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Article

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When Justice Holmes upheld the constitutionality of eugenic sterilization in *Buck v. Bell*,[1] he wrote what has become his most despised opinion[2] and one of the most reviled decisions in the entire Supreme Court canon.[3] Over the years, *Buck v. Bell* has been described as "a parody of justice,"[4] as "resting on rhetoric rather than logic or precedent,"[5] and as "gratuitously

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1. 274 U.S. 200 (1927).

2. *See, e.g.*, ALBERT W. ALSCHULER, LAW WITHOUT VALUES 28, 65 (2000) (describing the opinion as "infamous" and as "Holmes's most notorious"). Holmes, however, was delighted by the opinion. *Id.* at 67 (quoting two letters Holmes wrote to friends in which he said that "establishing the constitutionality of a law permitting the sterilization of imbeciles . . . gave [him] pleasure" and that he "felt that [he] was getting near to the first principle of real reform").

3. Professor Roberta Berry, for example, dwells on *Buck v. Bell*, along with *Scott v. Sandford*, 60 U.S. 393 (1857), and *Korematsu v. United States*, 323 U.S. 214 (1944), as illustrations of the proposition that "[s]ome judicial decisions are so horrendously wrong that they leave us dumbstruck on first encounter. Like survivors of natural disasters first surveying the scene, we must struggle at first to comprehend what has happened." Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of* Buck v. Bell, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 401 (1998).

4. Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1461 (1981).

5. Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 836 (1986); *see also id.* (describing the opinion as "an ideological statement that inherently conflicts with Holmes' idea of judicial deference" and that gave "a shaky eugenics movement a strong stamp of legitimacy").

callous."[6] Holmes's "now infamous epigram"[7] that "[t]hree generations of imbeciles are enough"[8] has especially been taken to task. His "misguided rhetoric,"[9] in addition to being "our own century's most famous pronouncement of blood guilt,"[10] was factually inaccurate.[11]

Everything about Holmes's opinion in *Buck v. Bell* has been subjected to withering criticism with one exception: its other famous epigram belittling Carrie Buck's equal protection claim as "the usual last resort of constitutional arguments."[12]

Unlike anything else in *Buck v. Bell*, Holmes's demeaning depiction of equal protection is taken as the gospel truth. It is quoted frequently as an accurate, pithy statement of equal protection's desuetude before the Supreme Court systematically began remedying racial discrimination in the 1950s. Joseph Tussman and Jacobus tenBroek's comment a few years before the landmark *Brown v. Board of Education*[13] decision is typical:

> Nothing in the annals of our law better reflects the primacy of American concern with liberty over equality than the comparative careers of the due process and equal protection clauses of the Fourteenth Amendment. The former, after a brief germinal period, flourished mightily. The latter, characterized by Mr. Justice Holmes as "the last resort of constitutional lawyers" has long been treated by the Court as

6. Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 288 (1963). Professor Paul Lombardo says "both the logic and the tone of Holmes's opinion were indefensible." Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 31 (1985); *see also id.* at 31 n.9 (collecting even harsher criticism of other scholars).

7. Lombardo, *supra* note 6, at 30.

8. Buck v. Bell, 274 U.S. 200, 208 (1927).

9. Lombardo, *supra* note 6, at 61.

10. Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331, 331 (1985).

11. After reviewing the evidence, which was based on IQ tests then in their infancy, pseudoscience about the inheritability of mental traits, and casual observation (later recanted) by a nurse of a six-month-old infant, Stephen Jay Gould concluded that "there were no imbeciles, not a one, among the three generations of Bucks." *Id.* at 338; *see also id.* at 334–35, 336–38; Cynkar, *supra* note 4, at 1458; Lombardo, *supra* note 6, at 32 n.10, 60–61. Much of the evidence was collected and supplied to Professor Gould by Professor Lombardo. Gould, *supra* note 10, at 336, 338.

12. *Buck*, 274 U.S. at 208; *see also* Fieger v. Thomas, 74 F.3d 740, 750 (6th Cir. 1996) (referring to Holmes's comment as "the only part of *Buck v. Bell* that remains unrepudiated").

13. 347 U.S. 483 (1954).

> a dubious weapon in the armory of judicial review. But after eighty years of relative desuetude, the equal protection clause is now coming into its own.[14]

So too is Erwin Chemerinsky's more recent observation that:

> The promise of [the equal protection clause] went unrealized for almost a century as the Supreme Court rarely found any state or local action to violate [it] . . . . Indeed, Justice Oliver Wendell Holmes derisively referred to the provision as "the last resort of constitutional arguments." Holmes probably was referring to the possibility of challenging almost any law as discriminating against someone and to the Court's consistent reluctance to use the equal protection clause to invalidate state or local laws.[15]

Yet Holmes's dismissive remark about equal protection is as wrong as everything else in his *Buck v. Bell* opinion. For three generations, Holmes's cavalier treatment of Carrie Buck's equal protection argument has masked the fact that, in the state and lower federal court decisions that preceded *Buck v. Bell*, equal protection had proven to be the strongest constitutional claim for defendants seeking to prevent their involuntary sterilization.[16] In addition, Holmes's refusal to engage seriously Buck's equal protection claim has blinded us to the fact that during the first four decades of the twentieth century, equal protection was an important branch of constitutional law, especially in the 1920s when Holmes made his caustic remark.[17]

This Article will demonstrate the importance of equal protection in the struggle against eugenic sterilization and its presence in Supreme Court adjudication throughout the

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14. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949).

15. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 642 (2d ed. 2002); *see also, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 326 (1978) (Blackmun, J., concurring in part and dissenting in part); Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 680 (7th ed. 2004); Stanley H. Friedelbaum, *State Equal Protection: Its Diverse Guises and Effects*, 66 ALB. L. REV. 599, 600 (2003); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 494 (2004); Donald E. Lively, *The Desegregation Legacy: Uncertain Achievement and Doctrinal Distress*, 47 HOW. L.J. 679, 696 (2004); W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1515 (2004); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1052 (2003); Melvin I. Urofsky, *The Supreme Court and Civil Rights Since 1940: Opportunities and Limitations*, 4 BARRY L. REV. 39, 40 n.10 (2003); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1067 (1969).

16. *See infra* Part I.B–C.

17. *See infra* Part II.

Lochner era. By undercutting Justice Holmes's famous epigram about equal protection, this Article supports the view that equal treatment norms—at least in economic affairs—remained a significant part of constitutional law until the New Deal revolution.

While this Article recovers equal protection's important role in eugenic sterilization litigation before *Buck v. Bell* and in constitutional decision-making during the *Lochner* era, it does nothing to rewrite equal protection's dismal record in race relations before the 1940s and 1950s. The race-relations cases are well known, and their myriad shortcomings have been canvassed for a long time.[18] This Article argues, however, for a change in our understanding of the role equal protection played in economic affairs. In an era that took economic liberty seriously, equality was an important constraint on economic legislation.

The role of equality as a constraint on economic legislation during the *Lochner* era is much debated. At present, the dominant claim is that constitutional law during the late nineteenth and early twentieth centuries was dedicated to preserving the Jacksonian ideal of government as a neutral arbiter in the struggle between labor and capital, and between interest groups and the public, in an increasingly pluralistic society.[19] According to this paradigm, *Lochner*-era constitutional law was grounded in norms of equal treatment and an aversion to what Jacksonians called "class legislation."[20]

It is not disputed that from 1880 to 1900, when Lochnerism gestated in the state and federal courts, constitutional adjudication was driven by a concern for determining whether modern regulatory statutes were instances of "class legislation"

18. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8–171 (2004).

19. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED 6–15 (1993); David Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12–13 (2003).

20. "Class legislation" refers to law that improperly seeks to benefit or burden parts of the population. *See, e.g.*, GILLMAN, *supra* note 19, at 7–15; Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 251–68 (1997); Mark Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1374–83 (1990) (reviewing WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988)).

that unjustifiably treated some groups more favorably, or more harshly, than others.[21] The debate centers on whether the Supreme Court shifted the basic focus on American constitutionalism from a concern with equal treatment to a concern for defining and protecting fundamental interests[22] when it began overturning statutes on "liberty of contract" grounds in *Allgeyer v. Louisiana*[23] and *Lochner v. New York*.[24] In effect, the debate is not about whether Justice Holmes's demeaning comment about equal protection was true in 1900 (it clearly wasn't), but whether it was true by the 1920s.

Part I of this Article reviews the course of compulsory sterilization litigation from its inception in 1912 until its denouement in 1927 in *Buck v. Bell* to show the importance of equal protection in the controversy over the constitutionality of eugenic sterilization. Part II generalizes the discussion by reviewing the many instances in the early twentieth century, especially during the 1920s, in which the Supreme Court voided legislation for violating the Constitution's Equal Protection Clause. The Article concludes with a discussion of the implication of this analysis for the controversy over whether *Lochner*-era constitutional law was directed toward protecting fundamental interests or preventing improper "class legislation."[25]

I. THE ROLE OF EQUAL PROTECTION IN COMPULSORY STERILIZATION LITIGATION FROM 1912 TO 1927

Eugenic sterilization was a socially, politically, religiously, and legally controversial movement in Progressive-Era America.[26] Before the Supreme Court decided *Buck v. Bell* in 1927,

21. *See* People v. Marx, 2 N.E. 29, 34 (N.Y. 1885); *In re* Jacobs, 98 N.Y. 98, 104–05, 113–14 (1885); ERNST FREUND, THE POLICE POWER 626–34 (Arno Press 1976) (1904) (discussing equality as a "fundamental right[]"); Bernstein, *supra* note 19, at 20-21 (acknowledging the importance of the animus against "class legislation" in 1904 before the *Lochner* decision).

22. *See* Bernstein, *supra* note 19, at 21–31; Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 *passim* (2005) (laying out various scholars' views on the importance of protecting fundamental interests).

23. 165 U.S. 578 (1897).

24. 198 U.S. 45 (1905).

25. *See supra* note 20 (defining class legislation).

26. *See* PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 30–87 (1991); CHRISTINE ROSEN, PREACHING EUGENICS: RELIGIOUS LEADERS AND THE AMERICAN EUGENICS MOVEMENT 3–23 (2004); Cynkar, *supra* note 4, at 1425–35;

sterilization statutes had been passed by twenty-three state legislatures.[27] Governors in five states had vetoed bills.[28] One statute had been revoked by popular referendum.[29] Courts in nine jurisdictions had ruled on sterilization statutes eleven times.[30] In seven decisions, sterilization statutes had been voided on constitutional grounds.[31] In one additional decision, a statute had been partially voided.[32]

Of the four decisions that wholly[33] or partially[34] upheld a sterilization law, two had been over substantial dissent.[35] Indeed, one of them had been decided by a tie vote.[36] In marked contrast, the decisions voiding sterilization statutes were all unanimous.[37]

Dudziak, *supra* note 5, at 841–48; Thomas C. Leonard, *"More Merciful and Not Less Effective": Eugenics and American Economics in the Progressive Era*, 35 HIST. POL. ECON. 687, 688 (2003).

27. HARRY H. LAUGHLIN, THE LEGAL STATUS OF EUGENICAL STERILIZATION 57 (1930) [hereinafter LAUGHLIN, LEGAL].

28. HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES: A REPORT OF THE PSYCHOPATHIC LABORATORY OF THE MUNICIPAL COURT OF CHICAGO, at x, 35–50 (1922) [hereinafter LAUGHLIN, EUGENICAL].

29. *Id.* at 41–43 (referring to a Virginia statute).

30. Michigan had three decisions: *In re Salloum*, 210 N.W. 498 (Mich. 1926); *Smith v. Command*, 204 N.W. 140 (Mich. 1925); *Haynes v. Lapeer*, 166 N.W. 938 (Mich. 1918). The other decisions are: *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918); *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914); *Williams v. Smith*, 131 N.E. 2 (Ind. 1921); *Smith v. Board of Examiners*, 88 A. 963 (N.J. 1913); *In re Thomson*, 169 N.Y.S. 638 (Sup. Ct. 1918), *aff'd*, *Osborn v. Thomson*, 171 N.Y.S. 1094 (App. Div. 1918); *State Board of Eugenics v. Cline*, No. 15,442 (Or. Cir. Ct. Dec. 13, 1921), *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 287; *Buck v. Bell*, 130 S.E. 516 (Va. 1925); and *State v. Feilen*, 126 P. 75 (Wash. 1912).

31. *Mickle*, 262 F. 687; *Williams*, 131 N.E. 2; *Davis*, 216 F. 413; *Haynes*, 166 N.W. 938; *Bd. of Exam'rs*, 88 A. 963; *In re Thomson*, 169 N.Y.S. 638; *Cline*, No. 15,442, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 287. It may be noted that the Oregon decision voided two different statutes. *See Cline*, No. 15,442, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 288.

32. *Command*, 204 N.W. at 144.

33. *In re Salloum*, 210 N.W. at 498; *Buck*, 130 S.E. at 516; *Feilen*, 126 P. at 75.

34. *Command*, 204 N.W. at 144.

35. *In re Salloum*, 210 N.W. at 498 (a 4–4 decision); *Command*, 204 N.W. at 140 (a 5–3 decision).

36. *In re Salloum*, 210 N.W. at 498 (a 4–4 decision).

37. *See, e.g.*, *Mickle*, 262 F. 687; *Williams*, 131 N.E. 2; *Davis*, 216 F. 413; *Haynes*, 166 N.W. 938; *Bd. of Exam'rs*, 88 A. 963; *In re Thomson*, 169 N.Y.S. 638; *Cline*, No. 15,442, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 287.

Opponents of compulsory sterilization statutes raised four constitutional objections: cruel and unusual punishment, procedural due process, substantive due process,[38] and equal protection.[39] To assess the strength of these various objections to compulsory sterilization legislation before *Buck v. Bell*, it is useful to separate the discussion into two branches, criminal and civil. It is also useful to separate the discussion of litigation involving civil sterilization statutes into two time periods, 1913–1922 and 1922–1926. Sterilization statutes litigated in the latter period were drafted in light of the fate of statutes litigated during the earlier time frame.

A. EQUAL PROTECTION IN THE STRUGGLE AGAINST CRIMINAL STERILIZATION LAWS

Criminal sterilization laws imposed sterilization as part of a convict's punishment. Before *Buck v. Bell*, criminal sterilization laws were challenged on three occasions. All three cases centered on whether sterilization by vasectomy was an impermissible cruel and unusual punishment. In the first case, decided by the Washington Supreme Court in 1912, the statute survived the cruel and unusual punishment attack.[40] According to the court, "the rule" regarding permissible punishments was "that the discretion of the Legislature will not be disturbed by the courts, except in extreme cases."[41] Given the expert testimony that vasectomies "require[] about three minutes' time . . . and the subject returns to his work immediately, suffers no inconvenience, and [except for sterilization] is in no way

38. Progressive-Era jurists did not use the term "substantive due process." Instead, they discussed what we mean by that term when they analyzed whether a police power statute pursued a legitimate state end by reasonable means. *See, e.g.*, Brief for Defendant in Error at 30–35, Buck v. Bell, 274 U.S. 200 (1927) (No. 292), *in* 25 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 516, 543–48 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

39. Only very rarely did opponents mention bill of attainder, double jeopardy, and ex post facto objections. *See* Davis v. Berry, 216 F. 413, 419 (S.D. Iowa 1914) (discussing bills of attainder); LAUGHLIN, EUGENICAL, *supra* note 28, at 442–43.

40. The appellant raised no other ground. *See* Brief of Appellant, State v. Feilen, 126 P. 75 (Wash. 1912), *in* LAUGHLIN, EUGENICAL, *supra* note 28, at 149, 149–52.

41. *Feilen*, 126 P. at 76. The Washington state constitution forbade only cruel punishments. *Id.*

impaired for his pursuit of life, liberty, and happiness,"[42] the court refused to "hold that vasectomy is such a cruel punishment as cannot be inflicted upon appellant for the horrible and brutal crime of which [he] has been convicted."[43]

Despite the favorable Washington Supreme Court decision, in 1914 and 1918 federal district courts relied on the constitutional proscription of cruel and unusual punishment to void criminal sterilization laws in Iowa and Nevada. The court that voided Iowa's criminal sterilization law pointed to the "shame and humiliation and degradation and mental torture" involved even in the relatively painless vasectomy operation.[44] The court that struck down Nevada's statute elaborated:

> It needs no argument to establish the proposition that degrading and humiliating punishment is not conducive to the resumption of upright and self-respecting life. When the penalty is paid, when the offender is free to resume his place in society, he should not be handicapped by the consciousness that he bears on his person, and will carry to his grave, a mutilation which, as punishment, is a brand of infamy. True, rape is an infamous crime; the punishment should be severe; but even for such an offender the way to an upright life, if life is spared, should not be unnecessarily obstructed.[45]

In addition to cruel and unusual punishment, the Iowa district court voided Iowa's law on procedural due process grounds, noting the absence of procedural safeguards in determining whether the sterilization law properly applied to the particular prisoner.[46] The Nevada district court, for its part, raised and favorably discussed an equal protection objection to Nevada's law before advancing to the cruel and unusual punishment argument.[47]

In light of these decisions, by 1922 the eugenic sterilization movement generally conceded the invalidity of sterilization imposed for punitive purposes.[48] As Harry Laughlin, the nation's

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42. *Id.* at 77.

43. *Id.* at 78. Feilen had been convicted of the statutory rape of a girl under the age of ten. *Id.* at 76.

44. *Davis*, 216 F. at 417. *Davis* was appealed to the United States Supreme Court, but the appeal was turned down when, after briefing, Iowa repealed its statute. Davis v. Berry, 242 U.S. 468, 470 (1917).

45. Mickle v. Henrichs, 262 F. 687, 691 (D. Nev. 1918).

46. *Davis*, 216 F. at 418–19.

47. *See Mickle*, 262 F. at 688.

48. *See* LAUGHLIN, EUGENICAL, *supra* note 28, at 117–18, 147; *see also* LAUGHLIN, LEGAL, *supra* note 27, at 53–54.

foremost authority on eugenic sterilization at the time,[49] wrote in his major reassessment of eugenic laws:

> Eugenical sterilization should have absolutely no element of punishment in it. It is true that there have been attempts in this country to impose sterilization as a particularly appropriate punishment for sexual crimes, and also for crimes which seem to connote general criminal tendencies. The decision of the United States District Court in the Nevada case seems to indicate that as a rule the American states will not tolerate punitive sterilization. If as a punishment vasectomy is not **cruel**, it is at least **unusual**.[50]

Laughlin suggested, however, "applying eugenical sterilization to all hereditary degenerates . . . regardless of whether . . . [they] have violated the criminal law. . . . Because, then, there being no punishment in eugenical sterilization, it cannot constitute 'cruel and unusual punishment.'"[51]

Laughlin was not disavowing the sterilization of criminals. Sterilizing criminals, he felt, should be permissible to the extent criminals were among other groups of "cacogenics"[52] whose sterilization was authorized under civil statutes.

In sum, before *Buck v. Bell*, criminal sterilization laws generally were regarded as constitutionally infirm on cruel and unusual punishment grounds.[53] Equal protection did not play a significant role in the litigation that established the constitutional invalidity of criminal sterilization. It did not have to. The constitutional norm banning cruel and unusual punishment was an adequate bar. The most that can be said against equal protection as a basis for constitutional argument is that it was not raised in the one decision that found sterilization to be a permissible punishment.[54] On the other hand, equal protection was discussed approvingly by another court before it settled on

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49. *See* REILLY, *supra* note 26, at 56–70 (discussing Harry Laughlin); Cynkar, *supra* note 4, at 1431 (same); Dudziak, *supra* note 5, at 846 (same).

50. LAUGHLIN, EUGENICAL, *supra* note 28, at 442.

51. *Id.*

52. "Cacogenic" was a eugenic term referring to "potential parents of socially inadequate offspring." *Id.* at 442, 447. The root of the word, *caco*, derives from a Greek word meaning "bad" or "evil." *See* THE OXFORD ENGLISH DICTIONARY 754 (2d ed. 1989).

53. This position persisted even after *Buck v. Bell*. *See* LAUGHLIN, LEGAL, *supra* note 27, at 53–54 (explaining that penal sterilization violates the "spirit" of the Eighth Amendment's protection against cruel and unusual punishment).

54. The Washington Supreme Court's failure to discuss equal protection may be somewhat mitigated by the appellant's decision to focus solely on the cruel and unusual punishment argument in his brief. *See* Brief of Appellant, *supra* note 40.

the cruel and unusual punishment ground.[55] In the struggle over criminal sterilization statutes, equal protection was neither a key nor a disdained argument.

In the end, litigation regarding criminal sterilization laws provides important background and context but is somewhat beside the point. *Buck v. Bell* involved the constitutionality of a civil sterilization statute. Holmes's comment deriding equal protection arguments was made in the civil context. Equal protection would play a far more prominent role in the pre-*Buck v. Bell* struggle against civil sterilization laws.

B. EQUAL PROTECTION IN THE STRUGGLE AGAINST CIVIL STERILIZATION LAWS

Equal protection was of greater moment in litigation involving civil sterilization laws. Civil sterilization involved police power regulations imposed as a means of bettering society by preventing the propagation of people who would be a "social menace"[56] because of their inheritable "physical, mental, and moral" defects.[57]

Prior to *Buck v. Bell*, civil sterilization laws had been adjudicated in seven cases. The pattern of these cases is more understandable if they are separated into two time periods—1913 to 1922, and 1922 to 1927.

1. Civil Sterilization Litigation Between 1913 and 1922

Between 1913 and 1922, courts addressed civil sterilization laws on five occasions.[58] On every occasion, the statute was found unconstitutional.[59] In most cases, equal protection was

55. *See* Mickle v. Henrichs, 262 F. 687, 688, 690–91 (D. Nev. 1918).

56. *In re* Hendrickson, 123 P.2d 322, 323 (Wash. 1942) (quoting the state's 1921 sterilization statute); LAUGHLIN, EUGENICAL, *supra* note 28, at 16 (same).

57. *See* LAUGHLIN, EUGENICAL, *supra* note 28, at 147 ("A state may . . . enact . . . eugenical sterilization laws . . . which have for their sole purpose the improvement of the natural hereditary physical, mental and moral endowment of future generations.").

58. Williams v. Smith, 131 N.E. 2 (Ind. 1921); Haynes v. Lapeer, 166 N.W. 938 (Mich. 1918); Smith v. Bd. of Exam'rs, 88 A. 963 (N.J. 1913); *In re* Thomson, 169 N.Y.S. 638 (Sup. Ct. 1918), *aff'd*, Osborn v. Thomson, 171 N.Y.S. 1094 (App. Div. 1918); State Bd. of Eugenics v. Cline, No. 15,442 (Or. Cir. Ct. Dec. 13, 1921), *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 287.

59. *See Williams*, 131 N.E. at 3–4; *Haynes*, 166 N.W. at 940–41; *Bd. of Exam'rs*, 88 A. at 966–67, *In re Thomson*, 169 N.Y.S. at 643–45, *Cline*, No. 15,422, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 289.

either the sole ground or among the prominent grounds of decision. In contrast, only two courts rested their decisions, either wholly or partially, on procedural due process. The courts never relied on substantive due process.[60]

Smith v. Board of Examiners[61] was the first and leading opinion on the constitutionality of civil sterilization statutes. *Board of Examiners* involved the application of an act, passed by the New Jersey legislature and signed by Governor Woodrow Wilson in 1911,[62] that authorized "the sterilization of feeble-minded (including idiots, imbeciles and morons), epileptics, rapists, certain criminals and other defectives."[63] The law had no punitive intent. It was premised on the belief that "heredity plays a most important part in the transmission" of the designated conditions and behaviors.[64] The act established a Board of Examiners to review the "mental and physical condition" of "inmates confined in [state and county] reformatories, charitable, and penal institutions."[65] The act declared it "lawful" to sterilize those inmates whose "procreation" the Board determined to be "inadvisable."[66] Because the act contained a severability clause,[67] and Alice Smith was an "epileptic inmate of [the State Village for Epileptics], a state charitable institution,"[68] only the compulsory sterilization of someone who was "an unfortunate person, but not a criminal" was involved.[69]

Smith's lawyer attacked the sterilization law on substantive and procedural due process, as well as equal protection, grounds.[70] In responding, the New Jersey Supreme Court accepted that the substantive due process issue was broad and

60. The courts did not rely on the ban on cruel and unusual punishment either; civil sterilization was not conceived as imposed for punitive purposes. *See, e.g.*, Smith v. Command, 204 N.W. 140, 142 (Mich. 1925); Buck v. Bell, 130 S.E. 516, 519 (Va. 1925). *But see Command*, 204 N.W. at 148–49 (Wiest, J., dissenting) (stating that castration was punitive). For further discussion, see *infra* text accompanying note 145.

61. *Bd. of Exam'rs*, 88 A. at 963.

62. LAUGHLIN, EUGENICAL, *supra* note 28, at 23.

63. 1911 N.J. Laws ch. 190, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 23, 23–24.

64. *Id.* at 24.

65. *Id.*

66. *Id.*

67. *Id.* at 25.

68. Smith v. Bd. of Exam'rs, 88 A. 963, 964–65 (N.J. 1913).

69. *Id.* at 965.

70. LAUGHLIN, EUGENICAL, *supra* note 28, at 166–68.

fundamental, "involv[ing] consequences of the greatest magnitude."[71] The case, it said, "raises the very important and novel question whether it is one of the attributes of government to essay the theoretical improvement of society by destroying the function of procreation in certain of its members who are not malefactors against its laws."[72] The New Jersey court recognized:

> [I]t is evident that the decision of [this] question carries with it certain logical consequences, having far-reaching results. For the feebleminded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the Legislature, be a distinct benefit to society. If the enforced sterility of this class be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open to which it would be difficult to assign a legal limit.[73]

Indeed, after observing that "other things besides physical or mental diseases . . . may render persons undesirable citizens, or might do so in the opinion of a majority of a prevailing Legislature,"[74] the court voiced its deepest concerns. It suggested "racial differences" and "the tendency of population to outgrow its means of subsistence" as analogous problems it feared a legislature might determine "should be counteracted by surgical interference of the sort we are now considering."[75]

In light of the magnitude of the substantive due process issue, the New Jersey Supreme Court declared its intent to "place the decision of the present case upon a ground that has no such logical results or untoward consequences."[76] That ground was equal protection.[77]

Quoting from United States Supreme Court precedent, the New Jersey court observed that statutory classifications must be "reasonable" and "not a mere arbitrary selection" and that

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71. *Bd. of Exam'rs*, 88 A. at 965.

72. *Id.* at 965–66; *see also id.* at 966 ("Evidently the large and underlying question is, How far is government constitutionally justified in the theoretical betterment of society by means of the surgical sterilization of certain of its unoffending, but undesirable, members?").

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* [Author's note: The version of *Smith v. Board of Examiners* on Westlaw omits some of the words in this quotation.]

77. *Id.*; *cf.* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 111–17 (1949) (Jackson, J., concurring) (observing that arguments premised on equal protection, as compared to due process, should be more readily accepted by courts because equal protection is less "disabl[ing]" of governmental power).

they must "bear[] a just and proper relation" to the purpose for which the classification is made.[78] From this perspective, the civil sterilization law's selection of the group to which Alice Smith belonged—"epileptics . . . confined to the several charitable institutions in the counties and state"[79]—was fatally flawed in several regards. First, the statutory classification applied only to poor epileptics, while "epilepsy, if not, as some authorities contend, mainly a disease of the well to do and overfed, is at least one that affects all ranks of society, the rich as well as the poor."[80] Second, even if the state could select only poor epileptics for sterilization, the law was still "singularly inept"[81] to accomplish the statutory goal of social betterment because it did not apply to the "vastly greater"[82] population of poor "epileptics who are not confined in [charitable] institutions . . . [and who] are, in the nature of things, vastly more exposed to the temptation and opportunity of procreation."[83]

In the New Jersey court's view, the "temptation and opportunity of procreation . . . in cases of . . . confined [epileptics] in a presumably well-conducted public institution [was] reduced practically to nil."[84] This belief reinforced the court's conclusion that the civil sterilization law employed "a principle of selection . . . that bears no reasonable relation to the proposed scheme for the artificial betterment of society."[85] The statute was a classic equal protection violation; it selected the most defenseless part of a defenseless group for substantial burdens not shared by the general population. In the more technically precise words of the New Jersey Supreme Court:

> The particular vice, therefore, of the present classification is not so much that it creates a subclassification, based upon no reasonable basis, as that having thereby arbitrarily created two classes, it applies the statutory remedy to that one of those classes to which it has the

78. *Bd. of Exam'rs*, 88 A. at 966 (quoting Gulf, Colo. & Santa Fé Ry. Co. v. Ellis, 165 U.S. 150, 165–66 (1897)). This was garden variety equal protection doctrine.

79. *Id.*; *see also* 1911 N.J. Laws ch. 190, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 23–24.

80. *Bd. of Exam'rs*, 88 A. at 966. The statute applied only to poor epileptics because the Board was authorized to "examine" only inmates of "charitable" institutions. *See* 1911 N.J. Laws ch. 190, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 23–24.

81. *Bd. of Exam'rs*, 88 A. at 966.

82. *Id.*

83. *Id.* at 967.

84. *Id.*

85. *Id.*

> least, and in no event a sole, application . . . . When we consider that such statutory scheme necessarily involves a suppression of personal liberty and a possible menace to the life of the individual who must submit to it, it is not asking too much that an artificial regulation of society that involves these constitutional rights of some of its members shall be accomplished, if at all, by a statute that does not deny to the persons injuriously affected the equal protection of the laws guaranteed by the federal Constitution.[86]

Thus the *Board of Examiners* court employed equal protection to void New Jersey's civil sterilization statute[87] without providing any answer to the substantive due process issue of the state's power to compel surgical sterilization for eugenic purposes.[88] The court understood the state's position to be that the legislature had untrammeled authority "to enact and enforce whatever regulations are in its judgment demanded for the welfare of society at large in order to secure or to guard its order, safety, health, or morals."[89] The court understood Smith's position to be that "under our system of government the artificial enhancement of the public welfare by the forceable [sic] suppression of the constitutional rights of the individual is inadmissible."[90] The court's view was that "[s]omewhere between these two fundamental propositions the exercise of the police power in the present case must fall."[91] Unable to say exactly where, and aware of the vast consequences of giving anything but the correct answer, the court shifted its focus to the statute's classification problem.[92] The turn to equal protection was not as a "last resort" in any derogatory sense. It was a turn

86. *Id.* The court's recognition that sterilization involved risk to the individual's life stemmed from the fact that female sterilization typically involved "salpingectomy," which was major surgery to remove both the patient's fallopian tubes. *Id.* at 965; *see also* LAUGHLIN, EUGENICAL, *supra* note 28, at 415–22 (discussing salpingectomy and "oophorectomy," the removal of the ovaries).

87. Due to the statute's severability clause, the decision had reference only to the sterilization of epileptics. *See Bd. of Exam'rs*, 88 A. at 965. However, the court's reasoning had obvious import for the act's application to the other designated classes of "defectives" who were not convicts.

88. *Id.* at 967. The court also did not respond to Smith's procedural due process argument, which was that although the sterilization order was imposed through a combined administrative and judicial process, it was not one in which a jury had ever been used to determine the facts. *Id.* Smith, therefore, was being deprived of a constitutionally protected liberty without a jury trial. *See* Brief of Petitioner-Appellant, *Bd. of Exam'rs*, 88 A. 963, *in* LAUGHLIN, EUGENICAL, *supra* note 28, at 166, 167–68.

89. *Bd. of Exam'rs*, 88 A. at 965.

90. *Id.*

91. *Id.*

92. *See id.* at 966.

to an equally important constitutional norm that, in the instant case, had a clearer application.

The *Board of Examiners* court's turn to equal protection proved prescient. The court's analysis dominated the course of litigation over the next decade and substantially shaped legal discussion of civil sterilization laws up to the United States Supreme Court decision in *Buck v. Bell*.[93] Between 1913 and 1921, four more courts addressed civil sterilization statutes, all declaring the laws unconstitutional.[94] Three of the courts used equal protection to void laws that applied only to "defectives" already in public institutions.[95] Two of the courts also found procedural due process grounds for overturning the laws.[96] None of the courts took a position on whether civil sterilization for eugenic purposes was a legitimate purpose of police power regulation.

2. Refining Civil Sterilization Statutes—Harry Laughlin's *Eugenical Sterilization in the United States*

By 1922, the result of the first wave of eugenic legislation litigation was clear. Every civil sterilization statute that had been litigated had been voided on either equal protection or

93. *Smith v. Board of Examiners* remained good law, even after *Buck v. Bell*, on the precise point it decided: civil sterilization cannot be limited to those confined to public institutions. *See infra* text accompanying notes 161–64 (referring to the statute at issue in *Buck v. Bell* that applied to all of the state's feebleminded, not only to those confined to public institutions).

94. Williams v. Smith, 131 N.E. 2, 3–4 (Ind. 1921); Haynes v. Lapeer, 166 N.W. 938, 941 (Mich. 1918); *In re* Thomson, 169 N.Y.S. 638, 644–45 (Sup. Ct. 1918), *aff'd*, Osborn v. Thomson, 171 N.Y.S. 1094 (App. Div. 1918); State Bd. of Eugenics v. Cline, No. 15,442 (Or. Cir. Ct. Dec. 13, 1921), *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 287, 288. The Oregon Circuit Court that decided *Cline* was the court of last resort for that type of case. No. 15,442, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 289 n.1.

95. *Haynes*, 166 N.W. at 940–41; *In re Thomson*, 169 N.Y.S. at 643–45; *Cline*, No. 15,442, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 287, 288. *Williams*, the case that did not use equal protection, dealt with the proposed sterilization of a "prisoner in the Indiana Reformatory," and this seemed to direct the court into following the precedents on criminal sterilization laws. *See* 131 N.E. at 2–3 (relying on Davis v. Berry, 216 F. 413 (S.D. Iowa 1914)). Because the statute in *Williams* was not expressly punitive, I have erred on the side of caution in treating the *Williams* case as a civil sterilization dispute even though it means not being able to say that *all* the courts adjudicating compulsory civil sterilization before 1921 followed *Board of Examiners* and relied on equal protection.

96. *Williams*, 131 N.E. at 2–3; *Cline*, No. 15,442, *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 287, 288–89.

procedural due process grounds. Two out of three criminal sterilization laws had also been struck down for imposing cruel and unusual punishment. If the eugenics movement was to succeed, it needed to refine the statutes that implemented its policies. In 1922, Harry Laughlin published a comprehensive review and reconsideration of the eugenic movement's legal strategy, *Eugenical Sterilization in the United States*.[97]

In *Eugenical Sterilization*, Laughlin exhaustively reviewed the biological, medical, surgical, and diagnostic aspects of eugenic sterilization;[98] every eugenic-sterilization-enabling statute that had been enacted;[99] and all aspects of the course of litigation on them.[100] He recounted not only every judicial decision on eugenic sterilization, the parties' briefs, and attorney-general opinions,[101] but also the law on related topics such as marriage, birth control, immigration, and protective incarceration.[102] Laughlin also proposed a model eugenic sterilization law, complete with explanatory comments and forms for use in its administration.[103]

Laughlin's model statute and forms were based on lessons he drew from the prior decade's course of sterilization decisions and from related areas of law.[104] In Laughlin's view, that earlier litigation taught four lessons. The first lesson was that the state's police power encompassed compulsory eugenic sterilization.[105] Laughlin interpreted the courts' decade-long silence on the substantive due process issue to be tantamount to their having "[i]n test cases . . . stated that a state may, if it chooses, exercise its undoubted legislative right to improve the racial qualities of its citizens by eugenical sterilization of . . . certain natural classes of degenerates."[106] This conclusion, or at least the strength of it, certainly reflected Laughlin's own enthusiasm for eugenic sterilization. But it was backed up by sound legal analysis.

97. LAUGHLIN, EUGENICAL, *supra* note 28.

98. *Id.* at 362–436.

99. *Id.* at 1–140. Laughlin's study also included all statutes that had been vetoed and the gubernatorial veto messages. *Id.* at 35–51.

100. *Id.* at 142–336.

101. *Id.*

102. *Id.* at 338–60.

103. *Id.* at 446–94.

104. *See, e.g.*, *id.* at 147, 428–44, 454.

105. *Id.* at 147, 438.

106. *Id.* at 438.

As Laughlin saw it, on the one hand, the key to the police power was convincing the courts that there was sufficient "compensation in benefit to the general welfare for the intrusion upon what might be called personal or natural rights of the citizen."[107] On the other hand, Laughlin believed that

> the eugenicist is now able to prove to the scientific world, to legislatures and to the courts of the land that by the application of certain pedigree principles to the pedigree findings in a particular case, it is possible to determine the hereditary potentialities of a given individual, and thus to demonstrate the eugenical menace of a given person.[108]

In fine, Laughlin argued: "Prevention of social menace is an essential purpose of law . . . . If eugenical sterilization . . . will protect the race against degeneracy, then such measures would appear to be well within the police power of the state."[109]

The second lesson of the prior decade's sterilization litigation was that criminal sterilization laws were unconstitutional as a violation of the "spirit of our constitutional provisions against cruel and unusual punishment."[110] In the future, Laughlin said, "[e]ugenical sterilization must . . . eliminate all signs and suggestions of punishment. Its motive is solely race betterment."[111] Laughlin's position was that eugenical sterilization statutes had to be civil rather than criminal.

The third lesson was that civil sterilization required substantial procedural safeguards. Because sterilization "cuts most deeply into the most fundamental of all natural functions,"[112] Laughlin concluded that it would be permitted only under stringent procedural safeguards, such as trial-type hearings in which judges reviewed *de novo* initial administrative determinations.[113] This was, however, all to the good. "In the long run," he wrote, "conservative court procedure will, doubtless, prove to

107. *Id.* at 130.

108. *Id.* at 438.

109. *Id.*

110. *Id.* at 147; *see also* LAUGHLIN, LEGAL, *supra* note 27, at 54 (acknowledging the same point after *Buck v. Bell*).

111. LAUGHLIN, EUGENICAL, *supra* note 28, at 119.

112. *Id.* at 133.

113. *Id.* at 147; *see also id.* at 132–40 (discussing due process arguments and state laws); LAUGHLIN, LEGAL, *supra* note 27, at 54 (discussing due process requirements after *Buck v. Bell*).

be the safest and most practical policy."[114] It was, Laughlin advised, both possible and desirable to draft statutes that provided the needed procedural safeguards.

The final lesson of the prior decade's sterilization litigation was that equal protection necessitated careful attention to the description of the population subject to compulsory sterilization. Equal protection, Laughlin said, required that in determining which population groups were subject to compulsory sterilization, the state must select "natural classes," classes that "must not be too much subdivided or too artificial or arbitrary in their inclusions and limitations."[115] He noted that "four cases"[116] had declared civil sterilization laws unconstitutional as "class legislation,"[117] reviewing, in particular, the *Board of Examiners* case's "suggest[ion] that the limits of undesirable parenthood would be difficult to establish."[118] Laughlin then conceded that "[i]f in the future the courts uphold the narrower view of 'class legislation' which has been upheld by the four cases above mentioned, then doubtless the states will be found bereft of a power for race betterment which they may in the future care to exercise."[119]

Evidently, Laughlin saw equal protection as involuntary civil sterilization's most serious constitutional problem. In *Eugenical Sterilization*, Laughlin suggested solutions to the "class legislation" issue. He questioned the *Board of Examiners* court's view that expert opinion was divided on the "classification of social inadequates and [the] definitions which set them off . . . from the normal population."[120] He contended that epileptics, the feebleminded, criminals, the insane, and the separate sexes were separate "natural classes" for equal protection purposes.[121] Ultimately, he attempted to elide the problem by proposing model legislation that "applies to all individuals in

114. LAUGHLIN, EUGENICAL, *supra* note 28, at 147; *see also* State Bd. of Eugenics v. Cline, No. 15,442 (Or. Cir. Ct. Dec. 13, 1921), *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 287, 288 ("Unquestionably [a compulsory sterilization] case belongs to the class requiring strict rules of procedure.").

115. LAUGHLIN, EUGENICAL, *supra* note 28, at 130.

116. *Id.*; *see supra* text accompanying notes 60–96 (discussing these cases).

117. LAUGHLIN, EUGENICAL, *supra* note 28, at 130.

118. *Id.* at 131.

119. *Id.*; *see also id.* at 147 (discussing the "class legislation" problem).

120. *Id.* at 131. The *Board of Examiners* court probably was right, and Laughlin wrong, on the question of expert unity. *See* Cynkar, *supra* note 4, at 1454–57 (discussing controversies within the eugenics movement).

121. LAUGHLIN, EUGENICAL, *supra* note 28, at 131, 147, 440–41.

the state, whether in institutions or in the population at large, who conform to a certain standard . . . of degenerate parenthood, regardless . . . of the particular type of defectiveness."[122]

Whether any of these responses would prove successful "remain[ed] to be decided from future litigation."[123] After a decade of civil sterilization litigation, what was clear to Laughlin was that equal protection "appears to be the only great stumbling block from which [civil] eugenical . . . sterilization statutes have fallen to their invalidity, and consequently, new laws must take great pains to avoid similar disaster."[124]

3. Civil Sterilization Litigation Between 1922 and 1927

Between the publication of Laughlin's *Eugenical Sterilization* in 1922 and the United States Supreme Court's *Buck v. Bell* decision in 1927, eleven state legislatures passed thirteen civil sterilization statutes.[125] Two of them, a Michigan statute and the Virginia act that was the basis of *Buck v. Bell*, were litigated in state courts before the Supreme Court's decision.[126]

The Michigan statute was litigated twice. The first time the state supreme court unanimously voided part of the law on equal protection grounds[127] but by a 5–3 vote upheld the rest against substantive due process, cruel and unusual punishment, and equal protection attack.[128] One judge joined the majority reluctantly.[129] The following year, when another case brought the statute back for additional review, a change in court personnel resulted in a 4–4 vote.[130] Thus, the remainder of the statute survived on a tie vote with each side simply resting on what it had written in the first case.[131]

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122. *Id.* at 131; *see also id.* at 440, 446 (discussing principles underlying a model state law on eugenical sterilization).

123. *Id.* at 147 (speaking of subdividing a natural class of defectives into those who are incarcerated and those who are in the general population).

124. *Id.* at 440.

125. LAUGHLIN, LEGAL, *supra* note 27, at 57.

126. *In re* Salloum, 210 N.W. 498 (Mich. 1926); Smith v. Command, 204 N.W. 140 (Mich. 1925); Buck v. Bell, 130 S.E. 516 (Va. 1925).

127. *Command*, 204 N.W. at 144.

128. *Id.* at 140.

129. *Id.* at 146 (Clark, J., concurring). Judge Clark had "grave doubts" and joined the majority "[w]ith reluctance." *Id.*

130. *In re Salloum*, 210 N.W. at 498.

131. *Compare id.* (citing the reasoning from *Command* to deny defendant's constitutional objections to the law), *with Command*, 204 N.W. at 145 (voiding part of the law but sustaining the rest of it as a "reasonable exercise of the po-

The Michigan statute, adopted in 1923, was a civil sterilization measure applicable to the feebleminded[132] but not other mentally disabled individuals, such as the insane.[133] Despite this initial discrimination, the statute was carefully crafted to circumvent the defect of the first generation of civil sterilization statutes that had been voided, on equal protection grounds, for applying only to institutionalized individuals.[134] As a formal matter, all the state's feebleminded were subject to the statute.[135] Still, not all the feebleminded were to be sterilized. Sterilization orders required that the feebleminded individual: (a) "manifests sexual inclinations" and be likely to have mentally defective children; [136] or (b) "manifests sexual inclinations" and "not be able to support and care for his children" because of "his own mental defectiveness," making them likely to "become public charges."[137]

It was subjecting this latter group of feebleminded individuals to sterilization that the court unanimously struck down for violating equal protection. This part of the statute was directed not toward eugenics but toward protecting the public fisc.[138] In pursuing its monetary goal, the statute impermissibly "carve[d] a class out of a class. In that it does not apply to those of the class who may be financially able to support their children, it is not made applicable alike to all members of the class."[139] The wealth discrimination of this part of the statute was a classic equal protection violation.

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lice powers of the state within the limits of the Constitution").

132. The statute was applicable to idiots and imbeciles as well as the feebleminded. *Command*, 204 N.W. at 141. For simplicity I have used only the last term as an umbrella designation.

133. *Id.*

134. *See* Smith v. Bd. of Exam'rs, 88 A. 963, 964–65 (N.J. 1913) (discussing a similar New Jersey statute). Michigan also had one of these statutes, and it had been voided in *Haynes v. Lapeer*, 166 N.W. 938 (Mich. 1918).

135. I say as a "formal matter" because sterilization would only occur after an alleged feebleminded individual had been taken into custody and adjudged feebleminded. *See Command*, 204 N.W. at 141 (describing the administrative process). Since there was no general program for seeking out feebleminded people, sterilization was de facto limited to individuals who were institutionalized.

136. *Id.* (citing 1923 Mich. Pub. Acts 285).

137. *Id.*

138. *See id.* at 144.

139. *Id.*

Sterilizing the feebleminded but not the insane was another matter. There, the Michigan court's majority and minority battled on cruel and unusual punishment and substantive due process grounds, as well as over the application of equal protection.

To the majority, cruel and unusual punishment did not apply because "[t]here is no element of punishment involved in the sterilization of feeble-minded persons."[140] Substantive due process was not violated because compulsory civil sterilization of the feebleminded was well within the police power. "[J]ustified by the findings of biological science," the sterilization law, like any other police power regulation, confronted "a serious menace to society" by "impos[ing] reasonable restrictions upon the natural and constitutional rights of its citizens."[141] With regard to equal protection, the majority held the legislature's decision to sterilize the feebleminded but not the insane to be permissible.[142] The feebleminded were "a natural class of defectives" to which "[t]he insane do not belong."[143] Acknowledging that "we do not know, of course, what the Legislature had in mind," the court still concluded that "it is reasonable to suppose that they knew that the insane have less of the sexual impulses than the feeble-minded, and that biological science has not so definitely demonstrated their inheritable tendencies."[144]

In response, the minority of three, and later four, judges entered a long, impassioned dissent. As for the ban on cruel and unusual punishment, the minority "refuse[d] to believe that this humane inhibition exists for the protection of criminals and bears no relation to the forcible mutilation of the gen-

140. *Id.* at 142. The majority analogized civil sterilization to compulsory vaccination. *Id.*

141. *Id.* In reaching the conclusion that "[b]iological science has definitely demonstrated that feeble-mindedness is hereditary," the court relied on testimony of "all the noted experts of England" taken by the English Royal Commission of 1904; quoted from two scholarly works, one of which was written by Dr. A.F. Tredgold, whom the court described as "one of the greatest authorities on feeble-mindedness"; referenced "the opinions of many notable biological students in this country"; and asserted that there was "a great quantity of other evidence to which we will not here refer." *Id.* at 141–42. For a review of the supposed scientific basis of early twentieth-century eugenics, see Cynkar, *supra* note 4, at 1425–31, and Leonard, *supra* note 26, at 688–92.

142. *See Command*, 204 N.W. at 143.

143. *Id.*

144. *Id.*

erative organs of the mentally unfortunate."[145] It found a substantive due process violation by questioning the entire basis of eugenic science[146] and the necessity of sterilization when protective incarceration of these "unfortunates" prevented reproduction equally well.[147] As for equal protection, the minority turned its attack on the basis of eugenic science into an assault on the ability of the state, in both theory and practice, to distinguish rationally the feebleminded from other citizens in terms of their mental capacity and the heritability of their undesirable traits.[148] The sterilization law's classifications and applications, the minority said, were "based on medical guess."[149] Given the diversity of expert opinion, equal treatment of individuals was impossible because "we may have one theory of heredity in one case and another possibly in the next, unless the same physicians are kept on the job."[150]

Thus, equal protection was among the grounds upon which half the Michigan Supreme Court was willing to bar all eugenic sterilization legislation. It was also *the* ground on which the court unanimously voided the law's more easily administrable classification.[151]

The equal protection objection had less appeal to the Virginia Supreme Court. But, because that court unanimously upheld the state's sterilization law, it would be fair to say the Virginia Supreme Court was also less impressed by all the other grounds of attack. The ultimate issue, however, is not whether the equal protection challenge was successful, but whether, in the litigation leading to Justice Holmes's decision in *Buck v. Bell*, equal protection was a serious or a spurious concern.

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145. *Id.* at 149 (Wiest, J., dissenting).

146. *See id.* at 149–52.

147. *See id.* at 146 (arguing that "no one can successfully maintain that it is essential for the public safety" to sterilize those who have been "segregated" as wards of the state).

148. *See id.* at 148, 150–52. The minority was less interested in the feebleminded/insane distinction than in the rationality of the classification "feebleminded" and its application to particular individuals. *Id.* at 150–52.

149. *Id.* at 148.

150. *Id.* at 151; *cf.* Bush v. Gore, 531 U.S. 98, 105–09 (2000) (per curiam) (finding that equal protection is violated when different ballot counting standards may be applied to neighboring tables in the same county).

151. The voided classification would have allowed sterilization based on a finding of feeblemindedness and poverty rather than feeblemindedness and inheritability of the trait. *See Command*, 204 N.W. at 141. It should be noted that the voided provision had quite broad application given the likely economic circumstances of allegedly feebleminded individuals.

Virginia enacted the statute validated in *Buck* in 1924.[152] In an arranged test case contesting Carrie Buck's sterilization order,[153] the law was challenged on the usual panoply of cruel and unusual punishment, procedural due process, substantive due process, and equal protection grounds.[154] The equal protection challenge, the only ground we need explicate, was based on the fact that the act authorized the sterilization "of inmates of State institutions."[155] Those institutions were the five public hospitals that cared for the state's epileptics, feebleminded, and mentally ill.[156] In other words, Virginia's act applied to the same limited group of people as had all the previous statutes that had been struck down for violating equal protection.[157]

Well aware of this, the act's defenders sought to distinguish the prior cases on two grounds. First, the Virginia act authorized sterilization when "it is for the best interests of the patients" as well as society.[158] "The Virginia statute," its defenders said, "is believed to be unique among and to be distinguished from other similar enactments in that it requires a judicial determination that the welfare of the patient will be promoted as a condition precedent to a sterilization order."[159] Among the benefits to the patient was the opportunity to be released into society at large, rather than remain institutionalized until age had rendered him or her infertile.[160]

Second, other provisions of the Virginia act allowed "any reputable citizen" to file a commitment petition against "any person residing in this State" who he or she "supposed to be

152. 1924 Va. Acts ch. 394, *reprinted in* LAUGHLIN, LEGAL, *supra* note 27, at 10–14.

153. *See* Lombardo, *supra* note 6, at 48–50; *see also* Cynkar, *supra* note 4, at 1437–40.

154. *See, e.g.*, Buck v. Bell, 130 S.E. 516, 518–20 (Va. 1925) (responding to these arguments).

155. 1924 Va. Acts ch. 394, *reprinted in* LAUGHLIN, LEGAL, *supra* note 27, at 10.

156. *See id.* § 1, *reprinted in* LAUGHLIN, LEGAL, *supra* note 27, at 11.

157. *See supra* Part I.B.1.

158. 1924 Va. Acts ch. 394, § 1, *reprinted in* LAUGHLIN, LEGAL, *supra* note 27, at 11.

159. Brief for Defendant in Error, *supra* note 38, at 532; *see also Buck*, 130 S.E. at 520 (distinguishing the statute at issue from the one in *Smith v. Board of Examiners* because the Virigina act "depend[s] upon whether the welfare of the patient would be promoted").

160. *See* 1924 Va. Acts ch. 394, *reprinted in* LAUGHLIN, LEGAL, *supra* note 27, at 10; *see also* Brief for Defendant in Error, *supra* note 38, at 38.

feeble-minded."[161] Reading the statutes "in *pari materia*"[162] meant that Virginia did not arbitrarily subject only the institutionalized feebleminded to sterilization. All the state's feebleminded were subject to commitment, and

> [i]f it be impracticable, as likely it is because of their number, that all the feeble-minded shall be taken into custodial care in institutions, the State should not be denied the power through an "in and out system" to take in such as it may and discharging such of these as it may after proper treatment, to make way for others until all shall be reached.[163]

As we now know, the Virginia Supreme Court and the United States Supreme Court accepted the defenders' arguments.[164] But in Harry Laughlin's view, it was the national Supreme Court's ruling that "established" that states had wide power to define classes of citizens for sterilization purposes.[165] Throughout the *Buck v. Bell* litigation, the equal protection challenge was treated as a major, and possibly as the major, issue.

The Virginia Supreme Court certainly took the equal protection issue seriously. Its response to the equal protection argument was longer than its response to either the cruel and unusual punishment or substantive due process points.[166] The briefs the parties submitted to the United States Supreme Court took the equal protection issue most seriously. Their treatment of equal protection was longer by far than any other issue. Carrie Buck's lawyers did not raise a cruel and unusual punishment argument at all, covered a combined procedural and substantive due process argument in two pages,[167] and devoted seven pages to the equal protection attack.[168] Most tell-

161. *Buck*, 130 S.E. at 520 (referring to VA. CODE ANN. § 1078 (1919)); Brief for Defendant in Error, *supra* note 38, at 39 (quoting the same Virginia Code section).

162. Brief for Defendant in Error, *supra* note 38, at 38.

163. *Id.* at 41.

164. *See* Buck v. Bell, 274 U.S. 200, 208 (1927); *Buck*, 130 S.E. at 520.

165. LAUGHLIN, LEGAL, *supra* note 27, at 54–55 (indicating that *Buck*, 274 U.S. 200, clarified the law in this respect).

166. *Buck*, 130 S.E. at 519–20 (showing that the court spent one page on equal protection, three-quarters of a page on substantive due process, and one-half of a page on cruel and unusual punishment). Only the procedural due process response was longer, occupying one and one-third pages. *Id.* at 518–19.

167. Brief for Plaintiff in Error at 9–11, *Buck*, 274 U.S. 200 (No. 292), *in* LANDMARK BRIEFS, *supra* note 38, at 500–02.

168. *Id.* at 11–17. One may discount somewhat the evidence from the plaintiff in error's brief because there is much support for the view that Carrie

ingly, the defenders of the act devoted two pages to denying the cruel and unusual punishment argument that had not been made,[169] four and a half pages to procedural due process,[170] seven pages to substantive due process,[171] and eleven pages to equal protection.[172]

Given the history of sterilization litigation, the pro-eugenic sterilization brief's page allocation reflects a sound legal judgment on whether Carrie Buck's equal protection argument was as frivolous as Justice Holmes implied when he dismissed it in a short paragraph, demeaning it and all equal protection as "the usual last resort of constitutional arguments."[173]

Indeed, it can be argued that Holmes substituted demeaning epithet for reasoned response to a difficult issue. Neither Holmes nor any defender of the act responded to the credible equal protection claim that because Virginia had no active program for bringing commitment proceedings against the state's mental defectives, the defenders' claim that the institutionalized and noninstitutionalized were treated equally was really a matter of form over substance.[174] Neither did Holmes nor any defender of the act respond to the equally plausible equal pro-

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Buck's lawyer had mixed loyalties in the case. *See* Lombardo, *supra* note 6, at 32–40, 50–58 (discussing Irving Whitehead, Carrie Buck's appointed counsel). Whitehead's major weakness was the record he allowed to be established. He also could have made a lengthier and stronger substantive due process argument, challenging the bonafides of eugenic science. With regard to his brief's equal protection challenge, his shortcoming was that he discussed only the most prominent arguments and did not raise other, more subtle lines of attack. *See infra* text accompanying notes 169–72 (discussing de facto limitations of the law).

169. Brief for Defendant in Error, *supra* note 38, at 24–26.

170. *Id.* at 26–30.

171. *Id.* at 30–37.

172. *Id.* at 37–48; *see also* Lombardo, *supra* note 6, at 49 (commenting that the state saw equal protection as the "principal issue").

I have counted the pages most favorably to finding the smallest number of equal protection pages. Two pages that I have counted as part of the substantive due process argument may well be understood as talking about the statute's differential treatment of the institutionalized and noninstitutionalized feebleminded. *See* Brief for Defendant in Error, *supra* note 38, at 35–37.

173. Buck v. Bell, 274 U.S. 200, 208 (1927).

174. *See id.* at 205–08; Brief for Defendant in Error, *supra* note 38, at 24–49. This argument was not raised by Buck's lawyer. *See* Brief for Plaintiff in Error, *supra* note 167, at 11–18. It was made, and also not responded to, in litigation over an Oregon sterilization statute in 1921. *See* Brief in Support of Defendant's Demurrer, State Bd. of Eugenics v. Cline, No. 15,442 (Or. Cir. Ct. Dec. 13, 1921), *reprinted in* LAUGHLIN, EUGENICAL, *supra* note 28, at 279, 280–81.

tection claim that because sterilization depended upon commitment to five named public hospitals, the Virginia statute de facto involved a classification impermissibly based on economic circumstances.[175] These unanswered arguments serve only to reinforce the magnitude of the equal protection claim in *Buck v. Bell*.

II. EQUAL PROTECTION IN THE 1920s AND 1930s—A BRIEF CONSIDERATION

Justice Holmes's disparaging comment about the importance of equal protection may still be correct. It is possible that equal protection's important role in the course of sterilization litigation was unusual. For that reason, I briefly survey cases that voided legislation on equal protection grounds during the *Lochner* era, with particular emphasis on the 1920s and 1930s, which is just before and after Holmes's *Buck v. Bell* decision.

Despite the conventional wisdom, the number of equal protection invalidations is surprisingly large. Between 1897, which is the conventional date for the beginning of the *Lochner* era of constitutional law,[176] and 1937, the conventional date for its demise,[177] the Supreme Court voided forty-six laws on equal protection grounds.[178] That is an average of slightly more than

175. Buck's lawyer only hinted at this argument. *See* Brief for Plaintiff in Error, *supra* note 167, at 14–15. Nonetheless, it clearly was available in the decisional law. *See supra* text accompanying notes 78–83, 137–39.

176. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the first Supreme Court case to void legislation on "liberty of contract" grounds, *id.* at 591, is regarded conventionally as marking the onset of the *Lochner* era. *See, e.g.*, CHEMERINSKY, *supra* note 15, at 589–90; LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (2d ed. 1988). Although it may be argued that the era started earlier in the 1890s, *see* Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 188–89, 213–24 (1984), using the latter date is convenient for the purposes of this Article.

177. *See, e.g.*, CHEMERINSKY, *supra* note 15, at 599–600; TRIBE, *supra* note 176, at 567. *But see* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 5–7, 104–05, 208–25 (1998) (saying that Lochnerism died slowly over the 1930s and early 1940s). I use 1937 only for convenience.

178. I have listed the cases in Appendices I and II. The derivation of my list is explained in Appendix I. *See infra* note 228. For comparative purposes, Professor Michael Phillips finds that between 1897 and 1937 there were 137 cases invalidating governmental action on substantive due process grounds. *See* Michael Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1059 (1997) [hereinafter Phillips, *How Many Times*]; *see also* MICHAEL PHILLIPS, THE *LOCHNER* COURT, MYTH AND

one law a year. These forty-six cases represent approximately one-fifth of the total number of decisions in which the *Lochner*-era Court voided governmental action on Fourteenth Amendment grounds.[179]

The sequence of cases shows that the frequency of equal protection invalidations increased as the *Lochner* era progressed, reflecting the overall ebb and flow of *Lochner*-era judicial activism.[180] In the twenty-three years from 1897 through 1919, fifteen cases striking down statutes relied on equal protection.[181] Thirty-one statutes fell before equal protection attack in the eighteen years from 1920 to 1937.[182] During the 1920s, the Court relied on equal protection seventeen times.[183] Fourteen of them were in the eight years from 1920 through 1927,[184] when Justice Holmes handed down *Buck v. Bell*. In-

REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S, at 56 (2001) [hereinafter PHILLIPS, THE *LOCHNER* COURT].

179. Phillips, *How Many Times, supra* note 178, at 1059 (concluding that there were "228 decisions invalidating government action on Fifth or Fourteenth Amendment grounds during the years 1897 through 1937"); *see also* PHILLIPS, THE *LOCHNER* COURT, *supra* note 178, at 56 (same).

Of his 228 cases, Michael Phillips sees 137 as involving substantive due process. PHILLIPS, THE *LOCHNER* COURT, *supra* note 178, at 56. The others involved procedural due process (twenty-eight cases), invalid attempts at extraterritorial regulation (thirty cases), and equal protection (thirty-three cases). *Id.*

By raising Phillips's count of equal protection invalidations from thirty-three to forty-six, I increase his total number of Fourteenth Amendment invalidations by only two cases (to 230). I have not decreased at all his count of cases relying on substantive due process. This is because most of the thirteen additional equal protection cases rest on both equal protection and substantive due process. *See infra* note 228.

180. The Supreme Court employed a strict stance in the years just around *Lochner v. New York*, 198 U.S. 45 (1905). That stance receded between 1906 and 1920, only to return and reach new peaks in the 1920s and 1930s. *See* Bernstein, *supra* note 19, at 10–11 (identifying three distinct *Lochner* eras); Robert C. Post, Lecture, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1492–93 (1998) (discussing the "periodization" of the *Lochner* era); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 13–16 (1991) (same).

181. *See infra* App. I.

182. *See infra* App. I.

183. *See infra* App. I.

184. *See infra* App. I. For comparison, it should be noted that the Court also overturned fourteen statutes on equal protection grounds during the eight years from 1930 through 1937, which are the years that the conservative Court is thought to have most actively voided governmental action on Fourteenth Amendment grounds. *See infra* App. I.

deed, equal protection invalidations were most frequent in the three years just around the *Buck* decision. From 1926 through 1928, there was a cluster of eight decisions overturning statutes on equal protection grounds.[185]

Only nine *Lochner*-era equal protection invalidations involved racial or alienage discrimination[186] despite that being the original focus of the Equal Protection Clause.[187] Most of the cases, thirty-seven in all, involved economic regulation.[188] They are evenly split between cases involving improper classifications in tax statutes (twenty cases) and general economic regulation (seventeen cases).[189] This reflects the constitutional values of an era that took economic rights more seriously than racial equality.[190]

Numbers aside, some of the cases were quite significant on substantive grounds. Focusing only on the 1920s, the decade in which *Buck v. Bell* was decided, *Truax v. Corrigan*[191] is the most famous equal protection invalidation.[192] That case invalidated antilabor injunction statutes on the ground that they singled out employer/employee disputes for uniquely burdensome treatment.[193] It was a very contested 5–4 decision, with Justices Holmes, Brandeis, Pitney, and Clarke submitting elaborate dissents.[194] But there were other important cases. *Nixon v. Herndon*[195] commenced the attack on the Southern white primary electoral system, while *Yu Cong Eng v. Trini-*

185. *See infra* App. I. There was another cluster of eight equal protection invalidations in the years 1935 through 1937. *See infra* App. I.

186. *See infra* App. II.

187. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 306 (1880); The Slaughter-House Cases, 83 U.S. 36, 81 (1873).

188. *See infra* App. II.

189. *See infra* App. II.

190. On the preference for economic rights over racial equality, see 8 OWEN FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 155–221, 352–85 (1993).

191. 257 U.S. 312 (1921).

192. *Truax*'s importance was noted by contemporaries. *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 152–54, 176–81, 220 (1930); RODNEY L. MOTT, DUE PROCESS OF LAW 287–89, 568, 584 (1926).

193. *Truax*, 257 U.S. at 338–39.

194. *Id.* at 342, 344, 354. Although not decided during the 1920s, it should be noted that the merits of *Ex parte Young*, 209 U.S. 123 (1908)—famous for its ruling on Eleventh Amendment immunity—involved the Supreme Court finding an equal protection violation when states enact large criminal penalties that effectively prevent challenges to statutes. *Id.* at 149, 165.

195. 273 U.S. 536 (1927); *see also* Nixon v. Condon, 286 U.S. 73 (1932).

dad[196] prevented the Philippine legislature from driving out Chinese businesses by overturning a law that required account books to be kept in English, Spanish, or local Philippine dialects. That decision protected twelve thousand Chinese businessmen who conducted sixty percent of the Philippines's business.[197] Significantly, several of the economic-liberty equal protection invalidations reflected the developing unconstitutional conditions doctrine,[198] which Holmes opposed.[199]

Many of the economic equal protection decisions enforced equal tax and regulatory treatment of in-state and out-of-state businesses.[200] Other cases ensured that taxpayers received some proportionate benefit from the taxes they paid.[201] Some cases stand for the important but debatable proposition that government cannot treat large and small businesses differently in tax[202] or regulatory matters.[203] In the *Lochner*-era Court's

196. 271 U.S. 500, 524–28 (1926) (resting on the equal protection clause of the Philippine Bill of Rights, which was interpreted as the equivalent of constitutional equal protection in the United States).

197. *Id.* at 512.

198. *Southern Railway Co. v. Greene,* 216 U.S. 400 (1910), is the seminal case in this line of precedent. *See also id.* at 415–15; Power Mfg. Co. v. Saunders, 274 U.S. 490, 496 (1927); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 507 (1926); Ky. Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 549–50 (1923).

199. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 8 n.10 (1988). Holmes dissented in all the cases cited in note 198 except *Hanover*, 272 U.S. at 494. I thank David Franklin for pointing out Holmes's opposition to the unconstitutional conditions doctrine.

200. *See, e.g.*, *Power Mfg.*, 274 U.S. at 493–97 (voiding differential venue statute for in- and out-of-state corporations); *Hanover*, 272 U.S. at 516–17 (voiding differential tax on in- and out-of-state insurers); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415–17 (1920) (voiding differential income taxation of in-state corporations depending on whether they had in- or out-of-state businesses).

201. *See, e.g.*, Rd. Improvement Dist. No. 1 v. Mo. Pac. R.R., 274 U.S. 188, 194–95 (1927); Gast Realty & Inv. Co. v. Schneider Granite Co., 240 U.S. 55, 58–60 (1916).

202. *See, e.g.*, Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 401–02 (1928) (voiding a statute that differentially taxed corporate and individually owned taxi businesses); Louisville Gas & Elec. Co v. Coleman, 277 U.S. 32, 39–40 (1928) (voiding legislation effectively taxing large and small mortgages differently).

203. *See, e.g.*, Frost v. Corp. Comm'n, 278 U.S. 515, 528 (1928) (voiding differential cotton gin permit requirements that varied depending on whether the gin was owned by a corporation or another type of business); *Ky. Fin. Corp.*, 262 U.S. at 544 (voiding differential regulation of nonresident corpora-

view, the size of a business was not in itself a legitimate ground for regulatory differences.[204] Railroads were a particular recipient of the Court's solicitude.[205] On a number of occasions, the Court found equal protection violations when states subjected railroads to differential tax schemes[206] and litigation rules.[207]

Only twenty-two of the forty-six equal protection invalidations were unanimous decisions.[208] Before 1920, dissents were less frequent and not particularly intense.[209] This pattern changed substantially with Justice Brandeis's arrival on the Court. From 1920 through 1937, there were dissents in eighteen of the thirty-one decisions. Many dissents were elaborate opinions expressing disagreement on fundamental principles and their application.[210] In the 1920s, only eight of the seven-

tions and individuals); *see also* McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 86–87 (1916) (voiding regulation that effectively applied to one large company); Cotting v. Kan. City Stock Yards Co., 183 U.S. 79, 113–14 (1901) (voiding differential regulations for the state's largest stock yard); *cf.* Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 564–65 (1902) (voiding an antitrust law that treated agriculture more favorably than business).

204. *See supra* note 203.

205. *See infra* notes 206–07.

206. *Rd. Improvement Dist. No. 1*, 274 U.S. at 194–95 (voiding a discriminatory assessment of a railroad); Kan. City S. Ry. Co. v. Rd. Improvement Dist. No. 6, 256 U.S. 658, 660–61 (1921) (voiding a differential assessment of railroads and individuals); *see also* Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445–47 (1923) (voiding a discriminatory assessment of a bridge company).

207. Chi. & Nw. Ry. Co. v. Nye Schneider Fowler Co., 260 U.S. 35, 47–48 (1922) (voiding differential penalties and fee shifting for common carriers); *see also* Atchison, Topeka & Santa Fé Ry. Co. v. Vosburg, 238 U.S. 56, 61–62 (1915) (voiding differential fee shifting for railroads); Mo. Pac. Ry. Co. v. Tucker, 230 U.S. 340, 350–51 (1913) (voiding differential penalties for railroads); Gulf, Colo. & Santa Fé Ry. Co. v. Ellis, 165 U.S. 150, 165–66 (1897) (voiding differential cost and fee shifting for railroads).

Although decided before the 1920s, *Smith v. Texas*, 233 U.S. 630 (1914), voided on equal protection grounds a law requiring railroad conductors to have served for two years as brakemen or freight train conductors. *Id.* at 641–42.

208. Holmes wrote some of these opinions. *See* Nixon v. Herndon, 273 U.S. 536, 539 (1927); *McFarland*, 241 U.S. at 79–80 (1916); Gast Realty & Inv. Co. v. Schneider Granite Co., 240 U.S. 55, 57 (1916). *Herndon*, 273 U.S. at 536, may be explained by its involving a facial racial discrimination.

209. *See infra* App. I. There were dissents on the merits in five of the fifteen cases decided between 1897 and 1919. The dissenters tended to dissent without opinion or with only short comments.

210. *See, e.g.*, Mayflower Farms Inc. v. Ten Eyck, 297 U.S. 266, 275-78 (1936) (Cardozo, J., dissenting); Louis K. Liggett Co. v. Lee, 288 U.S. 517, 541–86 (1933) (dissenting opinions of Justices Brandeis and Cardozo); Frost v. Corp. Comm'n, 278 U.S. 515, 528–53 (1929) (dissenting opinions of Justices Brandeis and Stone); Truax v. Corrigan, 257 U.S. 312, 342–76 (1921) (dissent-

teen equal protection invalidations were unanimous.[211] Brandeis dissented in nine cases and was joined by Holmes on eight of those occasions.[212] Brandeis and Holmes, frequently joined by Justice Stone, dissented in every equal protection invalidation decided in the 1920s after *Buck v. Bell*.[213] In the 1930s, equal protection invalidations were even more controversial. From 1930 until 1937, there was substantial dissent in nine of the fourteen cases that voided governmental action on equal protection grounds.[214]

Perhaps Holmes would have liked equal protection to have been "the usual last resort of constitutional arguments."[215] Given that from 1897 to 1937, substantive due process was successful 137 times and equal protection only forty-six,[216] Holmes's epithet may have been literally true. Nonetheless, the facts do not support the inference that equal protection was inconsequential. Equal protection was a significant part of constitutional argument throughout the *Lochner* era.

CONCLUSION

Justice Holmes's epigram in *Buck v. Bell* that equal protection is "the usual last resort of constitutional arguments" demeaned not only Carrie Buck but also all the judges and lawyers during the decade and a half of litigation over eugenic sterilization who had accepted similar arguments or taken them seriously enough to formulate extended responses. Holmes's remark was unfaithful to the course of equal protection litigation during the first four decades of the twentieth

ing opinions of Justices Holmes, Brandeis, Pitney, and Clarke).

211. *See infra* App. I.

212. *See infra* App. I. After Justice Stone joined the Court in 1925, he tended to join Justices Brandeis and Holmes.

213. *See infra* App. I.

214. *See infra* App. I.

215. Buck v. Bell, 274 U.S. 200 (1927).

216. *See supra* note 178 and accompanying text. The actual "last resort of constitutional argument[]," *Buck*, 274 U.S. at 208, at least in regard to the Fourteenth Amendment, is the Privileges or Immunities Clause. *See, e.g.*, Colgate v. Harvey, 296 U.S. 404, 443 (1935) (Stone, J., dissenting) ("Feeble indeed is an attack on a statute as denying equal protection which can gain any support from the almost forgotten privileges and immunities clause of the Fourteenth Amendment."). Only because Holmes said equal protection is the "*usual* last resort" may the remark retain some truth value. Interestingly, the remark is rendered frequently without inclusion of the "usual" qualifier. *See, e.g.*, *supra* text accompanying notes 13–15.

century. His witticism reflected Holmes's own delight at eugenic sterilization and dislike of judicial control of legislative majorities.[217] For three-quarters of a century, Justice Holmes's caustic remark has incorrectly shaped our understanding of the overall history of the Equal Protection Clause.

Equal protection's important role in eugenic sterilization litigation before *Buck v. Bell* and in constitutional decision-making during the *Lochner* era cannot make up for its dismal record in race relations before the 1940s and 1950s, but recognition of that role should alter our understanding of the importance of equal protection as a constraint on economic legislation of the era. Presently, the dominant claim is that *Lochner*-era constitutional law originally was grounded in norms of equal treatment and an aversion to what Jacksonians called "class legislation."[218] Accepting this view, scholars debate whether the Supreme Court shifted its focus from equal treatment to a concern for defining and protecting fundamental interests[219] when it began overturning statutes on "liberty of contract" grounds in *Allgeyer v. Louisiana*[220] and *Lochner v. New York*.[221] It did not.

This Article has shown the importance of equal protection in the struggle against eugenic sterilization and its presence in Supreme Court adjudication throughout the *Lochner* era. By demonstrating—at least outside the realm of race relations—that Justice Holmes's famous epigram about equal protection was baseless, this Article supports the view that equal treatment and fundamental interests norms were both prominent and entwined values in *Lochner*-era constitutionalism.[222]

Brown v. Board of Education,[223] the role of equal treatment in modern First Amendment law,[224] and even modern substantive equal protection[225] represent not an invention, but rather a

217. *See* ALSCHULER, *supra* note 2, at 67 (quoting Holmes's letters regarding *Buck v. Bell*).

218. *See supra* note 20 (defining class legislation).

219. *See* Bernstein, *supra* note 19, at 21–31; Cushman, *supra* note 22, at 881.

220. 165 U.S. 578 (1897).

221. 198 U.S. 45 (1905).

222. *See* Cushman, *supra* note 22, at 159–62 (suggesting this position).

223. 347 U.S. 483 (1954).

224. *See, e.g.*, Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 TUL. L. REV. 335 (1994) (discussing the religion clauses).

225. Substantive equal protection is the doctrine that the Equal Protection

shift in application, of norms that have been ever present in American constitutionalism.[226] With varying emphases and varying content, America's concern for equality and fundamental liberties precedes the founding.[227]

Clause protects not only against invidiously discriminatory classifications but also against the unequal distribution of fundamentally important substantive rights. *See, e.g.*, CHEMERINSKY, *supra* note 15, at 762–63; Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 982–85 (1979).

226. Jurists and scholars frequently have described the growth of American constitutional law as involving the reinterpretation and reapplication of Founding era norms in changing social and historical contexts. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In *Euclid*, Justice Sutherland commented that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." *Id.* at 387; *see also, e.g.*, Poe v. Ullman, 367 U.S. 497, 542 (Harlan, J., dissenting) ("[The American constitutional] tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound."); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 401 (1995) (explaining how evolving constitutional doctrine may reflect historic understanding); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431 *passim* (describing nineteenth-century evolutionary constitutionalism). Whether the Constitution does or should evolve this way is controverted. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

227. *See, e.g.*, J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 20–131 (2d ed. 1993); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 3–8, 60–64 (1986); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX 273–74 (1987).

APPENDIX I:
SUPREME COURT CASES FROM 1897 TO 1937 INVALIDATING GOVERNMENT ACTION ON EQUAL PROTECTION GROUNDS[228]

1.	Gulf, Colorado & Santa Fé Railway Co. v. Ellis, 165 U.S. 150 (1897). Dissents: Gray, J.; Fuller, J.; White, J.
2.	Carter v. Texas, 177 U.S. 442 (1900).
3.	Duluth & Iron Range Railroad v. St. Louis County, 179 U.S. 302 (1900).*
4.	Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).
5.	Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).* Dissent: McKenna, J.
6.	Rogers v. Alabama, 192 U.S. 226 (1904).
7.	*Ex parte* Young, 209 U.S. 123 (1908). Dissent: Harlan, J.
8.	Southern Railway Co. v. Greene, 216 U.S. 400 (1910). Dissents: Fuller, C.J.; McKenna, J.; Holmes, J.

228. Decisions are unanimous unless dissents are indicated. The list is drawn primarily from Michael Phillips, who mentions thirty-three equal protection invalidations in his *Mercer Law Review* article. Phillips, *How Many Times*, *supra* note 178, at 1059–62; *see also* PHILLIPS, THE *LOCHNER* COURT, *supra* note 178, at 34. I have supplemented Phillips's list by comparing it with a list provided by Justice Douglas in his Appendix to *Oregon v. Mitchell*, 400 U.S. 112, 150 (1970), and by my own research. The twelve cases on my list that are not treated by Phillips as equal protection cases are marked with an asterisk (*).

Most of the twelve additional cases were spotted by Phillips, but he discussed them as due process invalidations because they rely on both due process and equal protection rationales. One supplemental case, *Colgate v. Harvey*, 296 U.S. 404 (1935), rested on the Privileges or Immunities Clause as well as the Equal Protection Clause.

I located only two cases that were not included anywhere in Phillips's discussion of Fourteenth Amendment invalidations of governmental action between 1897 and 1937. They are *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151 (1914), and *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

In drawing up my list of forty-six equal protection invalidations, I have included only decisions that rest exclusively on equal protection, have equal protection as independent grounds of decision, or rely heavily on equal protection arguments while resting on no specified clause. I have not included decisions that draw on equality norms as part of a discussion that ultimately rested exclusively on the Due Process Clause. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 557–59 (1923); Bernstein, *supra* note 180, at 29 n.153, 53 n.294 (discussing the "class legislation" aspects of *Adkins*); Cushman, *supra* note 22, at 895–907 (discussing *Adkins* and numerous other instances in which a concern for equal treatment was involved in due process decisions).

9.	Missouri Pacific Railway v. Tucker, 230 U.S. 340 (1913).*
10.	Smith v. Texas, 233 U.S. 630 (1914).* Dissent: Holmes, J.
11.	McCabe v. Atchison, Topeka & Santa Fé Railway Co., 235 U.S. 151 (1914).*
12.	Atchison, Topeka & Santa Fé Railway Co. v. Vosburg, 238 U.S. 56 (1915).
13.	Truax v. Raich, 239 U.S. 33 (1915). Dissent: McReynolds, J.
14.	Gast Realty & Investment Co. v. Schneider Granite Co., 240 U.S. 55 (1916).
15.	McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916).
16.	F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Dissents: Brandeis, J.; Holmes, J.
17.	Bethlehem Motors Corp. v. Flynt, 256 U.S. 421 (1921). Dissents: Brandeis, J.; Pitney, J.
18.	Kansas City Southern Railway Co. v. Road Improvement District Number 6, 256 U.S. 658 (1921).
19.	Truax v. Corrigan, 257 U.S. 312 (1921).* Dissents: Brandeis, J.; Clarke, J.; Holmes, J.; Pitney, J.
20.	Chicago & Northwestern Railway Co. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922).*
21.	Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923).
22.	Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923). Dissents: Brandeis, J.; Holmes, J.
23.	Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71 (1924).
24.	Schlesigner v. Wisconsin, 270 U.S. 230 (1926).* Dissents: Brandeis, J.; Holmes, J.; Stone, J.
25.	Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926).*
26.	Hanover Fire Insurance Co. v. Harding, 272 U.S. 494 (1926).
27.	Nixon v. Herndon, 273 U.S. 536 (1927).
28.	Road Improvement District Number 1 v. Missouri Pacific Railroad 274 U.S. 188 (1927).
29.	Power Manufacturing Co. v. Saunders, 274 U.S. 490 (1927). Dissents: Brandeis, J.; Holmes, J.
30.	Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928). Dissents: Brandeis, J.; Holmes, J.; Sandford, J.; Stone, J.
31.	Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928). Dissents: Brandeis, J.; Holmes, J.; Stone, J.
32.	Frost v. Corporation Commission, 278 U.S. 515 (1929). Dissents: Brandeis, J.; Holmes, J.; Stone, J.

33.	Smith v. Cahoon, 283 U.S. 553 (1931).*
34.	Cumberland Coal Co. v. Board of Revision, 284 U.S. 23 (1931).
35.	Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931).
36.	Nixon v. Condon, 286 U.S. 73 (1932). Dissents: Butler, J.; McReynolds, J.; Sutherland, J.; Van Devanter, J.
37.	Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).* Dissents: Brandeis, J.; Cardozo, J.; Stone, J.
38.	Concordia Fire Insurance Co. v. Illinois, 292 U.S. 535 (1934). Dissents: Brandeis, J.; Cardozo, J.; Stone, J.
39.	Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). Dissents: Brandeis, J.; Cardozo, J.; Stone, J.
40.	Norris v. Alabama, 294 U.S. 587 (1935).
41.	Hollins v. Oklahoma, 295 U.S. 394 (1935).
42.	Colgate v. Harvey, 296 U.S. 404 (1935).* Dissents: Brandeis, J.; Cardozo, J.; Stone, J.
43.	Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936). Dissents: Brandeis, J.; Cardozo, J.; Stone, J.
44.	Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936). Dissents: Brandeis, J.; Cardozo, J.
45.	Binney v. Long, 299 U.S. 280 (1936). Dissents: Brandeis, J.; Cardozo, J.
46.	Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459 (1937). Dissents: Brandeis, J.; Cardozo, J.; Stone, J.; Roberts, J.

APPENDIX II: SUPREME COURT CASES FROM 1897 TO 1937 INVALIDATING GOVERNMENT ACTION ON EQUAL PROTECTION GROUNDS—BY AREA

RACE AND ALIENAGE—9 CASES	
1.	Carter v. Texas, 177 U.S. 442 (1900).
2.	Rogers v. Alabama, 192 U.S. 226 (1904).
3.	McCabe v. Atchison, Topeka & Santa Fé Railway Co., 235 U.S. 151 (1914).
4.	Truax v. Raich, 239 U.S. 33 (1915).
5.	Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926).
6.	Nixon v. Herndon, 273 U.S. 536 (1927).
7.	Nixon v. Condon, 286 U.S. 73 (1932).
8.	Norris v. Alabama, 294 U.S. 587 (1935).
9.	Hollins v. Oklahoma, 295 U.S. 394 (1935).
TAXATION—20 CASES[229]	
1.	Southern Railway Co. v. Greene, 216 U.S. 400 (1910).
2.	Gast Realty & Investment Co. v. Schneider Granite Co., 240 U.S. 55 (1916).
3.	F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).
4.	Bethlehem Motors Corp. v. Flynt, 256 U.S. 421 (1921).
5.	Kansas City Southern Railway Co. v. Road Improvement District Number 6, 256 U.S. 658 (1921).
6.	Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923).
7.	Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71 (1924).
8.	Schlesinger v. Wisconsin, 270 U.S. 230 (1926).
9.	Hanover Fire Insurance Co. v. Harding, 272 U.S. 494 (1926).
10.	Road Improvement District Number 1 v. Missouri Pacific Railroad Co., 274 U.S. 188 (1927).
11.	Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928).
12.	Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928).
13.	Cumberland Coal Co. v. Board of Revision, 284 U.S. 23 (1931).
14.	Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931).
15.	Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).
16.	Concordia Fire Insurance Co. v. Illinois, 292 U.S. 535 (1934).
17.	Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935).
18.	Colgate v. Harvey, 296 U.S. 404 (1935).

229. Seven cases involved favoritism to in-state firms. Thirteen cases involved tax laws deemed discriminatory for other reasons.

19.	Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936).
20.	Binney v. Long, 299 U.S. 280 (1936).
ECONOMIC REGULATIONS—17 CASES	
1.	Gulf, Colorado & Santa Fé Railway Co. v. Ellis, 165 U.S. 150 (1897).
2.	Duluth & Iron Range Railroad Co. v. St. Louis County, 179 U.S. 302 (1900).
3.	Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).
4.	Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).
5.	*Ex parte* Young, 209 U.S. 123 (1908).
6.	Missouri Pacific Railway v. Tucker, 230 U.S. 340 (1913).
7.	Smith v. Texas, 233 U.S. 630 (1914).
8.	Atchison, Topeka, & Santa Fé Railway v. Vosburg, 238 U.S. 56 (1915).
9.	McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916).
10.	Truax v. Corrigan, 257 U.S. 312 (1921).
11.	Chicago & Northwestern Railway v. Nye Schneider Fowler Co., 260 U.S. 35 (1922).
12.	Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923).
13.	Power Manufacturing Co. v. Saunders, 274 U.S. 490 (1927).
14.	Frost v. Corporation Commission, 278 U.S. 515 (1929).
15.	Smith v. Cahoon, 283 U.S. 553 (1931).
16.	Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936).
17.	Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459 (1937).