ARTICLES

JUSTICE OLIVER WENDELL HOLMES AND CHIEF JUSTICE JOHN ROBERTS'S DISSENT IN *OBERGEFELL V. HODGES*

STEVEN G. CALABRESI* & HANNAH M. BEGLEY**

In his dissenting opinion in *Obergefell v. Hodges*[1]—which was joined by Justices Antonin Scalia and Clarence Thomas, but not by Justice Samuel Alito—Chief Justice John Roberts relied heavily on the authority of Justice Oliver Wendell Holmes and in particular on his dissent in *Lochner v. New York*.[2] Although Justice Kennedy's opinion in *Obergefell v. Hodges* is very weak in its reasoning, jurisprudence, and writing, we agree with its conclusion, not for the reasons that he gives, but for originalist reasons that we have spelled out in an essay titled "Originalism and Same Sex Marriage,"[3] which we are publishing as a forthcoming law review article with the *University of Miami Law Review*. The purpose of this essay is not to rejoin the same-sex marriage debate, but instead to express our strongly held disagreement with the championing, in Chief Justice John Roberts's *Obergefell* dissent, of Justice Oliver Wendell Holmes's dissent in *Lochner*. The Chief Justice is not the only leading conservative who has cited Justice Holmes's opinion admir-

* Clayton J. and Henry R. Barber Professor of Law, Northwestern University; Visiting Professor of Law, Fall 2013–2015, Yale University; Visiting Scholar, 2015–2016 Brown University. This essay is dedicated to Akhil Amar and Gary Lawson.

** Class of 2013, Brown University.

[1] __ U.S. __, 135 S. Ct. 2584 (2015).

[2] 198 U.S. 45 (1905).

[3] Steven G. Calabresi & Hannah M. Begley, *Originalism and Same Sex Marriage* (Northwestern Public Law Research Paper No. 14-51, Oct. 13, 2014), http://ssrn.com/abstract=2509443.

ingly. Others, including Justice Scalia and Judge Robert Bork, have done so as well, although not recently. In fact, however, Justice Holmes's *Lochner* dissent is not a serious originalist effort to analyze the legal questions that it purports to answer. Rather, it is one of the best written—dare we say glibbest—exemplars of the wrong way to decide constitutional cases, with barely a reference to the text or history of the constitutional provision at issue in the case. It is also an exemplar of a largely anti-constitutional and anti-legal jurisprudence that most conservative legal thinkers today reject. It is time for judges and others who are serious about the enterprise of constitutional interpretation to declare an end to their infatuation with this opinion and its author and instead engage seriously with the text and history of the Fourteenth Amendment in cases where the question of its meaning is at issue.

In Part I of this Article, we will trace the intellectual history that has led to the lionization of Justice Holmes by liberals and conservatives alike. In Part II of this Article, we will discuss Justice Holmes's dissent in *Lochner v. New York*. In Part III of this Article, we will discuss Justice Holmes's deeply flawed legacy on the Supreme Court. Finally, in Part IV, we will make concrete recommendations about how to rectify the historical errors that have been propagated about Justice Holmes.

I. The Lionization of Justice Holmes

The lionization of Justice Oliver Wendell Holmes is deeply rooted in the Progressive Era critique of the American Constitution and the critique of such Founding Fathers as George Washington, James Madison, Alexander Hamilton, and John Marshall. The Progressive Era, as most Americans know it today, was largely launched by Woodrow Wilson, who was born and raised in Staunton, Virginia, as the son of two parents who supported slavery and owned slaves.[4] Wilson's father served as a chaplain in the Confederate Army.[5] Wilson himself grew up in a culture that was deeply racist, and he held racist views throughout the rest of his life.[6] His championship of national self-determination after World War I was affected by a lingering sympathy for the Confederate States of America, in whose army his father had served.[7] By many accounts, Woodrow Wilson did not grow up believ-

[4] John Milton Cooper, Jr., Woodrow Wilson: A Biography 13–25 (2009).
[5] *Id.* at 17.
[6] *Id.* at 24–25.
[7] *See id.* at 6.

ing, as Thomas Jefferson wrote, "all men are created equal."[8] Instead, on issues of race, he agreed with Vice President Alexander Stephens of the Confederacy, who responded to the Declaration of Independence by saying that "[o]ur new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery–subordination to the superior race–is his natural and normal condition."[9]

In 1885, Woodrow Wilson published *Congressional Government: A Study in American Politics*.[10] The book was a scathing indictment of American politics under the administration of President Chester Arthur, and it complained that the Framers' Constitution of checks and balances rendered the U.S. government too cumbersome and too gridlocked to effectuate sweeping social change.[11] In this book, Wilson called for fusing the legislative and executive powers together into one British-style parliamentary government.[12] Advocacy of parliamentary government and of government by small expert commissions became a staple of Wilsonian politics. As it happened, the period from 1880 on was highly supportive of Wilson's rejection of the idea that all men are created equal and have natural and inalienable rights to life, liberty, and property. The Progressives believed, along with Jeremy Bentham, that "natural rights [was] . . . 'nonsense upon stilts.'"[13] Many also agreed with Francis Galton—Charles Darwin's half-cousin—that nations should apply the principle of eugenics to the breeding of human beings.[14] The principle of eugenics held that those who are feeble-minded should be compulsorily sterilized so that they will not pass on their feeble-minded genes.[15] For somewhat related reasons, many Progressives believed that those who were smart and expert should be appointed to independent regulatory agencies because they knew bet-

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[8] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see* Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Concept*, 70 AM. J. INT'L L. 1, 6 (1976).

[9] Alexander Stephens, The Cornerstone Speech at the Athenaeum in Savannah, Georgia (Mar. 21, 1861).

[10] WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (15th ed. 1901).

[11] *See generally id.*

[12] *See id.* at 298.

[13] Hugo Adam Bedau, *Anarchical Fallacies: Bentham's Attack on Human Rights*, 22 HUM. RTS. Q. 261, 263 (2000).

[14] Note, *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1579 (2008).

[15] *Id.* at 1579–80.

ter than the American people what was best for the nation.[16] The late nineteenth and early twentieth century Progressives rejected as a primitive fiction the Protestant Christian idea of the inherent equality of the priesthood of all believers and its rejection of the special status of popes and bishops.[17]

The Wilsonian Progressive worldview was not just an idiosyncratic idea of a Princeton graduate whose father served in the Confederate Army. It became the widespread view of the European and American intelligentsia, who looked at the Madisonian system of checks and balances as a cynical effort by rich merchants and slaveholders at the time of the American founding to protect their property from being redistributed to the poor.[18] Charles A. Beard made precisely this argument, which came to be the widely accepted public wisdom.[19] It was not until Forrest McDonald's *We The People: The Economic Origins of the Constitution* that American legal historians came to realize that Charles Beard's work was badly flawed,[20] and it was not until the 1980s, during Ronald Reagan's presidency, that the Framers' Constitution of checks and balances came to be again appreciated, at least in some academic quarters, as the work of genius that many, including us, believe it to be.

Inevitably, the Progressive worldview had an impact on American constitutional law. The seminal moment came in 1893 at the World's Columbian Exposition, which was held in Chicago to celebrate the 400th anniversary of Christopher Columbus's discovery of America.[21] The speaker was a prominent Harvard Law School Professor, James Bradley Thayer, who published *The Origin and Scope of the American Doctrine of Constitutional Law* in the *Harvard Law Review*.[22] James Bradley Thayer, believing that the original U.S. Constitution was, for the most part, a bad document, argued that judges should only hold laws or

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[16] *See* Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 441 (2010).

[17] Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein's* The Classical Liberal Constitution, 8 N.Y.U. J.L. & LIBERTY 839, 909, 922 (2014).

[18] *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION 294–95 (1913).

[19] *Id.* at 160–65.

[20] FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 400 (1958).

[21] *The World's Colombian Exposition*, CHI. HIST. SOC'Y (1999), https://www.chicagohs.org/history/expo.html.

[22] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 134, 144 (1893).

executive actions to be unconstitutional if the political branches made *a clear mistake*.[23] Deference to the elected branches thus entered the American constitutional lexicon as part of the Progressive Era attempt to belittle and diminish the U.S. Constitution as compared to, say, the United Kingdom's parliamentary constitution, which was thought to be superior. Thus, even if the U.S. Constitution did not allow for the creation of independent regulatory agencies, this inconvenient fact was to be overlooked if some rational basis could be dreamed up for upholding the creation of such agencies. In the same vein, if the U.S. Constitution does not allow Congress to regulate the growing of wheat on one's own farm for one's own use, then congressional power can expand to cover this conduct if doing so affects national wheat prices in the aggregate.[24] Thus, Thayerian deference became, in practice, a blank check that allowed for the expansion of congressional power contrary to the express commands of the Constitution.

Justices Oliver Wendell Holmes and Felix Frankfurter championed Thayerian deference on the Court.[25] Thayer and Holmes served together as professors at Harvard Law School,[26] where their cynicism about the U.S. Constitution deepened into a legal realist nihilism that American law is still struggling to overcome. Neither Thayer nor Holmes believed in originalist interpretations of the law; they believed instead in the near total power of the political branches of the government.[27] Justice Felix Frankfurter was their disciple at Harvard Law School, and he ultimately succeeded them in championing judicial deference to the legislature on the U.S. Supreme Court.[28]

Justice Stephen Breyer is the modern-day heir to this tradition on the Supreme Court from the left. Justice Breyer deeply admires Holmes and believes the Court has little to no role to play in protecting the power of the states or the separation of powers.[29] Justice Breyer

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[23] *Id.* at 136–37.

[24] Wickard v. Filburn, 317 U.S. 111, 122 (1942).

[25] Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 526, 530 (2012).

[26] Sanford Byron Gabin, *Judicial Review, James Bradley Thayer, and the "Reasonable Doubt" Test*, 3 HASTINGS CONST. L.Q. 961, 961 (1976); *Biographies of the Robes: Oliver Wendell Holmes*, PBS (Dec. 2006), http://www.pbs.org/wnet/supremecourt/capitalism/robes_holmes.html.

[27] Posner, *supra* note 25, at 527.

[28] *Id.* at 530.

[29] *See* United States v. Lopez, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. 561 U.S. 477, 516–17 (2010) (Breyer, J., dissenting).

is himself a former Harvard Law School professor.[30] In general, he likes big government and expert commissions, and he served on one such expert commission—the U.S. Sentencing Commission.[31] Justice Breyer shares the Progressives' skepticism about law as an independent discipline[32]–although not, of course, their support for eugenics and outright racism that Justice Holmes embraced. His office at the Supreme Court is decorated with drawings of Paris, and he is so fluent in French that he has appeared and spoken French on lengthy television segments in that country.[33] Steven Erlanger of the *New York Times* reports that on April 8, 2013, Justice Breyer

> was inducted on Monday as a foreign member of the France's Académie des Sciences Morales et Politiques, one of the five academies of the Institut de France . . . . The academy's membership is limited to [fifty] French men and women and [twelve] foreign associated members; Justice Breyer was chosen to replace Otto von Habsburgh, the last crown prince of Austria-Hungary and later a noted European-minded legislator, who died in July 2011.[34]

There is some irony in this because as the first serious American Progressive, Woodrow Wilson abolished both the Austro-Hungarian Empire and the Ottoman Empire at the end of World War I.[35] Woodrow Wilson did so in the name of a form of national self-determination, which Wilson felt had been denied to the Confederacy, in whose army his father served.[36] Consider for a moment whether it was wise for Woodrow Wilson to carve Turkey, Iraq, Syria, Lebanon, and Palestine into separate countries. Consider also whether a democratized Austro-Hungarian Empire might provide support from Russian intervention into Eastern Europe. Professor Calabresi believes that only a

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[30] *Biographies of Current Justices of the Supreme Court: Stephen G. Breyer*, SUP. CT. OF THE U.S. (Jan. 17, 2016), http://www.supremecourt.gov/about/biographies.aspx.

[31] *Id.*

[32] David Bernstein, *Breyer's Dangerous Dissent in McCutcheon*, WASH. POST (Apr. 2, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04. . .yers-dangerous-dissent-in-mccutcheon-the-campaign-finance-case/.

[33] Robert Barnes, *Breyer Says Understanding Foreign Law is Critical to Supreme Court's Work*, WASH. POST (Sept. 12, 2015), https://www.washingtonpost.com/politics/courts_law/breyer-says-u. . .work/2015/09/12/36a38212-57e9-11e5-8bb1-b488d231bba2_story.html.

[34] Steven Erlanger, *Justice Breyer Inducted Into French Academy*, N.Y. TIMES (Apr. 8, 2013), http://www.nytimes.com/2013/04/09/world/europe/justice-breyer-inducted-into-french-academy.html.

[35] COOPER, *supra* note 4, at 6.

[36] *Id.* at 17 (noting Wilson's father's service in the Civil War); Valerie Epps, *Secession, Stagnation and the State-Centered Version of International Law*, 21 ILSA J. INT'L & COMP. L. 307, 308 (2015).

Princeton University president with a PhD in political science and a hatred for James Madison could have created such a mess.

Anyone who wants confirmation of Woodrow Wilson's views on race should read *The Long-forgotten Racial Attitudes and Policies of Woodrow Wilson,* written by Boston University historian William R. Keylor,[37] which was called to our attention by Georgetown Law Professor Randy Barnett. When Woodrow Wilson arrived in Washington on March 4, 1913, to serve as president, his first move in office was to segregate the previously integrated federal workforce.[38] Separate bathrooms, cafeterias, and screens were set up to segregate white and African-American federal employees, according to the research of Professor Keylor.[39] A leader in this effort was Woodrow Wilson's son-in-law, William McAdoo of Tennessee.[40] Professor Keylor goes on to note that the infamous racist film "Birth of a Nation" was given a private showing at the White House under the Wilson Administration, and that the movie was based on a novel written by a close friend of Wilson's, which praised the Ku Klux Klan ("KKK") and vilified African-Americans and the Reconstruction Era.[41] W.E.B. DuBois denounced Wilson for his outright racism, and the film "Birth of a Nation" led to a second founding of the KKK and an epidemic of lynching African-Americans in the South.[42]

II. Justice Holmes's Dissent in *Lochner*

Justice Holmes's dissent in *Lochner* occupies a crucial place in the left's account of American law, from the time it was handed down to the present. President Theodore Roosevelt appointed Justice Holmes to the Supreme Court.[43] Theodore Roosevelt was, along with Woodrow Wilson, a strong Progressive—who happened to draw bigger and more boisterous crowds than did Woodrow Wilson.[44]

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[37] William Keylor, *The Long-Forgotten Racial Attitudes and Policies of Woodrow Wilson*, Bos. U. Pub. Rel. (Mar. 4, 2013), http://www.bu.edu/professorvoices/2013/03/04/the-long-forgotten-racial-attitudes-and-policies-of-woodrow-wilson/.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] W.E.B. DuBois, Another Open Letter to Woodrow Wilson (Sept. 1913), *in* 5 The Crisis 212, 236 (Mar. 1913); John Hope Franklin, *"Birth of a Nation"—Propaganda as History*, 20 Mass. Rev. 417, 430 (1979).

[43] Marcia Jean Speziale, *Oliver Wendell Holmes, Jr., William James, Theodore Roosevelt, and the Strenuous Life*, 13 Conn. L. Rev. 663, 665 (1981).

[44] Julie A. Oseid, *The Power of Zeal: Teddy Roosevelt's Life and Writing*, 10 Legal Comm. & Rhetoric: JAWLD 125, 126 (2013).

When *Lochner v. New York* was handed down in a five to four decision, with Theodore Roosevelt's appointee Oliver Wendell Holmes in dissent, Roosevelt made the case the poster child of everything he disliked about the U.S. Constitution, the federal judiciary, and the constitutional system of checks and balances. Three years later, Theodore Roosevelt wrote that "[i]f the spirit which lies behind [*Lochner v. New York*] obtained in all the actions of the Federal and State Courts, we should not only have a revolution, but it would be absolutely necessary to have a revolution, because the condition of the worker would become intolerable[.]"[45]

Everyone on the left since 1905 has hated *Lochner*. To those who support maximum hours of work laws or minimum wage laws, *Lochner* is unsurprisingly the object of hatred. The case was rendered a dead letter in *West Coast Parish v. Hotel*,[46] and it was formally overruled in *Ferguson v. Skrupa*[47] by Justice Hugo Black. When the Warren Court reinvented substantive due process in *Griswold v. Connecticut*,[48] all of the Justices in the majority went out of their way, except for Justice Harlan, to claim they were not involved in Lochnerizing.

It is crystal clear why the Progressives and their New Deal and Great Society descendants hated *Lochner* and why they loved Holmes's dissent in the case. The Harlan dissent in *Lochner* is a legal document with no quips or one-liners in it to use in stirring up the oppressed masses. Holmes's brief dissent is full of quips, most famously that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[49] If you are a soapbox orator like Theodore Roosevelt, Holmes's dissent gives you the ammunition you need to fire up the masses.

But why do conservatives admire Justice Holmes's *Lochner* dissent?

The answer lies in the fact that American conservative and libertarian legal thought has undergone revolutionary changes in the last half-century. Post 1960 American conservative legal thought was, in its early days, primarily a reaction to a number of major decisions of the Warren Court, particularly in criminal procedure.[50] Conservatives'

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[45] D. Grier Stephenson, Jr., *The Supreme Court and Constitutional Change:* Lochner v. New York *Revisited*, 21 VILL. L. REV. 217, 218 n.10 (1976).

[46] 300 U.S. 379, 398–99 (1937).

[47] 372 U.S. 726, 730–31 (1963).

[48] 381 U.S. 479, 481–82 (1965).

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

[50] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 342–46 (1963).

strong opposition to these cases was framed in a number of different ways. One was that the Warren Court's decisions intruded on the role of the elected branches to set policy.[51] Another was that they were not written in the style of traditional legal arguments, but rather in the language of the Justices' policy preference.[52] A third was that they invented rights found nowhere in the Constitution.[53]

Many of these criticisms drew on or sounded a good deal like criticisms that Justice Felix Frankfurter and the second Justice Harlan had leveled at majority decisions that Frankfurter and Harlan argued were insufficiently deferential to the political branches.[54] But they also drew on criticisms that Justice Hugo Black had leveled at his colleagues in his originalist dissent in *Griswold v. Connecticut*, in which he accused his liberal colleagues of engaging in left-wing Lochnerizing.[55] Justice Black's jurisprudence, however, was quite non-Thayerian. He was a textualist who believed a Justice's duty was to enforce the words of the Constitution according to their original meaning.[56] His objection to *Griswold* and *Lochner* was not that they failed to defer to the legislative branch, but that the Court had struck down laws that were not contrary to the language of the Constitution.[57] He thought the Court had invented a doctrine of "substantive due process" that was nowhere to be found in the Fourteenth Amendment.[58]

Conservative criticism of the Court's jurisprudential approach became even more heated after the U.S. Supreme Court issued its seven to two ruling in *Roe v. Wade*,[59] creating a national right to have an abortion and displacing the abortion law of all fifty states.[60] Those who disagreed with the decision, including Professor Calabresi, believed that the Supreme Court had never before had the audacity to legislate so broadly in circumstances where the laws of every state in the union were fundamentally altered except in the *Dred Scott* case.

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[51] Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CAL. L. REV. 1101, 1104 (2012).

[52] *Id.* at 1103.

[53] *Id.* at 1105.

[54] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 269 (1962) (Frankfurter, J., dissenting).

[55] Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

[56] Michael Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 29 (1994).

[57] *Id.* at 40.

[58] *Id.*

[59] 410 U.S. 113, 115 (1973).

[60] *Id.* at 154–55, 163–64.

The basis for the criticism, however, continued to be something of a hodgepodge of two rather different arguments: (1) that the *Roe* decision was anti-democratic in that it was written by unelected judges who had failed to defer to the policy decisions of the elected legislatures of the several states (an echo of the Thayerian elements of Justice Holmes's *Lochner* dissent);[61] and (2) that it lacked any basis in the Constitution (an echo of Justice Black's *Griswold* dissent, emphasizing the lack of any broad "substantive due process" protection in the Constitution).[62] Further adding to the confusion, there may also have been some desire to hoist progressive defenders of the Warren Court on their own *Lochner* petard.

Two Justices dissented from *Roe v. Wade*: Justice Byron White and Justice William Rehnquist.[63] Both were, in their own way, disciples of Justice Frankfurter and therefore of Justice Holmes and of James Bradley Thayer as well. Justice White was a pretty quintessential Progressive and New Deal Era Supreme Court justice.[64] He had little use for federalism or for the separation of powers, and he tended to be a pure passive Thayerian in such cases,[65] although he was with the majority in holding the appointment provisions of the Federal Election Commission unconstitutional in *Buckley v. Valeo*.[66] His cardinal rule was that Congress could do whatever it wanted to do in the federalism and separation of powers area.[67] Justice White also had no patience for unenumerated constitutional rights, and on this, he was with Holmes in *Lochner*[68]—but more on Thayerian legislative supremacy grounds. Justice White was not, however, Thayerian in other areas. He regularly voted to strike down laws on the ground that they violated *Brown v. Board of Education*,[69] the one person, one vote doctrine, the First Amendment, and the Fourth and Eighth Amendments—including vot-

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[61] *Id.* at 174, 177.

[62] *Id.*

[63] *Id.* at 221 (White, J., dissenting); *Id.* at 171 (Rehnquist, J., dissenting).

[64] William Nelson, *Justice Byron R. White: A Modern Federalist and a New Deal Liberal*, 1994 BYU L. REV. 313, 319, 345 (1994).

[65] *Id.* at 333.

[66] 424 U.S. 1, 143 (1976) (per curiam).

[67] *See, e.g.*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 978–79 (1983) (White, J., dissenting) (rejecting the Court's finding that the veto mechanism violated the doctrine of separation of powers); New York v. United States, 505 U.S. 144, 203, 206, 210 (1992) (White, J., dissenting) (rejecting the Court's rigid obeisance to federalism).

[68] *See* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[69] 347 U.S. 483 (1954).

ing to hold that the death penalty for rape was unconstitutional.[70] Professor Calabresi believes that he had no theory of law by which he fit his decisions together, but simply was a Yale Law School legal realist who opined on his mostly New Deal-ish values.

Justice William H. Rehnquist arrived on the Supreme Court after clerking for New Deal Justice Robert Jackson.[71] Rehnquist was also very much influenced by Justice Holmes and Frankfurter, but he was a political conservative as well as a legal realist.[72] Over the course of his tenure on the Court, he came to increasingly decide cases as one might expect a legal realist with Thayerian sympathies and relatively pro-government conservative values to do. He did not think the Supreme Court ought to enforce the separation of powers, as he made clear in his opinions in *INS v. Chadha*[73] and in *Morrison v. Olson*.[74] He read the Bill of Rights and the Fourteenth Amendment very narrowly.[75] He did not favor an expansive reading of either the Free Exercise Clause of the First Amendment or of the Second Amendment,[76] as many conservatives do today. Rehnquist even voted to uphold an unconstitutional rent control ordinance that Justices Scalia and O'Connor would have struck down.[77]

Professor Calabresi is quite certain that former Chief Justice Rehnquist did not hate the U.S. Constitution the way the Progressives and Oliver Wendell Holmes did. Indeed, Justice Rehnquist thought that our constitutional system of checks and balances functioned pretty effectively on its own.[78] As a Justice, however, he was hesitant to have the Court play a strong role in checking the Congress, as he was too much of a legal realist and a supporter of judicial restraint to want to strike

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[70] Coker v. Georgia, 433 U.S. 584, 592 (1977).

[71] Phil Neal, *Justice Jackson: A Law Clerk's Recollections*, 68 ALB. L. REV. 549, 550 (2005).

[72] *See* Gerald R. Ferrara, *Ethics in Legal Education: An Augmentation of Legal Realism*, 18 PEPP. L. REV. 893, 894, 904 (1990–91); *see generally* Joan Biskupik, *Rehnquist Left Supreme Court With Conservative Legacy*, USA TODAY, http://usatoday30.usatoday.com/news/washington/judicial/supremecourtjustices/2005-09-04-rehnquist-legacy_x.htm (last updated Sept. 29, 2005, 2:15 PM) (discussing Justice Rehnquist's political affiliation).

[73] 462 U.S. 919, 1014 (1982) (Rehnquist, J., dissenting).

[74] 487 U.S. 654, 660 (1987).

[75] *See id.*; *Chadha*, 462 U.S. at 1013 (Rehnquist, J., dissenting).

[76] Thomas v. Review Bd., Ind. Emp't Sec. Div., 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).

[77] *See* Pennell v. City of San Jose, 485 U.S. 1, 18 (1987).

[78] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 632 (1977) (Rehnquist, J., dissenting); *see also* Kassel v. Consolidated Freightways Corp. of Del., 450 U.S. 662, 687 (1981) (Rehnquist, J., dissenting).

many laws down.[79] Moreover, as a Justice, he had little interest in the original meaning of the Constitution, the history of the Founding period from 1776 to 1791, or the history of Reconstruction and of the Fourteenth Amendment.[80] As a result of these various commitments, he was far more of a Thayerian than any kind of originalist. His answer to almost every social and economic problem he was presented with was to cite the *Williamson v. Lee Optical Co.*[81] rational basis test[82] because it kept the courts out of the policy-making business, without, as a general matter, having much interest in the text and original understanding of the Constitution itself.

Meanwhile, in academia, the prominent conservative legal scholar Raoul Berger led the conservative critique of the Court with a book he published in 1975 entitled *Government by Judiciary: The Transformation of the Fourteenth Amendment led the conservative critique of the Court.*[83] The book was a somewhat rambling indictment that challenged the correctness of *Brown I and II*, as well as almost all of the Supreme Court's Fourteenth Amendment case law from the one person, one vote cases to the incorporation of the federal Bill of Rights against the states following the adoption of the Fourteenth Amendment.[84] Raoul Berger's objections to these decisions were a mixed bag, jurisprudentially speaking. In part, he made a kind of originalist case, arguing for what he called "a jurisprudence of original intent."[85] He thought the legislative history of the Fourteenth Amendment suggested that public school segregation was perfectly constitutional and that *Brown v. Board of Education* and the one person, one vote cases—as well as the incorporation of the Bill of Rights cases—were all wrongly decided.[86] At the same time, Berger was an unrepentant Holmesian and Frankfurterian New Dealer, and much of the book makes Thayerian and pro-democracy

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[79] *See* Biskupik, *supra* note 72.

[80] *See* Roe v. Wade, 410 U.S. 113, 173 (1972) (Rehnquist, J., dissenting).

[81] 348 U.S. 483 (1955).

[82] Craig v. Boren, 429 U.S. 190, 217–18 (1976) (Rehnquist, J., dissenting).

[83] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

[84] *Id.* at 135–36.

[85] *See* Boris I. Bittker, *Observations on Raoul Berger's 'Original Intent and Boris Bittker'*, 757, 758–60 (Yale Law Sch. Legal Scholarship Repository, Faculty Scholarship Series, Paper No. 2313, 1991), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3383&context=fss_papers.

[86] BERGER, *supra* note 83, at 140.

arguments that suggest that he was opposed to the Supreme Court enforcing the Fourteenth Amendment at all.[87]

Berger's book reached a very large audience in the 1970s and was enormously influential among conservatives and moderates unhappy with the *Roe* decision.[88] Few of its specific arguments, however, have stood the test of time, in the view of most conservative legal scholars writing today. First, few modern conservatives share Berger's uncritical enthusiasm for Thayer's and Holmes's legal realism, especially in the context of constitutional interpretation.[89] Second, most modern conservatives believe that *Brown v. Board of Education I and II* were rightly decided and that the idea that state-mandated racial segregation in the provision of public education is permissible under the Fourteenth Amendment is, at the end of the day, quite implausible, even while many have serious reservations about major portions of the opinions.[90] Thus, they believe Berger wrongly excoriated the Supreme Court for striking down segregation laws that were in fact unconstitutional.[91] The argument for this is set forth in *Originalism and* Brown v. Board of Education.[92] Third, legal conservatives doubt Berger's historical account of the original understanding of the Fourteenth Amendment, in light of a wealth of originalist scholarship, starting with Professor Michael McConnell's *Originalism and the Desegregation Decisions*[93] and continuing through articles and books published in the last two years.[94] Finally, Berger reached the conclusions he reached by focusing on the *intentions* of those who wrote the Fourteenth Amendment.[95] By contrast, the vast majority of leading conservative constitutional theorists,

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[87] *See generally id.* at 409 (presenting his opposition to the Fourteenth Amendment and its enforcement).

[88] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 311 (2009).

[89] *See* Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1041 (1961).

[90] *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 384 (2000).

[91] Steven G. Calabresi & Michael W. Perl, *Orignalism and* Brown v. Board of Education, 2014 MICH. ST. L. REV. 429, 449 (citing RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 244–45 (1977)).

[92] *Id.*

[93] Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 951–52 (1995).

[94] Mike Rappaport, *The Growing Case for* Brown v. Board of Education, LIBR. OF L. AND LIBERTY (Mar. 10, 2014), http://www.libertylawsite.org/2014/03/10/the-growing-originalist-case-for-brown-v-board-of-education/ (giving a good summary of the literature).

[95] Stanley I. Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L.Q. 511, 514 (1979).

both on the Court and in academia, believe the focus should be on what the language of the Fourteenth Amendment actually says and how it would have been understood by a reasonable reader at the time of its adoption.[96] This is the approach to constitutional interpretation advocated by Justice Antonin Scalia, Justice Clarence Thomas, and most conservative legal scholars.[97]

To sum up where we are in the argument on the lionization of Justice Oliver Wendell Holmes, many on the left from 1893 to the present have lionized Justice Holmes, in substantial measure because his rhetorical attack on *Lochner* provided a rallying cry for those who wanted the Supreme Court to stop finding constitutional flaws with New Deal laws. Meanwhile, the leading conservative voices that Chief Justice Roberts might have heard when he was in law school—like Justice Rehnquist and Raoul Berger—also lionized Holmes and his *Lochner* dissent because the thrust of the conservative complaint in the 1970s about *Roe v. Wade* and about the Warren Court also was that the Court should do a lot less. This complaint, however, was somewhat confused about *why* the Court should do a lot less. Was it because unelected judges should not (or at least, almost never) interfere with the decisions of the people's representatives—a strong form of Thayerian deference based in significant measure on the difficulty and impossibility of knowing what the Constitution actually requires? Or was it because they were doing so based on their own policy preferences rather than the original public meaning of the Constitution, whose supremacy over ordinary law provides the only legitimate basis for that ordinary law's judicial invalidation? The latter view, which has become known as "originalism," is the one ultimately espoused by Judge Robert H. Bork, President Ronald Reagan, Attorney General Edwin Meese III, and Justices Antonin Scalia and Clarence Thomas.[98] For purposes of this article, it is important to see the significant difference between these two approaches.

Yale Law Professor Robert H. Bork laid the initial jurisprudential foundation for modern-day originalism in a law review article entitled

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[96] Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1088, 1090 (1989).

[97] *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, __ U.S. __, __, 132 S. Ct. 2566, 2644 (2012) (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

[98] Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension between Originalism and Democracy*, 80 U. CHI. L. REV. DIALOGUE 243, 255 (2013) (citing *Sebelius*, __ U.S. at __, 132 S. Ct. at 2644 (2012) (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting)).

Neutral Principles and Some First Amendment Problems.[99] In that pathbreaking law review article, Judge Bork made two important arguments. First, he agreed with a famous Columbia University Law Professor, Herbert Wechsler, that the Court needed to state a neutral principle of law when it decided a case, in order to ensure that the Court could be held to account in the future, as well as to ensure that the Court was deciding like cases alike and rendering equal justice unto the rich and the poor.[100] But, critically, Judge Bork argued that not only must a court—including the Supreme Court—state a neutral principal in writing the opinion of the court, but that the principle in question must be derivable by the judge in question from some neutral source and not from his own policy views.[101] Judge Bork argued, in essence, that our government is a government of laws and not of men, and that the cynical legal realists like James Bradley Thayer and Oliver Wendell Holmes were wrong.[102] The law is not an infinitely malleable or protean thing. There are right legal answers to some questions and also wrong legal answers, and the questions of what is the law and what is good public policy are two wholly different things. To those of us reading books and articles today, this point may seem commonplace, but when Judge Bork argued for it in 1971, it cut against the grain of eighty years of Holmesian nihilism and legal realism.

Judge Bork's second point in his *Neutral Principles* argument is more controversial, but is also profound under Professor Calabresi's view. Judge Bork argued for a purposive approach to constitutional interpretation in which the interpreter identified a meta principle, such as that the First Amendment's most important purpose is to protect political speech.[103] He then fell back on judicial restraint and said that the only speech the First Amendment protected was political speech and that it did not therefore protect pornography.[104] Judge Bork eventually backtracked on that claim, saying that speech about science, political philosophy, and art needed to be constitutionally protected as well because they play a role in the formation of our political

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[99] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971).

[100] *Id.* at 2.

[101] *Id.* at 7.

[102] *See id.*

[103] *Id.* at 22–23.

[104] *Id.* at 20.

values.[105] Nonetheless, he always insisted that the core of the Freedom of Speech and of the Press Clause was the protection of political speech and not viewpoint neutrality.[106]

Judge Bork gave hundreds of speeches from 1971 until his death in 2012, and he became an ardent defender of originalism over that period of time.[107] His biggest contributions to originalism were his unwavering faith in the rule of law over the rule of men and his belief that a core historical purpose underlies every clause in our Constitution, and therefore it is the duty of the judge to strike down laws that are unconstitutional. He defended the constitutionality of the death penalty on firm originalist grounds,[108] and he excoriated the War Powers Act as being unconstitutional on core originalist grounds.[109] Judge Bork single-handedly did more to revive the idea of the rule of law in the academy than anyone else has done. His contribution to constitutional law is as profound as his contribution to antitrust law.

The next significant event in the clarifying of the modern-day conservative perspective on constitutional law came with the election of President Ronald Reagan. President Reagan took on the Progressive movement's skepticism about the Constitution (and other American institutions) championed by Woodrow Wilson and Theodore Roosevelt.[110] He quoted Daniel Webster's view that the U.S. Constitution is a miraculously wonderful document that we must cling to because in Daniel Webster's words, "what has happened once in 6,000

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[105] Steven G. Calabresi & Lauren Pope, *Judge H. Bork and Constitutional Change: An Essay on* Ollman v. Evans, 80 U. CHI. L. REV. DIALOGUE 155, 157 (2013).

[106] *Id.* at 156.

[107] Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES (Dec. 19, 2012), http://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html?_r=0.

[108] *In Bork's Words: Abortion, Death Penalty, Gay Rights*, N.Y. TIMES (July 2, 1987), http://www.nytimes.com/1987/07/02/us/in-bork-s-words-abortion-death-penalty-gay-rights.html.

[109] *The Bork Hearings; Judge Bork at Senate Hearing: In Defense of Past Statements and Opinions*, N.Y. TIMES (Sept. 18, 1987), http://www.nytimes.com/1987/09/18/us/bork-hearings-judge-bork-senate-hearing-defense-past-statements-opinions.html?pagewanted=all.

[110] Sidney Milkis, *The Transformation of American Democracy: Teddy Roosevelt, the 1912 Election, and the Progressive Party* (June 11, 2012), http://www.heritage.org/research/reports/2012/06/the-transformation-of-american-democracy-teddy-roosevelt-the-1912-election-and-the-progressive-party; *see also* Rick Ungar, *Reagan Mythology Obscures And Denies The Real Reagan Accomplishments*, FORBES (Feb. 6, 2011, 2:06 PM), http://www.forbes.com/sites/rickungar/2011/02/06/reagan-mythology-obscures-and-denies-the-real-reagan-accomplishments/print/.

years may never happen again."[111] President Reagan said that the United States is a beacon of liberty to oppressed people everywhere because of the wisdom of the Founding Fathers.[112] He quite rightly called the United States a "shining city upon a hill."[113] It took two presidents, Woodrow Wilson and Theodore Roosevelt, to trash the Constitution, so Professor Calabresi believes that it was probably inevitable that only a great president like Ronald Reagan could bring the Constitution back. Reagan succeeded in doing this, and he made possible the beginnings of a revival of federalism and of the separation of powers that we have experienced since 1981.

President Reagan's second Attorney General, Edwin Meese III, took up the argument on both fronts, calling for renewing the nation's commitment to the Constitution both in broad terms and as a legal document.[114] With respect to the latter, he called for an understanding of the Constitution and the Court's job of respecting it that both limited the Supreme Court's power to invalidate laws only to those that were inconsistent with the original Constitution, but that also required it to invalidate laws that actually violated the Constitution—including structural constitutional provisions that the post–New Deal Court thought were simply not its concern.[115] In a series of speeches, General Meese III called on a return to a "jurisprudence of original intent" that interpreted the Constitution according to the original intentions of the Founding Fathers at the Philadelphia Constitutional Convention and not the judges' policy preferences.[116] General Meese III also specifically criticized the Supreme Court not only for striking down laws it should not, but also for not striking down laws that it should, including

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[111] Address by President Ronald Reagan at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia (Sept. 26, 1986), *reprinted in* THE FEDERALIST SOCIETY: THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 56 (1986) (quoting Daniel Webster); *see generally* 15 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 520 (1903).

[112] *See* President Ronald Reagan, Reagan's Farewell Speech (Jan. 11, 1989) (transcript available in PBS.org archives).

[113] *Id.*

[114] Edwin Meese III, U.S. Att'y Gen., Speech Before the American Bar Association (July 9, 1985), *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47 (Steven G. Calabresi ed., 2007).

[115] *See id.*

[116] Barbara A. Perry, *Original Intent or Evolving Constitution? Two Competing Views on Interpretation*, 5.1 INSIGHTS ON L. & SOC'Y 4–5 (2004); *see also* J. Clifford Wallace, *Whose Constitution? An Inquiry into the Limits of Constitutional Interpretation*, *in* STILL THE LAW OF THE LAND ESSAYS ON CHANGING INTERPRETATIONS OF THE CONSTITUTION 8 (Joseph S. McNamara ed., 1987).

its arrogance in not enforcing constitutional federalism and the separation of powers.[117] He staffed the whole legal team of the Reagan Administration with bright young lawyers like John Roberts and Samuel Alito, while appointing Justice Antonin Scalia to the Supreme Court.[118] General Meese III has done more to change people's views about constitutional law than any other Attorney General we are aware of.

Justice Scalia made a critically important alteration to originalist constitutional theory when he replaced Raoul Berger's, Robert Bork's, and General Meese III's calls for a jurisprudence of original intent with a call for a jurisprudence of following the original public meaning of legal texts. Justice Scalia explained that it is not the intentions of those who make the laws that bind us; it is the legal texts they enact that bind us instead.[119] He called for abandoning the search for legal "intentions" and for focusing instead on the historical meaning a text had when it was enacted into law.[120] An entire generation of conservative and liberal originalists has grown up since Justice Scalia went on the bench in 1986, and they analyze constitutional questions by asking what is the original public meaning of a text.

Finally, Justice Clarence Thomas has made two absolutely vital and underappreciated contributions to originalist legal theory. First, Justice Thomas is prepared to follow the original meaning of the text, even in the face of age-old incorrect legal precedents like the *Slaughter-House Cases*.[121] This is in contrast to Justice Scalia, who at one point (although no longer), described himself as a "fainthearted originalist,"

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[117] Edwin Meese III, *The Meaning of the Constitution*, THE HERITAGE FOUNDATION (Sept. 16, 2009), http://www.heritage.org/research/reports/2009/09/the-meaning-of-the-constitution.

[118] Jeffery Lord, *The Meese Effect*, THE AM. SPECTATOR (Feb. 8, 2011), http://spectator.org/articles/38133/meese-effect.

[119] Note, *Original Meaning and its Limits*, 120 HARV. L. REV. 1279, 1279 (2007).

[120] *See* Immigration & Naturalization Serv. v. Cardoza, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.").

[121] Saenz v. Roe, 526 U.S. 489, 522–23, 527–28 (1999) (Thomas, J., dissenting) ("[T]he *Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence . . . . I would be open to reevaluating its [Fourteenth Amendment] meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant.").

who believes precedent has more of a role to play, even for the originalist judge, in constitutional adjudication.[122] Second, Justice Thomas is the best historian of Reconstruction to sit on the Supreme Court since Justice Hugo Black retired. He has had an immense effect on American constitutional law.

Justices Scalia and Thomas have been joined on the Supreme Court by a colleague, Chief Justice John Roberts, who graduated from law school in 1979 and who clerked for Judge Henry Friendly and for then-Associate Justice William Rehnquist.[123] Neither of these two very distinguished men were originalists in any way, shape, or form. Both Judge Friendly and Justice Rehnquist would have assented to the lionization of Justice Holmes if asked, but neither of them probably gave the matter much thought. Friendly and Rehnquist would have proudly called themselves practitioners of judicial restraint, but they would not have joined Bork, Reagan, Meese III, Scalia, and Thomas in calling themselves originalists. The young John Roberts worked in the Reagan Administration,[124] and he is surely bright enough to know the difference in legal philosophy between the judges he clerked for and Reaganite originalism.

John Roberts has now been Chief Justice for ten years,[125] and he is one of the best writers and craftsmen ever to sit on the Supreme Court in Professor Calabresi's view. His opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[126] is one of the best originalist Supreme Court opinions Professor Calabresi has ever read. However, his dissent in *Obergefell v. Hodges*, which is a very important case, is quite simply not a good opinion. It reflects a viewpoint that was in the mainstream of conservative legal thought when the Chief Justice went to law school. Indeed, Judge Robert H. Bork could very easily have written an opinion like the Roberts's dissent in this case. A problem arises, however, because in the decades that have passed since Judge Bork was

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[122] *See* Jeffery Rosen, *If Scalia Had His Way*, N.Y. TIMES (Jan. 8, 2011), http://www.nytimes.com/2011/01/09/weekinreview/09rosen.html?_r=1. *But see* Ilya Somin, *Justice Scalia Repudiates "Fainthearted" Originalism*, THE VOLOKH CONSPIRACY (Oct. 7, 2013), http://volokh.com/2013/10/07/justice-scalia-repudiates-fainthearted-originalism/.

[123] *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S. (Jan. 17, 2016), http://www.supremecourt.gov/about/biographies.aspx.

[124] *Id.*

[125] *Id.*

[126] 565 U.S. __, 132 S. Ct. 694 (2012).

denied confirmation to the Supreme Court in 1987,[127] conservative legal thought has matured and changed greatly. It is simply bad lawyering in 2015 to write the leading dissent in a critically important Fourteenth Amendment case and to say nothing at all about the history of Reconstruction from 1865 to 1877.

In the last twenty years, there has been a flood of originalist scholarship on the original meaning of the Fourteenth Amendment, and a lot of this information was made available to the Justices in the amicus briefs filed in the *Obergefell* case.[128] It is quite evident that the Chief Justice ought to have read and incorporated originalist arguments into his dissent, and he willfully declined to do so. It is deeply, deeply troubling for the Chief Justice of the United States to begin his account of the history and meaning of Section One of the Fourteenth Amendment with a citation to Justice Oliver Wendell Holmes's 1905 glib dissent in *Lochner v. New York*.[129]

We will not dwell on the most surprising aspect of this dissent, which is that it implies that the Chief Justice neither knows anything about nor cares about the history and original meaning of the most important Amendment to the Constitution. We hope this is not the case and that in some future opinion this error will get fixed. But we will dwell for the moment on the Chief Justice's lionization of Justice Oliver Wendell Holmes—the hero and legal voice of the racist and eugenicist Progressive movement founded by Woodrow Wilson and Theodore Roosevelt. Just who is this man Holmes who Chief Justice Robert's holds up as a hero?

III. Meet the Real Oliver Wendell Holmes

We consider here separately Justice Holmes's *Lochner* dissent, his support for eugenics, his outright racism, and his First Amendment jurisprudence. We begin with the minor and short *Lochner* dissent only

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[127] Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, Nat'l Pub. Radio, (Dec. 19, 2012, 8:31 PM), http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever.

[128] *See, e.g.*, Brief of *Amicus Curiae* State of South Carolina In Support of Respondents at 2, Obergefell v. Hodges, __ U.S. __, 35 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 U.S. S. Ct. Briefs LEXIS 1313; Brief of *Amici Curiae* Scholars of Originalism In Support of Respondents at 2, Obergefell v. Hodges, __ U.S. __, 35 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 U.S. S. Ct. Briefs LEXIS 1269.

[129] Obergefell v. Hodges, __ U.S.__, __, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

because that is the opinion that Chief Justice Roberts lavishes his praise upon in *Obergefell v. Hodges*, and we then move on to Justice Holmes's opinions on eugenics, on race, and on the First Amendment.

A. *Justice Holmes and the* Lochner *Dissent*

Chief Justice Roberts's dissent fulminates about the substantive due process decision in *Lochner v. New York*, which, as we have seen, has been a favorite whipping boy for Progressives from Theodore Roosevelt to Oliver Wendell Holmes to the New Dealers led by Franklin Roosevelt.[130] It is more than a little puzzling to see a Republican-appointed Chief Justice echoing the Progressive movement views of Woodrow Wilson and the two Roosevelts, all of whom hated the Constitution of 1789 as amended by the Fourteenth Amendment. The Progressive movement, as we said above, was of the view that the U.S. Constitution's system of checks and balances and separation of powers was enacted to benefit only the rich white men who had written the Constitution in 1787.[131] The Progressives, under Woodrow Wilson, said that they preferred parliamentary government to the American system of the separation of powers.[132] They set out to create elite-dominated independent agencies in which there was to be no separation of powers, so that intellectual elites could do a lot of governing.[133] The Progressives did not believe that all men were created equal, and they therefore endorsed eugenics and racist legislation targeted against African-Americans in the U.S.[134] The democracy deficit in the Progressive independent agencies reflects their world view that elites should

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[130] Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting); Keith E. Whittington, *Congress Before the* Lochner *Court*, 85 B.U. L. Rev. 821, 839 (2005) (noting that Theodore Roosevelt suggested that the spirit of *Lochner* could lead to revolution); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 Geo. L.J. 1, 51 (2003) (noting that Franklin Roosevelt sealed *Lochner*'s fate by appointing New Deal activists to the Court).

[131] *See* Alan Freeman, *Introduction: Constitutional Law from a Critical Legal Perspective*, 36 Buff. L. Rev. 211, 212 (1987).

[132] *See* Michael Zuckert, *On the Separation of Powers: Liberal and Progressive Constitutionalism*, 29 Soc. Phil. & Pol'y 335, 344 (2012).

[133] *See* Ronald J. Pestritto, *The Birth of the Administrative State: Where It Came From and What It Means for Limited Government*, The Heritage Found. (Nov. 20, 2007), http://www.heritage.org/research/reports/2007/11/the-birth-of-the-administrative-state-where-it-came-from-and-what-it-means-for-limited-government.

[134] *See* Thomas C. Leonard, *Retrospectives: Eugenics in the Progressive Era*, 19 J. Econ. Persp. 207, 207–08 (2005).

govern while the masses obey.[135] Why Chief Justice Roberts would choose to associate himself with the Progressive elites who made *Lochner v. New York* into their favorite whipping boy is frankly beyond comprehension in the view of Professor Calabresi.

In *Lochner*, a five to four majority of the Supreme Court held that a New York law that forbade bakers from working more than sixty hours per week violated the bakers' fundamental right of liberty of contract, and was thus not a reasonable exercise of the police power.[136] The New York law was probably enacted by large baking companies to shut down competition from immigrant mom and pop bakers, and was thus a special interest, or class-based law.[137] There are two legitimate problems with the Supreme Court's opinion in *Lochner*, neither of which triggered Chief Justice Roberts's ire. First, *Lochner* was in reality a Privileges or Immunities Clause case disguised as a Due Process Clause case insofar as it suggested that there is a fundamental right to liberty of contract, which ought to get judicial protection.[138] This holding is inconsistent with the holding in the *Slaughter-House Cases*, which had eviscerated the Privileges or Immunities Clause.[139] To be legitimate, *Lochner* would have had to overrule the *Slaughter-House Cases*, which it did not do. This then is a solid case law argument as to why *Lochner* may have been wrongly decided. Second, as Justice John Marshall Harlan pointed out quite effectively in his very long and detailed dissent in *Lochner*, the New York State Legislature had compiled a very lengthy and thorough record of the health hazards associated with being a baker, and the *Lochner* court dismissed this evidence in much too cavalier a fashion.[140] Justice Harlan reached the right conclusion in his dissent in the *Lochner* case, and it is his opinion that Chief Justice Roberts ought to have praised.

Chief Justice Roberts's dissent in *Obergefell*, however, focuses entirely on the dissent filed in *Lochner* by the Harvard Law School graduate, Justice Oliver Wendell Holmes, who grandly declared what he thought the Fourteenth Amendment did *not* mean, without ever ex-

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[135] *See* Pestritto, *supra* note 133 (explaining that Progressives desired to see a significant portion of government grounded on expertise rather than popular consent).

[136] Lochner v. New York, 198 U.S. 45, 64 (1905).

[137] *Cf.* Paul Kens, Lochner v. New York*: Tradition or Change in Constitutional Law?*, N.Y.U. J.L. & Liberty 404, 409 (2005).

[138] *Lochner*, 198 U.S. at 53, 56–57.

[139] Slaughter-House Cases, 83 U.S. 36, 78–79 (1873).

[140] *Lochner*, 198 U.S. at 70–71 (Harlan, J., dissenting).

plaining what he thought it *did* mean.[141] Consider the following language from Justice Holmes's *Lochner* dissent:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.[142]

So there you have it: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[143] Fine, *but what DOES the Fourteenth Amendment enact instead?* Justice Holmes never says, and it is quite simply impossible to know what the Fourteenth Amendment *does not* protect unless you have a theory of what it *does* protect. We have such a theory, and it is set out in the dissenting opinions in the *Slaughter-House Cases*, as well as in Steven G. Calabresi's article, *Substantive Due Process After* Gonzales v. Carhart[144] and Steven G. Calabresi & Sofia M. Vickery's article, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees.*[145] Justice Holmes, however, has no theory of the Fourteenth Amendment, at least not that he has presented in his jurisprudence. Because he does not say what rights the Fourteenth Amendment *does* protect, his fulminations in *Lochner* about what the Fourteenth Amendment does not protect are essentially empty rhetoric. All that Justice Holmes is doing in his dissent in *Lochner v. New York* is echoing James Bradley Thayer's theory of the Rule of the Clear Mistake. He is watering down the Constitution into nothingness because he shares the Progressive movement's disdain for the document.

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[141] Obergefell v. Hodges, __ U.S. __, __, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting)*; see Lochner*, 198 U.S. at 75–76 (Harlan, J., dissenting).

[142] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[143] *Id.*

[144] 106 MICH. L. REV. 1517 (2008).

[145] 93 TEX. L. REV. 1299 (2015).

Justice Holmes's dissent in *Lochner* is eminently quotable, but it offers no theory of the Fourteenth Amendment at all. In contrast, the four dissenters in the *Slaughter-House Cases* do offer a comprehensive theory of the original meaning of the Fourteenth Amendment, which is almost certainly right and which suggests that the Amendment does protect liberty of contract, although that liberty can be overridden by just laws prescribed for the general good of the whole people.[146]

Moreover, the U.S. Constitution does enact an economic theory contrary to Justice Holmes's pithy dissent. The Constitution protects the institution of private property by saying that such property can: (1) only be taken for a public use; and (2) that private property can only be taken if just compensation is paid for taking it.[147] The original Constitution also protected liberty of contract by saying that "[n]o state shall . . . pass any law impairing the [o]bligation of [c]ontracts."[148] This Clause was read by the Marshall Court to constitutionally protect land grants in *Fletcher v. Peck*[149] and to prohibit the revocation or alteration of corporate charters in *Dartmouth College v. Woodward*.[150] It is not possible to write a constitution that is neutral on economic liberty but that also protects personal liberty, in Professor Calabresi's view, because a constitution that does not protect private property rights creates an all-powerful government like the former communist governments of Eastern Europe that can invade any right they want to invade.

The fact of the matter is that the U.S. Constitution is built on a regime of constitutional protection for private property rights,[151] unlike the constitutions of the former Soviet Bloc countries prior to 1989, which rejected the institution of private property.[152] Justice Holmes is right that the Constitution does not enact Mr. Herbert Spencer's Social Statics, but he is plainly wrong in saying that there is no economic theory that underlies the U.S. Constitution. The U.S. Constitution is

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[146] For a thorough and lengthy defense of this proposition, see Justice Clarence Thomas's opinion in *McDonald v. Chicago*, 561 U.S. 742, 805–58 (2010). *See* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 1046–49 (2013).

[147] U.S. CONST. amend. V.

[148] U.S. CONST. art. I, § 10, cl. 1.

[149] 10 U.S. 87, 138 (1810).

[150] 17 U.S. 518, 588–96 (1819).

[151] *See, e.g.*, U.S. CONST. amends. V, XIV, § 1.

[152] *See* Konstitutsiia SSSR (1977) [Konst. SSSR] [USSR Constitution] arts. 11, 13 (USSR).

built on a regime of private property ownership,[153] and this is one of the main reasons why, in Professor Calabresi's view, we are the freest and most prosperous G-20 nation on the earth. Professor Calabresi believes that Justice Holmes's *Lochner* dissent is quite simply wrong, and it is doubly wrong if one acknowledges, as he believes one should, that the *Slaughterhouse Cases* were wrongly decided and that the Constitution therefore does protect liberty of contract, although that liberty can be overridden by just laws enacted for the good of the whole people. As Justice Harlan's *Lochner* dissent points out, the sixty hour work week for bakers enacted by the New York State legislature was probably just such a law because of the health hazards faced by bakers who worked more than sixty hours per week.[154] Justice Holmes's *Lochner* dissent is quotable but is intellectually vacuous. It offers no theory at all as to what the Fourteenth Amendment does and does not mean. Chief Justice Roberts was therefore wrong to quote this dissent in his own dissent in *Obergefell v. Hodges*.

B. *Justice Holmes and Eugenics*

Twenty-two years after *Lochner*, Justice Oliver Wendell Holmes found himself writing a majority decision from which only one Justice, a Catholic man named Pierce Butler, dissented without opinion. The case was *Buck v. Bell*,[155] and it involved a Virginia state law that called for the compulsory sterilization of the feebleminded under the new theory of eugenics founded by Francis Galton, Charles Darwin's half-cousin, in 1883.[156] Galton took Darwin's theory of survival of the fittest to its ultimate extreme, and he called for selective breeding of the human race to produce smarter, better human beings in the next generation.[157] Galton, and the thousands of eugenicists who followed him, wanted to compulsorily sterilize the feebleminded so that they would not pass on their supposedly "impure" genes to the next generation.[158] The movement was most successful in the United States, where many African-Americans and people who Southerners called "white trash" were compulsorily sterilized.[159]

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[153] *See, e.g.*, U.S. CONST. amends. V, XIV, § 1.

[154] Lochner v. New York, 198 U.S. 45, 68–69 (1905) (Harlan, J., dissenting).

[155] 274 U.S. 200 (1927).

[156] *Id.* at 205*; see also* Philip K. Wilson, *Eugenics*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/science/eugenics-genetics (last updated Mar. 21, 2014).

[157] Wilson, *supra* note 156.

[158] *Id.*

[159] Matt Wray, *White Trash: The Social Origins of a Stigmatype*, THE SOC'Y PAGES (June 21, 2013), http://thesocietypages.org/specials/white-trash/; *see* Wilson, *supra* note 156; ED-

Eugenics caught on in the United States long before it gained favor in 1933 in Adolf Hitler's Nazi Germany, which essentially copied U.S. Eugenics Laws into a German Eugenic Law.[160] The Carnegie Institute and the Rockefeller Foundation financially supported the Eugenics movement in the United States.[161] Many university presidents in the United States supported the American eugenics movement, as did Alexander Graham Bell.[162] The Women's Christian Temperance Union endorsed the eugenics movement, as did Planned Parenthood founder Margaret Sanger, who argued for the legalization of birth control on eugenics grounds. The state of California was especially supportive of eugenics laws, and it compulsorily sterilized 20,000 people in the twentieth century. The Immigration Act of 1924 was enacted into federal law by Congress on eugenics grounds in order to shut off immigration from the so-called "feeble-minded races" of Southern and Eastern Europe into the United States. It was thought that the purer, more intellectually fit races of Northern Europe should dominate immigration into the United States.

California, Virginia, and several other states passed laws mandating compulsory sterilization of the feebleminded,[163] but it was thought that a test case was needed to give the Supreme Court's imprimatur to the eugenics movement. That test case arose in Virginia as *Buck v. Bell*.[164] Dr. Albert Sidney Priddy, superintendent? of the Virginia State Colony for Epileptics and Feebleminded, filed a petition in court seeking to compulsorily sterilize an eighteen-year-old woman, Carrie Buck, who was alleged to be feeble-minded herself, was the daughter of a feeble-minded mother, and was the mother of children she did not recognize.[165] The Virginia eugenics law in question was telling titled "The Racial Integrity Act of 1924."[166] There is no question which races

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WIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE xv–xvi (2003).

[160] Edwin Black, *The Horrifying American Roots of Nazi Eugenics*, HIST. NEWS NETWORK (Sept. 2003), http://historynewsnetwork.org/article/1796.

[161] *Id.*

[162] *Through Deaf Eyes: Signing, Alexander Graham Bell and the NAD*, PBS (Mar. 2007), http://www.pbs.org/weta/throughdeafeyes/deaflife/bell_nad.html.

[163] Wilson, *supra* note 156.

[164] *Id.*

[165] Buck v. Bell, 274 U.S. 200, 205–06 (1927); Wray, *supra* note 159.

[166] Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, U. VT., http://www.uvm.edu/~lkaelber/eugenics/ (follow "Virginia" hyperlink) (last visited Jan. 24, 2016).

the state of Virginia thought were fit to pass on their genes in 1924, and which races should be allowed to die out.

The issue went up to the U.S. Supreme Court, and Justice Oliver Wendell Holmes said the following:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the cutting of the Fallopian tubes . . . . Three generations of imbeciles are enough.[167]

Holmes's green light for compulsory sterilization led to a huge increase in the practice of eugenics and some 60,000 Americans were compulsorily sterilized thanks to the jurisprudence of Justice Oliver Wendell Holmes.[168] The compulsory sterilization of 60,000 Americans is probably the worst violation of human rights ever committed in the United States, second only to slavery and the system of Jim Crow racial segregation.

But Oliver Wendell Holmes's gift to the world did not end in the United States of America. After 1927, leaders all over the world became enamored with the idea of eugenics, based in part on the ideology and Supreme Court opinion on eugenics written by Justice Holmes.[169] One such leader was Adolf Hitler, who made the passage of a German eugenics law a high priority in 1933, during his first one hundred days as the dictator of Nazi Germany.[170] Only historians can answer the question of whether Hitler's legalization of compulsorily sterilizing the feebleminded played a role in his subsequent decision to exterminate and mass-murder the Jewish people in the Holocaust. Professor Calabresi thinks we can safely say that the replacement of the American founding ideal that "all men are created equal," with a belief in "the survival of the fittest" and of eugenics, was profoundly un-

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[167] *Buck*, 274 U.S. at 207.

[168] *See* VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 30 (2008) (explaining the aftermath of *Buck v. Bell*).

[169] *See* Matthew D. Martin III, *The Dysfunctional Progeny of Eugenics: Autonomy Gone AWOL*, 15 CARDOZO J. INT'L & COMP. L. 371, 387–92 (2007) (explaining the eugenics movement in Great Britain, Sweden, and Nazi Germany after the *Buck v. Bell* decision).

[170] *Id.* at 391; STEFAN KUHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM 27 (1994).

helpful with respect to avoiding an event like the Holocaust. Eventually, the New Deal Supreme Court repudiated eugenics in *Skinner v. Oklahoma*,[171] but by then, 60,000 Americans had been compulsorily sterilized.[172] Georgetown law professor Victoria Nourse brilliantly tells the wonderful story behind *Skinner v. Oklahoma*.[173]

C. *Justice Holmes and Women's Rights*

Justice Holmes said above, in *Buck v. Bell*, that "[t]he principle that sustains compulsory vaccination is broad enough to cover the cutting of the Fallopian tubes . . . . Three generations of imbeciles are enough."[174] But Justice Holmes's anti-feminist credentials extend well beyond the compulsory cutting of women's fallopian tubes. In *Adkins v. Children's Hospital*,[175] a majority of the Supreme Court held that women had the same constitutional right as men to work for less than the minimum wage under the *Lochner* era Due Process Clause.[176] Justice Sutherland said in his opinion for the court that

> In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.[177]

Justice Holmes quipped sarcastically in dissent that "[i]t will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."[178] This is classic Holmesian behavior—a snide quip devoid of any serious attempt to analyze the meaning of the legal texts involved. As it happened, *Adkins v. Children's Hospital* was overruled and Holmes's dissent in that case became the law in *West Coast Hotel Co. v. Parrish*,[179] a case that held that the state of Washington could establish a minimum wage for women, and that women's rights cases should receive only rational basis Equal Protec-

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[171] 316 U.S. 535 (1942).
[172] *Id.* at 540–42; Kaelber *supra* note 166.
[173] NOURSE, *supra* note 168.
[174] Buck v. Bell, 274 U.S. 200, 207 (1927).
[175] 261 U.S. 525 (1923).
[176] *Id.* at 545, 561–62.
[177] Adkins v. Children's Hospital, 261 U.S. 525, 553 (1923).
[178] *Id.* at 569–70 (Holmes, J., dissenting).
[179] 300 U.S. 379 (1937).

tion Clause scrutiny.[180] That case led, in turn, to *Goesaert v. Cleary*,[181] in which a six to three majority of the Supreme Court upheld a law limiting the right of women to be bartenders using the rational basis test of *West Coast Hotel Co.* rather than the heightened scrutiny for gender classifications of *Adkins v. Children's Hospital*.[182] Justice Holmes's misogyny lived on until Professor Ruth Bader Ginsburg persuaded the Supreme Court to overrule *Goesaert v. Cleary* in *Craig v. Boren*[183] and give gender classifications mid-level scrutiny.[184] Associate Justice William Rehnquist, the great conserver of the New Deal, dissented in that case, saying that gender classifications should receive only rational basis scrutiny, as Holmes had said in *Adkins v. Children's Hospital*.[185] Finally, in *United States v. Virginia*,[186] the Supreme Court returned to the rule of Justice Sutherland in *Adkins v. Children's Hospital*, saying that gender classifications should receive "skeptical scrutiny" and should be upheld only if there was an "exceedingly persuasive justification" for them.[187] This time Chief Justice concurred, but only to say that the gender classification in this case could be struck down using mid-level scrutiny so the majority's language about stricter scrutiny was technically dicta.[188]

All in all, it must be said that Justice Holmes had a benighted view of women's rights. Whether he was sanctioning the mandatory cutting of the fallopian tubes or applying only rational basis scrutiny to sex classifications, Justice Holmes was always on the side that was opposed to women's rights.

D. *Justice Holmes and Race Discrimination*

Justice Holmes was the author of the majority opinion in a major race discrimination voting rights case called *Giles v. Harris*.[189] In this case, the state of Alabama adopted a new constitutional provision that provided that anyone in Alabama whose grandfather had been eligible to vote could vote in that state for life with no need to re-register unless disqualified.[190] Alabamians whose grandfathers had not been eligible

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[180] *See id.* at 400.
[181] 335 U.S. 464 (1948).
[182] *Id.* at 467.
[183] 429 U.S. 190 (1976).
[184] *Id.* at 209–10.
[185] *Id.* at 217–18 (Rehnquist, J., dissenting).
[186] 518 U.S. 515 (1996).
[187] *Id.* at 531.
[188] *Id.* at 559 (Rehnquist, J., dissenting).
[189] 189 U.S. 475 (1903).
[190] *Id.* at 482.

to vote had to re-register through an interview with state election officials, who would ask a series of questions about good citizenship to decide whether to allow the person in question to vote.[191] The test was administered in a racially discriminatory way so that most African-Americans taking the test failed it, while most whites taking the test passed. Giles—who was the African-American plaintiff—had been registered to vote for thirty years, from 1871 until 1901, and he sued alleging that the Alabama Constitution violated the Fourteenth and Fifteenth Amendments of the U.S. Constitution.[192] Giles sued on behalf of himself and 5,000 other African-Americans in his voting district who were subject to the new grandfather clause on voting rights.[193] Giles was denied the right to vote himself because, like almost all African-Americans, he failed the "interview," while almost all white Americans passed it.[194]

Justice Holmes ruled that Giles was challenging the entire electoral scheme of the Alabama Constitution, but the only relief he was asking for was to be allowed personally to register to vote.[195] Holmes concluded that giving Giles the relief he was asking for—the personal right to vote—would do nothing to correct the Alabama Constitution's overall racism, and thereby ruled against Giles.[196] Second, Holmes added that it would be impossibly difficult for the Court to monitor the Alabama voting process in order to render it constitutional when the white population of Alabama did not want African-Americans to have the right to vote.[197] He also claimed that the Court lacked jurisdiction to hear this federal case under *Hans v. Louisiana*,[198] since Giles was an in-state citizen suing his own state, even though the suit was in equity and not at common law and no money damages were being sought.[199] At a minimum, Holmes could have said the suit was meritorious, but that it had to be brought seeking an injunction against a state officer and not against the state itself. This case represents a clear example of Justice Holmes allowing his racist views to shade his constitutional decision-making.

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[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.* at 492.
[198] *Id.* at 487–88 (addressing the holding regarding the jurisdictional element in *Hans v. Louisiana*, 134 U.S. 1, 9–10 (1890)).
[199] *Id.* at 486.

Justice Holmes's performance in *Giles v. Harris* is nothing short of appalling. Congress had passed several statutes protecting African-American voting rights after the Civil War, and even though these statutes were rarely used, they were passed pursuant to the enforcement powers of the Fourteenth and Fifteenth Amendments, and Justice Holmes should have considered these statutes in *Hans v. Louisiana*.[200] The Alabama grandfather rule was racist on its face and racist as applied. Three Justices on the Supreme Court dissented from Holmes's opinion: Justice Brewer, Justice Brown (the author of *Plessy v. Ferguson*), and the elder Justice John Marshall Harlan.[201] It is fair to say that Justice Oliver Wendell Holmes's opinion in *Giles v. Harris* helped sanction a massive disenfranchisement of African-American voters all across the South.[202] Whereas most African-American men could vote in the South from 1871 to the 1890s, by 1920, most African-American men could not vote—a situation that was not rectified until the passage of the Voting Rights Act of 1965.[203] Justice Oliver Wendell Holmes bears a significant amount of the responsibility for this gross deprivation of human rights. Even aside from his atrocious eugenics opinion, Justice Holmes's deprivation of the right of African-Americans to vote is an egregious constitutional error. As in *Buck v. Bell*, Justice Holmes was judicially restrained in *Giles v. Harris* when the law called for judicial activism to enforce a real legal right conferred by the Fifteenth Amendment.

Justice Holmes again addressed the issue of racial equality in his dissent in *Bailey v. Alabama*.[204] The case involved the constitutionality of an Alabama peonage statute, which provided as follows:

> Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished[.][205]

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[200] *E.g.*, Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870); The Force Act, ch. 99, 16 Stat. 433 (1871); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

[201] *See Giles*, 189 U.S. at 488 (Brewer, J., dissenting); *id.* at 493 (Harlan, J., dissenting).

[202] Louis Menand, *The Color of Law: Voting Rights and the Southern Way of Life*, THE NEW YORKER (July 8, 2013), http://www.newyorker.com/magazine/2013/07/08/the-color-of-law.

[203] *Id.; see also* Voting Rights Act of 1965.

[204] 219 U.S. 219 (1911).

[205] *Id.* at 227–28 (quoting ALA. CODE 1896, § 4730 1896, as amended in 1903 and 1907).

The case involved an African-American man, Alonzo Bailey, who agreed to work for a year for $12 per month.[206] Following the agreement, he received a $15 advance, entitling him to only $10.75 in monthly wages.[207] Bailey worked for the month of January and four days in February before he ceased to work and refused to refund the advance.[208] A refusal to work or to refund the advance was *prima facie* evidence of intent to defraud in Alabama, and so Bailey was convicted of violating the Alabama peonage statute.[209] In fact:

> The jury found the accused guilty, fixed the damages sustained by the injured party at fifteen dollars, and assessed a fine of thirty dollars. Thereupon Bailey was sentenced by the court to pay the fine of thirty dollars and the costs, and in default thereof to hard labor 'for twenty days in lieu of said fine, and one hundred and sixteen days on account of said costs.'[210]

Bailey appealed his conviction and sentence to the U.S. Supreme Court, arguing that the Alabama peonage statute violated the Thirteenth Amendment to the Constitution.[211] The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[212] Bailey argued that the contract he had signed was a form of indentured servitude, which was unconstitutional under the Thirteenth Amendment.[213] He was obviously right in making this claim. Advancing people money, or free passage over the Atlantic Ocean, was the classic form that indentured servitude took in the United States prior to 1865.[214] After the adoption of the Thirteenth Amendment, indentured servitude was rendered unconstitutional, even when agreed upon by contract by two private parties.[215] It is clear that Bailey's private contract to enter into indentured servitude was a violation of the Thirteenth Amendment and that the Alabama law criminally enforcing that statute was also unconstitutional. The opin-

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[206] *Id.* at 229.
[207] *Id.* at 230.
[208] *Id.*
[209] *Id.* at 237.
[210] *Id.* at 231 (internal citation omitted).
[211] *Id.* at 239.
[212] U.S. CONST. amend. XIII, § 1.
[213] Bailey v. Alabama, 219 U.S. 219, 227 (1911).
[214] *Slavery and Indentured Servants*, L. LIBR. OF CONG., https://memory.loc.gov/ammem/awhhtml/awlaw3/slavery.html. (last visited Jan. 20, 2016).
[215] U.S. CONST. amend. XIII, § 1.

ion of the Supreme Court was written by then-Associate Justice Charles Evans Hughes, and it was joined by Justices Harlan, Day, White, McKenna, and Moody.[216] Justice Oliver Wendell Holmes dissented, however, joined by Justice Lurton saying that:

> Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it. Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor; and if a state adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right; it does not make the laborer a slave.
>
> But if a fine may be imposed, imprisonment may be imposed in case of a failure to pay it. Nor does it matter if labor is added to the imprisonment. Imprisonment with hard labor is not stricken from the statute books. On the contrary, involuntary servitude as a punishment for crime is excepted from the prohibition of the 13th Amendment in so many words. Also the power of the states to make breach of contract a crime is not done away with by the abolition of slavery. But if breach of contract may be made a crime at all, it may be made a crime with all the consequences usually attached to crime.[217]

It is helpful at this point to consult Noah Webster's *1828 American Dictionary of the English Language* to see what was the original public meaning of the word "servitude" as it is used in the Thirteenth Amendment:

> **Servitude**, n. [Fr. From L. *servitude* or *servitas;* It. *Servitu.* See Serve]
>
> 1. The condition of a slave; the state of involuntary subjection to a master; slavery; bondage. Such is the state of the slaves in America. A large portion of the human race are in *servitude.*[218]

When the Thirteenth Amendment outlawed private contracts of indentured servitude, it was widely understood that it was outlawing the practice whereby people were given an advance payment, perhaps to help cover their trip from Europe to the United States, in exchange for what was generally a term of seven years of indentured servitude, which was often akin to slavery.[219] The original public meaning of the Thirteenth Amendment in banning private action and state action to impose peonage is crystal clear. Nonetheless, Justice Holmes ignored the plain, original, public meaning of the Thirteenth Amendment because of his policy view that breaking labor contracts ought to be crimi-

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[216] *Bailey*, 219 U.S. at 227.

[217] *Id.* at 246–47 (Holmes J., dissenting).

[218] *Servitude*, WEBSTER'S DICTIONARY, http://webstersdictionary1828.com/Dictionary/servitude (last visited Jan. 20, 2016).

[219] *Indentured Servitude*, U-S-HISTORY.COM, http://www.u-s-history.com/pages/h1157.html (last visited Jan. 20, 2016).

nally punished.[220] Justice Holmes argued for a judicial restraint that would have allowed a flagrant violation of the Thirteenth Amendment to go unpunished, and which could very well have led to a reintroduction, under another name, of African-American slavery in the South. Justice Holmes's opinion in *Bailey v. Alabama* is lawless and despicable as a moral matter. He would have erased the Thirteenth Amendment from the Constitution, as well as the Fourteenth and Fifteenth Amendments. It is important to remember that Holmes was following his Progressive Era mentors like James Bradley Thayer in not striking down as unconstitutional laws that were plainly unconstitutional. All of this was part of a systematic Progressive Era assault on the U.S. Constitution and its Amendments, which often led to negative repercussions for minorities and women.

E. *Justice Holmes and the First Amendment*

Justice Holmes's acolytes usually point to his contribution to First Amendment jurisprudence as his big positive achievement, but here too his overall record is not one of which to be proud. In *Patterson v. Colorado*,[221] Justice Holmes heard a case involving a First Amendment challenge to a state court judgment in which state judges held in contempt a person who had lampooned the state judges in question. As Holmes describes the case:

> The contempt alleged was the publication of certain articles and a cartoon, which, it was charged, reflected upon the motives and conduct of the Supreme Court of Colorado in cases still pending and were intended to embarrass the court in the impartial administration of justice. There was a motion to quash on grounds of local law and the state Constitution and also of the Fourteenth Amendment to the Constitution of the United States.[222]

It is obvious if one gives the matter a moment's thought that one should not allow state judges to hold people in contempt who lampoon the judges in question. Holmes had not yet formulated the clear and present danger test for when one ought to ban speech, and he upheld the contempt here based on common law precedents that forbade speech that led to bad tendencies. The outcome is nothing of which to be proud, although Justice Holmes was, as always, restrained in that he did not strike down anything as unconstitutional.

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[220] *Bailey*, 219 U.S. at 247 (Holmes J., dissenting).

[221] 205 U.S. 454 (1907).

[222] *Id.* at 458–59.

Justice Holmes wrote a unanimous opinion in *Schenck v. United States*,[223] upholding a conviction of defendants who distributed material urging resistance to the military draft on the ground that it created a clear and present danger of draft law disobedience.[224] The clear and present danger test is now widely regarded as having been too lax, and the current test is that only speech that advocates imminent lawless action can be proscribed.[225] Once again, Holmes heeded the judicial restraint teachings of his mentor James Bradley Thayer and punished political speech that ought not to have been punished.

Holmes's most despicable free speech opinion came in *Debs v. United States*.[226] The case involved Eugene V. Debs who, as the Socialist Party candidate for President in 1912, received nearly a million votes for president of the United States, coming in in fourth place after President William Howard Taft.[227] Debs was indicted in 1917 for making very vague statements that federal prosecutors alleged were an illegal attempt to encourage draft evasion.[228] He was sentenced to ten years in prison for engaging in core political speech as one of the leading political figures of his day.[229] Justice Holmes wrote the unanimous opinion for the Supreme Court upholding the constitutionality of Debs's ten-year prison sentence.[230] Debs remained in prison until President Warren G. Harding pardoned him on Christmas Day in 1921.[231] This opinion is a real outrage because of the vagueness of Debs's remarks, his stature as a leading politician, and the fact that he was engaged in core political speech. It was viewed as a triumph, however, of Progressive Era judicial restraint because Woodrow Wilson's administration prosecuted Debs and Holmes was too restrained to invoke the First Amendment.

The only constructive Holmesian contribution to First Amendment jurisprudence, in Professor Calabresi's view, came in Holmes's

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[223] 249 U.S. 47 (1919).

[224] *Id.* at 48–53.

[225] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[226] 249 U.S. 211, 212 (1919).

[227] Jay Jennings, *Campaign Tactics of Eugene Debs in the 1912 Presidential Election*, *in* 3 THE PUBLIC PURPOSE 65–66, https://www.american.edu/spa/publicpurpose/upload/Campaign-Tactics-of-Eugene-Debs-in-the-1912-Presidential-Campaign.pdf.

[228] *Debs*, 249 U.S. at 212.

[229] *Id.* at 216–17; RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE 47 (2d ed. 2013).

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

[231] *President Harding Pardons Eugene V. Debs*, TODAY IN C.L. HIST., http://todayinclh.com/?event=president-harding-pardons-eugene-v-debs (last visited Jan. 21, 2016).

dissent with Justice Brandeis in *Abrams v. United States*,[232] when he finally refused to uphold a conviction under the Sedition Act of 1798.[233] This was due to the prodding of Justice Louis Brandeis and of the great free speech scholar Zechariah Chafee, a descendant of Roger Williams. In *Abrams*, Holmes finally said what he should have said in *Schenck* and in *Debs*, which is that:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . . The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[234]

Even this statement is a garbled version of the speech protected by the First Amendment, which protects—at its core—political speech and not commercial advertising of ideas.[235] So, even when he got a case right, Justice Oliver Wendell Holmes was unable to articulate the right reasons for his decision. And, for good measure, he got wrong the next free speech case to reach the Supreme Court.

In *Meyer v. Nebraska*,[236] the Supreme Court held that a Nebraska law that forbade the teaching of German in the state was unconstitutional,[237] which is a conclusion that every modern scholar who has studied the case—including Judge Robert H. Bork—has agreed with on both First Amendment and on due process grounds.[238] Nonetheless, Justice Holmes dissented.[239] He did not think the liberty to study a foreign language was one of much importance.[240] In this sense, Justice

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[232] 250 U.S. 616 (1919).

[233] *Id.* at 630–31 (Holmes, J., dissenting).

[234] *Id.* at 630 (Holmes, J., dissenting).

[235] *See* C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 989–90 (2009).

[236] 262 U.S. 390 (1923).

[237] *Id.* at 403.

[238] Glen Elsasser & Janet Cawley, *Ideology At Center Of Battle Over Bork*, CHI. TRIBUNE (Sept. 14, 1987), http://articles.chicagotribune.com/1987-09-14/news/8 703090382_1 _robert-h-bork-night-massacre-special-prosecutor-archibald-cox/2 (explaining that Bork originally disagreed with the decision in *Meyer v. Nebraska*, but has since changed his mind to agree with the case).

[239] *Meyer*, 262 U.S. at 403 (Holmes, J., dissenting).

[240] *See* Bartels v. Iowa, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

Oliver Wendell Holmes's record on free speech is certainly not spotless.

F. *The Lionization of Justice Oliver Wendell Holmes is Problematic*

In sum, we have seen in Part I of this paper that racist, eugenicist Progressive politicians like Teddy Roosevelt and Woodrow Wilson—and their legal acolytes, James Bradley Thayer and Felix Frankfurter—all lionized Justice Oliver Holmes. We have now seen in Part III above that this lionization of Justice Holmes is problematic, given several troubling elements of his jurisprudence. We would like to close this discussion by quoting the work of Professor Calabresi's good friend and colleague, Akhil Amar, with whom Professor Calabresi differs on some subjects, but with whom he completely agree as to Justice Holmes:

> Many consider Justice Oliver Wendell Holmes a great stylist, and a great constitutional jurist, to boot, but not I. Style must ultimately subserve substance, and I do not find in Holmes's body of work on the Court an edifying substantive vision of American constitutional law. Many of Holmes's most notable one-liners are lazy, incomplete, cruel, or clueless. For example, in his dissent in the 1905 case of *Lochner v. New York*, involving a constitutional challenge to a state law limiting the maximum number of hours an employer could require bakers to work, Holmes famously quipped that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics." So far, so good—and this snappy line does feature a lovely use of iambic meter. But Holmes failed to tell us clearly what the Fourteenth Amendment *does* enact. Over the course of a long career, he did a poor job of explaining and defending the Reconstruction amendments' core commitments—anti-slavery, free expression, racial equality, and the like. Why does a justice who is willing to allow state judges, on their own say-so, to punish a newspaper simply for lampooning those very same judges in a cartoon, (see *Patterson v. Colorado* [1907]); willing to uphold years of imprisonment for a major political figure who merely voiced sharp opposition to federal war policies, (see *Debs v. United States* [1919]); and also willing to uphold peonage for southern blacks, forced sterilization of powerless women, and massive disfranchisement of African Americans, (see *Bailey v. Alabama* [1911], *Buck v. Bell* [1927], and *Giles v. Harris* [1903])—and who never clearly recanted these and many, many similarly misguided votes; and who failed to offset these large lapses with a comparably large set of truly impressive affirmative constitutional ideas, à la Hugo Black—deserve to be ranked among our nation's greatest constitutional figures? Long before Holmes came along, the constitutional principles he garbled had been made clear by other, far better constitutional thinkers and doers, including James Madison and John Bingham, who helped birth the First and Fourteenth Amendments, respectively.[241]

[241] Akhil Reed Amar, The Law of the Land, 319–20 n.2 (2015).

IV. Correcting the Record as to Justice Holmes

One problem with Chief Justice Roberts's dissent in *Obergefell* is that he lionizes Oliver Wendell Holmes, whose construction of the Fourteenth Amendment contributed to the compulsory sterilization of 60,000 Americans, who ruled against African-American civil rights claimants time after time[242] and who sent to jail for ten years a major American politician on the spurious ground that Congress could criminalize seditious speech.[243] Instead, the Chief Justice should be lionizing Abraham Lincoln, Charles Sumner, and John Bingham, who ended slavery and constitutionalized the idea of equal civil rights for everybody. Chief Justice Roberts's dissent is wholly un-originalist, and it owes more to the man who enabled the compulsory sterilization of 60,000 Americans than to those who crushed slavery and the Black Codes. In fact, if Justice Holmes had had his way, peonage slavery would have been revived in the South.

Professor Calabresi advances one final thought. He does not blame Chief Justice Roberts for falling into his Holmes moment of ecstasy. Judge Robert H. Bork, who Professor Calabresi greatly admires, could have made the exact same mistake. The problem with admiration for Oliver Wendell Holmes, according to Professor Calabresi, is a problem that Harvard Law School created thanks to James Bradley Thayer and Felix Frankfurter, and it is a problem that only Harvard Law School and the Supreme Court can correct. Professor Calabresi believes that just as South Carolina has quite correctly removed the Confederate flag from its state capital building and consigned it to a museum, Harvard Law School needs to remove its portraits of Oliver Wendell Holmes from places of prominent public display. The Oliver Wendell Holmes Lecture on Law should be renamed the Carrie Buck and Oliver Wendell Holmes Lecture on Law. Sixty thousand Americans were compulsorily sterilized thanks in part to Justice Holmes,[244] and African-American voters across the entire South were denied their Fifteenth Amendment right to vote thanks to Justice Holmes's opinion in *Giles v. Harris*.[245] If Holmes had had his way in *Bailey v. Alabama*, peonage slavery would have been reintroduced in the South.[246] In Pro-

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[242] *See* Kaelber, *supra* note 166.

[243] *See* Schenck v. United States, 249 U.S. 47, 53 (1919) (noting that Holmes wrote the majority opinion).

[244] Kaelber, *supra* note 166.

[245] 189 U.S. 475 (1903).

[246] Bailey v. State of Alabama, 219 U.S. 219, 245–50 (1911).

fessor Calabresi's view, then, Oliver Wendell Holmes was not only a nihilist; he was also a man with deeply troubling moral views and who had a very faulty conception of the proper role of a judge in a constitutional democracy. It is time for people to face up to the fact that Justice Oliver Wendell Holmes's jurisprudence is problematic and ought to be cited in Supreme Court decisions only with exceeding caution or not at all.