *Harvard Law School Organizations Petition to Denounce Professor Adrian Vermeule's 'Highly Offensive' Online Rhetoric*, THE CRIMSON (Jan. 13, 2021), https://www.thecrimson.com/article/2021/1/13/harvard-law-school-petition-vermeule/ (apparently urging the experimental use of Vermeule's own anti-conspiracy ideologies against Vermeule: "The statement urges Law School administrators to condemn Vermeule's 'spread of inaccurate conspiracy theories about the election' and conduct an investigation to determine whether Vermeule is 'spreading misinformation or discriminatory content in his classes.'").

339 Vermeule, *Beyond*, *supra* note 4 (rejecting Scalia's originalism); Cass R. Sunstein, *Resist the Siren's Call of 'Originalism'*, BLOOMBERG: OPINION (Feb. 4, 2014), https://www.bloomberg.com/opinion/articles/2014-02-04/resist-the-siren-s-call-of-originalism-#xj4y7vzkg [hereinafter Sunstein, *Resist*] ("originalism is ideological posturing with a constitutional veneer—a naive or cynical way of attributing the views of the current political right to the Constitution's ratifiers").

340 *See* Noah Feldman, *The Battle Over Scalia's Legacy*, N.Y. REVIEW (Dec. 17, 2020), https://www.nybooks.com/articles/2020/12/17/the-battle-over-scalias-legacy/ ("Scalia's legal approach adheres closely to the theory of legal positivism.").

341 *See* sources cited *supra* note 338 (illuminating the obvious political drivers for Vermeule and Sunstein's rejection of originalism).

342 PBS NewsHour, *WATCH: 'You Would Not Be Getting Justice Scalia,' Amy Coney Barrett Says of Her SCOTUS Nomination*, YOUTUBE (Oct. 13, 2020), https://www.youtube.com/watch?v=HiAC4EXPR0c ("Justice Scalia was obviously a mentor, and as I said . . . his philosophy is mine too.").

343 C.S. LEWIS, THAT HIDEOUS STRENGTH 223 (2003).

344 *Id.* at 153–55; Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2279 (2022) ("*Roe* and *Casey* must be overruled").

conservative, Vermeule found it too liberal, while Justice Barrett thought it was just right.[345]

Legal positivists carry on disputes over basic minutiae with fairy tale simplicity and tend to revert to might makes right to settle things, "even when doing so requires overriding the selfish claims of individuals to private 'rights.'"[346] Their ideas of legal legitimacy are styled after Tolkein's rings of power, depending upon the acquisition of one ring to rule them all.[347] Legal positivists are thus self-destructive and dominating, i.e., they *hate* each other.[348]

At times when legal positivists hold the rostrum and set the agenda for legal discussion, they assert new, undefined terms in an attempt to get them memed by the legal community.[349] Sunstein, Vermeule, and Barrett, are just

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345 *See* sources cited *supra* note 337–42.

346 Vermeule, *Beyond*, *supra* note 4; *see* Eric Blumenson, *Killing in Good Conscience: What's Wrong with Sunstein and Vermeule's Lesser Evil Argument for Capital Punishment and Other Human Rights Violations?*, 10 NEW CRIM. L. REV. 210, 212 (2007); *see, e.g.,* Thomas A. Balmer, *"Present Appreciation and Future Advantage:" A Note on the Influence of Hobbes on Holmes*, 47 AM. J. LEG. HIST. 412, 432 (2005) ("Holmes wrote that he came 'devilish near to believing that might makes right.'").

347 J.R.R. TOLKIEN, THE LORD OF THE RINGS epigraph (1987) ("One Ring to rule them all, One Ring to find them, / One Ring to bring them all, and in the darkness bind them"); *see, e.g.,* Holmes, Jr., *The Path*, *supra* note 1, at 464–65 ("You may assume with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. *It is all one to my present purpose.* Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found." (emphasis added)). To avoid accusations of anachronism, even though this article shows that legal positivism really began in the 1940s and 50s with references to men like Hobbes, Bentham, Holmes, Austin, and Comte as implicit forbearers, it should be noted that Tolkien's idea for "one ring" was apparently taken from Richard Wagner's opera cycle *Der Ring des Dibelungen* that was also derived, like Goethe's *Faust*, from possibly ancient folklore, and as Tolkein's version of the story is far more widely known today it is proper to reference him for the sake of effective communication regarding the common understanding of the symbols and mythology we share today. *See* Jamie McGregor, *Two Rings to Rule Them All: A Comparative Study of Tolkien and Wagner*, 29 MYTHLORE 133, 134–36 (2011) (noting that other interpretations of the old symbol of one ring in German folklore was more easily Nazified and made out to be sympathetic to fascism, unlike Tolkien's stories).

348 *See, e.g.,* Riley, *supra* note 190, at 2 (noting how Bentham targeted individuals who were similar to him to "'hate[] as much as it was possible [in] his benevolent nature to hate'"—treating Bentham's well known vitriol as "benevolent" locker room talk); Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 RATIO JURIS. 26, 29 (2002) (noting the old story of the conflict between Holmes and Langdell as arch-nemeses and yet both legal positivists); *id.* at 31 (noting that the picture "is more subtle than the old story would have it," noting that they tended to a "curious mixture of admiration and rejection" of each other); Michael Herz, *"Do Justice!: Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 114–15 (1996) (noting a sharp conflict between Holmes and Hand, both considered to be legal positivists, over whether justice should be done, though depending on whether Hand really meant that justice exists, he may not have been a legal positivist after all).

349 *See, e.g.,* Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMM. 253, 256–57 (2016) (explaining this behavior); *id.* at 281 n.140 (citing to H.L.A. Hart's *Essays On Bentham*). Bentham seemed to pioneer this kind of behavior by inventing and marketing odd terms like *Chrestomathia*, the

three drops in a very large bucket of legal positivist meming in America.[350] We have no shortage of new, posited legal "norms" each vying for control of U.S. society by extinguishing or manipulating the others—*Game of Thrones* style.[351]

Legal positivism repeatedly failed to "'pluck the mask of mystery' from [the] face" of the natural and common laws in a way that all or even a majority of legal positivists can agree.[352] Thus, there is no generally agreed upon definition of legal positivist principles.[353] In fact, Adrian Vermeule went so far as to identify the term legal positivism as fatally corrupted by a liberal narrative and proposed abandoning that term for what is, once again, a legal positivist theory.[354]

Panopticon, and his *Auto-Icon*. *See, e.g.*, Elissa S. Itzkin, *Bentham's* Chrestomathia*: Utilitarian Legacy to English Education*, 39 J. HIST. IDEAS 303, 303–04 (1978).

350 Greene, *supra* note 349, at 281 ("Memes are ubiquitous in American constitutional law.").

351 *Id.*; Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2065 (1995) ("The key point for Austin, as for Bentham, was to discover the unique source of legal norms in a given legal system."); Holmes, *The Path*, *supra* note 1, at 465 ("In every system there are such explanations and principles to be found."); *see Game of Thrones: You Win or You Die* (HBO May 29, 2011) ("When you play the game of thrones, you win or you die. There is no middle ground."); *see, e.g.,* Matthew Yglesias, *The Case for Normalizing Trump*, VOX (Nov. 30, 2016), https://www.vox.com/policy-and-politics/2016/11/30/13767174/case-for-normalizing-trump (presenting the debate over whether to consider Trump "normal," a debate that is fueled by the legal positivist belief in the legal nature of societal norms).

352 Mikhail, *supra* note 242, at 772–73 (quoting JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 113 (1891)) (noting how Hart positioned Bentham and Austin as if they were liberals who generally agreed with one another, when they did not and were not); *id.* at 775 (noting that toward the end of his life, Hart did not even agree with his former ideas).

353 *Id.* The commitments of legal positivism are so fluid that even those considered the biggest critics of legal positivism may have been or be legal positivists: HART, ESSAYS IN, *supra* note 254, at 50–51 (1983) (blaming the fluidity of "legal positivism" on Fuller for inventing the term as a pejorative that "has come to stand for a baffling multitude of sins"); *id.* at 86–87 (appearing to say that Fuller's theories could be included as a form of legal positivism, because Fuller's definition of "ought" has "nothing to do with morals"); Schauer, *supra* note 254, at 18–19 ("Fuller was at least enough of a legal positivist to recognize that there could be and was immoral positive or human law"); Erik Wolf, *Revolution or Evolution in Gustav Radbruch's Legal Philosophy*, NAT. L. F., Paper 25, at 22 (Marianne Cowan trans., 1958) (arguing that Gustav Radbruch's "alleged 'transformation' . . . is fully consistent with Radbruch's earlier [legal positivist] thinking"). The fluidity of legal positivism appears to consist in its allowance of the zealous deconstruction of the common law without a way of providing a viable replacement for common law strategies for statutory interpretation, because the Hobbesian connection between sovereign and law does not provide any tools at all for interpreting or making sense of the law. HART, ESSAYS IN, *supra* note 254, at 66 (rejecting the formalism of *other* legal positivists that *might* have supplied rules for statutory interpretation to replace those of the common law, because of its "preoccupation with the separation of powers and Blackstone's 'childish fiction' (as Austin termed it) that judges only 'find', never 'make', law"); *cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–3 (1982) (demonstrating how the United States is "choking on statutes," likely because legal positivists envisioned the replacement of common law with statutes, without providing an alternative way of interpreting the laws they themselves advocated to establish).

354 Vermeule, *Beyond*, *supra* note 4.

It is unclear whether Vermeule and his wing of radical-conservative Orbán fans will succeed in swaying a majority of conservative thinkers in the direction of "*illiberal legalism*."[355] Some scholars are pushing back, like Professor Randy E. Barnett, who spoke of Vermeule as what Scalia would call a "wolf [that] comes as a wolf."[356] Furthermore, Justice Barrett may defend Scalia's contributions on the bench.[357] Or she might not.[358]

Scalia dressed his legal positivism up in what he called originalism, but he was not actually an originalist.[359] Rather, Scalia was a student of Rousseau, who defended legal positivists like Robert Rantoul, Jr. and David Dudley Field, Jr. as if they were founders.[360] As noted by Vermeule, Scalia's game of dressing up modern conservative thought as founding memory "helped legal conservatives survive and even flourish in a hostile environment."[361]

Vermeule is the kind of conservative that does not mind revealing that Scalia's originalism was a mere political tool.[362] For Vermeule, Scalia's politicization of judges was not a problem, as long as the Court slanted conservative.[363] Nevertheless, Vermeule seemed to redefine the word

355 *Id.*; George F. Will, *Opinion | When American Conservatism Becomes Un-American*, WASH. POST (May 29, 2020), https://www.washingtonpost.com/opinions/when-american-conservatism-becomes-un-american/2020/05/28/336a953a-a0f6-11ea-b5c9-570a91917d8d_story.html.

356 Barnett, *supra* note 338.

357 *See* Michael Tarm, *Amy Coney Barrett, Supreme Court Nominee, Is Scalia's Heir*, AP NEWS (Sept. 26, 2020), https://apnews.com/article/election-2020-ruth-bader-ginsburg-chicago-us-supreme-court-courts-547b7de5b6ebabedee46b08b5bb37141; *see, e.g.,* Jane C. Timm, *What Supreme Court justices said about Roe and abortion in their confirmations*, NBC NEWS (June 24, 2022), https://www.nbcnews.com/politics/supreme-court/supreme-court-justices-said-roe-abortion-confirmations-rcna35246.

358 *See* James Hohmann, *The Daily 202: Amy Barrett Distances Herself From Scalia In Her Confirmation Hearings*, WASH. POST (Oct. 14, 2020), https://www.washingtonpost.com/politics/2020/10/14/daily-202-amy-barrett-distances-herself-antonin-scalia-confirmation-hearing/.

359 Harry V. Jaffa, *Original Intent and the American Soul*, 6 CLAREMONT REV. BOOKS 36 (2005) ("Although Scalia and Thomas may both be regarded as conservative 'originalist' judges, their views of the Constitution are fundamentally different. Positivists like Justice Scalia who look only to the 'text and traditions' of the Constitution, but not to its moral principles, are ultimately no match for the liberal critics of original intent jurisprudence. . . . These principles are spelled out in the Declaration of Independence, which the United States Code lists as the first of the Organic Laws of the United States. Yet Justice Scalia (and many other so-called originalist) finds no role whatever for the Declaration in constitutional jurisprudence, dismissing it as 'fluff.'").

360 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, THE TANNER LECTURES ON HUMAN VALUES 86–88, 113 (Mar. 8 & 9, 1995) (citing and defending "[t]he nineteenth-century codification movement espoused by Rantoul and Field" as if it complimented, rather than contradicted, the original intent of the founders because of its basis in legal positivism).

361 Vermeule, *Beyond*, *supra* note 4.

362 *Id.*

363 *Id.*

"conservative" as if it were the progressive political legalism first established in America by the Bull Moose himself, Theodore Roosevelt.[364]

Theodore Roosevelt loudly despised the American Ideals embodied in the Declaration of Independence, while paradoxically expressing adoration for the American Revolutionaries.[365] As Professor Jean M. Yarbrough revealed, the politicization of legal positivism that Vermeule (and Orbán) are presently tapping into, conspicuously runs back to the progressive socialist German Ideals that Theodore Roosevelt preferred.[366] The German Ideals were corrupted by Hegel, whose both/and "logic" reduced the law to a matter of mere politics and facilitated the rise of Hitler.[367]

Theodore Roosevelt nominated Justice Oliver Wendell Holmes, Jr. to the Supreme Court of the United States, where Holmes faithfully expounded Theodore Roosevelt's German Idealism in *Buck v. Bell* with Vermeulian flair.[368] Holmes, a socialist progressive, was the original common good constitutionalist.[369] Vermeule's urge to get the speck out of Scalia's eye, ignores the plank in his own, i.e., that Vermeule's theories originate in the disturbing history of Holmes's socialist authoritarianism.[370]

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364 Logan Stagg Istre, *Theodore Roosevelt and the Case for a Popular Constitution*, 4 AM. AFF.S 191 (2020) (quoting Vermeule, *Beyond*, *supra* note 4) (drawing a correlation between how Theodore Roosevelt broke "with his native Republican Party [to] champion the infant 'Bull Moose' Progressive Party" and Adrian Vermeule who "recently recommended that conservative jurists take a more assertive, bold approach to gain ground for 'common good constitutionalism' through new interpretive methods, using liberal-progressive tactics against liberalism").

365 YARBROUGH, *supra* note 244, at 257 (noting Theodore Roosevelt's "unofficial call for a new Declaration of Independence that would help to redefine rights and establish a new relationship of the citizen to government"); *id.* at 252 ("What was striking was that even as the United States entered into war with Germany, Roosevelt continued to profess admiration for its ideals and to pattern American reforms on the German model, singling out for special praise their military and industrial efficiency.").

366 *Id.* at 46 ("'This is what Hegel meant by his doctrine that morality (*Sittlichkeit*) is the end of the state.' It was surely no accident that Roosevelt, in his speech at the University of Berlin in 1910, would hold out his 'dream' in almost identical language, though it was impossible to reconcile such a vision with the political thought of the Framers."); Letter from Theodore Roosevelt to Hugo Munsterberg (Feb. 2, 1916) ("I have actively fought in favor of grafting on our social life, no less than our industrial life, many of the German ideals.").

367 YARBROUGH, *supra* note 244, at 46; RUSSELL, A HISTORY, *supra* note 196, at xxii (noting that Hegel provided Hitler with a doctrine of "State worship" that was useful to produce the Nazification of Germany); *see* BERTRAND RUSSELL, UNPOPULAR ESSAYS 20 (1921) [hereinafter RUSSELL, UNPOPULAR] ("Hegel's philosophy is so odd that one would not have expected him to be able to get sane men to accept it, but he did."); *cf.* GLENN ALEXANDER MAGEE, HEGEL AND THE HERMETIC TRADITION 92 (2001) ("When Hegel rejects a pair of opposites, however, one can be sure that they have not been rejected: they have been *aufgehoben*; they have been cancelled, but also taken up and preserved.").

368 Vermeule, *Beyond*, *supra* note 4; Buck v. Bell, 274 U.S. 200, 207 (1927); Schroeder, *The Dark*, *supra* note 6, at 340 n.77; *see* YARBROUGH, *supra* note 244, at 20, 252.

369 *Buck*, 274 U.S. at 207 ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."), *following* Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) ("There are manifold restraints to which every person is necessarily subject for the common good."); Vermeule, *Beyond*, *supra* note 4.

370 *See* sources cited *supra* notes 364, 368.

In actuality, Vermeule's views are strikingly similar to *Buck v. Bell*, considered in its time as a growth of far-left progressive thought.[371] Vermeule's authoritarian ideology appears to assert politics as a cheap way to earn populist support.[372] His legalism fails to deal with its origins in the Holmesian common good legalism that inspired the Holocaust,[373] which was anti-conservative, a growth of Hegelian authoritarian socialism.[374]

Following Hegel's conversion of violence into political currency, [375] Vermeule, Sunstein, and other legal positivists engage in a conversion of chaos symbolized by Trump.[376] These conversions of violence and chaos arise from Hobbes's war of all against all.[377] Such conversions of instability and upheaval into political will depended upon the preexisting idea that all

371 *See* sources cited *supra* notes 364, 368; *see* THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 191 (2016) ("Progressivism reconstructed American liberalism by dismantling the free market of classical liberalism and erecting in its place the welfare state of modern liberalism.").

372 Or else it is a strategy of "using liberal-progressive tactics against liberalism," which may be the same thing. Istre, *supra* note 364, at 191.

373 Nourse, *Buck*, *supra* note 317, at 103 ("With Justice Holmes's decision, eugenics was legislatively reborn, making America (not Germany) the eugenic legislative capital of the world in the period from 1927 until 1934."); WHITMAN, *supra* note 130, at 200.

374 YARBROUGH, *supra* note 244, at 20, 252 ("Beyond providing Americans with an interpretive framework for understanding their own troubled history, Hegel offered a comprehensive critique of Lockean liberalism that men such as Burgess, witnessing the rapid development of Bismarckian Germany, found compelling. To begin with, liberal political philosophy looked at 'man' in the abstract as he existed in a 'state of nature,' apart from all social and political influences. . . . Hegel sought to rectify this error by focusing on the development of particular peoples in their concrete historical circumstances. . . . His magisterial survey . . . added new layers of philosophical depth to the argument that the Teutonic peoples were the modern heirs of the Greeks and the Romans, uniquely qualified by culture and history for political rule.").

375 ÉTIENNE BALIBAR, VIOLENCE AND CIVILITY: VIOLENCE AND CIVILITY: ON THE LIMITS OF POLITICAL PHILOSOPHY 34–36, 41 (G. M. Goshgarian trans., 2015) (noting the Hegelian "conversion of violence into authority").

376 Steve Holland, Jeff Mason & Jonathan Landay, *Trump summoned supporters to 'wild' protest, and told them to fight. They did*, REUTERS (Jan. 6, 2021), https://www.reuters.com/article/us-usa-election-protests/trump-summoned-supporters-to-wild-protest-and-told-them-to-fight-they-did-idUSKBN29B24S; *see, e.g.*, KAHNEMAN, SIBONY & SUNSTEIN, *supra* note 26, at 4, 237 (defining "bias and noise" as "system deviation and random scatter" and using noise as a synonym for chaos to justify adopting paternalistic systems that Cass R. Sunstein advocated in his book *Nudge*); THALER & SUNSTEIN, *supra* note 336, at 6, 24–26 (using the chaotic way people think naturally to justify the government's adoption of "libertarian paternalism"—this is a conversion of chaos); Aaron J. Walayat, *Vermeule's Society and Its Enemies*, CANOPY FORUM (Aug. 18, 2021), https://canopyforum.org/2021/08/18/vermeules-society-and-its-enemies/ (attempting to explain Vermeule's dependence upon an idea springing from Cicero's *Fifth Philippic* that during emergencies the common good can require normal judicial procedures to be suspended). Cicero's *Philippics* did not succeed for him, however, and ended in his death. *See* José Miguel Baños, *The Brutal Beheading of Cicero, Last Defender of the Roman Republic*, NAT. GEO. (Apr. 9, 2019), https://www.nationalgeographic.co.uk/history-and-civilisation/2019/02/the-brutal-beheading-of-cicero-last-defender-of-the-roman-republic.

377 BALIBAR, *supra* note 375, at 34–36; HOBBES, LEVIATHAN, *supra* note 5, at 85.

humanity is so depraved by nature that deriving power by fraud and force is legitimate.[378]

Beginning with Cromwell and the Puritans, the Hobbesians began a movement to systematize and mechanize revolutions as mere conversions of violence to accomplish their political goals.[379] But as John Adams observed, the American Revolution preceded the Revolutionary War, as it occurred "in the Minds and Hearts of the people."[380] The war was a byproduct of English tyranny and the Americans' determination to resist in self-defense.[381] The Americans unanimously sought to avoid the war, and they did not attempt to convert violence into political power.[382]

The experience of America was that violence and war was not required to stage a revolution.[383] The English, French, and Russian royals did not need to be put to death in order for them to be successfully deposed as King George III was in America.[384] Rather, it appears that such conversions of violence symbolized by the beheading of Louis Capet did not serve revolutions, but rather it served counterrevolutionary movements of legal positivists like Jeremy Bentham whose philosophies endorsed Robespierre, i.e., the French Queen of Hearts.[385]

V. EARLY TWENTIETH CENTURY LESSONS ABOUT THE FLAWS OF (LEGAL) POSITIVISM

Octavio Paz once observed Porfirio Díaz's adoption of positivism and concluded: "Positivism gave us nothing at all. Instead, it revealed the principles of liberalism in all their nakedness, as lovely but inapplicable words."[386] Coinciding with utilitarian thought, and inspiring Social

378 OTIS, *supra* note 59, at 241; HOBBES, LEVIATHAN, *supra* note 5, at 119 (noting that the government should terrorize people for their own benefit).

379 *See* MICHAEL WALZER, THE REVOLUTION OF THE SAINTS 317 (1965) (seeking to create "a model of radical politics based on the history of the English Puritans"); *but see* Étienne Balibar, *From Violence as Anti-Politics to Politics as Anti-Violence*, 3 CRITICAL TIMES 384, 396 (2020) (developing a "counterpart—what I have tentatively called a strategy or politics of anti-violence or civility").

380 Letter from John Adams to Hezekiah Niles (Feb. 13, 1818); Letter from John Adams to Thomas Jefferson (Aug. 24, 1815).

381 *See* sources cited *supra* notes 153, 376.

382 *See* sources cited *supra* notes 153, 376.

383 Letter from John Adams to Thomas Jefferson (Aug. 24, 1815) ("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.").

384 *Id.*; *see* MICHAEL WALZER, REGICIDE AND REVOLUTION: SPEECHES AT THE TRIAL OF LOUIS XVI 208 (1993) (containing Thomas Paine's suggestion, ignored by the National Assembly, that Louis Capet be deported to the United States to live as a refugee, as a common man without title or rank).

385 *See, e.g.,* DUMONT, *supra* note 38, at 120 ("If it be better for the greatest happiness of the greatest number that a man should die, whoever he may be, and whatever he may be, *cut him off without mercy*. And so with his liberty, and so with his property.").

386 PAZ, *supra* note 3, at 133.

Darwinism and Phrenology, "positivism became a historical superimposition much more dangerous than those that preceded it, because it was based on a misconception."[387]

In reality, it seems that positivism's only purpose, at least in America, was to pull the wool over the eyes of government officials and their sycophants.[388] Positivism, including legal positivism, is a disguise that was "not intended to deceive the people but to hide the moral nakedness of the regime from its own leaders and beneficiaries."[389] Positivism does not contain any objective philosophy, i.e., its center will not hold, merely because it has no center.[390]

Herbert Spencer developed Social Darwinism upon Comte's positivism and Comte systematically endorsed Phrenology,[391] and in the early twentieth century both Nazi and American eugenicists relied upon these things to justify sterilizing and euthanizing vulnerable segments of the population.[392] By these human sacrifices, boldly lauded by Justice Oliver Wendell Holmes, Jr. in *Buck v. Bell*,[393] the State was to find its perfected form.[394] Call it *Leviathan* or the *Übermensch*,[395] it does not matter, eugenics made the State into an idol.[396]

Legal positivists literally made human sacrifices to the humanist god-state, and converted the violence and chaos they caused into political

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387 *Id.* at 130–32; Vincent Guillin, *The Biological Bias of Comte's Sociology: The Issue of Sexual Equality*, 65 REVIEW D'HISTOIRE DES SCIENCES 259 (2012), https://www.cairn-int.info/journal-revue-d-histoire-des-sciences-2012-2-page-259.htm?WT.tsrc=pdf; Sydney Eisen, *Herbert Spencer and the Spectre of Comte*, 7 J. BRIT. STUD. 48, 49 (1967).

388 PAZ, *supra* note 3, at 132.

389 *Id.*

390 *Id.*

391 1 HERBERT SPENCER, PRINCIPLES OF BIOLOGY 74 n.* (1864) (citing Auguste Comte); HERBERT SPENCER, FIRST PRINCIPLES 116 (1909); Guillin, *supra* note 387.

392 *See, e.g.,* HARRY LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 325 (1922) (quoting Herbert Spencer—this quote is also found on the last page of the book as an epigraph); Richard Weikart, *The Role of Darwinism in Nazi Racial Thought*, 36 GERMAN STUD. REV. 537, 538 (2013); *cf.* Mary Pickering, *New Evidence of the Link between Comte and German Philosophy*, 50 J. OF HIST. OF IDEAS 443, 447 (1989).

393 Buck v. Bell, 274 U.S. 200, 207 (1927) (extending the idea that "the public welfare may call upon the best citizens for their lives," to forced sterilizations that he called "lesser sacrifices").

394 LAUGHLIN, *supra* note 392, at 325 ("[T]he first requisite to success in life is 'to be a good animal,' and to be a nation of good animals is the first condition to national prosperity." (quoting HERBERT SPENCER, ON EDUCATION 159 (F.A. Cavenagh ed., 1932))); *cf.* MILLER, *supra* note 10, at 145 (explaining the ladder to heaven or human perfection that the eugenicists believed in).

395 HOBBES, LEVIATHAN, *supra* note 5, at frontispiece; FRIEDRICH WILHELM NIETZSCHE, THUS SPAKE ZARATHURSTRA 5 (Alexander Tille trans., 1896) (translating *übermensch* as "beyond-man").

396 *See, e.g.,* Graham J. Baker, *Christianity and Eugenics: The Place of Religion in the British Eugenics Education Society and the American Eugenics Society, c.1907–1940*, 27 SOC. HIST. MED. 281, 285 (2014) (noting how eugenicists used religion to conflate the demands of "God and his country" regarding the choice of bearing children).

currency, while pridefully maintaining that they were somehow superior to the "heathen" races.[397] The French were perhaps the first to consciously systematize political violence and literal human sacrifice as if it were revolutionary.[398] By great contrast, the American Revolutionaries attempted to avoid violence with Great Britain while inviting the whole British Empire to peacefully revolve with America, explicitly making an enemy of Jeremy Bentham and legal positivism.[399]

Justice Scalia, as a student of the French Revolution, politicized the Court as if it were a sitting revolutionary council by pressuring it to reject mercy in favor of the death penalty under the Hegelian principle, stolen from Hobbes, that the ends justify the means.[400] Later on, radicals like Adrian Vermeule posthumously criticized Scalia for not politicizing the court *enough*.[401] As radicals like Vermeule fail to abide even Scalia's scant sense of prudence, the role legal positivism played in systematizing "revolutions" for political agendas in government bodies like the U.S. Supreme Court may now be openly examined.[402]

While Vermeule relentlessly browbeat several of his peers for fearing tyrannies like wimps,[403] Donald J. Trump staged a *coup d'état*.[404] Trump

397 Eugene V. Debs, *Roosevelt and His Regime*, APPEAL TO REASON (Apr. 20, 1907) ("The American people are more idolatrous than any 'heathen' nation on earth."); RUSSELL, A HISTORY, *supra* note 196, at xxii (noting the "State worship" of "Hobbes, Rousseau, and Hegel"); DUMONT, *supra* note 38, at 120 ("If it be better for the greatest happiness of the greatest number that a man should die, whoever he may be, and whatever he may be, *cut him off without mercy*. And so with his liberty, and so with his property.").

398 Robespierre, *supra* note 40, at 8–9.

399 *See, e.g.,* Bentham, *Short Review*, *supra* note 167, at 131.

400 Schroeder, *We Will*, *supra* note 172, at 51 ("[A] near copy of *Prigg's* 'where the end is required, the means are given' rationale can be found in Scalia's Hobbesian tract and his concurrence in *Glossip v. Gross* to justify the death penalty because '*its use is explicitly contemplated in the Constitution*.'"); Schroeder, *The Boomer*, *supra* note 300, at 33 (noting that Scalia "was, to be sure, a student of the French Revolution; a Rousseau of our times; a conspicuous *Terroriste* who knew how far to push unrest and populism to achieve his private ends"); HOBBES, LEVIATHAN, *supra* note 5, at 123 ("[W]hosoever has right to the End, has right to the Means."); G.W.F. HEGEL, PHILOSOPHY OF RIGHT 120–24 (S.W. Dyde trans., 2001) ("To this place belongs the famous sentence, 'The end justifies the means.'").

401 Vermeule, *Beyond*, *supra* note 4.

402 *Id.*

403 Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, Working Paper 1, 28 (2009) [hereinafter Posner & Vermeule, *Tyrannophobia*] ("[I]n light of the current evidence on the determinants of democratic stability, tyranny should be at the very bottom of the scale of public concern."); Adrian Vermeule, *'No' Review of Philip Hamburger, 'Is Administrative Law Unlawful'*, 93 TEX. L. REV. 1547, 1566–67 (2015); Philip A. Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 205, 206 (2016); *cf.* HOBBES, LEVIATHAN, *supra* note 5, at 523 ("Tyranny, signifieth nothing more, nor lesse, than the name of Soveraignty, be it in one, or many men, saving that they that use the former word, are understood to bee angry with them they call Tyrants; I think the toleration of a professed hatred of Tyranny, is a Toleration of hatred to Common-wealth in generall, and another evill seed, not differing much from the former.").

404 Eastman v. Thompson, 2022 U.S. Dist. LEXIS 59283, at *63–64 (C.D. Cal. 2022) ("Dr. Eastman and President Trump launched a campaign to overturn a democratic election . . . . [I]t was a coup in search of a legal theory.").

similarly browbeat the military in preparation for January 6, complaining they were not more obedient to his personal demands like Hitler's generals appeared to be.[405] The founders would likely describe Trump's insurrectionists as counterrevolutionaries for trying to dismantle what they built, and yet the Trumpian horde considered January 6 "a real 1776 moment."[406]

Hobbes and his followers, including Bentham and Comte, would see no difference between a rebel horde and the peaceful Congress that usually sits on Capitol Hill.[407] Thus, included among the most basic of Comtists and Hegelians in America, Adrian Vermeule used Twitter to spread pro-insurrection conspiracy theories on January 6, 2021.[408] Prior to this, Vermeule paradoxically co-wrote *Conspiracy Theories* with Cass R. Sunstein, an article arguing that the president should be empowered to police public speech for the truth.[409] In another recent working paper Vermeule expressed his populist-fascist fantasies in the guise of Holmesian free speech utilitarianism:

> Free speech protection for socialist manifestos is a good idea because criminal punishment of socialist manifestos is a costly, and potentially fruitless, struggle against an irresistible majoritarian preference for socialism that either is or is not 'destined' to arrive. . . . In such cases, there is no point in complaining that liberalism should not undermine itself by allowing illiberal forces to come to power, or in agonizing about toleration of the intolerant. If a dominant majority wishes to abolish liberalism, then in the long run there is little that a liberal minority, especially judges, can do about it.[410]

Vermeule advocated for illiberal legalism, styled after Viktor Orbán, and hopes it is popularly established under Holmesian free speech ideology as if populism were democratic.[411] He, and his facially liberal colleague Cass R. Sunstein, have argued not to fear tyrannies arising from legal positivism.[412] These men, who were obviously unfazed when Congress was nearly

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405 Susan B. Glasser & Peter Baker, *Inside the War Between Trump and His Generals*, THE NEW YORKER (Aug. 8, 2022), https://www.newyorker.com/magazine/2022/08/15/inside-the-war-between-trump-and-his-generals.

406 Franita Tolson, *Op-Ed: Why the mob thought attacking the Capitol was their '1776 moment'*, L.A. TIMES (Jan. 21, 2021), https://www.latimes.com/opinion/story/2021-01-21/insurrection-capitol-attack-patriotism-1776.

407 *Id.*

408 Cho & Cho, *supra* note 338.

409 Sunstein & Vermeule, *supra* note 336, at 224–25.

410 Adrian Vermeule, *The Force of Majority Rule*, Harvard Public Law Working Paper No. 08-48, at 22 (2008) [hereinafter Vermeule, *The Force*].

411 Vermeule, *Beyond*, *supra* note 4.

412 SUNSTEIN & VERMEULE, *supra* note 43, at 19, 28–30.

disbanded on January 6, 2021, cannot be trusted to assuage legitimate fears of tyrannies.[413]

Vermeule and Sunstein's sycophantic supplications to centralized Bull Moose government authorities was drawn directly from the Roosevelts.[414] This makes sense as the administrative state they defend, was established by the Roosevelts.[415] It may, therefore, be worthwhile to look back so that we can decide for ourselves whether or not the paternalistic government of Sunstein and Vermeule isn't merely the "honorable tyranny" Díaz established in Mexico with the help of Theodore Roosevelt.[416]

In 1908, Theodore Roosevelt worked with Charles J. Bonaparte (literally a descendent of *the* Napoleon Bonaparte) to create the Federal Bureau of Investigation ("FBI") for paradoxical reasons.[417] On one hand Roosevelt used the newly established FBI to rein in the corruption of major U.S. land speculators on the ever-shrinking frontiers of America.[418] On the other, Roosevelt used the FBI to facilitate the same type of corruption caused by land speculators in Mexico, by using the FBI to investigate and prosecute detractors of the Mexican dictator Porfirio Díaz.[419]

In his twenty-fourth year as President of Mexico, Díaz spoke glowingly of President Theodore Roosevelt, counseling the American public not to oppose his potentially unlimited presidency.[420] As Díaz told a Canadian Reporter in 1908: "I can see no good reason why President Roosevelt should not be elected again if a majority of the American people desire to have him

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413 *Id.*; Cho & Cho, *supra* note 338; Cass R. Sunstein, On the Evaluation of Behaviorally Informed Interventions, Very preliminary Draft (Nov. 22, 2021) (while Trump was getting ready for a *coup d'état*, Sunstein was writing up this deep dive into cost/benefit analyses of the administrative state).

414 Istre, *supra* note 364, at 191; Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 464 (1987) [hereinafter Sunstein, *Constitutionalism*]; Adrian Vermeule, *A New Deal for Civil Liberties: An Essay in Honor of Cass R. Sunstein*, 43 TULSA L. REV. 921, 926 (2008) [hereinafter Vermeule, *A New*] ("Sunstein is a proponent—with qualifications, and nuances, but still a proponent—of cost-benefit analysis, which in the finest New Deal style he defends in both technocratic and democratic terms."); *cf.* Buck v. Bell, 274 U.S. 200, 207 (1927) (applying a cost-benefit balancing test).

415 Sunstein, *Constitutionalism*, *supra* note 414, at 423–24; Vermeule, *A New*, *supra* note 414, at 922.

416 KELLY LYTLE HERNÁNDEZ, BAD MEXICANS 29 (2022); *id.* at 39 ("President Theodore Roosevelt dubbed Díaz 'the greatest statesman now living.' Not everyone agreed."); *cf.* YARBROUGH, *supra* note 244, at 194 (quoting Letter from Theodore Roosevelt to George Otto Trevelyan (June 19, 1908)) (noting the irony of TR's quip: "'I don't think any harm comes from the concentration of power in one man's hands, provided the holder does not keep it for more than a limited time, and then returns to the people from whom he sprang.'").

417 HERNÁNDEZ, *supra* note 416, at 249–52.

418 *Id.* at 249 ("The Bureau was originally established because President Roosevelt wanted a federal police force to investigate land fraud.").

419 *Id.* at 252 ("[T]he Díaz regime was glad to see the U.S. government 'take special pains . . . [and] all the measures necessary' to arrest these 'agitators.'" (quoting Letter from Enrique Creel to Secretary of State (Aug. 11, 1909))).

420 James Creelman, *President Diaz, Hero of the Americas*, 19 PEARSON'S MAG. 231, 235–36 (Mar. 1908).

continue in office. . . . The American fear of a third term seems to me to be without any just reason."[421] Like the populist Hobbesian he was, Díaz advocated that "the real, the vital thing" is "whether a majority of the people need [Roosevelt] and desire him to go on."[422]

Theodore Roosevelt did not end up winning a third term in office,[423] but his cousin and nephew-in-law Franklin Delano Roosevelt won third and fourth terms in office.[424] Realizing that tradition alone was not enough to keep candidates from seeking and gaining a potentially lifelong tenure in the presidential office, the Twenty Second Amendment was eventually ratified.[425] Nevertheless, the administrative state was set in motion by men who opposed such traditions that limited executive power, even if it was started by President Washington himself.[426]

Though the Roosevelts did not pack the court, they certainly stacked it with judges who were amenable to their administrative desires.[427] At one point, the U.S. Supreme Court was dominated by eight picks by Franklin Delano Roosevelt.[428] The first of the Roosevelts' picks was the famed Justice Oliver Wendell Holmes, Jr., who took a particular role ensuring the punishment of any political actor who opposed Theodore Roosevelt's imperial projects.[429]

Eugene V. Debs was conveniently jailed under Holmes's anti-free speech decision *Debs v. United States* for speaking out against participating in World War I after years of attacking both Theodore Roosevelt and Porfirio

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421 *Id.*

422 *Id.* at 236.

423 Sidney Milkis, *Theodore Roosevelt: Campaigns and Elections*, UVA: MILLER CENTER, https://millercenter.org/president/roosevelt/campaigns-and-elections (last visited on Sept. 7, 2022) (noting Theodore Roosevelt's attempted third term in office in 1912 on the third-party progressive Bull Moose ticket).

424 NCC Staff, *FDR's Third-Term Election and the 22nd amendment*, NAT'L CONST. CTR.: CONST. DAILY BLOG, https://constitutioncenter.org/blog/fdrs-third-term-decision-and-the-22nd-amendment (last visited on Sept. 7, 2022).

425 U.S. CONST. amend. XXII.

426 *Id.*; Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DÆDALUS 33, 36 (2021) ("The Administrative Procedure Act (APA) of 1946 followed more than a decade of debate on the question of unconstitutional delegation and reflected a 'fierce compromise' balancing the competing goals of bureaucratic expertise and legislative accountability."); *id.* at 34–35 (noting "Roosevelt's threat to 'pack the court,'" and the softening of the U.S. Supreme Court's stance toward administrative agencies in the late 1920s and 1930s that allowed the administrative state to take form).

427 *Federal Judges Nominated By Franklin Delano Roosevelt*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Franklin_Delano_Roosevelt (last visited on Oct. 1, 2023).

428 *The Stone Court, 1941-1946*, SUPREME CT. HIST. SOC'Y., https://supremecourthistory.org/history-of-the-courts/stone-court-1941-1946/ (last visited on Oct. 1, 2023).

429 Debs v. United States, 249 U.S. 211, 216 (1919) (upholding Debs' sedition conviction for opposing U.S. participation in World War I in public speeches).

Díaz publicly.[430] In his public speeches, Debs unsettled major U.S. investors in Díaz's despotic regime, including huge names like the Rockefellers, Guggenheims, Morgans, and Hearsts.[431] Debs openly criticized these investors who "laid claim to more than 130 million acres of Mexico, amounting to more than 27 percent of Mexico's arable land," effectively evicting around 98% of Mexico's rural inhabitants.[432]

This mass eviction and the chaos caused by the U.S. incursion into Mexico with the help of the Díaz regime resulted more than a million refugees fleeing to the United States across the Mexican border.[433] Other than the transatlantic slave trade, the great migration of Mexicans into the United States around the time of the Mexican Revolution was the central reason why the United States will eventually lose its status as a "white" nation.[434] As such, the first basis of the administrative state as we know it today was to preserve the whiteness of America in the borderlands.[435]

President Theodore Roosevelt actively cultivated American racism to convert the chaos he created by displacing millions of Mexicans through his illegitimate land deals with President Porfirio Díaz into the political basis for eugenic border policies that would be codified in the Immigration Law of

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[430] HERNÁNDEZ, *supra* note 416, at 6 (noting how "Mother Jones and Eugene V. Debs, and others, instigat[ed] a series of political assaults that deeply wounded Díaz's political standing on the world stage"); *id.* at 300–03; *Debs*, 249 U.S. at 216; Eugene V. Debs, *This Plot Must Be Foiled: Conspiracy to Murder Mexican Comrades Now Imprisoned in This Country by Order of Díaz*, ST. LOUIS LABOR (Oct. 17, 1908), at 6 (calling Díaz "the bloody butcher of the so-called Mexican Republic," and writing: "The entente cordiale was established between the House of Roosevelt and the House of Díaz, and since then there has been perfect understanding and harmonious cooperation in carrying out the international program [of murdering and imprisoning Mexican Revolutionaries on the U.S.–Mexico Border."); Eugene V. Debs, *Just a Word [about Mexico], Mr. President*, APPEAL TO REASON (Dec. 10, 1910), at 1; *cf.* Eugene V. Debs, *Roosevelt and His Regime*, APPEAL TO REASON (Apr. 20, 1907).

[431] HERNÁNDEZ, *supra* note 416, at 37 ("The list of U.S. investors in Mexico reads like a who's who of robber baron America: Guggenheim, Rockefeller, Gould, Stillman, Morgan, Doheny, Huntington, Hearst, and more.").

[432] *Id.* at 37; Eugene V. Debs, *The Crisis in Mexico*, INT'L SOCIALIST REV. (July 1911) ("When the leaders of the Mexican Liberal Party undertake to transfer the lands from the rich to the poor, that hour they attack the armed forces of capitalism, which means the United States as well as Mexico. The lands in Mexico belong in large part to American capitalists and they will fight for them to the last ditch and with all the powerful resources at their command.").

[433] HERNÁNDEZ, *supra* note 416, at 7–8.

[434] *Id.* at 8 ("In other words, The 1910 Mexican Revolution is a seminal event in U.S. history: it changed who we are as a people."); Justin Gest, *What Happens When White People Become a Minority in America?*, FOREIGN POL'Y (Mar. 22, 2022), https://foreignpolicy.com/2022/03/22/us-white-majority-minority-nation-demographic-change/ ("[D]espite four years of former President Donald Trump's policies limiting the admission of foreigners, the United States is on track to reach its anticipated 2044 'majority minority' milestone: the moment when the majority ethnic group, non-Hispanic white people, becomes one of multiple minorities.").

[435] HERNÁNDEZ, *supra* note 416, at 19.

1924.[436] The constitutional roots of this law run directly into the Chinese Exclusion Act and *Chae Chan Ping*.[437] Using the Chinese Exclusion Act as a test case, the Roosevelts could be sure that their extreme immigration measures would not be struck down by the courts even as they struggled to gain support for other administrative endeavors.[438]

It is, therefore, highly interesting that the Roosevelts and other supporters of administrative expansion received perhaps their strongest support from immigrants.[439] If certain Asian immigrants did not contest their rights in the face of deportation during the Chinese exclusion era, the basis of administrative law may not have been realized in *Crowell v. Benson* and as a consequence the compromises embodied by the Administrative Procedure Act ("APA") may not have been reached.[440] In time, the immigrant resistance to deportation staged during the early twentieth century supplanted the Immigration Law itself as the cornerstone of administrative law.[441] When the efforts of the eugenicists were finally taken down, it was

[436] *Id.* at 141 (noting how President Roosevelt "order[ed] all U.S. authorities to 'go to the utmost limit in proceeding against these so-called revolutionists'"); Immigration Act of 1924, 43 Stat. 153 (setting up the United States' first visa system in order to enforce strict ethnic and racial quotas inspired by eugenicist Harry Laughlin); *see, e.g.,* NANCY J. PAREZO & DON D. FOWLER, ANTHROPOLOGY GOES TO THE FAIR: THE 1904 LOUISIANA PURCHASE EXPOSITION 165, 384 (2007) ("Race, especially black bodies and 'primitive peoples' in general, remained deviant. . . . Their 'strangeness' played into public policy discussions about immigration, eugenics, self-government, and assimilation for the next thirty years.").

[437] Immigration Act of 1924, 43 Stat. 153, *built upon the plenary power to exclude asserted in* Chinese Exclusion Act, Pub. L. 47–126, *aff'd as constitutional by* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889); *cf.* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550, 555–56 (1990).

[438] *Chae Chan Ping*, 130 U.S. at 609; Dudley, *supra* note 426, at 34–35.

[439] Crowell v. Benson, 285 U.S. 22, 60 (1932) (quoting Ng Fung Ho v. White, 259 U.S. 276, 285 (1922)); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 659 (2004) (noting that "*Crowell* . . . provided the foundation for much of the modern administrative state"); *see also* SUNSTEIN & VERMEULE, *supra* note 43, at 7–10, 131 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 36, 40–41 (1950)).

[440] *Crowell*, 285 U.S. at 60 (quoting *Ng Fung Ho*, 259 U.S. at 285) (requiring *de novo* review of administrative law adjudications wherever fundamental rights depend); *cf.* Pfander, *supra* note 439, at 659; Dudley, *supra* note 426, at 36; SUNSTEIN & VERMEULE, *supra* note 43, at 107 (admitting that *Crowell* was "the major doctrinal inspiration for neoclassical administrative law").

[441] Pfander, *supra* note 439, at 659 (naming *Crowell* rather than *Chae Chan Ping* as an important basis for judicial review of administrative adjudications); *Crowell*, 285 U.S. at 60 (quoting *Ng Fung Ho*, 259 U.S. at 285); *see also* Chapman v. California, 386 U.S. 18, 24 (1967) (drawing structural error doctrine from successful immigrant suits) (citing Woodby v. INS, 385 U.S. 276 (1966)); *Woodby*, 385 U.S. at 286 ("We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."); Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 566–67 (2012) (struggling to make immigration law, which is administered largely through "sub-regulatory rules and guidance documents," to comply with the APA without adequately addressing the fact that Immigration Law arises from pre-APA admin law and without asking the question of whether Immigration Law is even capable of compliance with the APA and other administrative norms developed after WWII).

the legal struggles of largely non-white immigrants and paper sons that fostered a legitimate rebirth of the law in America.[442]

VI. HOW TO AVOID PITFALLS OF (LEGAL) POSITIVISM IN THE EARLY TWENTY-FIRST CENTURY

Legal positivists in the vein of Hobbesian ideology cannot account for the role of an immigrant resistance in the making of a nation's laws.[443] Their system cannot take account of a separation of powers as they tend to get caught up in the question of who is the sovereign, the court, the Congress, or the President.[444] They cannot account for the separation of sovereign powers into three departments, and they cannot account for the way administrative law developed as a conversation between all three.[445]

Furthermore, legal positivists cannot account for major world events like World War II that shifted this conversation and caused people to change their minds.[446] Prior to World War II, the United States was a eugenic stronghold that sterilized people, deported them, and incarcerated them to purify the gene pool.[447] After World War II, the U.S. Supreme Court and several states began upholding fundamental human rights with the blessing of several presidents,[448] and Congress began passing acts in an attempt to remove eugenic vestiges from immigration law.[449]

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[442] *See* sources cited *supra* notes 439–41; *see generally* THE CHINESE EXCLUSION ACT (PBS 2017).

[443] Dyzenhaus, *supra* note 109, at 364; *see* Holmes, *The Path*, *supra* note 1, at 465 (examining the law as an expression of the sovereign's will or command, which cannot account for changes of opinion and intent in law that may take place over several years, that contradict or modify previous laws once felt just, but presently felt unjust and wrong); HOBBES, LEVIATHAN, *supra* note 5, at 212 (defining the law, as he does in several places, as an expression of the sovereign will or command).

[444] Purcell Jr., *supra* note 296, at 1501–02 ("the very structure of American government made classical legal positivism an unavoidably ambiguous and politically erratic constitutional guide," because "the Constitution did not confer 'sovereignty' to on any one unit or branch of government"); *see* Dyzenhaus, *supra* note 109, at 368; *cf.* Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1749–50 (2007) (cutting to the heart of the matter for Americans, Professor Barnett examined Scalia's erroneous ideas about sovereignty through the lens of *Chisholm v. Georgia*, which prescribes the American view).

[445] *See* sources cited *supra* notes 441–42, 444.

[446] *Compare* Buck v. Bell, 274 U.S. 200, 207 (1927), *with* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[447] WHITMAN, *supra* note 130, at 200.

[448] *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBRARY OF CONGRESS, https://www.loc.gov/exhibits/civil-rights-act/world-war-ii-and-post-war.html (last visited Feb. 4, 2023) (presenting several resources regarding the many steps taken to vindicate civil rights in the United States after World War II); *see, e.g.,* Edwards v. California, 314 U.S. 160, 176–77 (1941); Brown v. Board of Education, 347 U.S. 483, 495 (1954) ("We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place."); Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2016).

[449] Hart-Celler Act of 1965, 79 Stat. 911, *amending and repealing* Immigration and Nationality Act of 1952, 66 Stat. 163, *amending and repealing* Immigration Act of 1924, 43 Stat. 153; *but see* Tom

The post-WWII era easily saw the Immigration Law of 1924 as a mistake based upon the same debunked eugenic pseudo-science that Hitler used to murder millions of Jews.[450] From this context, it is easy to see how the immigrants that contested their rights in Article III Courts should (and did) compose the basis of administrative law going forward.[451] Thus, it came to pass that when Congress enacted the APA it looked favorably upon *Crowell v. Benson*,[452] which should be read as a wholesale refutation of *Chae Chan Ping* in the Administrative Law arena,[453] especially as *Chae's* anti-

Gjelten, *In 1965, A Conservative Tried To Keep America White. His Plan Backfired*, NPR (Oct. 3, 2015), https://www.npr.org/2015/10/03/445339838/the-unintended-consequences-of-the-1965-immigration-act.

[450] *Compare* WHITMAN, *supra* note 130, at 200, *with The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, OFFICE OF THE HISTORIAN, DEP'T OF STATE, https://history.state.gov/milestones/1945-1952/immigration-act (last visited Feb. 4, 2023) (noting that while this act initially "upheld the national origins quota system established by the Immigration Act of 1924" that "[i]t also ended Asian exclusion from immigration to the United States and introduced a system of preferences based on skill sets and family reunification"); *but see* Gjelten, *supra* note 449.

[451] This historical turn of events vindicated the U.S. Supreme Court in *Crowell*, rather than its mistake in *Buck*, embarrassing the Roosevelts who were steeped in elitist eugenic policies. Crowell v. Benson, 285 U.S. 22, 60 (1932) (quoting Ng Fung Ho v. White, 259 U.S. 276, 285 (1922)); PAREZO & FOWLER, *supra* note 436, at 165, 384.

[452] Pfander, *supra* note 439, at 659 n.62 (noting "the widespread reliance on *Crowell* in crafting rules to govern the judicial review of agency action").

[453] The following beautiful passage, and its correlating inference of federal jurisdiction into potentially all of Congress's enabling acts, should be cited as the basis of all administrative law and noted as supplanting the court's previous reliance upon plenary power doctrine in *Chae Chan Ping*:

> 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 of 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 character 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.

Crowell v. Benson, 285 U.S. 22, 56–57 (1932), *abrogating* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (asserting plenary power doctrine: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as part of those sovereign powers delegated by the Constitution, the right to its exercise at any time, when, in the judgment of the government, the interests of the country may require it, cannot be granted away or restrained on behalf of anyone."); *but see* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (chaotically applying the same "sovereign prerogative" rule as *Chae Chan Ping* by way of *Landon v. Plasencia*, while also appearing to abrogate *Chae Chan Ping* and potentially all "finality era" cases as superseded by law (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982))); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379–80 (2018) (Breyer, J., concurring) (appearing to drop his previous defense of *Crowell v. Benson* in *Stern v. Marshall*); *cf.* Stern v. Marshall, 564 U.S. 462, 506 (2011) (Breyer, J., dissenting) ("I fear the Court understates the importance of a watershed opinion widely thought to demonstrate the constitutional basis for the current authority of administrative agencies to adjudicate private disputes, namely, *Crowell v. Benson* . . . .").

immigrant plenary power doctrine was drawn directly from the illegitimate slave case *Prigg v. Pennsylvania*.[454]

This reality is interpreted exactly backwards by Cass R. Sunstein and Adrian Vermeule in their new book *Law and Leviathan*, because their legal positivism cannot adequately distinguish between a past sovereign that endorsed eugenics and the present sovereign that abhors eugenics.[455] Interestingly, Sunstein and Vermeule cite to a successful immigrant suit as the basis of their version of Administrative Law, but only as an affirmation of Congress's sovereign powers, placing the origin of administrative law too late: in 1946.[456] However, when they described the holding of *Crowell v. Benson* as "undone within about a decade of its creation,"[457] they conspicuously excluded *Crowell's* iconic jurisdiction "wherever fundamental rights depend."[458] To put an accent on Sunstein and Vermeule's grave error, Professor Victoria Nourse memorably described the courts' present willingness to review matters of fundamental rights to sharply distinguish us from our Holmesian past.[459]

While the APA is undoubtedly a key turning point of administrative law that, perhaps, should control immigration law as a subset,[460] Sunstein and

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[454] *Chae Chan Ping*, 130 U.S. at 609, *following* Prigg v. Pennsylvania, 41 U.S. 539, 611 (1842) (quoting the Fugitive Slave Clause, U.S. CONST. art. IV, § 2) (applying Story's second class of plenary powers as described in his earlier dissent in *Houston v. Moore* to exclude the immigration of escaped slaves to the North—the first federal affirmation of the federal plenary power to exclude); *id.* at 619 (openly expressing that the result of Story's plenary power ideology is that the ends justify the means, a controversial Hegelian proposition: "The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also, or, in other words, that the power flows as a necessary means to accomplish the end."); *see id.* at 654–55 (Daniel, J., concurring) (quoting Houston v. Moore, 18 U.S. 1, 48–50 (1820) (Story, J., dissenting)); *see* Schroeder, *We Will*, *supra* note 172, at 36 (explaining *Prigg's* chaotic role in pioneering the federal plenary power of exclusion, which led to the Civil War); *id.* at 46 ("*Prigg v. Pennsylvania* was the first use of this ideology to endorse the federal government's power to exclude immigrants and shut down immigration between the states.").

[455] SUNSTEIN & VERMEULE, *supra* note 43, at 7–10, 131 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 36, 40–41 (1950)) ("For our purposes, the main importance of *Wong Yang Sung* lies in its identification of a macroprinciple for understanding the role of the Administrative Procedure Act (APA) and its accompanying doctrine in American public law.").

[456] *Id.*

[457] *Id.* at 107–09, 112 (quoting NLRB v. Hearst Publications, Inc., 322 U.S. 111, 135 (1944)) (arguing that *Crowell* was effectively replaced by post-APA deference cases like *Chevron* and *Auer*, specifically noting *NLRB v. Heart's* use of "rational basis" review, which seems to extend, rather than replace, the very caveat created by *Crowell*—of deference to agency determinations that *do not* implicate fundamental human rights).

[458] *Crowell*, 285 U.S. at 57; SUNSTEIN & VERMEULE, *supra* note 43, at 105 (stating that "plenary or de novo judicial decision-making" extends only to "questions of law," without explaining *Crowell's* other caveat extending de novo review of administrative findings of fact that implicate fundamental rights and federal jurisdiction).

[459] *See* Nourse, *A Tale*, *supra* note 334, at 752.

[460] In this proposition I do not, in theory, disagree with Professor Jill E. Family. *See* Family, *supra* note 441, at 566 (struggling to make immigration law make sense in a modern administrative law context).

Vermeule conveniently forgot that the application of immigration law predates the APA.[461] The immigration law's ulterior constitutional basis in plenary power doctrine was not clearly repealed or supplanted by the APA or any other law or judicial decision including Sunstein and Vermeule's favorite immigrant suit *Wong Yang Sung v. McGrath*.[462] In fact, a fundamental conflict over the operation of the separation of powers under *Crowell* and *Chae Chan Ping*, in which the APA may properly tip the scales toward the re-affirmation of *Crowell*, remains untested in the federal courts to date.[463]

Understanding Sunstein and Vermeule's errors is crucial to answering why Biden has arguably failed to keep his campaign promise of rolling back Trumpian immigration policies.[464] Instead of doing what he promised, Biden hired Cass R. Sunstein into his administration to, apparently, repackage anti-immigrant Trumpian policies as "rollbacks" in order to make them appear more palatable to the American public.[465] In fact, early on in his administration, Biden openly announced his flip-flop on immigration with a statement that "nothing has changed!"[466]

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461 SUNSTEIN & VERMEULE, *supra* note 43, at 7–10, 131 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 36, 40–41 (1950)).

462 *Id.*; *see id.* at 66 (citing Accardi v. Shaughnessy, 347 U.S. 260 (1954)); *id.* at 27 (citing Trump v. Hawaii, 138 S. Ct. 2392 (2018)) (arguing that the Court reaffirmed "broad deference to the presidency in matters of immigration and national security" without addressing the plenary power doctrine); DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)) (asserting plenary power doctrine through a cost/benefit balancing test case).

463 Biden v. Texas, 142 S. Ct. 2528, 2538–40, 2543–44 (2022) (over Justice Alito's ringing dissent, the Court distinguished *Jennings* and asserted subject matter jurisdiction over an immigration law matter as an administrative law issue resolvable under "the INA and the APA," but, while noting that the INA does not prevent the Court from hearing the case, the Court stopped short of explaining exactly how these administrative issues should be resolved under both INA and APA, and it did not rely upon or consider *Crowell*); *see Thuraissigiam*, 140 S. Ct. at 1982 (quoting *Landon*, 459 U.S. at 32) (disregarding *Crowell v. Benson* and, instead, applying the dicta from a *Mathews* balancing test case as if it extended plenary power holdings as the law); Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1832–33 (2022) (describing the reasons why *Jennings v. Rodriguez* sidelined an earlier decision such that a future case may weigh in, perhaps relying on the central holdings of *Crowell* regarding the justiciability of administrative law where fundamental rights depend); *cf.* Zadvydas v. Davis, 533 U.S. 678, 689, 695 (2001) (this case has questionable validity after the 2022 term, but it cited to *Crowell v. Benson* to interpret the INA in such a way that it secured a liberty right, but falling short of applying *Crowell's* central holding regarding the federal jurisdiction to consider any case in administrative law where fundamental rights depend and, instead, affirming a confusing oxymoron of limited-plenary power when it said that Congress's "plenary power . . . is subject to important constitutional limitations").

464 *See generally* Joshua J. Schroeder, *It Didn't Have to Go Down Like This: On the Merciless Bureaucratic Cost/Benefit Balancing Behind Biden's Failed Immigration Rollbacks*, IMMIGRATIONPROF BLOG (Mar. 20, 2022), https://lawprofessors.typepad.com/immigration/2022/03/guest-post-by-joshua-j-schroeder-it-didnt-have-to-go-down-like-this-on-the-merciless-bureaucratic-co.html.

465 *Id.*

466 Newsweek, *Biden On Immigration Surge At Border: 'Nothing Has Changed'*, YOUTUBE (Mar. 25, 2021), https://www.youtube.com/watch?v=Dn1nOOZ5irw.

Thus, Biden repealed the Migrant Protection Protocols ("MPP"),[467] but only after extending Trump's Title 42 exclusions, which did practically the same thing.[468] After overseeing over 2.8 million Title 42 migrant expulsions,[469] Biden ended Title 42,[470] but implemented even more restrictive border policies including the notoriously clunky and arguably racist CBP One cell phone app.[471] In addition to direct U.S. immigration enforcement, Biden appears to have strong-armed Mexico into enforcing U.S. anti-immigration policy for the United States through informal executive agreements.[472] Then, apparently to add insult to injury, Biden resumed building Trump's border wall.[473]

Meanwhile, several children still remain separated from their parents whom Biden refused to settle with out of court.[474] As such, he continued litigating *Ms. L v. ICE* in order to force a watered down *Reno v. Flores* settlement with the ACLU to keep putting children in immigrant detention

467 Biden v. Texas, 142 S. Ct. 2528, 2536 (2022).

468 Uriel J. García, *Here's What You Need to Know About Title 42, The Pandemic-era Policy That Quickly Sends Migrants to Mexico*, TEX. TRIBUNE (Apr. 29, 2022), https://www.texastribune.org/2022/04/29/immigration-title-42-biden/.

469 Adam Isacson, *10 Things to Know About the End of Title 42*, WOLA (May 9, 2023), https://www.wola.org/analysis/end-title-42/.

470 *Id.*; *see also* Colleen Long, *Title 42 Has Ended. Here's What It Did, And How US Immigration Policy Is Changing*, AP NEWS (May 12, 2023), https://apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbefb798d.

471 Justo Robles, *Title 42 Migration Restrictions Have Ended, But Biden's New Policy is Tougher*, GUARDIAN (May 13, 2023), https://www.theguardian.com/us-news/2023/may/13/title-42-migration-biden-new-policy-tougher; Melissa del Bosque, *Facial Recognition Bias Frustrates Black Asylum Applicants to US, Advocates Say*, GUARDIAN (Feb. 8, 2023), https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias.

472 Conor Finnegan, *'Outsourcing' Border Enforcement: Biden's Migration Policies Rely On Mexico Despite Its Grim Record*, ABC NEWS (May 10, 2023), https://abcnews.go.com/Politics/outsourcing-border-enforcement-bidens-migration-policies-rely-mexico/story?id=99167102; *see* Biden v. Texas, 142 S. Ct. 2528, 2535 (2022); *Mexico: Asylum Seekers Face Abuses at Southern Border*, HUMAN RTS. WATCH (June 6, 2022, 12:00 AM), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border ("Outsourcing US immigration enforcement to Mexico has led to serious abuses and forced hundreds of thousands to wait in appalling conditions to seek protection." (internal quotation marks omitted)).

473 Miriam Jordan et al., *U.S. Will Build Stretch of Border Wall and Begin Deportations to Venezuela*, N.Y. TIMES (Oct. 5, 2023), https://www.nytimes.com/2023/10/05/us/biden-border-wall-waiver.html.

474 Aline Barros, *Five Years Later, Work of Reuniting Families Separated at US–Mexico Border Remains Unfinished*, VOICE OF AMERICA (June 11, 2022), https://www.voanews.com/a/five-years-later-work-of-reuniting-families-separated-at-us-mexico-border-remains-unfinished/6610677.html; Jonathan Blitzer, *Why Biden Refused to Pay Restitution to Families Separated at the Border*, THE NEW YORKER (Dec. 22, 2021), https://www.newyorker.com/news/news-desk/why-biden-refused-to-pay-restitution-to-families-separated-at-the-border.

facilities that,[475] after *DHS v. Thuraissigiam*,[476] may not even be reviewable through habeas corpus as was presumed as a fundamental basis of the constitutional validity of the original *Reno* settlements.[477] In addition, Biden embraced Trump's black site immigration courts,[478] Biden's DOJ and DHS have adopted rules that will fast track asylum claims through blatantly inquisitorial processes abandoning even the appearance of an adversarial court review,[479] under Biden's watch Customs and Border Protection ("CBP") Agents on horseback beat back legitimate Haitian asylum seekers with whips on the U.S.-Mexico border resembling slave-era oppressions against black people travelling northward,[480] and presumptively innocent immigrants in California are being held in solitary confinement,[481] among other things.[482]

Furthermore, it appears that merely putting immigration law under the ambit of the APA is not sufficient to secure justice for immigrants, as conservative judges in Texas and Louisiana used the APA as a pretext to obstruct Biden's rollbacks.[483] For example, Texas and Arizona joined by twenty other states successfully used the APA to temporarily block the Biden administration from ending Title 42.[484] Any rational judge should have seen

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475 Media Contact, *ACLU Announces Major Settlement in Family Separation Lawsuit*, ACLU (Oct. 16, 2023), https://www.aclu.org/press-releases/aclu-announces-major-settlement-in-family-separation-lawsuit.

476 DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (appearing to say that immigrants may not have due process rights to contest unjust incarceration through habeas corpus).

477 *Id.*; *see* Reno v. Flores, 507 U.S. 292, 314 (1993) ("There is no evidence . . . that habeas corpus is insufficient to remedy particular abuses.").

478 Avind Dilawar, *The Trump Administration's Cruelty Haunts Our Virtual Immigration Courts: How "judicial black sites" have come to shape our immigration system.*, IN THESE TIMES (Feb. 1, 2021), https://inthesetimes.com/article/virtual-courts-immigration-asylum-seekers-immigration-court.

479 Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (effective May 31, 2022).

480 Emily Green, *US Border Agents Are Removing Haitian Migrants Using Horses and Whips*, VICE NEWS (Sept. 20, 2021), https://www.vice.com/en/article/k78vdm/us-border-agents-are-removing-haitian-migrants-using-horses-and-whips.

481 Farida Jhabvala Romero, *California Lawmakers Call for Investigation Into Detainee Complaints of Solitary Confinement*, KQED (Sept. 15, 2022), https://www.kqed.org/news/11925791/california-lawmakers-call-for-investigation-into-detainee-complaints-of-solitary-confinement.

482 Angelika Albaladejo, *A Drunk Mechanic, Shackled Immigrants, a Crash Landing: The Dangers of ICE Flights*, CAPITAL & MAIN (Nov. 4, 2021), https://capitalandmain.com/a-drunk-mechanic-shackled-immigrants-a-crash-landing-the-dangers-of-ice-flights; *see also* Sam Biddle, *Amazon Co-Owns Deportation Airline Implicated in Alleged Torture of Immigrants*, THE INTERCEPT (Feb. 17, 2022), https://theintercept.com/2022/02/17/amazon-ice-deportation-flights-omni/.

483 Texas v. Biden, 20 F. 4th 928, 941 (5th Cir. 2021) ("After a full bench trial, the district court determined that the Termination Decision violated both the Administrative Procedure Act (the "APA") and an immigration statute, 8 U.S. C. § 1225."), *rev'd*, 142 S. Ct. 2528 (2022).

484 Arizona v. CDC, 2022 U.S. Dist. LEXIS 80434, at *22–23 (La. W. Dist. Ct. 2022) ("The Plaintiff States have demonstrated a substantial likelihood of success on the merits with respect to their claims that the Termination Order was not issued in compliance with the Administrative Procedure Act, 5 U.S.C.

through these States' hypocritical pretexts for APA suits as a defense of public health, since they have already made clear that they would rather spread COVID than negatively affect the fundamental freedom to travel.[485]

Also, simply adhering to *Chevron* as the cornerstone of the administrative state is not enough either, because the Court failed to cut back on DHS's violations of the Immigration Law in *Pereira* and *Niz-Chavez*,[486] as DHS and DOJ was allowed by all Twelve Circuits to ignore those decisions.[487] At first, the Circuits failed to uphold the plain meaning of the law as stated by the U.S. Supreme Court in *Pereira* except for one panel in the Ninth Circuit that appeared to be sidelined as perpetually stayed *en banc*.[488] This caused a repeat case in *Niz-Chavez* that reaffirmed *Pereira*, in response to which only two Circuits adopted the mere pittance of allowing Immigration Judges ("IJs") to rescind removal orders that violate *Niz-Chavez*, which is the same as allowing IJs to assert illegal jurisdiction on an ad hoc basis.[489] For the U.S. Supreme Court to rein in these abuses that

§ 551 et seq. ('APA').."); Uriel J. García, *Texas Sues to Block Biden Administration From Lifting Title 42, A Pandemic-era Health Rule Used to Expel Migrants*, TEX. TRIBUNE (Apr. 22, 2022), https://www.texastribune.org/2022/04/22/texas-biden-title-42-lawsuit/.

485 Sneha Dey, *Texas sues CDC to stop mask mandates on planes*, TEX. TRIBUNE (Feb. 16, 2022), https://www.texastribune.org/2022/02/16/texas-planes-mask-mandates/.

486 Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478–79 (2021); Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018); Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842–44 (1984) (upholding "the principle of deference to administrative interpretations" where "the intent of Congress is [un]clear").

487 Matter of Arambula-Bravo, 28 I&N Dec. 388, 390 (BIA 2021) (citing Karingithi v. Whitaker, 913 F.3d 1158, 1161–62 (9th Cir. 2019)) ("The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has deferred to the Board's interpretation in *Matter of Bermudez-Cota* and its progeny."); Matter of LaParra, 28 I&N Dec. 425, 436 (BIA 2022), *disagreeing with* Rodriguez v. Garland, 15 F.4th 351, 354–56 (5th Cir. 2021); *see* Practice Alert: DHS Issuing NTAs with Fake Times and Dates, AILA Doc. No. 18091858 (Nov. 26, 2019), https://www.aila.org/infonet/practice-alert-dhs-issuing-ntas-with-fake-times.

488 Lopez v. Barr, 925 F.3d 396, 401 (9th Cir. 2019) ("neither we nor DHS can override the clear statutory command that time and place information be included in *all* Notices to Appear"), *set aside en banc*, 948 F.3d 989 (9th Cir. 2020) (en banc) ("The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit."—the scope of this *en banc* decision is unclear and unlikely to be clarified by the court); *see* Pontes v. Barr, 938 F.3d 1, 7–8 (1st Cir. 2019); Gomez v. Barr, 922 F.3d 101, 110 (2d Cir. 2019); Chavez-Chilel v. AG U.S., 20 F.4th 138, 144 (3d Cir. 2021); United States v. Cortez, 930 F.3d 350, 359 (4th Cir. 2019); Mauricio-Benitez v. Sessions, 908 F.3d 144, 149 n.1 (5th Cir. 2018), *abrogated by* Rodriguez v. Garland, 15 F.4th 351, 354 n.11 (5th Cir. 2021); Santos-Santos v. Barr, 917 F.3d 486, 491 (6th Cir. 2019); Ortiz-Santiago v. Barr, 924 F.3d 956, 958 (7th Cir. 2019) (following the "Second, Sixth, and Ninth Circuits"); Ali v. Barr, 924 F.3d 956, 958 (8th Cir. 2019) ("We join the BIA and a unanimous chorus of other circuits that have considered and rejected the argument."); Karingithi v. Whitaker, 913 F.3d 1158, 1161–62 (9th Cir. 2019); Paz-Zaldivar v. Garland, No. 21-9571, 2022 U.S. App. LEXIS 20995, at *6 (10th Cir. July 29, 2022); Perez-Sanchez v. U.S. AG, 935 F.3d 1148, 1154 (11th Cir. 2019); Kiakombua v. Wolf, 498 F.Supp.3d 1, 28 (D.C. Dist. 2020).

489 *Niz-Chavez*, 141 S. Ct. at 1478–79, *extended by* Rodriquez v. Garland, 15 F. 4th 351, 355–56 (5th Cir. 2021); Singh v. Garland, 24 F.4th 1315, 1320 (9th Cir. 2022) (applying *Niz-Chavez* to justify rescinding removal orders made *in absentia* without legally sound Notices to Appear, but preserving the

involve distortions of the APA and *Chevron* instigated by the Circuit Courts, it must actually remember the holdings of *Crowell v. Benson* that Sunstein and Vermeule struggled to obscure throughout the Circuit Court system.[490]

The reason that Sunstein and Vermeule have attempted to obscure *Crowell* out of existence is that they are Hobbesians that have accepted the idea that law is the will, or command, of the sovereign.[491] They have decided to adhere to the dogma of automatic administrative legitimacy "even if doing so requires overriding the selfish claims of individuals to private 'rights.'"[492] They have boldly abandoned the plans of our forbearers to protect us from tyrannical rule, while Vermeule has taken to labeling most of America "tyrannophobes."[493]

Oddly, Sunstein cited to a study entitled *Refugee Roulette* as a reason to perfect rather than dismantle the immigration system.[494] This is an extreme departure from the ordinary answer given by U.S. law books: that arbitrary and capricious machinations must be undone and set aside by the courts especially when they affect fundamental human rights.[495] Sunstein wants to

errors of *Karingithi*); *cf. Karingithi*, 913 F.3d at 1161–62 (citing 8 C.F.R. § 1003.14(a)) (finding that an illegally issued document can create jurisdiction).

490 Crowell v. Benson, 285 U.S. 22, 56–57 (1932); SUNSTEIN & VERMEULE, *supra* note 43, at 105.

491 SUNSTEIN & VERMEULE, *supra* note 43, at frontispiece (referring to the frontispiece of Hobbes's *Leviathan*, Sunstein & Vermeule's frontispiece in *Law and Leviathan* also refers to Hobbes's concept of sovereignty); *see id.* at 26 ("The strong presidency is, in American constitutional law, perhaps the main check on the bureaucracy."); *see, e.g.,* Vermeule, *The Force*, *supra* note 410, at 22 ("If a dominant majority wishes to abolish liberalism, then in the long run there is little that a liberal minority, especially judges, can do about it."); THALER & SUNSTEIN, *supra* note 336, at 7 (advocating for the arguably unconstitutional adoption of a paternalistic government form); *cf.* Blakely, *supra* note 250; Epstein, *supra* note 250.

492 Vermeule, *Beyond*, *supra* note 4; *see* Lewans, *supra* note 288.

493 Posner & Vermeule, *Tyrannophobia*, *supra* note 403, at 3, 12 (arguing that tryannophobia is a counterproductive prejudice in America); *see* Vermeule, *Beyond*, *supra* note 4; Sunstein, *Resist, supra* note 339. Like Vermeule, Turgot also accused the Americans of tyrannophobic "fears properly belong to the English" before his country was ruined by the tyranny of Robespierre. JAMES MUNSON BARNARD, A SKETCH OF ANNE ROBERT JACQUES TURGOT 58–59 (1899).

494 KAHNEMAN, SIBONY & SUNSTEIN, *supra* note 26, at 6–7, 91, 174 (citing JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION 90 (2007)) ("A study of cases that were randomly allotted to different judges found that one judge admitted 5% of [asylum] applicants, while another admitted 88%. The title of the study says it all: 'Refugee Roulette.' (We are going to see a lot of roulette.)").

495 Crowell v. Benson, 285 U.S. 22, 49–50 (1932) (quoting ICC v. Louisville & Nashville R. Co., 227 U.S. 88, 91–92 (1913) (citing Tang Tun v. Edsell, 223 U.S. 673, 681 (1912); Chin Yow v. United States, 208 U.S. 8, 13 (1908); Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912); Zakonaite v. Wolf, 226 U.S. 272 (1912))) (noting that "provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or 'contrary to the indisputable character of the evidence,' or where the hearing is 'inadequate,' or 'unfair,' or arbitrary in any respect"); *id.* at 56–57 (noting that even if an enabling statute did not expressly extend jurisdiction, it must be implied "wherever fundamental rights depend"), *extended and supported by* Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2); *see* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil

perfect what Trump showed to be draconian and unjust by obfuscating the court's jurisdiction to hear such cases under *Crowell v. Benson* in order to extend rather than dismantle all or several arbitrary and capricious parts of the U.S. immigration system.[496] Sunstein hypocritically claims to be a progressive and adherent of the APA, while drawing a curtain over the vital constitutional contributions of Asian immigrants that inspired the arbitrary and capricious standard of the APA that might have been used by the executive branch to dismantle several Trumpian injustices.[497]

In their attempt to supplant *Crowell v. Benson* with *Wong Yang Sung*, it appears that Sunstein and Vermeule wanted to end the canon of imputed common law meaning as well as the related canons of prior construction and that implied repeals are disfavored.[498] In crafting the APA's arbitrary and capricious standard, Congress consciously used language drawn from the preexisting common law,[499] and it enacted no negative to repeal the preexisting rights vindicated in *Crowell* or other previous law.[500] If these were ordinary times, judges would simply imply the meaning of the common law and prior construction given in *Crowell* into the operation of the APA without repealing any preexisting rights.[501]

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.").

496 *See* KAHNEMAN, SIBONY & SUNSTEIN, *supra* note 26, at 17, 340–41 (noting that the policy goal of reducing "noise" and maximizing fairness comes at the cost of mercy, with specific reference to immigrants, which Kahneman, Sibony, and Sunstein appear willing to pay, even appearing to override Shakespeare who apparently chose mercy over fairness).

497 SUNSTEIN & VERMEULE, *supra* note 43, at 105 (obscuring and misstating *Crowell's* full holding and effect on the enactment of the APA).

498 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS §§ 53–55 (2012) (discussing the "cannon of imputed common-law meaning," the "prior construction canon," and "presumption against implied repeal"); *cf.* Schroeder, *Leviathan*, *supra* note 90, at 173 n.950 (noting that the presumption against implied repeals applies not only to positive law, but also to pre-existing natural and common law rights).

499 APA, 5 U.S.C. § 706(2), *adopting language from Crowell*, 285 U.S. at 49–50 (quoting ICC v. Louisville & Nashville R. Co., 227 U.S. 88, 91–92 (1913)) (noting that "provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or 'contrary to the indisputable character of the evidence,' or where the hearing is 'inadequate,' or 'unfair,' or arbitrary in any respect"); *id.* at 56–57 (noting that even if an enabling statute did not expressly extend jurisdiction, it must be implied "wherever fundamental rights depend").

500 There is no clear negative in the APA to repeal previous laws, and there is language in the APA to preserve jurisdiction to the Court to review agency action under previous and forthcoming law. APA, 5 U.S.C. §§ 559, 570 ("Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law.").

501 But these are not ordinary times: *see, e.g.,* Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018), *misconstruing and misapplying Crowell*, 285 U.S. at 62; Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1374 (2018), *misconstruing and misapplying Crowell*, 285 U.S. at 50–51; *see* Brief of Amicus Curiae the Claremont Institute's Center for Constitutional Jurisprudence in Support for Petitioners at 7, 10, 12, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19–1392) (co-authored by John C. Eastman) (citing John C. Eastman, *The One-Way Ratchet and Other*

In order to coax the court to establish the opposite by citing no valid canon of construction, Sunstein shamelessly gilded the lily of two Israeli-American immigrants: Amos Tversky and Daniel Kahneman.[502] Paradoxically, Sunstein and Vermeule proposed planting a technocracy in the United States upon the idea that technocrats are more rational than normal human beings, presuming *homo economicus*, even while the studies of Tversky and Kahneman explicitly proved that this is not possible.[503] Therefore, as reason generally rejects clear paradoxes and blatant contradictions, *reason* cannot possibly be motivating either Sunstein or Vermeule's Hobbesian claims.[504]

Problems of Stare Decisis for Conservatives, *in* THE COURTS AND THE CULTURE WARS 127, 134 (Bradley Watson ed., 2002)) ("*Janus* provides some guidance for when stare decisis should not bind future courts"), *apparently followed by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2264 (2022) (overruling *Roe* and *Casey's* interest-balancing test with *Janus'* anti-*stare decisis* balancing test); *id.* at 2332 (Breyer, Sotomayor, and Kagan, J.J., dissenting) (properly disagreeing with Eastman's brief saying "logic and principle are not one-way ratchets"); West Virginia v. EPA, 142 S. Ct. 2587, 2641–42 (2022) (Kagan, J., dissenting) (quoting Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 1734 (2002)); NYSRPA v. Bruen, 142 S. Ct. 2111, 2132 (2022) (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)); Kisor v. Wilkie, 139 S. Ct. 2400, 2419 (2019) (quoting Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 306 (2017)).

502 THALER & SUNSTEIN, *supra* note 336, at 26 (introducing Daniel Kahneman & Amos Tversky as "our heroes" without demonstrating how technocrats could possibly overcome the research of Kahneman & Tversky, and yet still claiming that libertarian paternalism is somehow rational); *cf.* LEWIS, THE UNDOING, *supra* note 317, at 342–43 (mistakenly taking Sunstein at his word and introducing him as a proponent of Kahneman & Tversky's research, when actually he diametrically opposed it).

503 *Compare* SUNSTEIN & VERMEULE, *supra* note 43, at 24, 113 (claiming to set forth "entirely rational decision-making strateg[ies]" of "rational and coordinated policymaking" that favor the decisions of administrative agencies to the judgments of federal judges), *with* LEWIS, THE UNDOING, *supra* note 317, at 278 (noting Amos Tversky's observation that "'the economists felt that we are right and at the same time they wished we weren't because the replacement of utility theory by the model we outlined would cause them no end of problems'"), *and id.* at 324–26 ("In overwhelming numbers doctors made the same [fatal error of logic] as undergraduates."); *cf.* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 377–78, 381 (2011) (maintaining the inherent irrationality of humankind).

504 Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, FSU College of Law, Public Law Research Paper No. 136, at 3–4 (2004) (stating the obvious); *but see* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1160 (2003) (attempting to respond to the general rejection of their theory that "libertarian paternalism seems to be a contradiction in terms"). There is only one exception to the irrational exercise of Cass R. Sunstein in attempting to convince lawyers to administer oxymoron as rational, and that is that he is exercising the kind of false reason that Hobbes himself invoked—an individual-sovereign reason that seeks to corrupt the common reason of an entire society. Crimmins, *Bentham and Hobbes*, *supra* note 183, at 688 (quoting HOBBES, A DIALOGUE, *supra* note 194, at 62) (noting that Hobbes rejected the reason of both individuals and of society as a whole, preferring "the natural reason of the sovereign, the 'King's Reason'"—which is a particular individual's reason); *see* Joshua J. Schroeder, *Why Cost/Benefit Balancing Tests Don't Exist: How to Dispel a Delusion that Delays Justice for Immigrants*, 125 W. VA. L. REV. 183, 220 (2022) [hereinafter Schroeder, *Why*] (noting how Cass R. Sunstein's approaches are "the product of '*individual reason—that unrefined reason, which only received the unaccountable consent of only one person, the judge*'"—which is similar to Hobbes's natural reason of the sovereign).

Rather, as Hobbes himself showed, Sunstein and Vermeule are being led to their paradoxical conclusions through the contradictory emotions of pride and dejection.[505] Hobbes claimed that pride and dejection are the same emotional experience, and that their simultaneous appearance among humans proves humankind's inherent insanity as a matter of the Christian dogma of original sin.[506] Thus, it is helpful to examine the Sunstein/Vermeule pairing as one in the same emotional example, while each accentuate the opposite of the pair.[507]

Sunstein tends toward dejection and disillusionment with society, and thus he finds the apparent organization of cost/benefit balancing tests soothing.[508] It doesn't matter whether his penchant for balancing tests actually results in increased utility—all that matters is that utility *appears* to Sunstein through his cost/benefit thought processes causing him to be soothed and comforted.[509] Lulu Miller's thought provoking study of David Starr Jordan's psychological reasons for obsessively collecting fish samples explains this likely theory.[510]

By great contrast, Vermeule tends toward pride and presumption in the face of overwhelming odds.[511] He likely sees himself as the captain of a ship

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[505] HOBBES, LEVIATHAN, *supra* note 5, at 46–48, *addressed by* Schroeder, *Why*, *supra* note 504, at 50–52, *and* Schroeder, *Leviathan*, *supra* note 90, at 143.

[506] HOBBES, LEVIATHAN, *supra* note 5, at 46–48, 327; Schroeder, *The Dark*, *supra* note 6, at 328.

[507] HOBBES, LEVIATHAN, *supra* note 5, at 46–48; *see* Schroeder, *Why*, *supra* note 504, at 50–54.

[508] *Compare* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. L. STUD. 1059, 1068 (2000) [hereinafter Sunstein, *Cognition*] (noting his desire to confirm that "the danger is actually quite low" by using cost/benefit analyses to "plac[e] the various effects on-screen"), *with* MILLER, *supra* note 10, at 14–15, 97–106 (explaining why collecting knowledge soothed the anxieties of the person collecting it, without necessarily increasing his reasonableness); *cf.* Schroeder, *Why*, *supra* note 504, at 44 n.272.

[509] It does not actually matter to Sunstein whether his cost/benefit processes actually result in order or increased reasonableness, in fact, as long as everything is placed "on-screen" and Sunstein is allowed to know the results, it would not matter to him if they showed no escape from total destruction of the human race. Sunstein, *Cognition*, *supra* note 508, at 1068 (showing that the object of Sunstein's systems is increased knowledge, not reason or the ability to make more rational choices). Wherever reason may require a leap of faith or trust in intuitive emotional leadings, Sunstein would likely oppose reason. *Id.*

[510] MILLER, *supra* note 10, at 14–15, 97–106.

[511] *See, e.g.,* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 17 (2022) (labeling practically everybody else's view in America a "vice," and seeing his views as virtuous, and proceeding to speak as though he is the final representative of the tradition of law itself). The way Vermeule arrived at the conclusion that all "progressives" are legal positivists and opposed to the classical tradition of law, unlike him, was a common equivocation of the term "progressive," such that Vermeule is both a progressive in the classical/historical sense (and therefore a legal positivist, though he denies it), and not a progressive in the modern sense, as that term now means, simply, liberal. *Id.* at 17, 34, 40 (both denying he is a progressive, and relying on the new deal era progressivism, and thereby legal positivism); *see* Istre, *supra* note 364, at 191 (recognizing Vermeule as an example of Bull Moose progressivism (citing Vermeule, *Beyond*, *supra* note 4)); *cf.* Joshua J. Schroeder, *Conservative Progressivism in Immigrant Habeas Court: Why* Boumediene v. Bush *is the Baseline Constitutional Minimum*, 45 THE HARBINGER 46, 51 n.13 (2021) [hereinafter Schroeder, *Conservative*] (generally explaining the common conservative equivocation regarding progressivism).

sailing through a hurricane in uncharted waters that only he can possibly navigate successfully, and thus he throws together whatever he can and calls it the answer for our age.[512] Whatever is in his way, like silly rights or liberties, he quickly denounces as frivolous and greedy without conceiving why even he might need what he denounces.[513]

This pair belongs together, as they demonstrate a certain form of irrational madness that is prevalent in the United States, however, they do not prove the inherent insanity of humankind.[514] Hobbes discounted the virtue of humility, and doubted that humanity might prove enough humility to avoid his charge of madness.[515] If the people of the United States, flawed as they are, prove that they are capable of even the shadowed beginnings of humility they will demonstrate that their present Hobbesian government does not deserve them.[516]

Both Biden and Trump have followed Sunstein and Vermeule into the abyss of Hobbesian utopias that seek to perfect humanity in their vices, because they cannot be perfect in their virtues.[517] The Puritan disappointment in the lack of perfection in humanity, continues to drown us in Hobbesian madness.[518] But if the present generation in the United States decided that imperfect human virtues are sufficient, then all that Hobbes prophesied about regarding the absolute destruction of humans in free governments may continue to be disproven in America.[519]

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512 *See, e.g.,* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 151 (2011) ("Given that the constitution is like the proverbial ship at sea that is constantly altered and rebuilt, implementing merely part of the original blueprint can have disastrous consequences, in light of intervening alterations to other parts of the structure.").

513 Vermeule, *Beyond*, *supra* note 4 (characterizing individual rights as greedy).

514 *Compare* SUNSTEIN & VERMEULE, *supra* note 43, at 24, 113, *with* HOBBES, LEVIATHAN, *supra* note 5, at 46–48 (defining "Madnesse").

515 HOBBES, LEVIATHAN, *supra* note 5, at 46–48, *addressed by* Schroeder, *The Dark*, *supra* note 6, at 328.

516 *See, e.g.,* Schroeder, *We Will*, *supra* note 172, at 64 (demonstrating how Americans can contest Hobbes's charge of "Madnesse").

517 *See* Schroeder, *The Dark*, *supra* note 6, at 327 ("Prior to the founding of the United States, the Puritans rejected flawed, human virtues and embraced the Platonic pursuit of perfection, which became central to Hobbes's rational theory of inherent human madness.").

518 *See, e.g., id.* at 355 ("we continue to chase perfect crimes over imperfect justice as Flannery O'Connor and Octavio Paz observed over sixty-five years ago"); HOBBES, LEVIATHAN, *supra* note 5, at 46–48.

519 *Id.* at 327 ("Our best hope is only a flawed kind of virtue rising from tar-waters. Accepting the flaws of human virtue is, if we believe O'Connor and Baldwin's prognoses, essential to our eventual success.").

CONCLUSION: HOW TO ASSERT THE PREEXISTING RIGHT TO ASSERT LEGAL POSITIVISM

The Proverbs say to love your enemy, "[f]or in so doing, you will heap burning coals on his head."[520] Thus, it may be wise to raise a defense of the natural right of legal positivists to assert legal positivism.[521] Such a natural law defense of legal positivism is like opposing the suicidal ideations of legal positivists' own theories, because legal positivists paradoxically deny that they possess a right to assert legal positivism.[522]

Under the natural "freedom of mind" vindicated by Phillis Wheatley, each person has an inalienable right to imagine a better world in order to take meaningful action to help improve society.[523] As legal positivists appear especially interested in unlocking the potential of the human imagination, it can be powerful to raise a natural law defense of the imagination as demonstrated by Wheatley and Cicero.[524] For the natural law is a reliable key to unlock the dreams of the people.[525]

Along with one's freedom of mind, which can be considered part and parcel with the First Amendment freedom of religion, one also has the freedom of speech to express one's dreams with others.[526] These rights were not created by the First Amendment; they were recognized by the First Amendment as preexisting rights.[527] These were the rights exercised by the

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520 *Proverbs* 25:21–22; *see, e.g.,* KESHA SEBERT, *Shadow*, *in* HIGH ROAD (Sony 2020) ("Ima love you even though you hate me.").

521 U.S. CONST. amend. I, *accord.*, ROGER WILLIAMS, THE BLOVDY TENENT OF PERSECUTION 2 (1644) ("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 they are only 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.").

522 *See* sources cited *supra* notes 41–42, 348.

523 Schroeder, *Leviathan*, *supra* note 90, at 158.

524 *Compare* Phillis Wheatley, *On Imagination* (1773), *in* WHEATLEY, *supra* note 60, at 65–68, *with* Cicero, *De Re Publica* 6 [*Scipio's Dream*].

525 *See, e.g.*, Phillis Wheatley, *On Imagination* (1773), *in* WHEATLEY, *supra* note 60, at 65–68 ("*Imagination!* who can sing thy force?"); Mercy Otis Warren, *A Political Reverie* (1774), *in* WARREN, *supra* note 42, at 188 (bearing witness to the dreams of the Americans, which "land[ed them] on a shore / Of which the dreamer never dreamt before"); Elizabeth Graeme Fergusson, *The Dream* (1768, 1790), https://commonplace.online/article/dream-1768-1790-elizabeth-graeme-fergusson/ ("A swift Succession thro my Brain there past, / The Wand of Morpheus oer my Eyes was cast, / Sweetly invaded my exhausted Frame / Sleep soft Composer! Uninvited came!").

526 U.S. CONST. amend. I.

527 WILLIAMS, *supra* note 521, at 2; *compare id.* at 225, 246–47, 435 (coining the "wall of separation, between the garden of the church and the wilderness of the world"), *with* Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802) (identifying the First Amendment freedom of religion with

founders when they created the nation, and as such they preexisted the Bill of Rights as explicitly confirmed by the Ninth Amendment as rights that already existed in human nature.[528]

According to legal positivism, rights (if they exist at all) are made by men, and exist only after society is set in motion; but legal positivists observe no apparent origin of that motion—its origin is dogma.[529] Hobbes wrote of a state of nature that is so horrible that all people would unanimously abandon it for the absolute government of a dictator where all laws are made by men, but he also didn't actually believe in a state of nature.[530] Rather, Hobbes asserted an imaginary state of nature as dogma in order to manipulate the people into adopting his form of government as dogma.[531]

In the United States, legal positivism exists by grace.[532] In a government built upon natural liberty and peace, Hobbesian legal positivism may be discussed and adopted under generous natural law precepts that contradict Hobbes's state of nature.[533] Thus, American legal positivists often attempt to destroy the very rights they depend upon when they assert legal positivism, that is, by asserting that natural law protections do not exist they are availing themselves of certain natural rights to speak and think freely.[534]

It would, perhaps, be easiest to label them all hypocrites in the style of Eugene V. Debs who hurled such accusations at Theodore Roosevelt and other capitalists, but it is likely more effective to acknowledge the preexisting

Williams' wall when he called it "a wall of separation between Church & State" (quoting U.S. CONST. amend. I)).

528 U.S. CONST. amends. I, IX; *see, e.g.,* OTIS, *supra* note 59, at 26 (naming "the liberty of speech, and of the Press" as "very important branches" of the preexisting rights of the American Colonists).

529 HOBBES, LEVIATHAN, *supra* note 5, at 208 (noting that rights and liberties are the absence of law commemorated by charters, which "are Donations of the Soveraign; and not Lawes, but exemptions from Law").

530 *Id.* at 83 (imagining human nature as "such a warre, as if of every man, against every man"); *id.* at 85 (admitting that "there had never been any time, wherein particular men were in a condition of warre one against another").

531 *Id.* at 83–85.

532 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring that government legitimacy depends upon the government's respect for preexisting, inalienable, natural human rights); U.S. CONST. amends. I–X (securing preexisting human rights); Judiciary Act of 1789, 1 Stat. 73 (facilitating each individual's access to the federal courts to secure the rights required by the Declaration of Independence and secured by the U.S. Constitution); *cf.* Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 CIN. L. REV. 1, 3 (1990) (explaining the triad of founding documents).

533 *See, e.g.,* WILLIAMS, *supra* note 521, at 2 (discussing the right to believe in and practice any religion one wants, which must include the state worship of Hobbes and his followers); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. I.

534 *Compare* U.S. CONST. amend. IX (stating that preexisting rights not named in the Bill of Rights, including the specific right to study and recommend Hobbesian ideology, are retained by the people such that they cannot be overridden by mere laws), *with* HOBBES, LEVIATHAN, *supra* note 5, at 208 (stating that liberties can only exist where the law is silent, which is the exact opposite system of what the U.S. Constitution established).

human right to be a hypocrite and to be irrational and to be strange, if one so wishes to be.[535] Nature makes room for all that is in nature; including intersex people, all the shades of our skin tones, and much more.[536] Nature includes contradictory and paradoxical things, including whimsical ideas that in one context might be good fun, but in the wrong context could wreak destruction.[537]

As Dave Eggers masterfully demonstrated in *The Every*, perhaps human beings do not want choices and feel freer when they are told what to think and do.[538] Perhaps the old distinctions between liberals and conservatives may fall away as anxiety ridden Americans may support any dictator that manages to seize power as long as they promise to stabilize the nation.[539] It has happened before, as it did in England with William the Bastard and in Mexico with Emperor Maximilian I.[540]

We cannot know fully what legal positivism represents as it is purposely hidden behind masks of neutrality.[541] In England it was Cromwell, in France

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[535] *See* sources cited *supra* notes 533–34; KESHA SEBERT, *Only Love Can Save Us Now*, *in* GAG ORDER (Sony 2023) ("Don't f***ing tell me that I'm dealing with reason."); GERARD MANLEY HOPKINS, *Pied Beauty*, *in* POEMS AND PROSE OF GERARD MANLEY HOPKINS 30–31 (W. H. Gardner ed., 1954) (demonstrating how some things that are profoundly beautiful are contradictory and their purpose in human societies and in nature does not seem to be connected to whether they are reasonable or not); HOBBES, LEVIATHAN, *supra* note 5, at 4 (explaining that Hobbes's *Leviathan* itself is an object of wonder that exists for purposes wholly outside of the ambit of reason or logic).

[536] KESHA SEBERT, *Rainbow*, *in* RAINBOW (Sony 2017); *see* Flannery O'Connor, *A Temple of the Holy Ghost*, *in* THE COMPLETE STORIES 246 (1971) (acknowledging the existence of intersex people in nature, as created by God); HOPKINS, *supra* note 535, at 30–31; George Frederick Root & Clare Herbert Woolston, *Jesus Loves the Little Children* [1861], HYMN TIME, http://www.hymntime.com/tch/htm/j/e/s/l/jesloves.htm (last visited Apr. 23, 2023). The idea of nature favoring certain races or sexualities or genders has paradoxically been used by legal positivists to advance totalitarian laws in the past, but in actuality nature facilitates all sorts of inter-racial, homosexual, transsexual, and intersexual experiences, including in love and sex, and, to be sure, nature even made the human imagination along with its capability of thinking of yet more ways to do things that may not have been done before. *Cf. The Seagulls*, RADIOLAB (June 2, 2023), https://radiolab.org/podcast/seagulls.

[537] CARROLL, *supra* note 26, at 124 (noting a vicious queen in the imagination of a girl, where the queen cannot actually kill anybody and where she might be fun to think about).

[538] EGGERS, *supra* note 2, at 298 ("They wanted to be told what to do. They were free from freedom. The limitless choices of the world were suddenly made for them. Order was promised.").

[539] *See id.* at 124, 562.

[540] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 22–24, 136 (2019); PAZ, *supra* note 3, at 125 (unlike England, in Mexico the attempt to export dictators from France ultimately failed with similarities to how the royal line of France itself ended "with the execution of Louis XVI"); *cf.* Schroeder, *Leviathan*, *supra* note 90, at 4.

[541] *See, e.g.,* Anand Giridharadas, *The Two Elizabeth Warrens: Bankruptcy Law Liz and Michalob Ultra Betsy*, TIME MAG. (Mar. 11, 2019), https://time.com/5549223/the-two-elizabeth-warrens-bankruptcy-law-liz-and-michelob-ultra-betsy/; Thomas Meaney, *Trumpism After Trump*, HARPER'S MAG. (Feb. 2020), https://harpers.org/archive/2020/02/trumpism-after-trump/ (noting that most supporters of Trump "straddled more than one category"); *cf.* Mark Hendrickson, *The Legal Positivism of the Elite: A Slippery Slope Toward Tyranny*, FORBES (Aug. 28, 2013),

it was Bonaparte, and in America it could be Trump, or DeSantis, or some heretofore unmade tech billionaire like Mae Holland.[542] Perhaps they will build Panopticon prisons,[543] or install physical veils of ignorance in American courtrooms,[544] we cannot guess the arbitrary ends their whimsy will chase and that is the point.[545]

Natural law must allow individuals to speak of and believe ideas that may threaten the idea of natural law as commemorated by First Amendment jurisprudence.[546] It is always a possibility in a free country that the people will see their present situation as so hideous that they would rather sell out future generations for lunch.[547] However, the people may also decide to return to the natural law of liberty and peace, imagine a new way forward, and take meaningful action to make it so.[548]

This article has shown how Hobbesian lies devour themselves.[549] A people that once chose these lies are always free by nature to renounce their

https://www.forbes.com/sites/markhendrickson/2013/08/28/the-legal-positivism-of-the-elite-a-slippery-slope-toward-tyranny.

[542] HILL, *supra* note 24, at 273; Asawin Suebsaeng, *Trump Family Dunks on DeSantis: You're 'Stealing' Our Bit!*, ROLLING STONE (Aug. 28, 2022), https://www.rollingstone.com/politics/politics-news/trump-desantis-rip-off-complaints-1234583383/; EGGERS, *supra* note 2, at 573.

[543] WILLIFORD, *supra* note 46, at 41, 1 (noting "Bentham's struggle to make his Panopticon prison reform plan a reality"); Seelie, *supra* note 131; Enrigue, *supra* note 226.

[544] *See* Pascal-Emmanuel Gobry, *Hey, Kids! Let's Take A Trip Behind The Veil of Ignorance!*, FORBES (Jan. 6, 2015), https://www.forbes.com/sites/pascalemmanuelgobry/2015/01/06/hey-kids-lets-take-a-trip-behind-the-veil-of-ignorance.

[545] CARROLL, *supra* note 26, at 124.

[546] Texas v. Johnson, 491 U.S. 397, 417 (1989), *extending* Schacht v. United States, 398 U.S. 58, 63 (1970) ("The final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment. To preserve the constitutionality of § 772(f) that final clause must be stricken from the section.").

[547] *See, e.g.,* Letter from Phillis Wheatley to Obour Tanner (Oct. 30, 1773).

[548] Phillis Wheatley, *On Imagination* (1773), *in* WHEATLEY, *supra* note 60, at 65–68*; 1 MONTESQUIEU, supra note 177, at 3–4 (citing and refuting* HOBBES, LEVIATHAN, *supra* note 5, at 64–65*); see Genesis 32:28 (noting that humans can struggle "with God and with humans and . . . overcome"); cf. ELIZABETH GILBERT, BIG MAGIC 221–22 (2016) ("As my friend the radio personality Caroline Casey always says: 'Better a trickster than a martyr be.'" (quoting Caroline Casey, Rising Woofiness of Women—Caroline Hosts Elizabeth Gilbert Etc., COYOTE NETWORK NEWS (July 3, 2014),* https://coyotenetworknews.com/radioshow/rising-woofiness-of-women/*); Karla V. Zelaya, Sweat the Technique: Visible-izing Praxis Through Mimicry in Phillis Wheatley's "On being Brought from Africa to America" 51 (Nov. 2015) (Ph.D. dissertation, Univ. of Massachusetts Amherst),* https://scholarworks.umass.edu/dissertations_2/484/ *(explaining the origin of Lauryn Hill's wisdom from Final Hour, that "it ain't what you cop, it's about what you keep" such that "with each act of copping—with each 'sip' from the literary chalice of whiteness that [Phillis Wheatley] took, she '[baptized] her lips'—making everything anew").*

[549] *See supra* notes 347–48 and accompanying text; *see, e.g.*, Schroeder, *The Boomer*, *supra* note 300, at 28 ("Perhaps his most vicious rebukes were trained on Justice Kennedy, with whom Scalia maintained an acrimonious relationship."); *cf.* MILLER, *supra* note 10, at 159.

past actions, as the people can always make themselves free if they choose.[550] However, renouncing Hobbes only after allowing Hobbesian falsehoods to destroy a two-century old republic would be galling to witness.[551] Fortunately, it appears that there is still time for the people of the United States to repent and make things right.[552]

[550] OTIS, *supra* note 59, at 126 ("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.").

[551] *See* Joshua Zeitz, *Ask the 'Coupologists': Just What Was Jan. 6 Anyway?*, POLITICO MAG. (Aug. 19, 2022), https://www.politico.com/news/magazine/2022/08/19/jan-6-coup-authoritarianism-expert-roundtable-00052281 (confronting "the myth of national innocence").

[552] *Id.*; *Matthew* 13:15–16; *but see* Ed Pilkington, *'US Democracy Will Not Survive For Long': How January 6 Hearings Plot a Roadmap to Autocracy*, THE GUARDIAN (July 24, 2022), https://www.theguardian.com/us-news/2022/jul/23/january-6-hearings-us-democracy-roadmap-autocracy.