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ARTICLE: **Oliver Wendell Holmes** as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law

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BIO:

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LEXISNEXIS SUMMARY:

... This Article examines the role of language as an expression of ideology through a discussion of the justice perhaps most revered in American constitutional history for deference to legislative bodies: **Oliver Wendell Holmes.** ... And through his uncritical embrace of eugenic policy, Holmes gave a shaky eugenics movement a strong stamp of legitimacy. ... "The possibility of improving the race of a nation," he wrote, ... Harry Laughlin, perhaps the most zealous advocate of eugenical sterilization, was concerned that the negative court decisions had put a damper on sterilizations in those states not directly affected by the rulings. Laughlin developed model legislation that he hoped would withstand court scrutiny and thereby establish the constitutionality of eugenical sterilization. ... Laughlin noted that, like her daughter, Emma Buck had a record of prostitution and venereal disease and had borne illegitimate children. ... By the time Holmes took up his pen to draft the Supreme Court opinion in *Buck v. Bell*, much ink had been spilled on both sides of the question of the propriety of eugenical sterilization. ... But Holmes spared his reader this debate. ...

TEXT:

[*833] *1. Introduction*

The potentially ideological character of the act of judging has concerned courts and their critics throughout American constitutional history. [n1] One form in which this problem has manifested itself is in debates over judicial activism and judicial restraint. [n2] Among the contemporary arsenal of arguments against judicial activism, a consistent theme is the notion that activist judges engage in particularly value-laden judging. [n3] To insulate constitutional principles from the policy choices of individual judges, contemporary advocates of judicial restraint generally urge adherence to a reified constitutional "text," and the original intention of its "framers" [n4] **[*834]** or deference to the value choices of popularly elected bodies. [n5] Through either strategy, it is argued, ideological neutrality can be achieved. [n6] Interpretative approaches and judicial outcomes have been the focus of this debate over value and judging.

The importance of a judge's choice of language as expressing her personal views in an opinion generally has been ignored. [n7]

This Article examines the role of language as an expression of ideology through a discussion of the justice perhaps most revered in American constitutional history for deference to legislative bodies: **Oliver Wendell Holmes.** [n8] Judicial deference was, for Holmes, an important means by which judges avoided personal policy choices in ruling on the validity of statutes. As he put it, the "proper course" in evaluating the constitutionality of a state statute

is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond **[*835]** their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain. [n9]

In contrast with conservative "activists" on the Court in his time who regularly overturned progressive era statutes regulating labor and the economy, [n10] Holmes placed a high premium on social experimentation through legislation and accordingly believed state legislatures and Congress should be left free to act as they might wish. [n11] Felix Frankfurter interpreted Holmes' judicial conduct as consistent with the ideal of personal detachment to which Holmes aspired. According to Frankfurter, if Holmes

threw the weight of his authority on the side of social readjustments through legislation it was not because of any faith in panaceas in general or in measures of social amelioration in particular. . . . [H]is scepticism and even hostility, as a matter of private judgment, toward legislation which he was ready to sustain as a judge only serve to add cubits to his judicial stature. For he thereby transcended personal predilections and private notions of social policy, and became truly the impersonal voice of the Constitution. [n12]

Holmes had strong political views, although he believed they had no place in his work on the Court. He was extremely skeptical of economic regulation and considered the economic reforms of his time to be "humbug." [n13] A Social Darwinist Darwinist at heart, Holmes saw life as a struggle for survival and social progress as a process of evolution. Economic conflict was best left unfettered so that through a continual clash of interests, the **[*836]** strongest groups would rightly survive. [n14] Holmes did support one form of social regulation, however. In keeping with many progressive reformers of his day, he believed that it might be possible for science to breed a better race of human beings. This science of eugenics was his first principle of social reform. [n15]

Late in his career, Holmes had an opportunity to consider the constitutionality of his favored policy in the 1927 case of *Buck v. Bell*. [n16] Planned as a test case by advocates of eugenical sterilization to establish the constitutionality of that practice, [n17] the case came to the Court at a time when the scientific validity and the wisdom of eugenics was a matter of spirited public debate. [n18] In his majority opinion upholding the statute, Holmes followed his policy of deference to legislative action. At the same time, however, the opinion clearly embraced eugenic reform. [n19]

Rather than carefully analyzing the legal questions, Holmes wrote from belief, resting on rhetoric rather than logic or precedent. And through his uncritical embrace of eugenic policy, Holmes gave a shaky eugenics movement [n20] a strong stamp of legitimacy. [n21]

This Article examines *Buck v. Bell* as an ideological statement that inherently conflicts with Holmes' idea of judicial deference. The Article **[*837]** first explores the contours of Holmes' approach to constitutional questions. [n22] Turning to Holmes' social views, it discusses eugenics as Holmes' first principle of social reform. [n23] The Article then discusses *Buck v. Bell* in the historical context of the eugenics movement of Holmes' time. [n24] Finally, it analyzes Holmes' opinion as a rhetorical expression of belief and an unusually clear illustration of ideology in constitutional language. [n25]

2. Justice Holmes and the Constitution

Oliver Wendell Holmes was not one to impose his politics on the Constitution. For Holmes, political ideology was the stuff of legislative action, and when he donned his judicial robes, partisan viewpoints were to be put aside. "I enforce whatever constitutional laws Congress or anybody else sees fit to pass," he wrote to his friend Sir Frederick Pollock. [n26] Consequently, although he considered the Sherman Act to be "humbug," he attempted to enforce it "in good faith and to the best of [his] ability." [n27] As he wrote to Harold Laski, "I have little doubt that the country likes [the act] and I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It's my job." [n28]

For Holmes, majority will was the legitimating factor in politics. Legislation was an expression of majority will, and the role of courts in ruling on legislation was to step back and give effect to the relations of power it reflected. Holmes believed that there could be no measure of the propriety of laws other than the yardstick of political power. As he wrote to Pollock, "I am so sceptical as to our knowledge about the goodness or badness of laws that I have no practical criterion except what the crowd **[*838]** wants. Personally I bet that the crowd if it knew more wouldn't want what it does -- but that is immaterial." [n29]

Holmes' principle of deference to legislative bodies was a consistent theme during his many years on the bench, first on the Supreme Judicial Court of Massachusetts and later on the United States Supreme Court. While on the Massachusetts court, for example, Holmes upheld laws that restricted freedom of speech as within the power of city governments. In *McAuliffe v. Mayor of New Bedford,* [n30] he upheld the firing of a Boston police officer for violating a regulation that forbade political solicitation. [n31] Holmes found that the regulation was constitutional, for

[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. [n32]

In *McAuliffe* and elsewhere, [n33] Holmes found few limits to the discretion of governmental bodies in matters committed to their authority.

Just as governmental bodies had broad powers to restrict the rights of citizens, they had equally broad powers to protect the interests of citizens. In a dissent that foreshadowed his famous *Lochner* dissent, [n34] Holmes disagreed with the majority's holding in *Commonwealth v. Perry* [n35] that a Massachusetts statute protecting weavers from nonpayment of wages for imperfect work violated the parties' rights to make reasonable contracts. [n36] "It might be urged," Holmes wrote,

that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the Constitution is correct, **[*839]** and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so. [n37]

Because a reasonable difference of opinion was possible in this case, Holmes would have found that statute to be constitutional. [n38]

Holmes felt that government meant experimentation and that legislatures must remain as free as possible from restraints on their experiments. [n39] He believed that it was "dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution," [n40] for "constitutional law like other mortal contrivances has to take some chances. . . ." [n41] Holmes was particularly troubled by the use of the fourteenth amendment to restrict legislative innovation. As he wrote in dissent in *Truax v. Corrigan,* [n42] the amendment should not be used

beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem

futile or even noxious to me and to those whose judgment I most respect. [n43]

Holmes' desire to leave room for legislative experimentation did not imply a derogation of individual rights, because, in his view, "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." [n44]

Holmes, of course, did acknowledge limits to proper legislative action. The taking of private property without just compensation was sufficiently outrageous to require judicial intervention. Consequently, Holmes held the Kohler Act, which prohibited coal companies from mining coal beneath structures used for human habitation, to authorize unconstitutional takings. [n45] Forbidding blacks from voting in political primaries was, for **[*840]** Holmes, another sufficiently blatant violation of constitutional rights to warrant a conclusion that the state practice was unconstitutional. [n46] Yet Holmes was often hard pressed to find abuses of power on the part of state and federal governmental bodies, [n47] and he upheld such practices as Alabama's "grandfather clause" [n48] and the federal government's deportation of persons of Chinese parentage without a judicial hearing to determine their claims of United States citizenship. [n49]

In upholding the constitutionality of legislative actions, Holmes was generally careful not to embrace one position or another. Rather, he would indicate that judgment was reserved for the legislature unless it was clearly wrong. As Holmes wrote for the Court in *Missouri, Kansas & Texas Railway v. May,* [n50]

[w]hen a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. [n51]

Further, he wrote, "a state may carry out a policy, even a policy with which we might disagree. It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable." [n52] Even when the reasonableness of a state government's judgment was in doubt, Holmes believed that "[t]he respect due to the judgment of the State would have great weight." [n53]

Though he vowed not to encode them in the Constitution, Holmes certainly held strong personal views. He was staunchly opposed to economic **[*841]** regulation as a means of social reform. He would disparage wrong-minded socialists who wished to tinker with property relations. [n54] However, when a majority of the Court in *Lochner v. New York* [n55] found that a New York statute that regulated the working hours of bakery employees unconstitutionally restricted freedom of contract, [n56] Holmes dissented. [n57] He felt that the majority based its analysis

upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. [n58]

For Holmes, laissez-faire economics had no special constitutional status: "[A] constitution is not intended to embody a particular economic theory," and, more specifically, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." [n59]

3. Personal Politics

As a judge, Holmes left the business of social reform to the legislature. Had he served in a legislature, however, Holmes had ideas he would have **[*842]** been happy to introduce to the arena of social policy. As Holmes put it, he held to

a few articles of a creed that I do not expect to see popular in my day. I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, co-ordinated human effort, cannot be

affected appreciably by tinkering with the institution of property, but only by taking life in hand and trying to build a race. That would be my starting point for an ideal law. [n60]

Holmes considered economic reform through changes in the distribution of property to be "twaddle," a "humbug" "through whose vitals Malthus ran a rapier a hundred years ago." [n61] He could "understand better legislation that aims rather to improve the quality than to increase the quantity of the population. I can understand saying, whatever the cost, so far as may be, we will keep certain strains out of our blood." [n62]

In keeping with many progressive reformers of his day, [n63] Holmes believed it would be possible and desirable to breed a selected race, although he did not expect to see such a program implemented in his lifetime. [n64] Holmes was heavily influenced in this regard by Thomas Malthus and considered himself to be a "devout Malthusian." [n65] Malthusianism in the early twentieth century generally was equated with birth control, in keeping with Malthus' fear that population would outstrip the productive capacity of society. [n66] Yet Holmes and many other turn-of-the-century Malthusians were concerned not just with the quantity, but with the quality of **[*843]** the population. [n67] They believed that the poor, immigrants, and other less desirable "stocks" of people were more prolific than the middle and upper classes and would therefore out-populate the rest of American society. [n68] Consequently, Holmes and other early twentieth-century Malthusians were concerned, not just with the problem of population, but with the question of who produced it. Equating human social progress with biological evolution, Social Darwinists turned Malthusian concerns over population control into a concern for the breeding of a better race of people. They analyzed the consequences of social reform efforts in terms of their propensity to facilitate or interfere with natural selection. [n69]

Holmes shared this Social Darwinist concern regarding the effect of human actions on the process of evolution. He agreed with Sir Francis Pollock, who observed that the problem with war "is not that it kills men but that it kills the wrong ones, taking an undue proportion of the strong and adventurous and leaving too many weaklings and shirkers, thus working a perverse artificial selection of those who are least fitted to adorn or improve the commonwealth." [n70] For Holmes, human intervention could have a positive effect on evolution as well. The very idea of human betterment through evolutionary change took the edge off his Malthusian fears. "[I]f I fear that we are running through the world's resources at a pace that we cannot keep," he wrote,

I do not lose my hopes. I do not pin my dreams for the future to my country or even to my race. I think it probable that civilization somehow will last as long as I care to look ahead -- perhaps with smaller numbers, but perhaps also bred to greatness and splendor by science. [n71]

Holmes thought that the human race might have "cosmic destinies" it did not understand, "like the grub that prepared the chamber for the winged thing it has never seen but is to be." [n72]

4. The Eugenics Movement

During the early twentieth century, many shared Holmes' belief that **[*844]** science could breed a better race. The science of improving "the race" [n73] by breeding was the science of eugenics. The early 1900's saw the growth of a movement aimed at implementing eugenic policies to better society. [n74]

Sir Francis Galton, founder of the eugenics movement, [n75] believed that the types of human beings, from the talented to the class of "criminals" and "loafers," were distributed on a bell curve, with the bulk of the population resting in or about the "mediocre" range. [n76] Galton thought that this distribution need not be absolute, however. "The possibility of improving the race of a nation," he wrote,

depends on the power of increasing the productivity of the best stock. This is far more important than that of repressing the productivity of the worst. They both raise the average, the latter by reducing the undesirables, the former by increasing those who will become the lights of the nation. [n77]

To implement his ideas, Galton urged early and fruitful marriages for women of the upper class. [n78]

Later eugenists would rely on Galton's methods, but would reverse his priorities, out of a concern that the lower classes were out-producing the rest. This approach viewed public welfare in a critical light that paralleled the laissez-faire critique of economic regulation. By the early 1900's, many eugenists believed that social reform efforts had interfered with the process of natural selection. [n79] Evolution was better left unfettered. Benevolent but wrong-minded social reform had perpetuated poorer genetic stocks that otherwise would have been eliminated through the natural evolutionary process. Eugenic policies were necessary to eliminate the poorest stocks and reestablish the balance that nature would have produced. Absent **[*845]** eugenic intervention, the result would be overall hereditary degeneracy. [n80] Defective genetic stocks would undermine the American race. [n81]

Eugenists had a strategy to combat this impending tragedy. They sought to curtail the reproduction of persons they considered to be genetically defective. [n82] The ethical questions raised by this strategy were answered, in the minds of the eugenists, by the result -- by the good they were doing for future generations. In the view of eugenist Michael Guyer, they were protecting the rights of future children to be "well-born." [n83]

Eugenics caught on most strongly in America among the superintendents of state institutions for "feeble-minded" [n84] people. [n85] Through family pedigree studies and through use of the new Binet intelligence test, the superintendents studied the extent to which feeble-mindedness was hereditary. [n86] The results they gathered instilled in them a sense of duty to protect American society from the danger posed by negative hereditary characteristics. [n87] The message of their research was clear: absent social control of the reproduction of feeble-minded people, American society would be swamped with incompetence. [n88]

[*846] For eugenists, governmental encroachment on the child-bearing decisions of individuals was a necessary and legitimate exercise of the state police power to safeguard the public health and morals. This governmental intervention was justified, according to eugenics expert Harry Laughlin, because "germ-plasm" belonged to "society and not solely to the individual who carries it." [n89] Eugenics effected a necessary balance of the interests of feeble-minded persons and society. The interest of society in preventing hereditary degeneracy outweighed the interests of the feeble-minded in having children. "A successful society must at all hazards protect its breeding stock," Laughlin wrote. [n90] For, "[i]f America is to escape the doom of nations generally, it must breed good Americans. The fall of every nation in history has been due to many causes, but always the chiefest [sic] among these has been the decline of the national stock." [n91]

For the eugenists, the two most direct means of preventing feeble-minded people from having children were sterilization and segregation in state institutions for the feeble-minded. [n92] The availability of improved surgical techniques during the early 1900's boosted the popularity of eugenical sterilization. [n93] Indiana passed the first compulsory sterilization **[*847]** statute in 1907, [n94] and by 1917 fifteen states had followed suit. [n95] However, as sterilization statutes made their way into the courts, they ran into trouble. The Indiana Supreme Court overturned its state's statute in 1921 as a violation of due process. [n96] Through the 1920's legislatures continued to favor eugenic policies, as twelve more states passed eugenical sterlization laws. [n97] But until 1925, no state supreme court had upheld such a statute. [n98]

Harry Laughlin, perhaps the most zealous advocate of eugenical sterilization, was concerned that the negative court decisions had put a damper on sterilizations in those states not directly affected by the rulings. [n99] Laughlin developed model legislation that he hoped would withstand court scrutiny and thereby establish the constitutionality of eugenical sterilization. [n100] Relying in part on Laughlin's work, officials in the State of Virginia passed a carefully drafted statute and orchestrated a test case. [n101] The case **[*848]** ultimately found its way to the Supreme Court, and found a sympathetic judicial ear in **Oliver Wendell Holmes.**

5. The Social Menace of Carrie Buck

The State of Virginia was committed to the goal of restricting the propagation of people it considered mentally defective and socially inadequate. [n102] In 1924 the state adopted legislation to enforce its eugenic objectives. [n103] The statute embraced the idea of eugenical sterilization as an alternative to institutionalization. [n104] The statute outlined detailed notice and hearing requirements to be followed before a sterilization could take place. [n105] A board composed of directors of an institution could order the procedure if it determined that an inmate at the institution was "insane, idiotic, imbecile, feeble-minded or epileptic, and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted." [n106] Further, sterilization could only be ordered if it would not harm the individual's health, and if "the welfare of the inmate and of society [would] be promoted by such sterilization." [n107]

Once Virginia adopted the law, its advocates set out to test its constitutionality. Virginia's state institutions agreed to share the expenses of a "friendly suit" to establish the validity of the law. [n108] Dr. A. S. Priddy, Superintendent of the Virginia State Colony for Epileptics and Feeble-Minded, found someone he considered to be an ideal subject to prove their point -- a woman named Carrie Buck, a resident of his institution. The state secured a guardian and a lawyer for Buck, and the manufactured controversy over the constitutionality of eugenical sterilization was under way. [n109]

[*849] From a very early age, Buck had lived with the Dobbs family of Charlottesville, Virginia. She grew up with them and attended school in that community until the sixth grade. Buck helped Mrs. Dobbs with household work and apparently had a very congenial relationship with the family. All of this came to an end when, at the age of seventeen, Buck became pregnant. The Dobbs then sought her commitment to the State Colony for Epileptics and Feeble-Minded, and on January 23, 1924, approximately two months before the Virginia legislature passed its sterilization statute, the commitment was secured. [n110]

Virginia law required that, to be institutionalized, an individual must be a danger to herself and others. [n111] Buck's guardians, however, felt that **[*850]** she was capable "of protecting herself against ordinary dangers without an attendant." [n112] The danger that required Buck's institutionalization was certainly not an ordinary one. According to eugenics expert Dr. Arthur Estabrook, Buck was not capable of taking care of herself and therefore needed supervision; the reasons for his opinion were elaborated in cross-examination at trial.

Q. [By I. P. Whitehead] [U]nless somebody took her and looked after her, she would land in the poorhouse?

A. [By Estabrook] No.

Q. Where would she land?

A. She would probably land in the lower-class area in the neighborhood in which she lives.

Q. But you said she was incapable of taking care of herself?

A. She is incapable of taking care of herself in the manner in which society expects her to. [n113]

Society expected a higher standard of living and a different set of social mores from Buck than she might attain if left to herself. This danger of social difference led Virginia to restrict Buck's liberty and prevent her from continuing her kind.

After Superintendent Priddy identified Buck as an ideal subject for eugenical sterilization, the State of Virginia followed its carefully drawn statute. State officials appointed Robert Shelton as Buck's guardian for the duration of the sterilization proceedings, [n114] and designated I. P. Whitehead, a former institution board member, as her attorney. [n115] They **[*851]** then conducted a hearing before the Special Board of Directors of the State Colony for Epileptics and Feeble-Minded. [n116] The board found that Buck was the "probable potential parent of socially inadequate offspring," and that she could be sterilized "without detriment to her general health." [n117] They ordered her sterilization, and Buck's court-appointed guardian appealed the ruling in state court. [n118]

In preparing to defend Buck's sterilization order, the State called upon eugenics expert Harry Laughlin. Working

from scanty records provided by the Virginia institution, [n119] he attempted to establish that Buck's child-bearing capacity presented a grave danger to the state, and therefore her eugenical sterilization was an appropriate exercise of the police power. [n120] In a written deposition, Laughlin testified that Buck had a record of

[m]ental defectiveness evidenced by failure of mental development, having a chronological age of 18 years, with a mental age of 9 years . . .; and of social and economic inadequacy; has record during life of immorality, prostitution, and untruthfulness; has never been self-sustaining; has had one illegitimate child, now about six months old and supposed to be mental [sic] defective. [n121]

According to Laughlin, Carrie Buck's mother Emma also had a history of mental defectiveness, of social and economic inadequacy, and "was maritally unworthy; having been divorced from her husband on account of infidelity." [n122] Laughlin noted that, like her daughter, Emma Buck had a record of prostitution and venereal disease [n123] and had borne illegitimate children. [n124] Laughlin based his conclusory statements on such evidence as Carrie Buck's low score on the Binet intelligence test, [n125] her pregnancy, and hearsay from institution staff members. [n126]

Through the testimony of Laughlin and others, the State intended to establish the family pattern of mental, physical, and social inadequacy **[*852]** essential to the theory of hereditary degeneracy. Teachers, social welfare professionals, and acquaintances of Carrie Buck and her family testified that she and her relatives had dull minds, were behind in school, were immoral, or were "right peculiar." [n127] However, the State was not merely concerned with the perceived inadequacy of Buck's family background. Buck's neighborhood was peopled by individuals below the standard of social acceptability. These people were, in the words of Laughlin, a "shiftless, ignorant, and worthless class of anti-social whites of the South." [n128] According to Dr. DeJarnette, Superintendent of the Western State Hospital at Staunton, Buck's sterilization would benefit society "[b]y not producing any more of that kind":

Q. [By Whitehead] It is a question of selective breeding, in other words? You are cutting out the unfit by breaking up the source?

A. [By DeJarnette] Yes, sir, and you are raising the standard of intelligence in the state. [n129]

In the eyes of Virginia, Carrie Buck's crime was not just that she belonged to this social stratum, but that she became pregnant. As Dr. DeJarnette testified, Buck "was a good worker and never brought into conflict with the law until she was pregnant. If she had remained sterile [sic], in all probability she would have been there at home working. . . ." [n130] Now, even without a surgical procedure, the State of Virginia would ensure that Buck never had another child. If not sterilized surgically, she would remain institutionalized until "sterilized by nature." [n131]

According to Dr. Priddy, feeble-minded women "clamor for" eugenical sterilization "[b]ecause they know that it means the enjoyment of life and the peaceful pursuance of happiness, as they view it, on the outside of institution walls. Also they have the opportunity of marrying men of their mental levels and making good wives in many cases." [n132] This is what Virginia hoped for Carrie Buck -- to be a happy, sterile housewife living up to social standards. All the state hoped to avoid was conception, for Buck's class background and social standing was below that which Virginia sought in its citizens.

On April 13, 1925, Judge Bennet Gordon upheld the board's order, finding that the state law was valid under the state and federal constitutions. [n133] Gordon further found that the sterilization order was in accordance with the Virginia statute, as Carrie Buck and her mother were feeble-minded **[*853]** and Carrie's daughter was "apparently feeble-minded." Therefore Carrie Buck's feeble-mindedness was hereditary, making her an appropriate subject for eugenical sterilization. [n134]

Buck's guardian secured a stay of the sterilization order and appealed the case to the Virginia Supreme Court. [n135] That court gave closer scrutiny to the legal questions in the case and presented a more detailed analysis of the facts presented in the record. [n136] Because Buck was "the probable potential parent of socially inadequate offspring, likewise

affected as she is," the court found that

[u]nless sterilized by surgical operation, she must be kept in the custodial care of the Colony for thirty years, until she is sterilized by nature, during which time she will be a charge upon the State. If sterilized under the law, she could be given her liberty and secure a good home, under supervision, without injury to society. Her welfare and that of society would be promoted by such sterilization. [n137]

Buck's guardian had challenged the sterilization statute on the grounds that it constituted a denial of due process, imposed a cruel and unusual punishment, and denied inmates of the State Colony equal protection of the laws because it did not apply equally to all feeble-minded persons. [n138] The Virginia Supreme Court found the procedures for notice, hearing, and appeal adequate to satisfy the requirements of due process. [n139] Further, it found that the state had complied with the procedural requirements set forth in the statute. [n140] And since the act was not a penal statute, the court held that it could not constitute cruel and unusual punishment:

The purpose of the legislature was not to punish but to protect the class of socially inadequate citizens named therein from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the State. [n141]

The court also noted that sterilization "is harmless and 100 per cent safe," and was beneficial to the individual because it relieved her from further confinement. [n142]

[*854] Finally, the court considered the question of whether the statute denied equal protection of the laws. It noted that it was well established that the state may "take into custody and deprive the insane, the feeble-minded, and other defective citizens of the liberty which is otherwise guaranteed them by the Constitution." [n143] The right to enact such laws rested in the police power. While the state police power must be exercised in a manner consistent with the federal Constitution, "the courts will not restrain the exercise of such power, except where the conflict is clear and plain." [n144] The court quoted with approval the Supreme Court's opinion in *Jacobson v. Massachusetts,* [n145] which had upheld the compulsory vaccination of school children as a valid exercise of the police power: [n146]

"According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. . . . [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. . . ." [n147]

According to the Virginia court, to be consistent with the fourteenth amendment, an exercise of the police power must only be "'reasonable and not arbitrary,'" and must apply equally "'to all persons similarly situated.'" [n148]

The fact that the Virginia statute applied only to feeble-minded persons institutionalized in the State Colony did not make it constitutionally infirm, the court ruled, for the two classes -- those institutionalized and those on the outside -- existed before passage of the act. [n149] "The female inmate, unlike the woman on the outside, was already deprived of the power of procreation by segregation . . . ." [n150] Further, "the woman on the outside, if in fact feeble-minded, can, by the process of commitment and afterwards a sterilization hearing, be sterilized under the act." [n151]

[*855] By upholding the eugenical sterilization statute, the Virginia court joined Michigan [n152] in reversing the trend of state courts that found these laws unconstitutional. [n153] The Virginia and Michigan decisions gave the eugenics movement a needed boost. A final obstacle to their program remained, however. They faced it as Carrie Buck's guardian appealed to the United States Supreme Court.

In their appearances before the Supreme Court, the advocates and opponents of sterilization presented their well-rehearsed arguments. Buck's attorney, I. P. Whitehead, warned the Court that if the statute were upheld, then there

would be no limit on a state's power "to rid itself of those citizens deemed undesirable." n154 Further, "[a] reign of doctors will be inaugurated and in the name of science new classes will be added, even races may be brought within the scope of such regulation, and the worst forms of tyranny practiced." n155 Whitehead argued that the statute was constitutionally infirm because it violated due process and equal protection. n156

Aubrey Strode presented the case for the State, arguing that Buck's liberty would be enhanced by sterilization. Her ability to procreate was already restricted by the State through institutionalization, and absent eugenical sterilization she would remain institutionalized for many years. n157 As Strode put it:

The precise question therefore is whether the State, in its judgment of what is best for appellant and for society, may through the medium of the operation provided for by the sterilization statute restore her to the liberty, freedom and happiness which thereafter she might safely be allowed to find outside of institutional walls. n158

Buck v. Bell was argued in April of 1927 when **Oliver Wendell Holmes** was eighty-six years old. In his many years on the bench, there were occasional cases that especially caught his fancy. Carrie Buck's case would number among them.

6. Writing Buck v. Bell

By the time Holmes took up his pen to draft the Supreme Court opinion in *Buck v. Bell,* much ink had been spilled on both sides of the question **[*856]** of the propriety of eugenical sterilization. n159 Given Holmes' central judicial principle of deference to the legislature and his desire to leave room for social experimentation, this case presented the opportunity for a classic Holmes opinion. He might weigh the arguments on one side against the arguments on the other and announce that in this area governed by new and developing scientific principles, the courts could not clearly say that one answer was right. In such an area of social policy, it was appropriate only to defer to the legislature, to protect social progress through legislative experiments from the dampening hand of the courts. Holmes might defer to majority will in keeping with his belief that we can know so little "about the goodness and badness of laws" that the only criterion is "what the crowd wants." n160 But *Buck v. Bell* turned out to be quite a different opinion. Holmes left his doubt and his deference behind in approaching the case. He had ideas of his own on the subject of eugenics. This time the crowd alone did not dictate his position: on the question of eugenics, he knew which side was right.

Any difficulty Holmes encountered in deciding *Buck v. Bell* was "rather with the writing than with the thinking." n161 In crafting the majority opinion, he chose his words very carefully to achieve a desired effect. n162 Holmes began by briefly reviewing the procedural history and then turned to the facts of the case. He noted that "Carrie Buck is a feeble minded white woman who was committed to the State Colony . . . in due form. She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child." n163 Holmes summarized the Virginia statute as providing:

[T]he health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, &c.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; **[*857]** and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, &c. n164

Whenever the superintendent of a Virginia institution felt that it was "for the best interests of the patients and of society that an inmate under his care should be sexually sterilized," that operation could be performed on someone with a hereditary disability in compliance with "the very careful provisions by which the act protects the patients from possible abuse." n165

Holmes then laboriously outlined those careful procedural protections. First, the superintendent would present a

petition to the institution's special board of directors. Notice of the time and place of the hearing would be served on the inmate, the inmate's guardian, and, if the inmate was a minor, the inmate's parents. If the individual had no guardian, one would be appointed by the county court. The inmate had a right to attend the hearing. All evidence at the hearing was to be put in writing, and the board's order, for or against an operation, could be appealed by the superintendent, the inmate, or the guardian to the county court. The court would consider the board's evidence and any other admissible evidence and enter such an order "as it deem[ed] just." Finally, any party could appeal to the Virginia Supreme Court of Appeals, which would independently review the record from the lower court. [n166] In light of these careful procedures. Holmes concluded,

There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law. [n167]

Holmes then proceeded to address what he considered to be the real issue in the case. According to Holmes, "The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds." [n168] The state court, in rejecting this position, had based its order upon the above facts and its finding that Buck "'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization.'" [n169]

[*858] Holmes believed that,

In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts,* 197 U.S. 11 [(1905)]. Three generations of imbeciles are enough. [n170]

Holmes added,

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached. [n171]

Holmes thereby concluded his brief opinion. Only Justice Butler chose to disagree. [n172]

In his cavalier disposal of Buck's constitutional claims, Holmes cited only one case. [n173] He saw no need to carefully ponder the contours of the constitutional arguments. He knew what was right. In *Buck v. Bell,* Holmes wrote about what he believed, and presented his views as if commonly held. [n174]

[*859] Holmes was rather overburdened during the spring of 1927, when Carrie Buck's case was heard. He was doing "nothing but law." [n175] Amid the endless parade of cases, "[o]ne decision that I wrote gave me pleasure," he told Lewis Einstein. That case established "the constitutionality of a law permitting the sterilization of imbeciles." [n176] Holmes recognized that the case arose out of a contemporary controversy over reform efforts, that it was "a burning

theme." [n177] In preparing his opinion in *Buck v. Bell*, Holmes was "amused . . . at some of the rhetorical changes suggested" by his colleagues, "when I purposely used short and rather brutal words for an antithesis, polysyllables that made them mad." [n178] Holmes was often accommodating when ideas were concerned, "but a man must be allowed his own style." [n179] Holmes was pleased with his final product, however, because in writing *Buck v. Bell* he felt that he "was getting near to the first principle of real reform." [n180]

7. Rhetoric in the Writing of Constitutional Law [n181]

In *Buck v. Bell* Holmes appealed not to logic but to emotion. He did not support his view with a dry analysis of previous holdings on the scope of the police power, as had the Virginia court. Rather, he asserted the truth of his position and called upon his reader to believe him. *Buck v. Bell* is an example of what F. G. Bailey has called the rhetoric of assertion. [n182] Assertive rhetoric aims to close off questioning and doubt and to exclude the possibility of competing claims. [n183] Holmes' approach differed from that of the Virginia court in that he demanded that his reader believe his views, rather than admitting to a range of possible interpretations and arguing for the ascendancy of one. Holmes asserted his position as right, as if it were inconceivable for anyone to hold an alternate view.

In assertive rhetoric, opposing views play a role, but are presented in such a way that they bolster the identification of the audience with the **[*860]** speaker who is "right." [n184] This is accomplished, in part, through the way the speaker presents opinion as fact. As Bailey describes it,

A "fact" is supposed to be an assertion that no sensible person wants to deny. . . . If someone does deny a fact, then either he has not understood or he is not a sensible person, out of his mind, and therefore excluded from consideration and therefore not in a position to assail the fact. [n185]

Holmes presented several "facts" in this manner, defying contradiction. With respect to Buck's procedural due process claim, he insisted,

There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, *there is no doubt* that in that respect the plaintiff in error has had due process of law. [n186]

Holmes threw the weight of the Court's authority behind this assertion, and after having reviewed Holmes' laborious presentation of the details of the statute's procedural protections, how could a reader disagree with this point? To the reader working only with the information in the opinion, Holmes' position seems entirely reasonable, if not compelling. After all, "every step in this case was taken in scrupulous compliance with the statute." [n187] However, Holmes looked only to the presence of procedures, not their questionable application to Buck. In fact, the Virginia sterilization statute only applied to individuals who were institutionalized under the laws of Virginia, and as Buck was capable "of protecting her self against ordinary dangers without an attendant," [n188] there is a question as to whether she was sufficiently "dangerous to [her]self *and* others, *and* to the community," to qualify as a "feeble-minded person" subject to institutionalization under Virginia law. [n189] Further, while "months" may have passed between her institutionalization and the initial sterilization order, [n190] much of the expert observation of Buck was through review of documents on her geneology prepared through the guesswork of institution staff. [n191] It is only with extraneous knowledge, with "facts" Holmes chooses not to **[*861]** present, that one might call into question the procedural fairness of Buck's sterilization order. Only then could one doubt when Holmes claims "there is no doubt."

In reviewing Buck's substantive claim, Holmes asserted that "[i]n view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result." [n192] Holmes did not try to convince his reader that grounds for the statute existed. By that point in the opinion he considered it so obvious that any reader who did not agree had either not paid attention or was not very bright.

In a broader assertion, Holmes insisted that "*[i]t 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." [n193] Here Holmes layered one rhetorical "fact" upon another. We must believe, first, that Buck is among a class of "manifestly unfit" persons; second, that unfitness is hereditary; third, that this unfitness can lead either to capital crimes or to such a level of "imbecility" that individuals would be unable to feed themselves; and finally, that the world would be a better place if governments were to eugenically eliminate this class of people rather than to leave them alone. In 1927 many eugenists argued a variant of this particular line. [n194] There also was scientific evidence Holmes could have brought to bear on the question. [n195] And by 1927 there was scientific and social commentary challenging the claims of eugenists. [n196] But Holmes spared his reader this debate. He presented one side as having the only reasonable claim to truth.

Holmes made his manipulation of facts more effective by creating a relationship with his audience from which irrational nonbelievers were excluded. He invoked a collective voice that extended beyond the Court: "We have seen more than once that the public welfare may call upon the best citizens for their lives." [n197] Here he posited a collectivity that included himself and the reader, and he gave it substance by appealing to patriotism. The "we" in this sentence would understand the allusion to wartime deaths and would agree that the nation's wars had taken the lives of those who were more worthy of citizenship than the likes of Carrie Buck.

Holmes reinforced the collective "we" by invoking the "other" that defined the boundary of the in-group. As Bailey suggests, the rhetorical **[*862]** "we" does not mean "everyone"; on the contrary, it means "*we*" contrasted with those who are nonbelievers. Assertive rhetoric seems to require the presence, whether openly or implicitly, of the infidel: the person to hate or despise or ridicule, the person who, if not hated, is at least on the outside, the person whose difference from us makes clear the nature of our identity, who we are and for what we stand. [n198]

Holmes defined the "other" as those opposed to his perspective. He accomplished this by disparaging both the arguments against his stand, and the arguers themselves. Anyone outside of the collective "we" was, after all, not rational. Holmes implied that their argument was confused: "*It seems to be contended* that in no circumstances could such an order be justified. *It certainly is contended* that the order cannot be justified upon the existing grounds." [n199] The use of "It seems to be contended" might otherwise imply uncertainty on the part of the writer. However, the follow-up, "It certainly is contended," brought back Holmes' authoritative voice, suggesting that the lack of clarity was on the part of the other. [n200]

The final blow to the outsider came near the end of the opinion. After building to his emotional climax ("[t]hree generations of imbeciles" [n201]), Holmes began his final paragraph with a presentation of the plaintiff's equal protection argument. [n202] He used extremely weak language, providing a strong contrast to the preceding emotive force. He began, "[b]ut, it is said, however it might be," presenting the other as not only wrong, but as weak and tentative. And for offering the argument, Holmes' opponent received a final, almost impatient, rejoinder: "It is the usual last resort of constitutional arguments to point out shortcomings of this sort." [n203]

[*863] A device used by Holmes to generate emotional attachment to his position was the invocation of danger, of the calamity that might follow from disregard of his view. The existence of a threat can serve to quash dissension, as a dissenting view could aid the common enemy. [n204] The danger Holmes railed against in *Buck v. Bell* was the menace of the feeble-minded. These "degenerate" people were not among the "others" previously discussed who were excluded from Holmes' community of "we." They were not sufficiently human to figure into the debate. Rather, they were an amorphous army of the unfit, personified by Carrie Buck.

The second paragraph of Holmes' opinion begins with a reference to Buck, her mother, and her daughter. [n205] The term "feeble-minded" appears three times in close succession, the repetition signifying the generational propagation of degeneracy that Holmes presents as the threat. [n206] The emotional tenor of the opinion picks up in the second-to-the-last paragraph. Buck is called the "probable potential parent of socially inadequate offspring." [n207] Her kind is contrasted with the "best citizens" who have given their lives for the country. These degenerates now "sap the

strength of the State," [n208] and if allowed to continue propagating, would swamp society with incompetence. They are a source of crime and of poverty and of all that is bad in the world. The reader is assailed by this barrage of negative images, which are all the more powerful because Holmes' strong language ("execute," "starve" [n209]) gives the threat a tangible form. [n210] Holmes carefully prepares his reader to assent to the opinion's **[*864]** climax, which he offers in strong, clear language: "Three generations of imbeciles [n211] are enough." [n212]

Through the invocation of danger, the identification of a community of believers, and the presentation of opinion as fact, Holmes rhetorically demanded his readers to believe that he was right. He did not argue in favor of the rationality of eugenics. Logic played no part in his emotional appeal, which simply insisted that the truth was all on one side. As such, the truth Holmes sought in *Buck v. Bell* was the truth of assertive rhetoric. It was "not a property of any objective 'real world,'" but was "what right-thinking people believe." [n213] Consequently, Holmes begged the constitutional questions in *Buck v. Bell*. [n214] In his approach to the opinion, **[*865]** analysis was unnecessary. To his community of believers, the correctness of his judgment would be obvious. And those who disagreed were not worth the trouble it would take to convince them.

Buck v. Bell presented Holmes with a classic opportunity to defer to legislative social experimentation. As might be expected, Holmes upheld the law, in accordance with the dictates of the crowd. But he did more than simply uphold the Virginia statute. *Buck v. Bell* is also a well-crafted rhetorical statement: it arouses the emotions, it angers nonbelievers, it fortifies believers through its intrinsic sense of rightness and purpose. To the extent the opinion is convincing, it is not because the logic is compelling, but because it strikes an emotional chord with the reader and appeals to preexisting sentiment. *Buck v. Bell* appealed directly to those who were predisposed to agree.

In 1927 Holmes wrote for a fairly receptive audience. The classicism and racism of his time [n215] led many to embrace the promise of scientific remedies to "race degeneration." Holmes appealed to fears many then held. He threw the authority of the Court and the morality of patriotism behind his appeal, legitimating race- and class-based fears as well as the policy those fears generated. *Buck v. Bell* came at a time when many pondered the morality of the practice of eugenical sterilization. Holmes encouraged them to put their moral qualms aside.

Holmes believed that politics had no place in judicial decisionmaking. He strove for political detachment and impartiality in his work. But when faced with his ideal reform program, Holmes transgressed this conception of the judicial realm and stepped into the role of eugenic reformer. In *Buck v. Bell* his aim was broader than to uphold the Virginia law. Through his rhetorical assertion of the rightness of eugenics, he assured his audience that it was "better for all the world."

8. Conclusion

When he wrote *Buck v. Bell,* rhetoric was not a novel device for Holmes. His crisp, blunt style was one of his trademarks. And specific rhetorical moves employed in the case peppered his other opinions. [n216] During the term in which *Buck v. Bell* was decided, Holmes repeatedly used phrases like "It is not open to dispute," [n217] "It does not appear to us to **[*866]** need argument," [n218] and "The argument . . . needs but a word." [n219] Holmes relied upon case law in many of his opinions, [n220] but he often found such authority as unnecessary as he had in Carrie Buck's case. [n221]

While *Buck v. Bell* does not differ in basic literary style from other of Holmes' writings, the opinion reaches a height of emotionality unusual even for Holmes. As such, it clearly illustrates a point consistent throughout Holmes' opinions: Holmes deftly used the form of his writings and the power of his language to evoke belief and, on a nonlogical level, to convey the rightness of his views. In *Buck v. Bell* Holmes asserted the rightness of eugenics. Elsewhere he employed rhetorical devices to assert the rightness of his version of the facts, [n222] of his constitutional theory, [n223] and of his views about the world. [n224]

For a justice both revered and scorned for his detachment, [n225] Holmes revealed much of himself in his opinions.

His firey pen, so forceful in exposing the failings of his adversaries, ultimately reveals a contradiction within Holmes himself. For it was through the power of his literary form that Holmes most clearly expressed the opinions that, in his view, were more appropriately kept to himself.

As a rhetorical statement, *Buck v. Bell* illustrates that the choice involved in crafting legal language can itself infuse value into even a consistent set of constraints on judicial action. *Buck v. Bell* is certainly an extreme example of rhetoric in constitutional law. However, the point it illustrates is generally applicable, for the form and the tone of any legal writing itself illuminates a court's commitment to the legal principles it expresses, [n226] as well as its assumptions about the conditions that give rise to the need for law. [n227] Consequently, a claim that judicial action is or is not free from **[*867]** the shaping forces of ideology cannot end with analysis of the holding of opinions, but must consider the form and function of legal language itself.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionParentageFamily LawPaternity & SurrogacyGeneral OverviewGovernmentsLocal GovernmentsPolice Power

FOOTNOTES:

n1 *See, e.g.,* G. GUNTHER, JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* (1969); D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887-1895 (1976); Radio Address by President Franklin Roosevelt, Mar. 9, 1937, *quoted in* G. GUNTHER, CONSTITUTIONAL LAW 129-30 (11th ed. 1985); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Kairys, *Legal Reasoning,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 11-17 (D. Kairys ed. 1982).

n2 *See generally* Mason, *Judicial Activism: Old and New,* 55 VA. L. REV. 385 (1969).

n3 *See* R. BERGER, *supra* note 1, at 417; Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 8-11 (1971); Erler, *Sowing the Wind: Judicial Oligarchy and the Legacy of* Brown v. Board of Educ., 8 HARV. J.L. & PUB. POL'Y 399, 399 (1985); Lee, *Preserving Separation of Powers: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine,* 25 ARIZ. L. REV. 805, 805-13 (1983).

n4 *See* R. BERGER, *supra* note 1, at 363-72; Bork, *supra* note 3, at 8-11; Graglia, *The Constitution, Community and Liberty,* 8 HARV. J.L. & PUB. POL'Y 291-97 (1985); Lee, *supra* note 3, at 811-13; Reynolds, *Renewing the American Constitutional Heritage,* 8 HARV. J.L. & PUB. POL'Y 225, 225-37 (1985); *see also* Epstein, *The Pitfalls of Interpretation,* 7 HARV. J.L. & PUB. POL'Y 101, 107 (1984) (arguing that ambiguities in constitutional and statutory texts can be resolved through reference to general "principles of implication" embodied in the text as a whole or in the body of law of which it is a part).

n5 *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 175 (Harper & Row publ. 1970).

n6 *See, e.g.,* R. BERGER, *supra* note 1, at 407-08; Bork, *supra* note 3, at 5-6; Erler, *supra* note 3, at 407-09; Lee, *supra* note 3, at 811-13.

n7 Much attention has been paid in recent scholarship to language and the law. *See, e.g.,* Brest, *Interpretation and Interest,* 34 STAN. L. REV. 765 (1982); Fish, *Fish v. Fiss,* 36 STAN. L. REV. 1325 (1984); Fiss, *Objectivity and Interpretation,* 34 STAN. L. REV. 739 (1982); *Interpretation Symposium* (pts. 1 & 2), 58 S. CAL. L. REV. 1, 277 (1985); *Symposium: Law and Literature,* 60 TEX. L. REV. 373 (1982). This scholarship primarily focuses on the reader and the text and consequently is concerned with questions of how written texts are interpreted, as compared with how texts come to be written the way they are. From this vantage point, the author can be important as, essentially, part of the text, or as something that informs the reader's experience of the text. *See* Foucault, *What Is an Author?,* in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141-60 (J. Harari ed. 1979). For example, the same words on paper will have a different meaning for a reader if the reader believes them to be written by a first-year law student than if the reader believes them to be written by Holmes in his capacity as a Supreme Court Justice.

This Article looks at the role of the author from a different, more historically oriented, perspective. It assumes that an author has significance, not simply as a social construction of a community of readers, but as an actual historical entity who has an active role in creating a text and thereby shaping and manipulating the reader's experience of it. Recent legal scholarship analyzing language from this perspective includes Weisberg, *How Judges Speak: Some Lessons on Adjudication, in* Billy Budd, Sailor *with an Application to Justice Rehnquist,* 57 N.Y.U. L. REV. 1 (1982); *see also* Prentice, *Supreme Court Rhetoric,* 25 ARIZ. L. REV. 85 (1983).

n8 *See* F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 44-45 (1938).

While agreeing with the assessment of Holmes as a detached judge, one contemporary critic has seen this characteristic as a failing. According to Yosal Rogat, Holmes was not sufficiently engaged as a judge: "[I]t is because Holmes' interest in the development of the law was not sustained by any larger interest in improving society that he largely ignored social, political or economic realities." Rogat, *The Judge as Spectator,* 31 U. CHI. L. REV. 213, 245 (1964). Rogat's approach is in keeping with the critical reassessment of Holmes in contemporary legal scholarship. *See, e.g.,* Gordon, *Holmes'* Common Law *as Legal and Social Science,* 10 HOFSTRA L. REV. 719 (1982); Rogat & O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion -- The Speech Cases,* 36 STAN. L. REV. 1349 (1984); Touster, *In Search of Holmes from Within,* 18 VAND. L. REV. 437 (1965).

In a recent article, Jan Vetter has characterized the shifting scholarly assessment of Holmes as relating to changing views as to the proper role of a judge. *See* Vetter, *The Evolution of Holmes, Holmes and Evolution,* 72 CALIF. L. REV. 343, 354 (1984). Hence, Vetter argues, much "revisionist" Holmesian scholarship is ahistorical. *See id.* at 351-54. This Article attempts to avoid the pitfall identified by Vetter of evaluating Holmes from the perspective of late twentieth-century conceptions of the ideal judge by considering instead whether Holmes lived up to his own idea of how judges should act.

n9 Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927).

n10 *See, e.g.,* Adkins v. Children's Hospital, 261 U.S. 525, 560-62 (1923) (overturning minimum wage law for women); Truax v. Corrigan, 257 U.S. 312, 340-42 (1921) (setting aside state law restricting use of injunctions in labor disputes); Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918) (striking down child labor law); Lochner v. New York, 198 U.S. 45, 64-65 (1905) (striking down state statute regulating working hours of bakery employees).

n11 *See infra* text accompanying notes 26-44.

n12 F. FRANKFURTER, *supra* note 8, at 44-45.

n13 *See infra* text accompanying notes 26-28.

n14 *See, e.g.,* Plant v. Woods, 176 Mass. 492, 504-05, 57 N.E. 1011, 1015-16 (1900) (Holmes, C.J., dissenting).

n15 *See infra* text accompanying notes 63-72. Although eugenic policy, in direct conflict with Holmes' general laissez-faire beliefs, required highly intrusive state regulation of social relations, eugenic reformers believed that their manipulation of human reproduction would only reestablish a balance that had been upset by previous charitable reforms. They believed charity had inhibited the process of natural selection, enabling "poorer stocks" to perpetuate themselves when they otherwise would have perished. Sterilization and other engenic measures were therefore necessary to restore the balance that unfettered natural selection would have achieved. *See, e.g.,* M. GUYER, BEING WELL-BORN: AN INTRODUCTION TO EUGENICS 414-16, 432-34 (1916).

n16 274 U.S. 200 (1927).

n17 *See infra* text accompanying notes 105-09.

n18 *See* D. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USE OF THE HUMAN HEREDITY 118-28 (1985). *See generally* H. LAUGHLIN, EUGENICAL STERILIZATION: 1926 (1926); Darrow, *The Eugenics Cult,* 8 AM. MERCURY 129 (1926); Eggen, *Eugenic Teaching Imperils Civilization,* 24 CURRENT HIST. 882 (1926).

n19 *See infra* text accompanying notes 159-74.

n20 By 1927, when *Buck v. Bell* was decided, many geneticists had repudiated eugenic policies such as sterilization and immigration restriction partly because of advancements in science and the increasingly racist tone of the eugenics movement. *See* K. LUDMERER, GENETICS AND AMERICAN SOCIETY: A HISTORICAL APPRAISAL 121-24 (1972).

n21 As eugenist Harry Laughlin wrote of *Buck v. Bell* in 1930,

[t]he influence of this decision is widespread, because -- among other things -- it will encourage eugenical research in its efforts to learn more about human heredity and better how to predict quality of offspring . . .; it will also direct the attention of the American people, and through their legislative and administrative officers, toward the possibility of preventing reproduction by family-stock which are demonstrably degenerate in hereditary qualities.
H. LAUGHLIN, THE LEGAL STATUS OF EUGENICAL STERILIZATION 61 (1930).

n22 *See infra* text accompanying notes 26-59.

n23 *See infra* text accompanying notes 60-72.

n24 *See infra* text accompanying notes 73-158.

n25 *See infra* text accompanying notes 181-215. This Article does not assume that, as a general rule, Holmes invoked his principle of deference in a value-free manner. Holmes' commitment to principles of laissez-faire arguably influenced his interpretation of statutes and constitutional requirements, so that his decisions about whether to defer to the legislature turned in part on the extent to which statutes furthered laissez-faire principles. *See, e.g.,* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412-13, 415-16 (1922) (Holmes holding state statute regulating coal industry an unconstitutional interference with property rights); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892) (Holmes finding municipal employment contract limiting policeman's free speech rights constitutional); *see also* Bailey v. Alabama, 219 U.S. 219, 246 (1911) (Holmes, J., dissenting) (Holmes would have held that thirteenth amendment did not apply to contracts for labor). The point of this Article is that even if Holmes' politics did not affect his decisions about whether to defer to legislative bodies, the act of writing an opinion is itself a political act that can have a political function, in that the form a writing takes can itself be intended to generate belief in and commitment to a particular set of ideas. *See infra* text accompanying notes 216-27.

n26 *See* 1 HOLMES-POLLOCK LETTERS 163 (M. Howe ed. 1941).

n27 *Id.*

n28 *See* 1 HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953).

n29 *See* 1 HOLMES-POLLOCK LETTERS, *supra* note 26, at 163.

n30 155 Mass. 216, 29 N.E. 517 (1892).

n31 *See id*. at 219-21, 29 N.E. at 517-18.

n32 *Id*. at 220-21, 29 N.E. at 517-18.

n33 In Commonwealth v. Davis, 162 Mass. 510, 39 N.E. 113 (1895), for example, he extended the principle of *McAuliffe* to city regulation of speech in public places. In that case Holmes, again writing for the court, upheld the constitutionality of a Boston city ordinance that prohibited individuals from making public speeches on public grounds without first obtaining a permit from the mayor. *See id*. at 511-12, 39 N.E. at 113. Holmes felt that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *See id*. at 511, 39 N.E. at 113.

n34 *See* Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

n35 155 Mass. 117, 28 N.E. 1126 (1891).

n36 *See id*. at 121-22, 28 N.E. at 1127.

n37 *Id*. at 124, 28 N.E. at 1127 (Holmes, J., dissenting).

n38 *See id*. at 124-25, 28 N.E. at 1127-28 (Holmes, J., dissenting).

n39 Frankfurter, *Mr. Justice Holmes and the Constitution,* 41 HARV. L. REV. 121, 144-45 (1927), *reprinted in* THE HOLMES READER 173, 196-97 (J. Marke ed. 1955); *see also* Holmes, *Law and the Court,* in THE HOLMES READER 94-98 (J. Marke ed. 1955) (speech at dinner of Harvard Law School Association of New York, Feb. 15, 1913).

n40 *See* Louisville & N. R.R. v. Barber Asphalt Paving Co., 197 U.S. 430, 434 (1905).

n41 *See* Blinn v. Nelson, 222 U.S. 1, 7 (1911).

n42 257 U.S. 312 (1921).

n43 *Id*. at 344 (Holmes, J., dissenting).

n44 *See* Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904).

n45 *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412-13, 415-16 (1922).

n46 *See* Nixon v. Herndon, 273 U.S. 536, 539-41 (1927); *see also* Pierce v. Society of Sisters, 268 U.S. 510, 530, 534-35 (1925) (Holmes siding with majority opinion holding Oregon compulsory education statute to be unconstitutional deprivation of parents' right to choose schools for their children and to be unconstitutional destruction of private school property). *But see* Bartels v. Iowa, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting) (Holmes dissenting from majority opinion in Meyer v. Nebraska, 262 U.S. 390, 397, 402-03 (1923), which held that act forbidding German language instruction violated due process clause of fourteenth amendment).

n47 *See generally* Rogat, *Mr. Justice Holmes: A Dissenting Opinion* (pts. 1 & 2), 15 STAN. L. REV. 3, 254 (1962-1963).

n48 *See* Giles v. Harris, 189 U.S. 475, 482, 488 (1903).

n49 *See* United States v. Ju Toy, 198 U.S. 253, 258-60, 263-64 (1905). *But see* Ng Fung Ho v. White 259 U.S. 276 (1922). In *Ng Fung Ho* Holmes essentially reversed himself, joining Brandeis' unanimous opinion holding that persons subject to deportation proceedings were entitled to judicial review of their claims of United States citizenship. *See id*. at 278, 285.

n50 194 U.S. 267 (1904).

n51 *Id*. at 269.

n52 *See* Quong Wing v. Kirkendall, 223 U.S. 59, 62 (1912).

n53 *See* Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916); *see also* Patsone v. Pennsylvania, 232 U.S. 138, 143-46 (1914).

n54 *See* Holmes, *Ideals and Doubts,* 10 ILL. L. REV. 1, 3 (1915), *reprinted in* THE HOLMES READER 102, 104 (J. Marke ed. 1955).

n55 198 U.S. 45 (1905).

n56 *See id*. at 64.

n57 *See id*. at 74-76 (Holmes, J., dissenting).

n58 *Id*. at 75 (Holmes, J., dissenting).

n59 *See id*. (Holmes, J., dissenting). Nevertheless, occasionally Holmes would explicitly state in his opinions his personal views on the merits of a particular policy. In his dissent in Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900), for example, he took the opportunity to discuss his economic views. In that case, he would have upheld the ability of the defendant to use strikes and boycotts to persuade employers to urge employees of other unions to join the defendant union. *See id*. at 505, 57 N.E. at 1016 (Holmes, C.J., dissenting). Though Holmes announced that his dissent was "not the place for extended economic discussion," *see id.,* 57 N.E. at 1016 (Holmes, C.J., dissenting), he offered his view on the nature of strikes. Holmes believed that the strike was an appropriate means to bargain for better wages or to strengthen union organization. It was "a lawful instrument in the universal struggle of life." *Id.,* 57 N.E. at 1016 (Holmes, C.J., dissenting). However, he believed that successful labor protest could not effect a greater wage distribution to some workers without a corresponding diminution to others because there was a finite annual product that was directly tied to overall consumption: "Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing." *Id.,* 57 N.E. at 1016 (Holmes, C.J., dissenting). Therefore, in considering labor questions, it was important to put aside "questions of ownership and other machinery of distribution." *Id.,* 57 N.E. at 1016 (Holmes, C.J., dissenting). By looking solely at the question of consumption, the court might stay "in the world of realities." *Id.,* 57 N.E. at 1016 (Holmes, C.J., dissenting).

n60 Holmes, *supra* note 54, at 2-3, *reprinted in* THE HOLMES READER 102, 104 (J. Marke ed. 1955).

n61 *See* Holmes, *Law and Social Reform,* in THE MIND AND FAITH OF JUSTICE HOLMES 399, 400 (M. Lerner ed. 1943).

n62 *See id*. at 400-01.

n63 *See generally* D. PICKENS, EUGENICS AND THE PROGRESSIVES (1968).

n64 2 HOLMES-POLLOCK LETTERS, *supra* note 26, at 41; *see also* M. HOWE, *supra* note 30, at 220-21.

n65 *See* 1 HOLMES-LASKI LETTERS, *supra* note 28, at 658.

n66 In his essay on the principle of population, first published in 1798, Malthus wrote that population increased geometrically while the food supply increased arithmetically. Population therefore eventually would outstrip the food supply unless measures were taken to control it. *See generally* 2 T. MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (1914) (1st ed. 1798). For Malthus, the means of population control lay in "moral restraint," or in the postponement of sexual intercourse through later marriage. *See id*. at 151-59. If men and women refrained from marrying shortly after puberty and waited until men were able to support their offspring, it might undercut "the constant tendency of population to increase beyond the means of subsistence" and thereby rescue society "from the most wretched and desperate state of want." *Id*. at 159-67. Malthus did not advocate artificial methods of birth control; however, given the rudimentary and often dangerous means of birth control available during his time, that is not surprising. W. PETERSEN, MALTHUS 192-217 (1979).

Malthus' predictions about population outstripping production were not borne out in the nineteenth century. 2 T. MALTHUS, *supra,* at xi. His ideas remained influential, however, even though his particular equation might have needed revision. Charles Darwin happened upon Malthus' essay in 1838, and in reading it, came up with his idea of natural selection. *Id*. at xiv-xv.

n67 As William Petersen notes, the Malthusian movement took on a life of its own apart from the ideas explicitly contained in the work of its namesake. For example, while Malthus approved of restriction of the population, but opposed artificial birth control methods, the Malthusian movement was specifically concerned with the latter. *See* W. PETERSEN, *supra* note 66, at 180.

n68 *See* H. LAUGHLIN, CONQUEST BY IMMIGRATION 24-32 (1939).

n69 *See* D. PICKENS, *supra* note 63, at 9-13.

n70 *See* 2 HOLMES-POLLOCK LETTERS, *supra* note 26, at 39-41.

n71 Holmes, *supra* note 39, at 98.

n72 *Id*.

n73 Just whose race eugenic reformers were concerned with was made clear in the eugenic literature discussing the potential demise of the white race. *See generally* J. CURLE, OUR TESTING TIME: WILL THE WHITE RACE WIN THROUGH? (1926); *see also generally* H. LAUGHLIN, *supra* note 68.

n74 M. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 6-7 (1963); D. KEVLES, *supra* note 18, at 57-69. For a thorough history of the eugenics movement in legal literature, see Cynkar, Buck v. Bell: "*Felt Necessities" v. Fundamental Values?,* 81 COLUM. L. REV. 1418 (1981); *see also* R. BURGDORF, THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS AND TEXT 857-84 (1980); Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons,* 50 TEMP. L.Q. 995 (1977).

n75 Galton, a British scientist, was strongly influenced by the work of his cousin, Charles Darwin. M. HALLER, *supra* note 74, at 9-10.

n76 *See* F. GALTON, *The Possible Improvement of the Human Breed, Under the Existing Conditions of Law and Sentiment,* in ESSAYS IN EUGENICS 3-12 (1909) (second Huxley Lecture of Royal Anthropological Institute, Oct. 29, 1901).

n77 *Id*. at 24.

n78 *See id*. at 26. Galton felt the growing tendency of "cultured women" to delay or abstain from marriage to retain their freedom and the opportunity for education was a problem that had to be reckoned with. *See id*.

n79 *See* M. GUYER, *supra* note 15, at 413-14.

n80 H. LAUGHLIN, REPORT OF THE COMMITTEE TO STUDY AND REPORT ON THE BEST PRACTICAL MEANS OF CUTTING OFF THE DEFECTIVE GERM-PLASM IN THE AMERICAN POPULATION: I. THE SCOPE OF THE COMMITTEE'S WORK 10 (Eugenics Record Office Bull. No. 10A, 1914).

n81 *See, e.g.,* M. GUYER, *supra* note 15, at 413; H. LAUGHLIN, *supra* note 68, at 31-32.

n82 J. LANDMAN, HUMAN STERILIZATION: THE HISTORY OF THE SEXUAL STERILIZATION MOVEMENT 1-14 (1932).

n83 Guyer felt that reformers must only add more wisdom to our charity and the enigma is solved. We need no sacrifice of pity but rather an extension of it. Let us but extend our vision from immediate suffering to the prospective suffering of our present unfit and ask ourselves the question, why should they be born? Why not prevent our social maladies instead of waiting to cure them?
M. GUYER, *supra* note 15, at 293.

n84 This Article uses the early twentieth-century term "feeble-minded," rather than a contemporary, less offensive term like "mentally retarded," because there is a serious question as to whether all those who were called feeble-minded were, in fact, mentally disabled. *See* Gould, *Carrie Buck's Daughter,* NAT. HIST., July 1984, at 14-16; Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 32 n.10, 61 (1985). Using the term feeble-minded avoids confusing the kind of population that concerned eugenists with the kind of people we now call mentally retarded.

n85 M. HALLER, *supra* note 74, at 95-110.

n86 *Id.* at 95-96. On the misuse of early standardized testing for eugenic purposes, see S. GOULD, THE MISMEASURE OF MAN 165-71 (1981).

n87 M. HALLER, *supra* note 74, at 95-110.

n88 In an influential study, Henry H. Goddard, psychologist at the Vineland Training School in New Jersey, and his army of fieldworkers, delved into the family history of his patient, Deborah Kallikak. Goddard concluded that feeble-mindedness was endemic in Kallikak's family. Further, other "degenerate" characteristics, such as alcoholism, criminal tendencies, and sexual promiscuity, were present, confirming for the eugenists their theory that such characteristics were hereditarily linked and were all products of a bad genetic "stock." Goddard viewed the extensiveness of the Kallikak clan as evidence supporting the notion that feeble-minded people were more prolific than others. H. GODDARD, THE KALLIKAKS 71 (1912); *see* M. HALLER, *supra* note 74, at 106-10.

n89 H. LAUGHLIN, *supra* note 80, at 16.

n90 *Id*. at 58.

n91 *Id*. at 59.

n92 Eugenists disagreed about the ethical considerations of both policies. Some preferred institutional segregation to sterilization because they considered forced surgery to be cruel and possibly unconstitutional. Others considered sterilization the appropriate measure because of the inability of states to institutionalize all feeble-minded people. They also felt the operations were more humane than life-long institutionalization, because once sterilized, individuals could be released to live productive and independent lives. *See* J. LANDMAN, *supra* note 82, at 3-50; M. HALLER, *supra* note 74, at 130-32.

For Harry Laughlin, the two policies were complementary. Segregation would protect present-day society from the immoral and criminal tendencies of feeble-minded persons; sterilization would safeguard the future. H. LAUGHLIN, *supra* note 80, at 46-47; *see also* H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES, at vi (1922).

Laughlin opposed birth control due to his concern that it would be used by "parents of worthy hereditary qualities" who should instead be encouraged to bear children. H. LAUGHLIN, *supra* note 80, at 56. Nevertheless, in the 1920's, eugenics was offered as a policy argument supporting the birth control movement. *See* M. SANGER, MOTHERHOOD IN BONDAGE 100-02 (1928); M. SANGER, WOMAN AND THE NEW RACE 30-46 (1920).

n93 In the early part of the twentieth century, eugenical sterilization was just becoming a viable option for eugenic reformers due to advancement in medical techniques. Before the turn of the century, castration was the only known surgical procedure for permanently inhibiting reproduction. It was used in some states, sometimes secretly because of its questionable legal status. In the last decade of the nineteenth century, however, Dr. Harry C. Sharp of the Indiana State Reformatory developed the surgical technique of vasectomy, and secretly sterilized hundreds of men before the Indiana legislature passed an act that authorized use of the procedure for eugenical purposes in 1907. Salpingectomy, the cutting of a woman's fallopian tubes, was developed in France at about the same time, replacing sterilization of women through removal of the ovaries. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 207-08 (rev. ed. 1971); J. LANDMAN, *supra* note 82, at 51-52.

n94 *See* Act of Mar. 9, 1907, ch. 215, 1907 Ind. Acts 377.

n95 *See* Act of Apr. 26, 1909, ch. 720, 1909 Cal. Stat. 1093; Act of Aug. 12, 1909, ch. 209, 1909 Conn. Pub. Acts 1135; Act of Apr. 10, 1911, ch. 129, 1911 Iowa Acts 144; Act of Mar. 14, 1913, ch. 305, 1913 Kan. Sess. Laws 525; Act of Apr. 1, 1913, ch. 34, 1913 Mich. Pub. Acts 52; Act of July 8, 1915, ch. 237, 1915 Neb. Laws 554; Act of Mar. 17, 1911, ch. 28, § 6293, 1912 Nev. Stat. 1812; Act of Apr. 18, 1917, ch. 181, 1917 N.H. Laws 704; Act of Apr. 21, 1911, ch. 190, 1911 N.J. Laws 353; Act of Apr. 16, 1912, ch. 445, 1912 N.Y. Laws 924; Act of Mar. 13, 1913, ch. 56, 1913 N.D. Sess. Laws 63; Act of Feb. 19, 1917, ch. 279, 1917 Or. Laws 518; Act of Mar. 8, 1917, ch. 236, 1917 S.D. Sess. Laws 378; Act of Mar. 22, 1909, ch. 249, § 35, 1909 Wash. Laws 890, 899; Act of July 31, 1913, ch. 693, 1913 Wis. Laws 971; *see also* M. HALLER, *supra* note 74, at 133-35. Not all of these statutes had an explicitly eugenic purpose. Washington and Nevada, for instance, sterilized criminals as punishment. *See* Act of Mar. 22, 1909, ch. 249, § 35, 1909 Wash. Laws 890, 899; Act of Mar. 17, 1911, ch. 28, § 6293, 1912 Nev. Stat. 1812 (all the preceding statutes have been repealed).

n96 *See* Williams v. Smith, 190 Ind. 526, 528, 131 N.E. 2, 2 (1921).

n97 *See* Act of Sept. 29, 1919, No. 704, § 10, 1919 Ala. Acts; Act of Mar. 9, 1929, ch. 45, 1929 Ariz. Sess. Laws 119; Act of Apr. 28, 1923, ch. 62, 1923 Del. Laws 152; Act of Mar. 13, 1925, ch. 194, 1925 Idaho Sess. Laws 358; Act of Apr. 11, 1925, ch. 208, 1925 Me. Acts 198; Act of Apr. 8, 1925, ch. 154, 1925 Minn. Laws 140; Act of Apr. 26, 1928, ch. 294, 1928 Miss. Laws 370; Act of Mar. 15, 1923, ch. 164, 1923 Mont. Laws 534; Act of Feb. 18, 1929, ch. 34, 1929 N.C. Sess. Laws 28; Act of Mar. 12, 1925, ch. 82, 1925 Utah Laws 159; Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569; Act of Mar. 5, 1929, ch. 4, 1929 W. Va. Acts 3 (all the preceding statutes have been repealed); *see also* M. HALLER, *supra* note 74, at 137.

n98 *See* Smith v. Wayne Probate Judge, 231 Mich. 409, 425, 204 N.W. 140, 145 (1925); *see also* S. BRAKEL & R. ROCK, *supra* note 93, at 208.

n99 *See* H. LAUGHLIN, *supra* note 80, at 61-63. H. LAUGHLIN, REPORT OF THE COMMITTEE TO STUDY AND TO REPORT ON THE BEST PRACTICAL MEANS OF CUTTING OFF THE DEFECTIVE GERM-PLASM IN THE AMERICAN POPULATION: II. THE LEGAL, LEGISLATIVE AND ADMINISTRATIVE ASPECTS OF STERILIZATION 12, 115-32 (Eugenics Record Office Bull. 10B, 1914) [hereinafter cited as H. LAUGHLIN, COMMITTEE REPORT].

n100 *See* H. LAUGHLIN, *supra* note 18, at 64-75.

n101 *See generally* Lombardo, *supra* note 84, at 47-59.

n102 *See generally id*. at 34-39, 45-48.

n103 *See* Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed).

n104 As explained in the preamble to the Act,

> [T]he Commonwealth has in custodial care and is supporting in various State institutions many defective persons who if now discharged or paroled would likely become by the propagation of their kind a menace to society but who if incapable of procreating might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society . . . .

Id. at 569.

n105 *See id*. § 2.

n106 *See id*.

n107 *See id*.

n108 Coogan, *Eugenic Sterilization Holds Jubilee,* 177 CATHOLIC WORLD 44, 45 (1953). *See generally* Lombardo, *supra* note 84.

n109 The possibility that the suit was not an actual controversy is supported by the actions of Buck's attorney, I. P. Whitehead. Whitehead, who was a former institution board member, *see* D. KEVLES, *supra* note 18, at 111, often pursued lines of questioning more beneficial to the State than his client. *See, e.g.,* Record at 45-47, 50, 60-61, 71-75, Buck v. Bell, 274 U.S. 200 (1927). He presented no evidence of his own, but only cross-examined the State's witnesses, and he did not question the scientific validity of eugenics, which, by the 1920's, was a matter of debate among scientists. M. HALLER, *supra* note 74, at 122; K. LUDMERER, *supra* note 20, at 121-26; Burgdorf & Burgdorf, *supra* note 74, at 1007.

As Paul Lombardo has established through his careful analysis of the relationships among the director of the institution and the attorneys for Buck and the State of Virginia, *Buck v. Bell* was a collusive lawsuit motivated in part by Dr. Priddy's desire to escape civil liability for performing sterilizations, a practice he had engaged in without legislative authorization for several years. Lombardo takes his important insights on *Buck v. Bell* a step too far, however, when he suggests that the case "is best understood not by focusing on the eugenical movement itself -- the common explanation of the case's outcome -- but rather by examining closely the web of personalities and events that were essential to both the genesis and the outcome." Lombardo, *supra* note 84, at 60. He sees Priddy's enthusiasm for establishing the constitutionality of eugenical sterilization as having "less to do with thinning the ranks of the mentally and physically bereft than they had to do with satifsying his own strong and unique sense of morality," with "winning legal protection for his private surgical hobby." *Id*. at 62.

To the extent that Lombardo is concerned with the way individual psychological motivations led to the way this particular case developed, his argument is important and persuasive. Even in this respect, however, the significance of the eugenics movement should not be downplayed, as it provided the social context and the socially acceptable ideology within which the actors' personal motivations would manifest themselves. But for the eugenics movement, Priddy's "strong and unique sense of morality" might have led him to support a different means of controlling the sexuality of others.

To the extent that Lombardo argues that but for the personal motivations of Priddy, Whitehead, and Strode, this "disgraceful chapter of American legal history would never have been written," *id*., he overemphasizes the significance of his characters. If *Buck v. Bell* had never happened, this chapter in American legal history certainly would have had a different story line. However, in 1925 the Michigan Supreme Court upheld that state's sterilization statute. *See* Smith v. Wayne Probate Judge, 231 Mich. 409, 425, 204 N.W. 140, 145 (1925). Many states had sterilization laws, and, due to their questionable legal status, eugenics advocates believed it was important to test their constitutionality. *See* H. LAUGHLIN, COMMITTEE REPORT, *supra* note 99, at 115-16. Consequently, if *Buck v. Bell* had never happened, it simply would have been a matter of time before a different state's sterilization statute found its way to the Supreme Court. It is, of course, possible that the circumstances of a different case might have changed the outcome. However, it is equally possible that this chapter in American legal history would not have been much different.

n110 Record at 19.

n111 Buck was institutionalized under a Virginia law that authorized the confinement of "feeble-minded" persons. *See* Va. Laws. § 1075

(1923) (repealed). Feeble-minded was defined to include

any person with mental defectiveness from birth or from an early age so pronounced that he is incapable of caring for himself or managing his affairs, or of being taught to do so, and *is unsafe and dangerous to himself and others, and to the community,* and who consequently requires care, supervision and control for the protection and welfare of himself, others and the community, but who is not classible as an "insane person" as usually interpreted.
Id. (emphasis added).

There is some evidence that Buck was not "feeble-minded" as defined by the statute, and consequently, was not a proper subject for institutionalization. The record suggests that Buck was not "unsafe and dangerous to [her]self and others, and to the community." In the proceedings that led to Buck's commitment, the Dobbs and three examining physicians answered "no" to the question "[h]as patient ever attempted acts of violence to herself or others, or to their property?" Record at 17. They also stated that Buck was "capable of protecting [her]self against ordinary dangers without an attendant." *Id*. Accordingly, there is some question whether Buck was properly committed to the institution, which in turn raises questions about the propriety of her sterilization, because institutionalization was a prerequisite to sterilization under the Virginia statute. *See* Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed).

n112 Record at 17.

n113 *Id*. at 85.

n114 *Id*. at 23-24.

n115 *See* D. KEVLES, *supra* note 18, at 111.

n116 Record at 28.

n117 *Id*.

n118 *Id*. at 7.

n119 *See* Cynkar, *supra* note 74, at 1438-39.

n120 *See id*. at 1439.

n121 Record at 32.

n122 *See id*.

n123 *See id*. Prostitution and venereal disease were terms used quite loosely by eugenists like Laughlin, in keeping with their attribution of all social evils to feeble-mindedness. *See supra* note 88. There is no evidence in the record that either Carrie or Emma Buck had venereal disease or engaged in prostitution.

n124 *See* Record at 32.

n125 *See id*. Buck's score at the level af a nine-year-old is not surprising given that she attended school only through the sixth grade. The Binet test was initially considered a valid measure of intelligence. However, its validity was seriously questioned by 1919. *See* M. HALLER, *supra* note 74, at 95-110; *see also* S. GOULD, *supra* note 86, at 146-92.

n126 *See* Cynkar, *supra* note 74, at 1438-39.

n127 *See* Record at 51-52.

n128 *See id*. at 32.

n129 *Id*. at 72.

n130 *See id*.

n131 *Id*. at 95.

n132 *Id*. at 92.

n133 *See* Buck v. Priddy (Amherst County Ct. Apr. 13, 1925), *reprinted in* Record at 3-4.

n134 *See id*. Judge Gordon did not discuss his reasoning in finding the statute to be constitutional.

J. H. Bell succeeded A. S. Priddy as superintendent of the State Colony, so the case continued as *Buck v. Bell*. *Id*. at 3.

n135 *See id*. at 4.

n136 *See* Buck v. Bell, 143 Va. 310, 312-15, 130 S.E. 516, 516-18 (1925); *see also* Record at 3-4, 27-29.

n137 *Buck v. Bell,* 143 Va. at 315, 130 S.E. at 517-18.

n138 *Id*. at 315, 130 S.E. at 518.

n139 *See id*. at 318, 130 S.E. at 518-19.

n140 *See id*., 130 S.E. at 518.

n141 *See id*., 130 S.E. at 519.

n142 *See id*. at 318-19, 130 S.E. at 519.

n143 *See id*. at 319, 130 S.E. at 519.

n144 *Id*., 130 S.E. at 519.

n145 197 U.S. 11 (1905).

n146 *See id*. at 38-39.

n147 143 Va. at 320-21, 130 S.E. at 519 (quoting *Jacobson,* 197 U.S. at 25-26 (citations omitted)).

n148 *See* 143 Va. at 321, 130 S.E. at 519 (quoting Anthony v. Commonwealth, 142 Va. 577, 585, 128 S.E. 633, 635 (1925)).

n149 *See* 143 Va. at 323, 130 S.E. at 520.

n150 *Id*., 130 S.E. at 520.

n151 *Id*., 130 S.E. at 520. In a very brief discussion, the court declined to follow the Supreme Courts of Indiana and New Jersey, *see id*., 130 S.E. at 520, which had held sterilization statutes to be unconstitutional. *See* Williams v. Smith, 190 Ind. 526, 527-28, 131 N.E. 2, 2 (1921) (statute violated due process); Smith v. Board of Examiners, 85 N.J.L. 46, 55, 88 A. 963, 967 (1913) (statute violated equal protection).

n152 *See* Smith v. Wayne Probate Judge, 231 Mich. 409, 425, 204 N.W. 140, 145 (1925).

n153 *See, e.g*., Williams v. Smith, 190 Ind. 526, 527-28, 131 N.E. 2, 2 (1921); Smith v. Board of Examiners, 85 N.J.L. 46, 55, 88 A. 963, 967 (1913); Osborn v. Thompson, 103 Misc. 23, 35-36, 169 N.Y.S. 638, 644-45 (Sup. Ct.), *aff'd,* 185 A.D. 902, 171 N.Y.S. 1094 (1918). *See generally* H. LAUGHLIN, *supra* note 21.

n154 *See* Buck v. Bell, 274 U.S. 200, 202 (1927).

n155 *Id*.

n156 Brief for Plaintiff in Error, Record at 9, 11.

n157 274 U.S. at 204.

n158 *Id*.

n159 *Compare* Smith v. Wayne Probate Judge, 231 Mich. 409, 425, 204 N.W. 140, 145 (1925) (supporting eugenical sterlization) *and* Buck v. Bell, 143 Va. 310, 318-19, 130 S.E. 516, 518-19 (1925) (same) *and* H. GODDARD, *supra* note 88, at 101-17 (same) *with* Williams v. Smith, 190 Ind. 526, 527-28, 131 N.E. 2, 2 (1921) (criticizing eugenical sterlization) *and* Smith v. Board of Examiners, 85 N.J.L. 46, 55, 88 A. 963, 967 (1913) (same) *and* Osborn v. Thompson, 103 Misc. 23, 35-36, 169 N.Y.S. 638, 644-45, (Sup. Ct.) (same), *aff'd,* 185 A.D. 902, 171 N.Y.S. 1094 (1918) *and* Darrow, *supra* note 18 (same) *and* Eggen, *supra* note 18 (same).

n160 *See* 1 HOLMES-POLLOCK LETTERS, *supra* note 26, at 163.

n161 *See* 2 HOLMES-LASKI LETTERS, *supra* note 28, at 938-39.

n162 *See id*. at 939.

n163 *See* 274 U.S. at 205.

n164 *Id*. at 205-06; *see* Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed).

n165 274 U.S. at 206.

n166 *Id*. at 206-07.

n167 *Id*. at 207.

n168 *Id*.

n169 Buck v. Bell, 143 Va. 310, 315, 130 S.E. 516, 517 (1925) (quoted in 274 U.S. 200, 207 (1927)).

n170 274 U.S. at 207.

n171 *Id*. at 208.

n172 *See id*. (Butler, J., dissenting). Justice Butler dissented without filing an opinion. *See id*. (Butler, J., dissenting).

n173 *See id*. at 207 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)). In a less cursory manner, the Virginia Supreme Court also relied on *Jacobson*. *See supra* text accompanying notes 145-51.

n174 *Buck v. Bell* has been the subject of much criticism. For citations to the critical literature, see Burgdorf & Burgdorf, *supra* note 74; Cynkar, *supra* note 74, and references cited therein.

n175 *See* 2 HOLMES-LASKI LETTERS, *supra* note 28, at 937.

n176 *See* HOLMES-EINSTEIN LETTERS 267 (J. Peabody ed. 1964).

n177 *See* 2 HOLMES-LASKI LETTERS, *supra* note 28, at 938.

n178 *See id*. at 939. Apparently Holmes' only alteration of his opinion after it was circulated to other members of the Court was to change the word "kill" in the phrase "kill degenerate offspring for crimes" *to* "execute." Draft Opinion of Buck v. Bell, in Mr. Justice Holmes Opinions, United States Supreme Court, October Term, 1926, at 3 (available in **Oliver Wendell Holmes,** Jr. Papers, Harvard Law School Library).

n179 *See* 2 HOLMES-LASKI LETTERS, *supra* note 28, at 939.

n180 *See id*. at 942.

n181 As James Boyd White has pointed out, the term "rhetoric" can have serveral meanings. *See* White, *Law as Rhetoric, Rhetoric as Law: The Art of Cultural and Communal Life,* 52 U. CHI. L. REV. 684, 687 (1985). This Article uses the term "rhetoric" in, perhaps, its popularized sense: as communication that takes persuasion as its purpose.

n182 *See* F. BAILEY, THE TACTICAL USES OF PASSION: AN ESSAY ON POWER, REASON AND REALITY 123-43 (1983).

n183 *Id*. at 123.

n184 *Id*. at 127-30.

n185 *Id*. at 131.

n186 274 U.S. at 207 (emphasis added).

n187 *Id*.

n188 *See* Record at 17.

n189 *See* Va. Laws § 1075 (1923) (repealed) (emphasis added); *see also* Gould, *supra* note 84, at 15-18; Lombardo, *supra* note 84, at 61.

n190 Buck was committed to the State Colony for Epileptics and Feeble-Minded on January 23, 1924. Record at 18-20. The Virginia sterilization statute became law on March 20, 1924. *See* Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed). On July 21 of that year, a guardian was appointed for Buck, pursuant to the sterilization statute. Record at 23-24. Buck's sterilization was ordered on September 30, 1924. *Id*. at 27-29.

n191 *See* Cynkar, *supra* note 74, at 1438-39; *see also supra* note 109.

n192 *See* 274 U.S. at 207.

n193 *See id*. at 207 (emphasis added).

n194 *See generally* H. GODDARD, *supra* note 88, at 401-17; H. LAUGHLIN, *supra* note 80.

n195 *See generally* S. GOULD, *supra* note 86, at 146-296; *see also supra* notes 88, 123 and accompanying text.

n196 *See* M. HALLER, *supra* note 74, at 122; K. LUDMERER, *supra* note 20, at 121-26; Burgdorf & Burgdorf, *supra* note 74, at 1007.

n197 *See* 274 U.S. at 207.

n198 F. BAILEY, *supra* note 182, at 134.

n199 *See* 274 U.S. at 207 (emphasis added).

n200 In fact, Buck's attorney was quite explicit in arguing that the statute was unconstitutional on its face, not simply as applied to Buck. Brief for Plaintiff in Error, Record at 9, 11.

n201 *See* 274 U.S. at 207.

n202 *See id*. at 208.

n203 *See id*. The opposition between the authoritative "we" and the "other" appears in other of Holmes' opinions. For example, in Jones v. Prairie Oil & Gas Co., 273 U.S. 195 (1927), Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921), and Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267 (1904), Holmes identified opposing viewpoints as belonging to a depersonalized "other," through the use of such phrases as "It is argued," *Jones,* 273 U.S. at 199, "It is admitted," *Marcus Brown,* 256 U.S. at 198-99, and "It is objected," *Missouri, Kan. & Tex. Ry.,* 194 U.S. at 269. The vague adversaries were always corrected by the more knowledgable "we," *Marcus Brown,* 256 U.S. at 199; *Missouri, Kan. & Tex. Ry.,* 194 U.S. at 269, whose views were at times "too obviously justified to need explanation." *Marcus Brown,* 256 U.S. at 199. In Roschen v. Ward, 279 U.S. 337 (1929), Holmes coupled the opposition between the "other" and "we" with an additional rhetorical device. He countered the opposing argument with a truism, implying that the argument was contrary to the truism and therefore must be false: "We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean." *Id*. at 337.

Holmes' use of "we" sometimes referred specifically to the Court and sometimes referred to a broader community of rightminded people. *See Marcus Brown,* 256 U.S. at 199; *Missouri, Kan. & Tex. Ry.,* 194 U.S. at 269.

n204 *See* F. BAILEY, *supra* note 182, at 138-39.

n205 *See* 274 U.S. at 205.

n206 The feeble-mindedness of Buck's child was a fact Holmes asserted without supporting evidence, when the lower court only found her to be "apparently feeble-minded." Record at 3. In fact, as Steven Jay Gould has demonstrated through an examination of Vivian Buck's grammar school record, Carrie Buck's daughter was an average student and not mentally disabled at all. *See* Gould, *supra* note 84, at 18.

n207 *See* 274 U.S. at 207.

n208 *Id*.

n209 *See id*.

n210 Holmes certainly understood the power in evoking visual images. He used this tactic to his advantage in *Buck v. Bell,* and was careful to avoid it in United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1922), where it would have prejudiced readers against his holding. In *Britt,* Holmes found the United Zinc and Chemical Company not liable for the deaths of two children who tried to swim in an abandoned, unmarked pool of water on the company's property that was poisoned with sulphuric acid and zinc sulphate. *See id*. at 275-76. Holmes presented the facts in a brief, matter-of-fact way: "On July 27, 1916, the children, who were eight and eleven years old, came upon the petitioner's land, went into the water, were poisoned and died." *See id*. at 274. Holmes' language here is passive. The children did not dive, swim, or jump; they "went" into the water. Holmes makes it difficult to picture the children and their actions. We can only guess at the conditions of their death.

The dissenting opinion filled out the description, providing the emotional punch Holmes wished to avoid:

The testimony shows that not only the two boys who perished had been attracted to the pool at the time but that there were two or three other children with them, whose cries attracted men who were passing near by, who, by getting into the water, succeeded in recovering the dead body of one child and in rescuing the other in such condition that, after lingering for a day or two, he died. The evidence shows that the water in the pool was highly impregnated with sulphuric acid and zinc sulphate, which certainly caused the death of the children, and that the men who rescued the boys suffered seriously, one of them for as much as two weeks, from the effects of the poisoned water.
Id. at 278 (Clarke, J., dissenting).

n211 Holmes' use of the term "imbecile" was improper. According to the terminology of mental disability of the time, Buck's intelligence test score identified her as a "moron," and therefore less severely disabled than a moderately mentally retarded "imbecile." Burgdorf & Burgdorf, *supra* note 74, at 1006 n.76.

It is likely that Holmes' departure from proper scientific terminology was not intentional, but rather in keeping with his lack of attention to detail and his focus on the broad principles embodied in the opinion. This comes out as well in his assumption, not based on fact, about the procedural propriety of Carrie Buck's institutionalization and the decision to sterilize her. *See supra* notes 111, 206. In this sense, Holmes was not as interested in carefully deciding the case before him as in more broadly establishing the constitutionality of eugenical sterilization.

n212 *See* 274 U.S. at 207.

Just as Holmes raised the stakes in *Buck v. Bell* through his characterization of the menace of the feeble-minded as a serious threat to society, he lowered them in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). That case concerned the validity of a Pennsylvania law forbidding the mining of coal beneath a structure owned and occupied by someone other than the owner of the underlying coal. *See id*. at 412-13. Holmes trivialized the public interest motivating the enactment of the statute by stating: "This is the case of a single private house. No doubt there is a public interest *even* in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified *even* in such a case." *See id*. at 413 (emphasis added). Holmes went on to rule that the public interest he had rhetorically emasculated was not sufficient to override preexisting property rights and consequently the statute restricting the mining of coal was invalid. *See id*. at 414-16.

n213 F. BAILEY, *supra* note 182, at 135.

n214 As Bailey notes,

> [A]ssertive rhetoric inescapably must proceed by begging the question: by simple assertion of the correctness of one answer to the question at issue. There is no other way of arguing about intrinsic values, for these are ends in themselves. The speaker asserts a truth by identifying the true believers who "happen" to be those who believe that truth. Accordingly, it is inappropriate to ask whether an argument advanced in this form of rhetoric is valid or invalid, and to test it by the rules of logic. The proper question to ask about assertive rhetoric concerns effectiveness.

Id. at 135-36.

n215 *See generally* J. HIGHAM, STRANGERS IN THE LAND 264-99 (1965).

n216 *See supra* notes 203, 210, 212.

n217 *See* Jones v. Prairie Oil, 273 U.S. 195, 199 (1927); *see also* Nixon v. Herndon, 273 U.S. 536, 540 (1927).

n218 *See* United States v. Ritterman, 273 U.S. 261, 268 (1927).

n219 *See* Railroad & Warehouse Comm. v. Duluth St. R.R., 273 U.S. 625, 628 (1927).

n220 *See, e.g.,* Jones v. Prairie Oil, 273 U.S. 195, 198-99 (1927).

n221 *See supra* text accompanying notes 159-215; *see also* Roschen v. Ward, 279 U.S. 337, 339-40 (1929); United States v. Alford, 274 U.S. 264, 267 (1927); Shukert v. Allen, 273 U.S. 545, 547-48 (1927); Power Mfg. Co. v. Saunders, 274 U.S. 490, 497 (1927) (Holmes, J., dissenting).

n222 *See, e.g.,* Marcus Brown v. Feldman, 256 U.S. 170, 199 (1921) (postwar overcrowding in cities "obviously" gives rise to need for regulation of housing market); *see also supra* note 210.

n223 *See, e.g.,* Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

n224 *See, e.g.,* Plant v. Woods, 176 Mass. 492, 504-05, 57 N.E. 1011, 1016 (1900) (Holmes, C.J., dissenting); *see also supra* note 59.

n225 *Compare* Frankfurter, *supra* note 39, at 131-33, *reprinted in* THE HOLMES READER, 173, 181-83 (J. Marke ed. 1955) (praising Holmes' judicial detachment) *with* Rogat, *supra* note 8, at 243-56 (speaking of Holmes' approach in less favorable terms).

n226 See, for example, the Court's strategic unanimity in Brown v. Board of Educ., 347 U.S. 483 (1954).

n227 See, for example, the sense of wartime emergency portrayed in Korematsu v. United States, 323 U.S. 214, 223-24 (1944).

This point, of course, is not limited to court opinions. In the act of writing, any author attempts to establish a relationship with her audience. The form the communication takes can itself define the audience (by limiting it to those with highly specialized knowledge, for example) as well as affect the nature of the author's relationship with her audience. While an author may be more or less conscious of the way in which the form of a writing will affect an audience, or may be more or less adept at controlling that aspect of the process of writing, the form, by design or by default, remains an important element of the communication.