THE JONATHON B. CHASE PAPER

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CLIMBING THE BEANSTALK: JUSTICE HOLMES AND THE SEARCH FOR RECONCILIATION

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INTRODUCTION

Justice Oliver Wendell Holmes, unquestionably one of our greatest jurists, stands prominently in the history of American law. He wrote extensively and thought expansively, searching endlessly for cohesion and unifying principles, particularly in his historical exposition of the law.[1] However, he never made any systematic presentation of his own intellectual development, and he continues to mean "different things to different generations."[2] The various tensions evident in his judicial and nonjudicial writings leave Holmes amenable to multiple interpretations, yet he continuously seems to elude static labels and rigid categorizations. As one biographer observed, "[I]t is difficult to study the life and work of Oliver Wendell Holmes, Jr., for very long without becoming uncomfortably aware of the enigmatic nature of this seminal figure in American legal history."[3] Another biographer has suggested that given the conflicting interpretations of Holmes, "[i]t is not possible to reduce his work to any one system."[4] Thus, one wonders if it is at all possible to disclose any unifying principles that governed the development of Holmes's intellectual growth.

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* For a biographical sketch of Dean Chase, see *Dedication*, 13 VT. L. REV. 1 (1988).

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1. *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Dover Publications 1991) (1881) [hereinafter THE COMMON LAW].

2. MICHAEL H. HOFFHEIMER, JUSTICE HOLMES AND THE NATURAL LAW 6 (1992) (describing the influence of natural law on Holmes's thought).

3. GARY J. AICHELE, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE at ix (1989).

4. LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 11 (1991).

There does, however, seem to be one overarching principle that permeates his life and his work—a theme that is manifested in his courtly letters, formal addresses, articles, books, and judicial opinions. That unifying principle is the search for reconciliation—the never ending struggle to demonstrate the inherent compatibility between conflicting principles. Holmes's writings are replete with dramatic tensions, many of which he himself acknowledged. In fact, he often was inspired rather than troubled by opposites. This is consistent with his broader world view which also encompassed competing principles.[5] Indeed, for Holmes, the study and practice of law was only one of many paths that led to a greater understanding of life. "My way has been by the ocean of the Law. On that I have learned a part of the great lesson—the lesson not of law but of life."[6] As he explained in one of many genteel letters to Lady Castletown, life itself is replete with tensions and conflicting principles:

> Life is an art not a thing which one can work out successfully by abstract rules. It is like painting a picture. At every moment one has to use one's tact and pigments in the right proportions between inconsistent desirables—between reading and writing—saving and spending—work and play etc. The trouble with many moralists as with many men of business is that they give too absolute a right of way to some one interest.[7]

As this paper seeks to demonstrate, Holmes's dedication to the process of reconciling competing principles, be they philosophical, legal, or political, was the force that propelled his intellectual development towards the elusive consummation of the whole. More importantly, it seems to account for the direction in Holmes's thought, and to explain, if not justify, what others dismissively have labeled "irreconcilable inconsistencies."[8] His attempts to unify ostensibly disparate elements informed his thinking with an inner dynamic of growth. Thus, Holmes, like the law, was continuously in a state of "becoming":

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5. *See id.*

6. OLIVER WENDELL HOLMES, JR., *Address at Brown University Commencement, 1897* [hereinafter *Brown University Commencement*], *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES 517, 518 (Sheldon M. Novick ed., 1995) [hereinafter 3 COLLECTED WORKS].

7. Letter from Holmes to Clare Fitzpatrick, Lady Castletown (June 18, 1897), *in* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 217 (1989) [hereinafter HONORABLE JUSTICE].

8. As explained by Professor Hoffheimer, "[d]espite widespread recognition of tensions in Holmes's thought, most interpreters have dismissed the tensions as simple inconsistencies. A few writers have seized on the tensions as evidence that Holmes lacked any coherent intellectual position at all." *See* HOFFHEIMER, *supra* note 2, at 4-5.

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.[9]

He innately understood that law, which is a function of life, is not for purists because perfect, dogmatic consistency, is static, and therefore, death.

Holmes's ideas developed and changed but, as in the law, there is a dialectical logic inherent in his intellectual development. The recognition of this tendency towards reconciliation seems to preserve and underscore the integrity of the Holmesian dialectic—the perpetual quest for the harmonious commingling of disparate ideas. Considered in this light, each of his writings is a work in progress, a phase in a continuous growth. As a result, his intellectual position at any given point in time must be assessed in its proper context, that is, in light of what it was and what it tended to become. Fortunately, his prolific writing enables us to witness his transformations in thought and in turn, to grow with him. As just revealed, Holmes believed that through the study of law one could learn the more general lessons of life; similarly, through a study of Holmes's thought, one can achieve a greater understanding of the role law plays in a changing society, and, albeit one step removed, life itself.

This essay is meant only to provide a broad overview of the significant ways in which competing interests infiltrated Holmes's life and work and how he sought to reconcile them. The vitality and complexity of his ideas, not to mention the sheer volume of his writings, defies encapsulation or canvassing in a article of this nature.[10] The structure of this essay reflects a more or less chronological exploration of Holmes's texts and provides a largely conceptual history of his thought. Part I concerns his early years and writings and is delineated as follows: (A) early discordant themes; (B) the Civil War: philosopher and soldier; and (C) scholar and practitioner. Part II addresses the four primary components of Holmes's intellectual endeavors: (A) his philosophy of life; (B) his philosophy of law; (C) his text *The Common Law*; and (D) his judicial philosophy. Finally, Part III analyzes the evolution of Holmes in his judicial opinions. Specifically, it addresses his conception of due process as it emerged in relation to the following: (A) social welfare and economic regulation; (B) civil liberties; and (C) fundamental rights. Part III

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9. THE COMMON LAW, *supra* note 1, at 36.

10. It is expected—in fact, encouraged—that the reader will presume that to the extent incongruities remain, such discrepancies are completely attributable to this writer's failure to capture or appreciate the essence of Holmes's thought and not to Holmes himself.

concludes with a brief discussion of the shortcomings and strengths of his concept of due process in sections (D) and (E).

One should note, however, that these divisions and subdivisions do not manifest mutually exclusive units. Rather, each informs and shapes the others. Nevertheless, for analytical purposes it is convenient to examine them separately, demonstrating the continuities where appropriate. To begin, it may be helpful to say a few words about the spirit of the times that infused Holmes's intellectual growth and the various influences on his early development. Such preparatory and constructive material will assist the reader in appreciating the life circumstances that bore on Holmes's emergence as one of the most significant jurists in American history.

I. THE ASCENT BEGINS

A. Early Discordant Themes

> " The cover of my copy of Jack and the Beanstalk—the beanstalk was cut off by the top of the cover and Jack was climbing—to one could not see what mysterious end."[11]

In the mid-nineteenth century, America was an immense, diverse, and rapidly growing country. It was a period of transition from an old to a new order of things. Essentially, the American composition was comprised of two melodic themes, sometimes harmonious but often discordant. First, there was the melody of discovery. The proliferation of railroads, mills, and factories of the industrial revolution, coupled with the progressive and liberal ideas of the Enlightenment and of evolutionism, infused New England communities with the promise of infinite possibility.[12] The specialization and efficiency spawned by the increased reliance on science fed the collective imagination and provided new incentives for utilitarian and utopian social theories.[13] However, not all was optimistic.

Counterpoised with the enthusiasm and fervor that infused the melody of discovery was the less sanguine tune of anxiety. Utopian dreams were not

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11. Letter from Holmes to Alice S. Green (Oct. 14, 1911), *in* HONORABLE JUSTICE, *supra* note 7, at 10.

12. *See* THOMAS H. JOHNSON, THE OXFORD COMPANION TO AMERICAN HISTORY 230-31, 506, 672-73 (1966).

13. *See* ROBERT O'BRIEN, THE ENCYCLOPEDIA OF NEW ENGLAND 2-3 (1985) (providing a brief explanation of the abolition movement and the economic underpinnings of slavery). *See generally* LINDSAY SWIFT, BROOK FARM (1961) (describing one of the most notable communitarian experiences of the mid-nineteenth century and the utopian and socialist theories that influenced its members, scholars, and visitors, including Margaret Fuller, Ralph Waldo Emerson, Nathanial Hawthorne, and Horace Greeley).

without the angst of waking reality, a growing consciousness of a country stratified along race and class lines with the promise of salvation uncertain.[14] Industry could provide many conveniences and comforts, but it fell far short of filling the spiritual void once occupied by well-grounded and unquestioned philosophical and theological doctrines.[15] Humankind's faith was being questioned and many struggled to make sense of the emptiness that accompanied the unpleasant sensation of doubt incident to an undetermined future. Without recourse to the supernatural, the universe appeared, to many, to be a bleak and terrifying place.

Holmes was born into a middle class family that very much reflected the competing themes of the times.[16] His father, for whom he was named, was a man of science, a physician, and also a *litterateur*—a best-selling author of a series of essays and poems for the *Atlantic Monthly* collectively entitled the *Autocrat of the Breakfast-Table*.[17] Dr. Holmes no doubt fostered his son's ambitions to be both thinker and artist. Likewise, his mother, born Amelia Lee Jackson, possessed a similar duality in personality that certainly influenced Holmes's intellectual development.[18] In addition to being devoted to her husband and three children, of whom Oliver was the eldest, she was equally devoted to the cause of abolitionism.[19]

The Holmes household generated much intellectual creativity, and it was often frequented by prominent intellectuals.[20] Among the esteemed visitors was Ralph Waldo Emerson. Emerson had perhaps the greatest influence on Holmes's development.[21] Holmes recalled an incident from his teenage years when he saw Emerson across the street. Holmes ran up to him and said, "If I ever do anything, I shall owe a great deal of it to you."[22] And toward the end of his life, Holmes stated, "The only firebrand of my youth that burns to me

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14. *See generally* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).

15. *See* JOHNSON, *supra* note 12, at 230-31 (explaining the impact of Darwinism on religion, including the growth of agnosticism and atheism, and Herbert Spencer's belief that "the good life would be most fully realized by way of technological improvements"); Joseph Schiffman, *Introduction* to SWIFT, *supra* note 13 (describing the utopian experiment at Brook Farm as being, in part, a reaction to "the cultural crisis provoked by the modern industrial revolution . . . [and] its exaltation of material progress and its neglect of the spiritual").

16. For general biographical information on the life of Holmes, see generally HONORABLE JUSTICE, *supra* note 7.

17. *See id.* at 19.

18. *See* BAKER, *supra* note 4, at 41-42.

19. *See* HONORABLE JUSTICE, *supra* note 7, at 15.

20. *See id.* at 16.

21. *See* 1 THE COLLECTED WORKS OF JUSTICE HOLMES 20 (Sheldon M. Novick ed., 1995) [hereinafter 1 COLLECTED WORKS].

22. *Id.*

as brightly as ever is Emerson."[23] It was Emerson, the transcendentalist, who provided the primary reconciling principle of Holmes's undergraduate studies. He fostered in Holmes a desire to study and to understand the hidden, fundamental forces that lie unsuspected behind every existent fact, and to recognize and appreciate the developmental nature of the world, progressing through the struggle of contending ideas.[24] Consider, for example, the transcendental tendency that emerges in one of Holmes's undergraduate essays analyzing the different forms of art:

> [T]he lowest form of good art is the mere portraiture of the single, unconnected fact, with no further view beyond, . . . so art is great in proportion as it rises above this, and the presumption is always in favor of that picture being greatest in which the lower truth of the individual is made subservient (notice I do not say falsified or even neglected, but made subservient) to the profounder truth of the idea . . . . [The] highest gift of the artist . . . is called the ideal tendency.[25]

However, the ideal tendency was not without its limitations, particularly when the quest for profound truth was predicated solely on an abstract, rational methodology. This concern of Holmes's manifested itself in his assessment of Platonic idealism.[26] Specifically, Holmes was critical of Plato's attempt to develop a systematic scheme in which logic—as concerned with immutable ideas—was higher than science, which was founded on observation and concerned with mutable matter.[27] Plato's theory of Forms elicited from Holmes the following observation:

> Logic is, in fact, merely an instrument which works with data previously obtained, whether from this very physical science or from intuition; and the unhappy fallacy in connection with this point, that is, with regard to its functions, which runs all through Plato, is that he confounds this drawing of conclusions already contained in the premise, by Logic, which can only develop a pre-existing statement, with the finding of new data or statements, for

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23. Letter from Holmes to Frederick Pollock (May 20, 1930), *in* 1 COLLECTED WORKS, *supra* note 21, at 20.

24. For further elaboration and explanation, see 1 COLLECTED WORKS, *supra* note 21, at 19-20.

25. OLIVER WENDELL HOLMES, JR., *Notes on Albert Durer* (1858), *reprinted in* 1 COLLECTED WORKS, *supra* note 21, at 153, 156-57.

26. *See* BAKER, *supra* note 4, at 89-90.

27. *See id.* at 90-91.

> which we must look to consciousness or to generalizations from experience.[28]

Holmes's critique of Platonic idealism evinces a philosophical theme that would reverberate throughout his later thought, specifically with respect to his jurisprudential attack on natural law and its avowal of preexisting rights independent of evolving legal systems.[29] It also reveals his understanding of the limitations of *a priori* logic as a method of investigation. Significantly, however, it was his participation in the Civil War, and thus the very tangible experience of conflict, that engendered his elaboration of a broader philosophical scheme that reconciled both his logical and empirical methodologies as well as his transcendental and materialist views.[30]

B. The Civil War: Holmes as Philosopher and Soldier

> "[T]he faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use."[31]

The polarization of the Civil War largely defined the nation as well as young Holmes.[32] In 1861, at the age of twenty, Holmes enlisted in the federal army and obtained a commission as a lieutenant.[33] He served for two years in the Twentieth Massachusetts Volunteer Infantry where he was wounded three times, twice almost fatally.[34] When he could, he retreated to more cerebral pursuits, apparently finding it easier to face tough philosophical questions than bullets.[35] As both soldier and philosopher, Holmes tried to understand his willingness to risk his life in order to preserve the freedom of others and consequently, developed "his combat experience into a materialist,

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28. OLIVER WENDELL HOLMES, *Plato* (1860), *reprinted in* 1 COLLECTED WORKS, *supra* note 21, at 145, 149.

29. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).

30. *See* 1 COLLECTED WORKS, *supra* note 21, at 21.

31. Oliver Wendell Holmes, Jr., *The Soldier's Faith* (May 30, 1895), [hereinafter *The Soldier's Faith*], *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 73, 76 (Mark DeWolfe Howe ed., 1962).

32. For a detailed account of Holmes's involvement in the Civil War, see generally HONORABLE JUSTICE, *supra* note 7, at 29-90.

33. *See* 1 COLLECTED WORKS, *supra* note 21, at 9.

34. *See id.*

35. *See id.* "In the relative leisure of winter quarters, he turned to philosophical writings [in notebooks he later destroyed]." *Id.*

evolutionist philosophy steeped in conflicts between rival nations and races, and governed by the rules of chivalry."[36]

For example, in his *Memorial Day* address, delivered in 1884, Holmes described the sense of the inevitability of conflict between North and South, and the honor derived from sacrificing one's self for an ideal—a sense of honor which would ultimately reconcile even enemies in war:

> [W]e believed in the principle that the Union is indissoluble; we . . . also believed that the conflict was inevitable, and that slavery had lasted long enough. But we equally believed that those who stood against us held just as sacred convictions that were the opposite of ours, and we respected them as every man with a heart must respect those who give all for their belief . . . . You could not stand up day after day in those indecisive contests where overwhelming victory was impossible because neither side would run as they ought when beaten, without getting at last something of the same brotherhood for the enemy that the north pole of a magnet has for the south,—each working in an opposite sense to the other, but each unable to get along without the other.[37]

If Emerson lit the fires of his mind, then the Civil War ignited the flames of his heart and his honor:

> Through our great good fortune, in our youth our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing. While we are permitted to scorn nothing but indifference, and do not pretend to undervalue the worldly rewards of ambition, we have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us. But, above all, we have learned that whether a man accepts from Fortune her spade, and will look downward and dig, or from Aspiration her axe and cord, and will scale the ice, the one and only success which it is his to command is to bring to his work a mighty heart.[38]

The war ingrained in Holmes a code of duty and a strong sense of honor. However, his wartime philosophical musings left him unable to explain the source of this sense of duty. Thus, he concluded that a more rigorous inquiry was necessary so that he might disclose a scientific justification for this code

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36. *Id.*

37. OLIVER WENDELL HOLMES, JR., *Memorial Day* (May 30, 1884), *in* 3 COLLECTED WORKS, *supra* note 6, at 462, 462.

38. *Id.* at 467.

of duty.[39] The war helped define the purposes of his intellectual pursuits. As he stated, "[i]f I survive the war I expect to study Law as my profession or at least for a starting point."[40]

C. Scholar and Practitioner

> "[L]aw opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die."[41]

The dualistic tendencies manifested by Holmes continued to develop upon his return from the war. However, he was no longer the soldier and the philosopher. Rather, he earned his law degree from Harvard and subsequently became the scholar and the practitioner. Although his creative, artistic spirit was nearly crushed by the oppressive aspects of his legal education, Holmes, upon reaching a deeper understanding that the universal can be found in the particular, was able to reconcile his ambitions to be both lawyer and artist. He characterized his thoughts on the study and practice of law:

> One found oneself plunged in a thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys. Voices of authority warned that in the crunch of that ice any craft might sink. One heard Burke saying that law sharpens the mind by narrowing it. One heard in Thackeray of a lawyer bending all the powers of a great mind to a mean profession. One saw that artists and poets shrank from it as from an alien world. One doubted oneself how it could be worthy of the interest of an intelligent mind. And yet one said to oneself, Law is human—It is a part of man, and of one world with all the rest. There must be a drift, if one will go prepared and have patience, which will bring one out to daylight and a worthy end. . . . [O]ne part of the universe yields the same teaching as any other if only it is mastered—that the difference between the great way of taking things and the small . . . is only the difference between realizing the part as a part of a whole. . . .[42]

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39. *See* Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L.Q. 703, 745 (1992) [hereinafter *Justice Holmes's Philosophy*] (noting that Holmes's "project, . . . was to find a scientific explanation for duty").

40. OLIVER WENDELL HOLMES, JR., *Class Book 1861—Entry*, *in* 1 COLLECTED WORKS, *supra* note 21, at 169, 170.

41. 1 COLLECTED WORKS, *supra* note 21, at 20 (quoting letter from Holmes to Ralph Waldo Emerson).

42. *Brown University Commencement*, *supra* note 6, at 518.

Holmes did not let his professionalism detract from his philosophical quest for meaning. Rather, he "seemed to ascribe a special status to legal scholarship that reflected law's unique combination of theory and practice. He saw himself as a philosopher, even in his legal work, not just a technician or a predictor."[43] He found solace in law because it demarcated and reconciled human endeavors with the sublime, the transcendent awesomeness of the cosmos. He learned "that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere . . . [he] may wear his heart out after the unattainable."[44] Through the law, Holmes found that one could "connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."[45]

Thus, after attending law school and joining a Boston firm, he continued to develop his intellectual pursuits by writing for *The American Law Review*.[46] In 1870, he resigned from the firm and attempted a career as an independent scholar, writing occasional poems and editing the twelfth edition of Chancellor James Kent's *Commentaries on American Law*.[47] In 1872, he married Fanny Dixwell, and finding that his earnings as a scholar were insufficient, he joined Shattuck, Holmes, and Munroe, which had a substantial commercial and admiralty practice.[48] In 1876, with *Primitive Notions in Modern Law*, Holmes began a series of essays that presented a systematic analysis of the common law.[49] He completed the series, gave them as the Lowell Lectures in 1880, and published them as a book, *The Common Law*, in 1881.[50] The lectures represented the culmination of his thought after years of schooling, of fighting valiantly for his country and his ideals, and of briefly practicing law. At this point in his life, Holmes's attempts to reconcile conflicting tendencies became most apparent, specifically in his metaphysics; his philosophy of life.

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43. HOFFHEIMER, *supra* note 2, at 89.

44. OLIVER WENDELL HOLMES, JR., *The Profession of the Law* (1886), *in* 3 COLLECTED WORKS, *supra* note 6, at 471, 472.

45. OLIVER WENDELL HOLMES, JR., *The Path of the Law* (1897), *reprinted in* 3 COLLECTED WORKS, *supra* note 6, at 391, 406.

46. For a detailed account of this period in Holmes's life, see generally HONORABLE JUSTICE, *supra* note 7, at 91-160.

47. JAMES KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes, Jr. ed., 12th ed. 1873).

48. *See* HONORABLE JUSTICE, *supra* note 7, at 138.

49. *See* 1 COLLECTED WORKS, *supra* note 21, at 23.

50. *See id.*

II. A MYSTIC AND A SCIENTIST

A. Philosophy of Life: View from the Beanstalk

> "[W]e are all mystics at bottom, for we recognize that the universe contains all we know and more—and what that more is is mystery."[51]

"Holmes once wrote to Dr. John C.H. Wu that 'philosophy wisely understood is the greatest interest there is.'"[52] From 1870 to 1872, Holmes was a member of a group of young men calling themselves the Metaphysical Club, who met regularly in Boston and Cambridge.[53] Philosophers William James and Charles Pierce were also members.[54] As a metaphysician, Holmes sought to reconcile the philosophical dichotomies that permeated his thought such as idealism and materialism, mind and body, and spirit and matter. Empirically speaking, life presented data that complicated and challenged a purely monistic structure of thought. As he stated, evolution was "in the air,"[55] and philosophical systems with fixed beginnings and ultimate ends were largely replaced by process-oriented, developmental theories.[56] Accordingly, it was through the integration, or reconciliation of monism and evolutionism that Holmes was able to acknowledge the organic, developmental nature of all things. As discussed below, this general world view provided the fundamental basis to his jurisprudence and to his method of adjudication.

Closely related to his concern with metaphysical antinomies was his effort to overcome epistemological dichotomies. This concern manifested itself in a Kantian-like recognition of the limitations of knowledge obtained by consciousness: "The real conclusion is that the part can not swallow the whole—that our categories are not, or may not be, adequate to formulate what we cannot know."[57] As a result, Holmes maintained a healthy skepticism causing him to reject dogmatic doctrines that sought to delimit the imponderables of life. He stated:

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51. Letter from Holmes to Alice Green (Dec. 27, 1913), *in* HOFFHEIMER, *supra* note 2, at 89.

52. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 463 (1994).

53. *See* HONORABLE JUSTICE, *supra* note 7, at 426 n.4.

54. *See id.*

55. Letter from Holmes to Morris R. Cohen (Feb. 5, 1919), *in* 1 COLLECTED WORKS, *supra* note 21, at 19.

56. Sheldon M. Novick provides a comprehensive list of the evolutionist theories and writers that most influenced Holmes. *See* 1 COLLECTED WORKS, *supra* note 21, at 18-30.

57. OLIVER WENDELL HOLMES, JR., *Natural Law*, *reprinted in* 3 COLLECTED WORKS, *supra* note 6, at 445, 447-48 [hereinafter *Natural Law*].

> Chauncey Wright[,] a nearly forgotten philosopher of real merit, taught me when I was young I must not say *necessary* about the universe, that we don't know if anything is necessary or not. I believe we can *bet* on the behavior of the universe in its contact with us so I describe myself as a *bet*tablitarian.[58]

Nevertheless, Holmes felt compelled, in a sense, to try to transcend the limits of subjectivity and consequently to gain a holistic if not objective understanding of the cosmos, in his words, to hear the "echo from behind phenomena."[59] In Holmes's world, all was connected. Even if he could not readily decipher the unknowable purposes of the cosmos, he could analyze existent facts and hope to find some pattern or coded message from the "Great Swell."[60] It is in this sense that his thinking becomes mystical:

> Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but wholly adequate significance is as parts of the unimaginable whole. It suggests that even while we think that we are egoists we are living to ends outside ourselves.[61]

Philosophy enables humans to hear the "chords of a harmony that breathes from the unknown," despite the discordant melodies of the current age.[62]

What Holmes termed "mystical materialism" greatly shaped his approach to the study and practice of law.[63] He developed and employed a methodology that combined logical deductive reasoning with empirical, inductive reasoning: a phenomenological approach.[64] Holmes believed that the scientific study of law was one means of disclosing the underlying evolutionary principles that governed the development of all organic phenomena, including judicial decisions.[65] "My chief interest in the law has been in the effort to show the universal in the particular—That has kept me alive."[66] His mode of inquiry regarding the evolution of the law, specifically

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58. Letter from Holmes to Frederick Pollock (Aug. 30, 1929), *in Justice Holmes's Philosophy*, *supra* note 39, at 715.

59. Sheldon M. Novick, *Holmes's Philosophy and Jurisprudence*, [hereinafter *Jurisprudence*] *in* 1 COLLECTED WORKS, *supra* note 21, at 25.

60. For an explanation of Holmes's concept of the "Great Swell," see *id.* at 25-26.

61. OLIVER WENDELL HOLMES, JR., *The Class of '61* (June 28, 1911), *in* 3 COLLECTED WORKS, *supra* note 6, at 504, 505.

62. *Natural Law*, *supra* note 57, at 448.

63. *Justice Holmes's Philosophy*, *supra* note 39, at 703.

64. *See id.* at 713-21, 737-45.

65. *See id.* at 746.

66. Letter from Holmes to Morris R. Cohen (Aug. 31, 1920), *in Justice Holmes's Philosophy*,

as it was employed in *The Common Law*, which will be addressed subsequently, seemed to resemble in many ways the phenomenological approach used by Hegel in the *Phenomenology of Spirit*.[67] In the *Phenomenology*, Hegel reached conclusions about the evolution of consciousness based upon a comprehensive assessment of objectively observable social phenomena occurring throughout the history of civilization.[68]

Similarly, Holmes sought to track the historical development of the common law using judicial decisions as his objectively observable data.[69] Unlike Hegelian phenomenology, however, which is premised on idealism and deductive logic, the phenomenological approach used by Holmes seemed to be predicated upon Spencer's evolutionary materialism and the inductive logic of the natural sciences.[70] For Holmes, the dialectical development of the law had its source in ancient Roman law and German customs.[71] For example, it was from these *primitive* legal systems that Holmes found the historical basis of liability, the need for vengeance.[72] He then employed his phenomenological approach to trace the evolutionary unfolding of this "single germ," the desire for retaliation, as it "multipli[es] and branch[es] into products as different from each other as the flower from the root."[73] Holmes acted as the legal scientist conducting his experiments in the laboratory of history, carefully and critically analyzing the multiple combinations of legal rules and policies which comprised his data. From this data he inductively reasoned his way to a principled and coherent account of the fundamental

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supra note 39, at 707.

67. G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT (A.V. Miller trans., 1977).

68. *See id.*

69. *See Justice Holmes's Philosophy*, *supra* note 39, at 746.

70. *See* 1 COLLECTED WORKS, *supra* note 21, at 22-23.

71. *See generally* THE COMMON LAW, *supra* note 1.

72. *See id.* at 2-3.

73. *Id.* at 34. It is interesting to compare Holmes's metaphor with the following excerpt from Hegel:

> The more conventional opinion gets fixated on the antithesis of truth and falsity . . . . It does not comprehend the diversity of philosophical systems as the progressive unfolding of truth, but rather sees in it simple disagreements. The bud disappears in the bursting-forth of the blossom, and one might say that the former is refuted by the latter; similarly, when the fruit appears, the blossom is shown up in its turn as a false manifestation of the plant, and the fruit now emerges as the truth of it instead. These forms are not just distinguished from one another, they also supplant one another as mutually incompatible. Yet at the same time their fluid nature makes them moments of an organic unity in which they not only do not conflict, but in which each is as necessary as the other; and this mutual necessity alone constitutes the life of the whole.

HEGEL, *supra* note 67, at 2.

nature of the common law, and the cosmos. Professor Novick described Holmes's insights into the nature of law:

> The law was what judges did in particular circumstances. No one, not even the judges, could consciously state the principle on which they were acting at the time. Only after studying numerous decisions could one expose the unconscious forces at work. The scholar was a scientist delving into the fossil remains of the law, trying to trace the lines of its evolution.[74]

The reasoning employed by Holmes was not solely inductive, at least it did not remain so. Once general propositions about the law were ascertained and carefully delineated, they formed the premises upon which particular legal conclusions could be then deductively reached. Thus, general principles were applied and worked out in individual cases. "We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction."[75] We now turn to his jurisprudence.

B. Philosophy of Law

> "I have tried to see the law as an organic whole."[76]

Holmes's general philosophical insights and conclusions were largely reflected in his juristic thought. As a result, his jurisprudence, like his metaphysics, is a synthesis of competing intellectual tendencies, in particular, positivism and natural law. On the one hand, as has been recently recognized by many legal scholars, Holmes was a pragmatist in the sense that he frequently espoused an instrumental view of the law.[77] His self-avowed skepticism and disapproval of rigid dogmatism permeated his judicial and nonjudicial writings. Consider, for example, the remarks he made to a group of lawyers after twenty years of service on the Massachusetts Supreme Judicial Court:

> It has seemed to me that certainty is an illusion, that we have few scientific data on which to affirm that one rule rather than another

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74. 1 COLLECTED WORKS, *supra* note 21, at 23.

75. Stack v. New York, New Haven & Hartford R.R. Co., 58 N.E. 686, 690 (Mass. 1900).

76. Oliver Wendell Holmes, Jr., *Twenty Years in Retrospect*, [hereinafter *Twenty Years in Retrospect*], *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 154, 155 (Mark DeWolfe Howe ed., 1962)

77. *See, e.g.*, Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 21 (1995).

> has the sanction of the universe, that we rarely could be sure that one tends more distinctly than its opposite to the survival and welfare of the society where it is practiced, and that the wisest are blind guides.[78]

And consider also, his observations after sixteen years of service as a United States Supreme Court Justice:

> But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism (sic). . . . Reason working on experience does tell us, no doubt, that if our wish to live continues, we can do it only on those terms. But that seems to me the whole of the matter. I see no *a priori* duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive.[79]

Thus, his skepticism prevented him from subscribing to tenets of natural law theory that proclaimed the preeminence of supernatural or pre-existing legal rights. According to Holmes, there simply were no distinct, external criteria of universal validity. In his own words, "[t]he common law is not a brooding omnipresence in the sky."[80] He repeated similar rejections of natural law when he argued against the existence of a "transcendental body of law outside of any particular State."[81] As he stated, "[t]he jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[82] However, as he continued, such a notion is absurd because "[t]he most fundamental of the supposed pre-existing rights, the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it."[83]

Hence, it was Holmes's skepticism, his recognition of the limitations of human understanding, that compelled him to view the law from the perspective of the "bad man," one who is not concerned about what the law

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78. *Twenty Years in Retrospect*, *supra* note 76, at 156.

79. *Natural Law*, *supra* note 57, at 446-47.

80. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

81. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Holmes's reasoning was subsequently adopted by the Court in its formulation of the "Erie Doctrine." *See* Erie Railroad Co. v. Tomkins, 304 U.S. 64 (1938).

82. *Natural Law*, *supra* note 57, at 446.

83. *Id.* at 447.

is in a jurisprudential sense, but who simply wants to know what actions will not entail punitive or legal consequences. As Holmes explained:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject a right. . . . The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. . . .
>
> The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? . . . [I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[84]

The amoral perspective of the "bad man" was, for Holmes, a device for ascertaining the limits of the law. It was a conceptual instrument that allowed him to engage in a scientific, business-like analysis of the law. However, unlike the "bad man," Holmes's ultimate goal was to disclose the legal principles cohering the distinct decisions of the courts. In other words, his transcendentalist tendencies were never fully suppressed. Consider, for example, the comments that immediately precede the above quoted passage:

> I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of

84. *The Path of the Law*, *supra* note 45, at 392-93.

> popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law.[85]

While Holmes never expressed the opinion that there were principles guiding human conduct which existed *independently* of enacted law or of the systems peculiar to any one people, he felt that universal rights and principles existed that were the natural product of evolution and that were embodied in man-made common law. It is in this sense that Holmes seemed to be influenced by the common law constitution of Great Britain wherein ideas and values are reflected and embedded in the ordinary common law and supplemented by statutes.[86] As one commentator explained, "even constitutions are based on, or presuppose, an underlying agreement on more fundamental principles—principles which may never have been explicitly expressed, yet which make possible and precede the consent and the written fundamental laws."[87]

Holmes recognized that the universe has in it more than could be fully understood by the human intellect.[88] As a result, he could not blindly accept the "*Ought* of natural law."[89] However, it is precisely because of his skepticism and not despite it, that he could not fully subscribe to a positivist view of the law either. He was never able to entirely disassociate himself from his transcendental idealist tendency, and thus he continued to maintain what he termed "*Can't Helps*."[90] Holmes's ambivalence was exemplified in a letter he wrote to Harold J. Laski: "All my life I have sneered at the natural rights of man—and at times I have thought that the bills of rights in Constitutions were overworked—but . . . they embody principles that men have died for . . . ."[91]

The reconciliation between his positivist skepticism and his idealist *Can't Helps*, occurred in his evolutionary doctrine of the common law. To the extent that the common law manifested firmly-rooted and continuous evolutionary patterns of development, it tended toward a certain level of objectivity in the sense that its growth was not arbitrary or sporadic.[92] Holmes

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85. *Id.* at 392.

86. *See Justice Holmes's Philosophy*, *supra* note 39, at 710, 748-49.

87. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 181 (1960).

88. *See* 1 COLLECTED WORKS, *supra* note 21, at 26.

89. *Natural Law*, *supra* note 57, at 446.

90. *Id.*

91. Letter from Holmes to Harold J. Laski (Sept. 15, 1916), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCES OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935, at 21 (Mark DeWolfe Howe ed., 1953).

92. *See* 1 COLLECTED WORKS, *supra* note 21, at 23.

believed that truth was rooted in time;[93] there is truth in consistency as there is truth in majority. Holmes could not grasp the ultimate purposes of the prevailing legal system, let alone the ultimate goals of the cosmos; however, he could say with certitude that the common law exists, and that it has persisted over many centuries. "I don't believe much in anything that is, . . . but I believe a damned sight less in anything that isn't."[94] As Holmes explained,

> [W]e have a great body of law which has at least this sanction that it exists. If one does not affirm that it is intrinsically better than a different body of principles which one could imagine, one can see an advantage which, if not the greatest, at least, is very great—that we know what it is. For this reason I am slow to assent to overruling a decision. Precisely my skepticism, my doubt as to the absolute worth of a large part of the system we administer, or of any other system, makes me very unwilling to increase the doubt as to what the court will do.[95]

Holmes's unique jurisprudence can be better understood in light of his major theoretical work, *The Common Law*,[96] which will now be addressed in detail.

C. The Common Law: Rendering the Law Self-Conscious

> "In order to know what it is, we must know what it has been, and what it tends to become."[97]

The Common Law is among the greatest works of legal thought in American history. The work is derived from a series of lectures that Holmes delivered at the Lowell Institute in Boston in November and December of 1880.[98] More than simply an historical exposition of the law, the lectures in *The Common Law* embody Holmes's attempt to formulate a coherent, comprehensive statement of his theories about the law. As such, it develops and intertwines his doctrinal ideas, both metaphysical and jurisprudential. As stated by Mark DeWolfe Howe, "*The Common Law* is not primarily a work

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93. *See Natural Law*, *supra* note 57, at 446.

94. Letter from Holmes to John H. Wigmore (Dec. 4, 1910), *in* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 812 (1989).

95. *Twenty Years in Retrospect*, *supra* note 76, at 156.

96. *See* THE COMMON LAW, *supra* note 1.

97. *Id.* at 1.

98. *See* Sheldon M. Novick, *Introduction* to THE COMMON LAW at iii, viii, *supra* note 1.

of legal history. It is an endeavor in philosophy—a speculative undertaking in which the author sought to find in the materials of legal history data which would support a new interpretation of the legal order."[99] Holmes begins the work as follows:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[100]

In *The Common Law*, the theme of reconciliation again emerges. Holmes believed that the prevailing theory about the common law was essentially a "study of tendencies"[101] and one of the fundamental tendencies of the evolutionary development of the law was the tendency towards reconciliation.[102] In particular, this tendency was manifested in continual legislative attempts to reconcile "the paradox of form and substance in the development of law."[103] In form, Holmes believed that the growth of the law was logically syllogistic.[104] In substance, however, he believed that its growth was legislative, grounded in public policy.[105] As a consequence, the rationale for legal rules established in the past, which have survived throughout the centuries, has changed as new policy reasons "more fitted to the [present] time"[106] supplant the outdated foundation of the old policies. Holmes considered these rules survivors "from more primitive times."[107] As he explained:

> The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how [the rule] is to be accounted for. Some ground of policy is thought of, which seems

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99. Mark DeWolfe Howe, *Introduction* to OLIVER WENDELL HOLMES, THE COMMON LAW at xi, xx (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

100. THE COMMON LAW, *supra* note 1, at 1.

101. *Id.* at 2.

102. *See id.* at 36.

103. *Id.* at 35.

104. *See id.* at 2.

105. *See id.*

106. *Id.* at 36.

107. *Id.* at 37.

> to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.[108]

To illustrate this process, Holmes traced the historical development of the bases of liability by examining the various circumstances in which liability would be imposed.[109] He began first by assessing legal procedure in its infancy as it originated under the two parents of modern law, ancient Roman law and Germanic tribal customs.[110] He explained how the early forms of legal procedure were grounded in vengeance and the desire for retaliation, and were frequently resolved by means of the blood feud.[111] Gradually, however, such violent confrontations were replaced by more peaceful means of dispute resolution.[112] Holmes's study of the forms of liability was consistent with his views of evolutionism, particularly with respect to the organic, developmental nature of the law.[113]

The Common Law is the most cogent example of Holmes acting as the scientist, inductively reasoning his way through the legal data of history. He did not believe that legal theories would be viable to the extent that "they attempt[ed] to deduce the *corpus* from *a priori* postulates."[114]

> The law did not begin with a theory. It has never worked one out . . . . [I]t is to be expected that its course should not be straight and its direction not always visible. All that can be done is to point out a tendency, and to justify it. The tendency, which is our main concern, is a matter of fact to be gathered from the cases.[115]

Nevertheless, despite the empirical approach and style of *The Common Law*, "the book [also] reflected the influence of transcendentalist attitudes in its general goal and in its organization."[116] Specifically, Holmes's "goal in the work was to raise the awareness of the process of legal development to self-consciousness;"[117] and, "[r]aising consciousness to self-awareness—the

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108. *Id.* at 5.
109. *See id.* at 2.
110. *See id.* at 2-3.
111. *See id.*
112. *See id.* at 3.
113. *See supra* Part II.B.
114. THE COMMON LAW, *surpa* note 1, at 36.
115. *Id.* at 77-78.
116. HOFFHEIMER, *supra* note 2, at 89.
117. *Id.*

pursuit of theoretical understanding for its own sake—incorporated one of the ideals of the transcendentalists."[118]

Holmes recognized that the process of developing new reasons for ancient rules, of reconciling form with content, had been largely unconscious.[119] By insisting "on a more conscious recognition of the legislative function of the courts,"[120] Holmes sought to render the law conscious of itself and of its meaning. Thus, through Holmes the law becomes self-conscious. As he explained, "[t]he business of the jurist is to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it, in order, from it its *summum genus* to its *infima species*, so far as practicable."[121]

Consequently, the lectures in *The Common Law* are arranged "on a continuum of duties and quasi-duties of declining force."[122] First, Holmes addressed duties in the context of criminal law—"the duties of citizens to the sovereign."[123] Second, Holmes discussed duties in the context of tort law—"the duties of each to all."[124] Third, he examined duties as they pertain to property—"the reciprocal duties of one in possession of something to and from all others."[125] Fourth, he dealt with contract law—"voluntarily assumed duties between persons."[126] And finally, he addressed duties which could be "passed on through sale or inheritance to persons in quite different circumstances."[127]

Through this focus on duties, Holmes attempted to facilitate the evolutionary trend toward objectivity. Holmes believed that the external tests of liability became solidified with each judicial decision and statute, and that eventually they could be reduced to one objective, "external standard."[128] As has already been noted, Holmes believed that abstractions and generalizations extrapolated from the data of history—such as judicial decisions—acquire a certain degree of objectivity and truth over time. Thus, as the evolution of the law tended toward objectivity and perhaps progressive simplification, Holmes desired to formulate a comprehensive external standard of general

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118. *Id.* at 90.
119. *See* THE COMMON LAW, *supra* note 1, at 36.
120. *Id.*
121. *Id.* at 219.
122. 1 COLLECTED WORKS, *supra* note 21, at 41.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. THE COMMON LAW, *supra* note 1, at 324; *see also* 1 COLLECTED WORKS, *supra* note 21, at 43.

application.[129] Holmes believed that this standard subsumed the standards of law that were founded on moral considerations of individual blameworthiness: "The moral phraseology has ceased to be apposite, and an external standard of responsibility has been reached."[130]

Holmes's emphasis on, and his conclusions concerning duties and the external standard, help to explain many of his decisions as a judge. This subject will be addressed in greater detail later, however, as a few preliminary comments are worth noting here. One of the most important and revealing aspects of Holmes's thought, as articulated in *The Common Law*, was his contention that "[l]egal duties are logically antecedent to legal rights."[131] Holmes believed that standards of law that proscribed conduct and defined duties revealed the original tendency of the law to clarify not what you can do, in the sense of exercising individual rights, but rather, what you cannot do.[132] He stated:

> To put it more broadly, . . . the direct working of the law is to limit freedom of action or choice on the part of a greater or less number of persons in certain specified ways; while the power of removing or enforcing this limitation which is generally confided to certain other private persons, or, in other words, a right corresponding to the burden, is not a necessary or universal correlative. Again, a large part of the advantages enjoyed by one who has a right are not created by the law. The law does not enable me to use or abuse this book which lies before me. That is a physical power which I have without the aid of the law. What the law does is simply to prevent other men to a greater or less extent from interfering with my use or abuse.[133]

To a certain extent, the above passage helps to explain Holmes's doctrine of judicial restraint and his deference to social legislation regulating conduct. It suggests that at least initially, Holmes was more concerned about defining duties rather than protecting individual liberties, not because the power of the state was absolute, but rather because at the time, individual liberties were not in need of protection. Through *The Common Law*, Holmes discerned and articulated the fundamental principles underlying the common law and thereby gained insight into the ultimate purposes of the cosmos. By doing so, Holmes

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129. *See* 1 COLLECTED WORKS, *supra* note 21, at 43.
130. THE COMMON LAW, *supra* note 1, at 325.
131. *Id.* at 219.
132. *See id.* at 220.
133. *Id.*

was better able to define the proper role of the judge in effectuating those purposes.

D. Philosophy of Judging

"[A] willing instrument in working out the inscrutable end."[134]

Holmes's conclusions in *The Common Law* had important implications with respect to his understanding of the proper role of the judge. Most importantly, they enabled him to reconcile his unique brand of judicial activism, with his doctrine of judicial restraint. By applying evolutionary theory to the development of the law in a material world, Holmes determined that mere logical deductions could not provide legal conclusions. In his words, "General propositions do not decide concrete cases[,]"[135] and therefore "[w]e must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true."[136] While abstract principles were a source of guidance, ultimately, it was incumbent upon the judge to make difficult choices between conflicting policies; that is, "to exercise the sovereign prerogative of choice."[137] The concept of choice as an outgrowth of consciousness had a significant impact on Holmes's perception of the judicial function. With the ability to choose, individuals and communities ceased to be simply blind slaves to their instincts. The machinations of the mind were no longer driven solely by unconscious impulses, such as the primitive need for vengeance. Rather, increased awareness equipped humanity with the freedom to reason, to conceptualize, and to choose.

Along with this constant confrontation with decision-making capacity, however, came responsibility. For the judge, this responsibility consisted of the duty to choose that which is just, right, and fair in the context of the defined legal system. On a general level, the concept of choice manifests the special role of humans as active participants in evolutionary development: agents who freely choose and define an undetermined future, bound by the laws of nature. More specifically, however, it marks the special role of the judge as an active participant in the development of legal principles and social structures, bound by precedent. Consequently, the judge, as arbiter of competing interests, shoulders the ponderous and weighty responsibility of

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134. *Brown University Commencement*, *supra* note 6, at 518.

135. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

136. OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899), *reprinted in* 3 COLLECTED WORKS, *supra* note 6, at 418.

137. *Id.* at 419.

defining public policy and shaping destinies. "The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies."[138]

Holmes believed that a sound body of law must correspond with the actual feelings and demands of the community: "[l]aw, being a practical thing, must found itself on actual forces."[139] Nevertheless, Holmes did not believe that humanity as a whole, nor judges in particular, had attained a level of pure consciousness or absolute knowledge.[140] Hence, judicial decisions could not be solely attributed to well-reasoned deliberations. On the contrary, as he stated, "the *felt necessities* of the time, . . . avowed or unconscious, . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[141] And as he further explained, judicial decisions were sometimes "the unconscious result of instinctive preferences and inarticulate convictions."[142] These considerations provided the bases for Holmes's doctrine of judicial restraint. It will be remembered that Holmes believed that the earliest appearance of law was as a substitute for the private blood feuds between families and clans.[143] Because competing interests would continue to engage in the struggle for self-preservation, and because the instincts could not be made to subserve the intellect, Holmes determined that his function as a judge was to ensure that the law provided a fair and peaceful means of dispute resolution: "As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves."[144]

Holmes's early emphasis on procedural fairness reflected his belief that public policy was most appropriately addressed through the democratic political process and not through the courts.[145] His reluctance to engage in judicial legislating can be partially explained by the moral relativism stemming from his philosophical and jurisprudential skepticism. Holmes was not interested in "improving men's hearts."[146] As he stated, "[m]oral predilections must not be allowed to influence our minds in settling legal distinctions."[147] As will be discussed in the context of his judicial opinions,

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138. OLIVER WENDELL HOLMES, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894), *reprinted in* 3 COLLECTED WORKS, *supra* note 6, at 377.

139. THE COMMON LAW, *supra* note 1, at 213.

140. *See* 1 COLLECTED WORKS, *supra* note 21, at 38-39.

141. *Id.* at 1 (emphasis added).

142. *Id.* at 36.

143. *See supra* notes 110-113 and accompanying text.

144. 1 Collected Works, *supra* note 21, at 213.

145. *See infra* Part III.B.

146. 1 Collected Works, *supra* note 21, at 144.

147. *Id.* at 148.

Holmes's amoral stance sometimes led to decisions that are clearly at odds with contemporary notions of substantive due process. Nevertheless, his concern with procedural due process was not entirely bereft of moral content in that it relied on principles of fundamental fairness derived from the common law. These principles compelled Holmes to adopt a more activist position with respect to the protection of personal liberty interests, in particular, the freedom of speech.

III. JUSTICE HOLMES, DISSENTING

A. The Evolution of Holmes in his Judicial Opinions

> "In modern societies every part is related so organically to every other, that what affects any portion must be felt more or less by all the rest."[148]

Holmes gave fifty years of service as a judge. He spent twenty years on the Massachusetts Supreme Judicial Court, from 1882 to 1902, and then thirty on the Supreme Court of the United States, from 1902 to 1932.[149] On the bench, "Mr. Justice Holmes's fundamental philosophy in rejecting absolutes, his spirit of accommodation, his realization that life is the reconciliation of contradictories, served as fruitful instruments for constitutional adjudication."[150] Holmes quickly recognized his role as a mediator between conflicting interests and his duty as a judge to attain a proper balance of power in the legislative and judicial contexts.[151] He had an ecological sensibility that recognized the interconnectedness of individual expression and governmental authority.[152]

These interrelationships and subtle overlapping of interests required the judge to engage in an enterprise of delicate and principled balancing. For Holmes, that balancing occurred primarily in the due process clauses of the Fifth and Fourteenth Amendments.[153] It was in the concept of due process that Holmes could reconcile competing and seemingly divergent political and societal interests. Due process entailed fundamental principles of fairness, and for Holmes, the principle of fairness was the means by which conflicting interests could be reconciled.[154] Holmes's "mystical faith in the unknowable

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148. Diamond Glue Co. v. United States Glue Co., 187 U.S. 611, 616 (1903).
149. *See* 1 COLLECTED WORKS, *supra* note 21, at 47, 55.
150. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 103 (2d ed. 1961).
151. *See id.* at 74-75.
152. *See id.*
153. *See infra* Part III.B.
154. *See* HONORABLE JUSTICE, *supra* note 7, at 456-57 n.29.

purposes of evolution"[155] and his disavowal of absolutes and deductive logic, engendered in him a process-oriented, rather than outcome-determinative theory of jurisprudence. Thus, his faith coupled with his scientific skepticism, supported his loyalty to the principle of fairness encompassed in due process.[156] At a minimum, individuals and groups defined by legislative categories were entitled to a fair process of adjudication. Accordingly, fairness was the organizing principle that enabled Holmes to sanction laws reflecting the *felt necessities* of the times, even if the interests of the prevailing forces in the community were contrary to his own personal views.[157]

Holmes's understanding of due process evolved in response to the issues that came before him in court, which in turn reflected the changing role of government in society. After the Civil War and the period of Reconstruction, the battle between the states and the national assembly became primarily economic.[158] The growth of the administrative state was commensurate with the growth of large-scale business, monopolies, and trade unions. As the states and federal government struggled over the control of commerce, government as a whole increasingly encroached on the liberties of individuals. Such encroachments proliferated when the United States entered the Great World War and enacted laws such as the Anti-Sedition Act, abridging the freedom of speech. As a result, individuals turned to the Constitution and to the courts for procedural and substantive protections.

In light of the enormous changes in government and society, Holmes was repeatedly balancing competing interests and expanding upon his conception of fairness. As a result, his concept of due process —the process that was due before a right could be infringed—varied depending on the interests at stake.[159] Thus, it is helpful to assess his understanding of due process as it applied to legislation involving: (1) social welfare and economic regulations; (2) civil liberties; and (3) fundamental rights.

In short, the early labor cases demonstrate Holmes's support for group rights and legislative experimentation with respect to social welfare and economic regulation.[160] However, Holmes was less deferential when individual civil liberties were at stake.[161] In this regard, his jurisprudence can

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155. *Id.* at 17.

156. *See id.* at 122 ("[Holmes] set as the highest aim of which law was capable a certain modest conception of fairness: equality of treatment, not equality of result.").

157. *See id.* at 122-23 ([I]n [Holmes's] later opinions . . . one saw nothing but his Olympian skepticism and a determination nevertheless to see that the government conduct itself honorably: that the struggle of competing ideas and principles, of classes and races, be carried out fairly and peacefully, in accordance with the rule of law, *come what might*.").

158. *See generally* HONORABLE JUSTICE, *supra* note 7.

159. *See infra* Part III.B.

160. *See* HONORABLE JUSTICE, *supra* note 7, at 456-57 n.29.

161. *See id.*

be examined in terms of procedural due process, in both the civil and criminal contexts, and in terms of substantive due process in the administrative context.[162] Finally, it was with regard to fundamental rights—rights specifically enumerated in the Constitution—that Holmes was most demanding of due process.[163]

The following sections categorically analyze representative opinions of Holmes's constitutional theory of fairness and due process as it developed. With regard to time and space, only a selective offering can be made. The goal, however, is to provide a broad overview of those cases reflecting the theme of reconciliation that permeated his ideas and ultimately gave rise to Holmes's commitment to the principle of fairness. Holmes's opinions have been quoted from at length because they provide the greatest insight to his constitutional jurisprudence.

B. Due Process in the Context of Social Welfare and Economic Regulation: Legislative Deference and the Development of the Doctrine of Judicial Restraint

Holmes was prepared to sacrifice his life for the preservation of the Union, however, he did not want to devitalize the states. He understood that the central government could not, pragmatically speaking, address and administer to the concerns of local regions, and he recognized that there were issues of local concern that were best dealt with by the local democratic processes.[164] He also felt that the ability to engage in social experimentation should not be denied to local authorities. Such experimentation concerned matters that the judiciary was simply not competent to address.[165] Hence, it was largely left to the judiciary to engage in a bit of self-regulation and define what those situations were and consequently what the limits of its authority were. Addressing the authority of the several states, Holmes wrote in a letter to James B. Thayer:

> There is another principle of *state* constitutional law not within the scope of your discussion which I always have supposed fundamental but which (between ourselves) I infer from the discussions I have had with my brethren does not command their assent— viz. that a state legislature has the power of Parliament, i.e. absolute power, except so far as expressly or by implication it is

162. *See id.*
163. *See id.*
164. *See id.* at 197, 258.
165. *See supra* Part II.D.

> prohibited by the Constitution—that the question always is where do you find the prohibition—not, where do you find the power—I think the contrary view dangerous and wrong.[166]

These principles and beliefs formed the basis for the development of Holmes's doctrine of judicial restraint. In general, Holmes trusted the ordinary political process more than he trusted the judgments of himself, or even his brethren on the bench.

> It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong . . . . When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law.[167]

As a result, Holmes consistently deferred to the majority—the dominant force in the community—in matters concerning social welfare and economic regulation. However, he was not overly idealistic about the intentions of the majority. His Darwinist views underscored the competitive nature of humankind:

> This tacit assumption of the solidarity of the interests of society is very common, but seems to us to be false . . . . [I]n the last resort a man rightly prefers his own interest to that of his neighbors . . . . All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* Supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum . . . . The fact is that legislation in this country, as well as elsewhere, is empirical. It is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else.[168]

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166. Letter from Holmes to James B. Thayer (Nov. 2, 1893), *in* Luban, *supra* note 52, at 462 n.34.

167. OLIVER WENDELL HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS 291, 295 (1920).

168. Oliver Wendell Holmes, *The Gas-Stoker's Strike*, *reprinted in* 44 HARV. L. REV. 795, 795-96 (1931).

Holmes was less concerned about righting all the wrongs in society then he was about maintaining a fair process of lawmaking. Nevertheless, his commitment to fairness instilled in him a desire to remove inequities in the distribution of economic power. As he explained when Chief Justice of the Massachusetts Supreme Judicial Court:

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[169]

Therefore, in response to challenges to economic regulation, Holmes was not willing to find constitutionally protectable property and liberty interests within the due process clause. In short, economic interests could be regulated if the processes of legislative enactment were fair. As a Supreme Court Justice, Holmes had ample opportunity to hone and refine his doctrine of judicial restraint. Beginning in 1905 in the *Lochner* decision, the majority frequently substituted its judgment for that of Congress and state legislatures on the wisdom of economic regulation interfering with contract and property interests.[170] In these cases, the Court relied mainly upon the due process clauses of the Fifth and Fourteenth Amendments. It was not until 1934 in *Nebbia v. New York*,[171] two years after Holmes's retired from the bench, that the majority severely limited these rulings. Thus, for the duration of his tenure with the Supreme Court, Holmes regularly dissented from the Court's reliance upon the due process clauses to justify its interference with legislative policymaking in economic regulation. The cases concerning economic regulation involved challenges to essentially two types of legislation: (1) labor legislation, including control of hours, wages, and anti-union discrimination; and (2) price regulation. Each is discussed in turn.

In *Lochner v. New York*, the Supreme Court struck down a state health measure limiting the working hours of bakers.[172] Holmes's dissent underscores his commitment to the majoritarian democratic process regardless

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169. Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

170. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Hammer v. Dagenhart, 247 U.S. 25 (1918).

171. *See* Nebbia v. New York, 291 U.S. 502 (1934) (sustaining a New York law regulating minimum and maximum retail milk prices).

172. *See Lochner*, 198 U.S. at 74.

of whether or not the outcome conflicted with his personal socio-economic views. Holmes elaborated on this commitment in the following familiar words:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[173]

Holmes also dissented when the Court struck down a federal statute establishing a minimum wage for women.[174] He believed that the due process clause of the Fifth Amendment afforded the same protections as the Fourteenth.

> [T]he only objection that can be urged [against a minimum wage law for women for the District of Columbia] is found within the vague contours of the Fifth Amendment, prohibiting the depriving

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173. *Id.* at 75-76 (Holmes, J., dissenting).

174. *See Adkins*, 261 U.S. at 525.

> [of] any person of liberty or property without due process of law. To that I turn.
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> The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.[175]

Holmes's opinions concerning the control over anti-union discrimination are equally deferential to legislation. In *Coppage v. Kansas*, Holmes dissented when the Court invalidated a state law forbidding employers from prohibiting their employees from joining labor unions.[176] He stated:

> In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of the opinion that there is nothing in the Constitution of the United States to prevent it. . . .[177]

Holmes was, however, concerned about giving *too much* power to the several states. His Civil War experience no doubt made him cautious about allowing the states to garner excessive authority. The economic realities of the turn of the century presented similar concerns. As big business grew, Holmes could see similar centrifugal forces at work and he was not ready to let state extensions of official authority go entirely unchecked by the National Assembly:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national

175. *Id.* at 568 (Holmes, J., dissenting).
176. *See* Coppage v. Kansas, 236 U.S. 1 (1915).
177. *Id.* at 26-27 (Holmes, J., dissenting) (citations omitted).

> views and how often action is taken that embodies what the Commerce Clause was meant to end.[178]

Thus, beginning with the Interstate Commerce Act, the government intervened to affect commerce through positive legislation. As noted by Felix Frankfurter, "[t]he tide of Congressional legislation came in, . . . just about the time that Mr. Justice Holmes joined the Court. The limit which in his view the Court could put upon Congress was merely an application of his general philosophy regarding judicial review."[179] As a result, when Congress sought to regulate national economic problems through the Commerce Clause, Holmes found fewer limitations on the commerce power than the other members on the Court.[180]

Holmes was concerned that there be some governmental supervision of free enterprise. When the majority found hindrance in the Constitution to legislation intended to prevent a recurrence of the Pullman strikes and to promote industrial peace on railroads, he protested:

> It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ,—I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.[181]

He expressed similar concerns when Congress attempted to regulate employment conditions that specifically pertained to child labor. Congress passed an act prohibiting the shipment in interstate commerce of products of

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178. OLIVER WENDELL HOLMES, *Law and the Court* (Feb. 15, 1913), *in* 3 COLLECTED WORKS, *supra* note 6, at 505, 507.

179. FRANKFURTER, *supra* note 150, at 98.

180. *See id.* at 97-99.

181. Adair v. United States, 208 U.S. 161, 191-92 (1908) (Holmes, J., dissenting).

manufacturers employing child labor.[182] In *Hammer v. Dagenhart*, a majority of the Court invalidated the act as a prohibited intrusion of Congress into state affairs, states having exclusive control over the methods of production.[183] Holmes again wrote the minority opinion:

> The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.[184]

Aside from the Commerce Clause, Holmes also found national legislative authority in the treaty power. While the states are free to regulate their internal affairs, public policy of the United States is shaped with a view to the benefit of the nation as a whole. When the power reserved to the states under the Tenth Amendment came into conflict with the treaty-making power of the national government under Article II, § 2, of the Constitution, Holmes found in favor of the national interest:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they

182. *See* Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (Holmes, J., dissenting).
183. *See id.* at 276-77.
184. *Id.* at 281 (Holmes, J., dissenting).

> have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . .[185]

Holmes continued:

> Here a national interest of very nearly the first magnitude is involved . . . . We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act.[186]

Finally, with regard to the regulation of prices, Holmes dissent from the decision of the majority in *Tyson v. Banton*, is particularly revealing of his concerns.[187] The majority of the Court held that the regulation of prices for commodities and services violated due process except with regard to a limited class of business "affected with a public interest."[188] As Holmes explained:

> We fear to grant power and are unwilling to recognize it when it exists. . . . [W]hen legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. . . . But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.
>
> I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain. . . .

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185. Missouri v. Holland, 252 U.S. 416, 433 (1920).
186. *Id.* at 435.
187. *See* Tyson v. Banton, 273 U.S. 418 (1927).
188. *Id.* at 431.

> I am far from saying that I think that this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.[189]

B. Due Process and Civil Liberties: Balancing Power Between Individuals and the Government

When individual civil liberties were at stake, Holmes was less deferential, and it was the Constitution's guarantee of due process of law that provided the necessary substantive limits to state and federal legislation. As observed by Mencken, Holmes's dissents in support of social welfare legislation expressed his judicial concern less for the rights of individuals rather than for the "rights of lawmakers."[190] However, with the expansion of governmental regulation, individual liberties were increasingly encroached upon. Therefore, the growth of government required judicial regulation as a means for demarcating the bounds of authority between the government and the individual and restraining exertions of governmental power injurious to persons. Consequently, the expansion of the administrative state engendered a need to define and to defend liberty and property interests that would trigger the protections of the due process clause. In the early stages of his tenure as a judge, Holmes dealt with individual rights that did not rise to the level of fundamental rights. As explained by Justice Sandra Day O'Connor:

> At the beginning, Holmes's influence would have been nearly impossible to predict. When Holmes was appointed to the Court in 1902, he was an unlikely person to develop a jurisprudence of individual liberties . . . .
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> . . . As a scholar, his interests ran to common law subjects like torts or contracts. As a state court judge, Holmes had little occasion to consider the Bill of Rights, which was understood at the time to limit the power only of the federal government, not the states. Most of his caseload concerned the same common law fields Holmes had explored as a scholar.[191]

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189. *Id.* at 445-47.

190. HENRY LOUIS MENCKEN, *Mr. Justice Holmes*, *in* THE VINTAGE MENCKEN 189, 190 (1955).

191. Sandra Day O'Connor, *They Often Are Half Obscure: The Rights of the Individual and the Legacy of Oliver W. Holmes*, 29 SAN DIEGO L. REV. 385, 387 (1992).

In the legal climate of the late nineteenth century, Holmes's lack of interest in the Bill of Rights was the norm. Even in the federal courts, the Bill of Rights was rarely at issue.[192]

Nevertheless, he did have ample opportunity to consider constitutionally protectable liberty and property interests not specifically enumerated in the Constitution. Although the rights themselves were not fundamental, they implicated fundamental principles of fairness in the sense that their infringement entailed a balancing of individual and governmental interests. This balancing occurred in the areas of both procedural due process and substantive due process. Thus, the Court's role was twofold: (1) the Court had to determine whether a constitutionally protectable property or liberty interest existed; and (2) if so, whether the government action infringing upon the interest complied with the requirements of due process.

With respect to defining constitutionally protectable interests, Holmes relied upon social policy considerations that furthered principles of fairness. This approach is illustrated in *International News Service v. Associated Press*.[193] The issue here was whether the Associated Press (AP) held a protected property interest in news stories it generated and was therefore entitled to an injunction against theft of those stories by the International News Service (INS).[194] The opinion for the Court held that AP was entitled to an injunction because its investment of time, effort, and resources in generating the news stories was analogous to other categories treated as property.[195] The Court's assumption of a preexisting concept of property was challenged in Holmes's separate opinion, which argued that property is a consequence, not an antecedent, of law.[196] Finding that legislation did not recognize a property interest and therefore did not provide a remedy, Holmes reasoned that "some other ground must be found."[197] Holmes continued: "One such ground is vaguely expressed in the phrase unfair trade."[198] Accordingly, Holmes employed common law principles of unfair competition to support the issuance of an injunction.[199] As a result, this case serves as an important example of how Holmes relied upon equitable principles of the common law to justify what Justice Brandeis referred to in his dissenting opinion as an

192. *See id.*
193. International News Serv. v. Associated Press, 248 U.S. 215 (1918).
194. *See id.* at 230-32.
195. *See id.* at 240-41.
196. *See id.* at 246 (Holmes, J., dissenting).
197. *Id.* at 246.
198. *Id.*
199. *See id.* at 247-48.

"important extension of property rights."[200] Thus, for Holmes, the ultimate legal standard used to define and delimit rights was fairness.

Once it was determined that a constitutionally protectable interest was implicated, the next inquiry was whether the infringement violated due process. Holmes first had occasion to consider legislation that infringed upon property interests. His opinions for the Massachusetts Supreme Judicial Court provided the foundation for his concern with fairness and an individual's right to due process. In two such opinions concerning tax assessments, Holmes addressed the power of local governments to make assessments against real property to pay for improvements such as street paving, sewer connections, railway terminals, and the like.[201] In *Sears v. Street Comm'rs of Boston*, the affected property owners challenged the taxes as uncompensated takings.[202] The court held that special assessments had to be proportioned to the benefits conferred on the property owner, and could not exceed them without becoming a taking of private property for public use which would require compensation.[203] When the local governments—pursuant to the authorization of the State legislatures—made group assessments as opposed to special, individualized assessments, the court held that the individual property owners comprising the legislative categories were not entitled to separate due process hearings.[204] Rather, individual hearings were required only when the value of the property was entirely taken or destroyed.[205]

This distinction between group and individual assessments and the amount of process each entailed, served as a precursor to his opinions for the United States Supreme Court. Consider, for example, his appraisal of the process that was due to individuals whose property interests were infringed in the following cases. In *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, Holmes—writing for the majority—held that a local board could increase the valuation of all taxable property in Denver without providing each property owner in the legislative category (*i.e.*, Denver) the opportunity to be heard under the due process clause of the Fourteenth Amendment.[206] Holmes distinguished the facts of *Bi-Metallic* from *Londoner v. Denver*,[207] where the action of the local board involved decisions of a quasi-judicial nature because it involved more individualized determinations.[208]

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200. *Id.* at 263 (Brandeis, J., dissenting).
201. *See, e.g.*, Sears v. Street Comm'rs of Boston, 53 N.E. 876 (Mass. 1899).
202. *See id.*
203. *See id.* at 877.
204. *See id.* at 878.
205. *See* Carson v. Sewerage Comm'rs, 56 N.E. 1, 2 (Mass. 1900) (Holmes, C.J.).
206. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445-46 (1915).
207. *See* Londoner v. Denver, 210 U.S. 373 (1908).
208. *See Bi-Metallic*, 239 U.S. at 445-46.

Consequently, those property owners exceptionally affected were entitled to a hearing.[209]

In *Bi-Metallic*, Holmes manifested his faith in the democratic process of decision-making which served as one of the underpinnings to his doctrine of judicial restraint. Sounding very much like the progenitor of Justice Stone's famous footnote four of *Carolene Products*[210] as it pertained to legislative groups that did not comprise discrete and insular minorities, Holmes explained:

> General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.[211]

Thus, if the "proper state machinery" is used to make legislative as opposed to adjudicative determinations, then the governmental action will be presumed to be constitutional.[212]

However, when constitutionally protectable liberty interests were infringed and there was concern about whether or not the "proper state machinery" was in fact used, Holmes was much less deferential. Specifically, such issues emerged in several habeas corpus cases in which criminal defendants faced possible incarceration without receiving a fair trial.[213] The habeas corpus cases concerned the power of the federal courts to enforce the constitutional rights of the accused denied procedural due process.[214] As explained previously, Holmes believed that civilization had evolved to the extent that it could achieve peaceful resolution of conflicts; there was simply no place in an advanced community for blood-letting or mob justice. Hence, fair process was directly linked to the preservation of institutional integrity.

In *Frank v. Mangum*, a jury—allegedly influenced by an angry mob—found Leo Frank guilty of murder.[215] Frank sought a writ of habeas corpus in the federal courts on the ground that he had been denied his constitutional right to due process of law, but the Supreme Court held he could not obtain

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209. *See id.* at 446.

210. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). I believe a comparison between footnote four and Holmes's judicial philosophy as a whole is very helpful. In short, both stand for the principle that the more personal and fundamental the interest infringed by legislation, the greater protection it should be afforded by the courts.

211. *Bi-Metallic*, 239 U.S. at 445.

212. *Id.*

213. *See* Frank v. Magnum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923).

214. *See* Frank v. Magnum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923).

215. *See Frank*, 237 U.S. at 324-25.

one.[216] The Court reasoned that the state appellate process which found Frank's trial to be fair was sufficient due process; therefore, the federal courts lacked the authority to upset this finding.[217] Holmes dissented. With respect to Frank's right to due process, Holmes reasoned that:

> Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury.[218]

And with respect to the question of a federal court's power to intervene where due process is lacking, Holmes criticized his colleagues for their undue deference to the local courts. He argued that the federal courts' "power to secure fundamental rights . . . becomes a duty and must be put forth."[219] He concluded that "the supremacy of the law and of the Federal Constitution should be vindicated in a case like this."[220]

In *Moore v. Dempsey*, Holmes's broader view of the power of federal courts to enforce the constitutional rights of criminal defendants commanded a majority.[221] In *Moore*, a group of black men were convicted of murdering a white man in a trial that was similar to Leo Frank's in the sense that an angry mob had surrounded the courtroom and threatened to lynch the defendants and maybe even the jurors if the latter did not find the former guilty.[222] The entire trial lasted only forty-five minutes, and the jury took only five minutes to reach a guilty verdict.[223] As in *Frank*, the state court permitted an appeal, but found that the trial had not been unfair.[224] However, Holmes, who this time had the support of his colleagues, refused to defer to the state courts. Where "the State Courts failed to correct the wrong," he observed, nothing "can prevent this Court from securing to the petitioners their constitutional rights."[225]

Having demonstrated his commitment to procedural due process, Holmes also had the opportunity to address the doctrine of substantive due process.

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216. *See id.* at 345.
217. *See id.* at 334-38.
218. *Id.* at 347 (Holmes, J., dissenting).
219. *Id.* at 348-49.
220. *Id.* at 349.
221. Moore v. Dempsey, 261 U.S. 86, 87 (1923).
222. *See id.* at 89. "The court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result." *Id.*
223. *See id.*
224. *See id.* at 91.
225. *Id.*

Although he rejected arguments against social welfare and economic regulations that relied on notions of liberty of contract,[226] he did recognize that the core of constitutionally protectable liberty interests was not limited to the specific provisions enumerated in the Bill of Rights.[227] This became increasingly apparent to Holmes as the scope and enforcement powers of governmental regulatory agencies grew, and the zone of privacy afforded by individuals became increasingly threatened. The substantive component of the due process clause proscribed certain arbitrary government actions irrespective of the fairness of the procedures used to implement them. Accordingly, Holmes was willing to read some things into the due process clause if not Herbert Spencer's *Social Statics*.[228] Hence, Holmes recognized limitations to official exercises of power, even if administrative agencies were acting pursuant to their delegated authority.[229] Even though legislation gradually displaced the common law as the regulatory regime, the administrative state and its regulatory organs were nevertheless accountable to those principles which evolved in the common law and were embodied in the Constitution. In short, the rule of law applied not only to private persons, but also to public persons and institutions.

Harriman v. Interstate Commerce Commission is arguably the first substantive due process right to privacy case.[230] Holmes, writing for the majority, asserted that the ICC had the statutory authority to investigate and report matters involving railroad discrimination and monopolies in coal and oil.[231] However, such power could not compel Mr. Harriman, the Director of Union Pacific Railroad Company, to testify in response to *general* questions concerning his business practices and stock transactions.[232] Specifically, as Holmes explained, "the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a *specific* breach of the law."[233] Further,

> We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in

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226. *See* Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

227. *See, e.g.*, Noble State Bank v. Haskell, 219 U.S. 104 (1911); *see also* HONORABLE JUSTICE, *supra* note 7, at 456 n.6.

228. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

229. *See* THE HONORABLE JUSTICE, *supra* note 7, at 456 n.6.

230. Harriman v. Interstate Commerce Comm'n, 211 U.S. 407 (1908). I am indebted to Professor Novick for calling this point to my attention.

231. *See id.* at 419.

232. *See id.*

233. *Id.* at 419-20 (emphasis added).

> which, and in which alone, as we have said, there is any need that personal matters should be revealed.[234]

In sum, Holmes was both a liberal and a libertarian on the Court. He repeatedly denied due process challenges to laws threatening laissez-faire economics—laws intended to rectify the ills of society. On the other hand, he frequently affirmed due process challenges to laws threatening civil liberties. Hence his liberal tendency compelled him to exercise judicial restraint, whereas his libertarian tendency encouraged him to adopt a more activist judicial role. The latter becomes even more evident in the next section, which concerns fundamental, personal rights.

C. Due Process in the Context of the Bill of Rights: The Free Speech Cases

When rights specifically enumerated in the Constitution were infringed, Holmes was most demanding of due process. However, Holmes did not believe that any individual liberty was absolute. He simply required more from the legislature when it sought to intrude upon fundamental rights. In the free speech cases, Holmes wrote his most enduring and ethically integrated opinions. These cases, in many ways, concerned the ultimate legal conflict—the power of the majority over the rights of the individual. Holmes was committed to finding a fair state-individual balance when appeals were made to the Court for resolution. Ultimately, he resolved that the only way to reconcile these competing interests was through a highly particularized, case-by-case analysis.

It should be noted at the outset, however, that Holmes was less heroic in the pre-war case of *Patterson v. Colorado*.[235] In that case, Patterson was fined for contempt by the Colorado Supreme Court for publishing articles and cartoons that accused the Colorado court of having decided some recent cases in a corrupt manner.[236] Holmes dismissed Patterson's First Amendment claim explaining that "the main purpose" of the First Amendment is only "to prevent . . . *previous restraints* upon publications;" it was not intended to "prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare."[237] Such a narrow interpretation of the First Amendment no doubt chilled the freedom of expression.

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234. *Id.* at 421.
235. Patterson v. Colorado *ex rel.* Attorney General of Colo., 205 U.S. 454 (1907).
236. *See id.* at 458-59.
237. *Id.* at 462 (emphasis in original) (citation omitted).

However, in 1919, with the case of *Schenck v. United States*, Holmes began his transformation into a champion of the right to free speech.[238] *Schenck* involved the prosecution of a man who printed and circulated leaflets during the First World War arguing that the government lacked the power to conscript soldiers to fight in Europe.[239] In an opinion written by Holmes, the Court affirmed Schenck's conviction, but in such a way that disclosed a more expansive understanding of the scope of the First Amendment. As explained by Holmes, "[i]t may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints."[240] Holmes continued, "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."[241] Thus, the government could prosecute Mr. Schenck only because he expressed his opposition to the draft in wartime, and as Holmes explained, "the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[242] He delineated the standard:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[243]

In the same year, Holmes had another opportunity to express his view of the freedom of speech. In *Abrams v. United States*, the defendants had published two leaflets asserting that the war was being fought for the benefit of the rich and was not in the interests of the working class.[244] The majority affirmed the convictions for publishing the two leaflets.[245] However, Holmes believed that even in times of war, congressional power was not absolute: "Congress certainly cannot forbid all effort to change the mind of the

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238. Schenck v. United States, 249 U.S. 47 (1919).
239. *See id.* at 50-51.
240. *Id.* at 51.
241. *Id.* at 52.
242. *Id.* (citation omitted).
243. *Id.*
244. *See* Abrams v. United States, 250 U.S. 616, 619-21 (1919).
245. *See id.* at 624.

country."[246] He dissented in language that has since become the classic articulation of the justification for a right to freedom of speech. He wrote:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[247]

Holmes also dissented when the majority of the Court sustained an order of the Postmaster General withdrawing a second class mail permit for an alleged violation of the War Espionage Act.[248] The majority treated the use of postal facilities as a privilege that was therefore subject to wide discretion in permitting its enjoyment.[249] According to Holmes:

> The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man.[250]

As a final example of Holmes's commitment to freedom of expression, consider how eloquently he spoke on behalf of a woman who declined to promise to bear arms for the United States in a future war because she was a pacifist:

> Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the

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246. *Id.* at 628 (Holmes, J., dissenting).

247. *Id.* at 630 (Holmes, J., dissenting).

248. *See* United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

249. *See id.* at 410-11.

250. *Id.* at 437 (Holmes, J., dissenting).

> thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.[251]

D. The Lack of Substantive Notions of Fairness in Holmes's Concept of Due Process

There is, unfortunately, a less noble side to Holmes's fidelity to fair process. Although he demanded that judicial and legislative procedure be fair and democratic, he would occasionally decline to assess the substance of legislation. Consequently, he at times appeared overly reluctant to protect liberty interests not specifically contained in the Bill of Rights. In general, he seemed to view citizenship more as a duty to abide by the majoritarian forces rather than as a right to participate in public life pursuant to core personal values. One explanation for his understanding might be that he believed that "*duty*, instead of the derivative notion, *rights*, . . . is the foundation of existing [legal] systems."[252] Nevertheless, his allegiance to majoritarianism, while laudatory in some contexts, seems cold and mechanical in others. As he explained in his essay on Montesquieu:

> [T]he most perfect government is that which attains its ends with the least cost, so that the one which leads men in the way most according to their inclination is best. . . . What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise. *But wise or not*, the proximate test of a good government is that the dominant power has its way.[253]

Holmes's battlefield conception of the world in general, and politics in particular, has been a cause of concern of many legal scholars. At times,

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251. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

252. OLIVER WENDELL HOLMES, *The Arrangement of the Law—Privity* (1872), *in* 1 COLLECTED WORKS, *supra* note 21, at 303.

253. OLIVER WENDELL HOLMES, *Montesquieu*, *in* COLLECTED LEGAL PAPERS, *supra* note 167, at 250, 257-58 (emphasis added).

Holmes seems overly analytical and a little too quick to ascribe validity to the dominant forces of the community. In part, his uneasiness with regard to evaluating the moral content of legislation can be attributed to his less than sanguine attitude about what the government could actually achieve through legislation. Consider, for example, the opinions expressed in his address, *The Soldier's Faith*.[254] Here Holmes directly challenges the objectives of the Benthamite social reformers who sought to make life more materially comfortable for the masses:

> Meantime we have learned the doctrine that evil means pain, and the revolt against pain in all forms has grown more and more marked. From societies for the prevention of cruelty to animals up to socialism, we express in numberless ways the notion that suffering is a wrong which can be and ought to be prevented, and a whole literature of sympathy has sprung into being which points out in story and in verse how hard it is to be wounded in the battle of life, how terrible, how unjust it is that anyone should fail.
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> . . . .
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> . . . For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine.[255]

This belief served as the underpinning of several of Holmes's more unfortunate opinions. For example, in *Bailey v. Alabama*, the Court considered a state law that criminalized an employee's breach of an employment contract and found that the law's effect was to create a form of slavery in violation of the Thirteenth Amendment to the Constitution.[256] Holmes dissented on the ground that the abolition of slavery did not limit the power of the government to compel an employee to continue working until he paid off his debts.[257] And, in *Meyer v. Nebraska*, he dissented when the majority refused to permit Nebraska to criminalize the teaching of languages other than English.[258] Holmes found no legitimate reason to prevent the government from intruding upon an individual's personal life, including his right to private decision-making. This opinion seems directly at odds with his prior opinions in support of substantive due process values.[259]

Moreover, several of his opinions for the majority of the Court are just as discouraging. In *Buck v. Bell*, Holmes had occasion to affirm his

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254. *The Soldier's Faith*, *supra* note 31, at 73.
255. *Id.* at 74-75.
256. *See* Bailey v. Alabama, 219 U.S. 219, 245 (1911).
257. *See id.* at 247 (Holmes, J., dissenting).
258. *See* Meyer v. Nebraska, 262 U.S. 390, 412 (1923).
259. *See, e.g.*, Harriman v. Interstate Commerce Comm'n, 211 U.S. 407 (1908).

acceptance of a kind of implicit inequality built into social spheres.[260] In this now infamous case, Holmes, writing for the majority, referred to the equal protection clause as "the usual last resort of constitutional arguments."[261] The Court upheld a sterilization law applicable only to mental defectives in state institutions, stating that "[t]hree generations of imbeciles are enough."[262] And even in First Amendment cases, he sometimes seemed to carry his Darwinist views to a regrettable extreme. Consider, for example, the fatalistic attitude expressed in *Gitlow v. New York*:

> If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[263]

The soldier's duty to obey majoritarian commands is not entirely consistent with more contemporary notions of the judicial function. The United States Supreme Court is an anti-democratic institution and as such it is designed in part to protect individuals from majoritarian forces. The unquestioning loyalty of the soldier, which may be virtuous in times of war, and which serves as the underpinning to the development of Holmes's doctrine of judicial restraint, was not always appropriate for a judge, particularly one on the highest tribunal of justice.

Hence, by ascribing normative principles to laws enacted by those yielding political power, that is, by finding validity and truth in laws simply because they existed, Holmes generated a kind of moral relativism not sufficiently protective of individual liberties. "Within the legal community,

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260. *See* Buck v. Bell, 274 U.S. 200 (1927).
261. *Id.* at 208.
262. *Id.* at 207.
263. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

convergence and consensus were effected by increasing reliance on procedural, morally neutral policy arguments."[264] This unwavering commitment to neutral principles at times left him bereft of a sense of responsibility. "[A] sense of responsibility is a confession of weakness. If I put all my powers into deciding the case and writing my decision, I neither feel responsibility nor egotism, nor yet altruism—I am just all in the problem and doing my best."[265] But when honor is defined by one's absolute fidelity to the dominant forces in the community, one loses the capacity for self-definition and for moral reflection; capacities that are greatly cherished under more contemporary standards.

E. Holmes's Final Deference to Fairness

As a whole, Holmes's commitment to fairness manifested both his detachment and his compassion. As explained by Professor Novick:

> A judge is subject to two mutually inconsistent duties. They correspond to the two senses in which we say that a judge's duty is to decide fairly. To be "fair" in one sense is to render judgment with a sympathetic understanding of the individual who stands before the court. But to be "fair" also means to be blind: to decide on the basis of neutral principles, without regard for the result in a particular case.
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> . . . .
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> Holmes showed few signs of a tender heart. But, when vindicating the right of free speech and other fundamental principles of the Constitution, or when insisting on fairness in the procedures of the courts, he did unite his respect for the law with, if not sympathy, detached respect and a noble regard for the freedom of the individual. These opinions accordingly rise higher than all the rest.[266]

When Holmes was confronted with a constitutional case of first impression towards the end of his tenure with the Court, he was willing to fall back on his fundamental beliefs and traditional notions of fairness. In *Olmstead v. United States*, the Court addressed the applicability of the Fourth Amendment to warrantless wiretapping by government agents.[267] The

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264. HOFFHEIMER, *supra* note 2, at 93.

265. Letter from Holmes to Canon Partick A. Sheehan (Mar. 21, 1908), *in* Luban, *supra* note 52, at 489.

266. Sheldon M. Novick, *A Critical Appraisal*, *in* 1 COLLECTED WORKS, *supra* note 21, at 123.

267. Olmstead v. United States, 277 U.S. 438 (1928).

majority analyzed the issue in terms of the privilege against self-incrimination, with parameters determined by property laws. Finding that speech is not property within the context of the Fourth Amendment, they concluded that wiretapping infringed upon an interest protected by the Fourth Amendment, and thereby the Fifth, only if it involved trespassing upon the accused's tangible property.[268] In his dissent, however, Holmes found neither the provisions of the Constitution nor the logic of precedent controlling. Consequently, he felt "free to choose between two principles of policy."[269] For Holmes, at least, the rule of decision was governed by his gentleman's idealism and his chivalrous fidelity to fairness.

> I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an *ignoble* part.[270]

In short, Holmes turned to common law principles of fairness as a source of guidance for his constitutional jurisprudence. These principles subsumed values that were both statist, as well as libertarian. To be "fair" meant for Holmes, as a judge, to find a proper balance between legislative power and personal liberty. As explained by Professor Novick:

> The boundary between legislative power and personal liberty was drawn around choices that lay at the core of that liberty, and so were in some sense fundamental. The courts, not the legislature, controlled the gateway through which government sought to enter the private space of personal choice on fundamental questions, and

268. *See id.* at 466.
269. *Id.* at 471 (Holmes, J., dissenting).
270. *Id.* at 469-70 (Holmes, J., dissenting) (emphasis added).

> Holmes accordingly found his rules of decision in the common law.[271]

As stated in an address delivered by Justice Sandra Day O'Connor, Holmes

> believed passionately in the democratic process and he generally refused to substitute his own judgment for the will of the people as expressed through legislation. At the same time, he applied the constitutional limits expressed in the Bill of Rights to the actions of government as a means of preserving the autonomy of the individual.[272]

Although his mutual and simultaneous concern did not always win him unqualified acclaim, he nevertheless engaged in the balancing process with a passion and dedication surpassed by none. Having recognized the universal in the particular, every legal issue and litigant that came before him in court received his best effort and undivided attention. Benjamin Cardozo, who would replace him on the Court, had this to say about Holmes:

> Men speak of him as a great Liberal, a lover of Freedom and its apostle. All this in truth he is, yet in his devotion to Freedom he has not been willing to make himself the slave of a mere slogan. No one has labored more incessantly to demonstrate the truth that rights are never absolute, though they are ever struggling and tending to declare themselves as such.[273]

Holmes was constantly striving for ideals. Although a skeptic who steadfastly believed that the ideal was unattainable in an ultimate sense, his whole being is a testament to the importance of the ideal as such: as a theoretical construct providing guidance and inspiration. In the end, he

> advanced arguments that supported consensus but did not require individuals to agree on important conflicting moral values. . . . [He] adopted rhetorical techniques that sought to win consent and establish community by inviting persons with conflicting values to seek unity in higher values . . . . [And he] employed the rhetoric of

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271. Sheldon M. Novick, *Holmes's Constitutional Jurisprudence*, 18 S. ILL. U. L.J. 347, 355 (1994).

272. O'Connor, *supra* note 191, at 396-97.

273. Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 687 (1931).

> transcendence to resolve—and evade—the most difficult and divisive issues.[274]

Thus, Holmes was and continues to be different things in different contexts; that is why he is so amenable to such divergent schools of jurisprudence. His lack of rigid dogmatism and his recognition of the ineffable and the organic behind legal concepts has provided much sustenance for subsequent generations of judicial philosophy. Holmes engaged in a noble undertaking—a search for meaning. And in many ways, his own intellectual development mirrors his assessment of the evolutionary development of the common law. As a result, although he never formally made a systematic presentation of his own thought, his intellectual ontogeny is the particularized version of the more general morphogenesis of the law. In other words, while Holmes is the law rendered self-conscious, the inverse is also true: The law is Holmes rendered self-conscious.

As stated by Professor Thomas C. Grey, "In his thinking he was dialectical and eclectic, a theorist who always tended to see life and law in terms of continuing struggles between opposed tendencies, neither of which could, or should, be eliminated."[275] His opinions were always related to some ideal principle; but his opinions envisage no outcome, no definitive closure. Glimpsing the universal in judicial phenomena was the affirmation that Holmes was seeking. This alone was enough.

And so, the perennial question remains: What *is* at the top of the beanstalk? We are forced to reconcile ourselves with the answer, for better or for worse, *more stalk*. The goal is in the climbing itself, not in reaching the top. In Holmes's own words, "[l]ife is an end in itself, and the only question as to whether it is worth living is whether you have enough of it."[276]

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274. HOFFHEIMER, *supra* note 2, at 93.

275. Grey, *Molecular Motions*, *supra* note 77, at 24.

276. OLIVER WENDELL HOLMES, *Speech* (March 7, 1900), *in* 3 COLLECTED WORKS, *supra* note 6, at 498, 499.