The Supreme Court in Context: Conceptual, Pragmatic, and Institutional

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INTRODUCTION

Is it possible to decide whether a constitutional decision is right or wrong? Legal scholars respond with an enthusiastic "Yes!" but their reasons for this answer are generally based on what philosophers call formal arguments.[1] These arguments, as opposed to substantive arguments, focus on internal coherence, rather than external standards. Originalism, textualism, structural analysis, and evolving meaning are all formal arguments.[2] Their appeal lies precisely in their

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1. *See* JOHN P. BURGESS, PHILOSOPHICAL LOGIC 1–3 (2012) (discussing the art of *formalizing* arguments).

2. For a useful taxonomy of such arguments, see generally PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). Bobbitt's categories of argument are historical, textual, doctrinal, prudential, structural, and ethical. *Id.* at 7–8. Textual, doctrinal, and structural arguments are undoubtedly formal; historical argument is based to an

independence from external issues—that is, from the sort of issues that generate political and social controversy. If one can demonstrate by formal argument that a particular constitutional decision is correct, then one can insist on the result, even in the face of those who disagree on normative or pragmatic grounds.

Erwin Chemerinsky's *The Case Against the Supreme Court* takes a different approach.[3] It condemns the Court's decisions, over the course of American history, on the grounds that these decisions have violated an external standard. That standard can be roughly described as a progressive approach to human rights issues. At the outset, Chemerinsky states that his standard for "assessing whether the Court is succeeding or failing" is whether it hands down decisions "that are uniformly condemned by subsequent generations of scholars and judges."[4] Such decisions could involve a wide variety of topics, of course, but Chemerinsky goes on to declare that the ones on which he is basing his assessment—and the ones we should care about—are "the rights of minorities who cannot rely on the political process" and resistance to "repressive desires of political majorities."[5]

The formal standards, such as fidelity to text or structural coherence, that dominate academic writing about constitutional law are subject to many challenges, but Chemerinsky's external standard is equally open to challenge, albeit on different grounds. Viewed as a philosophical or ethical standard, it depends on the consensus approach to truth,[6] as opposed to a correspondence theory (aligning with either textualism or original intent) or a coherence theory (aligning with structuralism or doctrinalism).[7] Viewed as a social norm, it can be accused of what Herbert Butterfield described as the

external factor, but can also be considered formal because it involves the meaning embedded in the text. Pragmatic and ethical arguments are substantive. They are certainly identified in academic discourse, but usually not accepted as independent determination of constitutional meaning. For example, it is common for the Justices or commentators to insist that the meaning of the Constitution cannot be based on practical considerations of convenience, a position typically identified as formalism. The opposing argument, often called functionalism, is not that such considerations should control by themselves, but rather that they represent a preferable interpretation of the text.

3. *See generally* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014).

4. *Id.* at 6.

5. *Id.* at 10.

6. Also described as a relativist approach. *See generally* STEVEN LUKES, MORAL RELATIVISM (2008); J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1980); DAVID WONG, MORAL RELATIVITY (1984).

7. *See* SIMON BLACKBURN, TRUTH: A GUIDE 56–58 (2005); RICHARD L. KIRKHAM, THEORIES OF TRUTH: A CRITICAL INTRODUCTION 104–12, 119–40 (1992); HILARY PUTNAM, REALISM WITH A HUMAN FACE 18–29 (1990); DONALD DAVIDSON, *On The Very Idea of a Conceptual Scheme*, *in* THE ESSENTIAL DAVIDSON 196–209 (2006).

Whig interpretation of history.[8] It is an interpretation that "studies the past with reference to the present . . . [so that] historical personages can easily . . . be classed into the men who furthered progress and the men who tried to hinder it . . . . The total result of this method is to impose a certain form upon the whole historical story."[9] Butterfield's critique is implicit in his description; we deploy our present consensus, itself unjustifiable, to impose unjustifiable praise or condemnation upon people in the past who lived in different worlds and could not have possibly imagined the one from which those judgments emanate.

This Article explores the approach to constitutional judgment that underlies Chemerinsky's book. Its basic approach is to contextualize these decisions in three different ways. The first, which can be described as a conceptual contextualization, is to place the decision in the mental framework that prevailed at the time the decision was made. In areas that develop cumulatively, the point is obvious; medieval physicians who tried to cure patients by bloodletting were neither incompetent nor cruel; James Clerk Maxwell's work cannot be faulted because he thought electro-magnetic waves propagated through the aether. But the point applies as well to normative positions that change over time. As Butterfield argues, the validity of imposing contemporary standards on past actors is questionable. The resulting judgments tend to be simultaneously too harsh and too lenient—too harsh because it tends to condemn everyone who lived more than a few decades ago, and too lenient because such global condemnation provides the protection of a crowd for those who should have known better at the time.

The second form of contextualization is pragmatic. Real-world decision-makers necessarily function in political, economic, and social settings, and those settings both empower and constrain them. It is one thing to expect people to carry out their roles with energy, imagination, and courage, but quite another thing to expect them to act outside those roles, and still another to insist on truly heroic or transformative behavior. Perhaps we will want to condemn people who did not speak out about the injustices of a totalitarian regime like the Soviet Union under Stalin, but the judgment will seem superficial and naïve if we do not take account of the costs that such speech would incur.[10] The extent of the demands we place on prior actors, and

8. HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 3–6 (1965).

9. *Id.* at 11.

10. The well-known anecdote, probably apocryphal, is that Khrushchev was giving a speech during the de-Stalinization movement and someone shouted, "Why didn't you challenge [Stalin]

the judgments that we make about their actions, necessarily depends on our attitudes about the pragmatic content within which they functioned, and realistic demands depend on an understanding of that context.

The third form of contextualization can be described as institutional. It takes into account not only the conceptual framework of the time when the decision was made and the pragmatic demands on the decision maker, but also the type of decision maker that is being judged. Individuals often act at a specific time and can be judged on the basis of that action. But institutions exist over time, and often maintain their relative position in society for the duration. A further contextualization of their actions, therefore, is to consider the institution's performance over time. This does not necessarily mean that one is being more lenient toward an institution. Rather, it only means that one recognizes its essential modality of action.

This Article will consider each of these forms of contextualization in succession. It will focus on the case with which Chemerinsky begins, *Buck v. Bell*,[11] a case in which the Supreme Court upheld the constitutionality of a law that permitted a state to sterilize certain classes of people against their will.

I. NORMATIVE CONTEXTUALIZATION

A. The Sterilization Debate

The Court's decision in *Buck v. Bell* clearly satisfies Chemerinsky's principal criterion for badness; it reaches a result that is "uniformly condemned by subsequent generations of scholars and judges." Although it comes from the now-disparaged Lochner Era, it cannot be ascribed to the conservative Four Horsemen[12] because it

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then, the way you are now?" When Khrushchev asked who had spoken, the room was silent. "Now you know . . . why I did not speak up against Stalin when I sat where you now sit," he responded. Comment to *Topic: Nikita Kruschev Anecdote*, SNOPES.COM (Jan. 11, 2005, 12:29 PM), http://msgboard.snopes.com/cgi-bin/ultimatebb.cgi?ubb=get_topic;f=96;t=000852;p=0 [https://perma.cc/CM64-4XAB].

11. 274 U.S. 200 (1927).

12. The Lochner Era takes its name from the Court's decision in *Lochner v. New York*, a seminal substantive due process decision invalidating a state maximum hours law. 198 U.S. 45 (1905). The Four Horsemen were Justices Pierce Butler (served 1923–39), James Clark McReynolds (1914–41), George Sutherland (1922–38) and Willis Van Devanter (1910–37). None were on the Court when Lochner was decided, but they agreed with its analysis and deployed it against New Deal legislation, and all were serving when *Buck v. Bell* was decided in 1927. For a discussion of their influence, see generally BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

was authored by Justice Holmes and was decided 8-1.[13] Moreover, Holmes' unsurpassed ability to write memorable epigrams betrayed him in this instance. His declaration that "[t]hree generations of imbeciles are enough"[14] remains an undying example of slovenly record-reading and elite insensitivity that blots his otherwise sterling reputation.

But does this judgment merely represent the questionable practice of imposing current values on the past, as Butterfield noted? Compelled sterilization of the unfit was a central policy of the eugenics movement that flourished during the first third of the twentieth century, particularly in the United States.[15] Eugenics was strongly championed by leading scientists; the First International Eugenics Conference, held in London in 1912, was attended by Leonard Darwin (Charles's son), Alexander Graham Bell, and a number of others who were well-known at the time and possessed impeccable academic qualifications.[16] Their efforts quickly garnered the support of some of the most prestigious private funding institutions and individual philanthropists in the nation, including the Carnegie Institution, the Rockefeller Foundation, Mary Harriman, John Harvey Kellogg, and John D. Rockefeller, Jr.[17] Many leading social reformers, including Margaret Sanger, the tireless advocate for legalizing contraception,[18] were in favor, as were Theodore Roosevelt and Woodrow Wilson.[19] The theory drew on a long tradition of pragmatic research on plant and animal breeding whose value is unquestioned to this day, and added the most up-to-date insights from Darwinian evolution and Mendelian genetics. It was directly

13. In fact, the lone dissenter in the case was one of the Four Horsemen, Justice Butler, who, however, did not write an opinion providing the reason for his dissent. One possible explanation is simply that the case did not involve a statute that was restricting traditional property rights, which is the issue that divided the Court and defined the Four Horsemen. *See infra* Section II.B. Thus there is no reason to expect that the Justices would divide along the same lines in this case.

14. *Buck*, 274 U.S. at 207.

15. *See generally* EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE (1st ed. 2003); MARK A. LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES (2008); PAUL LOMBARDO, THREE GENERATIONS, NO IMBECILES (2008); VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 13–31 (2008).

16. They included William H. Welch, first Dean of Johns Hopkins Medical School and president of the American Medical Association, Thomas Hunt Morgan, a genetic scientist who won a Nobel Prize in 1933 for his pioneering work on chromosomes, and Irving Fisher, a founder of neoclassic economics and econometrics. *See* BLACK, *supra* note 15, at 93–94; LOMBARDO, *supra* note 15, at 32.

17. BLACK, *supra* note 15, at 31–57; LARGENT, *supra* note 15, at 42–44, 56.

18. BLACK, *supra* note 15, at 125–44.

19. *Id.* at 68, 99; LOMBARDO, *supra* note 15, at 26, 32.

responsible for the development of both the IQ test and the SAT,[20] instruments that remain in use today and exercise major effects on the educational opportunities of nearly all Americans. Viewed from this perspective, compulsory sterilization might be compared to the medical treatments that prevailed in the Western World for nearly two thousand years based on the four bodily humors.[21]

Another exculpatory analogy for compelled sterilization might be slavery. We now regard slavery as an abomination even in its most kindly guises, to say nothing of the horrific treatment that it more frequently engendered. But no voice was raised against the practice during the entire course of pre-modern history. No one, including such towering ethicists as Plato, Aristotle, Epictetus (who was born a slave), Augustine, Aquinas, Grotius, or Locke, ever objected to it.[22] The first general condemnation came from the Quakers, a marginalized and scorned religious sect, in the late seventeenth century.[23] Montesquieu seems to be the earliest major thinker to express even tentative disapproval,[24] and there was no broader outcry until the latter part of the eighteenth century. It seems safe to say,

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20. *See* BLACK, *supra* note 15, at 76–83; STEPHEN JAY GOULD, THE MISMEASURE OF MAN 176–262 (rev. ed. 1996); LEILA ZENDERLAND, MEASURING MINDS: HENRY HERBERT GODDARD AND THE ORIGINS OF AMERICAN INTELLIGENCE TESTING 153–85 (1998).

21. *See* LOIS N. MANGER, A HISTORY OF MEDICINE 98–103, 121–32 (2d ed. 2005); ROY PORTER, THE GREATEST BENEFIT TO MANKIND: A MEDICAL HISTORY OF HUMANITY 56–58 (1999); JOHN HUDSON TINER, EXPLORING THE HISTORY OF MEDICINE 12–37 (1999). For an extended account of the theory from someone who still takes it seriously, see generally JEROME KAGAN, GALEN'S PROPHECY: TEMPERAMENT IN HUMAN NATURE (1996).

22. As late as the seventeenth century, Grotius based his argument for the social contract on what he regarded as the self-evident position that people could relinquish their natural liberty because they could, after all, sell themselves into slavery. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 63–70 (A.C. Campbell trans., 1901) (1625); *see also* RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 95–98 (1979).

23. *See* THOMAS DRAKE, QUAKERS AND SLAVERY IN AMERICA (1950); HUGH THOMAS, THE SLAVE TRADE 458–61 (1997). A century earlier, Bartolome de las Casas argued insistently, and successfully, against the enslavement of Native Americans by the Spanish conquerors. The basis for his argument, however, was that it was wrong to enslave people with a culture, not that slavery was wrong in general, and his solution to the resulting labor shortage was to import Africans as slaves. *See* THOMAS, *supra*, at 125–27.

24. CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 246–77 (Ann Cohler, Basia Miller & Harold Stone transs., 1989) (1748). Even at this late date (the book was published in 1748), Montesquieu felt the need to be circumspect in his condemnation. He says:

> If I had to defend the right we had of making Negroes slaves, here is what I would say: . . . A proof that Negroes do not have common sense is that they make more of a glass necklace than one of gold. . . . It is impossible for us to assume that these people are men because if we assumed they were men one would begin to believe that we ourselves were not Christians.

Id. at 250.

therefore, that the abolition of slavery was simply not within anyone's conceptual framework before modern times.

To be sure, there may be a difference between pre-modern medicine and the pre-modern acceptance of slavery. Pre-modern physicians were trying to do the same thing doctors do at present, and which we recognize as morally praiseworthy, namely, cure their patients. Their failures stemmed from a lack of empirical knowledge. Slavery, in contrast, is something we now recognize as a moral wrong, monstrous on its own terms and indicative of larger injustices in the general society. But if no one recognized it as a wrong, what are we doing when we condemn pre-modern people for accepting it other than restating our contemporary views? This would seem to be the case even when the judgment is framed as a condemnation of a particular individual. To admonish Aristotle for accepting slavery can be most readily understood as a warning to our colleagues: "Don't be such an enthusiastic follower of Aristotle. When you praise his theory of *praxis*, remember that comes from someone who accepted slavery and may incorporate the injustices we associate with that practice." But what can the condemnation of slavery say about Aristotle himself that would be of any use in contemporary ethics: "Remember to conceive of things you can't conceive of?"

Compulsory sterilization is not an issue of this sort, however. While it enjoyed widespread support among scientists, philanthropists, and government officials, it also engendered substantial opposition. Many people were clearly uncomfortable with it. Francis Galton, the British mathematician and statistician who founded eugenics, was circumspect about its applications[25] and one of his leading followers, David Heron, roundly condemned the scholarly literature that supported it as "fallacious and indeed actually dangerous to social welfare."[26] A number of American scientists and medical experts voiced serious doubts as well.[27] Alexander Graham Bell became uncomfortable with the unrestrained enthusiasm of the

25. BLACK, *supra* note 15, at 18. Galton was clearly in favor of "positive eugenics," that is, encouraging people to make genetically beneficial marriages. His support for "negative eugenics," including compulsory sterilization of the undesirable, is less clear. *See id.* at 19; MARTIN BROOKES, EXTREME MEASURES: THE DARK VISIONS AND BRIGHT IDEAS OF FRANCIS GALTON 296 (2004) (noting Galton's strong association of hereditary determinism and eugenics in contrast to sterilization and negative eugenics in the United States); LOMBARDO, *supra* note 15, at 7.

26. BLACK, *supra* note 15, at 99–100; LOMBARDO, *supra* note 15, at 44. Similar doubts were expressed by another of Galton's followers, Karl Pearson. BLACK, *supra* note 15, at 27, 60–61. Galton, Heron and Pearson were all British; in general, the British scientists were much more cautious than their American colleagues.

27. LARGENT, *supra* note 15, at 97–100; LOMBARDO, *supra* note 15, at 54–57.

movement's proponents and gradually withdrew his participation.[28] Clarence Darrow, perhaps the most famous lawyer in America at that time, published a withering condemnation.[29] Many public officials were also skeptical. Several state legislatures rejected bills to authorize compulsory sterilization for various characteristics.[30] When the Pennsylvania legislature enacted such a bill, Governor Samuel Pennypacker rejected it in ringing tones that voiced both moral objections and scientific doubts.[31] A number of state courts struck down compulsory sterilization laws on equal protection, due process, or cruel and unusual punishment grounds.[32] The U.S. Army declined to use intelligence tests developed by eugenicist Robert Yerkes as a means of classifying inductees.[33]

B. The Formal Criticisms of Buck v. Bell

Thus, the issue presented by compulsory sterilization is an intriguing one. An active debate about the merits of this practice existed at the time, with both sides represented; it was within people's conceptual framework to express opposition, in contrast to the situation with either pre-modern medicine or slavery. But the side that is now "uniformly condemned" was an entirely acceptable position and seems to have been the majority view when the issue first came before the Supreme Court. It was, moreover, the view associated with modern science and with important elements in the Progressive movement.[34] The question then is whether we can condemn the Court for failing to adopt the position that we take today. Should the Justices have known that forced sterilization of citizens whom they viewed as undesirable was wrong? Was there some warning sign, some indication that signaled to them that they should have reached the opposite result in *Buck v. Bell*?

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28. BLACK, *supra* note 15, at 104–05.

29. LOMBARDO, *supra* note 15, at 155; NOURSE, *supra* note 15, at 15, 56. Referring to the proponents of eugenic sterilization he wrote: "I shudder at their ruthlessness in meddling with life. I resent their egoistic and stern righteousness." LOMBARDO, *supra* note 15, at 155.

30. *See* LARGENT, *supra* note 15, at 66–71; LOMBARDO, *supra* note 15, at 21–22.

31. BLACK, *supra* note 15, at 66; LOMBARDO, *supra* note 15, at 22–23.

32. NOURSE, *supra* note 15, at 28–29. New York attorney Charles Boston, later president of the American Bar Association, leveled harsh criticism at the procedural aspects of New Jersey's law. LOMBARDO, *supra* note 15, at 53–54.

33. BLACK, *supra* note 15, at 84; GOULD, *supra* note 15, at 222–62.

34. LOMBARDO, *supra* note 15, at 17. Sanger was certainly a major figure in this movement. On the Progressive Movement, *see generally* JOHN WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890–1920 (2006); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA (2003); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877–1920 (1967).

One possible way of answering this question is to search for formal arguments, general rules of decision-making that can be deployed independent of substantive norms, to resolve a contested issue. Although, as stated at the outset, constitutional law tends to rely on arguments of this nature, modern ethics and epistemology generally rejects the validity of this approach. Some constitutional lawyers, for example, appeal to the original intent of either the Framers or the ratifying public,[35] but philosophers and literary critics almost all insist that the meaning of a text is necessarily constructed through an interaction between text and reader, with the reader's substantive views playing a crucial role.[36]

These theoretical objections are not necessarily decisive in the constitutional law context, however. A formal argument need not be universally valid in this context, as it would need to be as a philosophic matter; it need only be valid in terms of our political system. Kant's categorical imperative, for example, must be applicable to the Ancient Greeks as well as to our own society, according to the claim Kant advances for it. But a formal norm that guides constitutional decision-making need only be valid for our own political system, or, at the very most, for other democratic, rights-based systems in the modern era.

1. Do No Harm

One such formal norm that we might claim that the Supreme Court should have followed when confronted with the controversy over compulsory sterilization is: "First, do no harm."[37] To begin with, most

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35. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW (1999); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

36. *See, e.g.*, TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION (1983); STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1982); HANS-GEORG GADAMER, TRUTH AND METHOD (Garrett Barden & John Cumming trans., 1988) (1975); WOLFGANG ISER, THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE (1978).

37. *Primum non nocere*. It is often attributed to the Hippocratic Oath. Although it does not appear there as such, it can be regarded as consistent with the spirit of the Oath and it remains a staple of medical ethics. *See* C.M. Smith, *Origin and Uses of* Primum Non Nocere*: Above All, Do No Harm*, 45 J. CLINICAL PHARMACOLOGY 371, 371–72 (2005) (describing origins and fundamental role of the maxim in modern medical ethics). In political theory, it is Mill's basis for government intervention. John Stuart Mill, *On Liberty*, *in* THE ESSENTIAL WORKS OF JOHN STUART MILL, 253, 263–66 (Max Lerner ed., 1961). He treats it as a general principle of morality, in the sense that its violation justifies state restriction of individual liberty. For an extended discussion of how harm to others is an essential principle justifying criminal laws, see generally JOEL FEINBERG, HARM TO OTHERS (1984). The obverse principle, which is that the government

interventions do some harm to someone, so the question is really the relative balance between harm and benefit. Every surgical procedure, for example, carries a statistical risk of death, but we would not regard it with distrust if the risk is low and the countervailing advantages are great. That was in fact one of the arguments about the sterilizations, and once vasectomy replaced castration—due in part to the pioneering work of the unfortunately named Dr. Sharp—the proponents were right about the limited risk of surgical mishaps.[38]

In a political context, the harm principle is further limited because most government programs occur within a socially constructed space and involve alternatives that are equally interventionist, although perhaps in different ways. One of the prevailing controversies of the era that produced *Buck v. Bell*, for example, was the conflict between industrial workers and their capitalist employers. The employers claimed that they were being harmed by Progressive legislation that impinged on their property rights and liberty of contract. But the Progressive response was that the legislation was alleviating conditions that were themselves the product of society, including the property rights and other legal protections that enabled capitalists to exercise control over their employees.[39] In the substantive due process decisions of the era, such as the eponymous *Lochner v. New York*, the Supreme Court may have been applying the harm principle on the basis of the assumption that the Progressive legislation was an intervention, while the property laws and underlying economic conditions were natural occurrences. That is one basis for contemporary arguments that these decisions were mistaken.[40]

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should not cause harm but only prevent it, can be derived from Mill's formulation. It is often invoked in international law regarding one nation's intervention in another's internal affairs. *See generally* DAVID N. GIBBS, FIRST DO NO HARM: HUMANITARIAN INTERVENTION AND THE DESTRUCTION OF YUGOSLAVIA (2009).

38. *See* BLACK, *supra* note 15, at 63–66; LARGENT, *supra* note 15, at 28–31; LOMBARDO, *supra* note 15, at 23–24. Evidence for this is that men continue to obtain voluntary vasectomies as a means of birth control. The sterilization of women through tubal ligation is equally safe today, but this procedure was not available at the time of *Buck v. Bell*. *See* Robert K. Zurawin & Michel E. Rivlin, *Tubal Sterilization*, MEDSCAPE (Jan. 23, 2015), http://emedicine.medscape.com/article/266799-overview [https://perma.cc/5NB8-P7KY]. The Court should have been at least more cognizant of the potential danger of the existing method of sterilization, the one that was used on Carrie Buck.

39. CHAMBERS, *supra* note 34, at 132–50; MCGERR, *supra* note 34, at 13–19, 125–46; WIEBE, *supra* note 34, at 164–95.

40. For further explication of this point, see Edward L. Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 WIS. L. REV. 573, 600–04 (2013) (offering a full explication of how early substantive due process cases misconstrued the Fourteenth Amendment's interaction with property rights).

Compulsory sterilization, however, seems to be one situation where the harm principle could have applied. The operation itself may have been safe, but the Court seemed oblivious to its impact on the individuals subjected to it. Having children is widely regarded as one of human life's greatest rewards, whether it is viewed in terms of perpetuating one's name and memory, transmitting one's values, serving the purposes of one's race, religion, or nation, creating an intense emotional relationship, or providing for care in one's old age. The most rudimentary consultation of common human experience and, for most of the Justices, their own personal feelings, should have been sufficient to indicate the magnitude of the harm that compulsory sterilization inflicted. A mere sixteen years later, in *Skinner v. Oklahoma*, a different set of Justices were fully able to articulate this concern, and did so explicitly at the start of the opinion,[41] although they decided the case on other grounds, for reasons that will be described below.

Moreover, the interventionist character of the procedure is apparent. Every society interprets and regulates sexual activity in different ways, but reproduction itself is clearly independent of the social process. To impede such a basic human activity would seem to demand justification at a somewhat higher level than the choice between two contesting parties whose position is defined within the framework of society. In other words, the more basic or universal the interest that is being harmed, the more cautious society should be about intruding on that interest. Of course, different societies maintain different views about the natural order of the universe and the rules or practices that are inscribed within it. To demand that people in the past subscribe to twentieth-century social constructivism is as unreasonable as to demand that they adopt our specific values. But people can be charged with their own level of awareness on this issue. Everyone in the twentieth century understood that social arrangements, property rights, and methods of governance had varied over the course of Western history and had been debated by leading political theorists, while no one questioned that reproduction and the desire to have children, whether derived from God or explained by Darwin, was a human universal.

41. 316 U.S. 535, 536 (1942). Justice Douglas wrote: "This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race, the right to have offspring." *Id.* at 536.

2. Act on the Basis of the Truth

A second formal principle that might have informed the Court's decision in *Buck v. Bell* is the empirical justification for the intervention at issue. The extent to which this principle should be modified when the decision maker is a court, and particularly a court reviewing legislation in a democratic system, will be addressed in the discussion of pragmatic contextualization that follows. For now, the question is normative contextualization. What sort of evidence should a decision maker, or a critical observer, demand when determining whether a particular social program is justifiable? We are in the midst of several such debates at the present time, involving crucial issues such as climate change, the safety of genetically modified food, and the future direction of our economy. The anguish and uncertainty that we presently experience when confronting such issues should caution us against quick condemnations of the *Buck v. Bell* Court on the basis of hindsight.

One source of guidance for this complicated question is the society's prevailing structure of knowledge. We might be inclined to condemn Medieval Europeans for denying religious liberty. For them, however, Christianity was much more than a religion, as we currently use the term; it was a comprehensive explanatory system that accounted for their physical surroundings, the movement of the sun, moon, and stars, the behavior of human beings, and the basis of government.[42] Given this perspective, dissenting views of religion were not an expression of personal faith but false statements whose obvious invalidity robbed them of either informative or expressive value. This view cannot be attributed to some general resistance against new ideas, as the now-outdated canard about the Middle Ages would suggest. The fourteenth century, for example, was a time of tremendous innovation in the arts, including vernacular literature of Dante, Boccaccio, Petrarch, and Chaucer,[43] the realistic, quasi-

42. NORMAN CANTOR, THE CIVILIZATION OF THE MIDDLE AGES 373–93 (rev. ed. 1993); FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY, VOLUME II: MEDIEVAL PHILOSOPHY FROM AUGUSTINE TO DUNS SCOTUS 218–387 (1993); HEINRICH FICHTENAU, LIVING IN THE TENTH CENTURY: MENTALITIES AND SOCIAL ORDERS 245–332 (Patrick J. Geary trans., 1993) (1991); JACQUES LE GOFF, THE MEDIEVAL IMAGINATION 27–43, 67–77, 83–103 (Arthur Goldhammer, trans., 1988) (1985); WILLIAM MANCHESTER, A WORLD LIT ONLY BY FIRE: THE MEDIEVAL MIND AND THE RENAISSANCE: PORTRAIT OF AN AGE 15–25 (1992); J.A. Watt, *Spiritual and Temporal Powers*, *in* J.H. BURNS, THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT, C. 360–1450, at 367 (1988).

43. *See* DANTE ALIGHIERI, THE DIVINE COMEDY: THE INFERNO, PURGATORIO AND PARADISO (Lawrence Grant White trans., 1948) (1321); GIOVANNI BOCCACCIO, THE DECAMERON (John Payne trans., 1982) (1351); GEOFFREY CHAUCER, THE CANTERBURY TALES (Jill Mann ed., 2005) (1475); PETRARCH, THE POETRY OF PETRARCH (David Young, trans., 2005). *See generally* LYNN

perspectival painting of Giotto,[44] and the polyphonic ars nova music of Machaut.[45] But none of these innovations challenged religion as the dominant mode of explanation; indeed, they were equally centered on religion as their predecessors, and simply presented similar religious views in different ways.

By the twentieth century, our society's dominant mode of explanation was natural science; that is what we rely upon to explain our physical surroundings (including the sun, moon, and stars) and the behavior of human beings. If someone from the future were to visit us and tell us that our entire conception of science is mistaken, we might well respond with protests of innocence: how were we to know? But disputes occurring within the framework of science are issues that we can comprehend and that we can be properly expected to take into account when reaching decisions that affect people's lives. Thus, the formal principle is that a decision maker should make its best effort to base its decisions on truthful premises, with the contextualizing caveat that each society will have its own theory for determining the truth.

According to this principle, we are currently entitled to rely on the theory of evolution, and anyone who opposes the search for new antibiotics on the grounds that viruses cannot evolve can be properly condemned. We have reached this same level of scientific consensus regarding global warming, and the Republican Party deniers will certainly, and justifiably, be condemned by subsequent generations. But the eugenic theory that served as the basis for compulsory sterilization did not possess so secure a scientific status. While it could claim support from Darwinian evolution and Mendelian genetics, many voices within the scientific community were raised against it.[46] Many people, including important disciples of its British originator and well-regarded researchers in the United States, while accepting

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ARNER, CHAUCER, GOWER, AND THE VERNACULAR RISING: POETRY AND THE PROBLEM OF THE POPULACE AFTER 1381 (2013); DOUGLAS GREY, CHAUCER AND THE GROWTH OF VERNACULAR LITERATURE, C. 1350–1500 (2006); MARTIN EISNER, BOCCACCIO AND THE INVENTION OF ITALIAN LITERATURE: DANTE, PETRARCH, CALVALCANTI AND THE AUTHORITY OF THE VERNACULAR (2013); ERNST ROBERT CURTIUS, EUROPEAN LITERATURE AND THE LATIN MIDDLE AGES (1953).

44. *See generally* BRUCE COLE, GIOTTO AND FLORENTINE PAINTING 1280–1375 (1977); SAMUEL Y. EDGERTON, THE HERITAGE OF GIOTTO'S GEOMETRY: ART AND SCIENCE ON THE EVE OF THE SCIENTIFIC REVOLUTION (1981); Robert Smith, *Giotto, Artistic Realism, Political Realism*, 4 J. MEDIEVAL HIST. 267 (1978).

45. *See generally* ARDIS BUTTERFIELD, POETRY AND MUSIC IN MEDIEVAL FRANCE: FROM JEAN RENART TO GUILLAUME DE MACHAUT (2009); ALICE V. CLARK, GUILLAUME DE MACHAUT (2012); YOLANDA PLUMLEY, THE ART OF GRAFTED SONG: CITATION AND ILLUSION IN THE AGE OF MACHAUT (2013).

46. *See supra* text accompanying notes 25–33 (identifying the numerous sources of opposition to the Eugenics movement both within and beyond the scientific community).

its basic premises, challenged the validity of its conclusions. In other words, the basis of the sterilization programs was a contested, albeit not invalidated, scientific theory.

Thus, while we cannot charge the *Buck v. Bell* Court with our present view that the sterilization programs were based on pseudoscience, we can charge it with a failure to be attuned to the controversies that existed at the time. The offhand dismissal of opposing views that is implicit in Justice Holmes's infamous phrase[47] reflects a mental slovenliness that can be condemned without anachronism. When a decision is being made that involves serious consequences for people, as indicated by the harm principle described above, or perhaps some more specific standard, a decision maker should feel obligated to scrutinize the issue according to the theory of validity that prevails at the time. In the 1920s, as now, that theory was natural science. It is precisely because natural science is our dominant mode of explanation and we cannot be expected to move outside it, that disputes occurring within the scientific community must be taken seriously. The Court's decision in *Buck v. Bell* can thus be regarded as a bad one on this formal basis.

C. The Substantive Criticism of Buck v. Bell

These formal arguments indicate some of the problems with the Court's decision, which allowed state governments to inflict serious harm on their citizens on the basis of an inadequately supported scientific theory. But they do not seem to get at the core of our concern, the truly objectionable character of *Buck v. Bell*. This sense of dissatisfaction suggests the intrinsic weakness of formal arguments: their inability to connect with the things that we feel most deeply about. What seems to be required is a substantive argument, that is, an affirmative assertion of values specific to our culture. Substantive arguments possess a greater force precisely because they are culturally specific; they embody commitments that a society has developed through its cultural experience and exist within the socially constructed space that generates commitments of this kind. It is arguments of this kind that Chemerinsky relies upon, in contrast to the formal arguments typical of constitutional jurisprudence, when he says that so many of the Supreme Court's decisions reach results that are "uniformly condemned by subsequent generations of scholars and judges."[48]

47. Buck v. Bell, 274 U.S. 200, 207 (1927) ("three generations of imbeciles are enough").

48. CHEMERINSKY, *supra* note 3, at 4.

The substantive value that *Buck v. Bell* violates is an emerging morality of self-fulfillment: one that stands in contrast to the traditional morality that has no generally accepted name, but that I believe can be described as a morality of higher purposes.[49] According to that earlier morality, moral actions were defined as those that contributed to one's own salvation in the personal realm and to the strength and glory of one's kingdom or nation in the political realm. For a variety of reasons, this view gradually yielded, over the course of the past two-and-a-half centuries, to the contrasting view that moral actions are defined as those that enable each person to define their own life path, and follow it as fully as they can, subject to other people's equal right to do the same. In political terms, this means that people are no longer expected to serve the state; rather, the agreed-upon purpose of the state is to serve its people.

This sea change in morality has a wide range of manifestations; the one most relevant to *Buck v. Bell* is that government must treat all persons within its jurisdiction as entitled to the liberty and opportunity that will allow them to define their life paths and strive for self-fulfillment. This does not mean that the government of a given jurisdiction cannot deploy force to exercise control over its citizens. Weber is right in saying that the ability to use force is the basis for all in functional or legitimate government.[50] Rather, it means that the government must be able to assert a strong justification for imposing significant impairments of individual liberty. The standard justifications are state necessity and individual wrongfulness. Thus, the government may conscript groups of people for the military in the cause of national defense, but it can rarely compel them to perform less crucial tasks. It may impose involuntary servitude on individuals, but only as punishment for crime. It may also impose other liberty-denying punishments, but in all cases it can only do so by establishing, by valid legislation, that a certain action is a crime, and then demonstrating, by due process of law, that the individual committed the designated action.

A central question in the formulation of this basic right, of course, is the scope of the protected liberty. In general, it can be said that the boundaries of any general, socially constructed principle such as a right to liberty will be contested in society, and that the determination of those boundaries is as central to the social norm as

49. EDWARD L. RUBIN, SOUL, SELF, AND SOCIETY: THE NEW MORALITY AND THE MODERN STATE 13–16, 113 (2015).

50. MAX WEBER, ECONOMY AND SOCIETY 56, 212–26 (Guenther Roth & Claus Wittich eds., 1978).

the recognition of the principle itself. At the time *Buck v. Bell* was decided, much of the controversy about the contours of the right to liberty involved the Supreme Court's effort to expand the liberty right so that it included economic rights that were not previously covered. Current revisionist accounts assert that the Court was simply maintaining the existing scope of liberty,[51] but there can be no question, in that case, that it was doing so in a manner that struck down an increasing number of state and federal statutes that were justified by claims that they were protecting personal liberty against private oppression.

The problem with *Buck v. Bell* is that the Court, in its effort to either expand or deploy the right to liberty in unprecedented ways, missed a more basic and essential aspect of this right. This is the idea that the integrity of the body is an essential component of liberty, and that the state must treat the body as inviolable unless it can justify the deprivation of liberty itself on the basis of state necessity or individual wrongfulness.

An aspect of the preceding morality of higher purposes was that the individual's subordination to these purposes included the control of their bodies. In social terms, the basic view was that society was necessarily constructed as a hierarchy, ranging from the king through the nobility to free peasants and to serfs or slaves, just as the natural order was constructed as a hierarchy ranging from God to angels to humans to animals to vermin.[52] The concept of rights certainly existed, but rights were determined by one's status in society, not one's identity as a human being. A nobleman's body was generally inviolable, but at the other end of the spectrum, unfree people had no rights, which meant that they could be owned, that is, a higher-ranking individual could take virtually complete control of their bodies.[53] This view is responsible for the universal, unreflective

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51. DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 127 (2011); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER 10–11 (1993); DAVID MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 5–6 (2011). Two other books that offer related arguments are BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 33–40 (1998) (arguing that the 1937 change in doctrine has been misunderstood due to simplistic characterizations of the preceding Court's due process decisions) and NOGA MORAG-LEVINE, CATCHING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE 63–85 (2003) (arguing that the Lochner Court's decisions stemmed from its understanding of common law as much as from its expansive definition of liberty).

52. This hierarchical structure was known as the Great Chain of Being. *See generally* ARTHUR LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY IN THE HISTORY OF AN IDEA (1960).

53. The number of people who were actually owned, that is, were slaves, varied over the course of Western history. In the Early Middle Ages, unfree household servants were true slaves; they were regarded as movable property or cattle, and their owners could thus exercise virtually

acceptance of slavery that we find so astonishing today. Lower status people—not only slaves but anyone below the status of a landowner—could be tortured if accused of a crime, or even required as a witness.[54] Ordinary soldiers and sailors—almost always from the lower classes—as well as servants were regularly subjected to corporal punishment for inadequate performance of their duties, as well as for noncriminal misbehavior.[55] The social hierarchy was reiterated within the family, where the father played the role of king and was thus legally authorized and socially justified in using physical force against both his wife and his children. [56] By extension of this parental right, teachers regularly beat their students, of all social classes, for failing to learn the assigned material.[57]

The reason why these practices, which we now regard as unpalatable brutality, were so widely and uncritically accepted is that they were fully consonant with the prevailing morality of higher purposes. People were supposed to serve the social order and the state, provided that those demands did not conflict with their effort to achieve salvation in the afterlife. Thus, their bodies could be treated

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complete control over their bodies. MARC BLOCH, FEUDAL SOCIETY 255–56 (L.A. Manyon trans., 1961) (1939); FICHTENAU, *supra* note 42, at 370–73; JOSEPH O'CALLAGHAN, A HISTORY OF MEDIEVAL SPAIN 292–93 (1975). Serfs were unfree, but they were not slaves, of course, and their masters' rights over their bodies were constrained. *See* BLOCH, *supra*, at 256–74 (discussing the social structure of serfdom); FRANCES & JOSEPH GIES, LIFE IN A MEDIEVAL VILLAGE 67–80 (1990). Serfdom displaced slavery to a large extent during the High Middle Ages, but slavery did not disappear; there were household slaves in fourteenth century Florence, and "everyone in the house reprimanded and beat them, including the master, the mistress and older children." Georges Duby, Dominque Barthelemy & Charles de la Ronciere, *Portraits*, *in* A HISTORY OF PRIVATE LIFE: VOLUME II: REVELATIONS OF THE MEDIEVAL WORLD 33, 233 (Georges Duby ed., Arthur Goldhammer trans., 1988). Shortly thereafter, the Atlantic slave trade began, and the number of people enslaved by Western nations skyrocketed. *See* HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440–1870, at 153–54 (1997) (noting the internationalization of the slave trade after the Portuguese inroads in Africa in the fifteenth century). In the United States, slavery involved near-total control of the slaves' bodies, even if that control was not always exercised. *See* DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 193–96 (2006); EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 63–69 (1974); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 141–236 (1989). This control included the power to castrate male slaves; the practice was in decline in the nineteenth century, and sometimes forbidden, but it continued to exist. GENOVESE, *supra*, at 67–68.

54. *See* JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME 45–48 (1976); EDWARD PETERS, TORTURE 40–72 (rev. ed. 1996); STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 144–49 (2011). Pinker, however, seems a bit confused about the distinction between punitive and investigatory torture.

55. PINKER, *supra* note 54, at 146.

56. BARBARA HANAWALT, THE TIES THAT BOUND: PEASANT FAMILIES IN MEDIEVAL ENGLAND 182–85 (1986); PINKER, *supra* note 54, at 428–41.

57. PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 252–68 (Robert Baldick trans., Vintage Books 1965) (1962).

as instruments for the achievement of these goals. The sacrifice of the body for metaphysical purposes was morally prohibited, a principle that Western society has learned from both its Jewish and Greco-Roman ancestors.[58] But its sacrifice for the pragmatic purposes of society and state was regarded as entirely acceptable.

The morality of self-fulfillment began displacing the morality of higher purposes at the end of the eighteenth century and has been progressing steadily since then. Its defining principle—that people should determine their own life path and have the maximum possible opportunity for doing so—demands that they have control of their bodies as well as their minds.[59] The ever-strengthening opposition to state-imposed religion, censorship, and any sort of punishment for transmitting or receiving information has been paralleled by an increasing social aversion to the invasion of the body. Not only has slavery been outlawed, it is now also recognized as emblematic of social injustice, so much so that we find it difficult to understand its previous acceptability.[60] Our aversion to this sort of compulsion is now so great that it extends to comparatively mild practices such as the specific enforcement of employment contracts.[61] Torture, as either a method of investigation or a form of punishment, is morally repugnant in all its forms; the Bush II Administration invoked the

58. *See Genesis* 22:1–19 (substitution of the ram for Isaac); *see also* 2 ROBERT GRAVES, THE GREEK MYTHS 24–25 (1960) (punishment of Tantalus for serving his son's body to the gods, this being the curse on the House of Atreus); GRAVES, *supra,* at 52–54 (murder of Agamemnon by Clytemnestra for his sacrifice of Iphigenia at Aulis). In Euripides' version of the story, Iphigenia is rescued by Artemis and a deer substituted in her place. EURIPIDES, TEN PLAYS 243, 244 (Moses Hadas & John McClean trans., Bantam Classics 1960) (414 BCE).

59. RUBIN, supra note 49, at 113–75.

60. Despite the definitive rejection of slavery in the United States following the Civil War, moral condemnation of the system is an ongoing cultural process. Pre-World War II histories of American slavery often portrayed it in genial terms. *See, e.g.*, ULRICH PHILLIPS, AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR, AS DETERMINED BY THE PLANTATION REGIME (1918) (slavery was economically inefficient but not excessively cruel); *see also* RALPH B. FLANDERS, PLANTATION SLAVERY IN GEORGIA (1933); CHARLES S. SYDNOR, SLAVERY IN MISSISSIPPI (1933); CHARLES S. DAVIS, THE COTTON KINGDOM IN ALABAMA (1939). It was only with GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944), and KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956) that modern American historians began documenting the slave system as a regime of horror. That is now the prevailing view. *See, e.g.*, DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD (2006); EDMUND S. MORGAN, AMERICAN SLAVERY: AMERICAN FREEDOM (1975). The same process has occurred in popular culture. The moonlight and magnolias sensibility of GONE WITH THE WIND (MGM Studios 1939) has been replaced, but only quite recently, by depictions of slavery's horrors. *See, e.g.*, DJANGO UNCHAINED (Columbia Pictures 2012); 12 YEARS A SLAVE (Fox Searchlight 2013).

61. *See generally* Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

justification of state necessity under conditions of emergency,[62] but was nonetheless subjected to intense protest.[63] Physical abuse of one's spouse or child is now defined as a criminal offense and a moral wrong, and even milder physical chastisement of disobedient children is increasingly disfavored.[64] Most European nations have outlawed corporal punishment in schools, and even in the retrograde United States only 19 states, largely in the South and West, continue to permit it.[65]

At present, we have reached the point where even the bodies of convicted criminals are protected.[66] We have replaced the physical torture of the premodern legal system with punishments that confine convicts but leave their bodies inviolate.[67] To be sure, those convicted of a crime remain subject to involuntary servitude, the only exception to the Thirteenth Amendment prohibition. This is justified, of course,

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62. Memorandum from Jay Bybee & John Yoo to John Rizzo on Interrogation of Al Qaeda Operative (Aug. 1, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf [https://perma.cc/3RXX-FU6H]; *see also* ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT: RESPONDING TO THE CHALLENGE 131–63 (2003) (arguing for establishing torture warrants in the case of "ticking bomb terrorists").

63. U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, THE TORTURE REPORT (2014). *See generally* DAVID LUBAN, TORTURE, POWER AND LAW (2014); ALFRED W. MCCOY, TORTURE AND IMPUNITY: THE U.S. DOCTRINE OF COERCIVE INTERROGATION (2012); SANFORD LEVINSON, TORTURE: A COLLECTION (2006); Kim Scheppele, *Hypothetical Torture in the "War on Terrorism"*, 1 J. NAT'L SECURITY & POL'Y 285 (2005).

64. Significantly, political conservatives who attempt to maintain certain elements of the older morality of higher purposes (through opposition to abortion and same sex marriage) tend to rely on physical chastisement of children to a much greater extent than liberals or progressives who more fully accept the new morality. *See* GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 339–78 (2d ed. 2002) (discussing this phenomenon).

65. Melinda Anderson, *Where Teachers are Still Allowed to Spank Students*, THE ATLANTIC (Dec. 15, 2015), http://www.theatlantic.com/education/archive/2015/12/corporal-punishment/420420/ [https://perma.cc/9PWT-QPCS]; Valerie Strauss, *19 States Still Allow Corporal Punishment in Schools*, WASH. POST (Sept. 18, 2014), https://www.washingtonpost.com/news/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school/ [https://perma.cc/T5Q4-BX5G].

66. *See* Ruiz v. Estelle, 688 F.2d 266, 267–68 (5th Cir. 1982) (court order eliminating use of prisoners as guards in Texas prisons due to their brutality toward prisoners); Jackson v. Bishop, 404 F.2d 571, 579–80 (8th Cir. 1968) (enjoining corporal punishment used in Arkansas prisons, including beatings with a leather strap and administering electric shocks to the prisoner's genitals); *see also* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 56–57, 85–88 (1998); STEVE MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN (1987).

67. MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977), repeatedly describes modern incarceration as exercising control over the prisoners' bodies. This can be taken, however, as an effort to appear profound by saying something that is incorrect in a portentous manner. The whole point of modern incarceration is to punish the prisoner without inflicting physical pain or mutilation. To do so involves confinement, but it is confinement of the person, not the body, an essential distinction when speaking about physical treatment.

by their wrongful behavior. But forced labor that has the effect of torture has been prohibited since the prisoners' rights decisions of the 1960s and '70s, and so has corporal punishment for misbehavior.[68] In other words, the development of the modern, self-fulfillment–based norm that people's bodies are exclusively their own has reached the point where even a misbehaving criminal cannot be subjected to physical mistreatment.[69]

What seems most offensive about the Court's decision in *Buck v. Bell* is its blindness to this social norm. To be sure, the norm was not nearly so well established at the time as it is today. Slavery was certainly anathema, physical torture was unacceptable, and child abuse was becoming a recognized problem,[70] but children were still being beaten at home and in school, while corporal punishment of prisoners was common. Thus, once the decision is placed in the normative context of the time, it does not appear quite as offensive as it does to us today. But, with due consideration given to that context, it was disappointing at the very least. We can justifiably expect people to be on the evolving rather than the receding edge of social norms, precisely because such norms reflect our developing sense of right and wrong. To condemn Aristotle, Cicero, or Aquinas for tolerating slavery may be anachronistic, since there was no discernable trend in the direction of our current norms during their time. But the situation with Thomas Jefferson, Andrew Jackson, and Robert E. Lee is different; they should have known where society was headed, and can be justly and meaningfully condemned for their opposition to that emerging norm. The same can be said of the Supreme Court in *Buck v. Bell*.

Moreover, this general trend of social morality during the 1920s and 30s can be stated in more specific terms. The prevailing

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68. *See* FEELEY & RUBIN, *supra* note 66, at 51–95.

69. GRAEME NEWMAN, JUST AND PAINFUL: THE CASE FOR CORPORAL PUNISHMENT OF CRIMINALS (1983), offers the argument that safely administered physical punishment would likely be more effective as both special and general deterrence, and significantly less expensive. He is certainly right about the expense. One physician and two nurses (no anesthesiologist required), equipped with a simple medical office, could readily cut off a hand from two thousand thieves per year, at a total personnel and equipment cost of one million dollars or so. The cost of incarcerating that many people for three years each would be close to six hundred million dollars. *See* Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* (2012) (Vera Inst. for Crim. Justice Study) (finding marginal cost of incarceration to average $31,307 per year). What makes any attempt to realize these enormous savings inconceivable is our norm against purposeful mutilation of the body.

70. *See generally* Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of Parens Patriae*, 22 S.C. L. REV. 147 (1970); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile* 23 S.C. L. REV. 205 (1971).

argument for compelled sterilization was that the children of impaired individuals, being similarly impaired, would be a burden to society.[71] This is a virtually explicit statement of the premodern morality that the individual's purpose was to serve society, that people could be enslaved, conscripted, tortured, and generally sacrificed for more important goals. By the time *Buck v. Bell* was decided, the Court should have known that this argument was normatively unacceptable, that it was a violation of the individual's autonomy.[72] Such sacrifices, to the extent that they could be imposed at all, could only be imposed as punishment for wrongful behavior, that is, as punishment, or for purposes of collective survival, such as national defense. This argument against compelled sterilization was well known at the time, and it seems disgraceful, as Chemerinsky argues, that the Court was unresponsive to it.

II. PRAGMATIC CONTEXTUALIZATION

As we look back on the past, and attempt to judge people's performance in conceptual terms, there is a natural tendency to view these people as abstract entities, apart from their real-world or pragmatic context. However willing we may be to consider the mental frameworks that prevailed at the time, we may nonetheless overlook the practical realities in which they were embedded. One explanation for this tendency is that mental frameworks are abstract, whereas pragmatic contextualization is phenomenological.[73] To place people in their conceptual context, we need only study the prevailing views of the entire society. Absent unusual conditions, we can then assume that any knowledgeable member of the society had access to those views, so that their actions can be assessed against that conceptual

71. BLACK, *supra* note 15, at 39–40, 138–43, 153–54; LARGENT, *supra* note 15, at 64–73; LOMBARDO, *supra* note 15, at 43–47; NOURSE, *supra* note 15, at 21–23.

72. Instead, the Court reiterated the argument. *See* 274 U.S. 200, 207 (1927):

> 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.

73. For the basic principles of phenomenology, see generally EDMUND HUSSERL, IDEAS: A GENERAL INTRODUCTION TO PURE PHENOMENOLOGY (W.R. Boyce Gibson trans., Routledge 2d ed. 2012) (1931); EDMUND HUSSERL, CARTESIAN MEDITATIONS: A INTRODUCTION TO PHENOMENOLOGY (Dorion Cairns trans., Kluwer Academic 1999) (1950).

background.[74] But to appreciate people's pragmatic context, we need to understand their experience as individuals. It is not only the case that the view from a mountain looks different than the view from the valley below, but also that the view from one mountain looks different than the view from another mountain.[75]

The dramatic case of slavery provides a useful illustration. As stated above, it makes more sense to condemn Thomas Jefferson or John C. Calhoun for their support of slavery than it does to condemn Pericles or Cicero.[76] But Calhoun and Jefferson were also slave owners, and that must at least be taken into consideration. We must ask ourselves how willing we would be to relinquish a significant proportion of our personal wealth in support of a principle that was normatively preferable but not legally enforced.[77] One might also ask the question in connection with a member of a law firm that was representing slave owners (whether enforcing the Fugitive Slave Act or otherwise) or simply a non-slave owning storekeeper in a Southern city. How willing would we be to sacrifice a desirable job on the basis of a normative principle, or to incur the condemnation of our immediate community? In the final analysis, we may nonetheless decide that the slave owner, the lawyer, and the storekeeper merit condemnation. What we should not do, however, is to assume that the only forces acting on them were conceptual; we need to ask how it felt for the particular person we are considering to be located where that person actually was, in a pragmatic context as vivid and demanding as the one in which we find ourselves.[78]

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74. In the past, that may have been true for only a minority of the society's members, but anyone whose actions we would be inclined to judge is likely to fall within that minority. In other words, they will be leaders of the society. In discussing the subsistence farmers, or peasants, in pre-modern European nations, we may want to determine their motivations, but our approach would be sociological: it would be odd to ask if they were behaving morally. Such questions are typically reserved for the society's leaders or power holders, and they would have access to its conceptual framework.

75. A simple formulation of the phenomenological approach to human experience is that it is grounded on the idea that "I am always *here*." I am not *there*. If I were *there*, that "there" would become my "here." I would not have changed the fact that my experience is grounded in my location, but I would have had a different experience.

76. The first member of each pair was an unusually intelligent and well-educated ruler; the second member was a political leader who was also a leading political theorist of his day.

77. One's willingness to make ordinary charitable contributions, even at the tithing level (one tenth) is not an answer to this challenge. The whole point of setting this level (whether or not the contributions are tax deductible) is that it does not impair the benefactor's basic life style.

78. This is essentially the question that Kierkegaard asks the reader in his re-telling of the sacrifice of Isaac. SOREN KIERKEGAARD, FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH 21, 26–37 (Walter Lowrie trans., Princeton University Press 1954) (1849). How willing would we be to sacrifice our child in obedience to what we perceive as a divine command?

A great deal of scholarship has been devoted to the proper role that the Supreme Court should play in a democratic system. That scholarship is certainly relevant to the present inquiry, but the issue here is a bit narrower: it is the answer, or the range of answers, that the members of the Supreme Court were considering at the time of the decision in question. In other words, for any given decision, how did the members of the Court conceive their role at that particular time, and how should they have conceived that role? This is the question that Robert Cover asks in his discussion of the choices facing anti-slavery judges in the decades prior to the Civil War.[79] Again, it is open to us to declare that the members of the Court were wrong, and that they should have reconceived their role and reconsidered their conclusions. What we may not do, if we want to ask the question seriously, is to ignore the reality that they were members of an institution and were strongly influenced by the beliefs and expectations that accompanied that institutional position.

A. Focusing on Human Rights

As noted above, Chemerinsky's book derives from the premise that the basic purpose of judicial review is to protect human rights. This is a widely, although not universally, accepted view, but the question under consideration is whether it is simply our present view, and that imposing it as a judgment on the past represents a Whig interpretation of history. As such, the question becomes one of pragmatic contextualization. Is the protection of rights intrinsic to the entire enterprise of judicial review, as it has developed in the United States, so that it can be said that Justices who do not advance at least some aspect of this enterprise were failing in an essential aspect of their role? If not, then even if a particular practice violates a developing human rights norm, it would not be incumbent upon courts to rule against that practice.

There is a complex interplay between this question of role morality and the contours of legal doctrine. One institutional role consideration on which everyone agrees is that courts cannot use judicial review to overturn a particular social practice, unless they can justify their ruling by reference to the constitutional text. Some issues lie outside virtually anyone's interpretation, and are thus inaccessible to judges acting in their institutional role, however they might feel as

79. *See generally* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1984) (examining the antebellum judge's concept of his judicial role).

individuals.[80] An example is an issue that in many ways paralleled compelled sterilization, which was the use of lobotomy for the treatment of people with alleged mental disturbances.[81] Lobotomy, like eugenics, garnered significant scientific support in the 1930s and 40s, and was also justified by the rationale that it prevented the people subjected to it from being a burden to society.[82] Like sterilization, it also engendered both scientific and humanitarian opposition at the time, and has subsequently been rejected with a sense of horror at its prior popularity.[83] It was carried out by private physicians, however, usually under legal authority that was well established for other treatments, and no constitutional objection was articulated. Thus, unlike compelled sterilization, it lay beyond the reach of legal doctrine as it was understood at the time, and the Court cannot be charged for its failure to oppose it.

But while doctrine has established boundaries at any given time, it is of course dependent on interpretation. A court can be criticized on normative grounds for failing to change or reinterpret doctrine, just as private individuals can be criticized for failing to change their moral sentiments. To be sure, stare decisis provides a countervailing institutional norm for courts, so we might want to allow them more time to change their views, assuming it is possible to make such fine distinctions. It is also possible to argue that one or the other interpretation is preferable on purely doctrinal or formal grounds, depending on one's theory of interpretation. But there is no a

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80. The extent to which text or doctrine limits judicial decisions is of course a matter of dispute. Stanley Fish argues that texts cannot impose any objective or external limits on the interpreter. *See* FISH, supra note 36. Many legal scholars disagree, of course. *See, e.g.*, Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739–55 (1982) ("Interpretation, whether it be in the law or literary domains, is neither a wholly discretionary nor a wholly mechanical activity. It is a dynamic interaction between reader and text. . . ."). But the argument here refers only to limits that are perceived and accepted in context, that is, at a given time in a given culture. Fish does not argue against such limits; indeed, he specifically acknowledges them as evidence for the non-existence of culturally independent limits. *See* Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1332–39 (1984) (distinguishing Fiss's views from his own).

81. *See generally* STANLEY FINGER, ORIGINS OF NEUROSCIENCE: A HISTORY OF EXPLORATIONS INTO BRAIN FUNCTION 290–96 (1994); JENELL JOHNSON, AMERICAN LOBOTOMY: A RHETORICAL HISTORY (2014); JACK D. PRESSMAN, PSYCHOSURGERY AND THE LIMITS OF MEDICINE (1999); German E. Berrios, *The Origins of Psychosurgery: Shaw, Burkhardt and Moniz* 8 HIST. OF PSYCHIATRY 61 (1997). For a vivid first person account by a lobotomized patient, see HOWARD DUDDY, MY LOBOTOMY (2007).

82. In this case, of course, by becoming tractable, rather than by not producing defective offspring. It is quite possible that someone who had been lobotomized might also have been sterilized by joining inaccurate eugenics with inaccurate neurology, but I have not found any such instance.

83. FINGER, *supra* note 81, at 293–96; JOHNSON, *supra* note 81, at 106–31; PRESSMAN, *supra* note 81, at 401–25.

priori reason to assume that a previous interpretation is doctrinally preferable to a newly developed one.[84] As a general matter, therefore, judges remain subject to normative assessment of their decisions, despite the institutional limitations imposed by legal doctrine.

With these considerations in mind, the argument that judicial review should focus explicitly and preeminently on human rights can be assessed. The institutional context of the courts strongly supports this argument. Accepting the validity of judicial review, which is a matter of near-consensus in the United States generally, even among legal academics,[85] it seems clear that explicit guarantees of rights are a notable feature of the text that the judiciary is assigned to enforce. Not only are such guarantees explicitly stated, in both the original text and the amendments, but the language of these guarantees strongly implies judicial enforcement. One need not accept the legal process argument that the court should leave structural features of the text to the political process, and limit itself to human rights on a Footnote Four rationale,[86] to perceive the textual support for human

84. It might appear that an originalist theory of interpretation would favor prior interpretations over current ones, based on the idea that earlier interpreters are in closer contact with the Framers. But originalists are often textualists as well, which leads them to the claim that they can read the language more accurately than their predecessors. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 592–95 (2008) (reversing two hundred years of judicial precedent based on the claim that a current interpreter was better able to discern the Framers' original intent by reading the text). This parallels the distinction between the Protestant and Catholic interpretation of Scripture.

85. A number of scholars have recently championed departmentalism, which argues that other branches of government have equal authority to interpret the Constitution. *See, e.g.*, SANFORD LEVINSON, CONSTITUTIONAL FAITH 27–53 (1988); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 254–67 (2d ed. 2000); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV 83, 106 (1998); Robert C. Post & Reva B. Siegal, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimmel, 110 YALE L.J. 441, 513–22 (2000); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 845–51 (2002). Others have argued for different versions of popular constitutionalism, which grants the populace an influential or decisive role in the interpretive process. *See generally* LARRY D. KRAMER, POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); Robin West, *Katrina, the Constitution and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006). Although these approaches would certainly change the authoritative nature of Supreme Court decisions, neither is particularly relevant to the issue under discussion. As long as the Court has some role in constitutional review of legislation, it should make the right decision rather than the wrong one, regardless of whether that decision is final or contingent.

86. For statements of this position, see generally JESSE C. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1981); Bruce LaPierre, *Political Accountability and the National Political Process—An Alternative to Judicial Review*, 80 NW. U. L. REV. 577 (1985); Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 808 (1982); Herbert Wechsler, *The Political Safeguards of*

rights enforcement. Most of the rights provisions, including guarantees of free speech, free exercise, non-establishment, due process and equal protection, and prohibitions of ex post facto laws, bills of attainder, self-incrimination and slavery are stated as limits on the legislature, that is, on the government's dominant policy maker. It seems natural, given the Anglo-American legal tradition, that such limits would be imposed by a court. Federalist provisions, such as the Tenth Amendment, the Eleventh Amendment, and the prohibition against sub-dividing states, can claim judicial enforcement on the same grounds. Other structural provisions, however, are stated as grants of authority to a particular decision maker, or general design features, without any implication that these provisions will be enforced by an external institution.

A second reason to ascribe enforcement of human rights to the Supreme Court's institutional role is the protections that the Constitution provides for the Justices: life tenure and salary protection[87] as well as the independence from any other decision maker that judges are understood to possess in the Anglo-American tradition. These elaborate provisions seem more necessary if the Court is expected to place limits on the government in its entirety, as opposed to deciding against one political institution but in favor of another. In other words, the structure of the Supreme Court and other federal courts suggests that these courts are intended to protect the powerless individual against the force of government, or the tyranny of the majority.

On the basis of this institutional context, *Buck v. Bell* once again appears as a bad decision, a basic failure by the Court. The vulnerability of those subjected to compulsory sterilization could not have been more apparent.[88] Their weakness was the explicit basis for the deprivation that was imposed on them.[89] The rationale for this deprivation was not their own benefit, but the benefit of the society that was declared to have become weary of their presence. Moreover, the deprivation itself was severe; the Justices need only have been human beings to understand the value that most people attached to

Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954).

87. U.S. CONST. art. III, § 1.

88. The Virginia sterilization law at issue in the case had the effect of permitting sterilization of those committed to state hospitals as feeble-minded or epileptic, a notably powerless group of people. LOMBARDO, *supra* note 15, at 92; *see also* Buck v. Bell, 274 U.S. 200, 205–07 (1927). Carrie Buck herself, a test case for the law, had been thrown out of her foster home when she became pregnant. See BLACK, *supra* note 15, at 108–17; LOMBARDO, *supra* note 15, at 103–35. The evocative title of Black's book is *War Against the Weak*.

89. *Buck*, 274 U.S. at 207.

having children. While this may not have been clearly identified as a legal right at the time of the decision, the idea of the family and the home as a private realm, exempt from government control, was well established in the legal tradition. In short, the Justices should have known that their institutional role involved the protection of vulnerable individuals from government intervention that imposed severe burdens on them in the name of public benefit.

Moreover, the Justices should have been cognizant of the effect that their decision would produce as a result of the Supreme Court's role as the nation's highest court and a purported guardian of human rights. The decision in *Buck v. Bell* was widely regarded as a normative imprimatur for compelled sterilization. It dispelled the doubts that had been widespread at the time about the legality and acceptability of the procedure. As Edwin Black reports: "Once Holmes' ruling was handed down, it was cited everywhere as the law of the land. New laws were enacted, bringing the total number of states sanctioning sterilization to twenty-nine. Old laws were revised and replaced."[90] As a result, the number of compelled sterilizations increased and remained at that higher level for the next thirteen years.[91] In other words, the Court's role enabled it to influence public opinion beyond the legal effect of its decision. This predictable intrusion on the lives of vulnerable individuals should have provided the Court with an additional basis for reaching a different result in *Buck v. Bell*.

B. Distinguishing Property Rights

The Supreme Court's pragmatic context has a temporal as well as a structural aspect; that is, in addition to the position of the Court in our governmental system, as just discussed, we must also consider the status of the Court at the particular time when the decision in question was being made. *Buck v. Bell* was decided in the midst of what has subsequently been called the Lochner Era. In considering people's decisions in context, it is important to avoid imposing current periodization on those who were not thinking in those terms; no one in

90. BLACK, *supra* note 15, at 122; *see also* LARGENT, *supra* note 15, at 114; LOMBARDO, *supra* note 15, at 185–98; NOURSE, *supra* note 15, at 31.

91. BLACK, *supra* note 15, at 122–23. States such as Utah, South Dakota, and Minnesota, which had not performed any compelled sterilizations before the decisions, performed 252, 577, and 1,880, respectively, during the thirteen years that followed. Of the 35,878 compelled sterilizations between 1907 and 1940, almost 30,000 were performed after the decision. This trend was brought to a close by the Court's decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which is discussed below.

the Middle Ages thought of themselves as living in the Middle Ages, and the term Renaissance was invented in the nineteenth century.[92] But the term "Lochner Court" refers to a reality that was well understood at the time. During the three decades prior to *Buck v. Bell*, the Supreme Court struck down state and federal statutes regulating economic activity on the basis of a newly articulated constitutional right, which it identified as liberty of contract.[93] Because this legislation was the product of a broad-based social movement well recognized at the time, the Court's decisions were extremely controversial. Many people, in both the legal academy and the wider society, condemned the Court as exceeding its authority or misinterpreting the Constitution.[94] This controversy would come to an end exactly one decade after *Buck v. Bell*, with the demise of liberty of contract as a constitutional doctrine.[95] But no one knew that at the time, of course, and the decision must thus be understood in the context of that raging debate about the Supreme Court's proper role.

The standard account of the Court's liberty of contract decisions is that they represent an unprincipled effort by a politically conservative court to impede progressive legislation.[96] In recent years, however, scholars have challenged this interpretation, based on the fact that the Court was actually making careful distinctions and upheld a good deal of regulatory legislation.[97] David Bernstein argues

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92. *See generally* JACOB BURCKHARDT, THE CIVILIZATION OF THE RENAISSANCE IN ITALY (Samuel George Chetwynd Middlemore trans., Modern Library 2002) (1860) (memorializing the term "renaissance" two years after it was coined by French historian Jules Michelet in 1858).

93. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 46 (1905) (maximum hours law); Adair v. United States, 208 U.S. 161, 168–69 (1908) (federal law prohibiting employers from forbidding union members among employees); Coppage v. Kansas, 236 U.S. 1, 6–7 (1915) (state law prohibiting employers from forbidding union members among employees); Adkins v. Children's Hosp., 261 U.S. 525, 539 (1923) (minimum wage law); New State Ice Co. v. Liebmann, 285 U.S. 262, 271 (1932) (law requiring certification before entering business).

94. *See* PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK 128–37 (1990); PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES: 1918–1969, at 68–82, 99–115 (1972).

95. West Coast Hotel v. Parrish, 300 U.S. 379, 381, 400 (1937) (upholding minimum wage law); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 5 (1937) (upholding Wagner Act regulation of employee relations through unions); United States v. Carolene Prods., 304 U.S. 144, 145–46, 154 (1938) (upholding consumer protection law forbidding sale of milk mixed with vegetable oil).

96. CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 179–80, 230–31 (Russell 1958) (1930); ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 513–23 (1948); BENJAMIN TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT (1942); Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545, 571–72 (1924); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 876–883 (1987).

97. *See generally* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning laws); Bunting v. Oregon, 243 U.S. 426 (1917) (maximum hours laws in manufacturing enterprises); Hipolite

that liberty of contract was a well-recognized element of nineteenth century legal thought derived from natural rights beliefs;[98] David Mayer argues that it emerged from the Founders' understanding of the liberty for which they had fought, and on which they based the nation they created;[99] and Howard Gilman regards it as reflecting a long-standing American aversion to class legislation, a demand that government act neutrally and for the common good.[100] Barry Cushman offers the related argument that many cases decided by the Lochner Court laid the groundwork for the subsequent rejection of liberty of contract doctrine,[101] while Noga Morag-Levine notes that the Court was strongly motivated by a desire to preserve common law doctrine.[102]

One difficulty with the revisionist effort to rehabilitate liberty of contract doctrine is that it fails to account for the Lochner Era Court's reliance on a uniquely narrow reading of the Commerce Clause to strike down economic legislation enacted by the federal government.[103] These doctrinally unrelated decisions suggest that the Court had broader and more political motivations than the revisionists suggest.[104] What truly motivated the Court, in my view, was a desire to protect the right to private property, including the opportunity to acquire property, against legislation that was seen as undermining it.[105] This enterprise dominated the Court's decisions, and its thinking, at the time that the constitutional challenge to compulsory sterilization was presented.

Protection of private property and the constitutionality of compulsory sterilization are not directly related to one another. That

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Egg Co. v. United States, 220 U.S. 45 (1911) (the federal Pure Food and Drug Act); Muller v. Oregon, 208 U.S. 412 (1908) (maximum hours laws for women).

98. BERNSTEIN, *supra* note 51.

99. MAYER, *supra* note 51.

100. GILLMAN, *supra* note 51.

101. CUSHMAN, *supra* note 12.

102. MORAG-LEVINE, *supra* note 51, at 63–85; *see also* KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND THE LIBERAL DEVELOPMENT OF THE UNITED STATES (1992) (noting the influence of common law on American political and legal thought).

103. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 282–84 (1936) (maximum hours for coal miners); United States v. Butler, 297 U.S. 1, 58–59 (1936) (agricultural price supports); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 344 (1935) (pension system for railroad workers); Hammer v. Dagenhart, 247 U.S. 251, 280 (1918) (prohibition of goods produced with child labor); *see also* United States v. E.C. Knight Co., 156 U.S. 1, 17–18 (1895) (restrictive reading of the Sherman Antitrust Act on Commerce Clause grounds).

104. This does not apply to Cushman, who discusses the Commerce Clause at length, but neither he nor Morag-Levine is attempting to rehabilitate liberty of contract doctrine. *See generally* CUSHMAN, *supra* note 12; MORAG-LEVINE, *supra* note 51.

105. Edward L. Rubin, *Lochner and Property*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: A TRIBUTE TO THE WORK OF JERRY MASHAW (Nicholas Parrillo ed., forthcoming 2016).

is, there is no particular reason why a court that was intent on protecting property rights should have been unwilling to strike down laws that mutilated people's bodies and denied them the opportunity to have children on the basis of a questionable scientific theory. But it is also not difficult to perceive that the controversy over economic rights that the Supreme Court had created for itself affected its judgment about the sterilization issue. When confronted with a challenge to democratically-enacted legislation, the Court's first instinct was to ask if this legislation trenched upon the property rights it was attempting to protect. If not, it tended to view the legislation as unobjectionable.

This tendency is most apparent in the Lochner Court's insensitivity to free speech issues. The controversy about American entry into World War I, followed by the Communist takeover of Russia and the increase in political radicalism within the United States, sparked a series of statutes aimed at suppressing political speech. These statutes were clearly seen at the time as constitutionally suspect, and convictions under them were challenged on that ground.[106] But the Supreme Court rejected all these challenges and upheld the statutes.[107] As Geoffrey Stone has pointed out,[108] these decisions follow the pattern that has prevailed until very recent times: the Supreme Court has always succumbed to the political pressures of wartime and hardly ever enforced the First Amendment against government suppression of speech during those times. In many ways, this consistent pattern is the strongest evidence for Chemerinsky's "case against the Supreme Court."

The Court's failure to enforce the First Amendment may be ascribed to political timidity, and the absence of other human rights decisions may be seen as a result of the conceptual context, that is, the undeveloped state of doctrine in this area. But it is the decisions where the Court did strike down legislation on grounds that we associate with human rights that reveals the extent to which the Lochner Court was transfixed, or obsessed, by its concern for private property. In *Meyer v. Nebraska,* the Court struck down a nativist

106. GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 135–233 (2004).

107. *See, e.g.*, Whitney v. California, 274 U.S. 357, 363–72 (1927) (upholding a state law criminalizing the Communist Party as disturbing public peace); Gitlow v. New York, 268 U.S. 652, 664–65 (1925) (acknowledging that the Fourteenth Amendment had made the First Amendment applicable to the states, but upholding a state law criminalizing political speech); Abrams v. United States, 250 U.S. 616, 616–17 (1919) (upholding a conviction under the federal Sedition Act of 1918 for distributing leaflets); Schenk v. United States, 249 U.S. 47, 48–50 (1919) (upholding a conviction under the Federal Espionage Act of 1917 for distributing leaflets).

108. STONE, *supra* note 106.

statute that forbid teaching school children in a foreign language and forbid any foreign language instruction to children younger than high school age.[109] In *Pierce v. Society of Sisters*, it struck down a Ku Klux Klan inspired statute that forbid attendance at private schools below the high school level.[110] Both decisions, which relied on substantive due process, have been seen as harbingers of the Court's subsequent human rights jurisprudence. Perhaps they were, but the Court's rationale in both cases rested on a defense of private property and economic opportunity. The *Meyer* case was brought by a German teacher. In the decision, Justice McReynolds (one of the Four Horsemen)[111] wrote that: "Plaintiff in error taught [German] in school as part of his occupation. His right thus to teach and the right of the parent to engage him so to instruct their children, we think, are within the liberty of the Amendment."[112] *Pierce* was brought to court by owners of private schools. Justice McReynolds, again writing for the Court, declared that the owners "have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which [the state] is exercising over present and prospective patrons of their school."[113] And he added, with some self-awareness and considerable accuracy, that "this court has gone very far to protect against loss threatened by such action."[114]

The people who were subject to compulsory sterilization were neither language teachers nor private school owners. They appeared before the Court as impecunious and disadvantaged, indeed, as metaphorically naked, since what they had put at issue was the integrity of their genitals. The Court's failure to respond to their challenge can be seen as a direct result of its concern with private property rights. The institutional context was that the Court at this time saw itself as the defender of these rights, and was essentially unwilling to enforce any other types of rights against democratically enacted legislation.

Given the institutional context of the Justices at the time of *Buck v. Bell*, to what extent can that decision be condemned? The answer is: to a very great extent. Indeed, the institutional context itself is a primary ground for such condemnation. The answer to the

109. 262 U.S. 390, 403 (1923).

110. 268 U.S. 510, 534–35 (1925).

111. *See supra* note 12 and accompanying text.

112. *Meyer*, 262 U.S. 390, 400 (1923).

113. *Pierce*, 268 U.S. 510, 535 (1925).

114. *Id.* There is a good deal of fine language about liberty in both decisions, and this language would provide support for future decisions that supported human rights. But, the grounds of both decisions rest on economic rights.

revisionists' attempt to rehabilitate the economic liberty decisions of the Lochner Court is that these decisions were clearly wrong at the time. They were premised on the idea that the Constitution establishes a substantive right to private property, independent of the procedural right to avoid confiscation of such property, once granted, without due process or just compensation. Alternatively, the decisions were premised on the idea that the common law has constitutional significance and cannot be altered by legislation, unless some sort of amplified justification is provided.

This doctrine, in either version, is based on what we now regard as a misunderstanding of the federal judiciary's institutional role. There is no textual or doctrinal support for a substantive right of private property or a presumptive rule against changing common law.[115] The contours of property are a matter for the political process to determine, and have been throughout the entirety of Anglo-American legal history. Some political theorists have argued in favor of substantive property rights,[116] but there is no reason to assume that the Constitution enacts Mr. John Locke's social contract theory. The Supreme Court strongly endorsed the view that property is governed by majoritarian decision just ten years after *Buck v. Bell*, [117] and has maintained it ever since.[118] It clarified the implications of this position

115. The original Constitution uses the word property only once. Article IV, Section 3, Clause 2 states: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The term "property" does appear in the Fifth Amendment, and states that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation," and the Fourteenth Amendment applies the first phrase to the states. U.S. CONST. amend. V, XIV. But this language does not grant a right to private property; rather it grants a right to due process. It says that the state can take property away from an individual if it compensates the individual, and may take an individual's property away with compensation on a showing that the individual fits into a generally established legislative category that justifies such treatment (a tax, a fine for misbehavior, a restriction on property use, etc.). This does not impose limits on the sort of legislation the state can enact, as the Court recognized in 1937.

116. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 22–26 (1962); G.W.F. HEGEL, PHILOSOPHY OF RIGHT 122–34 (T.M. Knox trans., 1967); John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government*, *in* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 100, 111–21 (Ian Shapiro ed., 2003); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 169–82 (1974). *See generally* ALAN RYAN, PROPERTY AND POLITICAL THEORY (1986); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

117. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–54 (1938) (upholding a law outlawing the sale of milk mixed with vegetable oil under rational basis review); West Coast Hotel v. Parrish, 300 U.S. 379, 398–400 (1937) (ruling that the legislature may pass minimum wage laws since those laws do not impede the right to contract).

118. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–16 (1976) (noting that legislative acts regulating economic life are presumptively Constitutional and will be upheld if

in the administrative due process cases, declaring that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[119]

But even if we are willing to accept the revisionist position and argue that the Lochner Court's doctrine was more justifiable at the time it was articulated, there is certainly no justification for allowing that effort to preclude protection of other human rights. The two claims are doctrinally unrelated. Protecting the rights of an employer to pay his workers lower wages, or demand that they work longer hours, and then ignoring the claims of powerless and impoverished individuals to avoid physical mutilation that will destroy their ability to have children, is simply class-based bias. It is inexcusable today, and it was inexcusable at the time. By 1927, after roughly half a century of national concern over the conditions of the urban and rural poor, the Court should have been conscious of the same injustice we perceive at present.

A converse version of this assessment may explain the somewhat surprising fact that Justice Holmes wrote the majority opinion in *Buck v. Bell*. Holmes was, of course, the leading opponent of the Court's liberty of contract or substantive due process doctrine.[120] His argument is the one nearly everyone accepts today; majoritarian governments determine the contours of property rights through legislation. Having taken this position, he seems to have generalized it to the idea that the government has broad authority, subject to few constitutional constraints. As is well known, he wrote the opinion for the Court that upheld convictions under the Sedition Act of 1918, coining another of his famous phrases in the process,[121] before he recognized that such legislation violated his own commitment to free

there is a rational basis for that regulation); Williamson v. Lee Optical, 348 U.S. 483, 490–91 (1955) (upholding regulations of eye doctors under rational basis review).

119. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

120. *See* Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting) (arguing that liberty of contract is not found in the Fourteenth Amendment); Adair v. United States, 208 U.S. 161, 191 (1908) (Holmes, J., dissenting) ("I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to its extreme by the decisions."); Coppage v. Kansas, 236 U.S. 1, 26–27 (1915) (Holmes, J., dissenting) (noting the opposition to the rulings in *Lochner* and *Adair*); Adkins v. Children's Hosp., 261 U.S. 525, 567–71 (1923) (Holmes, J., dissenting) (reemphasizing questions about liberty of contract in the Constitution); *see also* G. EDWARD WHITE, OLIVER WENDELL HOLMES, JR. 92–93 (2d ed. 2006) (noting that Holmes considered the idea that liberty of contract was in the Constitution a "fiction").

121. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919).

speech.[122] He dissented from the decision in *Meyer v. Nebraska*, declaring: "I think I appreciate the objection to the law, but it appears to me to present a question upon which men reasonably might differ, and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried."[123]

The normative condemnation of Holmes for his position is parallel to the condemnation of the Court's majority. Both failed to make the sorts of distinctions that moral actors, and also, in this case, legal professionals are expected to comprehend. The majority was so concerned about its perceived right of private property that it seemed to lack the motivation to consider any other rights. Holmes was so intent on opposing the majority's invalidation of state law on property rights grounds that his ability to discern constitutional problems with other types of laws was seriously weakened. This is exactly the sort of conceptual slovenliness that merits condemnation by subsequent observers.

C. Protecting the Court

A third element of pragmatic contextualization involves the structural position of the institution itself, rather than the substantive policies or doctrines that derive from the institution's design. It is natural for someone who is placed within an institution, particularly in a leadership position, to defend the status of the institution. This instinct, moreover, will generally be justifiable upon reflection; the individual can readily argue that protection of the institution is an essential aspect of his or her position. In other words, when people function as members of an institution, rather than as members of society in general, their institutional role serves as a pragmatic factor that influences, and sometimes determines, their decisions. This does not preclude a global condemnation of the institution, from the perspective of either an external observer or a member of the society. But in the absence of such a condemnation, it would seem to alter the normative judgments that we are willing to impose upon an individual who functions in an institutional setting.

The question is directly relevant to Chemerinsky's book. Some scholars challenge the validity of judicial review in its entirety, most

122. *See* THOMAS HEALY, THE GREAT DISSENT: HOW HOLMES CHANGED HIS MIND – AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 96–100 (1st ed. 2013) (describing Holmes's views on free speech).

123. Bartels v. Iowa, 262 U.S. 404, 412 (1923) (companion case to *Meyer*).

typically because it is counter-majoritarian.[124] But Chemerinsky offers no such criticism; his "case against the Supreme Court" is based on the content of its particular decisions. In effect, he argues inductively rather than deductively; what is wrong with the Supreme Court as an institution, specifically an institution authorized to reverse democratically enacted legislation on constitutional grounds, is that the Court has regularly reached bad decisions in particular cases. The force of this approach lies in its sincerity. Generalized attacks on the institution of judicial review often seem to be motivated by dissatisfaction with the Court's substantive positions. More specifically, it was political conservatives who tended to condemn judicial review during the Warren Court era, and political progressives who have voiced such condemnation as the Court moved to the right during the Rehnquist and Roberts eras. This natural tendency provides a reason to abjure such global condemnations and formulate normative judgments of institutions, and institutional behavior, on the basis of the institution's actual performance.

Assuming we adopt this perspective, does the understandable and justifiable inclination to defend one's institution provide at least a partial justification for the Court's decision in *Buck v. Bell*? At first glance, this might appear to be a reasonable argument. The Court had certainly been subjected to extensive criticism for its decisions striking down Progressive legislation. Its Justices may well have concluded that they should not expose their institution to additional stress, that it would be better to ignore constitutional problems in other areas. Such concern for the Supreme Court's overall legitimacy was strongly championed by Alexander Bickel in his idea of the "passive virtues."[125]

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124. The phrase was coined, and made famous, by Alexander M. Bickel. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986). But the concern goes back much further. Barry Friedman has explored its influence on American constitutional law. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (detailing the development of judicial review and supremacy); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002) (discussing judicial review during Reconstruction); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 79 N.Y.U. L. REV. 1383 (2001) (discussing judicial review in the *Lochner* era); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV, 971 (2000) (examining the Court during the New Deal); Barry Friedman, *The Birth of An Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002). For further discussion regarding Bickel's work and its lasting significance, see generally THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY (Kenneth D. Ward & Cecelia Castillo eds., 2005).

125. *See* BICKEL, *supra* note 124, at 111.

It can be seen as preserving the Court's ability to reach desirable results in future cases.

A general difficulty with taking institutional considerations of this sort into account is that they are second order arguments. The decision maker, instead of doing what she perceives to be right, makes strategic judgments about the broader effects of her decision. Similarly, the observer, in judging her actions, tends to justify them on the basis of judgments that he knows she made, or that he interposes on the basis of his own sense of the situation. Because such effects are difficult to assess, however, these judgments often become vehicles for normative failure; both the decision maker's action and the observer's assessment reflect an unwillingness to make hard choices or suppress extraneous beliefs.

That would seem to be the case with any institutional protection justification for *Buck v. Bell*. The opposite decision would certainly have antagonized the proponents of eugenics, some of whom were truly messianic about the subject, but they were largely a narrow elite group, not a broad-based social movement. Moreover, as discussed above, the forces that opposed them were at least as influential, so that the Court was in its typical stance of choosing between the two sides of a political debate, rather than opposing an overwhelming majority. More generally, there is good reason to doubt that the Supreme Court's status is as fragile as the idea of institutional protection necessarily assumes. The Justices who decided *Buck v. Bell* could not have known that the Court would weather rather easily a frontal assault from an enormously popular President, commanding large majorities in both Houses of Congress, some ten years later.[126] But they did know that they had struck down a great deal of state and federal legislation without generating any serious threat to the Court itself, and they were clearly willing to continue doing so. They knew, moreover, that the Court had survived decisions in the past that created massive controversy, and that they themselves must have viewed as mistaken, such as *Dred Scott v. Sanford*.[127]

A further normative problem with *Buck v. Bell* involves the impact of the decision. Bickel's passive virtues are designed to protect

126. *See* CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF LIBERTY 404–19 (1st ed. 2003); CUSHMAN, *supra* note 12, at 11–32; WILLIAM E. LEUCHTENBURG, FRANKLIN ROOSEVELT AND THE NEW DEAL 231–38 (1st ed. 1963); JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 293–316 (1st ed. 1956), Cushman effectively refutes the view that Justice Owen Roberts was intimidated into switching his position by Roosevelt's initiative.

127. 60 U.S. 393 (1857) (invalidating the Missouri Compromise by declaring that slaves could not become citizens).

the Court's legitimacy by enabling it to avoid making decisions. In the familiar phrase, he wants the Court to punt in certain circumstances. The Court could certainly have done so in *Buck v. Bell*; there was no insistent reason why it needed to take the case or decide it on anything but the narrowest grounds. Instead, it issued a ringing endorsement of compelled sterilization, and thereby directly affected the frequency with which the procedure was used. If this was an effort to preserve the Court's legitimacy, then it did so by sacrificing the rights, and the bodies, of innocent people in the interest of a powerful institution or its privileged members. That is perhaps the paradigmatic case of immoral behavior.

III. INSTITUTIONAL CONTEXTUALIZATION

There is, however, a third normative ground on which the Supreme Court can be judged. It involves the basic reason why we might want to engage in the enterprise of assessing decisions made by people who are dead. We might do so for own edification; by reflecting on moral judgments made by people in the past, we might gain insight into ideas about right and wrong that can guide our own behavior. But another, more concrete reason for this exercise arises when the decision makers are members of an institution that continues to exist, and whose decisions affect the present. In other words, institutions can long outlast the lives of their members, thus projecting the actions of long-dead individuals into the realities of contemporary life. This is clearly the case with the Supreme Court, and the reason to be concerned about a bad decision issued by Justice Holmes and his colleagues.

The consequence of this consideration can be described as institutional contextualization. Not only should we place an individual's action in the conceptual context of its time, and in the pragmatic context that he or she confronted, but we should also consider the performance of the institution to which the individual belonged over an extended period of time. This broader approach can be understood from two perspectives, the one normative and the other functional. As a normative matter, we may want to judge institutions on a broader temporal basis because they act on such a basis. It is possible to apply this approach to individuals as well, to forgive their mistakes if they recant their views or compensate for their actions. But we might also want to ignore such subsequent reversals as insincere or ineffectual. With institutions, subsequent action is more intrinsic to any given decision. Because the institution outlasts its members and generally continues to occupy a similar role in society at

each time, reversals cannot usually be judged by the same standards of insincerity or insignificance. If Jefferson quietly regretted his slaveholding practices at the end of his life,[128] we could say that he nonetheless enjoyed its illegitimate benefits for the majority of his existence and that his quiet regrets at the end of it count for little. But the fact that the United States, which inherited slavery from its colonial predecessor and tolerated it for many years, ultimately fought a war to abolish it and then declared it illegal is an essential consideration in our normative judgment because the nation's existence is continuous.

Similarly, the subsequent actions of an institution matter from a functional perspective because of the institution's continuing role. Individuals often exercise influence during discrete periods of their lives. Jefferson created a great deal of economic dislocation through the Embargo Act of 1807;[129] a year later he was out of office, and while he would enjoy a great deal of respect and lionization thereafter, he would no longer wield any significant influence on public policy. Thus, there was no practical way for him to undo the damage he had caused, or compensate for it by taking action in another area. But institutions, as long as they continue to exist, retain exactly this capacity.

This institutional contextualization does not change the assessment of *Buck v. Bell*; it remains a dreadful decision, meriting condemnation even when considered in its conceptual and pragmatic context. But the force of this condemnation lies in our assessment of the Supreme Court as an ongoing institution—a factor in our own lives—and here the Court's subsequent performance becomes relevant.

Within a decade and a half, the Court reversed its position on compelled sterilization. In *Skinner v. Oklahoma*,[130] it struck down a statute authorizing the sterilization of those convicted of three successive felonies, using a rationale that undermined the

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128. *See* 1 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 68 (Paul Leicester Ford ed., 1892) ("Nothing is more certainly written in the book of fate than that these people are to be free."); *see also* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 314–26 (1998) (pointing out that Jefferson wrote these words to justify himself for posterity).

129. *See* ELLIS, *supra* note 128, at 283–84 (describing Jefferson's second term as "disastrous"); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 91–118 (2012) (describing the Act as "regulatory hubris"); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 131–34 (2005).

130. 316 U.S. 535 (1942). For a comprehensive and vivid account of the case, see NOURSE, *supra* note 15.

constitutional validity of all such statutes. It held that the statute violated the equal protection clause because it applied only to certain categories of offenders, and not to others. Writing for the Court, Justice Douglas noted that if a stranger steals $20 "and repeats his act and is convicted three times, he may be sterilized. But [a clerk who embezzles from his employer] is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions."[131]

This did not quite overrule *Buck v. Bell*, of course, and it is not the way that we would decide the case today. As Victoria Nourse points out,[132] it relies on a type of equal protection argument that had been used to strike down economic legislation during the Lochner Era, and was implicitly rejected in *United States v. Carolene Products*[133] in favor of a test that depends on the existence of a suspect classification.[134] But the Court at least gestured at three factors that were prominent in the societal attack on eugenics-based sterilization and that rendered the statute vulnerable on the basis of its distinctions. First, it noted that the scientific support for the underlying premise that criminal propensities could be inherited was questionable. Second, it implied that the distinctions might reflect racial bias. Third, and most explicitly, the Court stated that "[t]here is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."[135] These collateral considerations rendered the opinion consonant with emerging social norms, even though the Court was unwilling to use these norms directly to decide the case. They also signaled that other compulsory sterilization statutes were likely to be struck down, no matter how inclusive their scope of application.

Today, it is simply inconceivable that the Supreme Court would uphold any compulsory sterilization statute. In the Court's defense, therefore, it can be said that its decisions tend to move in the same

131. *Skinner,* 316 U.S. at 539.

132. *See* NOURSE, *supra* note 15, at 145–72.

133. 304 U.S. 144 (1938). The Court reasoned, as we do today, that the Fourteenth Amendment "does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another." *Id.* at 151.

134. *See id.* at 152 n.4 (noting that review more stringent than rational basis review may apply in different cases). The outdated character of the Court's rationale is indicated by the fact that current laws increasing the acceptable punishment of incarceration for three-time offenders, now described with questionable levity as "three strikes and you're out," have been upheld by courts. Thus Oklahoma's three strikes and they're off law seems to have been troublesome on different grounds.

135. *Skinner*, 316 U.S. at 541.

direction as social morality. To make this judgment, it is necessary to distinguish between social morality and legal specificity. Moral principles are generated by civil society and can only reach a certain distance into the provisions of any specialized field, whether engineering, medicine, or law. Beyond that point, technical knowledge will render the development of practices within the field relatively insulated from civil society and subject to the more fine-grained variations that are discernable only to those trained in that field. These variations may well be based on the moral inclinations of the decision makers who possess that specialized training, and those inclinations will certainly connect with social morality, but they will not be controlled by social morality. The result is that, within this insulated area of specialization, implementation of the general social principles will be subject to relatively small-scale variation. These will seem significant to those within the field—and may indeed be significant within that delimited compass—but they will not alter the extent to which an institution can be said to reflect the more general social morality.

This interplay of social morality and technical or specialist adjustment is well illustrated by the decisions of the Supreme Court during the past sixty years or so, from the appointment of Earl Warren as Chief Justice until the present day. During the Warren Era, the Court handed down a series of ground-breaking decisions involving racial equality,[136] sexual autonomy,[137] electoral representation,[138] police practices,[139] and the rights of the accused.[140] After Warren retired, the Court's progressive wing continued to prevail for several years, and there were a number of additional decisions of this magnitude involving free speech,[141] administrative procedure,[142] family planning[143], and the death penalty.[144] In doing so,

136. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (striking down racial segregation in public schools).

137. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (striking down prohibitions against the distribution of contraceptives to married couples).

138. *See* Baker v. Carr, 369 U.S. 186, 237 (1962) (declaring state election apportionment issues justiciable); Reynolds v. Sims, 377 U.S. 533, 579–81 (1964) (striking down unequal state election apportionment).

139. *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (requiring specified warnings before police interrogations).

140. *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (requiring state-appointed counsel for indigents in criminal cases).

141. *See* Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (striking down punishment of speech under criminal syndicalism statutes).

142. *See* Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (declaring that government benefits require the same type of procedural protections as common law property rights).

143. *See* Roe v. Wade, 410 U.S. 113, 165 (1973) (striking down legal prohibition of abortion).

it placed itself at the advancing edge of the emerging social morality on each of these issues. Chemerinsky is certainly correct in arguing that leadership of this sort represented an unusual period in the Court's history. Since the mid-1970s, the Court has generally not assumed this role. But it also has not reversed any of the Warren Court's major initiatives, with the possible exception of the death penalty decision.[145] Instead, it has modified these decisions, making the sorts of technical adjustments that are accessible to technical or specialized knowledge and insulated from more general social morality.[146]

In other words, the Supreme Court has not reversed the general trend of its decisions in the direction of evolving social morality, even though it is no longer exercising the moral leadership of the Warren Court era. A notable example from recent decades, parallel in many ways to the compelled sterilization decisions, involves gay and lesbian rights. When first presented with the issue, the Court upheld a Georgia sodomy law criminalizing homosexual activity between consenting adults.[147] This failed to reflect social morality, which was clearly moving away from the traditional idea that sex is only acceptable when used as an instrument for procreation, and toward recognition of its role in human self-fulfillment.[148] The Court's language was as harsh as Holmes's three generations of imbeciles; Justice White, writing for the majority, said that "respondent would have us announce . . . a fundamental right to

144. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (invalidating existing death penalty statutes).

145. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976). *Gregg* does not overrule *Furman*; it merely refuses to move in the same direction. *Furman* declared existing state capital punishment statutes unconstitutional on the basis of their arbitrary application to particular offenses. Many states then amended their statutes. Anti-death penalty forces were hoping that these statutes would be struck down on similar or other grounds, but the Court in *Gregg* found no constitutional defects with the new statutes. Leadership for abolition of the death penalty then passed into civil society, and has led to a substantial reduction in the number of executions, although not to the elimination of the sanction.

146. *See, e.g.*, Vieth v. Jubilerer, 541 U.S. 267, 305–06 (2004) (declaring partisan gerrymandering non-justiciable); Planned Parenthood v. Casey, 505 U.S. 833, 876–79 (1992) (replacing *Roe v. Wade*'s trimester rule with an undue burden test, but preserving the constitutional right to an abortion); New York v. Quarles, 467 U.S. 649, 657–59 (1984) (allowing admission of evidence obtained without Miranda warnings in emergency situations); Matthews v. Eldridge, 424 U.S. 319, 347–49 (1976) (imposing cost-benefit analysis on due process rights in administrative cases); Milliken v. Bradley, 418 U.S. 717, 745–52 (1974) (precluding inter-district busing as a remedy for school segregation without proof of a direct effect of one district on another).

147. *See* Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986) (ruling that the Constitution does not protect those who engage in homosexual acts).

148. *See* RUBIN, *supra* note 49, at 205–12 (discussing the morality of intimate relationships).

engage in homosexual sodomy. This we are quite unwilling to do."[149] Chief Justice Burger concurred for the specific purpose of being still more retrograde, quoting laws from non-democratic regimes that ranged from two hundred to two thousand years old to support the position that "there is no such thing as a fundamental right to commit homosexual sodomy."[150]

But this decision lasted only one year longer than *Buck v. Bell*, and this time, the Court definitively overruled its earlier action. Writing for the majority in *Lawrence v. Texas*, Justice Kennedy noted that attitudes toward homosexuality, whatever they were in the distant past, were changing rapidly, and that "[t]his emerging recognition should have been apparent when *Bowers* was decided . . . *Bowers* was not correct when it was decided, and it is not correct today. It . . . should be and now is overruled."[151] A decade later, in *Obergefell v. Hodges*,[152] the Court struck down the exclusion of same sex couples from state marriage laws in ringing tones that invoked both due process and equal protection. By the time it reached this decision, about two-thirds of the states had already changed their marriage laws, either by statute or judicial decision. Thus, the Court was riding the crest of a change in social morality, rather than placing itself at the advancing edge of this development.

How should we evaluate this performance? If we place the Court's decisions in an institutional context, it would appear that *Buck v. Bell*, like *Bowers v. Hardwick*, is not as reprehensible as it would be when judged by our present standards, or even when judged solely in its conceptual and pragmatic context. The Court's subsequent and relatively rapid reversal of the decision should be taken into account.[153] To be sure, people were denied rights that we now regard as important, and that the Court subsequently recognized as such, during the years that intervened between those decisions and their reversal. But institutions, unlike individuals, are ongoing entities that often exist over long periods and remain equally influential for the duration. Thus, their performance can be viewed as spreading out over a longer period, like viewing an object through a differently shaped lens.

149. *Bowers*, 478 U.S. at 191.

150. *Id.* at 196 (Burger, C.J., concurring).

151. 539 U.S. 558, 572 (2003).

152. 135 S. Ct. 2584, 2604–05 (2015) (holding that same-sex couples have a fundamental right to marriage).

153. As opposed to the decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which was reversed only some fifty-eight years later. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (desegregating public schools).

The Supreme Court might still be faulted for failing to position itself at the advancing edge of an evolving social change. Gerald Rosenberg describes our expectation for it to do so as a "hollow hope,"[154] and Chemerinsky certainly agrees with him. But from an institutional perspective, that may be too much to ask. American government is made of separate and distinctive components. At different times, different institutions will take a leading role; that is to be expected. Condemnation is merited when one institution acts as a determined and sustained impediment to the process of evolving social norms, as the Supreme Court did during the Lochner Era. When an institution fails to lead, but follows willingly or reluctantly, the preferable reaction may be mere disappointment.

CONCLUSION

Erwin Chemerinsky's case against the Supreme Court is not based on the usual sort of constitutional law arguments, such as the claim that the Court has failed to interpret the original text faithfully or that it had failed to adapt the original text to changing circumstances. Instead, it relies on a substantive political view: the validity of the progressive agenda to establish and expand human rights. This may not be easy to justify as a matter of theory, but constitutional law is not a matter of theory. It is a statement of our own society's norms and commitments. How many people in our society would deny it? Who would defend the Court's position in *Dred Scott v. Sandford*[155] or *Plessy v. Ferguson*[156]? Who would defend its refusal to protect freedom of speech whenever the nation was at war? Who would defend the decision in *Buck v. Bell*?

As a matter of theory, it is possible to suspend moral judgment regarding the decisions of past actors by placing these decisions in their conceptual or pragmatic context. What is the point, we might ask, of condemning people who are long dead for failing to recognize and accept our current views? And how realistic is it to ignore the very real political, economic, and social pressures that were acting on them when we do not ignore, and in fact often internalize, those very same types of pressure when they impinge on us? Here again, however, the answers change when the topic is constitutional law. The Supreme Court is an institution that continues to exist, and to

154. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (discussing the court's role in social change).

155. 60 U.S. 393 (1857).

156. 163 U.S. 537 (1896).

affect our lives, in the present day. Its proper role is a subject of current debate. If its members regularly made incorrect —and immoral—decisions from our present perspective, then the value of the institution itself is called into question. It would be unrealistic to ignore the conceptual and pragmatic context of these decisions entirely, but it seems appropriate to expect that the Court would reflect and advance the beliefs we value once that context is taken into account. If its history consists of decisions that we now regard as outrageous and despicable, then the case against the Supreme Court is powerful indeed.

That same institutional context, however, serves to modify our sense of condemnation when we appropriately consider the Supreme Court's past performance from our current perspective. It is true that the Court has often reached indefensible positions. And it is also true that the Court has failed to assume leadership on many important issues that would seem to fall within its particular area of responsibility. Nonetheless, it seems to correct itself over time. Sooner or later —quite soon on the issue of same sex marriage, much too late on the issue of racial segregation—the Court reaches results that we currently approve. Occasionally it exercises leadership, and quite often it adds moral force to the position that it ultimately reaches.

The *Buck v. Bell* decision exemplifies these considerations. We currently regard compulsory sterilization with horror and perceive it as a clear violation of human rights. Given the scientific support for this practice during the early part of the twentieth century, the issue was not as clear during the 1920s. But it was clear enough, given the concurrent scientific doubts and the obvious intrusion on values that were well recognized at the time, such as bodily integrity and family autonomy. It was inexcusable that the Court failed to perceive those values, that it was too immersed in a controversy of its own creation about the constitutional status of property to focus on an obvious human rights violation. The Court corrected its mistake in less than two decades, however, reaching an opposite decision that we fully approve today. In the interval, it validated an immoral practice, and was partially responsible for a good deal of harm. But its opposite decision brought an end to that practice and provided a moral imprimatur for the forces in society that were rallying in support of our current beliefs about human rights. That is a role that seems worth preserving, despite all the Court's defects.