

**Common Law and Aesthetic Dissent: Oliver Wendell Holmes, Jr., Pragmatism, and the
Jurisprudence of Agon**

by

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Abstract

This dissertation investigates Oliver Wendell Holmes Jr.'s dissents that instantiate his evolutionary view of the common-law system. The style and rhetoric of his dissents drew attention to his legal propositions that undermined the law as established by the majority; in so doing, Holmes ensured that the oppositional legal proposition was retained in the legal canon so that it would be available for future judges and justices to consider and possibly vindicate. Holmes thereby guaranteed that the legal system had, in his own words, some “play in the joints” and remained flexible in order to adapt to changes in culture and technology. I examine some of Holmes’s dissents for their aesthetic and rhetorical properties to show that those properties contributed to the canonization of his writings and the vindication of his arguments. I use Richard Poirier’s notion of superfluity and linguistic skepticism, which he attributes to Holmes’s mentor Ralph Waldo Emerson, and Jonathan Levin’s notion of the poetics of transition to the genre of dissent. These theories of Poirier and Levin are about overcoming stasis and ensuring creative progress—something that is central to Holmes’s view of an evolutionary common law in which rules must change and adapt. I consider how Holmes’s canonical dissents, especially those regarding freedom of speech and expression, suggest that his model for the common law is also a pragmatic model for the way in which society can adjust effectively to change and to divided opinions among the populace.

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INTRODUCTION

Holmes and the Evolutionary Paradigm for the Common Law

This dissertation investigates the dissents of Oliver Wendell Holmes, Jr., to understand how they instantiate his evolutionary view of the common-law system. Influenced by Darwinian science and by the classical pragmatism of C.S. Peirce, William James, and John Dewey, Holmes forged a paradigm for the common law in which legal principles progressed through constructive competition and through the selective elimination of unfit theories and practices. He rejected any formulation of the law as static and unchanging. My argument is that the style and rhetoric of his dissents drew attention to his legal propositions that undermined the law as memorialized by the majority position. In so doing, Holmes ensured that the oppositional proposition was retained in the legal canon so that it would be available for future judges and justices to consider and possibly to vindicate. Holmes thereby guaranteed that the legal system had some “play in its joints” (*Bain Peanut Co. of Tex. v. Pinson* 501) and remained flexible to adapt to changes in culture and technology.

Dissenting opinions are by nature agonistic; they compete with majority opinions, push back against established precedents, multiply the range of judicial options, and diversify the franchise in legal theory. Their oppositional nature and function make them productive sites for aesthetic and theoretical experimentation. Richard Poirier and Jonathan Levin, drawing from Harold Bloom, have proposed that pragmatists in the Emersonian lineage developed their own dissenting tradition by struggling against the anxiety of influence and linguistic skepticism to produce original and lasting aesthetics. This pragmatic tradition illuminates the practice of judicial dissent in the American common-law context by showing that both law and aesthetics depend upon agon and variation to facilitate constructive change.

Poirier and Levin suggest that agonistic struggles maximized the Emersonian pragmatists' creative energies and generated a superfluous aesthetic that enacted the poetics of transition by influencing future writers in the same tradition. Holmes is part of this tradition. Emerson was his mentor. Holmes was a member of the Metaphysical Club who adopted his own type of pragmatism compatible with common-law jurisprudence. He struggled not only against the anxiety of influence and linguistic skepticism but also against majority positions and the doctrine of *stare decisis*. Studying Holmes's dissents shows that the problem of linguistic skepticism that stimulated the originality of the Emersonian pragmatists operates comparably in the legal context in which utterances constitute rules that guide social activity. By dissenting with a style that demanded attention, Holmes struggled against the textual and institutional limitations that were also the sources of his ingenuity. He availed himself of superfluity to unsettle majority positions and to enable a constructive vagueness in the law that future judges and justices were forced to confront, interpret, and overcome. "Style" in this sense refers not just to the complex, allusive, learned, and paradoxical dimensions to Holmes's writing but to his facility with metaphor, sound, rhythm, and figurative language that are uncommon in legal writing.

Dissents are superfluous for the parties and issues under consideration because they do not affect the disposition or outcome of the case. Their weight and effect are only potential; their arguments may be adopted or realized only in the future. Because they do not obtain as law, dissents lend themselves to creative experimentation. The author of a dissent has wider latitude to register legal arguments in a memorable fashion. Holmes inspired a tradition of creative dissent. In part because of their literary and rhetorical power, his dissents have been taught, read,

and cited in law schools and have enabled his legal arguments to persist in the legal canon and to become, in some cases, the majority position.

The Great Dissenter

This dissertation is the first work of its kind to examine Holmes's dissents as an aesthetic genre. Most scholarly treatments of Holmes's dissents concern those who study and shape United States constitutional law and do not interest those who study language, literature, or even pragmatism. Legal scholarship on Holmes lacks literary and rhetorical perspective that a combination of Emersonian aesthetics and pragmatic philosophy can supply. This is also the first extensive non-biographical work to consider the theoretical relationship between Emerson and Holmes and to focus on their mutually illuminating uses of language and influence. Although the rapport between these men is mentioned in biographies and discussed in essays and articles, no one has adequately drawn out the jurisprudential implications of their relationship through the matrix of literary theory and pragmatism. Because an exhaustive exploration of Emerson's influence on Holmes would require more examination than is possible in one dissertation, I consider Emerson through the lens of Poirier and Levin, whose theories of superfluity, linguistic skepticism, and the poetics of transition provide an Emersonian framework within which to explore Holmes's dissents. I synthesize Poirier and Levin not merely to reveal previously unexplored affinities but to devise new pragmatic and aesthetic approaches to Holmes's common-law jurisprudence and dissents.

Holmes is frequently referred to as the Great Dissenter, but this dissertation is the first work to present comprehensive numerical data about his dissenting opinions and to demonstrate empirically that his dissents are significant not for their quantity but for their quality. Although they have been accessible for many years, Holmes's papers have only recently been digitized by

Harvard Law School in an easily searchable online archive. These archives include some materials that nobody has written about outside the biographical context. The sudden online proliferation of primary sources on Holmes opens new directions for scholars concerned with his intellectual influences and with his notions of language and interpretation. This dissertation situates Holmes and his writings within the pragmatic, aesthetic tradition associated with Emerson and mapped out by a long list of scholars seeking answers to a question posed by Stanley Cavell: what is the use of calling Emerson a pragmatist?

To varying degrees and with differing styles, Harold Bloom, Richard Poirier, Louis Menand, Joan Richardson, and Jonathan Levin strike out at Cavell's question, which implies a negative answer, by developing and exploring a tradition of writers whose work points back to Emerson. By adding Holmes to the mix, I show how this canon is plugged into the practical and administrative machinery of government as manifest in the judicial branch, which, in the United States, models itself on its precursor, the British common-law system, albeit within a constitutional framework. My work is pragmatic, focusing on the application of theory by an institution that is designed and authorized to control and regulate society. Holmes deployed his Emersonian agonism and aesthetics in an arena that determined how society considered punishment, restitution, marriage, voting, contracts, torts, taxes, spending, race relations, legislation, the prison system, debt, banking, civil rights—in short, almost every conceivable zone of civil society. Authors do not have to acknowledge their influences. In a common-law system, however, there can be no law unless or until it is linked to some proper authority, either case precedents or statutes or constitutional provisions. We can therefore trace clearly how Holmes's dissents have transitioned from non-binding to binding legal authority and state with

certainty whether some later judge or justice was relying on Holmes when she issued her opinion.

The Evolutionary Paradigm of the Common Law

Holmes's evolutionary conception of the common law is at loggerheads with the more superficial, august, and magisterial conception of the common law as a reflection of divine will written on men's hearts and aligned with sacred scripture and the laws of nature. This latter conception is undermined by history: the common law has been many things at many times and has been executed by courts of competing jurisdiction—the chancery courts, the courts of exchequer, the courts of assize, the courts of common pleas, the king's bench, the general eyres, and so on—before descending into the American constitutional context. Dissents support the evolutionary conception of the common law because they imply that binding rules and principles are always subject to change and adaptation: Why would a judge or justice dissent if not to shape the future of the law? Holmes wrote in one dissent that the “common law is not a brooding omnipotence in the sky” (*Southern Pacific Company* 222). “We do not realize,” he remarked on another occasion, “how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind” (Holmes, “The Path of the Law,” 466). In *The Common Law* he employed Darwinian terminology to describe how a “rule adapts itself to the new reasons which have been found for it, and enters on a new career” so that the “old form receives new content” and “in time [...] modifies itself to fit the meaning which it has received” (Holmes, *The Common Law* 4). He maintained in this regard that the law “is forever adopting new principles from life at one end” while “always retain[ing] old ones from history at the other, which have not yet been absorbed or sloughed off” (Holmes, *The Common Law* 25). This line echoes Emerson's proposition that “every law [...] was a man's expedient to meet a particular case” and that all

laws are “imitable” and “alterable” (Emerson, “Politics” 559). Holmes saw in the common law the embodiment of what Emerson called “the very oldest of thoughts cast into the mould of these new times” (Emerson, “The Transcendentalist” 193). In the United States, where the common law perseveres in method if not in name, the “laws and institutions exist on some scale of proportion to the majesty of nature,” not on the imposition of legislative fiat (Emerson, “The Young American” 217). Holmes decried proponents of a fixed natural law because he agreed with Emerson that “[t]here are no fixtures in nature” or in a “universe [that] is fluid and volatile” (Emerson, “Circles” 403). Dissents make possible in fact what Holmes suggested was true in theory, vesting in case precedent the proliferating potential for modification in light of changed circumstances. Dissents ensure that in the common-law system every “general law” is “only a particular fact of some more general law presently to disclose itself” (Emerson, “Circles” 405). Holmes’s dissents and evolutionary jurisprudence place him squarely in the pragmatic aesthetic tradition that Joan Richardson charts in *A Natural History of Pragmatism* (2006) and *Pragmatism and American Experience* (2014). Richardson ascribes this tradition to Darwin and Emerson and the methods and movements they inspired. Absent an engagement with Holmes, her work suffers from a deficit that this dissertation helps to repair.

This dissertation also positions Holmes’s jurisprudence in contradistinction to the paradigm of a static and unchanging common-law system. It is widely accepted that Sir William Blackstone represents the tradition viewing the common-law as static and unchanging and that Holmes represents the tradition viewing the common-law as dynamic and fluid.

¹ One biographer claims that Holmes “shook the little world of lawyers and judges who had been raised on Blackstone’s theory that law, given by God Himself, was immutable and eternal and judges had only to discover its contents” (Baker 257). “Holmes,” she says, “wrested legal

history from the aridity of syllogism and abstraction and placed it in the context of human experience, demonstrating that the corpus of the law was neither ukase from God nor derived from Nature, but, like the little toe and the structure of the horse, was a constantly evolving thing, a response to the continually developing social and economic environment” (Baker 258). The “immutable principles” of Blackstonian common law suffered from an “inertia” that prevented them “from dealing with the disorder and changefulness and all the other complexities of nineteenth-century life” (Baker 249). “A hundred years ago,” Holmes wrote just over a century after Blackstone published *The Commentaries*, “men explained any part of the universe by [...] demonstrating what they conceived to be its final cause according to a providential scheme. In our less theological and more scientific day, we explain an object by tracing the order and process of its growth and development from a starting point assumed as given” (Holmes, “Law in Science and Science in Law” 443).

Although the Holmes/Blackstone dichotomy is permeable and subject to interrogation, it is a useful hermeneutic for emphasizing the central differences between two modes of jurisprudence in the United States. This dissertation suggests that pragmatism influenced Holmes’s thinking about the common law and about the dissent as an agonistic genre that allowed for literary creativity while enabling growth and improvement in the rules adumbrated in case precedents. Critical to this dissertation is the literary theory of agon, a mode of creative influence that resonates in the common-law context in which all laws are the product of argumentation and suasion and in which judges and justices issue dissenting opinions to counteract or offset rivaling contentions. Bloom has spent his career nurturing and improving the concept of agon. His most recent effort, *The Daemon Knows* (2015), promotes a theory of

literary greatness that the following chapters irradiate, although his infatuation with the daemon and shamanism push him into oracular and ahistorical thematizing that is incompatible with my pragmatic project.

Chapter one of this dissertation provides empirical data about Holmes's writings as a justice on the United States Supreme Court to show that Holmes is remembered as the Great Dissenter because of the aesthetic properties of his dissents, not because he was a prolific dissenter. Richard Poirier's theories about literary or rhetorical "superfluity" in the tradition of Emerson, William James, Robert Frost, Gertrude Stein, Wallace Stevens, and T.S. Eliot shed light on Holmes's literary or rhetorical superfluity in his judicial dissents. The term *superfluity* signifies the creative urge to overcome, outdo, move beyond, facilitate, generate, push forward, transcend, outlast, or surpass. Like genius according to Emerson, superfluity "looks forward" and "creates" (Emerson, "The American Scholar" 58). Superfluous language "smites and arouses" with its "tones," "breaks up" our "whole chain of habits," and "opens" our eyes to our own "possibilities" (Emerson, "Circles" 409). It is characterized by an extravagance of style that consists of sound, metaphor, rhythm, and complexity. Poirier portrays his subjects as agents of superfluity in their struggle against linguistic skepticism and as both responders to and enablers of the anxiety that accompanies an awareness that language is vague and arbitrary and never in complete agreement with its referents.

Like the poetry and poetic prose of Poirier's subjects, Holmes's dissents sought to overcome and surpass the stasis resulting not just from the anxiety of influence and linguistic skepticism but from the institutional restraints imposed by case precedents and majority opinions. The fluidity and vagueness of language that compel linguistic skepticism problematize

the very utterances that obtain as law. Examples arise whenever judges and justices undertake to interpret the meaning of a statute, an exercise complicated by the concept of meaning itself. Holmes explained to this end that “[d]ifferent rules conceivably might be laid down for the construction of different kinds of writing” and that “[i]t is not true that in practice [...] a given word or even a given collection of words has one meaning and no other” (Holmes, “The Theory of Legal Interpretation” 419, 417). Holmes recognized that a “word is not a crystal, transparent and unchanged” but rather “the skin of a living thought” that “may vary greatly in color and content according to the circumstances and the time in which it is used” (*Towne* 425). There is much at stake when the diction and syntax that constitute the law lack the clarity and consistency on which people base their decisions. In Holmes the tension between stability and uniformity on the one hand and dynamism and transition on the other hand comes to a head. He never completely resolves this tension, which may defy resolution, but he does suggest that “the substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient,” even though “its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past” (Holmes, *The Common Law* 1). What Holmes calls the “substance of the law” is language itself; all rules and regulations are conveyed in utterances. Language is a system of representation; it never completely corresponds with its referents in the phenomenal world. According to Poirier, if language “is to represent the flow of individual experience,” it “ceases to be an instrument of clarification or of clarity and, instead, becomes the instrument of a saving uncertainty and vagueness” (3-4). Uncertainty and vagueness in the law are inevitable because of the changing nature of language as well as the changing social circumstances that language facilitates and

describes. The manner in which language obtains as law in one time and setting will differ in another time and setting because the meaning of language itself depends upon context and situation. The word “child” may signify one thing in a case about an aborted fetus and another thing in a case about intestate succession or an award of custody or alimony. Holmes accordingly saw the need for the law to adapt and to adjust. His dissents were colored with superfluity to undermine the clarity and authority of the majority position. His dissents became instruments of a saving uncertainty and vagueness by destabilizing prevailing rules and by convincing future judges and justices to reconsider the arguments—the language—that did not attain a majority the first time around.

The pragmatic common-law tradition of Holmes and the pragmatic literary tradition of Emerson share a root concern not only with the inheritance of past forms and ideas but also with future forms and ideas that must be anticipated and articulated in the present. Holmes like Emerson inaugurated a style that attracted future adherents whose transformative creativity both extended and revised the tradition. Holmes operated on Emerson’s dictum that society did not lie “before him in rigid repose” but was “fluid” (Emerson, “Politics” 559). His common-law paradigm comports with Emerson’s premise that the “law is only a memorandum” (Emerson, “Politics” 559), a product of our “political institutions” that “are not better” than “any other in history” but rather “fitter for us” and “in coincidence with the spirit of the age” (Emerson, “Politics” 563). Holmes and his progeny such as Louis Brandeis, Benjamin Cardozo, John Paul Stevens, and Antonin Scalia have struggled against their judicial precursors just as Emerson and his progeny struggled against their literary precursors; both aesthetic camps sought to communicate with and to influence future generations with the originality and strength of their

language. Their ability to do so implicates Jonathan Levin's theory about poetic transition that brings "the familiar" (or the majority position that represents the law) "into contact with the unknown" (or the dissent that represents non-law) and that "familiarizes the strange" while "estranging the familiar" (Levin 3). Judges and justices subvert the settled rules of cumulative majority positions by writing dissents to both validate and give audience to a disorienting and unsettling legal position, one that goes against the grain of precedent. The authors or judges and justices who over time have succeeded in yielding the poetics of transition together form a canon known for its aesthetic distinction. These men and women followed their "instinct" to press "eagerly onward to the impersonal and the illimitable," to improve our conditions and circumstances even if we can never achieve "the Unattainable" or "the flying Perfect" (Emerson, "Circles" 403). These men and women, moreover, are the generative speakers who "[strike] a new light" and "[emancipate] us from the oppression of the last speaker" before "yield[ing] us to another redeemer" (Emerson, "Circles" 408), thus enabling the collaborative, spontaneous, contradictory, and gradual generation and regeneration of the normative rules that shape, bind, and reflect majority thinking and social convention.

Chapter two examines the reception and legacy of Holmes's dissents to demonstrate that his dissenting views have become vindicated and hence that the common-law system is, in fact, adaptive and meliorative. The theory of the poetics of transition derived from Richard Poirier and made comprehensive by Jonathan Levin can pertain as much to poetry and works of imaginative literature as to judicial opinions. The theory of the poetics of transition is predicated on Emerson's notion that "[p]ower ceases in the instant of repose" and "resides in the moment of transition from a past to a new state" (Emerson, "Self-Reliance 271). Such poetical transition

can occur when a dissenting opinion transitions from non-law into law in part because of the rhetorical properties of the dissent. The transitional ethics and dynamics of pragmatism first enunciated by Levin have become important subjects of contemporary study.² My emphasis on Holmes's superfluity unearths legal dimensions to those transitional processes that constitute the "temporal and historical media in virtue of which we work through a situation from old to new, past to future, prior to posterior" (Koopman 11).

Poirier's subjects thrive on opposition: each author struggles against the ideas and practices of his or her greatest influences while striking out against the stasis of unoriginality and the restrictions of language. Poirier's trace accounts of literary influence and his suggestion that forms and methods are passed from author to author warrant a comparison with the common-law system in which judges and justices struggle against their peers and against established case precedents. Holmes's dissents in particular make Poirier's and Levin's theories of influence, as expressed in terms of superfluity and the poetics of transition, both useful and legible beyond the typical pragmatist associations with such authors as William and Henry James, George Santayana, Wallace Stevens, Gertrude Stein, and Robert Frost. This chapter examines three of Holmes's dissents for evidence of the Emersonian superfluity that brought about the poetics of transition in the form of judicial vindication. These dissents are placed alongside Holmes's letters about sound and language which demonstrate that his superfluity was deliberate and designed for its lasting effect or ability to survive in the canon. Although this chapter accounts for federal appellate citations to Holmes's dissents, it treats these citations as evidence of influence rather than of vindication because dissents can be vindicated even apart from future appellate citations as long as the reasoning or conclusion of those dissents is adopted by a later

court or legislature. Holmes's resort to style and sound rather than syllogisms suggests that he sought to advance the common-law system through enthymematic reasoning. Vindicated dissents such as his show how a state of deliberate vagary and unrest in the law can facilitate judicial adaptation to the social environment and overcome dominant legal trends. As the canon of case precedents grows and expands, dissents can serve as corrective mechanisms: they can provide alternative theories from which to adopt lines of reasoning and with which to shape the normative orders that reflect and define the ethos of the time and place while retaining what is indispensable from past times and places.

The theories of Poirier and Levin involve a type of canon formation that resembles the canon formation of cases within the common-law system. Chapter three argues that creative struggles in judicial opinions and dissents in the United States develop into a dynamic canon of juxtaposed legal theories and principles that resolve themselves through their practical application and their constant revision by subsequent judges and justices. Such resolution is never about achieving pure wholeness of thought but about balancing contradictions and sustaining multiple, energetic dialectics. These dialectics do not solidify into a single compromise or synthesis but preserve competing binaries and gradually wear away theories that are no longer suitable for the social and technological environment. The canons of the common-law system in the United States are analogous to literary canons as defined and described by Bloom and Richard Posner. Bloom, a literary critic, and Posner, a judge, both refer to their theory of canon formation as pragmatic and evolutionary; both maintain that a canonical work is one that continues to be read because it remains fit for future environments and relevant to future readers—because, in short, it has a lasting effect. The United States constitutional canon is made

up of canonical and anticanonical cases that struggle against each other in an agonistic contest for authority; a unique literary or rhetorical quality of an opinion or dissent can enhance the lasting value of that opinion or dissent. A literary or legal canon cannot advance and progress without the possibility of new texts undermining the authority of prior texts, hence the importance of dissent. Like Emerson, Holmes has become known as a “prophet” or “seer” because his dissents were able to become canonized by speaking to future audiences and by remaining fit for later environments. The aesthetics and style of Holmes’s dissents enabled their fitness by drawing attention to their arguments. They guaranteed that his legal positions did not “pale” and “dwindle” before “the revelation of a new hour” (Emerson, “Circles” 405). His most canonical dissents involve his First Amendment jurisprudence regarding freedom of speech and expression. His views on the First Amendment evolved, and as he grew more tolerant of dissenting opinions in the social and political sphere he also began to author more dissents from the bench. His First Amendment jurisprudence parallels his agonistic, evolutionary conception of the common law in that it championed the free interplay of competing ideas as the best means for filtering the good from the bad. In his view, ideological competition ensured that contest and disagreement remained rhetorical and discursive and did not degenerate into brute force or physical violence. The case for rhetorical and theoretical struggle is also, according to Holmes, the case for practical and institutional tolerance; agon is paradoxically about neutralizing conflict. Holmes’s canonical dissents regarding the First Amendment suggest that his model for the common law is also a pragmatic model for the way in which society itself can adjust to change and to divided opinions among the populace.

Holmes's First Amendment jurisprudence is imbued with peacefulness, despite its couching in martial metaphors and military diction that recall his soldier past. As a student at Harvard, Holmes served as a bodyguard for the abolitionist Wendell Phillips. He later enlisted in the infantry before joining the Twentieth Massachusetts, a regiment that lost five eighths of its men (Lerner xxiii). He was wounded at the Battle of Ball's Bluff in October of 1861, when he took a bullet to his chest; the bullet passed through his body without touching his heart or lungs. In September of 1862 he was wounded at the Battle of Antietam, a bullet having passed through his neck. In May of 1863, at Marye's Hill, close to where the battle of Fredericksburg had taken place six months earlier, Holmes was shot and wounded a third time. This time the bullet struck him in the heel, splintered his bone, and tore his ligaments; his doctors were convinced that he would lose his leg. He did not, but he limped for the rest of his life. These experiences were philosophical determinants for Holmes, shaping his view that true violence could be curtailed if conflict and competition were limited to discursive and rhetorical struggles and dispersed among distant communities rather than concentrated in one centralized body of powerful actors.

Chapter four, the final chapter, adduces reasons for the compatibility of pragmatism with Holmes's evolutionary paradigm of the common law, revealing that Holmes more than anyone integrates the disparate elements of what is now called the "classical pragmatism" founded by Peirce, William James, and Dewey. Holmes's common-law theory shares with Peirce a consensus-based methodology for ferretting out the rules that govern phenomena, with James a respect for pluralism and variety, and with Dewey an instrumentalist approach to social inquiry. Theories of pragmatism have become so intertwined with theories about the common law as established in the United States that Thomas Grey has insisted that "pragmatism *is* the implicit

working theory of most good lawyers” (1590, emphasis added). Posner has likewise insisted that “most American judges have been practicing pragmatists” (Posner, “What Has Pragmatism” 1666). What makes Holmes’s pragmatism jurisprudentially unique is its use of Emersonian aesthetics to draw attention to antagonistic arguments, which, by their very antagonism, ensure that competition among ideas continues in the legal canon. Holmes understood that language and representation can impact the probability of replication and that rhetoric can code wording and syntax with such potency that the underlying ideas become copied and made numerous. Rhetorical superfluity can supply the language of the law with the maximum fitness for survival and increase the chance of multiple propagation. Each synthetic statement in common-law cases can self-replicate into a complex variety that exceeds one judge’s capacity for complete comprehension but that nevertheless embodies the communal or corporate knowledge from which a judge derives experiential discernment. In a civil law system the codified rules and regulations of a centralized legislative body represent the principal source of the law. Holmes appreciated the common-law system because, unlike a civil code, it comported with his pragmatic cognition whereby critical control is dispersed among authorities and jurisdictions and the law is like a continuous stream without definite boundaries. The common-law judge discriminates among possibly workable rules and standards within an unbroken chain of successful antecedents, envisioning the effects of his ruling and hoping that his own choices prove fit for replication because he has achieved the right and just result. Judges in this endless operation are, in effect, conduits through which pass the strongest principles that are differentially replicated and selectively retained.

Holmes's evolutionary paradigm for the common law is politically noncommittal and redolent of philosophical pragmatism as a mode of knowing or a method of learning rather than as a form of social advocacy or partisan lobbying.³ Pragmatists have been politically conservative and politically liberal, and pragmatism as a system of thinking does not lead inexorably to a political program or agenda, only to theoretical postulates that answer concrete problems. Acrimonious attempts to assign political labels to Holmes fail because they do not account for his relative indifference to the normative models, superlative abstractions, simplistic hypotheticals, and general histrionics that characterize popular politics. Allergic to current events and partisan dogma, Holmes did not read newspapers; after the Civil War, he was not active in social causes. He remained aloof from the political arena, preferring simply to ride the wave of evolutionary progression or regression, accepting his modest role as one jurist in a vast web of inferential and situational legal processes that, without any intentional design or plan, formulate and reformulate the canon of rules and precedents making up the common-law system.

Varieties of Emerson

Holmes was raised in the milieu of the literary Boston Brahmins, one of whom was Holmes's father, Oliver Wendell Holmes, Sr., a colorful and outspoken figure, a poet, doctor, and socialite, author of the popular *Autocrat of the Breakfast Table* series and a darling of the Harvard elite. Because of his father's reputation and connections, young Holmes, or "Wendell," as he was known before he reached the age of maturity, was blessed to grow up among the intelligentsia and specifically among such giants as Emerson (who reportedly became "Uncle Waldo"), Henry Wadsworth Longfellow, William Ticknor, James Fields, and James Russell Lowell. There were many prominent visitors to the Holmes residence, and the regular company

of sophisticated minds seems to have left a lasting impression on Wendell, who was always bookish and curious. Holmes never abandoned his interest in Emerson. He maintained his correspondence with Emerson after the Civil War and mimicked Emerson's prophetic voice in his writings. Roughly a decade before *The Common Law* reached print, Holmes's involvement as a member of the Metaphysical Club—a philosophical conversation group that numbered among its participants Peirce, William James, Chauncey Wright, John Fiske, and Francis Ellingwood Abbot—immersed him in the ideas of pragmatism. No investigation of Holmes's common-law jurisprudence is adequate to the task absent the backdrop of Emerson and pragmatism.

There is a long tradition of scholarship regarding Emerson's pragmatism. Among those who have written about Emerson's pragmatism are Russell B. Goodman, Giles Gunn, Poirier, Cornel West, Joan Richardson, Levin, and James M. Albrecht. Even earlier, Kenneth Burke noted that "we can see the incipient pragmatism in Emerson's idealism" (*Grammar of Motives* 277) and that "Emerson's brand of transcendentalism was but a short step ahead of an out-and-out pragmatism" (Burke, "I, Eye, Ay" 191). Goodman analyzed Emerson as "America's first Romantic philosopher" (35), the counterpart to Wordsworth, Coleridge, and Carlyle (34) whose idealism would influence William James and later John Dewey and Stanley Cavell (34, 68). Gunn examined while contributing to the critical renaissance of American pragmatism in the 1990s (2); he suggested that Emerson cast a long shadow "at the commencement of the pragmatist tradition in America" (17) and that Emerson belonged to a family of writers that included Henry James, Kenneth Burke, John Dewey, Frank Lentricchia, and others. To reach this conclusion, Gunn adopted a more diffuse definition of pragmatism that went beyond the

philosophical tradition of Peirce, Dewey, George Herbert Mead, Sidney Hook, Morton White, Richard Bernstein, John McDermott, and Richard Rorty (2). He attended to aesthetically charged political texts presented not only by Emerson but also by W.E.B. DuBois, James Baldwin, Flannery O' Connor, Elizabeth Hardwick, Poirier, Cornel West, Clifford Geertz, and Stanley Fish. Gunn left behind James's "somewhat restricted focus on the nature of knowledge and the meaning of truth" and turned instead to literary and cultural works that affected social issues (4). Gunn's focus on the social indicates a debt to Dewey, and his valuation of Emerson must be considered in a Deweyian context. That Emerson is a pragmatist is somewhat implied or tacit in Gunn's account; his discussion is not about what elements of Emersonian thought evidence pragmatism but about how Emerson influenced Henry James Sr. and his sons William and Henry, who in turn influenced a host of other writers; how Emerson spearheaded an American tradition of strong poets and transmitted optimism to subsequent writers; and how Emerson cultivated aesthetic rhetoric and anticipated progressive sociopolitical thought.

If Gunn is a bridge between classical philosophical pragmatism and neopragmatism of the aesthetic variety, Poirier was neither classical philosophical nor neopragmatist, eschewing as he did the logics and empiricism of Pierce and James as well as the political agitating of some of Gunn's subjects. Poirier concentrated above all on the literary and cultural aspects of pragmatism: not that these aspects are divorced from politics, only that their primary objective is aesthetic or philosophical rather than partisan or activist.

Poirier sought to "revitalize a tradition linking Emerson to, among others, [Gertrude] Stein, and to claim that new directions can thereby be opened up for contemporary criticism" (17). He, like Gunn, was frank about his attempt to expand the pragmatist canon that

purportedly began with Emerson. “As Emerson would have it,” he explained, “every text is a reconstruction of some previous texts of work, work that itself is always, again, work-in-progress” (17). This constant, competitive process of aesthetic revision gives rise to a community of authors whose mimetic activities gradually form and reform a canon that resembles and functions like the constantly reformulating legal principles in a common-law system: “The same work gets repeated throughout history in different texts, each being a revision of past texts to meet present needs, needs which are perceived differently by each new generation” (Poirier 17-18). Within this revisionary paradigm, Poirier heralded Emerson as the writer who “wants us [...] to discover traces of productive energy that pass through a text or a composition or an author, pointing always beyond any one of them” (38).

Cornel West explored the radical implications of pragmatism to democracy in the works of Emerson, Peirce, William James, Dewey, Sidney Hook, C. Wright Mills, W.E.B. DuBois, Reinhold Niebuhr, Lionel Trilling, Roberto Unger, and Michel Foucault. Unlike the interpreters of pragmatism discussed above, West extended the pragmatist canon from America to the European continent and professed a radical preoccupation with knowledge, power, control, discourse, and politics (3); like the previous interpreters, however, he acknowledged the family resemblances among disparate pragmatist thinkers and their ideas and so, in Nietzschean or Foucaultian fashion, undertook a “genealogy” of their traditions. Recent work by Colin Kooper has run with the historicist compatibilities between genealogy and pragmatism to articulate novel approaches to cultural studies.⁴ Although the topic exceeds the scope of this dissertation, genealogical pragmatism might serve as a promising methodology for future studies of the common-law system.

“My emphasis on the political and moral side of pragmatism,” West explained, “permits me to make the case for the familiar, but rarely argued, claim that Emerson is the appropriate starting point for the pragmatist tradition” (6). West’s emphasis on pragmatism as a “new and novel form of indigenous American oppositional thought” has an interesting valence with Holmes’s new and novel form of judicial dissent from the majority and plurality opinions of the U.S. Supreme Court and lends credence to the proposition that Holmes is an Emersonian agonist (8). Holmes’s jurisprudence was oppositional, in other words, although not radical in the sense that West means. West credited Emerson with enacting “an intellectual style of cultural criticism that permits and encourages American pragmatists to swerve from mainstream European philosophy,” and Holmes’s dissents likewise moved American jurisprudence away from its British origins—especially from Blackstonian paradigms of the common law—and towards an oppositional paradigm modeled off theories of Darwinian struggle (9).

Richardson borrows a phrase from Darwin, “frontier instances,” which he borrowed from Francis Bacon, to trace the continuity of pragmatism in American life and thought. Her argument “proceeds by amplification, a gesture mimetic of Pragmatism itself, each essay illustrating what happened over time to a form of thinking brought over by the Puritans to the New World” (1). She treats pragmatism as a uniquely American philosophy and more impressively as an organism that develops through natural selection: “The signal, if implicit, motive of Pragmatism is the realization of thinking as a life form, subject to the same processes of growth and change as all other life forms” (1). Her diverse subjects signal the definitive expositors of pragmatism for their respective eras: Jonathan Edwards, Emerson, William and Henry James, Wallace Stevens, and Gertrude Stein. Her Emerson is a visionary who retained a

ministerial or spiritual philosophy but who repackaged it in less conventionally Christian terms than his Puritan, evangelical predecessors (62-65). Richardson explains that Emerson imperfectly replicated the work of Old Testament prophets and New Testament apostles to make it apprehensible in the rapidly changing American context (65-97). Her latest book endeavors to untangle the knot of pragmatism and transcendentalism, searching Cavell for illumination regarding the perceived mismatch between these two prominent schools of American philosophy (Richardson, *Pragmatism and American Experience* 126-158).

Albrecht interrogates the term “individualism” and describes its currency within a pragmatic tradition that runs from Emerson, William James, and Dewey to Kenneth Burke and Ralph Ellison. Unlike the aforementioned scholars of Emerson, who “do not resolve the question of how far, and to what purpose, one can claim the ‘pragmatic’ character of Emerson’s thought,” Albrecht comes close to a practical answer that is made more insightful and understandable in light of Holmes’s judicial writings that appear in media (opinions and dissents) that control rather than merely influence social patterns (Albrecht 30-31). Albrecht strikes a balance between radical and conservative characterizations of pragmatism, “which gets accused of [...] contradictory sins: it optimistically overestimates the possibilities for reform, or it succumbs to a conservative gradualism; it is too committed to a mere, contentless method of inquiry that undermines the stability of traditional meanings, *or* its emphasis on existing means places too much weight on the need to accommodate existing customs, truths, and institutions” (Albrecht 17, emphasis in original). The same could be said of the common-law tradition that Holmes adored and about which he authored his only book, *The Common Law*, in 1881. Albrecht never mentions the common law, but there is a mutual radiance between his analysis of

Emerson and the longstanding notion of the common law as the gradual implementation and description of rules by courts, aggregated into a canon by way of innumerable cases and in response to changing social norms. Nor does Albrecht mention Holmes, whose Emersonian contributions to pragmatism only affirm Albrecht's contention that "there are important benefits to be gained not by calling Emerson a pragmatist, [...] but by reading Emerson pragmatically—by applying the fundamental methods and attitudes of pragmatism in order to highlight the ways in which similar attitudes are already present in, and central to, Emerson" (30). One such benefit involves the sober realization that Holmes's Emersonian pragmatism cannot be or ought not to be distorted to mean an equivalence with contemporary and coordinate signifiers such as "Left" and "Right," "Liberal" and "Conservative," for there are as many self-proclaimed "Conservative pragmatists," to borrow a term from the jurist Robert H. Bork (3), as there are Cornel Wests: thinkers "concern[ed] with particularity—respect for difference, circumstance, tradition, history and the irreducible complexity of human beings and human societies—[which] does not qualify as a universal principle, but competes with and holds absurd the idea of a utopia achievable in this world" (Bork 4).

Due to the long line of scholars celebrating and studying Emersonian pragmatism, Albrecht is able to remark, "The notion that Emerson is a seminal figure or precursor for American pragmatism is no longer new or controversial" (18). He extends and affirms a scholarly tradition by depicting "an Emerson whose vision of the limited yet sufficient opportunities for human agency and power prefigures the philosophy of American pragmatism" (29). More important than Albrecht's being the latest link in a chain is the clarifying focus he provides for examining an Emersonian Holmes by attending to two ideas that comport with

common-law theory: first, that Emerson prefigured James by walking a line between monism and pluralism and by emphasizing the contingency and complexity of natural phenomena; and second, that Emerson considered ideas as derived from past experience but open to creative revision in keeping with present circumstances. Regarding the first, Albrecht seeks to undermine a prevailing assumption that Emerson was some kind of absolute idealist, as even William James suggested (Albrecht 32, 36-42, 47-48). Albrecht's argument is based on the position that Emerson rejected essentialisms and envisioned a cosmos consisting of competing forms and ideas that grow and evolve because of their competition. Regarding the second, Albrecht seeks to show that although Emerson imagined himself as breaking from past forms and ideas, he also regarded the past as indispensable to our understanding of the present and as necessary for generating and cultivating creative dynamism; the past is inescapable and must be utilized to shape the present, in other words. "All attempts to project and establish a Cultus with new rites and forms, seem to me vain," Emerson preached in this vein in his Divinity School address, adding that all "attempts to contrive a system are as cold as the new worship introduced by the French to the goddess of Reason[.] [...] Rather let the breath of new life be breathed by you through the forms already existing" (Emerson, "Divinity School Address" 91).

Albrecht promises an Emerson who recounts the mimetic and derivative nature of creativity and genius; yet his portrait of Emerson is incomplete without Poirier, who describes an Emersonian stream of pragmatism flowing with idiomatic, resonate, sonorous, and figurative language. Poirier's notion of superfluity is central to understanding Holmes's Emersonian role within a common-law system where "[e]very several result is threatened and judged by that which follows" (Emerson, "Circles" 405). In the common-law system according to Holmes a

“rapid intrinsic energy worketh everywhere, righting wrongs, correcting appearances, and bringing up facts to a harmony with thoughts” as they are permuted in case precedents (Emerson, “Divinity School Address 77). Poirier’s notion of Emersonian superfluity involves a thinker’s “continual effort to raise himself above himself, to work a pitch above his last height,” and to push the syntactical and intellectual boundaries so as to avoid having “the same thought, the same power of expression, to-morrow” (Emerson, “Circles” 406). Superfluity is an attempt to realize in language the restive impulse to drive forward and reenergize, to prophesy and transcend. It characterizes language that is designed to “stir the feelings of a generation” (Holmes, “Law in Science and Science in Law” 443), or less grandiosely to compensate rhetorically for the inability of the written word to realize the extraordinary power of an idea or emotion.

Emerson’s superfluity evinces several influences, too many to list but some of which merit discussion. At Harvard he studied Hugh Blair’s *Lectures on Rhetoric and Belles Lettres* (1983), which “treated figurative language [...] as the natural clothing of the energetic and passionate speech of ordinary people” (Richardson, *Emerson: The Mind on Fire* 7). He grew interested in Francis Bacon as a stylist and learned from reading Thomas Blackwell “that the words for poet and prophet are the same in Hebrew” (Richardson, *Emerson: The Mind on Fire* 12). He was impressed by the “original force” of an oration by Sampson Reed (Richardson, *Emerson: The Mind on Fire* 16). The essays of Montaigne inspired him with their fluid, pragmatic, diversionary, open, recursive, and meandering style (Robinson 100-102; Levin 17; Goodman 53; Poirier 40). From his paternal aunt Mary Moody Emerson, who was “bold, vigorous, [and] extravagant” (Richardson, *Emerson: The Mind on Fire* 25), a “visionary” and

“almost a prophet” whose “energy was phenomenal” and “limitless” and whose “force of character” was “enormous,” he learned a “strange style” that was characterized by “great energy, beauty, and intensity,” all elements of his emergent superfluity (Richardson, *Emerson: The Mind on Fire* 23). Her correspondence was “high-energy” (Richardson, *Emerson: The Mind on Fire* 23); she and Emerson wrote missives to each other until she died in 1863. She was Emerson’s “chief mentor” (Rusk 36). He called her the “best writer in Massachusetts” (Richardson, *Emerson: The Mind on Fire* 23), and she authored the “prophetic” prayers that Emerson, still a young boy, would read aloud each morning shortly after his father’s death (Rusk 31). In his thirties Emerson meticulously copied her letters and notebooks into a nearly 900-page manuscript with an index (Richardson, *Emerson: The Mind on Fire* 25). Once he complained to her about his writer’s block; she replied that his “*éclat*” could get him through his “stagnation” (Poirier 207). She more than anyone impelled his superfluity. He in turn passed it to Holmes, who used it to enact his method of common-law judging.

Against the Static Common Law

The common law figures in Holmes’s writings not as the quasi-divine expression of first principles frozen in time—the Blackstonian view⁵ that I have simplified for purposes of differentiation—but as a receptacle for filtered theories or as the latest living product of the relentless workings of natural selection. For Holmes the common law is not a unified, fixed body of rules with determinant applications that contemporary jurists can mine for certain answers and definite resolutions. Law has evolved, and continues to evolve. Such evolution has taken place in the United Kingdom and in the United States within a single framework: the common law. The common-law system therefore is not a statement of what the law is but a

designation for the methodology of making, enhancing, repairing, and reformulating the customs and practices that social exigencies require to be articulated as judicial imperatives. The common law is a framework within which the law fluctuates and a name for a system of revision and interpretation about the ground rules for governing society. What is at play is not the formal structure itself—the common-law system—but the binding vocabularies and interpretive claims *within* the formal structure that give direction to our everyday activity. Within the common-law framework the interactions between finite social rules and the concrete circumstances to which those rules apply find expression in judicial opinions and dissents.

Holmes's attempts to effectuate his theory of the common law in the United States were in some ways anachronistic because the United States was not the home of the British common-law system that had emerged from antiquity. The United States had a constitution to which all states and jurists were bound. "Blackstone," on the other hand, "recognized the existence of a constitution in the modern sense [... but] did not consider there to be a body of constitutional law strictly separated from other law" (Cairns 347). The common law in the United States is a system in which judges and justices are constrained to follow precedent within the confines of a constitution. It is distinguishable from the civil law in nations that have rejected the common law and where judges and justices interpret large bodies of legislative code by way of opinions and rulings that do not bind future judges and justices.

Holmes was a scholar of the British common law and authored his only book on that subject to much acclaim. He edited James Kent's *Commentaries on American Law*, which was first published in 1826 and consisted of lectures that Kent had given at Columbia University in 1794. Holmes's understanding of the common law was historically informed and mindful of the

numerous legal developments and jurisprudential variants that had emerged in response to political urgencies and complex social conditions throughout British and American history. By comparison, Blackstone's "history was not very profound" (Plucknett 286). Blackstone not only "expected little more in history than a plausibility at first sight" but also regarded legal history in particular "as an object of 'temporate curiosity' rather than of exact scholarship" (Plucknett 286). Blackstone's teachings about the common law were "an attempt to explain and justify the common law in the eyes of the laity" (Plucknett 286). The lectures that made up Blackstone's *Commentaries* were not delivered to scholars or lawyers or judges but to young boys considering the study of law at Oxford. One such attendee was sixteen-year old Jeremy Bentham, who was famously unimpressed by Blackstone's primer and gained a reputation by criticizing Blackstone.⁶

Blackstone used the common-law trope to inspire laypeople and the youth and to classify and abridge prevailing legal norms for educational purposes.⁷ He was not interested in formulating an exact science or an accurate history, and with few exceptions his compilations and analyses of legal decisions were descriptive rather than prescriptive: he evaluated what the law was and how it came to be but was hardly a consistent activist or a ready polemicist advocating for what the law ought to be.

Despite his humble pedagogical objectives, Blackstone looms large in American history. It has become "part of the accepted wisdom of American history that Sir William Blackstone and his *Commentaries on the Laws of England* [...] have exercised a dominant and pervasive influence on America's political thought and legal development" (Nolan 731). One metanarrative maintains that the American founders' "faith in God and in His revelation in

support of their revolutionary cause mirrored Blackstone's faith in God's will as revealed in nature and in the holy Scriptures" (Titus 4). According to this story, the "Biblical philosophy that laid the foundation for the common law at the time of America's founding" had met its demise, "occasioned by a late nineteenth century Darwinian revolution" (Titus 4) during which "God's revelation as the foundation and framework of the common law came under relentless attack from the pens of Oliver Wendell Holmes, Jr." (Titus 15). Holmes thereby marked a "shift from a common law system founded and framed by God's revelation to a common law system determined by judges' opinions" (Titus 16). This claim is called into question by the fact that Blackstone's *Commentaries*, "from Bentham on," have been critiqued as "confused and contradictory, based on theoretical foundations which were either irrelevant to [Blackstone's] task, or ignored in practice in the book" (Lobban 311). The above praise for Blackstone's paradigm of the common law is even stronger than Sir Edward Coke's apparent reverence for the common law as an expression of "the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of right and truth) fined and refined" (Coke 6). Coke's chosen diction suggests that Holmes's conception of the common law as a vessel of experience is more similar to Coke's and Blackstone's conception than caricatures of Blackstone allow. Blackstone himself articulated a version of Holmes's claim that the life of the law was not logic but experience when he declared that the "judges in the several courts of justice" were "the depository of the laws" who "must decide all cases of doubt" because their "knowledge of the law is derived from experience and study" (Blackstone 69). Differentiations between the Blackstonian and the Holmesian common-law paradigms are often exaggerated for ideological purposes, and I have not fully adopted either essentialism because "[g]rand theories do not work,

whether they are generated from a moral-religious perspective or from a biological-scientific standpoint” (Hutchinson 16). Instead, I recall these essentialized understandings of Blackstone and Holmes because they clarify the major differences between competing interpretations of the common law in the United States. Studying the career of Holmes’s dissents reveals that, at least in the United States, the common law has fluctuated and adapted according to shifting norms and standards of conduct.

As I am not called upon or compelled to resolve these disputed metanarratives about the common law, I confront a different issue: how Holmes’s aesthetic dissents instantiate his philosophy of the common law, a philosophy characterized by mobility and kinetics as against stasis and inertia. The focus and function of this dissertation is not to attack the enemies of Holmes in his day or in ours. I will not engage with his critics but will acknowledge here that there *are* many critics, as well as many fundamental assumptions about the nature of the common-law system that contradict and undermine Holmes. Holmes “still evokes strong emotions in people,” and “to introduce his name into informed discussion is to risk a fight” (Duggan 471). David Bernstein’s *Rehabilitating Lochner* displays on its front cover a cartoon of Justice Rufus Peckham, the author of the majority opinion in *Lochner v. New York* (1905), punching out Holmes in a boxing ring; both men are clothed in judicial robes and boxing gloves. The image is telling: Holmes’s legacy remains disputed. His opinions and dissents continue to be cited by the United States Supreme Court and by other federal courts. In *Kelo v. City of New London* (2005), Justice Stevens’s majority opinion and Justice Thomas’s dissent both rely on Holmes for different propositions that lead to different results. Even state appellate courts have wrestled over Holmes’s jurisprudence. In 2013 the Supreme Court of Alabama rendered an

opinion in *Ex parte Christopher* in which Chief Justice Roy S. Moore overruled a 24-year-old precedent established in *Ex parte Bayliss* (1989). Chief Justice Moore claimed that the author of *Bayliss* had misapplied one of Holmes's hermeneutical metaphors to arrive at an improper legal conclusion that threatened the separation of powers between the judicial and legislative branches. Having dissented in *Ex parte Tabor* (2012), a case following the *Bayliss* precedent, Chief Justice Moore authored the majority opinion in *Christopher* and now enjoys the unique distinction of having vindicated his own dissent.⁸

Rather than taking sides in any one controversy over Holmes and his approach to judging, I seek to remain objective in this dissertation and to follow the facts where they lead, although I have permitted myself some critical remarks about *Buck v. Bell* in the closing passages of Chapter Four. Nor do I have in mind merely to defend Holmes or happily to celebrate or validate his common-law jurisprudence. Holmes does not need my patronage. His legacy will outlast my opinion of it. By pointing out that there is a tradition attributed to Bracton and Coke and Blackstone that treats the common law as immutable and static, I have fashioned a permeable dichotomy to suggest the type of jurisprudence Holmes was writing against. If we do not understand why Holmes's dissents became canonized—i.e., because of their rhetorical superfluity that enabled the poetics of transition—then we cannot answer the more significant question: Why are Holmes's dissents important? If we do not understand how the principles in Holmes's dissents transitioned from non-law into law, then we cannot know how rules that continue to regulate our everyday activities came to be and so cannot predict how they might change in the future.

Posner once said of one of Holmes's canonized dissents that it would not have received a passing grade on a law school examination (Posner, *Law and Literature* 271). Chief Justice Taft reportedly said that Holmes's dissents were unhelpful.⁹ If Holmes's dissents became canonized and vindicated despite lacking logic and citations and other judicial conventions, then why were they canonized and vindicated? How could an unconventional legal opinion become the law when it did not start out as the law? Holmes opened *The Common Law* by stating that the "life of the law has *not been logic*" and by explaining that "[t]he 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" (Holmes, *The Common Law* 1, emphasis added). Holmes's dissents prove this to be true by their pragmatic, memorable appeals to culture and experience—and by their ability to transform a rejected argument into the majority position in spite of the fact that they did not present model legal arguments. Instead, Holmes's dissents anticipated cultural change in language that was meant to connect with future audiences; they were, in this sense, prophetic—not because he purported to know what the law would become but because his views of what constituted the law were vindicated by future jurists.

CHAPTER ONE

Holmes's Dissents and Emersonian Superfluity

“We do not write on a clean slate,” wrote Justice Anthony Kennedy in 2007, “for the decision in *Dr. Miles* is almost a century old” (*Leegin* 899). The case was *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, and Justice Kennedy was referring to *Dr. Miles Medical Company v. John D. Park & Sons Company*, a prior decision of the United States Supreme Court. At Justice Kennedy’s writing, *Dr. Miles* remained binding precedent. Holmes had dissented in *Dr. Miles*, stating, “I think also that the importance of the question and the popularity of what I deem mistaken notions makes it my duty to express my view in this dissent” (*Dr. Miles* 413). Twenty-five years following Holmes’s tactical line Justice Kennedy was born in Sacramento, California, only one year after Holmes’s death. Holmes could not have known that a soon-to-born child from California would, nearly a century after *Dr. Miles*, overrule *Dr. Miles* with his colleagues. By dissenting, however, Holmes supplied the formal variation that increased the probability of that overruling. Recalling Holmes’s evolutionary jurisprudence, Justice Kennedy opined in *Leegin* that “the common law adapts to modern understanding and greater experience” (*Leegin* 899). “The case-by-case adjudication contemplated by the rule of reason,” Justice Kennedy said, “has implemented this common-law approach” (*Leegin* 899). By declining to adhere to the rule announced by the majority in *Dr. Miles*, Justice Kennedy vindicated Holmes’s dissent in that case and added yet another mutation to the genetic makeup of case precedents in the American legal canon. Justice Kennedy’s opinion in *Leegin* may seem like a minor moment in American constitutional history, but it testifies to the meliorating, elastic aspect of the common law that prompted Holmes to author creative dissents.

A *dissent* is either a “disagreement with a majority opinion” or an “opinion by one or more judges who disagree with the decision reached by the majority” (*Black’s Law Dictionary*). A dissent is distinguishable from the binding opinion, which is a “court’s written statement explaining its decision in a given case, usu[ally] including the statement of facts, points of law, rationale, and dicta” (*Black’s Law Dictionary*). Binding opinions are divided into majority opinions and plurality opinions. The former is defined as an “opinion joined in by more than half the judges considering a given case” (*Black’s Law Dictionary*); the latter is defined as an “opinion lacking enough judges’ votes to constitute a majority, but receiving more votes than any other opinion” (*Black’s Law Dictionary*). If a case is 5-4 and there is a unified dissent but the five votes in the majority are in a three-person opinion and a two-person opinion, the three-person opinion constitutes a plurality even if it has fewer votes than the four-person dissent. There are 4-1-4 cases such as *Industrial Union Department v. American Petroleum Institute* (“*the Benzene Case*”) (1980)¹⁰ in which the first four justices make up a plurality although they are equal in number to the four-person unified dissent. The plurality is accordingly the opinion with the most votes of any opinion supporting the disposition of the case. In rare instances a dissent might constitute a plurality that deprives the main opinion of precedential value. In *Harper v. State* (Ala. 2015),¹¹ for example, Chief Justice Roy S. Moore of the Supreme Court of Alabama authored an opinion remanding the case to the trial court, but only one justice concurred with his opinion. Three justices concurred in the result, meaning that they agreed with the outcome of the case but not with the reasoning that led to that outcome. Justice Lyn Stuart authored a dissent that was joined by two other justices. Because that dissent had three concurrences to the main opinion’s one concurrence, the dissent constituted the plurality.

An opinion can be *per curiam* if the judges or justices on an appellate court do not identify which judge or justice authored the opinion. Most *per curiam* opinions are unanimous, but there are exceptions such as *Bush v. Gore* (2000) that was settled 5-4 on the disposition and 7-2 on the Equal Protection question while the main opinion was designated *per curiam*. Ira P. Robbins has argued that early uses of *per curiam* opinions signaled unity between the justices but that *per curiam* opinions with dissents began with Oliver Wendell Holmes, Jr. (1200).

A majority opinion becomes the law unless there is a concurrence that surreptitiously contradicts the majority as did Justice Kennedy's concurrence in *Lujan v. Defenders of Wildlife* (1992). A plurality opinion may constitute the law but not without qualification. In a 4-1-4 case in which the one justice who concurred in the judgment has a narrower theory than that of the other justices in the plurality, the narrowest theory controls. There remains an ongoing debate as to whether Justice Lewis F. Powell's one-justice opinion in *Regents of the University of California v. Bakke* (1978) constituted "the law" until the United States Supreme Court explicitly adopted his position in *Grutter v. Bollinger* (2003).

Dissents are not the law but may protest what the law is and propose what the law ought to be. The dissent is constitutionally agonistic in that it establishes itself against the dominant trend or rule and subverts the reasoning of the binding opinion. It is possible for a dissent to become binding law if future judges or justices vindicate its reasoning over that of the majority.¹² Dissents are in this sense the state of exception: they are not law but always retain the potential to become law. They await validation and cannot control the population until they receive validation. They can command respect and attention, even though they stand outside the law, because they confirm the validity of the rules that they simultaneously undermine. They reify

the principles that they seek to demolish and demolish the principles that they seek to reify. Their disruption of the official, authorized opinion invests them with underdog appeal, especially when they are couched in memorable language that commands attention.

The importance of dissents in the aggregate is not only to overcome some majority opinion; it is to multiply and diversify jurisprudential options for the lawyers, judges, and justices whose arguments about the rules of society obtain to the population writ large. Faced with a set of facts that does not easily comport with the law as expressed in binding precedent, a judge or justice may consult a stock of dissents for clarification or illumination. Finding some dissent that is on point and well-reasoned, the judge or justice might vindicate the dissent and turn what was dead letter into living authority. The most powerful dissents are those that the legal community does not have to look for because they are already well-known. The question for these dissents is not whether they will be cited but when, not whether they will be remembered but whether the memory of them will lead to their vindication. If such dissents were never written, future generations of lawyers, judges, and justices would lack a textual record to consult, revise, and adopt. Only by authoring dissents may judges and justices ensure that their arguments remain preserved in the textual record.

Holmes's dissents achieved their canonical status in part because their literary qualities were memorable and therefore revisited, discussed, taught, and cited. Their greater impact upon the United States is in their vindication and in their graduation from non-law into law. Holmes's talent as a writer enabled his most memorable dissents to become canonized and later vindicated. It is not possible to prove that Holmes's literary aptitude *caused* his dissents to become law, only that it made that possibility more likely.

Holmes and Dissent: Data

Holmes served on the United States Supreme Court from December 4, 1902, to January 12, 1932. As of this writing, no one has amassed comprehensive numerical statistics regarding Holmes's authored opinions and dissents during this period, specifically regarding the percentage of cases in which he dissented or joined a dissenting opinion or in which he authored a majority opinion. Such statistics for justices from roughly the mid-twentieth century forward can be ascertained by consulting numerous sources,¹³ but Holmes's judicial writings have not been quantified in this way.¹⁴

A Westlaw search that I conducted in 2014 turned up a total of 106 dissents by Holmes: 90 from the United States Supreme Court and 16 from the Massachusetts Supreme Judicial Court. To test these numbers for accuracy and completeness, I consulted the United States Supreme Court Reports, located each case released during Holmes's tenure, and determined whether Holmes had written in the case. If Holmes had written in the case, I recorded whether his writing was a majority opinion, a concurrence, or a dissent. Table One below lists in chronological order each dissent in which Holmes participated either by writing or by joining the writing of another justice. I have not included cases in which Holmes dissented without a writing or joined other justices who dissented without a writing. Examples of such cases include *Chicago, M. & St. P. R. Co. v. State of Wisconsin*, 238 U.S. 491 (1915), in which Holmes joined Justice McKenna in dissenting without a writing, and *Williams v. Standard Oil Co. of Louisiana*, 278 U.S. 235 (1929), in which Holmes dissented without a writing and no other justices dissented. Table One also does not include dissents that Holmes never published.¹⁵

Appendix A at the end of this chapter charts similar statistics for the majority opinions that Holmes authored. Table One and Appendix A represent the first empirical attempt by

anyone to quantify comprehensive numerical data regarding Holmes's chosen medium for his judicial writings on the United States Supreme Court. Table One reveals that, during his tenure as a United States Supreme Court justice, Holmes authored 73 dissents and joined 25 dissents written by other justices. Of the 25 dissents written by other justices and joined by Holmes, 17 (or 68%) were authored by Justice Brandeis. The initial Westlaw search that yielded 90 dissents either erroneously attributed some dissents to Holmes or included dissents in which Holmes authored no writing or joined another justice's writing.

Holmes sometimes wrote a dissent and joined a dissent in the same case. Table One categorizes Holmes's writings in those cases as both "Dissenting Opinions Authored" and "Dissenting Opinions Joined." Totaling the dissents in each column will not result in the sum of the cases in which Holmes dissented because Table One includes only cases in which Holmes dissented with a writing. (As mentioned above, Holmes sometimes dissented without an opinion or joined another dissenting justice who did not write an opinion.) The seven cases that appear in both columns are *Haddock v. Haddock*, 201 U.S. 562 (1906); *American Column & Lumber Co. v. U.S.*, 257 U.S. 377 (1921); *U.S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407 (1921); *Myers v. U.S.*, 272 U.S. 52 (1926); *Tyson & Bro.-United Theatre Ticket Offices v. Banton*, 273 U.S. 418 (1927); *Olmstead v. U.S.*, 277 U.S. 438 (1928); and *Baldwin v. State of Missouri*, 281 U.S. 586 (1930).

Table One

<u>Dissenting Opinions Authored</u>	<u>Dissenting Opinions Joined</u>
<ol style="list-style-type: none"> 1. <i>Northern Securities Co. v. U.S.</i>, 193 U.S. 197 (1904) (Holmes, J., dissenting). 2. <i>Kepner v. U.S.</i>, 195 U.S. 100 (1904) (Holmes, J., dissenting). 3. <i>Muhlker v. New York & H.R. Co.</i>, 197 U.S. 544 (1905) (Holmes, J., dissenting). 4. <i>Lochner v. New York</i>, 198 U.S. 45 (1905) (Holmes, J., dissenting). 5. <i>Madisonville Traction Co. v. St. Bernard Mining Co.</i>, 196 U.S. 239 (1905) (Holmes, J., dissenting). 6. <i>Haddock v. Haddock</i>, 201 U.S. 562 (1906) (Holmes, J., dissenting). 7. <i>Bernheimer v. Converse</i>, 206 U.S. 516 (1907) (Holmes, J., dissenting). 8. <i>Travers v. Reinhardt</i>, 205 U.S. 423 (1907) (Holmes, J., dissenting). 9. <i>Chanler v. Kelsey</i>, 205 U.S. 466 (1907) (Holmes, J., dissenting). 10. <i>Raymond v. Chicago Union Traction Co.</i>, 207 U.S. 20 (1907) (Holmes, J., dissenting). 11. <i>Howard v. Illinois Cent. R. Co.</i>, 207 U.S. 463 (1908) (Holmes, J., dissenting). 12. <i>Adair v. U.S.</i>, 208 U.S. 161 (1908) (Holmes, J., dissenting). 13. <i>Chicago, B. & Q. Ry. Co. v. Williams</i>, 214 U.S. 492 (1909) (per curiam) (Holmes, J., dissenting). 14. <i>Keller v. U.S.</i>, 213 U.S. 138 (1909) (Holmes, J., dissenting). 15. <i>Continental Wall Paper Co. v. Louis Voight & Sons Co.</i>, 212 U.S. 227 (1909) (Holmes, J., dissenting). 16. <i>Atchison, T. & S.F. Ry. Co. v. Sowers</i>, 213 U.S. 55 (1909) (Holmes, J., dissenting). 17. <i>Southern Ry. Co. v. King</i>, 217 U.S. 524 (1910) (Holmes, J., dissenting). 	<ol style="list-style-type: none"> 1. <i>Board of Directors of Chicago Theological Seminary v. People of State of Illinois ex rel. Raymond</i>, 188 U.S. 662 (1903) (White, J., dissenting). 2. <i>Hafemann v. Gross</i>, 199 U.S. 342 (1905) (White, J., dissenting). 3. <i>Haddock v. Haddock</i>, 201 U.S. 562 (1906) (Brown, J., dissenting). 4. <i>Neilson v. Rhine Shipping Co.</i>, 248 U.S. 205 (1918) (McKenna, J., dissenting). 5. <i>Sandberg v. McDonald</i>, 248 U.S. 185 (1918) (McKenna, J., dissenting). 6. <i>F.S. Royster Guano Co. v. Commonwealth of Virginia</i>, 253 U.S. 412 (1920) (Brandeis, J., dissenting). 7. <i>Schaefer v. U.S.</i>, 251 U.S. 466 (1920) (Brandeis, J., dissenting). 8. <i>U.S. v. Reading Co.</i>, 253 U.S. 26 (1920) (White, C.J., dissenting). 9. <i>Burdeau v. McDowell</i>, 256 U.S. 465 (1921) (Brandeis, J., dissenting). 10. <i>American Column & Lumber Co. v. U.S.</i>, 257 U.S. 377 (1921) (Brandeis, J., dissenting). 11. <i>Duplex Printing Press Co. v. Deering</i>, 254 U.S. 443 (1921) (Brandeis, J., dissenting). 12. <i>U.S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burlison</i>, 255 U.S. 407 (1921) (Brandeis, J., dissenting). 13. <i>U.S. v. Moreland</i>, 258 U.S. 433

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| <p>18. <i>Kuhn v. Fairmont Coal Co.</i>, 215 U.S. 349 (1910) (Holmes, J., dissenting).</p> <p>19. <i>Pullman Co. v. State of Kansas ex rel. Coleman</i>, 216 U.S. 56 (1910) (Holmes, J., dissenting).</p> <p>20. <i>Western Union Telegraph Co. v. State of Kansas ex rel. Coleman</i>, 216 U.S. 1 (1910).</p> <p>21. <i>Dr. Miles Medical Co. v. John D. Park & Sons Co.</i>, 220 U.S. 373 (1911) (Holmes, J., dissenting).</p> <p>22. <i>Bailey v. State of Alabama</i>, 219 U.S. 219 (1911) (Holmes, J., dissenting).</p> <p>23. <i>Brown v. Elliott</i>, 225 U.S. 392 (1912) (Holmes, J., dissenting).</p> <p>24. <i>Hyde v. U.S.</i>, 225 U.S. 347 (1912) (Holmes, J., dissenting).</p> <p>25. <i>Donnelly v. U.S.</i>, 228 U.S. 243 (1913) (Holmes, J., dissenting).</p> <p>26. <i>Coppage v. State of Alabama</i>, 236 U.S. 1 (1915) (Holmes, J., dissenting).</p> <p>27. <i>Frank v. Mangum</i>, 237 U.S. 309 (1915) (Holmes, J., dissenting).</p> <p>28. <i>Southern Pac. Co. v. Jensen</i>, 244 U.S. 205 (1917) (Holmes, J., dissenting).</p> <p>29. <i>Motion Picture Patents Co. v. Universal Film Mfg. Co.</i>, 243 U.S. 502 (1917) (Holmes, J., dissenting).</p> <p>30. <i>Ruddy v. Rossi</i>, 248 U.S. 104 (1918) (Holmes, J., dissenting).</p> <p>31. <i>Toledo Newspaper Co. v. U.S.</i>, 247 U.S. 402 (1918) (Holmes, J., dissenting).</p> <p>32. <i>International News Service v. Associated Press</i>, 248 U.S. 215 (1918) (Holmes, J., dissenting).</p> <p>33. <i>Hammer v. Dagenhart</i>, 247 U.S. 251 (1918) (Holmes, J., dissenting).</p> <p>34. <i>City and County of Denver v. Denver Union Water Co.</i>, 246 U.S. 278 (1918) (Holmes, J., dissenting).</p> <p>35. <i>Abrams v. U.S.</i>, 250 U.S. 616 (1919) (Holmes, J., dissenting).</p> <p>36. <i>Maxwell v. Bugbee</i>, 250 U.S. 525 (1919) (Holmes, J., dissenting).</p> <p>37. <i>Evans v. Gore</i>, 253 U.S. 245 (1920) (Holmes, J., dissenting).</p> <p>38. <i>Knickerbocker Ice Co. v. Stewart</i>, 253 U.S. 149</p> | <p>(1922) (Brandeis, J., dissenting).</p> <p>14. <i>U.S. v. Oregon Lumber Co.</i>, 260 U.S. 290 (1922) (Brandeis, J., dissenting).</p> <p>15. <i>Lemke v. Farmers' Grain Co. of Embden, N.D.</i>, 258 U.S. 50 (1922) (Brandeis, J., dissenting).</p> <p>16. <i>Kentucky Finance Corp. v. Paramount Auto Exch. Corp.</i>, 262 U.S. 544 (1923) (Brandeis, J., dissenting).</p> <p>17. <i>Texas Transport & Terminal Co. v. City of New Orleans</i>, 264 U.S. 150 (1924) (Brandeis, J., dissenting).</p> <p>18. <i>Jay Burns Baking Co. v. Bryan</i>, 264 U.S. 504 (1924) (Brandeis, J., dissenting).</p> <p>19. <i>Myers v. U.S.</i>, 272 U.S. 52 (1926) (Brandeis, J., dissenting).</p> <p>20. <i>Di Santo v. Commonwealth of Pennsylvania</i>, 273 U.S. 34 (1927) (Brandeis, J., dissenting).</p> <p>21. <i>Tyson & Bro.-United Theatre Ticket Offices v. Banton</i>, 273 U.S. 418 (1927) (Stone, J., dissenting).</p> <p>22. <i>Olmstead v. U.S.</i>, 277 U.S. 438 (1928) (Brandeis, J., dissenting).</p> <p>23. <i>Wuchter v. Pizzutti</i>, 276 U.S. 13 (1928) (Brandeis, J., dissenting).</p> <p>24. <i>John P. King Mfg. Co. v. City Council of Augusta</i>, 277 U.S. 100 (1928) (Brandeis, J., dissenting).</p> <p>25. <i>Baldwin v. State of Missouri</i>, 281 U.S. 586 (1930) (Stone, J., dissenting).</p> |
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- (1920) (Holmes, J., dissenting).
39. *Eisner v. Macomber*, 252 U.S. 189 (1920) (Holmes, J., dissenting).
 40. *Truax v. Corrigan*, 257 U.S. 312 (1921) (Holmes, J., dissenting).
 41. *American Column & Lumber Co. v. U.S.*, 257 U.S. 377 (1921) (Holmes, J., dissenting).
 42. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (Holmes, J., dissenting).
 43. *U.S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407 (1921) (Holmes, J., dissenting).
 44. *Leach v. Carlile*, 258 U.S. 138 (1922) (Holmes, J., dissenting).
 45. *U.S. v. Behrman*, 258 U.S. 280 (1922) (Holmes, J., dissenting).
 46. *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (Holmes, J., dissenting).
 47. *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923) (Holmes, J., dissenting).
 48. *Bartels v. State of Iowa*, 262 U.S. 404 (1923) (Holmes, J., dissenting).
 49. *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553 (1923) (Holmes, J., dissenting).
 50. *Craig v. Hecht*, 263 U.S. 255 (1923) (Holmes, J., dissenting).
 51. *Panama R. Co. v. Rock*, 266 U.S. 209 (1924) (Holmes, J., dissenting).
 52. *Gitlow v. People of State of New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting).
 53. *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926) (Holmes, J., dissenting).
 54. *Schlesinger v. State of Wisconsin*, 270 U.S. 230 (1926) (Holmes, J., dissenting).
 55. *Myers v. U.S.*, 272 U.S. 52 (1926) (Holmes, J., dissenting).
 56. *Frost v. Railroad Commission of State of Cal.*, 271 U.S. 583 (1926) (Holmes, J., dissenting).
 57. *Power Mfg. Co. v. Sanders*, 274 U.S. 490 (1927) (Holmes, J., dissenting).
 58. *Tyson & Bro.-United Theatre Ticket Offices v.*

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| <p><i>Banton</i>, 273 U.S. 418 (1927) (Holmes, J., dissenting).</p> <p>59. <i>Compania General de Tabacos de Filipinas v. Collector of Internal Revenue</i>, 275 U.S. 87 (1927) (Holmes, J., dissenting).</p> <p>60. <i>Quaker City Cab Co. v. Commonwealth of Pennsylvania</i>, 277 U.S. 389 (1928) (Holmes, J., dissenting).</p> <p>61. <i>Louisville Gas & Electric Co. v. Coleman</i>, 277 U.S. 32 (1928) (Holmes, J., dissenting).</p> <p>62. <i>Panhandle Oil Co. v. State of Mississippi ex rel. Knox</i>, 277 U.S. 218 (1928) (Holmes, J., dissenting).</p> <p>63. <i>Goodyear Tire & Rubber Co. v. U.S.</i>, 276 U.S. 287 (1928) (Holmes, J., dissenting).</p> <p>64. <i>Long v. Rockwood</i>, 277 U.S. 142 (1928) (Holmes, J., dissenting).</p> <p>65. <i>Louis K. Liggett Co. v. Baldridge</i>, 278 U.S. 105 (1928) (Holmes, J., dissenting).</p> <p>66. <i>Olmstead v. U.S.</i>, 277 U.S. 438 (1928) (Holmes, J., dissenting).</p> <p>67. <i>Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.</i>, 276 U.S. 518 (1928) (Holmes, J. dissenting).</p> <p>68. <i>Springer v. Government of Philippine Islands</i>, 277 U.S. 189 (1928) (Holmes, J., dissenting).</p> <p>69. <i>U.S. v. Schwimmer</i>, 279 U.S. 644 (1929) (Holmes, J., dissenting).</p> <p>70. <i>Farmer's Loan & Trust Co. v. State of Minnesota</i>, 280 U.S. 204 (1930) (Holmes, J., dissenting).</p> <p>71. <i>New Jersey Bell Telephone Co. v. State Board of Texas and Assessment of New Jersey</i>, 280 U.S. 338 (1930) (Holmes, J., dissenting).</p> <p>72. <i>Baldwin v. State of Missouri</i>, 281 U.S. 586 (1930) (Holmes, J., dissenting).</p> <p>73. <i>Hoeper v. Tax Commission of Wis.</i>, 284 U.S. 206 (1931) (Holmes, J., dissenting).</p> | |
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Some conclusions and reasonable inferences may be drawn from Table One and Appendix A. One is that Holmes was more likely to write dissents as a proportion of his

writings in his last decade on the United States Supreme Court than during his first two decades there. Sixty-four percent of his authored dissents (47 total) appeared during the latter half of his tenure on the United States Supreme Court. Eighty-eight percent of the dissents that were authored by others and joined by Holmes (22 total) occurred during this same period. These percentages do not necessarily imply that Holmes was more likely to dissent the longer he sat on the United States Supreme Court. The years 1902-32 can be divided into roughly three decades: 1902-12, 1913-22, 1923-32. In the first decade, the numbers in columns one and two of Table One are 24 and 3. In the second decade, the numbers in the same columns and table are 22 and 12. In the third decade, the numbers in the same columns and table are 27 and 10. Appendix A shows that in these same three decades Holmes's majority opinions amount to 327 and 347 and 216 per decade. Therefore, by absolute dissent authorship no trend is apparent. Absolute dissent votes increase from 27 to 34 to 37 by decade, but this rise does not correlate with frequency or proportion. The ratio of dissents authored to majority opinions authored is .073 to .063 to .125 by decade, suggesting a dip in the middle decade but a substantial rise in the last decade. The ratio of dissenting votes to majority opinions authored is .083 to .098 to .171, suggesting a rise, but one that is difficult to speculate about if one compares only dissenting votes with majority authorships. What Table One shows clearly is that the percentage of cases in which Holmes dissented increased during his last decade on the United States Supreme Court.

As prolific as he was, Holmes produced fewer dissents than Supreme Court justices produce today (see Tables Two through Five below) perhaps because he did not have the same kind of assistance from law clerks that United States Supreme Court justices have enjoyed since the 1960s, if not earlier.¹⁶ He did his own research and wrote his own opinions, and fewer briefs

and petitions reached the United States Supreme Court during his tenure than they did during the latter half of the twentieth century and into the new millennium. From 1940 to 1970 the number of petitions before the United States Supreme Court “more than tripled” (Jucewicz and Baum 125). Increased caseloads, however, do not necessarily correlate with an increase in dissents because “the growth in caseload was not dramatic until the 1960s, twenty years after the rise of dissent” as a popular medium (Henderson 326).¹⁷

There are a few justices—Justice Brandeis, for instance—whose dissents Holmes was likely to join and who were likely to join Holmes’s dissents. Of the dissenting opinions Holmes joined, 68% were authored by Justice Brandeis and 12% were authored by Justice White. Holmes accordingly appears to have been more aligned with the jurisprudence of certain justices. In 28% of the cases in which he joined the dissent of another justice, Holmes wrote separately to register his reason for dissenting. Holmes published 890 majority opinions during his tenure as a United States Supreme Court justice (see Appendix A). He dissented in only 8% of the cases in which he authored an opinion, excluding concurrences. This percentage seems unremarkable in light of the “rate of non-unanimous decisions [that] mounted from under twenty percent in the early 1900s to over 70 percent in the middle 1980s” (Ginsburg 147). However, the percentage of cases in which Holmes authored a dissent must be considered within historical context because the “ratio of dissenting opinions to majority opinions was less than ten percent in the early 1900s” (Ginsburg 147). By contrast, “in the middle 1980s, in number, majority and dissenting opinions ran just about even” (Ginsburg 147). Since the time Holmes took his seat on the bench of the United States Supreme Court, justices on that court have dissented with more frequency.

The frequency of dissenting opinions over time should not distract from the remarkable frequency with which Holmes dissented during an era when dissents were uncommon.

Perhaps the most interesting conclusion is that, although Holmes has become known as “The Great Dissenter,” entire terms passed in which he never authored a dissent. He did not author a dissent in 1903, 1914, or 1916, although he joined one in 1903. By comparison, Justice Thurgood Marshall, Chief Justice William Rehnquist, Justice John Paul Stevens, and Justice Sandra Day O’Connor never went a term without dissenting except during a year of retirement. As the tables below indicate,¹⁸ Justice Marshall averaged 15 dissents per term; Chief Justice Rehnquist, 10 dissents per term; Justice Stevens, 21 dissents per term; and Justice O’Connor, seven dissents per term. Holmes sat on the United States Supreme Court for 10,627 days. Of the justices in the tables below, only Justice Stevens (12,611 days) and Chief Justice Rehnquist (12,293 days) served longer. The number of cases in which Holmes dissented during his entire career is roughly equivalent to the number of cases in which the justices in the tables below dissented within five to nine terms. Holmes’s 73 dissents¹⁹ seem insignificant in light of the 365 dissents of Justice Marshall (see Table Two), the 329 dissents of Chief Justice Rehnquist (see Table Three), the 710 dissents of Justice Stevens (see Table Four), and the 174 dissents of Justice O’Connor (see Table Five). In just three consecutive terms (1983-1985), Justice Stevens dissented 103 times, seven more times than Holmes dissented during his entire career. Such statistics appear to undermine Holmes’s status as “The Great Dissenter,” and I have selected only four justices to compare with him. A cursory review of the output of other United States Supreme Court justices since Holmes’s retirement reveals that this exercise could be repeated with similar results for any number of them.

The dates listed in the tables below indicate the year *of the term* such that the corresponding figures amount to the number of votes *per term* rather than *per year*. The proper interpretation of Table Two below is that Justice Marshall dissented once during the 1967 term, three times during the 1968 term, twice during the 1969 term, ten times during the 1970 term, and so forth; these figures do not necessarily mean that Justice Marshall dissented that many times during that particular year. Moreover, these figures account for written dissents and not dissents by memorandum. Following the practice of the *Harvard Law Review*, which compiled the statistics for each term, I have considered a dissent as “written” even if it consists merely of a brief statement. I also have followed the *Harvard Law Review* by classifying a justice as dissenting if he or she voted to dispose of a case in a manner different from that of the majority and by categorizing as a “dissent” any opinions that concur in part and dissent in part.

TABLE TWO: Thurgood Marshall	
1967	10 opinions; 1 concurrence; 1 dissent
1968	13 opinions; 0 concurrences; 3 dissents
1969	9 opinions; 1 concurrence; 2 dissents
1970	9 opinions; 4 concurrences; 10 dissents
1971	15 opinions; 3 concurrences; 20 dissents
1972	12 opinions; 8 concurrences; 21 dissents
1973	13 opinions; 4 concurrences; 19 dissents
1974	11 opinions; 4 concurrences; 8 dissents
1975	17 opinions; 8 concurrences; 19 dissents
1976	12 opinions; 6 concurrences; 21 dissents
1977	15 opinions; 4 concurrences; 20 dissents
1978	13 opinions; 4 concurrences; 15 dissents
1979	14 opinions; 7 concurrences; 21 dissents
1980	13 opinions; 1 concurrence; 12 dissents
1981	15 opinions; 5 concurrences; 4 dissents
1982	17 opinions; 3 concurrences; 27 dissents

1983 15 opinions; 2 concurrences; 16 dissents
1984 13 opinions; 6 concurrences; 13 dissents
1985 15 opinions; 6 concurrences; 31 dissents
1986 16 opinions; 1 concurrence; 20 dissents
1987 15 opinions; 1 concurrence; 13 dissents
1988 14 opinions; 0 concurrences; 18 dissents
1989 14 opinions; 4 concurrences; 15 dissents
1990 12 opinions; 2 concurrences; 17 dissents²⁰

TABLE THREE: William Rehnquist

1971 11 opinions; 0 concurrences; 9 dissents
1972 16 opinions; 2 concurrences; 21 dissents
1973 17 opinions; 4 concurrences; 15 dissents
1974 15 opinions; 6 concurrences; 12 dissents
1975 16 opinions; 1 concurrence; 15 dissents
1976 15 opinions; 3 concurrences; 15 dissents
1977 14 opinions; 7 concurrences; 24 dissents
1978 16 opinions; 12 concurrences; 12 dissents
1979 15 opinions; 3 concurrences; 26 dissents
1980 15 opinions; 10 concurrences; 15 dissents
1981 17 opinions; 7 concurrences; 15 dissents
1982 20 opinions; 5 concurrences; 16 dissents
1983 19 opinions; 3 concurrences; 14 dissents
1984 17 opinions; 1 concurrence; 15 dissents
1985 19 opinions; 3 concurrences; 15 dissents
1986 17 opinions; 0 concurrences; 9 dissents
1987 15 opinions; 2 concurrences; 7 dissents
1988 15 opinions; 1 concurrences; 7 dissents
1989 15 opinions; 2 concurrences; 5 dissents
1990 14 opinions; 1 concurrence; 4 dissents
1991 11 opinions; 2 concurrences; 9 dissents
1992 14 opinions; 2 concurrences; 5 dissents
1993 10 opinions; 0 concurrences; 6 dissents
1994 11 opinions; 1 concurrence; 4 dissents
1995 10 opinions; 3 concurrences; 2 dissents
1996 11 opinions; 0 concurrences; 3 dissents
1997 12 opinions; 2 concurrences; 3 dissents
1998 9 opinions; 3 concurrences; 6 dissents
1999 9 opinions; 0 concurrences; 5 dissents

2000 9 opinions; 2 concurrences; 3 dissents
2001 10 opinions; 0 concurrences; 4 dissents
2002 8 opinions; 0 concurrences; 4 dissents
2003 9 opinions; 2 concurrences; 3 dissents
2004 7 opinions; 1 concurrence; 1 dissent²¹

TABLE FOUR: John Paul Stevens

1975 9 opinions; 9 concurrences; 17 dissents
1976 13 opinions; 17 concurrences; 27 dissents
1977 14 opinions; 10 concurrences; 21 dissents
1978 15 opinions; 7 concurrences; 13 dissents
1979 14 opinions; 12 concurrences; 21 dissents
1980 11 opinions; 17 concurrences; 25 dissents
1981 15 opinions; 15 concurrences; 26 dissents
1982 15 opinions; 12 concurrences; 27 dissents
1983 16 opinions; 18 concurrences; 34 dissents
1984 16 opinions; 9 concurrences; 33 dissents
1985 17 opinions; 15 concurrences; 36 dissents
1986 16 opinions; 14 concurrences; 32 dissents
1987 19 opinions; 6 concurrences; 17 dissents
1988 16 opinions; 14 concurrences; 22 dissents
1989 14 opinions; 17 concurrences; 29 dissents
1990 14 opinions; 5 concurrences; 25 dissents
1991 12 opinions; 11 concurrences; 22 dissents
1992 13 opinions; 10 concurrences; 21 dissents
1993 11 opinions; 9 concurrences; 13 dissents
1994 9 opinions; 6 concurrences; 19 dissents
1995 8 opinions; 6 concurrences; 21 dissents
1996 10 opinions; 5 concurrences; 17 dissents
1997 7 opinions; 8 concurrences; 15 dissents
1998 9 opinions; 6 concurrences; 19 dissents
1999 7 opinions; 7 concurrences; 18 dissents
2000 10 opinions; 7 concurrences; 17 dissents
2001 8 opinions; 3 concurrences; 14 dissents
2002 9 opinions; 10 concurrences; 9 dissents
2003 8 opinions; 9 concurrences; 12 dissents
2004 8 opinions; 9 concurrences; 13 dissents
2005 7 opinions; 6 concurrences; 15 dissents
2006 7 opinions; 8 concurrences; 16 dissents

2007	7 opinions; 8 concurrences; 13 dissents
2008	9 opinions; 3 concurrences; 17 dissents
2009	6 opinions; 13 concurrences; 14 dissents ²²

TABLE FIVE: Sandra Day O'Connor

1981	13 opinions; 12 concurrences; 10 dissents
1982	16 opinions; 7 concurrences; 11 dissents
1983	17 opinions; 10 concurrences; 9 dissents
1984	16 opinions; 11 concurrences; 9 dissents
1985	17 opinions; 12 concurrences; 7 dissents
1986	18 opinions; 11 concurrences; 13 dissents
1987	16 opinions; 8 concurrences; 12 dissents
1988	13 opinions; 12 concurrences; 8 dissents
1989	17 opinions; 7 concurrences; 5 dissents
1990	16 opinions; 4 concurrences; 5 dissents
1991	15 opinions; 11 concurrences; 11 dissents
1992	13 opinions; 7 concurrences; 11 dissents
1993	12 opinions; 9 concurrences; 6 dissents
1994	10 opinions; 13 concurrences; 19 dissents
1995	9 opinions; 2 concurrences; 4 dissents
1996	9 opinions; 6 concurrences; 7 dissents
1997	10 opinions; 3 concurrences; 3 dissents
1998	10 opinions; 3 concurrences; 2 dissents
1999	8 opinions; 6 concurrences; 1 dissent
2000	9 opinions; 3 concurrences; 5 dissents
2001	8 opinions; 6 concurrences; 7 dissents
2002	9 opinions; 6 concurrences; 2 dissents
2003	8 opinions; 4 concurrences; 2 dissents
2004	8 opinions; 5 concurrences; 5 dissents
2005	3 opinions; 0 concurrences; 0 dissents ²³

Tables Two through Five suggest that Holmes, by comparison to Justice Marshall, Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor, did not author many dissents. Yet none of these justices is known as "The Great Dissenter."

Holmes's admirers are partially responsible for his inflated standing as a prolific dissenter. One scholar accuses them of exaggerating Holmes's reputation by "emphasizing [his] occasional dissents and ignor[ing] the more numerous instances" in which he joined the opinions and dissents of other justices. Even this explanation is flawed. Table One indicates that Holmes joined just 25 dissents while authoring 73 dissents of his own (White 578). There are other, more plausible reasons why Holmes acquired the moniker "The Great Dissenter" besides the number and length of his dissents. One is that he dissented more frequently than his predecessors on the United States Supreme Court.²⁴ Another is that he dissented frequently relative to the volume of cases filed in the United States Supreme Court during his career whereas later justices dissented even more frequently simply because of the increased volume of overall cases filed.

There is no single reason why Holmes became known as "The Great Dissenter." Evidence of his reputation as a literary judge, however, points to the probability that his rhetorical style earned him an audience and secured for his dissents a place in the legal canon. Holmes enjoyed an "uncanny ability to compact his thought into the confines of a powerful paragraph or a poignant sentence or a poetic phrase" (Collins xviii). "One of the few points on which all commentators agree," notes Thomas Grey, "is Holmes' greatness as a prose stylist" (787). Richard Posner has said that "Holmes was a great judge because he was a great literary artist" (xvii). Justice Frankfurter claimed that the greatness of most judges is determined by recounting "an analysis of specific decisions" but that Holmes was different because his "specialty was the great utterance," which he used to give "momentum" to "constitutional philosophy" (28). "[I]f we care for our literary treasures," Justice Frankfurter added, then "the

expression of his views must become part of our national culture” (29). Frederic R. Kellogg suggests that Holmes’s “fame” was “made in several ringing dissents” (8). Posner would agree: “Holmes’s innovations were dissenting opinions that, often after his death, became and have remained the majority opinion. [...] His majority and dissenting opinions alike are remarkable not only for the poet’s gift of metaphor that is their principal stylistic distinction, but also for their brevity, freshness, and freedom from legal jargon; a directness bordering on the colloquial; a lightness of touch foreign to the legal temperament; and insistence on being concrete rather than legalistic—on identifying values and policies rather than intoning formulas” (xiii). Posner concludes that most judges “lack Holmes’s eloquence” (xiv). In light of the foregoing, I submit that Holmes’s greatness as a dissenter and the reason he gained his reputation as “The Great Dissenter” has to do with the *content* rather than the frequency or quantity of his dissents. The literary and rhetorical excellence of his dissents enabled them to become canonized in leading textbooks and popularized in the American legal education system. I am not the first commentator to reach this conclusion. Gary J. Aichele has claimed that “it was the quality and thrust of Holmes’s dissenting opinions that attracted public attention, and not their number” (151).²⁵ This dissertation, however, is the first work of its kind to back up this conclusion with comprehensive numerical data.

Holmes’s Style

Holmes once wrote that the “tendencies of my family and myself have a strong natural bent to literature” (Holmes, *Autobiographical Sketch*, quoted in White, *Law and the Inner Self* 8). He is remembered as a poet like his father and like his hero, Emerson. “[H]ow like Emerson Holmes could sound,” declares an early biographer of Holmes (Biddle 25), adding that “[t]here was a kinship of nobility between the two men” (Biddle 24). Holmes himself wrote that the

“only firebrand of my youth that burns to me as brightly as ever is Emerson, and I am bound to admit that for many years I have read but two or three pieces of his, coupled with *The Heart of Emerson’s Journals* (I am not sure of the title) which impressed me a few years ago” (1930 letter to Pollock, in *The Essential Holmes*, 16). The present perfect tense of “have read” suggests that Holmes read these selections of Emerson repeatedly for many years, not that he read only a few pieces during a few years. In 1912 Holmes wrote to Patrick Sheehan, “You put it much too strongly when you say that I had no sympathy with Emerson. When he was breaking and I was still young, I saw him on the other side of the street and ran over and said to him: ‘If I ever do anything, I shall owe a great deal of it to you,’ which was true. He was one of those who set one on fire—to impart a [thought] was the gift of genius” (1912 letter to Sheehan, in *The Essential Holmes*, 64). In 1919 Holmes wrote to Morris Cohen that “Emerson and [John] Ruskin were the men that set me on fire” (1919 letter to Cohen, in *The Essential Holmes*, 110).

Holmes was the Class Poet at Harvard, a position Emerson himself had held in 1821 (Richardson 6). After the Civil War, when he was forced to embark upon a career, he “framed his choice as between Poetry and Philosophy, and then as between Philosophy and the Law. Philosophy was apparently the middle term, the psychological bridge between Poetry and the Law, and when he crossed that bridge it was ‘law-law-law,’ as he put it at the time in a letter to William James” (Touster 682).²⁶ The celebrations of Holmes’s talent as a writer seem to be endless and in many cases mawkish. Take, for instance, Francis Biddle’s representatively sentimental acclaim:

His words were feathered arrows, that carried to the heart of the target, from a mind that searched and saw. Words and thought were so closely knit that the thought could not have been said differently, the words re-arranged. They were warm with his own feeling, incisive with the precision of his mind, or tender, so

that they became his words, and others had not used them before. He was a great stylist. Or, perhaps, as the word somehow conveys to our minds the suggestion of polish and surface without the depths below, I should suggest rather the inevitableness of his language. (Biddle 2)

The following two dissents rendered in poetic form provide examples of the aesthetic properties to which Biddle refers. Regarding the first dissent, Justice Brandeis wrote to Justice Frankfurter in 1928 with the prediction that “Holmes’s dissent in the *Black & White Taxi Cab Case* will stand among his notable opinions” (*Letters of Louis D. Brandeis* 335). Justice Frankfurter himself wrote to Holmes about the dissent, saying, “I have just read your dissent in the *Black & White Taxicab* case and I’m all stirred with delight. You have written, if I may say so, a landmark opinion” (*Holmes-Frankfurter Letters* 225). Later audiences concurred, calling the dissent “eloquent” (Litwiller 76), “brilliant” (Post 1595), “impassioned” (Levy and Murphy 1291), “famous” (Young 486, Goodnight 526, Monaghan 780, Dudley 1790), and “famous and important” (Eastman 703). These praises are not accompanied by explanations about what properties of the dissent make it extraordinary. Examining the dissent for such properties allows one to ascertain why the dissent gained its literary reputation that led to its vindication. Consider the following lines from the dissent, which I have reformatted as a poem:

Black & White Taxi & Transfer Co. v. Brown & Yellow Taxi & Transfer Co.²⁷

A Poem²⁸ (1928)

It is very hard to resist the impression
that there is one august corpus
to understand which clearly is the only task
of any Court concerned.

If there were such a transcendental body of law
outside of any particular State
but obligatory within it unless and until changed by statute,
the Courts of the United States might be right in using

their independent judgment
as to what it was.

But there is no such body of law.

The fallacy and illusion that I think exist
consist in supposing that there is this outside thing to be found.

Law is a word used with different meanings,
but law in the sense in which courts speak of it today
does not exist
without some definite authority
behind it.

One can almost sense Wallace Stevens in this “verse.”²⁹ These lines appear abruptly in Holmes’s dissent and in the context of a discussion about what the common law is. Holmes is refuting the majority’s finding that the “cases cited show that the decisions of the Kentucky Court of Appeals holding such arrangements [i.e., railroad contracts granting certain companies exclusive privileges to do business on railroad property] invalid *are contrary to the common law as generally understood and applied*” (*Black & White Taxi* 528, emphasis added). Holmes is arguing that the common law is not one general body of abstract principles with definite applications that are binding in all times and places; he is suggesting that the common law may encompass many different rules in many different jurisdictions and that the law is ultimately whatever the government treats as the law at any given time and place. The implication is that the common law is not one thing but many, not the name for a fixed order of principles but for a process or methodology for handing down and following precedents. Because the common law in one place may differ from the common law in another place, Holmes reasons, the common law in Kentucky may consist of rules that are valid there but invalid elsewhere.

Holmes's background in poetry and literature warrants the inference that he deliberately chose his diction for its sound effects, including this succession of "c" sounds: "corpus-clearly-Court-concerned." He displays here alliteration, rhyme, and iambic feet, as this phonetic rendering demonstrates: "*clear-LEE is-THEE on-LEE task-OF an-EE court-CON serned.*" This line might have rounded out an Emily Dickinson poem. Other alliterative, near-rhyming phrases include "It *iS/reS-iSt/impreSS,*" "there *iS/auguSt/corpuS,*" and "*exiSt/conSiSt.*" Other iambic phrases include "*might-BE right-IN yoos-ING*" (note also the "might/right" rhyme), "*as-TO what-IT was*" (note also the "s" and "w" alliteration), "*that-I think-EX ist*" (note also the "th" alliteration), "*used-WITH diff-RENT mean-INGS*" (note also the "with-diff-rent" assonance), and "*speak-OF it-TO day*" (note also the "s" and "t" alliteration). These iambs would be unremarkable if they were not positioned alongside one another to create a rhythm and meter; the series of successive iambic phrases gives rise to feet, which gives rise to the presumption that the metrical patterns were not accidental but designed for rhetorical effect.

The manner in which Holmes employs metonymy by calling the majority's notion of the law "this outside thing" highlights his belief that the law consists of nothing more than the rules that are backed by government; there is, he seems to say, no law separate from and above that which the sovereign recognizes. He reinforces this point with the phrase "[l]aw is a word used with different meanings." Here as in the other lines in this dissent Holmes appears to have "elected to stick with already familiar and nonprofessional forms of language," turning plain idioms into resonant and memorable sounds through the careful organization of diction and syntax (Poirier 136). He eschews citations, logical reasoning, and case analogies and makes sweeping philosophical claims that raise ontological questions about what the law is and

epistemological questions about how we know what the law is. Dissents ordinarily do not discuss the philosophical nature of the law, only how the case ought to have been decided and on what precedential basis. Holmes's sentiment could have been stated more simply: "It is understandable that people want there to be some higher form of law that governs how courts decide cases, but there is not a higher form of law—there are only the rules that the government establishes." Yet he went further than that, giving us lines that are memorable for their style and sound.

Compare Holmes's lines with the holding of the majority opinion:

The decree below should be affirmed unless federal courts are bound by Kentucky decisions which are directly opposed to this court's determination of the principles of common law properly to be applied in such cases. Petitioner argues that the Kentucky decisions are persuasive and establish the invalidity of such contracts, and that the Circuit Court of Appeals erred in refusing to follow them. But, as we understand the brief, it does not contend that, by reason of the rule of decision declared by section 34 of the Judiciary Act of 1789 (now R. S. 721, U. S. C. tit. 28, 725 (28 USCA 725)), this court is required to adopt the Kentucky decisions. But, granting that this point is before us, it cannot be sustained. The contract gives respondent, subject to termination on short notice, license or privilege to solicit patronage and park its vehicles on railroad property at train time. There is no question concerning title to land. No provision of state statute or Constitution and no ancient or fixed local usage is involved. For the discovery of common-law principles applicable in any case, investigation is not limited to the decisions of the courts of the state in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule. Kentucky has adopted the common law, and her courts recognize that its principles are not local but are included in the body of law constituting the general jurisprudence prevailing wherever the common law is recognized. *Hunt v. Warnicke's Heirs Hardin* (3 Ky.) 61; *Lathrop v. Commercial Bank*, 8 Dana, 114, 121, 33 Am. Dec. 481; *Ray v. Sweeney*, 14 Bush, 1, 9, et seq., 29 Am. Rep. 388; *Aetna Insurance Co. v. Commonwealth*, 106 Ky. 864, 876, 51 S. W. 624, 45 L. R. A. 355; *Nider v. Commonwealth*, 140 Ky. 684, 686, 131 S. W. 1024, Ann. Cas. 1913E, 1246. And see 1 Kent's Commentaries (14th Ed.) pp. 451, 602. As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a state and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this court is that, in determining questions of

general law, the federal courts, while inclining to follow the decisions of the courts of the state in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this court.

These lines lack the voice that is evident in Holmes's dissent. They explain the rationale without narrative asides such as "[i]t is hard to resist the impression" or "[t]he fallacy and illusion that I think exist." If there are alliterative phrases in the majority's holding, they appear to be incidental and not designed. Although there are iambs in the majority's holding, as there are iambs in all ordinary speech, they are not arranged in a series to create a rhythm or meter. There are no aphorisms, and the citations to authority tend to disrupt the flow of the passage. This comparison is not meant to suggest that Holmes's dissent was vindicated because it was more literary than the majority opinion—as if the literariness of an opinion were all that mattered, notwithstanding logical argument and legal reasoning—but the comparison does explain why *Black & White Taxi* has become famous not for the majority opinion but for Holmes's dissent. The fact that Holmes's dissent has been widely criticized for its reasoning and logical analysis only strengthens the proposition that its most lasting traits—the reasons it remains read, discussed, and quoted—are aesthetic and stylistic.³⁰ Its vindication could be attributed to his reaching the right result from logically specious or jurisprudentially questionable premises.

Holmes's dissent in this case was later vindicated in that it became the majority position.³¹ Justice Breyer, writing for a unanimous court in *Hertz Corp. v. Friend* (2010), explained that the majority's holding in *Black & White Taxicab* had been superseded by statute (*Hertz* 85-89). Statutes represent a form of majority opinion insofar as legislation reflects the dominant views of the populace as expressed through elected representatives. Even before the decision of the United States Supreme Court in *Hertz*, the majority holding in *Black & White*

came under scrutiny in *Erie R. Co. v. Tompkins* (1938) (819-20) in which Justice Brandeis delivered the opinion of the United States Supreme Court. Allan C. Hutchinson claims that the *Erie* decision “vindicated” Holmes’s dissent in *Black & White Taxicab* “in substance if not in rhetoric” (100). In 1988 a Fourth Circuit judge in *Capital Tool and Manufacturing Co., Inc. v. Maschinenfabrik Herkules* recognized that the majority holding in *Black & White* had been abrogated (172). Two federal district courts declined to extend the precedent of *Black & White* in *Toste Farm Corp. v. Hadbury, Inc.* (1995) and *Lenco, Inc. v. New Age Industrial Corp., Inc.* (2001). Although no judge or legislator overtly professed that the distinctive literary and aesthetic properties of Holmes’s dissent in *Black & White* necessitated a formal reconsideration of that case, those properties lent Holmes’s dissent a certain aura for which there can be no empirical measure but which stand out as unusual and memorable in the canons of American constitutional law. Subsequent chapters will demonstrate that other dissents by Holmes became known for their literary and aesthetic qualities and were likewise vindicated. *Black & White* therefore is not an aberration or an isolated example but merely one illustration within a pattern of vindication.

Holmes’s dissent in *Gitlow v. New York* (1925) provides another illustration, marked as it is by “extraordinary prose to find in [a] judicial opinion” (Kalven 156). This dissent has been called “powerful” (Gunther 239, Horowitz 278), “prescient” (Abrams 196), “forcefully articulated” (Gamso 1596), “stirring” for its “stylistic brilliance” (Rogat and O’Fallon 1401), and “classic” for its “memorable rhetoric” (Gunther, “Learned Hand and the Origins of Modern First Amendment Doctrine” 751). One scholar has proposed that Holmes’s dissent in *Gitlow* “is more an example of his distinctive literary style than an attempt to develop a new First Amendment

jurisprudence” (White, *Law and the Inner Self* 445). Despite such acclaim, there is a glaring absence of commentary about what elements of the dissent make it literary or stylistic.

Consider the following lines, which I have reformatted as a poem:

Gitlow v. New York³²

A Poem³³ (1925)

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.

Aphorisms such as “[e]very idea is an incitement” and “[e]loquence may set fire to reason” are rare in judicial opinions. They “put the point memorably [...] with pragmatist resonance” (Blasi 37) and have earned a reputation as “famous” (Schwartz 239), “quotable” (Gordon 4), and “arresting and memorable” (White, *Law and the Inner Self* 445). They have become a “mantra”

in First Amendment commentary (Tsai 204). Even more foreign to judicial opinions is personification of the kind expressed when Holmes treats an “idea” as an acting agent that can “offer itself.” Holmes’s alliterative use of the letter “n” emphasizes mobility, momentum, and ignition: “incitement,” “energy,” “movement,” “incitement,” “enthusiasm,” “conflagration.” These nouns suggest provocation, stimulus, and instigation; they are tied to ideas themselves, as in the line “every idea is an incitement,” hence the correspondingly alliterative “n” sounds in the words “expression” and “reason.” “For Holmes, expression remained combustible,” and the metaphor of fire created in these lines evokes his pronouncement in *Schenck v. United States* (1919) that the First Amendment does not protect someone who falsely shouts “*fire!*” in a crowded theater (Tsai 203).

The diction in these brief lines recalls Holmes’s advice to Lewis Einstein: “A sentence gets its force from short words” (*Holmes-Einstein Letters* 5). Even an economical use of ordinary nouns and adjectives can bring about the extravagance that characterizes Emersonian superfluity. Such superfluity signals an emphatic sound and style and not necessarily verbosity or prolixity. Richard Poirier explains that “[e]xtravagance in writing is more [...] than simply a matter of the local magnification of a word. It can involve a kind of rapid or wayward movement of voice, something often heard in the casual, idiomatic passages of speech, as it simultaneously focuses on particular things” (Poirier 45-46). “Familiar, homey words,” Poirier continues, “cannot, then, be dispensed with; they can, however, be reshaped, especially by alterations in any written syntax designed to catch those tones or sounds of speech that can substantially inflect or even reverse the meanings normally assigned to the words” (Poirier 136). Holmes recognized in this vein that “the *normal* speaker of English” can be “a literary form”

(Holmes, “The Theory of Legal Interpretation 418, emphasis added). Emersonian superfluity is not about verbosity or ornamentation of diction but occurs whenever writing and speech “create significances, especially by inflections of voice” (Poirier 46). Emersonian superfluity can teach us “to hear sounds already deeply embedded in the caves of the human mouth and of the human ear” (Poirier 136).

The sound of Holmes’s prose in *Gitlow* exhibits superfluity. He follows a series of dactyls with spondaic feet just as he describes the possibility of combustion: “Eloquence [stress / slack / slack] may set fire [stress / stress / stress / slack] to reason [stress / stress / slack].” It is as though he wishes to create the sense of building pressure and then of sudden release or combustion. Two unstressed lines abruptly interrupt the heightened tension; the first appears with the transitional conjunction “But,” which signals a change in the tone. Holmes appears to reverse the intensity as he assures us that the “redundant discourse,” a phrase made cacophonous by the alliterative “d” and “s” sounds, has “no chance of starting a present conflagration.” A sudden transition to iambic feet and a lightened tone round out these lines and suggest that Holmes has smothered or extinguished whatever energy had been building with the three-syllable feet. His ability to turn brief sentences and undemonstrative words into profound and demonstrative utterances heralds what Poirier calls the “American pragmatist heritage that goes back to Emerson, a philosophical heritage that is unique for the privileges it accords to casual, extemporized, ordinary idiom, to uses of language that translate into little more than sound” (166).

These lines from Holmes’s *Gitlow* dissent develop an aesthetic characterized as much by the sound as by the meaning of Holmes’s diction. “Style, I think, is sound—a matter of the ear,”

Holmes wrote to Lewis Einstein (*Holmes-Einstein Letters* 322). Poirier refers to the “*sound*” of certain American writers such as Robert Frost, Gertrude Stein, and Wallace Stevens as the “central aspect of the Emersonian pragmatist contribution” (155, emphasis in original). These pragmatic writers “made the value of sound explicitly a subject of their work” (Poirier 154). At the time he authored the *Gitlow* dissent, Holmes had recently read and commented on the writings of Santayana,³⁴ T.S. Eliot,³⁵ Thomas Hardy,³⁶ James Joyce,³⁷ Rudyard Kipling,³⁸ and Sinclair Lewis,³⁹ among other modernists who were using ordinary idioms with extraordinary effect. Within the next few years he would read Ernest Hemingway,⁴⁰ D.H. Lawrence,⁴¹ Robinson Jeffers,⁴² Siegfried Sassoon,⁴³ and E.M. Forster.⁴⁴ He was, as he put it in a letter to Sir Frederick Pollock, “pleased” by Santayana’s unique “style” and convicted that “*superfluity* of energy [...] makes it necessary for a man to act” (*Holmes-Pollock Letters Vol. I* 260-61, emphasis added). Holmes was attentive to the function of syllabics and meter in his prose, explaining in a letter to Albert J. Beveridge that “except in rare cases I try to end a paragraph with a monosyllable or word accented on the last syllable—so that the axe may fall—and the head drop. When you end on a polysyllable it gives a squashy feeling. Of course there are cases where although you make a new paragraph you only pause to take breath and then continue the previous line of thought” (“Letter to Albert J. Beveridge,” July 11, 1926). Holmes’s attention to the sound, style, meter, and syllabics of his prose suggests that his use of these features of language in *Gitlow* were intended for rhetorical effect.

Compare Holmes’s lines from the *Gitlow* dissent with the following passage from the majority opinion:

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions

of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543, 42 S. Ct. 516, 27 A. L. R. 27, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution (5th Ed.) 1580, p. 634; *Robertson v. Baldwin*, 165 U.S. 275, 281, 17 S. Ct. 326; *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 10 Ann. Cas. 689; *Fox v. Washington*, 236 [268 U.S. 652, 667] U. S. 273, 276, 35 S. Ct. 383; *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247; *Frohwerk v. United States*, 249 U.S. 204, 206, 39 S. Ct. 249; *Debs v. United States*, 249 U.S. 211, 213, 39 S. Ct. 252; *Schaefer v. United States*, 251 U.S. 466, 474, 40 S. Ct. 259; *Gilbert v. Minnesota*, 254 U.S. 325, 332, 41 S. Ct. 125; *Warren v. United States*, 183 F. 718, 721, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. *Robertson v. Baldwin*, supra, p. 281 (17 S. Ct. 326); *Patterson v. Colorado*, supra, p. 462 (27 S. Ct. 556); *Fox v. Washington*, supra, p. 277 (35 S. Ct. 383); *Gilbert v. Minnesota*, supra, p. 339 (41 S. Ct. 125); *People v. Most*, 171 N. Y. 423, 431, 64 N. E. 175, 58 L. R. A. 509; *State v. Holm*, 139 Minn. 267, 275, 166 N. W. 181, L. R. A. 1918C, 304; *State v. Hennessy*, 114 Wash. 351, 359, 195 P. 211; *State v. Boyd*, 86 N. J. Law, 75, 79, 91 A. 586; *State v. McKee*, 73 Conn. 18, 27, 46 A. 409, 49 L. R. A. 542, 84 Am. St. Rep. 124. Thus it was held by this Court in the

Fox Case, that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert Case, that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story, *supra*, does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *State v. Holm*, *supra*, p. 275 (166 N. W. 181). It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. *People v. Most*, *supra*, pp. 431, 432 (64 N. E. 175). And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. *People v. Lloyd*, 304 Ill. 23, 34, 136 N. E. 505. See, also, *State v. Tachin*, 92 N. J. Law, 269, 274, 106 A. 145, and *People v. Steelik*, 187 Cal. 361, 375, 203 P. 78. In short this freedom does not deprive a State of the primary and essential right of self[-]preservation; which, so long as human governments endure, they cannot be denied. (*Gitlow* 665-668)

Not until the final line of this passage is there a phrase that registers as quotable, most likely because it rounds out the analysis. Even this line lacks the impressiveness of Holmes's more philosophical statements about the distinction between an expression of an opinion and an incitement. There are no aphorisms or metaphors or other forms of figurative language in the majority opinion. The alliteration that appears in the majority opinion (such as the repetition of "s" sounds in the first sentence of the passage) does not come across as intentional and does not underscore a particular point the way Holmes's repetition of "n" sounds calls attention to "combustion" and to his fire metaphor.

The literary and rhetorical qualities of Holmes's *Gitlow* dissent contributed to its memorability, without which one probably could not have said that "the *Gitlow* dissent became law" (Kellogg 155). The aphoristic premises of this dissent—*every idea is an incitement*;

eloquence may set fire to reason—“resonate with particular audiences” and “*continue to resonate*” (Danisch 232, emphasis added). In a letter regarding *Gitlow*, Holmes complained to Lewis Einstein about “a criticism of my opinions that they might be literature but were not the proper form of judicial expression” (“Letter to Lewis Einstein,” July 11, 1925). Such criticism makes the vindication of Holmes more remarkable because it suggests that his dissent is not remembered as much for *what* it says as for *how* it says. If Holmes had not aestheticized his dissent, it might not have been canonized and might not have shaped the trajectory of First Amendment jurisprudence. This dissent was considered nearly vindicated in 1951 by the United States Supreme Court in *Dennis v. United States*: “Although no case subsequent to *Whitney*⁴⁵ and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale” (*Dennis* 507). Writing for the majority of the United States Supreme Court in *Thomas v. Collins* (1945), Justice Rutledge cited Holmes’s *Gitlow* dissent to support this axiom: “The First Amendment is a charter for government, not for an institution of learning. ‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts” (537). In 1946 the United States Supreme Court in *Pennekamp v. State of Florida*, a case that relied on *Gitlow* to reach its conclusion, recalled this about Holmes’s First Amendment jurisprudence: “No Justice thought more deeply about the nature of a free society or was more zealous to safeguard its conditions by the most abundant regard for civil liberty than Mr. Justice Holmes. He left no doubt that judicial protection of freedom of utterance is necessarily qualified by the requirements of the Constitution as an entirety for the maintenance of a free society” (351-52). Numerous federal and state court decisions have linked their freedom-of-speech rationale to Holmes’s dissent in

Gitlow. Chapter three will demonstrate that Holmes's complex notions of freedom of speech and expression are not reducible to his *Gitlow* dissent from which he eventually distanced himself. The point here is that the citational network of federal cases emanating from the *Gitlow* dissent would not have been possible if that dissent had been unremarkable, nor perhaps would Holmes's arguments about unrestrained speech have been revisited if they had been couched in boring or bland prose.

Emersonian Superfluity

The hagiographic treatments of Holmes as a poetic genius signal a tendency in Holmes's own writing toward Emersonian superfluity. Holmes employed remarkable turns of phrase and insisted on rhythmic and memorable language where a mundane and mechanical style would have sufficed. Poirier's theory of superfluity, which refers to an extravagant literary style that Poirier attributes to Emerson, resonates in the context of Holmes's writings and in light of Holmes's devotion to Emerson. Poirier considered superfluity to be Emerson's recourse for overcoming the influence of his aesthetic predecessors while making his own mark on their tradition. He presented superfluity as a textual means for creative minds to struggle against the inherent limitations and vagaries of language and to experiment with diction and syntax to attract and affect future readers. Related to Harold Bloom's theory of the anxiety of influence, Poirier's notion of superfluity holds that Emerson and others in his revisionary tradition (William James, Robert Frost, Gertrude Stein, Wallace Stevens, and T.S. Eliot) drew creative inspiration from the angst that accompanied their desire to overcome their literary predecessors as well as the confines of language and representation. The agonism inherent in Emersonian superfluity goes lengths toward explaining how Holmes's dissents not only draw from Emerson's influence but also instantiate an aesthetic pragmatism that struggles to generate continuity and improvement in

rules that are couched in binding utterances. The language of Holmes's dissents exemplifies the creative urge as against supine submission to other judges and justices and against the uncritical acceptance of established precedents. His memorable diction and syntax serve important rhetorical functions and shape judicial precedents to fit the present environment, as evidenced by the ability of his dissents to transition into law. Holmes's dissents counteracted the tendency among judges and justices to mechanically receive or repeat only partially relevant holdings that left current parties without an adequate remedy and future parties without guidance as to how old laws obtain in new contexts. The sonorous qualities of those dissents emphasized and popularized his normative utterances about what the law ought to be and thereby increased the probability that those utterances would impact if not become the law.

Emerson enacted the superfluity he described. He writes about superfluity in the form of "energies, processes, movements, transitions, and transformations" while making his "writing the literal embodiment of these vital forces" (Levin 2). He substantiates superfluity by couching his claim "that the world is a force" in language that "has a force" and that "draws on and extends the force" (Levin 2). The opening of "Circles," for example, announces that "[t]he eye is the first circle; the horizon which it forms is the second; and throughout nature this primary picture is repeated without end" (Emerson, "Circles" 403). Here Emerson separates three short, emphatic independent clauses with two semi-colons, creating the sense that the sentence itself is flowing outward from the first "circle" and repeating a syntactical structure the way nature repeats her forms. The eye metaphor suggests that all experience is concentric in that it shares the same origin, which itself is not a point but a curved line having multiple points on it, to say nothing of the power to "see." All circles of knowledge and existence derive from the first. The

metaphor applies not just spatially but temporally: the circles of the present develop out of past circles and enable future circles.

Emerson states that “[t]here are no fixtures in nature” because the “universe is fluid” (Emerson, “Circles” 403); the constitution of each circle, he suggests, has to do with “laws” and “culture,” the former being what regulates and explains the latter even as both change in synchronized stages (Emerson, “Circles” 403). The eye and circle metaphors exemplify superfluity by making figurative what could have been simple and literal but also less memorable; his punctuation and syntax exemplify superfluity by representing and resembling the circular processions that are Emerson’s subjects. Emerson’s use of auxesis also mimics the circularity that he depicts in the eye metaphor: “Our life is an apprenticeship to the truth, that around every circle another can be drawn; that there is no end in nature, but every end is a beginning; that there is always another dawn risen on mid-noon, and under every deep a lower deep opens” (Emerson, “Circles” 403). This sequence of phrases beginning with the conjunctive “that” demarcates the stages in which each new circle is drawn and signals the endlessness and repetitiousness of natural phenomena. This line, like the material world, resembles the “vast ebb of a vast flow” (Emerson, “Circles” 406). In these opening sentences to “Circles” there is “no sleep” and “no pause” or “inertia” but instead “incessant movement and progression” (Emerson, “Circles” 412). Emerson’s prose performs the momentum it celebrates—it superfluously promotes superfluity. Such moments are common in Emerson’s essays. He might comment about the greatness of simplicity, for instance, in simple diction and syntax: “Nothing is more simple than greatness; indeed, to be simple is to be great” (Emerson, “Literary Ethics” 100). This aphoristic sentence is indeed great; it is superfluous not because of prolixity or ornateness,

which it lacks, but because it is rendered in a manner that reflects the philosophical point Emerson is making. Another example of such superfluity appears in “Spiritual Laws,” where Emerson discusses a ship on a river surrounded by “obstructions on every side but one” in an independent clause stuck between two semicolons; he then submits that “on that side all obstruction is taken away” as he drops the repetition of semicolons and allows the sentence itself, like its subject, to flow forward (Emerson, “Spiritual Laws” 310). In light of this creative and precise organization of punctuation, it is telling that Emerson immediately follows this sentence with the declaration that the “talent” and “call” to break through obstructions “depend on [...] organization” (Emerson, “Spiritual Laws” 310).

Poirier explains that “the democratic impulse shared by Emersonian pragmatists [...] involved a recognition that language, if it is to represent the flow of individual experience, ceases to be an instrument of clarification or of clarity and, instead, becomes the instrument of a saving uncertainty and vagueness” (3-4). Emersonian superfluity is in this sense an overcompensation or overreaction to skepticism about the ability of language—or what Holmes called the “uncertainty of speech” (Holmes, “The Theory of Legal Interpretation” 418)—to summon forth absolute meaning. Holmes’s dissents enacted Emersonian pragmatism by subverting the clarity of the law (the majority opinion) while displaying unforgettable language that diminished the persuasive force of the majority opinion. Holmes’s dissents defamiliarized the majority rule by calling it into question with language that is provocatively aesthetic. Poirier employs the phrase “Emersonian individualist and dissenter” in a way that could have described Holmes (6). Like judges and justices in a common-law system who are obligated to follow precedent, Poirier’s Emerson is concerned with “the language we inherit” (Poirier 11). “Every new compound / Is

some product and repeater,” intones Emerson in words that both substantiate Poirier’s theory and evoke the mimetic rules within the common-law system (Emerson, “The Visit” 14). He says elsewhere in thematically similar diction that “the experience of each new age requires a new confession” (Emerson, “The Poet” 450) and that “the inventor only knows how to borrow” (Emerson, “Plato, or the Philosopher” 634). Like precedents in a common-law system, creativity for Emerson is mimetic and transmitted, not fashioned in a vacuum.

Poirier’s pragmatist canon is subject to its own version of *stare decisis* whereby writers inevitably receive the precedents on which originality is predicated. Poirier coins the term “linguistic skepticism” to describe the struggle “to reveal, in the words and phrases we use, linguistic resources that point to something beyond skepticism, to possibilities of personal and cultural renewal” (11). Linguistic skepticism is tied to the idea that language can never represent reality; that vocabularies are social adjuncts standing in for concrete phenomena; and that words are signs for referents and cannot completely convey the sensations one feels while perceiving material objects. What characterizes Poirier’s conception of superfluity is the attempt to overcome linguistic skepticism with poetic language and prominent style. Common-law judges and justices also avail themselves of superfluity: Although they are restrained by binding precedents, certain judges and justices may use such restraint as a source of creative originality for disrupting the majority position or for swerving from the course of precedent.

“Although he was the most eloquent writer on the bench,” observes one biographer, Holmes “could also be the most obscure” (Healy 103). Holmes himself admitted in a letter to Ellen A. Curtis that his surplus of meaning may have led his writing into the kind of obscurity or vagueness that characterizes the aesthetics of Poirier’s pragmatists: “Obscurity has been my

trouble, although I hardly should count that in estimating what I mean by style. Obscurity sometimes means, with me as with others, that one still is out on the fighting line of thought” (“Letter to Ellen A. Curtis”). Holmes thus expressed an element of superfluity: the way in which “Emersonian pragmatism [...] never allows any one of its [key, repeated terms] to arrive at a precise or static definition” (Poirier 129). The anxiety for the Emersonian pragmatist consists in breaking from the gridlock of influence and compensating for the obscurity inherent in language while always leaving room for future adaptation and influence. Poirier portrays Stevens’s poem “Seventy Years Later” as articulated “in a vocabulary and syntax opaque even for Stevens, suggesting that a burden of obscurity is revealed to him in the very process of the poem’s delivery to us” (162). This very burden “validate[s] the possibilities for new invention” (Poirier 163) and motivates “an impatient rejection of defeat” (Poirier 164). In Poirier’s view, the inherent limitations of language are also conditions for its creative perpetuation; the struggle against the constraints of language enables originality to proliferate. The common-law judge or justice confronts not only language constraints but also the constraints of *stare decisis*. Superfluity can to some extent free the common-law judge or justice from these constraints. The anxiety of influence for the common-law judge or justice is creatively to achieve workable solutions in particular cases without allowing lines of reasoning to solidify into rigid rules that may not obtain in future contexts.

Holmes’s dissents are on the order of superfluity insofar as they evoke the possibilities of language to make the past “*foreseen* in the present, a present always intent, as the past was, on transforming itself into a very different and better future” (13). Holmes’s dissents consult the laws of the past while reaching future audiences to influence the law at later dates. Holmes’s

dissent in *Haddock v. Haddock* (1906), for example, consulted the legal history regarding matrimonial domicile to make possible the majority opinion in *Williams v. State of North Carolina* (1942), which expressly overruled the majority in *Haddock* and cited an aphorism from Holmes's dissent ("this is pure fiction, and fiction always is a poor ground for changing substantial rights") to establish a new majority position (*Williams* 300). As indicated in the opening of this chapter, Holmes dissented in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911), stating, "There is no statute covering the case; there is no body of precedent that, by ineluctable logic, requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere" (*Dr. Miles* 411). The United States Supreme Court eventually overruled the majority in *Dr. Miles* and vindicated Holmes's dissent. When it did so it borrowed from Holmes's Darwinian terminology, declaring that "[s]tare decisis does not compel continued adherence to the *per se* rule here" because the "rule of reason's case-by-case adjudication implements the common-law approach" whereby the statutory prohibition on the restraint of trade "evolves to meet the dynamics of present economic conditions" (*Leegin Creative Leather* 879).

Another example of the ability of Holmes's dissents to shape the law long after his death appears in *Olsen v. State of Nebraska ex rel. Western Reference and Bond Association* (1941), which overruled part of the majority opinion in *Tyson & Bro.-United Theatre Ticket Offices v. Banton* (1927) and credited Holmes's dissent for the reversal (*Olsen* 247). *Green v. United States* (1957) explains that Holmes's dissent in *Kepner v. U.S.* (1904) has been vindicated while *Green* itself vindicates the *Kepner* dissent. By concurring with the main opinion in *Fernandez v. Wiener* (1945) on grounds presented in Holmes's dissent in *Hooper v. Tax Commission of*

Wisconsin (1931), Justice Douglas vindicated Holmes's dissent in *Hoeper*. Pushing back against the holding in *Farmer's Loan & Trust Co. v. State of Minnesota* (1930), the United States Supreme Court in *Curry v. McCannless* (1939) nudged case precedent back in the direction of Holmes's dissent in *Farmer's Loan*, giving rise to a limited vindication of Holmes's views. *State Tax Commission of Utah v. Aldrich* (1942) vindicated Holmes's position on the Fourteenth Amendment as articulated in his dissent in *Baldwin v. State of Missouri* (1930), quoting Holmes's superfluous maxim that the Fourteenth Amendment was not "intended to give us carte blanche to embody our economic and moral beliefs in its prohibitions" (*Baldwin* 595). Writing for the majority in *Girouard v. United States* (1946), Justice Douglas vindicated Holmes's dissent in *United States v. Schwimmer* (1929), proposing that Justice Holmes's dissent exposed a fallacy underlying the general rule at issue in the case (*Girouard* 63-64). Vindication of Holmes's dissenting view was acknowledged in *Youngstown Sheet & Tube Co. v. Sawyer* (1952): "Although more restrictive views of executive power, advocated in dissenting opinions of Justice Holmes, McReynolds and Brandeis, were emphatically rejected by this Court in *Myers v. United States*, *supra*, members of today's majority treat those dissenting views as authoritative" (*Youngstown Sheet* 702). *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.* (1973) compared the majority opinion of Justice Sutherland in *Louis K. Liggett Co. v. Baldridge* (1928) with Holmes's dissent in *Liggett* before adopting Holmes's position as the law: "The *Liggett* case, being a derelict in the stream of the law, is hereby overruled" (*North Dakota State Board* 167). Finally, in *Harper v. Virginia Department of Taxation* (1993), Justice Thomas vindicated an aspect of Holmes's dissent in *Kuhn v. Fairmont Coal* (1910).

Holmes's dissents have influenced not just the United States Supreme Court and inferior federal courts but also state appellate courts. When a Florida appellate court declined to follow the majority in *Kuhn*, it did so partially on the ground of Holmes's dissent in *Kuhn* (*Robbat* 1156). In *Monongahela River Consol. Coal & Coke Co. v. Jutte* (Penn. 1904), the Pennsylvania Supreme Court, following the decision in *Northern Securities Company v. United States*, moved toward the position of Holmes's dissent in *Northern Securities*. Even the United States Supreme Court, without expressly vindicating Holmes, looked back to Holmes's writing in *Northern Securities* as a source of authority. In *Dennis v. United States* (1951), for example, Justice White adopted Holmes's opening dictum from *Northern Securities* about great cases making bad law and hence called attention to Holmes's oppositional reasoning. This dictum was so catchy that it was repeated in several United States Supreme Court cases, mostly in dissents: *Penn-Central Merger and N & W Inclusion Cases* (1968); *New York Times Company v. United States* (1971); *United States v. Chavez* (1974); *Nixon v. General Service Administrator* (1977); *Larkin v. Grendel's Den, Inc.* (1982); *Pennzoil Co. v. Texaco, Inc.* (1987); and *Skinner v. Railway Labor Executives' Association* (1989).

These examples demonstrate that when a dissent registers legal positions that the present majority has rejected, later justices influenced by that dissent may register their own legal opinions until the dissenting position becomes vindicated. The constant process of working through differing viewpoints, of sifting through opposing arguments and antagonistic reasoning, results in what at any given moment is deemed "the law," a term that in the common-law system signifies the cumulative product of longstanding trial and error. Because it draws attention to

itself, superfluity can ensure that judges and justices remain interested in the legal arguments lying beneath compelling language.

Poirier's notion of linguistic skepticism articulates a parallel between what a strong common-law judge like Holmes does and what a strong poet like Emerson does. Poirier does not mention judges or justices, but his take on what Emerson believed texts to be and to do is remarkably similar to what common-law judges and justices are trained to believe that textual precedent is and does. In a sense, Poirier portrays Emerson as a judge of and within the literary tradition who "wishes to point out [...] that no matter how appealing the historical nature of any text, especially as it gets expressed in uses of language, historicity is itself the germ of what could become the cultural obsolescence of that text" (16). By the standards of this hypothetical Emerson, a work of literature (or a legal opinion) that is too historically bound to remain relevant to future readers exhausts its importance. Authors (or judges and justices) who are too eager to break from precedent, whose "tiresome injunction" is "to make it new," are merely "weak Emersonians" who "fail to perceive that this is also to say that 'it' will become old and will not thereby be discredited" (Poirier 16). Rather than altogether dispensing with precedents, the Emersonian modifies or adapts precedents for present conditions and purposes. He wrests control of the only natural constant: "life, transition, and the energizing spirit" (Emerson, "Circles" 413). In the common-law system, the inheritance of acquired rules and principles embodied in case precedents supplies future judges and justices with a range of data on which to base their decisions. By dissenting, a judge or justice widens the range of data. Poirier's claim that even "words of resistance and dissent" are "products of 'previous human thinking'" therefore resounds in the context of the common-law system (Poirier 27).

Poirier's Emerson maintains that "every text is a reconstruction of some previous texts of work, work that itself is always, again, work-in-progress" (17). "[A]ccording to Emerson himself," Poirier submits, "nothing can be recognized as new unless it offers in itself some hint of its obligation to the past" (16). Or in Emerson's words, "There is not a piece of science but its flank may be turned tomorrow; there is not literary reputation, not the so-called eternal names of fame, that may not be revised and condemned" (Emerson, "Circles" 407). "Every ultimate fact," Emerson says, "is only the first of a new series. Every general law only a particular fact of some more general law presently to disclose itself" (Emerson, "Circles" 405). This evolutionary understanding of literary and intellectual history that Poirier attributes to Emerson nearly aligns with Holmes's view of the common-law system. Poirier even ascribes to Emerson a view of textual heritability that resembles the common-law processes by which majority opinions are advanced and opposed over time and in response to changing social and technological circumstances. He claims, for instance, that Emerson held the notion that a "same work gets repeated throughout history in different texts, each being a revision of past texts to meet present needs, needs which are perceived differently by each new generation" (17-18). This Emersonian idea of "creation consist[ing] of repetition with a difference, of repeating in a new text work already being carried on in the texts of the past," is in fact the basis of the common-law system that Holmes repeatedly called attention to in *The Common Law* (Poirier 18).

Conclusion

Holmes is "The Great Dissenter" not only because he dissented with literary sparkle but also because, as Poirier said of Emerson, he "ma[d]e oneself conscious of things before they [went] public, as it were, before they c[ould] be known publicly by virtue of having passed into

language” (25). Holmes’s dissents “lack the perspicuity of a logical demonstration” and have been resurrected “as fragments of American public culture that continue to circulate *beyond* the particularities of the decisions rendered in each case” (Danisch 227, emphasis added). Poirier may as well have called Emerson a prophet. In a similar sense, Holmes’s dissents not only provide normative utterances about what the law ought to be in theory but also prophesy about what the law will become in fact. It is indeed the Emersonian “virtue” of “superfluousness” and the “determination to show that excess is more important than necessity, energy more lasting than any meanings it may toss out to the intellectually sedentary,” that marks Holmes’s dissents with distinction and that enables them to become prophetic (Poirier 37). “[W]hat elevates the style of a great decision,” explains one commentator on Holmes, “is its capacity to *gesture beyond the particularities* of a case without employing broad generalizations. This is why Holmes’s dissents are so *stylistically memorable*—the metaphors they employ *gesture beyond the case at hand* to larger, more pressing paradoxes that *continue* to mark American political affairs” (Danisch 227, emphasis added). Holmes appropriates Emersonian superfluity and vests certain legal arguments in resonant language to preserve those arguments in American legal discourse for future generations. His vindicated dissents suggest that the proliferating potential of any dissents to become majority positions is maximized by “mutations and superfluities of meaning” (Poirier 38); by the “power of troping” or “turning or changing the apparently given” (Poirier 39); and by inflecting language to “ever so slightly make some persons *feel* like changing the world” (Poirier 39). If superfluity “points to a human desire to go beyond these usual stopping places in sentences, these nouns, abstractions, concepts that serve the function of homes or still points, making us their dependents,” then dissents as rhetorical media are

conducive to superfluity because they seek to push society forward by diversifying jurisprudential options for future judges and by placing ideas in constructive competition (Poirier 40). Dissents defamiliarize the law as expressed by the majority and enable the vagaries of meaning from which creativity is derived. Dissents are an oppositional genre, and opposition forces the struggle for creativity and originality that are the hallmarks of Emersonian pragmatism.

CHAPTER TWO

The Poetics of Transition and Three Vindicated Dissents

Drawing from data comparing Holmes to other United States Supreme Court justices, the previous chapter suggested that Holmes earned his reputation as a great dissenter not because of the quantity but because of the quality of his dissents. Underscoring Holmes's style, the previous chapter then adopted Richard Poirier's theories about linguistic skepticism and Emersonian superfluity to show that they illuminate Holmes's writings and reflect the common-law system as depicted by Holmes.

This chapter explores Holmes's aesthetics with more attention and analyzes three of Holmes's most famous dissents to demonstrate that aesthetics impact the reception and legacy of his judicial writing. I begin by describing the "poetics of transition" that frames my discussion of Holmes's aesthetics as represented in these three dissents. I analyze these three dissents for specific examples of Holmes's superfluity, reveal how superfluity contributed to the vindication of the dissents, and integrate Jonathan Levin's theory of the poetics of transition into Poirier's formulation of superfluity and linguistic skepticism. Holmes's Darwinian "ethic of struggle," which he denominated a "'judicial duel,' 'battle of the market,' 'battle of trade,' 'battle grounds' of beliefs, and 'battle on the question of legislative policy,'" finds aesthetic expression in his use of sound in the dissents discussed in this chapter (Springer 57).⁴⁶ The legacy of these dissents suggests that Holmes's style enacted the poetics of transition that contributed to the vindication of his legal arguments.

Recent empirical scholarship has measured the importance of dissents by totaling the number of times federal appellate cases cited them.⁴⁷ Although this chapter accounts for

citations to Holmes's dissents by federal appellate courts, it does not adopt the premise that federal appellate citations represent the only or the best measure of a dissent's influence or vindication. Counting appellate court citations to Holmes's dissents proves that the dissents influenced future judges and justices, but citation numbers are not a proxy for vindication. Consider Colin Starger's observation about the limitation of the citation-based approach to evaluating influence or vindication:

An exclusively citation-based approach would apparently conclude that Holmes's dissent played no role in *Lochner's* famous and definitive overruling by *West Coast Hotel v. Parrish* in 1937. This is because Holmes' *Lochner* dissent was cited exactly zero times in the *West Coast Hotel* majority opinion and zero times in the authorities relied upon by the majority. [...] I regard this absence of citation more as evidence of a methodological limitation in this empirical approach than as proof that Holmes' dissent failed to contribute to the demise of *Lochnerism*. Despite the absence of citation, a direct line unquestionably connects the *West Coast Hotel* majority opinion to Holmes' *Lochner* dissent twenty-two years later. (1256)

Starger uses graphs and tables to illustrate a "hermeneutic connection" between dissents and subsequent opinions "notwithstanding the absence of formal citation" from one case to the next (1257). This chapter follows Starger by treating the citation of Holmes's dissents by future courts as evidence of influence while acknowledging that other measures of influence exist. Even when this chapter points out where appellate courts have explicitly relied on Holmes, it does not consider these moments of agreement determinative of vindication. A number of dissents have been vindicated apart from the ruling of a future court. For example, the Fourteenth Amendment may be interpreted as vindicating the dissents of Justice Benjamin Curtis and Justice John McLean in the notorious *Dred Scott* case. Likewise, Holmes's dissents were vindicated not merely because some future justice quoted them or borrowed from their reasoning

but because the logic and rules he recommended were adopted at some later date, if not by a court then by a legislature or some other lawmaking body.

Poetics of Transition

Dissents prevent case precedents in a common-law system from reaching a state of repose or stasis; they yield variety in rules and principles and generate competition among different legal theories, thereby facilitating the forward mobility of judicial decision-making. In this respect, the theory of the poetics of transition derived from Richard Poirier and made comprehensive by Jonathan Levin pertains as much to poetry and works of imaginative literature as to judicial opinions, especially in light of dissents that are inherently agonistic. Poirier's subjects thrive on opposition: each author struggles against the ideas and practices of his or her greatest influences while striking out against the stasis of unoriginality and the restrictions of language. Poirier's trace accounts of literary influence and his suggestion that forms and methods are passed from author to author warrant a comparison with the common-law system in which judges and justices struggle against their peers and against established case precedents.

Poirier has argued that Emersonian superfluity counteracts repose in writing and ideas and involves "a kind of rapid or wayward movement of voice" that "is associated [...] with speed" and a "momentum or volatility of style" (Poirier 45). Poirier does not construe superfluity because obscurity and vagueness are aspects of superfluity. The nebulous meaning of superfluity must be inferred from the context in which Poirier uses the concept. Superfluity is about "generative interaction" (Poirier 47), "a struggle with language" (Poirier 50), the "continuous struggle with language" (Poirier 67), "creative energy" (Poirier 50), a "commitment" to "more than is necessary [for the] survival" of ideas and influences (Poirier 55),

“accelerations of a process” (Poirier 55), the “power of invention” (Poirier 57), an “overwhelming excess of productivity” (Poirier 58), “words in excess of the minimum daily requirements of human beings” (Poirier 58), the “plenitude and power of language” that propels one’s “voice into the future” (Poirier 60), “the power for new creation” (Poirier 71), “generative” and “creative power” (Poirier 73), “engendering” (Poirier 74), and “speaking to a posterity in no way bound by th[e] discourse” in which people in their specific time and place are immersed. All of these notions are emphatically against “a loss of creative powers” (Poirier 47), “immobility” (Poirier 59), “stand still” (Poirier 58), “the stasis achieved by former movements that have become textualized or intellectualized” (Poirier 65), and “bareness” (Poirier 70-71). Poirier surveys pragmatists who follow Emerson by resorting to superfluity to overcome the precedents of their influential predecessors as well as the inability of language to fully represent its referents. Judges and justices are subject to the same inquiry because they may also seek to overcome the precedents of their influential predecessors and to struggle against the vagaries of the language of the law that would seem to require clarity and interpretability for all members of society who must rely on evident rules. Justices like Holmes who are known for their literary style provide a basis for examining judicial opinions and dissents for Emersonian superfluity. Holmes’s dissents in particular make Poirier’s and Levin’s theories of influence both useful and legible beyond the typical pragmatist associations with such authors as William and Henry James, George Santayana, Wallace Stevens, Gertrude Stein, and Robert Frost.

Like Poirier, to whom Levin expresses his “luckiest debt,” Levin attributes his theory of the poetics of transition to Emerson (xv). Defining superfluity and the poetics of transition is a betrayal of the terms: they have fluid, luminous, fluctuating meanings that pertain to language

and its capacity to register meaning and feeling. They transport such registers into the future, achieving temporary influx in the works of certain writers who are sensitive to the past and concerned about the future. Poirier glosses the word and the concept of “transition” throughout *Poetry and Pragmatism* (Poirier 25, 28-29, 45-46, 67, 122, 150); Levin builds on and rounds out Poirier’s glosses. Levin’s theory of the poetics of transition is rooted in the belief that, “[o]nce we settle into a condition of repose, we compromise the vital energies that should constitute our power or [...] compromise the energies that should constitute power in our always elusive relationship to it” (Levin ix). Levin’s theory of the poetics of transition both supplements and clarifies Poirier, whose writing is famously complex and ambiguous. Poirier and Levin each reject neopragmatism and the postmodernist spin on pragmatism popularized by Richard Rorty; they focus on the “demanding, uncertain struggle for renewal” in both ideas and aesthetic forms (Levin 22). Whereas Poirier decried mainstream scholarship and technical prose and adopted the expository, meandering style of his subject Emerson, Levin writes conventional scholarship that supplements, refines, and elucidates Poirier. Levin draws out the transitional implications of Poirier’s theory of superfluity and frequently echoes Poirier, claiming, for instance, “Writing does not reflect or correspond to a world of things, but rather contributes to and extends the active processes and energies that flow through and thereby constitute the world” (Levin 2). Levin’s and Poirier’s theories are complementary if not intertwined discourses on the same themes: progress and momentum, creativity and vitality, rhetorical excess and its constructive and practical effects. Levin says at length and in detail what Poirier merely hints at and implies.

Although Levin’s theory of the poetics of transition describes literary history and literary figures, the common-law system renders it more comprehensible insofar as the power of the law

to facilitate cooperation and to adjudicate disputes may be compromised when certain rules have settled into a condition of repose in the form of case precedent that is no longer relevant or workable in the present environment. The poetics of transition involves the use of aesthetic language to provoke and sustain the evolution of imaginative forms and ideas in both the literary and the legal context because it signals a “process that extends knowledge further into the mysterious margin of things even as it defamiliarizes the very categories through which that movement is conducted” (Levin 3). In the legal context, for example, superfluous dissents may call into question the authority and clarity of majority opinions by defamiliarizing and unsettling the utterances in those opinions that constitute the law. Pragmatism in the common law and the literary context “is in many ways an extension of this transitional dynamic” (Levin 3) in that it recognizes and facilitates the “task of human intelligence,” which is “to evolve, and to keep evolving, ideas of the world that meet constantly changing human needs” (Levin 4).

The prepositional phrase “of transition” signifies that poetry (or poetic prose) is the predicate concept and that transition is an adjectival construction separating one type of poetry from others: some poetry does not generate a practical influence whereas other poetry mobilizes future audiences to action and inspiration. The word “transition” refers to the tendency of poetic language to stimulate future poetic language in the form of troping, mimesis, and rhetorical superfluity both derived from and breaking from precursor writers. Transition brings “the familiar into contact with the unknown” (Levin 3) such as when Robert Frost or Wallace Stevens creates “an abyss” or “a gap” in their writing by using “indistinct and loose phrasings, the kind people habitually use without expecting that the phrase will do more than keep them in touch with themselves and others” (Poirier 149-150). Frost carves out gaps in lines about gaps in

“Mending Wall.” Five full lines after his previous mention of gaps, he says, in his characteristically colloquial way, “But they would have the rabbit out of hiding, / To please the yelping dogs. The gaps I mean, / No one has seen them made or heard them made, / But at spring mending-time we find them there” (Frost 33). For a genre that prizes concision and precision, the repetition of the conjunction “But” is unusual; then there is the ambiguity of the referent of “they,” which is not clarified until Frost states, “The gaps I mean,” as though the speaker, as all ordinary speakers might, remembers too late that his subject is unclear, especially as it consists of unanimated objects—gaps in a stone wall—that have no agency that could *intend* to have a rabbit out of hiding. Here we see the superfluity possible in common speech and in the sort of personification that people use in everyday parlance. This carefully crafted sequence of words is supposed to seem natural and incidental, as if the rhetorical productions were only a mistake, merely chance phrases. Frost defamiliarizes familiar, basic language by making it figurative and difficult.

Frost and Stevens also enact transition with sounds that “invite us to live with others in a space of expectation rather than deferral” (Poirier 150). Notice how such expectation inheres in the third section of Stevens’s poem “Credences of Summer”:

It is the natural tower of all the world,
The point of survey, green’s green apogee,
But a tower more precious than the view beyond,
Axis of everything, green’s apogee

And happiest folk-land, mostly marriage-hymns.
It is the mountain on which the tower stands,
It is the final mountain. Here the sun,
Sleepless, inhales his proper air, and rests.
This is the refuge that the end creates. (Stevens 323)

Like Frost, Stevens yields a vague pronoun reference. The “It” of these lines could refer back to the sun, the subject of the previous section of the poem, but that seems unlikely given the mention of the sun in the seventh line above. Each line in isolation is perfectly comprehensible. Taken together, however, this extract is exasperatingly obscure yet arrestingly beautiful. The meaning of the passage gets lost in the operation of its sound: the alveolar approximates and near trills resulting from the “r” in *natural, tower, world, survey, green, tower, precious, everything, marriage, Here, proper, air, rests, refuge, and creates*; the voiceless alveolar stops and ejectives resulting from the “t” in *It, natural, tower, point, happiest, mostly, mountain, stands, rests, creates*; and the hissing sibilants resulting from the “s” in *is, survey, green’s, precious, Axis, happiest, mostly, hymns, stands, sun, Sleepless, inhales, his, rests, This, and creates*. The hypnotic, trancelike sweep of these singing intonations—seemingly effortless—is complemented by the mechanical repetition of the words *It, green, apogee, tower, and mountain*. Without grandstanding, parading, or imposing himself, Stevens’s speaker eases readers into the poem, driving his message forward with an unassuming lyrical eloquence that requires a heightened level of engagement. There appears to be no fussing with words, no tinkering with structure—just natural flow. The words seem spontaneous, inevitable. In fact they are a meticulous exercise in estrangement, distancing readers from any plain or ready understanding. The “It” is ultimately unknowable and unnamable even as it comes across as familiar, having assignable characteristics and a describable relationship to the surrounding words but defying exact identification: what is the subject of this passage? These lines evince the kind of emotional and imaginative obscurity Stevens believed to be intrinsic to poetry, which he described in terms germane to Poirier’s characterization of superfluity:

Things that have their origin in the imagination or in the emotions (poems) very often have meanings that differ in nature from the meanings of things that have their origin in reason. They have imaginative and emotional meanings, not rational meanings, and they communicate these meanings to people who are susceptible to imaginative or emotional meanings. They may communicate nothing at all to people who are open only to rational meanings. In short, things that have their origin in the imagination or in the emotions very often take on a form that is ambiguous or uncertain. (Stevens, "A Comment on Meaning in Poetry" 825)

Stevens, a lawyer himself, recognizes an open-ended and emotive aspect of communication that resists the logic and coherence that typify the law. Holmes's superfluity activates this moving, stirring potential in language.

Holmes creates transitions of a piece with Frost's and Stevens's not only by locating the "functional processes of intelligence and belief within the ongoing realm of experience" that he characterized as the "life of the law" (Levin 3; Holmes, *The Common Law* 1), but also by emphasizing explicitly in his jurisprudential writings and implicitly in his dissents "the constant need to adjust and readjust knowledge and belief about the world" (Levin 4). Holmes invoked the poetics of transition in his maxim that "repose is not the destiny of man" (Holmes, "The Path of the Law" 465). Just as he left "absolute truth" and "absolute ideals of conduct" for "those who are better equipped" (Holmes, "Ideals and Doubts" 4) and opined that the "aim of the law is not to punish sins" (*Commonwealth v. Kennedy* 20), so Levin's Emersonian pragmatists were "unwilling to accept any kind of transcendental, transexperiential force that guides or grounds moral and intellectual processes from without" (Levin 14). As Stevens said, "The notion of absolutes is relative" (Stevens, "From the Notebooks" 901), and "when the gods have come to an end, when we think of them as aesthetic projections of a time that has passed, men turn to a

fundamental glory of their own and from that create a style of bearing themselves in reality. They create a new style of a new bearing in a new reality” (Stevens, “Two or Three Ideas” 844).

In law as in literature, the intellectual powers of the Emersonian pragmatists “are imperfect and everywhere subject to the vagaries of time and place, mood and belief, confusion and error,” which happen also to be the “source of any impulse to rise above the worst effects of these limitations” (Levin 14). Poirier supplies examples in the “virtue and necessity of vagueness” as expressed in Robert Frost’s attention to “voice,” “sentence sounds,” and the “sounds of sense,” an attention that Poirier attributes to William James’s “The Stream of Thought” (from *Principles of Psychology*) and to Emerson’s “Self-Reliance,” in which “a self in continuous transition is preferred to any self in repose” (Poirier 137-139). Poirier is short on precise illustrations from Frost’s work probably because there are so many to choose from. One illustration might have been the incantatory lullaby sound that rounds out “After Apple-Picking.” Readers of this poem become vicarious participants in the speaker’s narcotic sleepiness and melancholy resignation by dint of the rhyme, enjambment, alliteration, slow rhythm, and mostly iambic meter:

I feel the ladder sway as the boughs bend.
And I keep hearing from the cellar bin
The rumbling sound
Of load on load of apples coming in.
For I have had too much
Of apple-picking: I am overtired
Of the great harvest I desired.
There were ten thousand thousand fruit to touch,
Cherish in hand, lift down, and not let fall.
For all,
That struck the earth,
No matter if not bruised or spiked with stubble,
Went surely to the cider-apple heap
As of no worth.

One can see what will trouble
This sleep of mine, whatever sleep it is.
Were he not gone,
The woodchuck could say whether it's like his
Long sleep, as I describe its coming on,
Or just some human sleep. (Frost 68-69)

More could be said about these lines—about their alternating length; their repetition of *sleep*; and their use of neologism (*overtired*), hyperbole (*ten thousand thousand fruit to touch*), and anthropomorphism (of the woodchuck), all to the effect of drowsiness—but just as Levin appropriates the captivating ambiguity that is the strategy of his subjects, I will leave Frost's words to speak for themselves.

According to Levin, Emersonian pragmatists embrace the notion that “there is no definitive ideal or belief that puts us in closer contact with the inherent nature of things or the absolute moral grounds or ethical imperatives of being” (197). He locates this notion in Emerson's concept of God or Soul and Spirit (Levin 33-35), in William James's formulations of thought and truth (Levin 50-52), in Santayana's and Dewey's skepticism “toward any and all fantasies of the absolute” (Levin 92), in Henry James's skepticism regarding metaphysical abstractions (Levin 117-118), in the patterns of language employed by Gertrude Stein (Levin 152-158), and in the “distinctive metaphors of transition” in Wallace Steven's poetry (Levin 169). Holmes himself postulates this Emersonian pragmatism in the common-law context by discarding the moral vocabularies that find their way into legal discourse⁴⁸ and by refusing to glorify the law as a collection of absolute syllogisms. He complained about the “evil effects of the confusion between legal and moral ideas” (Holmes, “The Path of the Law” 458) and went so far as to dismiss what he dubbed the “Hegelian” notion that one “can make a syllogism wag its tail—or less metaphorically, that he can get from logic into time and create the universe out of

nothing” (“Letter to Lewis Einstein,” August 9, 1921). Holmes maintained that the law “cannot be dealt with as if it contained only the axiom and corollaries of a book of mathematics” (Holmes, *The Common Law* 1). “A page of history,” he argued, “is worth a volume of logic” (*New York Trust Co. v. Eisner* 349). Rather than logic or syllogisms, the law according to Holmes consisted of “systematized prediction” and the “scattered prophesies of the past” (Holmes, “The Path of the Law” 458, 457).

The Emersonian pragmatists in Levin’s canon profess that “nothing protects against our inevitable failures of imagination” (Levin 43); still these limitations can provoke a creative desire to transcend and to move beyond, to anticipate and to prophesy, and to “emphasize that only the ongoing process of continuous imaginative activity can provide adequate protection against intellectual error and moral disaster” (Levin 44). Wallace Stevens nurtured his creative powers out of his acute sensitivity “to the way in which imaginative forms become inadequate to the experience of things that initially give rise to them” (Levin 89). Gertrude Stein abandoned any effort to “clarify a point or drive home a specific idea” and sought instead “to keep the movement—of words, of ideas, of self-awareness—on the go” (Levin 150). Her prose style and palpable modernism were responses to the inability of language to mirror the external world (Levin 149-151). She saw to it that the contingency and plasticity of language inured to her benefit; she wittily exploited polysemy and rhetorical ambiguity to disrupt staid prose conventions. These lines from the introductory chapter of *The Autobiography of Alice B. Toklas* reveal her superfluity as she contrives an inordinate vivacity with ordinary words and phrases:

Before I decided to write this book my twenty-five years with Gertrude Stein, I had often said that I would write, The wives of geniuses I have sat with. I have sat with so many. I have sat with wives who were not wives, of geniuses who were real geniuses. I have sat with real wives of geniuses who were not real

geniuses. I have sat with wives of geniuses, of near geniuses, of would be geniuses, in short I have sat very often and very long with many wives and wives of many geniuses. (Stein, *Autobiography of Alice B. Toklas* 14)

Playful repetition and word inversion invest these rhythmic sentences with velocity and opacity, forcing the reader to question and interpret Stein's message and intent. Although styled an autobiography in which Stein plays center stage while the narrator defers to her, Stein is in fact the author of the book, and her presiding focus is art itself and how modernism is supposed to look and act on the page. The previous extract might remind one of her portrait of Cezanne:

The Irish lady can say, that to-day is every day. Caesar can say that every day is to-day and they say that every day is as they say.

In this way we have a place to stay and he was not met because he was settled to stay. When I said I settled I meant settled to stay. When I said settled to stay I meant settled to stay Saturday. In this way a mouth is a mouth. In this way if in as a mouth if in as a mouth where, if in as a mouth where and there. Believe they have water too. Believe they have that water too and blue when you see blue, is all blue precious too, is all that that is precious too is all that and they meant to absolve you. In this way Cezanne nearly did nearly in this way. Cezanne nearly did nearly did and nearly did. And was I surprised. Was I very surprised. Was I surprised. I was surprised and in that patient, are you patient when you find bees. Bees in a garden make a specialty of honey and so does honey. Honey and prayer. Honey and there. There where the grass can grow nearly four times yearly. (Stein, *Three Portraits of Painters* 329).

Thus concludes Stein's tribute to the French painter that exhibits just how deep and wide is her bag of rhetorical tricks. She is concerned in this passage with representation: how can her writing *do* what Cezanne's paintings *do*? To this end, her repetition of diction mimics the repetition characteristic of Cezanne's brushstrokes, as though this passage were a canvass in miniature in which she labors against the inevitable failing of the written word to completely and convincingly match its visual subject, a modernist painting.

Holmes's transitional dynamic, like that of Stevens and Stein, appeared in his striking prose. His beliefs about the transitional possibilities of the common law find expression in the

Emersonian pragmatist notion that “[m]istakes contribute to the unfolding process by stimulating fresh adjustments and modifications in practice and belief” and that “creative intelligence posits no definitive ideal or standard of truth, beauty, or goodness, but cultivates a transitional dynamic that at once assimilates and recasts available ideals and standards” (Levin 44). This transitional dynamic occurs in the common-law system whenever future courts find a mistake in a previous ruling and therefore adjust or modify the law as it is uttered in the previous ruling; the process of receiving, adjusting to, and modifying precedent likewise undermines the notion that law is the articulation of a definitive ideal or the absolute standard of truth. By dissenting creatively and memorably Holmes called attention to mistakes in the law and laid the groundwork for modifications and adjustments. His dissent in *Adair v. U.S.* (1908), for example, enabled the United States Supreme Court to recognize that the “course of decisions in this Court since *Adair v. United States* [...] have completely sapped those cases of their authority” (*Phelps Dodge Corp.* 187). Still later courts would then refer to the majority position in *Adair* as a “regime” that had been “effectively overruled” (*Hotel and Restaurant Employees and Bartenders Intern. Union Local 54* 823). Like Poirier, Levin does not focus on the law *per se* but on language generally and on the ideas that language represents. The law, however, consists in language: each legislative or judicial imperative stands in the place of and reacts to ideas that are embedded in the practices and habits of the community. The law is a field of language in which Poirier’s and Levin’s theories reveal and enact themselves in practice.

The poetics of transition is a process “designed to include mistakes—false beliefs and moral failures—from which both individuals and larger social communities learn” (Levin 44). Like judges and justices in a common-law system whose holdings are essential to the

evolutionary process of social development, the authors of poetry and imaginative literature to whom Levin attends contribute “to the unfolding process” of social development “by stimulating fresh adjustments and modifications in practice and belief” (Levin 44). If poetic language in the pragmatic tradition appeared in layers from Emerson to William and Henry James, from Santayana to Stevens, from Stein to Frost, and so forth, then the poetics of transition would demarcate the blurry line of sedimentation between each author. The poetics of transition involves the pragmatic, aesthetic features of writing that are common to each author in the Emersonian tradition but that also strive toward originality. The aesthetic Emersonian canon of pragmatism advanced by Poirier and Levin consists of traces of the poetics of transition between each creative author who extends while modifying the inspired tradition. In the context of American constitutional law, the poetics of transition marks the noticeable shifts from Holmes to jurists such as Brandeis, Cardozo, Stevens, and Scalia, who make up their own canon of creative dissenters. What makes the poetics of transition resonate in the context of judicial dissents is its concentration on transition and “the tendencies-in-realization latent in any given condition” (Levin ix). The nature and function of a judicial dissent is to be transitional and to make latent in case precedent the possibility of change, progress, and mobility—or, in Levin’s words, “to make the transition from repose to a state of unsettled possibility” (ix).

The doctrine of *stare decisis* preserves common-law precedents in a state of relative repose. The implementation of this doctrine in cases maintains the stability and uniformity that together organize judicial imperatives. Inevitable changes of the political environment and unpredictable revolutions in culture and technology may unsettle the social order and necessitate the adaptation of the law as it is expressed in cases. Sudden or extreme shifts in values may

cause the minority opinion—or the dissent—to become the majority opinion, or the majority opinion to become the minority opinion, the dissent. The common-law system offers latitude within which rules may move and flexibility with which rules may adjust to unexpected change. In the context of language, such latitude and flexibility *are* the poetics of transition inasmuch as this concept reflects “a core dissatisfaction with all definite, definitive formulations, be they concepts, metaphors, or larger formal structures” (Levin x).

To the extent that Levin treats the poetics of transition as an element of pragmatism it is also an element of the common-law system, albeit one that is underappreciated and overlooked by scholars of constitutional law. “Pragmatism is in many ways an extension of [a] transitional dynamic,” Levin explains, because the pragmatists “typically locate the functional processes of intelligence and belief within the realm of ongoing experience” (3). Using similar language, Holmes opined in *The Common Law* that the “life of the law has not been logic” but “experience” (1) and that the law is made up of “seemingly self-sufficient propositions” that are “but a phase in a continuous growth” (25). The following three dissents by Holmes employ superfluities of language to bring about the poetics of transition and the eventual vindication of legal ideas that the majority rejected. The aesthetic properties of these dissents enabled them to compete with and eventually to overcome the majority opinion. These dissents suggest that Holmes is to the American constitutional canon what Emerson is to the American pragmatic literary canon. Holmes inaugurated an aesthetic tradition among jurists such as Brandeis, Cardozo, Stevens, and Scalia, who are known for their impressive language and memorable dissents. Holmes’s dissents stood out for their sound and in particular for their cadence, rhythm, rhyme, feet, alliteration, and assonance. Considered alongside his letters that discuss sound and

style, which demonstrate that he was acutely aware of the possibilities of language and the modes of reception effectuated by certain syntax, the following dissents display the measured words and carefully executed phrases of a justice seeking to persuade his audience to his point of view. Holmes was raised in the nineteenth century in a culture that valued public speaking both in the political realm and among Christian audiences at church and revival meetings. He also bridges the twentieth century and would have been able to listen to music and speeches on the gramophone while writing his letters and opinions. He might have even listened to the radio, which was in full broadcast mode by the 1920s. The hot technologies of recording and radio and their marketing of sound in the early 20th century would surely have influenced Holmes's attention to the sonorous qualities of his writing.

Lochner v. New York (1905)

Lochner is among the most famous if not the most formative cases in American legal history.⁴⁹ It is what “blissfully unversed” lawyers associate with “unbridled judicial activism” as well as “a shorthand description of a court overreaching its constitutional authority and thwarting a majority will as represented in the legislature” (Bartrum 348). Richard Posner has called Holmes's dissent in *Lochner* “the most famous opinion by our most famous judge” (“Law and Literature: A Relation Reargued” 77). Posner refers to the dissent as a “rhetorical masterpiece” (271) and mines it for evidence that Holmes was a “fine legal stylist” (266). Writing for the majority in *Roe v. Wade* (1973), Justice Blackmun referred to Holmes's dissent in *Lochner* as “now-vindicated” (117). Charles Fairman affirmed the vindication of this dissent even earlier, stating, “An entire philosophy compressed into three paragraphs. Many men know those sentences by heart. A number of Holmes' best remembered opinions in later years were but the

application of the *Lochner* dissent to the circumstances of the particular case. His point of view has now become a part of the accepted doctrine of the [United States Supreme] Court” (Fairman 335).

Holmes positioned himself—his dissent—against this so-called judicial activism and alongside the New York legislature. The legal community has always tried to cabin Holmes within some label to make sense of his dissent in *Lochner*.⁵⁰ “Progressives” laud his dissent for challenging the interests of big-business and industry and for sticking up for the “little guy” or the “worker,”⁵¹ whereas “conservatives” celebrate his dissent for its rejection of judicial activism and its deference to the state legislature.⁵² Regardless of their accuracy, these attempts to label Holmes and his *Lochner* dissent have contributed to the canonization of the dissent, the first in the United States to become canonized when it became widely accepted as the correct view (Krishnakumar 788).

Lochner reached the United States Supreme Court as an appeal from the Court of Appeals of New York, which held that an employer had violated a New York labor statute prohibiting employers from allowing employee bakers to work more than 60 hours per week or 10 hours per day. The employer owned a biscuit, bread, and cake bakery, and he allowed—indeed required—a certain baker to work more than 60 hours in one week. The employer was convicted of violating the labor statute. He sued in the County Court of Oneida County, lost, appealed to the New York Supreme Court, lost, appealed to the New York Court of Appeals, lost, and then appealed to the United States Supreme Court. Justice Peckham, writing for the majority and reversing the New York decisions, held in favor of the employer, reasoning that the right to contract free from government interference was a protected liberty under the Fourteenth

Amendment,⁵³ that the labor statute was not necessary to ensure the health and welfare of bakers,⁵⁴ that bakers' tasks were not so dangerous or unhealthy as to justify the legislature's interference with them,⁵⁵ and that restricting bakers' working hours bore little relation to the statute's alleged purpose of enhancing the quality of bread.⁵⁶ Therefore, Justice Peckham concluded, the labor statute interfered with the liberty to contract and impeded business activities in violation of the United States Constitution.

Holmes disagreed. "This case is decided upon an economic theory which a large part of the country does not entertain," he wrote (*Lochner* 75). He also explained that he would not decide whether he agreed with the statute but that, if forced to do so, he would "desire to study it further and long before making up my mind" (*Lochner* 75). Holmes believed that "my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law" (*Lochner* 75). He then portrayed the United States Constitution as organic and pointed out the flaws of treating the Constitution as representative of any particular ideology:

[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. (*Lochner* 75-76)

The Constitution, so interpreted, is accommodating and does not service the political ideas of particular groups but addresses and applies to all groups irrespective of ideology. Holmes explains that "[g]eneral propositions do not decide concrete cases" because judicial decisions depend upon "a judgment or intuition more subtle than any articulate major premise" (*Lochner* 76). According to Holmes, judges and justices should not "prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that

the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law” (*Lochner* 76).

Holmes directs readers’ attention to the fact that the New York statute is simply the latest in a long line of statutes dealing with ancient Sunday and usury laws and more recently with lotteries (*Lochner* 75). He states that 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 law schools, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not” (*Lochner* 75). Holmes seems to be suggesting that the principle of liberty propagated by the majority is undermined by the very existence of laws and institutions that deprive citizens of the allegedly fundamental principle of liberty at issue in the case.

In what is perhaps the most recognizable and quoted line of the *Lochner* dissent,⁵⁷ Holmes announces that the “14th Amendment does not enact Mr. Herbert Spencer’s Social Statistics” (*Lochner* 75). This line represents the “most terse and eloquent statement” in the dissent and is “an example of synecdoche” inasmuch as it professes “a belief in the ‘natural’ authority of an economic theory in terms of one particular book” (Danisch 230). This line has also been called “the most famous line from the most famous dissent of all” (Gillies 10). Having contextualized the labor statute within an historical framework, Holmes launches into this remark about Spencer as if to trumpet the fact that this case arose in a particular moment defined by a particular ethos. By doing so he signals to future judges and justices who will be writing in a different moment defined by a different ethos. He anticipates later courts’ citations to his dissent “not as a justification for overturning the Old Court’s established line of precedent, but in

recognition of its ultimate vindication and as an admonition against repeating the egregious mistakes of the *Lochner* era” (Krishnakumar 789-90). His dissent is “politically convenient for later generations of lawyers and judges” who will use it to attack both progressive and conservative policies (Gillmore 861).

Holmes wrote that “[i]t 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” (*Lochner* 75). With impeccable timing, he then offers this short, clipped statement: “A more modern one is the prohibition of lotteries” (*Lochner* 75). This abrupt move generates a rhythm carried on by a succession of “s” and “th” sounds: “settled,” “various,” “decisions,” “this,” “that,” “constitutions,” “state,” “laws,” “ways,” “as,” “legislators,” “think,” “as,” “injudicious,” “as,” “as this,” “with this,” “with,” “the.” Add to these the other alliterative combinations—“l” as in “laws,” “life,” “legislators,” “like,” and “liberty”; “t” as in “It,” “court,” “state,” “constitutions,” “state,” “regulate,” “might,” and “contract”; “r” as in “various,” “court,” “regulate,” and “contract”; “w” as in “ways,” “which,” “we,” “which,” “with,” and “with”—and this sentence begins to attest to Holmes’s fascination with sound. Alliteration may be a basic feature of ordinary speech, but the extent to which Holmes employs it suggests something more: a deliberate effort to produce memorable tonality. In this respect, Holmes taps into the “extraordinary dimension of the ordinary” that Stevens’s poetry “sets out to reveal” (Levin 169).

“[G]reat works survive by sound,” Holmes wrote in a letter to Harold Laski (“Letter to Harold Laski,” November 23, 1926). “Style,” he added, “seems to me fundamentally sound” (“Letter to Harold Laski,” November 23, 1926), a line he would later repeat to Lewis Einstein

after having read Siegfried Sassoon, Helen Waddell's *Medieval Latin Lyrics* (1929), Samuel Hoffenstein's *Poems in Praise of Practically Nothing* (1928), and *The Stuffed Owl: An Anthology of Bad Verse* (1930), a book edited by D. B. Wyndham Lewis and Charles Lee (*Holmes-Einstein Letters* 322). Holmes expressed appreciation for the profundities of even commonplace sounds such as "those Sunday morning church bells — and hymn tunes — and the sound of the citizen's feet on the pavement" ("Letter to Harold Laski," May 18, 1918), "the sound of many bobolinks singing in the meadow below the house" ("Letter to Lady Pollock," July 20, 1897), "the sound of a waterfall and birds" ("Letter to Margaret Bevan," May 18, 1915), and finally "some shells put to the ear [that] give a sound like the faint echo of waves" ("Letter to Nina L. Grey," August 30, 1904). He once worried that he had breached decorum by writing in a light tone about certain judges, but he at last decided that "it makes a letter sound like a guide book unless one should turn to the other end of the wire" ("Letter to Ellen A. Curtis," January 12, 1913). Holmes's ear for tone guided his awareness of genre: he could tell how the sounds of particular sentences were more appropriate for a guide book, for example, than for a friendly letter. The tones he employed in his judicial writings set him apart from other justices and were not likely accidental but rather creative registers that pushed the bounds of genre.

After rereading Francis Bacon's essays in 1926, Holmes dashed off a missive to Ellen A. Curtis, averring that "a large part of the success of the past depends upon its sound" ("Letter to Ellen A. Curtis," November 16, 1926). "Shakespeare does enormously," he continued, "and Bacon is good to the ear even when as is not infrequent or unnatural he talks drool" ("Letter to Ellen A. Curtis," November 16, 1926). Holmes referred to Dante as a "troubadour and a poet" and deemed him to have possessed "the divinest singing gift that ever was among man" ("Letter

to Ethel Scott,” February 18, 1910). Dante’s sound, Holmes concluded this letter, “has sung in my ears for a week” (“Letter to Ethel Scott,” February 18, 1910). Holmes likewise professed to Morris Cohen that “the first survival of a great work is its sound” and that “without the song of his words Shakespeare would not be read as he is” (“Letter to Morris Cohen,” November 29, 1926). Bacon’s essays would go unread, Holmes added, “if they didn’t sound so well” (“Letter to Morris Cohen,” November 29, 1926). Ten years earlier Holmes remarked to Margaret Bevan that Shakespeare “is kept going largely by his song, the enchanting sound of his words” (“Letter to Margaret Bevan,” August 19, 1913). He wrote to Curtis, “Sounds vanish but sound is the secret to immortality—witness the Bard [Shakespeare]. He is up, today” (“Letter to Ellen A. Curtis,” February 9, 1926). Holmes’s theory about Shakespeare’s longevity is related to Poirier’s assertion that Shakespeare’s plays survive as “examples of superfluity” (74). Holmes like Poirier finds in sound the potential superfluity that endures because of its lasting effect on readers and listeners. For Holmes as for Poirier the aural properties of language protect the ideas it represents from the constant pressures and onslaught of sweeping change.

That Holmes connects sound with literary survival in each of these letters is telling in light of his treatment of legal principles in the common-law system as products of natural selection. If sound is a condition or enabler of survival, then arguments rendered in certain tones may be more likely to withstand the selective elimination of the unfit. Sound alone does not mark the survival of the fittest legal doctrines, but arguments about legal doctrines are more likely to be remembered—and hence reexamined and kept alive—if they are couched in language that is notable for its sound. The notion that legal doctrines rendered in memorable sounds might persist in the legal canon dovetails with the Emersonian pragmatic premise that

language is an “organism” responding to its “accidental environment” and shaping “the profligacy of forms necessary to ensure the possibility of adaptation or fit to constantly changing conditions” (Richardson 8). Holmes like Emerson and Darwin “understood language as a fundamental power” (Richardson 81). He doubted “if any writer of English except Darwin [had] done so much to affect our whole way of thinking about the universe” (“Letter to Lady Pollock,” July 2, 1895). Holmes’s association of sound with survival or endurance anticipates Poirier’s portrayal of Emerson and Emerson’s pragmatic successors as preoccupied with the aural properties of language that give it lasting value.

Holmes’s letters prior to *Lochner*, some of which have been quoted above, suggest that he had been interested in the properties and effects of sound long before he penned his *Lochner* dissent. In 1893, when he was the Chief Justice of the Massachusetts Supreme Judicial Court, he wrote to Sir Frederick Pollock about the “sound of the polyphloisboian, the mosquito and the crow” (“Letter to Sir Frederic Pollock,” August 27, 1883). In 1898, he wrote to Pollock, “I hear the sound of music as I write these words—probably some fellows going off—or it may be only down to some of our seacoast defences—but such sounds are frequent and recall old days. It gives a certain ache” (“Letter to Sir Frederick Pollock,” May 13, 1898). These excerpts attest to his attentiveness to the *effects* of sound, although not necessarily to the properties of sound that brought about the sensations he describes. On April 19, 1868, however, he rounded out a letter to William James with the following lines:

O! passionate breezes! O! rejoicing hills! How swells the soft full chorus—for this earth which slept hath awakened, and the air is tremulous with multiplied joyous sound.

Sing, sparrow—kissing with they feet the topmost tassels of the pines.

Cease not thy too much sound, O! robin. Squirrels grind thy scissors in the woods. Creek, blackbirds. Croak, frogs. Caw, high-flying crows, who have seen the breaking of the ice in northern rivers and the seaward moving booms.

A keen, slender, stridulous vibration—almost too fine for the hearing, weaving in and out, and in the pauses of the music dividing the silence like a knife—pierces my heart with an ecstasy [sic] I cannot utter. Ah! what is it? Did I ever hear It? Is it a voice within, answering to the others, but different from them—and like a singing flame not ceasing with that which made it vocal?

(“Letter to William James,” April 19, 1868). Holmes was 27 at the time of this letter, which is different tonally from his later correspondence but similar in its use of alliteration, rhythm, and assonance. It raises the possibility that sound technology changed the way he used sound over the course of his life as these lines appeared when the primary medium for sound was public oration, whereas his later writing, which was less lyrical, appeared in the age of the gramophone and the radio. The lines above reveal Holmes’s awareness of the properties of sound and not just of their sensory effects. They seem influenced by Walt Whitman’s *Leaves of Grass* and especially “Song of Myself,” several editions of which had appeared by 1861. This passage to James performs the subjects it describes; it is characterized by sigmatism: the repetition of “s” sounds for dramatic and musical effect (“passionate,” “breezes,” “rejoicing,” “hills,” “swells,” “soft,” “chorus,” “this,” “slept,” “is,” “tremulous,” “joyous,” “sound,” “Sing,” “sparrow,” “kissing,” “topmost,” “tassels,” “pines,” and so forth). Holmes resorts to a device characteristic of Emerson and the transcendentalists when he employs apostrophe, addressing directly the breezes, the hills, the sparrow, the robin, the squirrel, the blackbirds, the frogs, and the crows. There can be little doubt that he meant for these sonorous lines to ring of their subjects: the “full chorus” of the hills and the singing sparrow and the squirrels’ grinding teeth. With the creaking and the croaking and the cawing, Holmes reanimates the “stridulous vibration” and “music” that have apparently moved him to ecstasy. The diction and tempo are too distinctive and lyrical to

be accidental; they affirm that Holmes was careful about the precision and effect of his language and suggest that his meticulousness with words emerged when he was still a young man, long before Leland B. Duer, who was Holmes's secretary (or law clerk) from 1909 to 1910, wrote to Justice Frankfurter, "You know how carefully he [Holmes] chose his words, and how he delighted in a well termed phrase. I never knew him in doubt as to how he believed a case should be decided, but I have seen him re-cast more than once an opinion for the sake of a phrase, or even a word" ("Letter from Leland B. Duer to Justice Frankfurter," February 16, 1938).

Holmes's correspondence reveals that he was fascinated by other writers' use of sound and diction. On July 2, 1908, for instance, he wrote to the Brazilian statesman Joaquim Nabuco about the French translation of a book that is not identified by title in the letter. "Th[r]ough it all there is the sound of steel and the music of singing words," Holmes stated, admitting that he "could have cried over the sad, highhearted song of a fighting man" ("Letter to Joaquim Nabuco," July 2, 1908). In a letter to Laski dated May 12, 1922, Holmes mentioned a "breath stopping theory," a designation with a double meaning insofar "breath stopping" is not just an adjectival hyperbole but also a description of what happens phonetically when certain phrases are pronounced ("Letter to Harold Laski," May 12, 1922). In context Holmes's remark seems sarcastic, the implication being that the book he is reading—George Willis's *The Philosophy of Speech* (1920)—is not exciting. That Holmes would consult such a book at all nevertheless indicates his interest in the subtleties and nuances of language and speech. The "breath stopping" theory maintains that all "substantives," or adjectives that are used as a noun or that take the place of a noun rather than modifying a noun, derive "from a preposition postponed—

e.g., serve = servo-de = servod = servô with the o lengthened on the dropping of the consonant and as I becomes Ai when we drop the k from IK” (“Letter to Harold Laski,” May 12, 1922). “Here is a sample sentence,” Holmes continues, “‘the’ ‘bi’ in ‘tibi’ = to thee, the ‘bus’ in ‘omnibus’ = for all, and the by in ‘thereby’ would seem to be the same word” (“Letter to Harold Laski, May 12, 1922). This is a rough quotation of Willis (Willis 143-144). Holmes’s scrutiny was not limited to the written word; in another letter he lamented the “degeneration” of pronunciation in the “middle west” owing to the “obliteration of consonants” (“Letter to Harold Laski,” April 12, 1931). He playfully claimed in one letter that he had “spent every spare minute in browsing over the dictionary of Modern English Usage for forty eight hours,” marveling at “the pronunciation of girl” that made him “whinny with delight” (“Letter to Laurence Curtis,” November 18, 1926). He also observed that Southerners tend to say “you all” for the second-person plural (“Letter to Margaret Bevan,” November 6, 1913) and wondered whether “the accent of the e [in *Karénina*] merely indicates the pronunciation of the vowel” or “the accent of the syllable” (“Letter to Harold Laski,” September 9, 1929).

In light of these letters, the alliteration, rhymes, and pararhymes in Holmes’s *Lochner* dissent seem premeditated and carefully constructed: “ways” and “laws,” “with” and “this” and “injudicious,” “state” and “regulate,” “tyrannical” and “liberty.” The phrase “do not decide concrete cases” can be read as iambic; the repetition of “d” and “c” is alliterative. “Propositions” nearly rhymes with “cases.” Depending on how one pronounces “Every” (i.e., whether one enunciates three syllables or elides the final two syllables to say “Ev’ry”), the hyperbolic aphorism—“Every opinion tends to become a law”—can be read as dactylic; at any rate the line consists of a falling rhythm that lends itself to recall. Rather than simply stating that “reasonable

men would uphold the law,” Holmes goes for intonation and emphasis by accentuating an understatement for rhetorical effect: “Men whom I certainly could not pronounce unreasonable would uphold [the law] as a first installment of a general regulation of the hours of work.” The deliberate negation of an affirmative (“certainly could not pronounce unreasonable would uphold”) marks this line as litotes. Holmes might be accused of prolixity here if it were not for the superfluity at work that makes the line striking and memorable and likely to be revisited and repeated by its readers. In a line already quoted above he supplies one of the most memorable and repeated aphorisms in American legal history: “General propositions do not decide concrete cases.” The inference here is that the facts and experiences embodied in individual cases shape what the rules and principles will be: because each case is unique, the facts and experiences of the case do not fit neatly within some operative paradigm of law. Instead the rules and principles are derived from facts and experience, which themselves determine which rules and principles obtain in the case.

A 2014 Westlaw search indicates that there have been thousands of references to Holmes’s *Lochner* dissent in courts across the United States. There is no empirical way to measure whether the literary devices and memorable language that Holmes used in *Lochner* caused his dissent to become known as “the canonical rejection of the anti-canonical decision” (Balkin 692). However, the continued praise bestowed upon Holmes’s style in his *Lochner* dissent, coupled with the vindication of that dissent, suggests that this case is memorable not because of its holding but because of its dissent.⁵⁸ Holmes’s style instantiated the poetics of transition by representing his legal argument with aesthetic coding and signaling; the memorability of his words stimulated future attention to his point of view. The *Lochner* dissent

earned him the reputation as “the greatest—or only—literary figure of the *Lochner* Court” (Leonard 1003). Anita S. Krishnakumar calls his *Lochner* dissent “thoroughly vindicated” (789). Citations to the dissent by later judges and justices suggest that the aesthetic qualities of his dissent gave his argument lasting power. Examples of such citations appear in *Winters v. New York* (1948),⁵⁹ *Griswold v. Connecticut* (1965),⁶⁰ *Roe v. Wade* (1973),⁶¹ and *Planned Parenthood v. Casey* (1992),⁶² the latter three of which reference Holmes favorably while applying Fourteenth Amendment jurisprudence that Holmes would have rejected. The absence of agreement with Holmes on the Fourteenth Amendment, which determined how the United States Supreme Court ruled in these four cases, makes these references to Holmes’s *Lochner* dissent even more revealing, for it suggests that the later justices were drawn to Holmes’s dissent less for its logic than for its style and sound as well as the totemic reputation it had earned.

***Abrams v. United States* (1919)**

Holmes’s dissent in *Abrams* was also vindicated⁶³ and is known for its “language [that] approached poetry in its rhetorical power” (Lewis 80). It was vindicated because it expressed views that became widely and generally accepted as correct. It has been dubbed “canonical” (Blasi, “Holmes and the Marketplace of Ideas” 2), “a classic” (Schwartz 88), “the supreme achievement of an otherwise largely uninspiring period” for the United States Supreme Court (Currie 130), and “brilliant” (Oppenheim 194). Justice Felix Frankfurter claimed that “[i]t is not reckless prophesy to assume that [Holmes’s] famous dissenting opinion in the *Abrams* case will live as long as English prose retains its power to move” (Frankfurter 54-55). The dissent is said to have marked “the beginning of modern First Amendment theory” (Walker 27) and to have “sow[ed] the seeds of a new tradition that would bear fruit in later times” (Fagan 454).

The facts of *Abrams* are as follows. In the trial court, the defendants, five Russian-born individuals, three of whom considered themselves rebels, revolutionists, or anarchists, were charged with conspiring to violate the Espionage Act of Congress when they published statements deemed disloyal to the United States, which at the time of publication was at war with Germany. The defendants argued that the prosecution lacked the evidence needed to convict them of inciting resistance to the war and of curtailing the production of ammunition. They argued that the Espionage Act was unconstitutional because it conflicted with the First Amendment. Writing for the majority of the United States Supreme Court, Justice John Hessin Clarke used the “bad tendency” test rather than the “clear and present danger” test to hold that substantial evidence supported the finding that the defendants incited violence and curtailed ammunition, that the Court did not have to evaluate the sufficiency of the evidence as to each count, and that the defendants had not convinced the Court that their pamphlets intended to thwart setbacks to the Russian cause. The Court therefore upheld the defendants’ conviction.

Holmes dissented in what was later called “as strong a self-revision as American legal culture has known” (Cole 882). This dissent is a self-revision because in two previous decisions—*Schenck v. United States*⁶⁴ and *Debs v. United States*⁶⁵—Holmes affirmed convictions under the Espionage Act. “By dissenting in *Abrams*,” explains Robert Cover, “Holmes not only *argued* that the Constitution tolerated dissent, he also exemplified the dissent” (373). Adapting his earlier views to the new political climate, perhaps to placate critics of his earlier decisions,⁶⁶ Holmes began by describing each count against the defendants. He then undertook a close reading of the leaflets that had brought about the defendants’ conviction. This led him to conclude that the defendants had not violated the Espionage Act because they had posed no clear

and present danger. “Holmes might have ended his opinion there,” since he had “explained why the defendants had not violated the Sedition Act and why their speech did not pose a clear and present danger” (Healy 203). He was “under no obligation to say anything further” (Healy 203). If he had “stopped there,” however, “his dissent might have faded into the fog of history, another well-intentioned yet ultimately futile attempt to curb the excesses of popular government” (Healy 203). Rather than stopping Holmes turned to superfluity. As an Emersonian pragmatist who wished his posterity to discover the “traces of productive energy that pass through a text or a composition or an author, pointing always beyond any one of them” (Poirier 38), Holmes produced in *Lochner* “that plenitude and power of language” that propelled “his voice into the future” (Poirier 60).

In the most aphoristic and arguably the most famous line in the dissent, Holmes went on to declare, “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” (*Abrams* 630). The metaphor of the unregulated marketplace recalls both John Stuart Mill and Adam Smith, whom Holmes had read that year (Healy 204-06). Emerson too had adopted the metaphor of capitalism as an “aboriginal power” and a “human invention designed to satisfy the rage for the superfluous” (Poirier 54). As a metaphor “capitalism is preeminently the economy of superfluity” (Poirier 51). Such a metaphor asks to be noticed and hence enables Holmes’s sentence to be recognized

as “rich,” “profound,” and “unforgettable” (Healy 206), as well as “one of the [...] most-quoted justifications for freedom of expression in the English-speaking world” (Baker 539).

Holmes intoned that “[e]very year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge” (*Abrams* 630). The words “every year if not every day” are in a strict sense unnecessary: without them the sentence bears the same meaning. Nevertheless, they lend flair with their tempo and rhythm and stand out for their parallel structure: the nouns “year” and “day” share an adjective (“every”) and are divided by the words “if not”:

[**every year** → *if not* ← **every day**]

The words “if not” separate nearly mirrored dactylic expressions; in this respect the phrase represents palistrophe, a symmetrical structure related to chiasmus. The nouns “year” and “day” are notable for their strong, nasal “y” sounds that form diphthongs. These nouns designate units of time and approximately establish an alphabetic and grammatical inversion inasmuch as “year” begins with a “y” whereas “day” terminates with a “y” and inasmuch as “*year*” forms a rising diphthong (a phoneme beginning with a less prominent semivowel and ending with a more prominent semivowel) whereas “*day*” forms a falling diphthong (a phoneme beginning with a more prominent semivowel and ending with a less prominent semivowel). The pronunciation of the gliding vowel sounds in these units of time generates a euphonic and syllabic pattern. As a sonorous predicate phrase, “every year if not every day” underscores the subject that follows: “prophecy based on imperfect knowledge”—words that signal key elements of Holmes’s pragmatic jurisprudence, namely, the predictive nature of the law and the fallibility of human intelligence. Like the aphoristic lines in *Lochner* these aphoristic lines attest to Holmes’s literary

discernment and to his ability to employ resonant language to highlight important jurisprudential points. The phrases “best test of truth,” “to get itself accepted,” and “which their wishes” are alliterative and describe the function of speech according to one hermeneutic under the First Amendment. “Best test of truth” not only rhymes “best” and “test” but also forms a dispondee in that it consists of back-to-back spondees (or four consecutive stressed syllables); the effect is emphatic, accenting the nature of truth as consensus-based. Other near rhymes include “safely,” “be,” and “carried.” Holmes’s stark combinations of sound produce staccato deliveries that are memorable and that make his *Abrams* dissent more quotable and recitable than textbook commentaries on the First Amendment.

Between colloquial phrases with no discernable measure Holmes alternates iambic and trochaic patterns as if to emphasize certain statements and to validate Poirier’s claim that we learn “from the sounds we hear in the movements of sentences, or fragments of sentences” (137). The iambic phrasing—“I am aware,” “the word intent as vaguely used,” “means no more than knowledge at the time,” “said to be intended will ensue,” “Even less than that,” “A man may have to pay,” “may be sent to prison,” “if at the time”—generates a rhythm (da-DUM-da-DUM-da-DUM-da-DUM) that calls attention to the philosophical positions Holmes takes in relation to free expression. Discussions of acts, knowledge, and consequences, common to all criminal treatises, usually do not display the aphoristic flair displayed in these lines. The alliteration, rhymes, and pararhymes—“man *may* have to *pay*,” “at the time of his *act* he knew *facts*,” “when words,” “deed is not done,” “does not do the act,” “produce...proximate”—make Holmes’s phrases memorable, and memorability is essential to “the continuity of successful forms of expression in the evolution of thinking” and to the “context of language as an organic form”

(Richardson 6). One may be tempted to recall a stanza by Emily Dickinson that uses iambic meter to make a point about dissent:

Great streets of silence led away
To neighborhoods of pause —
Here was no notice — no dissent —
No universe — no laws.⁶⁷

This risks overstating the point, but is it not remarkable that Holmes's choice of feet reflects Dickinson's lines about dissent and laws and that in Dickinson's poem stasis corresponds with a lack of dissent and laws whereas in Holmes's jurisprudence dissents enable activity and competition, the opposite of stasis? It is almost as if Dickinson associates dissent with activity and the law and the lack of dissent with repose. If so, then her construction dovetails with the thesis of this work that dissents enable the gradual spread of workable rules through constant competition.

The *Abrams* dissent “not only breaks from and misreads the authority of precedent,” proclaims David Cole, “it ultimately becomes the authoritative precedent itself,” and not just any authoritative precedent but one that “gains more precedential power than the three unanimous opinions that preceded it” (Cole 887). Referencing the “stirring” final paragraph of this dissent has become a “time-honored ritual” (Blasi 1343). The *Abrams* dissent is “illustrative of [...] Holmes's aphoristic style” (Danisch 224). His aphorism regarding free speech and the marketplace of ideas not only represents superfluity but also enacts the poetics of transition by marking “a beginning in free speech decisions” that gestures “*beyond itself* to the living, mysterious, unfinished debates that *will come* regarding the limits of free speech” (Danisch 226, emphasis added).

Two days after *Abrams* was decided, Felix Frankfurter, not yet a justice on the United States Supreme Court, wrote to Holmes about “the pride I have in your dissent” because it contains “the voice of the noble human spirit” (*Holmes-Frankfurter Letters* 75). Frankfurter could not have known how many commentators would issue similar tributes. The United States Supreme Court has referenced the dissent several times,⁶⁸ and numerous state and federal courts have likewise quoted Holmes’s catchiest phrases from the dissent. It is not just the free-speech concept but the words in which the free-speech concept is couched that make the arguments in Holmes’s *Abrams* dissent worthy of reconsideration. Holmes was aware that “a word even in the dictionary has shades of meaning” and that “the meaning of words according to the usage of speech” can alter the “external character of the law” (“Letter to James Bradley Thayer,” December 11, 1898). Words themselves, he maintained, are meaningful only within a context: “In like manner, still by the usages of speech the rest of the document may qualify the sentence” (“Letter to James Bradley Thayer,” December 11, 1898). Holmes’s use of sound and metaphor in *Abrams* appears to have been designed to shape the external character of the law and to have succeeded in attaining lasting power. One biographer of Holmes beams that the “splendid language” of this “great dissent [...] added to our national heritage a concept of freedom to speak that Americans will cherish as long as they cherish freedom” (Biddle 163). Another commentator suggests that “[f]rom Holmes we learn that the practice of rhetoric is vital for democratic life and that the theory of our Constitution allows for the ‘free trade in ideas’ in which only what proves persuasive will succeed” (Danisch 234).

Over the course of his career, “Holmes took great pride in his writing and worked hard to make every sentence shine,” believing as he did that “judicial opinions should be agreeable to the

ear when read aloud” (Healy 209). By the time he authored his *Abrams* dissent, “he had grown into his style and was now the most assured writer on the Court” (Healy 209). By crafting the *Abrams* dissent with style he “produced a document that far exceeded his own estimation” and that would “survive long after he was gone” (Healy 209). The *Abrams* dissent was “direct and provocative” and possessed “the qualities that made his voice as a judge distinctive,” including “an almost aggressively colloquial style” (Healy 209). The *Abrams* dissent “continues to make its presence felt [...] in a vast range of expressive activity, from commercial advertisements and campaign spending to defamation of public figures and the burning of the American flag” (Healy 249). The “centrality of free speech in our legal culture today” is largely attributable to this dissent (Healy 250); moreover, the “metaphor of the marketplace of ideas and [the] concept of ‘clear and present danger’ have worked their way into our collective consciousness, becoming part of our language, our view of the world, and our identity as a nation” (Healy 250). Generations of readers have “internalized” Holmes’s words in *Abrams* and have “come to regard” these words “as [their] own” (Healy 250). By “re-animating” his audience’s “emotional commitment” to both rhetoric and the “underlying, metaphoric value embedded in law,” Holmes hoped “to *move beyond* the original emotional directive behind the laws banning speech against U.S. involvement in the First World War” (Danisch 231, emphasis added). His ability to employ stylistic rhetoric “to *move* the audience someplace” enacts the poetics of transition by guaranteeing the perseverance of his legal arguments amid the constant struggle for survival among cases (Danisch 231, emphasis added).

Tyson & Brother v. Banton (1927)

Tyson & Brother v. Banton involved an appeal from the United States District Court for the Southern District of New York, which had denied a request for a temporary injunction brought by a licensed ticket-broker to restrain certain New York officials from revoking the ticket-broker's license and from prosecuting the ticket-broker because of the ticket-broker's refusal to comply with a statute fixing the price at which theater tickets could be resold. The practical effect of the statute was to prohibit the scalping of theater tickets. The ticket-broker challenged the severity of the statute, the violation of which was punishable by one-year imprisonment or a \$250 fine or both. The ticket-broker alleged that execution of the statute would deprive the ticket-broker of its property and liberty rights under the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court framed the operative issue on appeal as "whether every public exhibition, game, contest, or performance to which an admission charge is made is clothed with a public interest, so as to authorize a lawmaking body to fix the maximum amount of the charge which its patrons may be required to pay" (429). Justice Sutherland issued the opinion for the majority, striking down the New York statute on the grounds that the New York legislature possessed the authority to police businesses or properties with a "public interest" but that places of entertainment such as theaters were private enterprises not similar in kind to gas or electric providers that were clothed with a public interest; therefore, the majority held, the statutory price-fixing violated the Fourteenth Amendment.

Holmes began his dissent with an aphorism: "We fear to grant power, and are unwilling to recognize it when it exists" (*Tyson* 445). Holmes adored aphorisms, labored over them, and took pride when he at last stated them to his satisfaction. As one example, on January 16, 1910,

he informed the Baroness Marie Moncheur in a letter that he had been reading Oscar Wilde for Wilde's "Civilized Speech" and "was rather pleased with an aphorism I touched off at dinner the other night to Mrs. Harry White—"Things that are just as good as things, aint'" ("Letter to Baroness Marie Moncheur," July 16, 1910). Robert Danisch has argued that Holmes's "use of aphorisms demonstrates a philosophical commitment to understanding law as a competition between different rhetorics" (228). Danisch claims that Holmes's "job as a judge was to keep the public competition between rhetorics as open as possible. To do so, he used a style of argument that was suggestive, allusive, and terse, not final or complete" (Danisch 228). Holmes's use of aphorism often reflected the underlying philosophical point he was making. His use of aphorisms in *Abrams*, for example, accented the belief that "the world is made up of competing aphorisms" and that "[w]e defend the right to free speech because we are open to the possibilities of multiple interpretations" (Danisch 225). The powerful opening aphorism in the *Tyson* dissent highlights not only those powers vested in the New York legislature by the citizens of the State of New York but also those powers vested in the federal courts by way of the Fourteenth Amendment. "Holmes's style carries his worldview and mimics his philosophy," Danisch says to this end (233), observing, too, that Holmes's "literary skill is not used merely to convey the truth he is after, but as an argumentative device itself designed to foreground values and emotions that are always already part of the legal process" (Danisch 233). The aphorism about fearing power so much that we turn a blind eye to its existence indicates Holmes's apparent indifference to the good or bad content of the statute. "I am far from saying that I think this particular law a wise and rational provision," he concludes, adding, "That is not my affair" (*Tyson* 447). Suggesting that we casually accept the things we most fear once they become part

of our experience or that anticipated fears are never as obvious or devastating once their cause materializes or moves from a mere concept to a tangible reality, Holmes's aphorism in *Tyson* calls out for interpretation and context. It is a mechanism for Holmes to bring about the poetics of transition by evoking "the quality of alertness to possibilities of meaning as they lurk in the always dynamic margins of experience" (Levin xii).

Holmes's dissent in *Tyson* can be summed up in one phrase: the State of New York did not violate the Fourteenth Amendment by legislating a price-cap on theater-ticket resales. Not content with such a trite statement that would do little to inspire the imaginations of future judges and justices, Holmes launched into a critique of the signifier "police power," which he called "apologetic" and "convenient [...] to conciliate the mind to something that needs explanation" (*Tyson* 445). "[P]olice power," he announced, "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" (*Tyson* 446). Holmes then used the word "machine" as a metonym for the state legislature and "joints" as a metonym for the law, stating, "some play must be allowed to the joints if the machine is to work" (*Tyson* 446). His use of metonymy transfers the mechanical characteristics of a piece of equipment or a powered device to statutory regulations and thus highlights the difference between planned or designed legislative codification and the unplanned and spontaneous ordering of the common-law system. This subtle recourse to figurative language establishes a rhetorical framework within which Holmes may exposit his Fourteenth Amendment jurisprudence that favors deference to local political branches. When he commissions the resonant metonym "some moral storm of the future" to minimize the gravity of the present legislation, which he contextualizes alongside changing attitudes about the regulation

of wine and lotteries, he evinces his pragmatic view of the common-law system as responsive to rather than determinative of cultural consensus (*Tyson* 446-447). Holmes's resort to superfluity in the form of metonymy underscores his refusal to arrogate to himself the authority to divine the best interests of communities not his own.

Aphorism and metonymy are just two elements of superfluity working in Holmes's *Tyson* dissent. Other examples of superfluity in the *Tyson* dissent include auxesis, a form of incremental overstatement that in this instance stresses the power of the state government to interfere with private property: "*the fact that* the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; *that* property rights may be taken for public purpose without pay if you do not take too much; *that* some play must be allowed in the joints if the machine is to work" (*Tyson* 445-46, emphasis added). This sentence repeats the conjunctive "that" to enlarge the importance of the culminating metonym; it is also an example of asyndeton in that it drops the conjunction "and" for rhetorical and aural effect. The hyperbole that "respect for art" is "one of the glories of France" anticipates the claim that "to many people the superfluous is necessary" (*Tyson* 447). There is playfulness in this superfluous hyperbole that precedes a remark about superfluity that prefigures Poirier's celebration of "the human need for superfluosness" (Poirier 54). One is reminded of Levin's observation that Emerson used forceful language when writing about the "vital forces" that constitute our universe (Levin 2).

Each of the literary and rhetorical strategies used by Holmes in the *Tyson* dissent amplifies his language and contributes to the momentousness of his argument that would in time become vindicated. The majority in *Tyson* was overruled in part by *Olsen v. State of Nebraska*

(1941)⁶⁹ and criticized in *Nebbia v. People of New York* (1934)⁷⁰ and *Gold v. DiCarlo* (1964).⁷¹ An implied overruling of the *Tyson* majority was recognized by *State v. Cardwell* (1997)⁷² and *People v. Rosenblatt* (1997).⁷³ An abrogation of the majority in *Tyson* was recognized by *New Jersey Association of Ticket Brokers v. Ticketron* (1988),⁷⁴ *People v. Concert Connection, Ltd.* (1995),⁷⁵ and *Arlotta v. Bradley Center* (2003).⁷⁶ The majority in *Tyson* was called into doubt by *Blue v. McBride* (1993).⁷⁷ Numerous courts have distinguished the majority in *Tyson* from the fact patterns in the case before them in order to arrive at a different legal result. Holmes's ability to influence future judges and justices with his *Tyson* dissent evidences the fact that he, like the Emersonian pragmatists in Poirier's canon, was "writing for the future and into the future" (Poirier 131). Holmes validated with *Tyson* the pragmatist notion that "language [...] and thinking [...] can be changed by an individual's acts of imagination and by an individual's manipulation of words" (Poirier 135). Holmes capitalized on the "value" of his words that, "as pragmatism recommends," points "toward future realization, toward the existence of things" such as potential rules and principles that "it cannot verbally re-present" (Poirier 148). As if tracking the Emersonian pragmatists, Holmes fashioned in his dissents in *Lochner*, *Abrams*, and *Tyson* "sounds [that] invite us to live with others in a space of expectation," always forcing us to wonder how his dissents will be received and whether they will be vindicated by future courts or legislatures (Poirier 150).

Conclusion

Techniques of prosody reveal much about the meaning and reception of Holmes's dissents. He experimented with language and tried to endow aesthetics with a legal function and the law with aesthetics. Liberated from the periphrasis that characterizes legal discourse, his

prose exemplifies superfluity as that term is deployed by Poirier and enables the poetics of transition as that term is deployed by Levin. It has been observed that “Holmes consistently argued that legal reasoning requires more than logic, and the ‘more’ that he pointed to included passions, values, timing, and style” (Danisch 231). He spoke of “the fallacy of the logical form” (Holmes, “The Path of the Law” 468) and worried that “logic does not carry us far” in our understanding of the law (Holmes, “Ideals and Doubts” 5). His style is “deeply indicative” of “enthymematic reasoning” (Danisch 228). Rather than couching his reasoning in complete syllogisms, he advanced his arguments and facilitated the poetics of transition by cultivating superfluity and by moving the law toward a vague state from which his dissenting rationale might be redeemed. He began *The Common Law* by acknowledging that syllogisms alone do not advance the common-law system: “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” (Holmes, *The Common Law* 1). Enthymematic reasoning in the form of rhetorical superfluity enabled him to tap into these other sources for the rules of governance. “If style matters to enthymematic reasoning,” then Holmes’s use of literary devices “presents a unique opportunity for analyzing how the style of a particular genre of writing can advance a reasoned argument” (Danisch 221). Holmes’s superfluity substantiates Richard Posner’s submission that “rhetoric counts for a lot in law because many legal questions cannot be resolved by logical or empirical demonstration” (271). Holmes developed the medium of dissent as a literary genre that Brandeis, Cardozo, Stevens, and Scalia would build upon with their own distinctive sounds and style. The combination of Holmes’s

aphoristic charm with his enthymematic reasoning not only allowed him “to perform and articulate his version of pragmatism” but also “to conceptualize law as a kind of perpetually unfinished task that requires special attention to language” (Danisch 220). This was his way of implicating “the democratic impulse shared by Emersonian pragmatists” (Poirier 3-4). He accelerated the flux and flow of the law and made possible the realization of his arguments in future cases.

Poirier and Levin insinuate that superfluity serves a rhetorical function, assuages the anxiety of influence, and earns the writer (or for my purposes a judge or justice) a wider audience and possibly even a place in the canon. To the extent that superfluity represents the urge to progress, overcome, transcend, improve, increase, advance, extend, and outdo, it is conducive to judicial dissents, the most memorable of which are stylistic and predictive appeals for change to unnamed future lawyers, judges, justices, and legal academicians. As the canon of case precedents grows and expands, dissents can serve as corrective mechanisms: they can provide alternative theories from which to adopt lines of reasoning and with which to shape the normative orders that reflect and define the ethos of the time and place while retaining what is indispensable from past times and places.

Dissents ensure that the struggle for the right rules and principles continues. Aesthetic dissents are, because of their appealing properties, likely to succeed in redirecting the common-law system towards workable solutions and practical applications once some majority position becomes untenable or disagreeable. Rules and principles in a common-law system do not merely reflect the selection of outcomes attained in appellate cases. They also evidence the accumulated experience and prevailing reasoning of acting agents within a given territory. By contrast,

dissents are signals of what might be accomplished through the concerted efforts of future litigants to secure for themselves what is just and reasonable in their own particular context and in light of their own particular arguments. Vindicated dissents such as Holmes's prove that a state of deliberate unrest in the law can facilitate juridical adaptation to the social environment and overcome dominant trends toward bad judicial decisions. Vindicated dissents also suggest that triumphant legal norms and judicially established value systems make up but a fraction of the potential options for arranging and responding to the complexities of human behavior.

The three aestheticized dissents discussed in this chapter reveal why Holmes was called the Great Dissenter. Chapter three extends this focus on Holmes's literary talent and places it in conversation with pragmatic theories about agon and canonicity that characterize the work of Harold Bloom. As in this chapter, the following chapter analyzes the dissent as a rhetorical medium that prevents case precedent from fossilizing into a state of immobility when the exigencies of the social order demand revision, modification, and adjustment.

CHAPTER THREE

Canon Formation and the Marketplace of Ideas

Clair L'Heureux-Dubé, a former justice on the Supreme Court of Canada, has argued that dissents have prophetic potential and reflect the complexity of judicial reasoning, a complexity that is, she suggests, more necessary than unanimity for the evolution of the law (504-509). She adopts former United States Supreme Court Chief Justice Charles Evans Hughes's proverb that a "dissent in a court of last resort" is "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed" (496). She suggests, moreover, that dissents are unlike the Gregorian chants sung by European choirs a "thousand years ago" in that dissents sound "new melodies" in a "polyphonic world" (516) and enable courts to speak with "a plurality of voices" (496).⁷⁸ This musical analogy extends to the common-law system that she characterizes as conducive to dissenting opinions because it allows "for a certain measure of polyphony in the voices of the law" (496). L'Heureux-Dubé's proposition that dissents facilitate constructive deviations among case precedents comports with the arguments made in my earlier chapters that dissents ensure the continuity of the common-law system by making possible judicial malleability and reproductive variation among legal principles. The common law is as much about sustaining the residual form of institutionalized values and traditions as it is about building room for new institutions consistent with changed values and traditions; therefore, the system requires, in Holmes's words, some "play" in the "joints" (*Tyson* 446).

L'Heureux-Dubé's commentary about dissents resonates with the idea proffered in earlier chapters that agon has the potential to generate societal progress and creative jurisprudence—or

what L'Heureux-Dubé refers to as “a blossoming of legal concepts and solutions” (496). As with earlier chapters, this chapter does not challenge Holmes’s assumption that the optimal paradigm for an enduring legal order is the common-law system, which resembles a Jamesian multiverse of pluralistic voices absorbed within one judicial canon. I argue here that creative struggles in judicial opinions and dissents develop into a dynamic canon of juxtaposed legal theories and principles that resolve themselves only through their practical application and constant revision by subsequent judges and justices. Such resolution is never about achieving pure wholeness of thought but about balancing contradictions and sustaining multiple, energetic dialectics. These dialectics do not solidify into a single compromise or synthesis but preserve competing binaries and gradually wear away theories that are no longer suitable for the social and technological environment. Maintaining what appear to be irresolvable tensions prevents one absolutism or essentialism from dominating another by force or by the threat of force; such tensions tend to correct each other or to cancel each other out. The processes of creating and sustaining a binding legal canon involve similar agonistic struggles that characterize the gradual formation of literary canons. Harold Bloom’s declaration that there “can be no strong, canonical writing without the process of literary influence, a process vexing to undergo and difficult to understand,” applies to legal canons as well as to literary canons (Bloom, *The Western Canon* 7). Holmes more than any other United States Supreme Court justice substantiates this claim insofar as his influence on the development of the American legal tradition comes in equal measure from his philosophical rigor and his rhetorical force (Danisch 220).

Holmes also demonstrates, as earlier chapters have shown, that judicial dissents can be a literary genre. The canon formation resulting from Holmes’s dissents reveals an interesting

relationship between the common-law system of sorting through judicial precedents and Bloom's observation that "[a]ny strong literary work creatively misreads and therefore misinterprets a precursor text or texts" (Bloom, *The Western Canon* 7). The relationship has less to do with misreading and more to do with the agonistic tensions between case precedents that reveal both the "burden of influence" and the "conflict between past genius and present aspiration" among judges and justices (Bloom, *The Western Canon* 8). The same "literary survival" and "canon inclusion" that mark the literary tradition mark the American constitutional canon in which milestone cases continue to be studied and debated (Bloom, *The Western Canon* 8). In both canons the tensions between present and past creations enable originality to flourish; in the legal canon, according to one scholar, "rhetorical struggles [...] have always fueled jurisprudential development" (Cole 861). Justice Frankfurter trumpeted that the rhetorical expression of national habits in Holmes's judicial writings "is itself a creative force" for constantly renewing the law, first in the minds of the public and of jurists and then in the formation of new decisions and new precedents (63).

In the common-law system according to Holmes's evolutionary paradigm, jurisprudence is passed from generation to generation through successive judicial opinions. What L'Heureux-Dubé calls the "tradition of dissent" (498) that reflects the "adversarial culture" (502) of lawyers and their clients who are either plaintiffs or defendants, appellants or appellees, petitioners or respondents, allows an ongoing competition and even a sort of conversation to take place among different ideas, principles, and schools of thought in the legal system (503). Because its form and content are necessarily adversarial to the majority position, the dissent is constructively competitive, especially when it is creative; it produces variation among legal theories and

principles and makes possible the differential survival of certain rules that a majority has overlooked, misapprehended, or rejected. The author of a dissent struggles against the anxiety of influence and linguistic skepticism and against the majority position and the doctrine of *stare decisis*. Like the agonism essential to Bloom's postulations about literary influence, this judicial agonism is paradoxically and simultaneously disabling and enabling; the restrictions it imposes are sources for creative modeling and borrowing.

I acknowledge that Bloom's treatment of the canon can be problematic and controversial because of the exclusionary tactics it recommends. His formulation of the Western Canon was a progenitor of the academic culture wars of the late twentieth century. Oriented with the work of Allan Bloom, John M. Ellis, and E.D. Hirsch, Jr., Bloom's canon translates into literary terms the Oedipus complex and its relation to the anxiety of influence. His allegedly apolitical framing of literary studies is susceptible to fair characterization as political. Nevertheless, those who study the common-law tradition will find his evolutionary approach to canon formation rewarding and possibly more insightful in the context of judge-made opinions. The lack of ethnic, racial, gender, and sexual diversity among Supreme Court justices raises its own troubling challenges and difficulties, but it makes the selection of canonical cases less vulnerable to accusations of sexism or racism. Applying Bloom's evolutionary theories of the canon to opinions of the United States Supreme Court narrows our interpretative focus to the processes rather than the results of canon formation, bypasses heated polemics about the importation of politics to literary study, and, because of the inherently political nature of the law, avoids any pretense that the text object can be isolated from political considerations.

It is the aim of this chapter to approach dissents as seeds planted for the growth of the legal system and to consider the agonistic nature of the legal canon that drives abstract jurisprudence toward practical applications within changing social and political environments. This chapter also brings together the salient arguments of the preceding chapters by uniting the themes of agonism, creativity and aesthetics, precedent, evolutionary struggle, and constructive competition that have borne directly on the tradition of dissents in American constitutional history. Keeping pace with fluctuating social conditions and technological advances, the common-law system, such as it is in the United States, incorporates and has adjusted to new customs and activities with which dissenting viewpoints have corresponded and may eventually correspond. Because he recognized the meliorative potential of the common-law system, Holmes authored creative, aesthetic dissents to ensure that there remained a productive tension between permanence and stability on the one hand and adaptation and flexibility on the other. “Not until after his death,” Justice Frankfurter said of Holmes, “did the powerful seeds of his dissents bear fruit in the decisions of the [Supreme] Court” (62).

This chapter begins by examining the Darwinian processes of canon formation to suggest that the so-called prophetic elements of Holmes’s writing are attributable, in part, to their rhetorical style. The canon versus anti-canon paradigm for classifying decisions of the United States Supreme Court substantiates Holmes’s theories about the evolutionary disposition of the common-law system within a constitutional framework. It also highlights parallels between theories of common-law formation and Bloom’s theories of canon formation as they pertain to heroism, greatness, influence, staying power, and continuity. Having contextualized Holmes’s common-law theories in terms of canon formation, this chapter then turns to Holmes’s writing on

freedom of speech and the First Amendment to demonstrate that, consistent with his evolutionary approach to the common law, Holmes saw the free interplay of varying ideas as requisite to the constructive advancement of society. In his view the agonism that inheres in a system of free expression neutralizes conflict by allowing a critical mass of opinion to moderate extreme ideologies and to enable more profitable claims to win out over their less advantageous competition. Holmes was a warrior who enlisted martial language and metaphor in his writings, yet his agonism is, counterintuitively, about peace, not violence, in that it restrains conflict at the level of rhetoric and discourse rather than instigating physical aggression.⁷⁹ The common-law paradigm is thus an antecedent theoretical cognate to Holmes's First-Amendment jurisprudence. A renewed appreciation for the peacefulness at the core of Holmes's free-speech jurisprudence requires a teasing out of Holmes's complicated understanding of the most violent conflict of his life: the Civil War. Accordingly, I round out the chapter with a discussion of Holmes's "bettabilitarianism," which supplies the best premise from which to approach Holmes's attitude toward the Civil War. Defined at length later in the chapter, "bettabilitarianism" is Holmes's notion that lived experiences combine to form valid inferences from which we rationally deliberate, or bet, about the place of our actions and beliefs in the complex order of the cosmos. A thrice-wounded veteran, Holmes identified with the average, unranked soldier, who was, he thought, a noble victim of the ideological certitude of his more powerful superiors. Insofar as the common-law system consisted of decentralized networks of jurists responding to residual customs and communal assent rather than legislative or parliamentary imperatives, it stood in marked contrast to the military system whereby the top-down commands of centralized powers (the president and his generals and officers) controlled and disposed of the lives of inferiors and

disregarded the antagonistic sentiments within lower ranks. Judges in the common-law system were accountable to ordinary people in a way that military leaders were not. Therefore, the common-law system, being responsive to the community, minimized violence, whereas the military system, in which a small elect commanded orders to the community, maximized violence—or so Holmes came to believe.

Holmes as “Prophet”

L’Heureux-Dubé refers to Holmes as a “great dissenter” because he “embodied the role of the prophetic dissenting judge” (506). Justice Benjamin Cardozo memorialized Holmes as a “philosopher” and a “seer” (684). G. Edward White attached to Holmes the label of “inspiring judge” (577), “prophet” (577), and “visionary” (578),⁸⁰ and Holmes has been dubbed “an agnostic prophet to an agnostic age” (McKinnon 345). Holmes has emerged in the American constitutional canon as a “prophet” whose words are “quoted with almost Biblical reverence” (Sundby and Ricca 394). What did he produce that he should be likened to a prophet or a visionary or a seer, the very monikers that Bloom bestows upon Emerson (Bloom, *Agon* 145-47), who, for Bloom, represents a “voice in the wilderness” (Bloom, *Agon* 160)? The answer involves not only what L’Heureux-Dubé calls the prophetic element of dissents but also the “common denominator” of the “diverse and heterogeneous tradition” that is American pragmatism, namely, the “future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action” (West 5).

This instrumentalism in the common-law system is not “a plebeian radicalism that fuels an antipatrician rebelliousness for the moral aim of enriching individuals and expanding democracy” (West 5). The inherently pragmatic and instrumental common-law system is,

however, forward-looking and future-oriented inasmuch as it concerns itself with the reception and extension of judicial precedents by the legal community and especially by future judges and justices. The primary role of a dissent in the common-law system is to provide accessible alternatives so that when abrupt transitions of culture and business necessitate shifts in legal paradigms, there remains a substitute theory to meet new needs. Dissents add to the store of options and resources that judges and justices are obligated to consult before issuing an opinion that gives normative preference to one rule or assemblage of rules over another.

The free interplay between dissenting and majority opinions results in canon construction. The law is “very much a canonical exercise” because the whole practice involves calling on the authority of specific past rules or precedents to determine the outcome of any specific case (Hutchinson 127). “Great cases” are “the heart and soul of the common law” (Hutchinson 126) and become canonized when they demonstrate pragmatically the ability of the common law to keep up with and respond to changes in the moral attitudes and social order of the nation (Hutchinson 125). Judges and justices inherit rules and principles that are approved by their workability and that reflect the acquired characteristics of everyday social systems within a given jurisdiction. These rules and principles are embodied in common-law precedents that evolve even as they draw from tradition and modify historical standards and norms. Judges and justices must predict which heritable traits of different rules and principles are most advantageous for the legal system now and in the future. When they are faced with competing paradigms in the form of prior majority opinions and dissents, judges and justices must choose which paradigm is operative and profitable in light of the facts at hand and must locate their decision in both custom and reason while balancing demands for stability, uniformity, and

predictability with demands for adaptation and transition. This process entails predictions about the future, or “prophesies”: how will a rule or principle obtain in society if it alters slightly the normative guides that are authorized by the accretion of case precedents? What will it mean for the durability and credibility of the law if certain canonical opinions are challenged by judges and justices as unreasonable, impracticable, or obsolete?

If Holmes was prophetic, it was because he recognized that, on account of the agonistic manner in which canons are constructed and sustained, there is a prophetic element to judicial writing. He even maintained that the law consisted of the “*prophesies* of what the courts will do in fact” (Holmes, “The Path of the Law,” 461, emphasis) as well as the “scattered prophecies of the past” (Holmes, “The Path of the Law,” 457). In this respect, and perhaps only in this respect, religious and legal canons operate according to similar modes of development and implicate what Bloom calls “the true Emersonian test for the American religion,” which is that such religion cannot gain its status “*until it first is canonized as American literature*” (Bloom, *Agon* 148, emphasis in original). Holmes’s dissents have been canonized as legal masterpieces because of their literary and rhetorical distinction, and Bloom’s point, which is relevant to Holmes’s style as a vehicle to legal authority, seems to be that a subsidiary canon tailored to literary merit is different from the larger, more general canon rooted in pragmatic utility and widespread acceptance. “Poetry and criticism,” Bloom expounds on this score—and he might have added judicial opinions and dissents to these genres—“are useful not for what they really are, but for whatever poetic and critical use you can usurp them to, which means that interpretive poems and poetic interpretations are concepts you make happen, rather than concepts of being” (Bloom, *Agon* 39). Bloom styles this formulation “wholly pragmatic” (Bloom, *Agon* 39). It

suggests that texts comprising the literary canon are not inherently or intrinsically canonical but must be made canonical by future readers; those works marked by qualities and style that continue to compel, move, and attract future readers outlast their competition in the struggle for survival. Although there is nothing inherent in a case that can ensure that it will form a part of the canon, Holmes's dissents suggest that a memorable style and sound can attract readers and generate discussion and thereby increase the likelihood that a dissent will become canonical (Hutchinson 128).

Bloom is sometimes unfairly maligned as the promoter of a fixed canon when in fact he treats the canon as open and fluctuating and always evolving. He does, however, argue for demonstrably fixed standards by which canonical texts should be measured and suggests that the canon is stable, although never unchanging. The distinction between his treatment of the canon and his standards for canonicity is important because it means that the canon is not set and static; rather, the differential survival of certain texts within the canon suggests that the qualities of those texts are advantageously heritable. Implicit in Bloom's theory of the canon is the warning that, if we discard the good and proper standards by which to measure the lasting value of literature, we risk the degeneration of the canon and the concomitant loss of knowledge about the survival probability of texts.

Richard Posner, who is known for his unique contributions to the legal canon, shares Bloom's belief that "the survival of works of literature is, broadly speaking, Darwinian" in that "literary reputation—the mark of survivorship—is something bestowed upon a writer for the purposes of the people doing the bestowing" (Posner 15). Posner explains that if there is any one thing that causes a text to enter the canon, it is probably the text's flexibility or ambiguity and

usefulness to people writing under the unforeseeable cultural circumstances of the future (Posner 18). The workings of the literary canon as described by Posner mirror the workings of the legal canon in which a case becomes canonical simply because people (especially lawyers and judges) in the future *use it* as canonical (Hutchinson 131). The ambiguity to which Posner refers with regard to the literary canon has its counterpart in the ambiguities or vagaries that dissents necessarily produce in the common-law system. Dissents cause ambiguity by undermining the authority of the majority position and by preserving viable alternatives to the majority position. Logical soundness and syllogistic reasoning are equally or possibly less important to the survival of a literary or legal text than is their ability to interest and attract future readers. According to Allan Hutchinson, “The greatness of great cases is less about their formal attributes than it is about their substantive appeal” (Hutchinson 134). The “continuing preeminence” of canonical cases is equally the result of people’s future ideas about the text as it is the result of characteristics inherent in the original. As Hutchinson puts it, “Canonicity is what is bestowed on texts, not something that a text simply has” (Hutchinson 145). The previous chapters have suggested that the substantive appeal of a case can be bound up with its formal attributes such as the style and sound of its language. A memorable or literary style can help a case to gain canonicity by reaching future legal writers’ ears and inkwells (Hutchinson 139, 145).

Bloom and Posner’s ostensible agreement regarding the evolutionary properties of canonical works affirms the similarity between the legal and literary communities: both are shaped heavily by a canon of influential works (Hutchinson 129). The Darwinian pragmatics of Bloom’s and Posner’s theories are more evident in legal decisions than in works of imaginative literature such as novels or poems because legal decisions more obviously and practically

demonstrate their influence in the workaday world. A law is meaningless unless and until it regulates social behavior; the value and effect of a legal canon is unclear until its role in the social sphere can be ascertained.

The canonical status of both literary and legal texts depends upon the customs and traditions of the people to whom the texts are directed. Like a literary text, a legal opinion or dissent becomes canonical when by general consensus it represents an accepted source of cultural authority on which most people rely when making decisions about how to act or what to believe. The failure or refusal to accept the legal canon as authoritative or to act in accordance with its mandates may trigger punitive consequences meted out by the government. By contrast, there are no punitive consequences meted out by the government for the failure or refusal of ordinary citizens to acknowledge or to follow the authority of the literary canon. Lacking any centralized enforcement mechanism or apparatus, the literary canon is looser and more permeable than the legal canon, even if it functions in a similar manner: shifting and improvising, revising and resituating, adapting and modifying, incorporating and discarding. The analogy between legal and literary canons goes only so far because these canons serve different social and cultural functions. Their similarities, however, illuminate the ways in which both canons form and function.

Holmes's prophetic voice and vision have elevated him to the status of a cultural hero figure, symbolic of the great traditions of American law and lawyers—his voice because of its style and sound and his vision because it predicted the trends and influences of the United States Supreme Court in future times (White 576-77). Holmes's canonization came not only from the appeal of his writing but also from his usefulness to the progressives (Synder 720). Both parties

benefited from their mutual admiration. Progressive journalists, with whom Holmes disagreed about most things, canonized Holmes because they “needed a constitutional symbol of what the Supreme Court could be, and a voice to legitimate the constitutionality of their ideas” (Snyder 720).

The canonization of Holmes was a singular event in that he marked a shift in the cultural currency of the United States Supreme Court (White 576). No legal figure besides Holmes has become a symbol of American culture (Reimann 1916). Not since Chief Justice John Marshall had a justice on the United States Supreme Court been elevated as an icon or symbol for a mode or system of jurisprudence or as “the leading symbol of the legal culture” (Reimann 1916). The following lines represent a condensed version of a commonly retold narrative about the elevation of Holmes to the status of heroic prophet and his dissents to the status of judicial ideals:

Holmes’s canonization was part and parcel of the project to reconstitute the [Supreme] Court’s interpretation of the Fourteenth Amendment. Once the switch in time had effected this reconstitution, and permitted the New Deal to become a pervasive element in American society, commentators began to hail Holmes, not just as their champion of right, but as a “prophet” and a cultural hero. (Krishnakumar 793)

The canonization of Holmes the man cannot be divorced from the canonization of his judicial writings because the two are reciprocal and mutually reinforcing; such canonization was as much a product of Holmes’s own efforts as it was of the appropriation and commemoration of Holmes by future judges and justices. If Holmes has achieved the status of a cultural hero or icon, it is because admiring and emulating readers, especially judges, justices, and legal academics, have cultivated that status for him and have encouraged others to read and interpret his work. “Holmes, the greatest of the dissenters,” explains one scholar, “was reimagined [...] by the generation of judges and academics who canonized his dissents and made him into a heroic

Justice” (Primus 285). Holmes’s writings gained value and appeal as his image and reputation began to stand for models of constitutional jurisprudence such as judicial restraint, deference to state legislatures, freedom of speech, and common-law processes and procedures. The fact that Holmes authored a dissent invested that dissent with authority notwithstanding the coherence, cogency, or validity of the argument he pieced together.⁸¹ The stature of Holmes’s judicial opinions and dissents magnified and spread as more commentators began to recycle praises of his jurisprudence and to mythologize his influence on constitutional law. As Holmes became a sign or symbol of justice and fairness, wisdom and excellence, restraint and moderation, his opinions and dissents gained force and influence. Holmes shows how reputations built on writing style and rhetorical facility can impact the reception of particular judicial texts. By decorating his opinions and dissents with unique and memorable language, he called attention to his style and enhanced his reputation and slowly gained his spot in the American constitutional canon, a concept that bifurcates into two categories: canon and anti-canon.

Canon and Anti-Canon

An understanding of “canon” is requisite to an understanding of the “anti-canon.” Holmes’s position as a United States Supreme Court justice situated his judicial writings within the *constitutional canons* that have received more scholarly attention than the canons of particular areas of law—for instance, torts or contracts or criminal law, disciplinary categories that interest practitioners and specialists. A constitutional canon is a “set of greatly authoritative texts that above all others shape the nature and development of constitutional law” (Primus 243). Those authoritative texts are expurgated and aggregated in casebooks and hornbooks to be used by law students and legal academics and in treatises to be used by the practicing bar, including

the courts. The purpose of a legal canon in casebooks is chiefly pedagogical: “Just as literature professors decide what poems and novels to teach, editors of casebooks decide what ‘cases and materials’ students ought to be exposed to on their intellectual journey from uninitiated laypersons to well-educated, ‘disciplined’ lawyers” (Balkin and Levinson 973). The purpose of a legal canon in treatises is chiefly practical: lawyers, judges, and justices consult treatises for summaries of the prevailing rules and practices within certain jurisdictions. Because they arrange, collect, and classify the official sources that educated lawyers must learn to carry out their practice with competence, legal casebooks and hornbooks have been likened to anthologies of literature (Balkin and Levinson 973) consisting of those precedents that modern experts and authorities by and large agree are key to learning and practicing law (Primus 243).

The constitutional canon in the United States is like a literary canon, which is, according to Bloom, “a choice among texts struggling with one another for survival” (19). Mindful of Bloom’s definition, J.M Balkin and Sanford Levinson observe that in the “liberal arts, debates about the ‘Western canon’ have been going on for some time, often through controversies about what texts should be assigned in basic humanities courses” (968). They note that similar “debates about canonicity have occurred in the legal academy,” albeit by “other names and using different vocabularies,” to wit, those pertaining to “interdisciplinarity,” “narrative scholarship,” “identity politics,” “the structure of the law school curriculum,” and the “preservation of the liberal precedents of the Warren Court and early Burger Court eras” (968). What distinguishes a legal canon from a literary canon, according to Balkin and Levinson, is an institutional concern for binding precedents because the canons of law must include previous laws and legal decisions that have a definitive authority over decisions in the present (Balkin and Levinson 983). This

means that lawyers and judges are constrained in what they can use and therefore what they must learn in a way that literary authors and academics are not (Balkin and Levinson 983). There is no equivalent institution or practice in the literary academy that can mandate which past works of fiction and criticism future authors must consult (Balkin and Levinson 983). The correlation between the legal and literary canons ultimately collapses, but the hermeneutical, conceptual, and analogical benefits of comparing and modeling the two canons justify continued inquiry and sustained investigation into their likeness.

A constitutional anti-canon stands in contradistinction to a constitutional canon because it represents a set of the “worst decisions” within a jurisdiction that are “not adduced by anyone’s reflective legal opinion but rather preselected by the broader legal and political culture” (Greene 380). In the history of the United States Supreme Court, anti-canonical cases include *Dred Scott v. Sandford* (1857), *Plessy v. Ferguson* (1896), *Lochner v. New York* (1905), and *Korematsu v. United States* (1944) (Greene 380). The anti-canon reflects the “dual structure” of the constitutional canon (Primus 245) that distinguishes a legal canon from a literary or religious canon. A literary or a religious canon tends to preserve only what is considered best. A legal canon must also preserve decisions and legislations that are believed in hindsight to be reprehensible (Primus 245). Jamal Greene explains that the anti-canon is the body of decisions in which the Supreme Court has done an “especially poor job” of drawing on the common-law traditions and adapting them to present circumstances (Greene 381). The choice of the term “anti-canon” reveals a conscious rejection of more confusing designations such as “approved canonical cases” as against “disapproved canonical cases” to refer to subcategories of the component texts that make up the overall canon (Primus 245). In a sense the anti-canon is part

of the overall canon but carries a different designation to denote its inclusion of only bad decisions; regardless, texts in both the canon and the anti-canon are necessary to master in order to understand the basics of American constitutional law. Establishing the canon versus anti-canon paradigm yields an agonistic frame of reference for explaining how competing legal positions can orchestrate social coordination despite the variety of rules they recommend. The agonistic nature of the common law can be inferred from the tensions between “a canon composed of the most revered constitutional texts” and an “anti-canon composed of the most reviled [constitutional texts]” (Primus 245). The canonical and the anti-canonical by their very opposition create the potential for alternating authorities that guide the interactions of people and communities. Although some anti-canonical opinions may be possible to revive as law, most will fall into disuse to allow another form of opposition to take their place.

The undesirable qualities of cases in the anti-canon can be set off by dissenting opinions that are viewed more favorably by later audiences; these dissents provide choice and diversity for later judges and justices who must select the right rules and rationale for their opinions that may themselves become canonical. In this respect, a dissent, and not just a binding majority or plurality opinion, may become canonical. Every time a jurist uses a dissent as if it were a canonical authority he or she implicitly reasserts that the canon of the common law is mutable because every dissent, by its nature and function, was at one time not authoritative (Primus 247). The dissent becomes canonized by transitioning from memorable, non-binding legal argument to vindicated, binding legal argument. Such canonization arises as a result of the anti-canonical reasoning embedded in the majority opinion; the canonical and the anti-canonical are therefore mutually exclusive and yet dependent upon one another. When later courts vindicate or validate

the legal arguments of a dissent about a matter with immediate importance or vast ramifications, the dissent becomes canonized.⁸² Whatever appealing or engaging rhetorical qualities dissents display enhance the probability that future readers will remember the legal arguments proffered therein; accordingly, the rhetorical properties of a dissent are not useful in isolation but only in their participation with future judges and justices within a citational network of judicial writings. Any theory that attempts to determine which dissents have the potential for canonicity based on some property inherent in the dissent is limited (Primus 251-52). The canonicity or redeemability of a dissent comes not from the dissent itself but from later decisions that “restructure the constitutional canon by reversing yoked pairs” (Primus 252). This yoked-pairs model is another name for what I have been calling agonism. It indicates that the very structure of the common-law constitutional canon and the dissents therein creates the ineradicable possibility that some past dissent will be redeemed and some past canonical decision will become anti-canonical (Primus 252). Under this model, every canonical text is linked to an anti-canonical text; every prevailing argument has a corresponding non-prevailing argument: “The argument that the court adopted and the argument that it rejected are bound together [...], and the judicial canon is composed not just of a series of free-standing texts but of a series of members of yoked pairs, each canonical text dragging its partner along with it” (Primus 254). The purpose and function of dissents make them “presumptively members of yoked pairs” and “natural candidates for being made authoritative and even canonical,” although in Richard Primus’s permutation the standing of the author of a dissent, not just the formal qualities or the logical soundness of his or her dissent, enhances the authority of that dissent (Primus 257-58). The fact that Holmes became known as heroic and prophetic therefore increased the probability that his

dissents would become authoritative. Primus echoes Bloom and Posner in stating that canonicity happens to a text and is not built into the text. In Primus's paradigm, the potential of a dissent is not in its supposedly self-contained, independent features cut off from the externalities of human activity but in its capacity to interact with some future community by contributing to ongoing legal conversations.

Primus sees a nexus between the "theory of the Heroic Justice as Great Dissenter" and the canonization and vindication of dissents simply by virtue of their authorship (259). He asserts that the "heroism of the dissenting judge and the greatness of his dissenting opinion are constructed in tandem, each supporting the other" (259). He also suggests that the "role of dissenter is conducive to heroism" inasmuch as "it is in the struggle with adversity that [...] heroism is established" (259). Primus's theory of the hero is comparable to Bloom's theory of the genius, the measure of which, according to Bloom, is vitality (Bloom, *Genius* 4). In language similar to that which I have used to describe Holmes's evolutionary paradigm of the common law, Bloom imparts that genius is about the "deepest desire [...] for survival" and that to "be augmented by the genius of others," or possibly by the insights of some past dissent or dissenter, "is to enhance the possibilities of survival, at least in the present and the near future" (Bloom, *Genius* 5). Genius is therefore about "agon" and the "invention of a continuity and so of a tradition" (Bloom, *Genius* 6). Like Emersonian superfluity as described by Richard Poirier, Bloom's genius is characterized by the urge "to beget" and to "cause to be born" or to harness "intellectual or imaginative power" to "strongly influence" other individuals, including judges and justices (Bloom, *Genius* 7). Contextualizing Bloom's assertions within the common-law

framework suggests that laws derived from aestheticized dissents have been made possible by totemic geniuses or heroes like Holmes who rendered strong and memorable writings.

Bloom's and Posner's notion of canonicity harmonizes with Ross Posnock's pragmatic exposition of the "politics of nonidentity" apparent in the philosophical and literary principles that worked for both Henry and William James, with identity serving as a curious proxy for the operative rule in a plastic, mutable, fluctuating legal system. Posnock alleges that social life is necessarily an agonistic experience not unlike the dialectic of dissenting and majority opinions (5). The agonistic experience of constant contradictions within social orders permitted Henry James "to tap the energy of its repressions as a source of critical power and excitement" (Posnock 5). Posnock explains that Henry James "converts the bourgeois self of control into a more supple mode that eludes social categories and is open to the play of the fundamental passions" (Posnock 5). Henry James moves between psychic and subjective categories and habits of mind and cuts across totalizing labels and states of inquiry, disrupting his chosen identity as soon as he adopts it. His openness toward alien peoples and cultures is pragmatic because it reveals an "inordinate receptivity" that "replaces theory with practice, the a priori with contingency, clarity with shock, information with immersion" (Posnock 10). Henry James is "between cultures" (Posnock 8) in a manner that is congruous with his brother William James's unwillingness to be subsumed to any political labels and his dogged insistence on open, conversational inquiry, "which conceives the aim of politics to be the circulation of differences rather than their imperial subjugation" (Posnock 16). The cosmopolitan James brothers resisted the homogenizing rush to assimilate and synthesize the assorted mores, practices, and attitudes of disparate and even alien communities into monistic units and preferred, at least in theory, to

balance the competing varieties of human experience within divided jurisdictions, permitting social and economic interaction and coordination among anonymous actors to shape the overall polity.

Holmes's skeptical, hands-off jurisprudence is a companion construct of the politics of nonidentity, committed to no political program or partisan creed but deferential to the composite will of unlike, far-off communities. This will is reflected in the legislative enactments of elected representatives who derive their power from local majorities. An unaffiliated, uncommitted Holmes could, without passing judgment on the wisdom or goodness of local laws, stare into the laboratories of state legislatures and uphold any statutory scheme that did not clearly offend constitutional provisions. Holmes, like the James brothers, considered himself a residuum who worried about the capacity of American culture and institutions to absorb the alien "into a homogenous social order" (Posnock 16). Cognizant of the "unknowability of the nation's future" (Posnock 16), Holmes and the James brothers offered an alternative to the absolutist dream of a central, final law for all places and times (Posnock 17). Holmes did this by eschewing the totalizing certitude of natural-law theories used to justify imperial expansion of the kind that the James brothers denounced in Theodore Roosevelt's international military policy (Posnock 17). Consistent with the James brothers' "revisionist stance" that "finds incongruity and contradiction crucial to their identities," Holmes fashioned a jurisprudence of abjectness and submissiveness that simply accepted the hereditary variety of local laws as evidence of natural, unconscious selection, guided by different legislatures that responded to the disparate norms and behaviors within their jurisdiction, with the sifting and sieving electoral processes always ensuring that representatives remained just that: representative of the characteristic features of

the community. Holmes dissented not merely to protest or pontificate but because dissents opened the textual record to contingency and variation, making it more susceptible to hybrid crossings and institutional diversity, accelerating future inquiry and debate, reconciliation and compromise, adjustment and reformulation. Holmes capitalized on the dissent's unique capacity to effect reversal and transition, correction and meliorism, and to bring about a wide-ranging, diffuse common-law system that accommodated divergent traditions and viewpoints for the sake of corporate growth in the legal canon.

Judicial Aesthetics

Primus's model of heroism in which every dissenter needs an adversary (Primus 259) and in which "the holding of a dissent is retrospectively created" (Primus 284) accords with my argument that agonism as represented by dissents energizes the common-law system by facilitating necessary changes in jurisprudence. Primus rejects the commonly held idea that dissents are necessarily more literary than majority opinions, but he acknowledges that some dissents are wonderfully literary and that dissents as a class tend to be thought of as a literary form (267). Primus does not consider whether the agonistic properties of the dissent contribute to its literary potential by forcing judges and justices to struggle against textual limitations. Emersonian pragmatists in the tradition mapped by Richard Poirier and Jonathan Levin, however, find inspiration and originality by struggling against the anxiety of influence and linguistic skepticism in the same manner in which a judge or justice finds inspiration and originality by struggling against the majority position and established case precedents. Primus is right that by itself "literary merit is a slim reed on which to rest a theory of redeemed dissent" (Primus 268) and that some redeemed dissents, most notably Justice Harlan's in *Plessy v.*

Ferguson, are hardly literary *tours de force* (Primus 269). But literary merit alone does not bring about vindication; rather, the literary qualities of a dissent draw attention to the reasoning that is itself worthy of vindication but likely to be ignored absent some aesthetic dressing. A literary opinion that is irrational or unsound will not or is not likely to be redeemed. The coupling of sound argument with aesthetics, however, increases the probability of a dissent's vindication and contributes to the heroic reputation of the author of the dissent. Holmes's literary aptitude, accordingly, is not the cause of the vindication of his dissents but merely a contributing factor.

It has been observed that "the lines of distinction" between judges and poets "are not as sharp as they first appear" (Cole 858). Although the "rules of precedent" that are "central to Anglo-American notions of law [...] demand that Justices follow past authority and generally forbid the radically creative breaks that we value in the poet," the poet likewise is "not free from historical influence" because "a creative act is always a break *from* a past tradition and is defined and understood in terms of its relation to that tradition" (Cole 858). Creativity is required of the judge or justice who applies old paradigms to new settings and who sifts through canonical and anti-canonical cases for the right rule for the case under consideration. "By focusing on [the] moments of tension" between the canonical and the anti-canonical, "the law, like poetry, can be read as an antithetical struggle for meaning" (Cole 859). Such tensions indicate that, in law as in poetry, those authors regarded as canonical break ranks, innovate, and deviate from established tradition (Cole 859). In this respect, Bloom's theory of the anxiety of influence obtains for the judge or justice as much as for the poet, although as I have already stated the act of misreading is less central to legal canonicity than the agonism inherent in the common-law system.

The anxiety of influence for a judge or justice “is assuaged insofar as legitimacy rests on following precedent, but it is exacerbated to the extent that greatness lies in breaking from precedent” (Cole 866). The tension between the organic and dynamic methods of adjudication in the common-law system and the need for order and stability among case precedents compels judges and justices to exercise a principled creativity. Those judges and justices who are inclined to institute changes in rules and principles while also attending to landmark antecedents are more likely to generate memorable and lasting opinions or dissents. There is little reason to doubt that what Bloom says of the anxiety of influence applies to jurists to same degree as to strong poets: both jurists and poets are concerned “not that one’s proper space has been usurped already, but that greatness may be unable to renew itself, that one’s inspiration may be larger than one’s own powers of realization” (Bloom, *Genius* 6). Such anxiety of influence is no doubt heightened for those dissenting judges and justices who already have a sense that their arguments and interpretations have been rejected by the majority.

As the theory of superfluity suggests, value, whether of literature or of dissents, “has much to do with the idiosyncratic, with the excess by which meaning gets started” (Bloom, *How to Read* 23). Value proves itself over time, either running its course or advancing in gradual stages. In the common-law system, the value of an opinion or dissent is determined by the constant struggle of the canonical versus the anti-canonical, the precedential versus the novel, and the rule versus the exception. To guarantee that the legal system continues to grow in keeping with the values and priorities of society and to avoid what L’Heureux-Dubé calls the monovocal Gregorian chant by assimilating multiple voices into a polychoral harmony, prophetic judges like Holmes will dissent: the textual record thus will retain whatever advantageous traits

preserve and generate practices that effectively govern human activity. Although dissents do not constitute binding precedents, they are nevertheless precedents and can be useful and instructive even if they are only potentially binding. The failure to preserve constructive legal theory in a dissent leaves future judges and justices without a textual basis for vindicating that theory; therefore, judges and justices who believe their theory is superior to the majority's must register their position in a dissent to safeguard it for future consideration.

Vindication and the Marketplace of Ideas

The vindication of Holmes's dissents demonstrates the value of preserving legal theories that happen to be rejected by a majority at a particular moment. Such vindications are most apparent in Holmes's First Amendment jurisprudence regarding freedom of speech and expression in part because the presence of the First Amendment in our constitutional order indicates why dissents are so important in our legal tradition (Cole 860). The jurisprudence of the First Amendment, after all, is based on the protection of the rights of the minority (Cole 860). And the dissenter—perhaps the Emersonian nonconformist—is almost by definition in the minority and in need of protection (Cole 860). Holmes saw the need for such protection and for ensuring that the First Amendment “clears the field for antithetical battle and affirms the place of such struggles in the self-governance of the nation” (Cole 861). His First Amendment jurisprudence is a signpost for all who came after him; it warns of the disabling consequences of attempts to eliminate political opposition.

Justice Thurgood Marshall had this to say in *Norton v. Discipline Committee of East Tennessee State University* regarding the vindication of Holmes's writings on the First Amendment:

It seems to me altogether too late in the constitutional history of this country to argue that individuals can properly be punished for pamphleteering[.] [...] These pamphlets are similar in some ways to the broadsides circulated by popular writers in England and the Colonies, official suppression of which helped lead to adoption of the First Amendment; to the writings of Republican polemicists, against which the Sedition Act prosecutions were aimed—prosecutions this Court has said violated the First Amendment [citation omitted]; and to leaflets distributed by protestors during the First World War and the 1920's, which evoked *the classic opinions* of Holmes and Brandeis, *since vindicated by history*, upon which so much of our law of free speech and the press is based.

(*Norton* 907, emphasis added). Justice Marshall verifies that Holmes's First Amendment dissents have become classic or canonical as well as vindicated. He adduces as evidence Holmes's dissents in *Abrams v. United States* and *Gitlow v. New York*.

Justice Marshall is not alone among United States Supreme Court justices to have announced Holmes's dissents as thoroughly vindicated. Shortly after Holmes's death, in *Craig v. Harney*, Justice Frankfurter wrote in his own dissent that the "Court minimizes these findings by pointing to a likeness between them and those that were made in *Toledo Newspaper Co. v. United States* [citation omitted], and found inadequate by Mr. Justice Holmes' dissent, an inadequacy subsequently supported by our decision in *Nye v. United States*" (*Craig* 386).

Because the First Amendment protects freedom of speech and expression, it is particularly rich in the context of judicial dissents that represent a form of precluded expression, that is, a statement of the law that is not accepted as the law. United States Supreme Court justices have dissented in cases about the First Amendment while arguing that the First Amendment ought to safeguard political dissent. Indeed, through much of the history of the nation the political dissenter has been the paradigmatic figure who must, imperatively, be protected by freedom of speech (Balkin and Levinson 1011). This view has been embodied in Supreme Court rulings protecting seditious political activists over the course of the latter half of

the twentieth century (Balkin and Levinson 1011). The aesthetic liberties that Holmes took in his dissents on the First Amendment underscore the liberty to speak that he sought to protect with those dissents. The “concise and emphatic quality” of his dissents about the First Amendment and the “stylistic devices” at play in those dissents reveal “the importance of passionate thought” to the evolution of the common law (Danisch 223).

Holmes’s notion of free speech changed over time, most notably in a series of cases decided in 1918 and 1919.⁸³ In *Toledo Newspaper Company v. United States* (1918), Holmes dissented from the majority’s affirmance of a lower court’s criminal conviction of a newspaper company for allegedly obstructing that court’s ability to discharge its duties. The case involved a popular newspaper that had published articles about pending litigation regarding a railroad company and its creditors; according to the trial court, the articles attempted to incite readers, intimidate the judge, and turn the public against the creditors, who had sought an injunction against the railroad company. The trial court found the newspaper guilty of criminal contempt. Refusing to overturn the trial court, Chief Justice White, writing for the majority, rejected what he characterized as the notion that “the freedom of the press is the freedom to do wrong with impunity” that itself “implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including the press, depends” (*Toledo* 419).

Holmes dissented, noting that the statute criminalizing the newspaper’s activities had only recently gone into effect and that the newspaper, which was on the popular side of the conflict between the railroad and its creditors, was merely publishing the same type of material it had published before the enactment of the statute. “Misbehavior,” Holmes declared, “means

something more than adverse comment or disrespect” (*Toledo* 423). He pointed out that the danger of violence had been abated and concluded that none of the published materials “would have affected a mind of reasonable fortitude” (*Toledo* 425). Although not an ardent call for freedom of expression and far from asserting that freedom of speech and of the press are absolute privileges, Holmes’s *Toledo* dissent, which was later vindicated,⁸⁴ does undercut a criminal scheme designed to suppress forms of protest. In four subsequent cases, however, Holmes stood on a different side of the free-speech issue.

The first was *Sugarman v. United States* (1919) in which Justice Brandeis, writing for a unanimous court, dismissed for want of jurisdiction an appeal brought by a socialist who had been prosecuted and convicted under the Espionage Act for allegedly inciting insubordination, disloyalty, or mutiny within the United States military. According to Justice Brandeis, the United States Supreme Court could gain jurisdiction over the case only if the ruling of the trial court implicated a substantive constitutional question. Finding that the trial judge’s instructions to the jury were proper and hence that no constitutional violation had occurred, Brandeis dismissed the case. Holmes’s concurrence in *Sugarman* does not reveal a substantive position on free speech because the Court declined to hear the case on its merits. On the same day, however, the Court decided *Schenck v. United States* (1919), which also involved the Espionage Act and the conviction of a socialist who had printed and mailed leaflets or circulars urging men to defy the draft during a time of war. Holmes authored the unanimous opinion from which the popular sayings “clear and present danger” and “shouting fire in a crowded theater” originated. “We admit that in many places and in ordinary times,” Holmes intoned, “the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character

of every act depends upon the circumstances in which it is done” (*Schenck* 52). The meaning of an utterance, Holmes seems to suggest, is not only in the words in which it is couched but also in the context in which it is issued. “The most stringent protection of free speech,” Holmes continues by way of example, “would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force” (*Schenck* 52). So the leaflets or circulars distributed by the socialists during wartime were not protected speech: they were used “in such circumstances” and were “of such a nature as to create a clear and present danger that they [would] bring about the substantive evils that Congress has a right to prevent” (*Schenck* 52). Holmes’s *Schenck* opinion represents his characteristic if programmatic deference to local legislatures and not his later embrace of free speech and expression.

Holmes’s opinions in *Frohwerk v. United States* (1919) and *Debs v. United States* (1919), which, like *Schenck*, were joined by all of the justices on the Court, were released one week after *Sugarman* and *Schenck*. *Frohwerk* involved an appeal of the conviction of Jacob Frohwerk, a journalist in Missouri who had authored 12 newspaper editorials criticizing the involvement of the United States in World War One. The trial court fined and sentenced Frohwerk to 10 years’ imprisonment for each of the 12 counts of which he was convicted; the later counts were, the trial court indicated, to run concurrently with the first count. Faced with the issue of whether Frohwerk’s conviction under the Espionage Act violated his speech rights under the First Amendment, Holmes answered in the negative, stating that the First Amendment was not “intended to give immunity for every possible use of language” (*Frohwerk* 206). Returning to his fire metaphor, Holmes wrote that, based on the record before the Court, “it is impossible to

say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out” (*Frohwerk* 209). His holding in *Debs*, which involved the conviction and sentencing of Eugene Debs, a prominent leader of the Socialist Party of America, was similar. It had “nothing to do,” Holmes qualified, with “the main theme of the speech,” which “was socialism, its growth, and a prophecy of its ultimate success,” but “if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in the passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech” (*Debs* 212-213). These words were directed at the charge that Debs had deliberately interfered with the military recruitment of service-members; the other charge at issue was that Debs had incited “insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States and with intent so to do delivered, to an assembly of people, a public speech” (*Debs* 212). Holmes’s words effectively upheld Debs’s sentence, and Debs entered prison shortly thereafter.

This series of rulings seems to contradict Holmes’s dissent in *Abrams*. The majority holding in *Abrams* merely tracks Holmes’s own prior reasoning on freedom of speech and the First Amendment. Holmes’s position on freedom of speech and the First Amendment, however, changed considerably. The historical narrative about Holmes’s evolved views on the First Amendment has already received a great deal of scholarly treatment. Of concern to this chapter are the philosophical ramifications of the First Amendment jurisprudence on which Holmes finally settled. In his book about Holmes’s First Amendment jurisprudence, Thomas Healy describes Holmes’s ultimate stance on the First Amendment, as represented by his *Abrams*

dissent, as a synthesis of Holmes's pragmatism: "[I]t incorporated nearly all the major themes of his life—his belief in the supremacy of experience over logic, his strange combination of confidence and doubt, his commitment to Darwinism, his bettabilitarianism, [and] his taste for battle" (210). Holmes's evolving view of freedom of speech was a reflection of his pragmatic belief about the manner in which the common-law system, which accommodated change, already worked. Holmes was "primarily concerned with a process" that served as the basis for the evolutionary common-law system "in which those who hold minority views are given a fighting chance to win over a critical mass and grow into a dominant force" (Cate 40). Holmes's desire to protect freedom of speech stemmed from his desire to allow dissenting rhetoric to lead to dissenting decision-making in governments or courts (40).

Some have portrayed Holmes's freedom of speech paradigm as bleak and ominous, calling it a "darker vision" that "rejects the values of human freedom and dignity on which the liberal humanist view rests" and adding that it "is best understood as part of the struggle for power between different social groups—a struggle that ultimately can be resolved only by force" (Heyman 664). This dissertation proposes that something emphatically different is true: as long as the inevitable and perpetual battle for power or leverage remains dialogic and argumentative, and as long as it remains in the realm of rhetoric and argumentation, it is less likely to succumb to an unthinking brute force and more likely to marginalize or disempower extreme, violent positions that cannot thrive or gain momentum amid relentless competition; those who acknowledge and propel the natural processes of sustaining perpetual counterpoints through competitive discourse are more likely to practice and encourage tolerance of different ideas because they are more aware that a variety of viewpoints and rivaling theories brings about, not

deadlock or gridlock, but progress—and because such people are more likely to doubt the certainty of their own convictions.

This is the reasoning I believe Holmes to have adopted with regard to freedom of speech. Others agree to varying extent and for similar reasons. Consider the following passages about Holmes and freedom of speech. I quote at length because the language of these impressions is as suggestive as the impressions themselves:

Different persons attach differing degrees of importance to matters of politics, religion, art, ethics, and so forth, depending on their individual temperament and the circumstances under which the convictions were initially acquired. [...] [I]f we accepted Holmes's proposition that other people's preferences are based on grounds as good as ours, it is hard to justify why they would not have the same entitlement to express them. (Cate 48)

[Holmes's] invocation of the market metaphor in the *Abrams* peroration may have been to make the point that truth reduces to choice. Perhaps the imagery that we should take from Holmes's figure of speech is not that of a highly structured price-determining *market* such as a stock exchange, a mechanism designed to achieve plebiscitary and transactional precision, but rather a choice-proliferating *marketplace*, a site for spontaneous and promiscuous browsing, comparing, tasting, and wishing, a paean to peripatetic subjectivity amid abundance. Applied to ideas, the image evokes intellectual serendipity. (Blasi 13)

These, then, were the elements of Holmes's argument [in *Abrams*] for tolerance: an acknowledgment, based on experience, that human judgment is fallible; a recognition, thanks to [John Stuart] Mill, that free speech is the necessary predicate on which our bets about the universe must be based; and a conviction, inherited from [Adam] Smith, about the power of free trade and competition to promote the greater good. (Healy 206)

[The marketplace of ideas] is the metaphor of probabilistic thinking: the more arrows you shoot at the target, the better sense you will have of the bull's-eye. The more individual variations, the greater the chances that the group will survive. We do not (on Holmes's reasoning) permit the free expression of ideas because some individual may have the right one. We permit free expression because we need the resources of the whole group to get us the ideas we need. Thinking is a social activity. I tolerate your thought because it is part of my thought—even when my thought defines itself in opposition to yours. (Menand 431)

These bases for freedom of speech are also the reasons why Holmes contributed dissents to a common-law system that was constitutionally predisposed to vary and adapt: only by introducing diversity among judicial viewpoints can an efficient pattern of social coordination arise apart from a centralized legislative body. Such diversity minimizes the power of any one judge or group of judges and keeps in check any legal theories that fly in the face of the guiding principles of society. The more viable legal options that are accessible for the legal community in a common-law system, the harder it becomes for any one judge or group of judges to assign values or to impose unwanted rules on their supposed subordinates, and the more feasible it becomes for the corporate needs and demands of society to be met by judicial decisions that are agreeable to most people.

Bettabiliarianism and Civilization

Counterintuitively, Holmes's call for tolerance complements rather than contradicts his infatuation with military rhetoric and with the concept of fighting that was indelibly stamped on his memory after he served in the Civil War. It would be wrong to associate Holmes's glorification of the soldier and his frequent use of martial metaphors with the promotion of violence or death. Holmes reviled the Civil War (Menand 3), which he considered "a hideous human waste" (Menand 43). His rejection of certitude as a legitimate or a desirable goal was a reaction to the bloodshed he witnessed firsthand as a first lieutenant in the 20th Massachusetts Volunteer Infantry, a regiment that included his close friend Henry Abbott, who despised Abraham Lincoln and the Emancipation Proclamation, claimed to be a Copperhead, and praised Southern racial ideologies but who nevertheless gave his life in battle for the Union. Men like Abbott taught Holmes to appreciate the strange, irreducible complexity of political and

philosophical struggle and to cultivate a legal methodology in which “[c]ertitude is not the test of certainty” (Holmes, “Natural Law” 40) because, in Holmes’s words, “[c]ertitude generally is illusion” (Holmes, “The Path of the Law” 465). “We have,” Holmes cautioned elsewhere, “been cocksure of many things that were not so” (Holmes, “Natural Law” 40). Although he was famously dedicated to attending the funerals of soldiers, the dedications of war monuments, and the gatherings of veterans (Baker 156), his recollection of the Civil War occasioned not triumphalism or fearsome approval but the skeptical disinterestedness that he believed was essential to the work of a good judge and to the peaceful resolution of conflicts via the common law (Baker 158).

Holmes portrayed the evolution of the Anglo-American legal system in *The Common Law* as progressing from a primitive state in which tribal interests sought to institutionalize revenge through authorized violence to a more mature system that recognized private property rights and the validity and enforcement of contracts as mechanisms for minimizing conflict and for facilitating cooperation; conflict was inevitable even in the mature system, but the way in which it was diffused and mediated reflected the degree of civilization that society had attained. “The degree of civilization which a people has reached, no doubt,” he said in a reformulation of the Golden Rule, “is marked by their anxiety to do as they would be done by” (Holmes, *The Common Law* 30). Doubt rather than certitude characterized a civilization in which such relationships were common and widespread. “To have doubted one’s own first principles,” Holmes opined, “is the mark of a civilized man” (Holmes, “Ideals and Doubts” 1). The certainty of both Southerners and Northerners in their respective causes during the Civil War brought about what Holmes considered to be avoidable death. “The war had changed Holmes’s world in

ways he had not anticipated” because it became for him “a symbol of the endless struggle between death and life” and had “assumed the dimensions of a classical myth” in which “the only life befitting a gentleman was one built on [a] soldier’s choice of honor” (Aichele 68). The law suited Holmes because it could mitigate conflict in a flawed universe where “the *ultimate ratio*, not only *regum*, but of private persons, is force,” and where “at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference” (Holmes, *The Common Law* 30). The law curtailed hostility by guaranteeing that “a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter” (Holmes, *The Common Law* 54-55).

Conjecturing that “[t]he lesson Holmes took from the war could be put in a sentence,” namely that “certitude leads to violence” (Menand 61), Louis Menand characterizes Holmes’s reaction to the Civil War as follows:

The moment Holmes returned home from the war, he seems to have fast-frozen his experience, and to have sealed its meaning off from future revision. He told the stories of his wounds for the rest of his life, he recalled former comrades with emotion, and he alluded frequently to the experience of battle in his writings and speeches. But although he read almost every other kind of book imaginable, he could not bear to read histories of the Civil War. He rarely mentioned the issues that had been the reason for the fighting or expressed a political opinion about the outcome. The war had burned a hole, so to speak, in his life. It was a hold he had paid a high price for, and he had no interest in rethinking its significance. (Menand 61)

One of Holmes’s most famous speeches is his 1884 Memorial Day Address in which he displays an apparent enthusiasm for the warlike spirit and seems to celebrate the carnage of the sectional conflict that wounded him three times and that took the lives of many of his comrades. In the context of his entire *oeuvre*, however, this speech reads less like an apology for violence and

more like a demonstration of what he referred to as “enlightened skepticism” (Holmes, “The Path of the Law” 469), a feature of his “bettabilitarianism” that made him appear agonistically to hold both certainty and uncertainty in his mind at the same time (Reimann 1916). Emerson’s approach shared this sort of balance between faith and skepticism, and Holmes like Emerson was simultaneously a man of conviction and an enthusiastic doubter of certainties (Levin 18). Both men were focused more on the experiences and habits of seeking truth and finding error in daily life than in formal designs or demonstrations of final certainties or even uncompromising skepticisms (Levin 18). *Bettabilitarianism*, a play on the word *utilitarianism*, is Holmes’s term for the creed that probability and statistical inference narrow our range of guesses about the possible outcomes of actions and events that transpire in this vast and mysterious cosmos. Holmes wrote these clarifying lines about bettabilitarianism in a letter to Sir Frederick Pollock dated August 30, 1919: “Chauncey Wright, a nearly forgotten philosopher of real merit, taught me when young that I must not say *necessary* about the universe, that we don’t know whether anything is necessary or not. So I describe myself as a *bettabilitarian*. I believe that we can *bet* on the behavior of the universe in its contact with us. We bet we can know what it will be” (*Holmes-Pollock Letters Vol. II* 252). A bettabilitraian is therefore someone who believes that there is no final certainty, only probability regarding what will happen if we make this choice or that one, take this road or another one (Menand, *American Studies* 45). This description recalls Holmes’s searching remark in “Natural law” that the “universe has in it more than we understand” so that we are all, with our limited perspective and selective, partial knowledge, like “private soldiers” who “have not been told the plan of campaign, or even that there is one” (Holmes, “Natural Law” 43).

The distinction between faith and doubt is discernable in Holmes's exaltation of the soldier as against the politicians and proselytizers who controlled the soldier's fate. Holmes revered the faith of the soldier but doubted the ideological certainty of those who used the soldier for personal gain or to chase an abstract cause.⁸⁵ Holmes romanticized Abbott's death in his Memorial Day Address not to praise fighting and killing but to lament that in war the "boldest were the likeliest to die" (Menand 43). He rebuked those "who believe that their idea of civilization is a justification for killing those who decline to share it" and maintained that civilizations "sacrifice their moral advantage" when they "take up arms in order to impose their conception of civility on others" (Menand 45). When Holmes crooned in his Memorial Day Address that "the 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," he undoubtedly had in mind Abbott (Holmes, "Memorial Day Address" 89). Holmes was calling up his old reaction to having lost his dearest friend in a war controlled by the faulty plans of distant commanders seeking to fulfill the fraudulent dreams of even more distant politicians (Howe 145). Furthermore, Holmes's ideas about warfare changed substantially in the years and decades after the Memorial Day address so that it became difficult to ascribe to him any wartime zeal that might seem apparent in that speech.

Evidence of Holmes's doubt or skepticism is abundant in his many writings. Evidence of his faith is more subtle but perceptible in his paeans to the virtues of courage, ambition, and soldierly perseverance. Holmes believed that faith and doubt depended on each other and that humans must seek to attain their ideals even though we are doomed to fail (Reimann 1917). He

assumed that faith and doubt must coexist because “we must [...] pursue our ideals, unattainable as they may be” (Reimann 1919); yet he also considered our philosophies and desires to be products of our environment that cannot be trusted to correspond with absolute truth or moral rightness. “What we most love and revere,” he explained, “generally is determined by early associations” (Holmes, “Natural Law” 41). “I love granite rocks and barberry bushes,” he persisted, “no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one’s experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be leaves one able to see that others [...] may be equally dogmatic about something else. And this again means skepticism” (Holmes, “Natural Law” 41).

The coexistence of faith and doubt in Holmes’s philosophy came in large part from his from experiences in the Civil War (Reimann 1917, 1919). That foundation led him to believe that although one can never be certain that one’s ideals are always and everywhere final and true, one must live life with an ardent conviction in those ideals (Reimann 1919). Holmes summarized this position as follows: “Not that we would not fight and die for [our belief or love] if important—we all, whether we know it or not, are fighting to make the kind of world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief” (Holmes, “Natural Law” 41). Society on this view is rife with conflict that necessitates eusociality, a behavioral condition in which members of a civilization learn to work together to secure healthier, safer lives for themselves and their posterity regardless of their divergent principles and fundamental disagreements. Nonviolent resolution guided by laws confers competitive advantages to those societies that pursue and

practice it. Nonviolence is a precondition for a society to graduate into a civilization. The devastation of the Civil War was, in Holmes's imagination, a lesson about the fragility of civilization. His memory of the Civil War led him to promote a fluctuating legal system of predictable and consensus-based rules that restrained violence and engendered tolerance.

According to Holmes's common-law paradigm, a person cannot help but having convictions, which can and ought to be pursued, but civilization depends upon the collective awareness that such convictions may not be right. Each individual is an indispensable part of the overall process of social development; if each individual acts on his or her own convictions and pursues his or her own motivations, then the sum of our combined activity will reveal which individual preferences and beliefs yield profitable dividends and which should be abandoned. It follows *a fortiori* that any "sound body of law" should "correspond with the actual feelings and demands of the community, whether right or wrong" (Holmes, *The Common Law* 28). Only the common-law system could produce this body of law "based upon a morality which is generally accepted" within a given jurisdiction (Holmes, *The Common Law* 30). This was the system in which Holmes's commitment to nonviolence converged with his views about dissent, agonism, creative expression, freedom of speech, the evolutionary nature of the law, and the need for society to mature into a more advanced and civilized state.

The gradual working out and occasional overturning of judicial precedent in a common-law system depends on free expression and ongoing conflict between different points of view—expressed most iconically in the majority and dissenting opinions of the United States Supreme Court (Cole 861). This agonistic or antithetical method of jurisprudence depends on present judges rereading, reinterpreting, and thus necessarily misreading the decisions of the past (Cole

869). This fact extends Bloom's theory of the anxiety of influence beyond any context that he himself has explored. Over time creative misreadings become incorporated in the legal canon and vested with authority by judges or justices who wish to supplant the temporary authority of some decisions (soon to become part of the anti-canon) with updated or superior rules and reasoning. Because freedom of speech in a common-law system entrusts to the community the power to formulate the rhetorical antagonisms to which the judiciary must respond, it is also what enables judges and justices to exercise their creative faculties, at least to the degree that judges and justices may consider competing binaries against one another dialectically and in furtherance of binding decisions. Judges and justices are like poets struggling against the anxiety of influence: they "are sometimes strong, creative misreaders of prior texts, and their strength can reroute the path of precedent, change the meaning of the Constitution or federal law, and become a new source of anxiety for their descendants" (Cole 866). The idea that the interaction of contending theories and beliefs is socially advantageous can lead a judge or justice to dissent; the anxiety of influence can cause judges or justices like Holmes to experiment with superfluities of language, which increase the probability that the dissent will be reconsidered by others and canonized in textbooks, hornbooks, and treatises—and eventually redeemed by some future majority.

Conclusion

L'Heureux-Dubé acknowledges John Locke as the source of the observation that "new opinions in law are often suspect and are opposed for the sole reason that they are not already shared by a majority of the profession" (504). She purports to agree with Locke that because of technological, economic, and cultural developments, society is constantly changing and

jurisprudence must adapt to fit the new form of the social order (504). The rules and principles prevailing in a common-law system are mostly imparted to judges and justices through the innumerable influences of culture and training. Obligated by institutional design and sworn duty to uphold and sustain the precedents that obtain as law within the community, judges and justices in a common-law system tend to transmit by mechanical repetition the values and priorities of one age to the next. The law in this sense is little more than an official affirmation of the beliefs and normative character of the jurisdiction in a particular time and place.

Not all times and places are the same, however. Some are chaotic; some are revolutionary; and some so nearly destructive that any attempt to coordinate human action by judicial imperative could result in backlash and organized disobedience. Therefore, to preserve an orthodoxy in times of transition is not always tenable or desirable, especially when exigencies demand adaptation. Dissents can supply fitful alternatives for achieving social coordination and for redirecting society toward a state of relative harmony and cooperation. Dissents represent the sort of constructive competition that enables judges and justices to facilitate profitable collaboration among acting agents within circumstances of unrest. Judicial dissents are themselves forms of unrest that preserve an anticipated response to *potential* unrest; conflict and contention are thus conditions for their own perpetuation. Their exercise within a common-law framework permits the system to grow alongside the changing standards and practices of the social unit. In this respect, dissents can be prophetic. I have argued that Holmes's aesthetic dissents yield appreciable results because of their form and qualities as much as for their reasoning. They are prophetic in that they anticipate future results predicated upon projected changes in values. If these dissents sounded Emersonian, their prophetic qualities were only

heightened, Emerson being the American prophet, or as Bloom calls him, “the mind of America” (Bloom, *Agon* 145).

The underlying ideal of pragmatism is the recognition that thought is never perfect, final, and permanent but must grow, decay, and transform just as all life must (Richardson 1, 8). To the extent that this is true and that Holmes’s dissents incorporated this Emersonian approach, we can say that Holmes sought to preserve the welter of differences and alternatives in American common law, seeing in the confused multitudes of jurisdictions and precedents the fecund ground from which new ways of living and lawyering might emerge; thus, the canonization of Holmes’s dissents and of Emerson’s writings are themselves subject to similar processes of natural selection and creative destruction. Holmes and Emerson represent the type of critics who, even when they “do not modify or revise the Canon,” at least “ratify the true work of canonization, which is carried on by the perpetual agon between past and present” (Bloom 486). Perhaps this judgment is premature. “Canonical prophesy,” after all, “needs to be tested about two generations after a writer dies” (Bloom 487). At any rate, Holmes’s dissents were instrumental to the emergence of freedom of speech and expression as those concepts are understood today. His poetic prose has been celebrated and remains perhaps the central reason why his arguments are cited and recited in cases, textbooks, and treatises. His dissents were seeds planted for future growth. Whether they will continue to hold a place in the legal canon as it develops in the future is not as important as the fact that they have increased the number of variables requisite for the survival of certain legal theories and for the resilience of the common-law system writ large. What matters, in short, is that he was an indispensable part of the process, superfluous as his writing may have been, and that he kept the system moving forward, cycling

on, descending by modification, as he elaborately constructed, in his several dissents, alternative forms of logic and reasoning in response to external conditions about which he had little control. For that the American constitutional structure owes to him its very essence.

CONCLUSION

Holmes and the Differential Reproduction of Emersonian Ideas in a Transitional Era

This dissertation has pointed out that among the operative paradigms for the common law within the American constitutional framework, two take prominence: one that treats the common law as a settled and complete canon of rules unchanged over time, and the other that treats the common law as a process for deciphering malleable and adaptive rules within a fluctuating canon.⁸⁶ The former is evoked whenever a judge or justice declares, “At common law, the rule was such and such,”⁸⁷ as if the rule had never been anything else and was not still within the common-law tradition, albeit in attenuated form and subject to constitutional restrictions. Although these paradigms of the common law track similar, related debates about whether the United States Constitution should be interpreted as a “living” document or according to its original meaning,⁸⁸ they involve a different subject and inquiry: the role of the judge or justice with regard to case precedent derived from custom and practice and the assimilation of cultural norms and standards into the body of rules that governs society. A constitution fixes the parameters within which a judge or justice may interpret rules and precedents, but the methodology of following or revising precedent is still resolved by common-law traditions and hermeneutics to a great extent, even in the United States.⁸⁹

The paradigm of a static common law results from the messy incorporation of the British common law into the legal system of the former colonies during the early years of the American Republic.⁹⁰ The British common law was never permanently stable, unified, or complete; however, it did include a definite and operational set of rules in Britain when the colonies sought to implement it in their own legal training and methods.⁹¹ The two paradigms for the common

law seem like an irresolvable dichotomy, but they are permeable: in theory both necessarily exclude the other, but in practice the separation is not total and the difference not obvious.

Throughout his legal writing and in his book *The Common Law*, Holmes presented the common law as evolutionary rather than static.⁹² In the third paragraph of *The Common Law* he cautioned against the error of “supposing, because an idea seems familiar and natural to us, that it has always been so” (Holmes, *The Common Law* 1). His notion of the common law was rooted in “historicism and Darwinian natural selection” (Alschuler, *Law Without Values* 87), which ground the methods and practices of pragmatism as well (Richardson 2). Holmes admired Sir Frederick Pollock, his British pen pal and a popular jurist, and Pollock admired Darwin and modeled his jurisprudence on evolutionary theories. Pollock once stated in a letter to Holmes that “I have been turning over the life of a much greater man, C. Darwin. His letters are about the most fair-minded and charitable a much attached man ever wrote” (“Letter to Holmes from Sir Frederick Pollock,” November 14, 1923). Harold Laski seemed to be reading Darwin regularly and dashing off missives to Holmes that praised Darwin as a great, brilliant, and gentle man. Frederic R. Kellogg’s *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint* picks up on Holmes’s connections to Darwinism and calls attention to the pragmatic qualities of Holmes’s evolutionary common-law theories. Kellogg suggests that the common law was for Holmes the instantiation of Darwinian pragmatism. Affirming Kellogg, this dissertation has demonstrated that Holmes’s stylish and superfluous mode of dissenting revealed, as H. L. A. Hart observed of Holmes’s judicial writings, that what is “taken to be settled and stable is really always on the move” (Hart 593). Holmes concretized in dissents his conviction that the fittest

rules in the common-law system adapt and evolve and that animated, memorable, and sonorous iterations of legal principles facilitate such adaptation and evolution.

The term “pragmatism” was not in wide circulation during the early years of Holmes’s long career. Holmes did not declare himself a pragmatist. Nevertheless, the term *pragmatism* gained purchase because of such pragmatist thinkers as C.S. Peirce, William James, John Dewey, Chauncey Wright, Jane Addams, George Santayana, and George Herbert Mead. Holmes’s pragmatism resounds in his belief that the meaning of law inheres in the practical effects of applying certain rules, that rules are preeminently settled by the observable consequences of their exercise, that abstract pieties and epistemological pretensions are not useful guides for jurists, and that received practices and customs reveal the normative, synthetic cultural patterns to which the common law responds. Writers on Holmes have assigned the term *pragmatist* to Holmes’s methodology. Kellogg has argued that Holmes’s notion of the common law not only “draws heavily from the historical debate between English legal theorists over the nature and source of legal rationality” but also “finds remarkable parallels to certain ideas of Holmes’s nonlawyer friends, Chauncey Wright, Charles S. Peirce, William James, and others, among whom were founders of the American school of philosophical thought known as pragmatism, growing out of the multifaceted influence of the Scottish Enlightenment on American thought and the response of Cambridge intellectuals to Darwin’s *Origins of Species*” (14).

Kellogg is not alone in spotting the connection between Holmes, pragmatism, Darwin, and the common law. In 1943 Paul L. Gregg described Holmes’s pragmatism as seeking out truth through hypothesis, experiment, and community consensus. Gregg called attention to Holmes’s “delightful literary style” (263) and placed Holmes in the tradition of Peirce and James

insofar as Holmes “refers to majority vote as the test of truth” (267). Holmes’s pragmatism underwent pointed reproach in the 1940s and was even accused of sharing the positivist themes and goals of Nazism.⁹³ Such tendentious exaggerations were not widespread and were counterbalanced by more reasonable and levelheaded assessments just a few years later.⁹⁴ Attention to Holmes’s pragmatism fell away as general attention to pragmatism fell away during the 1950s, 60s, and 70s. With the explosion of studies on pragmatism in the 1980s and 1990s, scholarship on Holmes began to reconsider his relationship to pragmatism and the pragmatists. “[W]hile there are indeed multiple and apparently clashing strands in Holmes’s thought,” Thomas C. Grey observed at this time, “most of them weave together reasonably well when seen as the jurisprudential development of certain central tenets of American pragmatism” (788). Likewise, Richard Posner observed that “Holmes was a friend of Peirce, James, and other early pragmatists, and his philosophical outlook is strongly pragmatic” (57).

In 1990 *Southern California Law Review* held a symposium entitled “The Renaissance of Pragmatism in American Legal Thought.” Holmes was the catalyst for this renaissance. Six years later a conference on Holmes and pragmatism took place at Brooklyn Law School to commemorate the 100th anniversary of “The Path of the Law.” Posner was the keynote speaker. Other speakers included Grey, Catharine Pierce Wells, G. Edward White, and Gary Minda. A flurry of articles on Holmes and legal pragmatism pursued the arguments put forth at the conference.⁹⁵ The sudden attention to Holmes led legal scholars to contemplate the relationship between pragmatism and the American legal system. Richard Rorty, seemingly dismissive of the growing interest in pragmatism among legal academics, declared, “I think it is true that by now pragmatism is banal in its application to law” (1811). Legal pragmatism seemed banal because,

according to Rorty, who was borrowing from Thomas Grey, pragmatism was simply what lawyers and judges do: the school of legal realism that separated law from morals and broke down the “is/ought” distinction in the nature of the law had prevailed, rendering legal formalism and natural-law theory relics of the past. Rorty inveighed that even Ronald Dworkin, who purported to extend natural law thinking or neonatural law, committed himself despite himself to the pragmatic methods of legal realism. Although judges reach different conclusions using different approaches, Rorty alleged, their methodology is mostly the same or at least substantially similar. What differs is their political vision: They deduce and formulate unlike rules only because they are visionaries of unlike causes.

Louis Menand was the first popular writer to recognize an Emersonian streak in Holmes’s pragmatism. Emerson’s role as a pragmatist or proto-pragmatist is highly contested, but this dissertation has shown that Holmes more than anyone bears out the pragmatic elements of Emerson’s thought. Menand’s Pulitzer Prize winning *The Metaphysical Club* generated attention to Holmes’s pragmatism as a response to the trauma and suffering of the Civil War and to the burgeoning ideas of Darwinian evolution. Menand also attended to the ways in which Holmes’s boyhood “enthusiasm for Emerson never faded” and explained how Holmes’s “posture of intellectual isolation” was “essentially Emersonian” (68). Menand thereby complicated the already ramified literature regarding Emerson’s alleged status as a forerunner to pragmatism.

Holmes’s pragmatism is well established. Susan Haack has announced that “both legal scholars and historians of philosophy acknowledge Holmes as the first legal pragmatist; and with good reason, for many themes familiar from the philosophers of the classical pragmatist tradition can also be found in Holmes’s legal thinking” (“Pragmatism, Law, and Morality” 67-68). “It

would seem,” says Kellogg, “that nothing quite like the intellectual background of Darwinian evolution and [Chauncey] Wright-influenced fallibilism could be found in previous theoretical writings about the common law, and it is evident that Holmes himself believed his theory to be original” (47). Darwin’s *Origins of Species* did not appear until 1859, just 21 years before the publication of *The Common Law*, and Chauncey Wright was Holmes’s friend and contemporary. Holmes himself admitted that as a young man he had absorbed Darwinism without having read much of it: “*The Origin of Species* I think came out while I was in college—H. Spencer had announced his intention to put the universe into our pockets—I hadn’t read either of them to be sure, but as I say it was in the air” (Holmes to Morris Cohen, in *The Essential Holmes* 110). When Holmes passed away a marked-up copy of Darwin’s *The Origin of Species* was found among his books (Baker 84).

It has been said that “it is quite impossible to understand and appreciate the judicial method of Justice Holmes without taking into account the fact that he was steeped in the tradition of the common law” (Wu 222). Holmes’s career spanned some of the most transitional eras of American history; widely accepted notions of the common law changed during various periods of his life. Many of those changes are attributable to him.⁹⁶ He pushed American jurisprudence away from the Blackstonian conception of the common law that had appealed to the founding generation⁹⁷ and that had been dealt a heavy blow by the Civil War and Reconstruction.

Kellogg summarizes Blackstone’s conception of the common law as a fixed entity that is universal (48), continuous (48), valid because of its long standing (48), and customary (49). Like Sir Edward Coke and Sir Matthew Hale, Blackstone envisioned the common law as the institutional perfection of human reason that was separated from codified legislation (Kellogg

48-49).⁹⁸ Against statutory commands, Blackstone referred to the common law as “unwritten” law (Blackstone 63) and “the monuments and evidences of our legal customs [as] contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treaties of learned sages of the profession, preserved and handed down to us from the times of highest antiquity” (Blackstone 62-63).⁹⁹ He acknowledged that the common law was rooted in binding oral traditions and submitted that “[o]ur ancient lawyers [...] insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated” (Blackstone 64). Blackstone’s insistence upon the “unchanged” and “unadulterated” aspect of the common law is inapposite to Holmes’s conception of the common law as a spontaneously ordered system of growth that adapts and evolves over time. Blackstone viewed the common law as divorced from legislation (Kellogg 54-55), as a “judicial prerogative” set against “a transformative tide toward majoritarian legislation and central government” (Kellogg 55), and as a “defense of embedded, and not entirely well reasoned or intentioned, practices” (Kellogg 55). Holmes more than Blackstone took into account the manifold rules and regulations that were not judicially made: the countless acts of parliaments or legislatures (Kellogg 56). Also more than Blackstone, Holmes accounted for the role of the sovereign through its legislature to confer rights and duties upon its citizens. In Blackstone’s paradigm the sovereign was the king, who shared his power with the legislature or Parliament, but in Holmes’s it was an executive and legislative branch in a maturing American republic.

For Holmes the judge did not divine pure law or right reason by consulting the wisdom of the ages as embodied in enduring case precedent but considered “intractable legal disputes [as]

bearing a certain degree of unforeseen novelty or originality” while treating the “legal profession, in concert with the community at large, [as] work[ing] out a gradual resolution through progressive abstraction from specific cases” (Kellogg 56). As Holmes put it in a line that has already been quoted in this dissertation: “The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past” (Holmes, *The Common Law* 1). Although Holmes went beyond Blackstone in acknowledging the plain historical fact that codification was on the rise and increasingly displacing the common-law tradition, he remained enamored with the common law. The irony of *The Common Law* is that it describes a “theory of the judiciary alone, limited to the special conditions of the common law development during a period before legislation became the dominant mode of lawmaking” (Touster 693). *The Common Law* was published when “legislation had become the acknowledged and central means by which the state pursued social ends” (Touster 693). Holmes sought to incorporate the latest science into his jurisprudence “by using the new biological and anthropological materials on evolution that the Darwinian revolution in thought was providing” (Touster 684). Holmes’s jurisprudence has been called “evolutionary pragmatism” (Gordon 721). “According to this idea,” explains one scholar, “no legal form has a frozen meaning; rather, legal forms are changing and contingent and depend on the specific practical uses to which successive generations wish to put them. The form may stay the same, but the content changes with changing views of policy—the policy upon which all law must ultimately be grounded” (Gordon 721). The primary difference between Blackstone and Holmes is that the former embraces a common-law paradigm consisting of fixed rules rooted in

ancient custom whereas the latter embraces a common-law paradigm consisting of fluid rules responsive to changing social conditions.

Haack lists the following features of Holmes's jurisprudence that are compatible with traditional common-law theory that flies in the face of legal positivism and that underplays the role of legislatures in transmitting laws to the public: the prediction theory of law (Haack, "Pragmatism, Law, and Morality" 68); the growth and adaptation of legal concepts (Haack, "Pragmatism, Law, and Morality" 69); the evolution of legal systems (Haack, "Pragmatism, Law, and Morality" 70); the past and the future of the law (Haack, "Pragmatism, Law, and Morality" 71); the relevance of the sciences, and especially the social sciences, to the law (Haack, "Law, Pragmatism, and Morality" 71); and moral fallibilism (Haack, "Pragmatism, Law, and Morality" 72). Each of these features participates with one another; none exists to the exclusion of the others. For instance, Holmes's dogged insistence that law and morality were separate or only incidentally aligned brought about his reasonable man theory of negligence that turned on the foreseeable consequences of a given human action.¹⁰⁰ This theory captures his signature concept of law as prediction,¹⁰¹ grows out of his prior theories of negligence,¹⁰² and incorporates moral fallibilism insofar as it proposes that a tortfeasor is not judged according to his particular state of mind but according to an objective standard about how reasonable people in general ought to behave in light of their circumstances.¹⁰³

Kellogg suggests that insofar as Holmes's conception of the law offers a model of an "ongoing community exploring common problems," it bears "remarkable similarities to the model of scientific inquiry emerging at roughly the same historical period in the writings of Holmes's controversial friend Charles S. Peirce, a model later adopted by John Dewey" (34).

Holmes's "underlying conception of society" reflects his "exposure to the struggle of Darwinian evolution" (Kellogg 94). This conception was "much discussed in the Metaphysical Club and confirmed in some respects by the American Civil War, both of which reinforced doubts concerning the prospects for [the] law-based liberal or utilitarian reform" (94). Kellogg purports that Holmes "looked backward to common law as the archetypal decentralized model, modified in the spirit of public inquiry, parallel to the Peircean model of scientific inquiry and problem solving, balanced with a comprehensibility and predictability derived from the spread of external standards" (95). To this end Holmes viewed the judge's role as receptive to existing cultures at local levels and considered order itself to be "decentralized, supple, [...] unfinished, [and] constantly under construction and revision" (Kellogg 95). He was unlikely to deem as unconstitutional any enacted legislation and in fact did so only once during his twenty-year career (1882-1902) on the Massachusetts Supreme Judicial Court. He disapproved of legislation only if it abridged freedom of speech and came to be committed to the notion that a marketplace of ideas was necessary for the best theories to outdo competitors and to prove their practical worth.¹⁰⁴ Holmes's jurisprudence commemorates judges as cultural interpreters subject to "community-approved standards and precedents [that] derive from ancient rules" (Kellogg 122). He maintained that judges ought not to "*set* the policy so much as be aware of it," although they "could and should update the reasoning" about how to apply old concepts in the current environment (Kellogg 122).

What sets Holmes apart from the other classical pragmatists is not just his station as a Supreme Court justice but his commitment to Emersonian thought and aesthetics. Emerson "put the living generation into masquerade" out of the "faded wardrobe" of the past (Emerson,

“Nature” 7) just as Holmes discussed the “form of continuity” that is “nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements” (Holmes, “Book Review” 234). Like Emerson, Holmes appreciated the “peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before” but also warned that “the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity” (“Learning and Science” 68). Holmes never forgot Emerson. He published *The Common Law* in 1881. In 1882, Emerson died. The year between 1881 and 1882 represents the passing of a baton as Holmes preserved Emerson’s ideas and aesthetics but stripped them of the characteristics and qualities that were no longer suited for the postwar era.¹⁰⁵ Holmes was an Emersonian and a pragmatist, and if there were a model for how those two traditions coincide, it is in Holmes’s judicial dissents that mobilize the common law by undermining current case precedents while anticipating future case precedents.

Transition and Reproduction

In 1881 America was in transition. Reconstruction was coming to a close in the South. Immigration, urbanization, and industrialization continued apace; the federal government expanded its power over the states. Everything, it seemed, was changing; the quotidian habits and practices of individuals in all areas of the country seemed to have transformed after the Civil War. Gone was the transcendental optimism in New England; gone were the feudal ways of the Old South. Gone were the defining characteristics of American culture with which the founding generation would have been familiar. America was taking shape, growing, waking up from its post-war slumber and reaching out for fresh ideas. Menand suggests that “the Civil War

discredited the beliefs and assumptions of the era that preceded it” (x). He submits that those “beliefs had not prevented the country from going to war; they had not prepared it for the astonishing violence the war unleashed; they seemed absurdly obsolete in the new, postwar world” (x). And then there was the publication, in Boston, of a curious little book called *The Common Law*, a compilation of essays by Holmes, who had enjoyed intimate connections with traditional, Protestant New England families and traditions but was striking a new course. Holmes turned forty in 1881. The publication of *The Common Law* that year gave him a chance to express his jurisprudence to a wide audience. This marked a turning point in his career. Over the next year, he would become a professor at Harvard Law School and then, a few months later, an associate justice of the Massachusetts Supreme Judicial Court.

The trauma of the Civil War affected his thinking and would eventually impact his jurisprudence. Leading up to the Civil War, he had been an Emersonian idealist who associated with such abolitionists as Wendell Phillips. Holmes emerged from the Civil War a different man. He was colder now, and more sober-minded. “Holmes believed,” Menand says, “that it was no longer possible to think the way he had as a young man before the war, that the world was more resistant than he had imagined. But he did not forget what it felt like to *be* a young man before the war” (68). And he learned that forms of resistance were necessary and natural in the constant struggle of humans to organize their societies and to discover what practices and activities ought to govern their conduct. The Civil War made him both wiser and more disillusioned. His disillusionment reflected the general attitudes of many men his age. But not all men his age shared his penetrating intellect or his exhilarating facility with words; nor did they have his wartime experience. Most men who experienced what he had during the Civil War

did not live to tell about it. Certainly no one besides Holmes could claim to have experienced such intimate and privileged access to the Brahmin, Emersonian culture of New England before the Civil War, and he more than anyone was equipped to see the continued relevance of that culture to the present. He knew there were things the Civil War could not destroy and varieties of thought that could endure.

It is not too much to say that only Holmes could have served as an intellectual link between the old and new ethos of New England; he was a carryover, a lively and sometimes bombastic highbrow whose ideas and methodologies retained qualities of Emersonian transcendentalism. But Emersonian transcendentalism was maladapted to the current climate. It could not survive the turmoil of the preceding era, at least not in the form in which Emerson had articulated it. Philosophy and idealism had advanced in slow degrees since the Revolution, and Emerson seemed to have been the culmination of American optimism. The Civil War undermined Emerson; its massive slaughter and economic tumult suggested there was no heritable advantage to embracing transcendentalism and that Emerson, brilliant though he was, had not produced the particular combination of aesthetics and knowledge necessary to outlast the selective elimination of unfit ideas.

Yet Emerson's ideas were not destroyed; they descended by modification. They survived in part because of thinkers like Holmes. Holmes revised them and in so doing endowed them with the variation necessary for their subsequent existence. He also realized their poetic vision in the most improbable of fields: the law. The hard and mechanical features of the law enabled Emersonian thought to differ in the critical ways necessary to remain fit in the new American climate. Holmes, like his father and Emerson, was a poet, indeed had been the class poet at

Harvard, and he discovered that poetry could be effective and powerful when it was clothed in legal lexica and preserved in legal canons. Holmes did not think like his father or his father's friends, but he knew how they thought, and he employed what features of their thought were worth preserving and discarded what features he knew to be unsuited for the challenges of the day. Holmes carved out a legacy by finding room for old principles, including Emersonian aesthetics and propheticism, in his rapidly transitioning society. Although he was more skeptical and realistic after the Civil War, "his enthusiasm for Emerson never faded," and his "posture of intellectual isolation" was "essentially Emersonian" (Menand 68). Holmes recognized, in short, the significance of Emerson to the index of modern thought.

It is no coincidence that Holmes admired both the common law and Emersonian pragmatics and treated them as paired enterprises; the two have much in common. Holmes was historically conscious; he revered the past from which he sought to break; he felt that the new necessarily derived from what came before, that nothing was without an antecedent, and that ideas did not spring from a vacuum outside of time. He agreed with Emerson that "the inventor only knows how to borrow" (Emerson, "Plato; or, the Philosopher" 634). Just as Emerson held that "the artist must employ the symbols in use in his day and nation" (Emerson, "Art" 431) or that "the new in art is always formed out of the old" (Emerson, "Art" 431), so Holmes believed that the law "embodies the story of a nation's development through many centuries" (Holmes, *The Common Law* 1) and is "forever adopting principles from life at one end" while "retain[ing] old ones from history at the other, which have not yet been absorbed or sloughed off" (Holmes, *The Common Law* 25). Holmes thus did not view the artist and the judge as working in mutually

exclusive fields; he demonstrated with his own writings that Emersonian aesthetics had a place in the otherwise dull and doctrinal prose of the law.

Emerson had in mind an aesthetic canon of ingenious inventors, himself among them, building upon the works of one another. This notion carried over into Holmes's conception of the common law: "When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory" (Holmes, *The Common Law* 25). Like Emerson, Holmes considered extensive knowledge of the past empowering; also like Emerson, he was willing to attribute invention and insight to genius: "In the course of centuries the custom, belief, or necessity [of a rule or a formula] disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for" (Holmes, *The Common Law* 4). For Emerson as for Holmes, genius could be realized in the course of studying ordinary social conditions prevailing at various points in history. This genius could have meliorating effects on the associations that tie people together into social units. Genius, then, did not arise without some effort on the part of the person possessing it, and Holmes was inclined to view that effort as a search for the clarity needed to apprehend the complex instrumentalities of legal institutions. This clarity motivated prudent judges in their search for the desirable directions for the law to take and for the useful categories for the law to assume. "[W]hen ancient rules maintain themselves," Holmes explained, "new reasons more fitted to the time have been found for them, and [...] they gradually receive a new content, and at last a new

form, from the grounds to which they have been transplanted” (Holmes, *The Common Law* 24). Inferred in these lines and in Holmes’s treatment of the common law is the idea that it is personal knowledge that makes one aware of the impersonal mechanisms driving the law toward some imperfectly realized ideal about regulating the population.

To come to Holmes’s understanding of the law as a system of growth rooted in human knowledge requires an initiation into the field of history. The more comprehensive one’s knowledge of history, especially as it pertains to the law, the greater facility one has to contextualize any fleeting standard within the operative paradigms that influence ongoing conversations about human conduct. “However much we may codify the law into a series of seeming self-sufficient propositions,” Holmes maintained to this end, “those propositions will be but a phase in a continuous growth” (Holmes, *The Common Law* 25). Analyzing such propositions in light of the waxing and waning standards, values, and tastes with which various communities have experimented is itself a test of the validity of those standards, values, and tastes. In other words, such analyses reveal the practical consequences of instituting the standards, values, and tastes by operation of law. Such analyses are, therefore, indispensable guides for judges considering how to rule in specific cases with particular facts. A judge determining whether a seemingly unfair or deceptive label on a product should qualify as false advertising or mere puffery would consult the decisions of past judges and compare whether and to what extent the facts before the past judges are analogous to the facts at present. If the comparison suggests that a similar ruling in this case would lead to a bad result, then the present judge modifies the rule by highlighting the facts that are readily or obviously distinguishable. But if the present judge thinks a past decision would apply to the circumstances at hand, he

downplays or disregards the distinguishable facts and highlights their family resemblances. Hence when judges and jurists study the history of the law they must bear in mind their own historical position in relation to those older propositions that shaped the current content of the law: “To understand [the propositions’] scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is” (Holmes, *The Common Law* 25). On this score, Holmes echoes Emerson:

No man can quite emancipate himself from his age and country, or produce a model in which the education, the religion, the politics, usages, and arts, of his times shall have no share. Though he were never so original, never so wilful and fantastic, he cannot wipe out of his work every trace of the thoughts amidst which it grew. The very avoidance betrays the usage he avoids. Above his will, and out of his sight, he is necessitated, by the air he breathes, and the idea on which he and his contemporaries live and toil, to share the manner of his times, without knowing what that manner is. (Emerson, “Art” 432)

The difference between Holmes and Emerson in this regard is that Holmes suggests we can, in fact, know what the manner is, at least to some degree, if we understand how and from where it developed. The function of the common law is to supply us with this understanding.

The common law describes a body of rules that develop as literary canons develop. Works of literature become canonized just as rules become settled through the endless processes of the common law. Only the test of time shows whether a work of literature will remain in the canon after extraordinary content has been filtered from content unable to speak meaningfully to future generations. Literary works of enduring appeal are able to outlast the embedded prejudices, pressing issues, and prevailing tastes of an age. On the other hand, works that cannot remain relevant do not survive the onslaught of competition that must be overcome to procure a place in the canon. This is what Emerson meant when he described the eternal process of

transmuting life into truth through texts as a “distillation” of “process,” none of which is “quite perfect” (Emerson, “The American Scholar” 56). He goes on to say, in furtherance of this theme, “As no air-pump can by any means make a perfect vacuum, so neither can any artist entirely exclude the conventional, the local, the perishable from his book, or write a book of pure thought, that shall be as efficient, in all respects, to a remote posterity, as to cotemporaries, or rather to the second age. Each age, it is found, must write its own books; or rather, each generation for the next succeeding. The books of an older period will not fit this” (Emerson, “The American Scholar” 56-57). So it is with the common law: the decisions issued by various judges speak to their present audience but with an eye toward an imagined future consisting of rational citizens to whom earlier principles remain valid and by whom those principles advance in subsequent increments.

In this manner, the common law, at least in theory, parallels the Emersonian concepts of influence. The principle that perennial truths must be restated in the vocabularies of successive generations has been embodied in the common law since time immemorial. Indeed, that principle defines the common law. To know why pragmatism was such a natural fit for an Emersonian Holmes, one needs only to consider what the common law is and why it appealed to him. Doing so shows that pragmatism is not “The American Philosophy,” as it is so often proclaimed to be, for the common law is, in effect, pragmatism by another name, and its characteristics and methodologies gradually have developed, hand in hand with evolving mores, for centuries.

Integrating Holmes with Peirce, Dewey, and James

Kellogg suggests that insofar as Holmes's conception of the law offers a model of an "ongoing community exploring common problems," it bears "remarkable similarities to the model of scientific inquiry emerging at roughly the same historical period in the writings of Holmes's controversial friend Charles S. Peirce, a model later adopted by John Dewey" (34). Kellogg could have added James, who advocated for the "experimental method" to guard against error, and for the "comparative method" to supplement the experimental method (James, *Principles of Psychology* 192-194). The mark of these methods was their starting point of "introspective observation" (James, *Principles of Psychology* 185) and of "successive thoughts" or "subjective data" (James, *Principles of Psychology* 192-194, 342, 401) to the process of discerning the relation of individual consciousness to external objects (James, *Principles of Psychology* 187). Peirce wished to model philosophy off the consensus-based practices and protocols of the scientific community. His essay "Some Consequences of Four Incapacities" proposed that a single, fallible mind cannot be the absolute arbiter of truth because truth is established by a lack of doubt, which occurs when several individuals agree about some state of existence. A corollary is the inverse notion that we should doubt whatever is rejected by a collection of intelligent and disciplined minds. These premises are strikingly resonant in Holmes's recognition that a single judge or small group of judges ought to have reason to doubt their logic and inferences that conflict with the legislative process. That rigorous process represents the end result of painstaking negotiations, compromises, and experiments among lawmakers receiving direction from their constituents, and it should not be undone by the

convictions of a judge altogether dislocated from popular representation and electoral accountability.

Holmes considered good law to be the product of a method similar to the scientific method, which, according to Peirce in “The Fixation of Belief,” stands in contradistinction to the method of authority; the former prizes inquiry and practices the drawing of inferences from sustained observation whereas the latter assumes without challenge the validity and viability of an allegedly right or unassailable premise. The former is like the common law with its inherent positivism; the latter is like natural law theories about origins preceding posited laws. The scientific method of the common law is always about experimentation; the theory of our Constitution, with its adoption of the common law within a covenantal framework, is “an experiment, as all life is an experiment” (Holmes, *Abrams* 630). What motivates experimentation, according to Peirce, is the irritation of doubt, the vexing insecurity that we are not right about what we believe. Inquiry is the means by which we seek to pacify or eradicate that irritation. The sole object of inquiry for the scientific philosopher was the settlement of an opinion (“The Fixation” 6). For the common law judge, who is not unlike the scientific philosopher, the sole object of inquiry is the settlement of rules, which, remarkably, is called an “opinion” in the legal vocabulary. The legislative method of authority operates by raw force or imposition and short-circuits inquiry: it directs others to conform to it and threatens to visit consequences upon those who fail to comply. Peirce and Holmes did not see this method as likely to generate good beliefs, whether in phenomena generally or in supposedly moral principles guiding legal rules. As Peirce declared,

The willful adherence to a belief, and the arbitrary forcing of it upon others, must, therefore, both be given up, and a new method of settling opinions must be

adopted, which shall not only produce an impulse to believe, but shall also decide what proposition it is which is to be believed. Let the action of *natural preferences* be unimpeded, then, and under their influence let men, conversing together and regarding matters in different lights, gradually develop beliefs in harmony with natural causes. (“The Fixation” 10)

By way of analogy, Peirce seems to be advocating a common-law approach to the settling of opinions and rules as against the ritual of executive or sovereign command. The common law advances by accommodating the natural preferences of society and by facilitating their constant articulation in the superintending rulings of judges and justices. Like the “machinery of the mind” that transforms knowledge “but never originate[s] it” (Peirce, “How to Make” 287), the common law never purports to have an identifiable origin or a fixed point of entry. It registers indirect dialogues between judges about the rules of the jurisdiction and establishes case precedents to ensure that the conversation remains ongoing. Some precedents are preserved and passed down in their entirety; others persist in residual form only. Residual precedents are improved or diminished by their utility; the effort to integrate the differentiated elements of experience within a system of rules tends to neutralize or eliminate bad and inexpedient practices. The corrective processes of the common law and of Peirce’s scientific method (or method of inquiry) enable the incremental development of consistent and predictable guidelines; they provide the legal or scientific community with an element of certainty and stability. They also establish a comprehensive and comprehensible record of the continual adaptations of human behavior.

Despite its capacity for growth, or perhaps because of it, the common law never attains some fixed, transcendental unity that allows us to predict all of the legal outcomes of any specified action; the rules in a common-law system are constantly being remade and thus cannot

accomplish perfect uniformity. “The truth is,” Holmes remarked, “the law is always approaching, and never reaching, consistency” (Holmes, *The Common Law* 25). So it must be that the prudent judge determines the laws of social interaction as Peirce suggests that scientists and philosophers determine the natural laws of the universe: by the study of probabilities and chance. Holmes knew the law would never attain perfect consistency because, to borrow from Peirce (who, again, was referring to the natural laws of the universe and not the laws of human government, but whose comments are nevertheless germane), they “developed out of pure chance, irregularity, and indeterminacy” (“A Guess at a Riddle” 223). “For every conceivable object,” Peirce adds, “there is a greater probability of acting as on a former like occasion than otherwise. This tendency itself constitutes a regularity, and is continually on the increase” (Peirce, “A Guess at a Riddle” 224). The nature of a tendency in the common law matures in a similar manner; the difference, if there is one, is that in the common law tendencies reflect what judges determine will resolve a dispute between litigants in a manner that can be replicated under like circumstances. Laws for both Holmes and Peirce resolve themselves into probabilities about the soundness and workability of some rule or set of rules. Such probability is derived from experience and observation that have varying degrees of reliability in proportion to the extent to which they have been tested. When the rule of a case yields profitable dividends, confidence in the rule grows and spreads until it achieves general assent within the jurisdiction, at which point it becomes the authority until such time as changed circumstances in society challenge its worth. “The substance of the law at any given time,” Holmes says in a line that I have quoted in the Introduction but that bears repeating, “pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able

to work out desired results, depend very much upon its past” (Holmes, *The Common Law* 1). Judges seek out the tendencies of human behavior to determine what tendencies in the law will suffice to keep the peace, compensate victims, punish wrongdoers, and maintain order. The law is an exercise in probability, developed according to a growing assurance in the viability of binding rules.

In “The Path of the Law,” Holmes put forth the bad man theory or prediction theory of law, which holds that we should not view the law as an abstract statement about morals but as those consequences that a bad man predicts will obtain if he chooses one course of action instead of another. The law is, accordingly, a prediction about what will happen if one performs certain acts. Informed and calculated guesses about outcomes are what most of us turn to before choosing any particular course of action. Most of us do not, when we stop at a traffic light, for example, consider the morality of the action we are performing, but instead consider the ramifications of our potential act should we actually carry it out. Therefore, determining in advance what the law is or might be involves determining the probability that certain social ramifications will result from choosing to perform the act under consideration. But judges do not guess in advance what the law will be, at least not in their capacity as judges; other people do. Judges sort through facts already given to determine which general principles will apply, and then, in Menand’s words, “what judges say *is* law” (343). Put another way, judges decide what the law is only after the facts of the case, however sanitized, reach the court; or maybe it is more accurate to say that judges decide whether and how precedent squares with those facts, since general principles are passed to judges through prior cases, and judges must categorize the facts in line with the general principles previously established. Once a general principle is made to fit

a set of facts, the facts are just as dispositive as the general principles in illustrating what the law is. The general principle of trespass—for the purposes of this example, trespass is a wrongful entry onto another’s property—is only a principle and not a guide for human conduct (that is to say, a law) until the judge determines to which situations the principle pertains: a person’s front yard may be property, but what about his poetry or his ideas or his children? Once the judge determines whether and how the general principles attach to the concrete facts before him, he announces the rule and thereby supplies the population with a guiding illustration. Now the population, bad men and all, can predict, with a little more certainty, whether taking actions in relation to, say, a man’s poetry or ideas or children will trigger a legal analysis regarding trespass or whether a different law—or no law at all—will obtain. It is in light of this process that Holmes proclaimed, “General propositions do not decide concrete cases” (*Lochner* 79). The decision is not in the principle but in the method in which the facts are shaped to fulfill the principle.

This process resembles the very method that Dewey considered necessary “to direct and make fruitful social inquiry,” which itself proceeded “on the basis of the interrelations of observable acts and their results” (Dewey 59). Dewey, like Holmes, considered facts to come from method and technique (Dewey 50) and to provide the basis for knowing the import of theories, which are like the general principles guiding the common law (Dewey 86-89). Dewey’s entire method of social inquiry is in fact comparable to the common law inasmuch as it rejects the search for causal origins (Dewey 44, 60) and evaluates theories in terms of their perceived consequences (Dewey 51) in the environment of a specific time. Dewey’s introduction to Sidney Hook’s *The Metaphysics of Pragmatism* reformulates Emerson’s concept

of the new arising out of the old through dialectical refutation and assimilation (Dewey, “An Introductory Word” 1-5). Dewey demonstrates his consequentialism this way: “Conditions are stated in reference to consequences which may be incurred if they are infringed or transgressed” (70). What Dewey calls a “theory” might well have been a “law” for Holmes. Both entities reveal themselves in the concerted actions of others—bad men, if you will—and can be quantified as a series of predictions; the growth of that series of predictions is tantamount to the operation of the common law, namely, to the process of following and simultaneously establishing precedents to direct social inquiry and order social relations. The common law is, in this respect, a system of probabilities about human action and its consequences. Dewey might as well have been referring to the common law when he said that “human acts have consequences upon others, [and] some of them are perceived, [and] their perception leads to [the] subsequent effort to control action so as to secure some consequence and avoid others” (46). The implication is that in one case after another rules build upon rules and then eventually abstract into general principles to which facts about human action are made to conform; the resultant laws are therefore not legislative commands (Dewey 69, 167) but an aggregation of dialectical developments.

The controlling question of law in most cases is framed by extant paradigms drawn from these developments. The sheer weight of precedent may mean that seemingly archaic taxonomies remain in force. Master-servant law, for instance, continues in full operation in terms of principals and their agents under the doctrine of *respondeat superior*. It does not follow, however, that because such vocabulary and principles remain, the facts giving rise to the present cases reflect the facts that would have borne out at earlier times. Like the Peircean

scientist who relies upon community consensus or the Holmesian judge who defers to the legislature, Dewey acknowledged that no thought or scheme of organization springs from an individual mind deliberating in isolation; rather, all thoughts and schemes of organization make up “an association in the sense of a connection and combination of things” (Dewey 51). Generating knowledge by testing ideas within a community of thinkers enables the proliferation of democracy, which is, for Dewey, the ultimate ideal; and even if an ideal “is not a fact” and “never can be” (Dewey 119-120), it nevertheless inspires or motivates people to assemble bodies of knowledge (like the canons of literature or the precedents of the common law) and facilitate communication between groups. The associated ties of an intellectual community thus strengthen, not weaken, the individual minds within it. “There is no limit,” Dewey intones, “to the liberal expansion and confirmation of limited personal intellectual endowment which proceed from the flow of social intelligence when that circulates by word of mouth from one to another in the communications of the local community” (159-160). Accordingly, the judge or justice divorced from the local community and withdrawn from the processes of deliberation that brought about habits of mind and conduct within the community cannot himself deduce the optimal legal conditions for the community; he must defer to the judgment of the community as embodied in enacted legislation. The term “majoritarianism” as ascribed to both Holmes and Dewey derives from this proposition. The judge must also leave factfinding to juries in cases demonstrating genuine issues of material fact because a judge’s province in such cases is to charge or instruct juries regarding the pertinent laws whereas the role of juries—the litigants’ peers—is to determine the truthfulness or probability of truthfulness of the narratives presented by the litigants and substantiated or unsubstantiated by the evidence.

Of the so-called “classical pragmatists,” Dewey was the person Holmes claimed to admire most. Max Harold Fisch describes this admiration as follows:

Holmes did not discover Dewey until the latter’s *Experience and Nature* was recommended to him by a young Chinese friend. He began it skeptically; it seemed to be so badly written. But he read it twice in the winter of 1926-27, and wrote his impressions in five letters over a period of a year and a half. ‘He seems to me,’ Holmes said, ‘to have more of our cosmos in his head than any philosopher I have read.’ Holmes reread the book in 1929 when a second edition appeared, and recommended it to Sir Frederick Pollock. The only clearly intelligible sentences Pollock professed to find in it were the two pages Dewey had quoted from Holmes. (8)

It is possible, in light of Holmes’s late arrival to Dewey’s writings, that Dewey benefited from Holmes’s influence more than Holmes benefited from Dewey’s, but at any rate their ideas were sufficiently similar to have attracted each man. It is possible that Holmes, who rarely liked to give credit where credit was due, did not wish to draw attention to the similarities of his jurisprudence with the thinking of Peirce and James and thereby to detract from his reputed originality, but found Dewey to be different enough to warrant praise safe from public speculation about the two men’s shared premises. Nevertheless, Holmes’s jurisprudence smacked of Peircean theories about probability, prediction, and communicative consensus and had much to do with the philosophical musings of James, whose version of pragmatism Holmes disingenuously dismissed as an “amusing humbug” (“Letter from Holmes to Lewis Einstein,” June 17, 1908). In fact, Holmes agreed with much of what James wrote about “truth.” “Truth then, as one, I agree with you,” Holmes wrote to James in 1907, “is only an ideal—an assumption that if everyone was as educated and clever as I he would feel the same compulsions that I do” (“Letter from Holmes to William James,” March 24, 1907). James was a pluralist. So was Holmes. James’s salutary stand against monism and deference to the practices and beliefs of

different communities correspond with Holmes's judicial restraint and enthusiasm for the common law. His description of how the mind forms impressions and chooses between options would seem to have influenced Holmes's theories about intentional torts and quantitative prediction:

[T]he mind is at every stage a theatre of simultaneous possibilities. Consciousness consists in the comparison of these with each other, the selection of some, and the suppression of the rest by the reinforcing and inhibiting agency of attention. The highest and most elaborated mental products are filtered from the data chosen by the faculty below that, which mass in turn was sifted from a still larger amount of yet simpler material, and so on (James, *Principles of Psychology* 288)

The fundamentals of Holmes's bad man theory consist in these lines by James.

James likened a pluralistic world to a "federal republic" rather than an "empire or kingdom" ("A Pluralistic Universe" 321-22). A federal republic depends upon checks and balances not only between competing branches of government but also between competing cultures. A federal republic is pluralist to the extent that its constituent parts "hitch up" but do not mirror one another or correspond absolutely. Pluralism is the opposite of monism, which holds that "when you come down to reality, everything is present to everything else in one vast instantaneous co-implicated completeness—nothing can in any case be really absent from anything else, all things interpenetrate and telescope together in the great total conflux" (James, "A Pluralistic Universe" 322). Holmes noticed such totalism or monism in natural law theories, the uncompromising supporters of which believed their jurisprudence was universally binding and unconditionally true and therefore innately superior to anyone else's. Holmes by contrast did not view judges as Platonic guardians and was loath to intrude upon the local intelligence of distant communities. "Constitutions," he said, "are intended to preserve practical and substantial

rights, not to maintain theories” that any particular judge or justice might entertain (*Davis v. Mills* 1904). Holmes maintained that the personal preferences of judges or justices should not govern the outcome of cases by standing in the way of the natural orders that arise apart from the design or plan of any one judge. “I can’t help preferring champagne to ditchwater—I doubt if the universe does,” he wrote to William James (“Letter to William James,” March 24, 1907). Echoing James’s claims about truth, Holmes speculated that “there are as many truths as there are men” and that “if we all agreed, we should only have formulated our limitations and the conditions of life and the kind of world we wanted to make” (“Letter to William James,” March 24, 1907).

Adhering to the notion that “the attempt to make [our] limitations compulsory on anything outside our dream—to demand significance, etc., of *the* universe—[is] absurd” (“Letter to William James,” March 24, 1907), Holmes adopted a position of skepticism about the ability of a judge or justice to reason on behalf of a community. The utility of this skeptical position was to leave it to the people and their representatives to risk their own wellbeing in determining what they thought was best for themselves. “I always say, as you know,” Holmes wrote to Harold J. Laski, “that if my fellow citizens want to go to Hell I will help them. It’s my job” (“Letter to Laski,” March 4, 1920). Related to this constructive skepticism is the principle that one who is honest about the probable limitations of his ingrained convictions must acknowledge the danger of carrying those convictions to their logical end in an illogical world full of people with different convictions. The trouble is when hostile ideas, unlike in kind but not in degree, bring their adherents into irreconcilable conflict. Productive antagonisms and dissents are one

thing; stalemate and destruction are quite another. The quickest way to retard growth and upset social harmony is unreservedly to embrace militant and extreme ideas.

Militant and extreme ideas are comprised of such particles as to become combustible when brought into contact with other ideas having similarly combustible properties. The collision of these ideational forces results in their total annihilation, along with the people who cling to them. Holmes, extending the beer analogy to weightier subjects, puts it this way: “Deep-seated preferences cannot be argued about—you cannot argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours” (Holmes, “Natural Law” 41). For Holmes, then, the simple recognition of our possible error is enough to generate healthy opposition. It is when opposition shuts down all communication and disregards all awareness of probable error that it becomes violent and destructive. That, Holmes believed, is what happened during the Civil War. Holmes took it upon his occupation to ensure that other civil wars would not happen, that antagonisms remained constructive, and that totalizing worldviews would not result in the obliteration of good ideas or in complete intellectual stasis. The common law demonstrated that parties came into conflict all the time, yet their conflicts led not to devastation but to clarity and growth in the legal system. Although it was acceptable for unfit ideas to become extinct, as it were, through natural processes, it was not acceptable to eliminate fit ideas by means of overpowering force. Opposition and dissent were necessary, of course, to facilitate competition among people and principles; in turn, competition was necessary to prevent militant people and principles from gathering such force that they would bring about violence. Imposition of rules

from the top down distorted the bottom-up flow of rules from person to person and group to group.

Accordingly, it was not relativism that Holmes welcomed. It was a method of debate and exchange; the coordination of human action toward dispute resolution; the distillation and dispersal of power; and the arrangement of practical rules, derived from common experience, into an articulable classification that could guide judges and lawyers to the benefit of society writ large. This combination of traits enabled an evaluation of ideas based upon “the demonstrated efficacy of free inquiry in enlarging knowledge” (Posner, “What Has Pragmatism” 1661). The “plausible extension of Holmes’s marketplace of ideas approach” is that “there are ascertainable, ‘objective’ standards for establishing the proprieties of expression” and that, therefore, the “market,” not the judge, ought “to be the arbiter” (Posner, “What Has Pragmatism” 1662). Let the people experiment with their own communicative standards and prescriptions, Holmes maintained, for an obligation is not enjoined on the courts to sit in ultimate judgment over the solemn acts and decent politics of reasonable people. Courts were not designed to referee or legislate moral tendencies but to ensure that the consequences of human action are reasonable and practicable in the workaday social sphere.

The confluence of Emerson, Peirce, Dewey, and James in the jurisprudence of Holmes gave rise to what Richard Posner has dubbed *legal pragmatism*. The features of legal pragmatism retain the influence of each of these thinkers. Posner is an unabashed admirer of Holmes. His legal pragmatism includes twelve tenets:

1. Legal Pragmatism is not just a fancy term for ad hoc adjudication; it involves consideration of systemic and not just case-specific consequences.

2. Only in exceptional circumstances, however, will the pragmatic judge give controlling weight to systemic consequences, as legal formalism does; that is, only rarely will legal formalism be a pragmatic strategy. And sometimes case-specific circumstances will completely dominate the decisional process.
3. The ultimate criterion of pragmatic adjudication is reasonableness.
4. And so, despite the emphasis on consequences, legal pragmatism is not a form of consequentialism, the set of philosophical doctrines (most prominently utilitarianism) that evaluates actions by the value of their consequences: the best action is the one with the best consequences. There are bound to be formalist pockets in a pragmatic system of adjudication, notably decision by rules rather than by standards. Moreover, for both practical and jurisdictional reasons the judge is not required or even permitted to take account of *all* the possible consequences of his decisions.
5. Legal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty.
6. The legal pragmatist believes that no general analytic procedure distinguishes legal reasoning from other practical reasoning.
7. Legal pragmatism is empiricist.
8. Therefore it is not hostile to all theory. Indeed, it is more hospitable to some forms of theory than legal formalism is, namely theories that guide empirical inquiry. Legal pragmatism is hostile to the idea of using abstract moral and political theory to guide judicial decisionmaking.
9. The pragmatic judge tends to favor narrow over broad grounds of decision in the early stages of the evolution of a legal doctrine.
10. Legal pragmatism is not a supplement to formalism, and is thus distinct from the positivism of H. L. A. Hart.
11. Legal pragmatism is sympathetic to the sophistic and Aristotelian conception of rhetoric as a mode of reasoning.
12. It is different from both legal realism and critical legal studies. (Posner, *Law, Democracy, and Pragmatism* 59-60).

Although it is difficult to pinpoint where, exactly, the theories of Peirce or Dewey or James control in any of these tenets taken in isolation, it can scarcely be denied that the tenets taken together contemplate the general methods and attitudes of each of these classical pragmatists.

These classical pragmatists sought to strip philosophy—in Holmes’s case, the philosophy of law—of its extraneous modes of reasoning and its abstract or dogmatic moralizing and to avoid attenuated lines of thinking that did not comport with commonsense empiricism. They viewed social communities as composite unities replete with differing opinions and motivations. They examined ideas in light of human expectations concerning causes and effects, actions and consequences. They quantified these expectations in terms of probability. And whatever meaning they took from these expectations depended upon what practical difference it made to interpret the expectations in one manner as opposed to another.

Holmes’s non-identitarian, unaffiliated disposition makes him difficult to categorize politically. He was neither a political naïf nor an impartial observer of congressional activity, but he was largely indifferent to current events, refusing to read newspapers, and he did not take sides in partisan games or ideological movements, at least not consistently. His position as a judge required him to maintain an appearance of neutrality and to avoid overtly political pronouncements or risk seeming partial on matters that might come before him on the bench. Although he became a darling of the progressives like Harold Laski, Herbert Croly, Walter Lippmann, and Felix Frankfurter who published in the *The New Republic* (White, *Law and the Inner Self* 359-60; Snyder 664-65, 673-74, 690-96, 702, 704-08, 713, 715, 717-19, 720), his personal views were mostly antagonistic to progressivism and his legal opinions were characteristically reticent about progressivism or any sort of crusading political mobilization, left

or right (Snyder 665-66, 671-674). Progressives were not a uniform or homogeneous group; neither were the classical pragmatists or their progeny. Progressivism as a movement and progressives as a class stretched from the late nineteenth century to the early 1930s and included individuals with different backgrounds and beliefs. Richard Hofstadter described the progressive movement as “the complaint of the unorganized against the consequences of organization” (216) and posited a serviceable definition for *progressivism* as “that broader impulse toward criticism and change that was everywhere so conspicuous after 1900, when the already forceful stream of agrarian discontent was enlarged and redirected by the growing enthusiasm of middle-class people for social and economic reform” (5). Under this definition Holmes was not a progressive, yet his evolutionary paradigm of the common-law and of civilization more generally led inexorably toward a worldview in which progress was always possible but never inevitable.

Theodore Roosevelt, whose presidential administration prioritized antitrust litigation and “trustbusting,” nominated Holmes to the United States Supreme Court to fill the seat vacated upon Justice Horace Gray’s retirement. Holmes’s sprightly dissent in *Northern Securities Company v. United States* (1904) contradicted Roosevelt’s allegation that the Northern Securities Company had violated the Sherman Antitrust Act. Holmes’s dissent permanently damaged his relationship with Roosevelt. He began his criticism of the majority opinion in *Northern Securities Company* with the maxim that “[g]reat cases, like hard cases, make bad law” (400). Despite disappointing progressives in *Northern Securities Company*, Holmes endeared himself to progressives a year later when he dissented in *Lochner*. He ruled in favor of Southern progressive efforts to disenfranchise black voters in Alabama¹⁰⁶ and appealed to Northern progressives with his vigorous defense of free speech in *Abrams*. As a result, progressives began

to lionize Holmes for upholding regulatory labor laws and for preserving civil liberties (Snyder 678-687).

A war veteran with an academic pedigree, Holmes was a fitting symbol for the progressives who advocated for military intervention and imperialism in the pages of the *The New Republic*. President Roosevelt had nominated Holmes for a seat on the United States Supreme Court in part because he was impressed with Holmes's Memorial Day Speech and admired Holmes's service as a soldier in the Union Army (Snyder 697). The progressives "canonized Holmes partly because his Civil War service reinforced his heroic image" (Snyder 696), which squared with progressive narratives about military might that were articulated by such leaders as Woodrow Wilson. The progressive era was the prelude to if not the impetus for what would become known as the Old Right, a label for conservative factions that resisted economic interventionism and the New Deal and opposed military interventionism abroad and the spread of democratic values to other nations through government coercion.¹⁰⁷ The arc of the progressive movement changed over the course of the early twentieth century, with Holmes gradually becoming a more suitable symbol for martial progressivism within an aloof judiciary that lacked progressive champions. A year before Holmes was elevated to the High Court, Wilson published "The Ideals of America" in *The Atlantic Monthly*. The piece was adopted from a speech Wilson had given in 1901 and represented a rallying cry for military power and American exceptionalism, likening opponents of such things to the opponents of the American Revolution. A decade later in *The Promise of American Life* Herbert Croly wrote that "[w]ar may be and has been a useful and justifiable engine of national policy" (Croly 255). Even William James, who identified as a "pacifist" (James, "The Moral Equivalent of War" 1284)

with a devout belief “in the reign of peace” (James, “The Moral Equivalent of War” 1289) and with convictions that, he said, “put me squarely into the anti-militarist party” (James, “The Moral Equivalent of War” 1289), wrote in 1910 that “war has been the only force that can discipline a whole community” (James, “The Moral Equivalent of War” 1292). “[U]ntil an equivalent discipline is organized,” he said, “war must have its way” (James, “The Moral Equivalent of War” 1292). James praised virtues associated with war such as discipline, valor, glory, and honor and speculated that “[i]f war had ever stopped, we should have to reinvent it [...] to redeem life from flat degeneration” (James, “The Moral Equivalent of War” 1284). It is against this backdrop and in this context that we must understand the progressive valorization of Holmes as well as Holmes’s resort to martial metaphors and military language in his writings and speeches.

The reality is that Holmes eluded pure, unmediated, essentialized political groupings, measures, and types. He was not an ordinary politician but a political and legal theorist whose thought encompassed an enormous, even a planetary scale, and who envisioned the known cosmos as a measureless likeness of the common law, expanding by endogenous, continual processes of modification by descent and dissent. Dewey himself wrote that Holmes “has no social panacea to dole out, no fixed social programs, no code of fixed ends to be realized. His social and legal philosophy derives from a philosophy of life and of thought as a part of life, and can be understood only in this larger connection” (Dewey, “Justice Holmes and the Liberal Mind” 178). Holmes’s philosophy, according to Dewey, is “free, growing, ever learning, never giving up the battle for truth, or coming to rest in alleged certainties, or reposing a formula in a slumber that means death” (Dewey, “Justice Holmes and the Liberal Mind” 179). “[M]any of

[Holmes's] most impressive statements," Dewey concludes, "have been set forth in dissenting opinions" (Dewey, "Justice Holmes and the Liberal Mind" 183). Dewey was as prophetic as Holmes when he predicted that "the day will come when the principles set forth by Justice Holmes, even in minority dissent, will be accepted commonplaces" (Dewey, "Justice Holmes and the Liberal Mind" 183). Dewey prognosticated that Holmes's rhetorical skill and superfluity would facilitate transitions in the law from dissent to majority and thus would remind us, in Dewey's words, "that life is still going on, is still an experiment, and that then, as now, to repose on any formula is to invite death" (Dewey, "Justice Holmes and the Liberal Mind" 183).

It is difficult to imagine the emergence of legal pragmatism as a named discipline or a celebrated method apart from the contributions of Peirce, Dewey, or James. The jurisprudence of Benjamin Cardozo and Posner, among others, seems to have cobbled together its substance from these pragmatists who inspired Holmes. Nevertheless, Posner notes a difference between philosophical and legal pragmatism. *Contra* philosophical pragmatism, which Posner deems "orthodox" pragmatism, legal pragmatism focuses on the everyday. "Everyday pragmatists," Posner clarifies, "tend to be 'dry,' no-nonsense types" (Posner, *Law, Pragmatism, and Democracy* 12). More often than formalist judges, judges who are pragmatic implement anti-foundational and precedent-based techniques to transform the useful or the convenient into the legal or operative. "An everyday-pragmatist judge," Posner submits, "wants to know what is at stake in a practical sense in deciding a case one way or another. . . . [He] does not deny the standard rule-of-law virtues of generality, predictability, and impartiality, which generally favor a stand-pat approach to novel legal disputes. He just refuses to reify or sacralize those virtues. He dares to balance them against the adaptationist virtues of deciding the case at hand in a way

that produces the best consequences for the parties and those similarly circumstanced” (Posner, *Law, Pragmatism, and Democracy* 12).

A pragmatist judge might therefore dissent on the grounds that the majority opinion abstracts into airy flourishes about “justice,” “rights,” and “equity.” Opinions that turn on such loaded terminology, the pragmatist judge might say, reveal more about judges’ personal ideologies than about the meaning of the terminology. Legal pragmatism would seem to be, in this respect, both common sense and no-nonsense. Certainly that is how Holmes thought of the law. “[T]he only definition of law for a lawyer’s purpose,” the English jurist Sir Frederick Pollock wrote to Holmes, “is something which the Court will enforce” (Letter from Pollock to Holmes, July 3, 1874, in Howe, *Holmes-Pollock Letters* 3). Holmes agreed with his friend and pen pal. It was not that he considered the law to be without philosophical substance or that he delighted in its inevitable malleability; it was that he had it out for jurists who overstated the ontology of the law and glorified the law as the earthly manifestation of divine purpose or as a majestic surrogate for morality.

Law did not work this way; it was not divorced from the mundane social sphere or autonomous from ordinary, routine human interactions. Indeed, it derived from those things. Lawsuits with specific facts and murky issues came before the courts, which assessed the arguments of both sides and extracted a general rule based on the evidence and consistent with the principles expressed in patterns of established precedent. The actions of a few people were thereby plugged into a vast network of human relations spanning different times and places; what linked the people and places was the general rule, which had been in circulation long before the parties disputed. When they initiated suit, the parties did not know which general rule the judge

would apply to their case, but their aim was to present the facts in such a way as to implicate the general rule that would allow them to prevail. In essence, the parties knew the facts of their case and had an assortment of general rules to choose from, and based on the precedents related to their claim, they predicted what the judge or jury would need to hear in order to find or rule in their favor. Legal pragmatism looks at this process and does not see anything ontologically or epistemologically magnificent. It looks at this process and sees, rather, a plain representation of the way things are and a possible prophecy about the way things might be.

As a link between the old and the new, Holmes appreciated the ways in which the law, like history itself, unfolds in stages and in accordance with community consensus. He had witnessed firsthand the stark cultural transitions in New England before, during, and after the War, and he understood the importance of adjusting to change, or rather of accommodating it. He neither liked nor disliked the concept of change; he simply recognized that it was what it was and would happen despite anyone's preferences for or against it. That became his take on the law as well: it was neither good nor bad; it just was. Some people sought to remake it—they were supposed to be the legislators and their constituents—but whatever passed as law at any given moment was just a temporary place-marker until something different came along. This does not mean that he did not welcome certain changes, only that he did not see those changes as steps towards realizing an abstract teleology. When other justices or jurists seemed to champion an absolute or teleological position about the law, Holmes knew he had to dissent, and to dissent well, lest the law itself become fixed in a maladapted state from which it could not recover.

Holmes's opinion in *Buck v. Bell* (1927) has undergone warranted and extensive criticism for upholding Virginia's eugenics law of compulsory sterilization for the mentally disabled. It is

tempting to dismiss *Buck* as an outlier case or an aberration or as just another example of Holmes's programmatic deference to state legislatures that have passed unpalatable laws.¹⁰⁸ However, Holmes upheld the Virginia law with apparent enthusiasm, stating, "It is better for all the world if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind" (*Buck* 207). He added, "Three generations of imbeciles are enough" (*Buck* 207). Two points of qualification place these remarks within a legal and historical context that explains their motivation without diminishing their horror. The first is that, stripped of his gratuitous asides about the merits of eugenics, Holmes's legal position is simply that the appellants made weak constitutional arguments for voiding Virginia's statute under the Fourteenth Amendment, which had yet to undergo the jurisprudential shifts caused by *Brown v. Board of Education* (1954), *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992), and *Lawrence v. Texas* (2003), among other cases. Holmes technically was not wrong when he called equal protection "the usual last resort of constitutional arguments" because, as of his writing, the Equal Protection Clause of the Fourteenth Amendment had yet to be utilized as it was after *Brown v. Board of Education* (1954) and its progeny (*Buck* 208). In Holmes's day only the right wing of the United States Supreme Court was open to expansive, activist readings of the Fourteenth Amendment that would overturn state laws as violating the Fourteenth Amendment. The right wing of the United States Supreme Court, for instance, invoked the Fourteenth Amendment to strike down state legislation prohibiting foreign companies from transacting business in a state (*Allgeyer v. Louisiana*, 1897), state legislation restricting weekly working hours (*Lochner v. New York*, 1905), federal legislation prohibiting companies from

banning union membership among employees (*Adair v. United States*, 1908, and *Coppage v. Kansas*, 1915), federal regulations of child labor (*Hammer v. Dagenhart*, 1918), federal legislation potentially exempting labor unions from antitrust litigation (*Duplex Printing Press Co. v. Deering*, 1921), federal taxation of companies with goods in interstate commerce if those companies hired underage children (*Bailey v. Drexel Furniture Company*, 1922), federal legislation setting a minimum wage for woman- and child-workers in the District of Columbia (*Adkins v. Children's Hospital*, 1923), and federal legislation regulating the coal industry (*Carter v. Carter Coal Company*, 1936). Striking down Virginia's eugenics law would have required Holmes to adopt the Fourteenth-Amendment jurisprudence of the justices on the right wing of the United States Supreme Court. Holmes, however, shared with progressives the view that it was wrong to invoke the Fourteenth Amendment beyond the purpose for which it was ratified: to confer citizenship on former slaves, ensure the privileges and immunities of that citizenship to all qualified individuals irrespective of race, and to guarantee due process and equal protection of the laws to all citizens, again irrespective of race. Articulating what was then the progressive view that the federal courts had a limited role to play in constitutional adjudication, Holmes once explained 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" (*Tyson Brother v. Banton* 446).

The second qualification is that Holmes was not alone in his opinion; only one justice—Justice Pierce Butler—dissented and without writing. Although enthusiasm for eugenics was

widespread in the 1920s, it is unlikely that the concurring justices were all ardent eugenicists. The fact of the matter is that judges and justices in a common-law system lack the authority to raise arguments *ex mero motu* or *sua sponte* except under certain conditions subject to strict rules. Judges and justices are supposed to remain impartial and thus cannot supply arguments that one party or another has failed or refused to raise. Proffering legal arguments on one party's behalf would bring a judge or justice into the realm of advocacy and partiality. Therefore, judges and justices, against their hopes and desires, are often required to rule in favor of parties whose argument is based on deplorable laws and against parties who wish to strike down deplorable laws. Even if Holmes had despised Virginia's mandatory sterilization law—and the language of his opinion suggests that he did not—he could not have raised constitutional arguments that the parties did not raise unless he could support doing so under extant, precedential grounds. In light of these two qualifications Holmes's opinion in *Buck* cannot be attributed exclusively to apocalyptic eugenics, yet the seeming endorsement of eugenics in the opinion also cannot be ignored or downplayed. It is possible that this endorsement reflects Holmes's overcommitment to Darwinism and science at the expense of traditional humanism and the precepts of natural law that tended to proclaim the basic dignity and bodily integrity of every human person.

By the time 1881 came to a close, Holmes had made his mark. *The Common Law* had been favorably received; it earned him the reputation of an accomplished jurist and guaranteed his continued friendship with such renowned legal figures as Pollock. It also made him a discussion point among important political figures and public intellectuals. 1882 ushered in a new phase of his life. He began to adjust to the duties and responsibilities of life on the bench. His lifelong hero Emerson died that year, and as a novice justice on the highest court in

Massachusetts Holmes was faced with rare opportunities to give Emersonian expression to pragmatic principles that would obtain to the people of that state. Emerson's ideas remained persuasive to Holmes and others inasmuch as they addressed theories that had not gone away. But Emerson's language no longer conveyed the convictions of the age and no longer registered a perspective familiar to the younger generation. The country was asking questions, and the answers were not to be found in pure transcendentalism. Holmes realized this and so sought to repackage Emerson in pragmatic idioms and ideas that the current era could recognize and through a medium that would have a direct impact on the problems concerning ordinary Americans. Eventually he would sit on the United States Supreme Court, and from that revered post he would begin to promulgate and preserve his lively variety of pragmatism—which synthesized Emerson, Peirce, Dewey, and James—in the legal canons of the country. Holmes availed himself of Emersonian superfluity in his dissents to vest the legal canon with the agon and variety necessary for the common-law system to flourish. He couched his dissents in memorable style and sound to make them more competitive among their peers. He thereby instantiated in his legal writing his belief that “free competition is worth more to society than it costs” (*Vegeahn v. Gunter* 104). Rather than imposing his personal convictions on communities not his own, shutting down the free flow of ideas within some distant jurisdiction, or rendering judgments with the potential to incite strife and violence among those who disagree, he indicated that “I simply infer that my biggest is inadequate” and that, therefore, he would keep his preferences to himself and “leave to the universe the care of deciding how much it cares about them” (“Letter to William James,” March 24, 1907). Enough time has passed to proffer the conclusion that the universe of American constitutional law cares a great deal about Holmes's

jurisprudence. Without his sparkling dissents, the laws of the land would be very different from what they are. The American constitutional canon would not have been shaped as it has if Holmes had not dissented in the vein of his mentor, Emerson. Perhaps, after all, the fourteen-year-old Holmes was right: Holmes would one day owe his accomplishments to Emerson. If that is the case, as I believe it is, then all of us within the common-law tradition in the United States are to some extent governed by the unintended consequences of Emerson's superfluity that inspired Holmes to "write like the devil" (Touster 679).

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APPENDIX A

Majority Opinions Authored

What follows is a list of Holmes's opinions chronologically by year but not by date of authorship; in other words, I have not made an effort to determine whether certain cases should precede other cases on the ground that they were written earlier in the year, e.g., in April rather than December. Although the cases proceed chronologically by year, they are not purely chronological. This list has filtered out several writings that are sometimes mistakenly attributed to Holmes. For instance, *Goltra v. Weeks*, 271 U.S. 536 (1926), and *Yu Cong Eng. v. Trinidad*, 271 U.S. 500 (1926), are sometimes attributed to Holmes because he announced the opinion, but the opinion was authored by Chief Justice Taft, who was absent on the day of the announcement. My 2014 Westlaw search turned up results that had mistakenly attributed these two opinions by Chief Justice Taft to Holmes.

1. *U.S. v. Barnett*, 189 U.S. 474 (1903).
2. *National Bank & Loan Co. of Watertown, N.Y. v. Carr*, 189 U.S. 426 (1903).
3. *Texas & P. Ry. Co. v. Behymer*, 189 U.S. 468 (1903).
4. *Home Life Ins. Co. v. Fisher*, 188 U.S. 726 (1903).
5. *American Colortype Co. v. Continental Colortype Co.*, 188 U.S. 104 (1903).
6. *Brownfield v. State of S.C.*, 189 U.S. 426 (1903).
7. *Pullman Co. v. Adams*, 189 U.S. 420 (1903).
8. *Otis v. Parker*, 187 U.S. 606 (1903).
9. *Kidd v. State of Alabama*, 188 U.S. 730 (1903).
10. *Pardee v. Aldridge*, 189 U.S. 429 (1903).
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629. *Southern Pac. Co. v. Berkshire*, 254 U.S. 415 (1921).
630. *Missouri, K. & T. Ry. Co. v. U.S.*, 256 U.S. 610 (1921).
631. *Silver King Coalition Mines Co. v. Conkling Mining Co.*, 255 U.S. 151 (1921).
632. *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44 (1921).
633. *U.S. v. Coronado Beach Co.*, 255 U.S. 472 (1921).
634. *Erie R. Co. v. Board of Public Utility Com'rs*, 254 U.S. 394 (1921).
635. *Marine Ry. & Coal Co. v. U.S.*, 257 U.S. 47 (1921).
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637. *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921).
638. *Bullock v. State of Florida ex rel. Railroad Commission of State of Florida*, 254 U.S. 513 (1921).
639. *Central Union Trust Co. of New York v. Garvan*, 254 U.S. 554 (1921).
640. *St. Louis-San Francisco Ry. Co. v. Middlekamp*, 256 U.S. 226 (1921).
641. *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921).
642. *Block v. Hirsh*, 256 U.S. 135 (1921).
643. *John L. Whiting – J. J. Adams Co. v. Burrill*, 258 U.S. 39 (1922).
644. *Forbes Pioneer Boat Line v. Board of Com'rs of Everglades Drainage Dist.*, 258 U.S. 338 (1922).
645. *Burrill v. Locomobile Co.*, 258 U.S. 34 (1922).
646. *New York Cent. & H.R.R. Co. v. Kinney*, 260 U.S. 340 (1922).
647. *Pacific Mail S.S. Co. v. Lucas*, 258 U.S. 266 (1922).
648. *Davis v. Green*, 260 U.S. 349 (1922).
649. *Morrisdale Coal Co. v. U.S.*, 259 U.S. 188 (1922).
650. *Brown v. Thorn*, 260 U.S. 137 (1922).
651. *New York, N.H. & H.R. Co. v. U.S.*, 258 U.S. 32 (1922).
652. *McKee v. Gratz*, 260 U.S. 127 (1922).
653. *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922).
654. *Knights v. Jackson*, 260 U.S. 12 (1922).
655. *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*, 259 U.S. 200 (1922).
656. *First Nat. Bank v. J.L. Iron Works*, 258 U.S. 240 (1922).
657. *Mutual Life Ins. Co. of New York v. Liebing*, 259 U.S. 209 (1922).
658. *Keokuk & Hamilton Bridge Co. v. U.S.*, 260 U.S. 125 (1922).
659. *Pine Hill Coal Co. v. U.S.*, 259 U.S. 191 (1922).
660. *Gillespie v. State of Oklahoma*, 257 U.S. 501 (1922).
661. *Santa Fe Pac. R. Co. v. Payne*, 259 U.S. 197 (1922).
662. *American Smelting & Refining Co. v. U.S.*, 259 U.S. 75 (1922).

663. *Levinson v. U.S.*, 258 U.S. 198 (1922).
664. *State of North Dakota ex rel. Lemke v. Chicago, N.W. Ry., Co.*, 257 U.S. 485 (1922).
665. *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346 (1922).
666. *Jones v. U.S.*, 258 U.S. 40 (1922).
667. *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922).
668. *Gooch v. Oregon Short Line R. Co.*, 258 U.S. 22 (1922).
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671. *Grogan v. Hiram Walker & Sons*, 259 U.S. 80 (1922).
672. *The Western Maid*, 257 U.S. 419 (1922).
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674. *Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549 (1922).
675. *Frese v. Chicago, B. & Q.R. Co.*, 263 U.S. 1 (1923).
676. *Heyer v. Duplicator Mfg. Co.*, 263 U.S. 100 (1923).
677. *Fox Film Corporation v. Knowles*, 261 U.S. 326 (1923).
678. *National Ass'n of Window Glass Mfs. v. U.S.*, 263 U.S. 403 (1923).
679. *Bianchi v. Morales*, 262 U.S. 170 (1923).
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681. *Federal Land Bank of New Orleans v. Crosland*, 261 U.S. 374 (1923).
682. *A. Bourjois & Co. v. Katzel*, 260 U.S. 689 (1923).
683. *Leigh Ellis & Co. v. Davis*, 260 U.S. 682 (1923).
684. *Davis v. Wechsler*, 263 U.S. 22 (1923).
685. *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923).
686. *Diaz A. v. Patterson*, 263 U.S. 399 (1923).
687. *Ewen v. American Fidelity Co.*, 261 U.S. 322 (1923).
688. *Hill v. Smith*, 260 U.S. 592 (1923).
689. *U.S. v. Sischo*, 262 U.S. 165 (1923).
690. *Stevens v. Arnold*, 262 U.S. 266 (1923).
691. *U.S. v. Carver*, 260 U.S. 482 (1923).
692. *Galveston Wharf Co. v. City of Galveston*, 260 U.S. 473 (1923).
693. *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290 (1923).
694. *New Orleans Land Co. v. Brott*, 263 U.S. 97 (1923).
695. *Gardner v. Chicago Title & Trust Co.*, 261 U.S. 453 (1923).
696. *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).
697. *U.S. Grain Corporation v. Phillips*, 261 U.S. 106 (1923).
698. *People ex rel. Clyde v. Gilchrist*, 262 U.S. 94 (1923).
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701. *Clallam County, Wash., v. U.S.*, 263 U.S. 341 (1923).
702. *U.S. v. Stafoff*, 260 U.S. 477 (1923).
703. *Moore v. Dempsey*, 261 U.S. 86 (1923).
704. *Hester v. U.S.*, 265 U.S. 57 (1924).
705. *Davis v. Kennedy*, 266 U.S. 147 (1924).
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707. *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487 (1924).
708. *Avent v. U.S.*, 266 U.S. 127 (1924).
709. *New York, Philadelpa & Norfolk Telegraph Co. v. Dolan*, 265 U.S. 96 (1924).
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711. *Wilson v. Illinois Southern Ry. Co.*, 263 U.S. 574 (1924).
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713. *Electric Boat Co. v. U.S.*, 263 U.S. 621 (1924).
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715. *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131 (1924).
716. *A.W. Duckett & Co. v. U.S.*, 266 U.S. 149 (1924).
717. *B. Fernandez & Bros. v. Ayllon*, 266 U.S. 144 (1924).
718. *U.S. v. New York Cent. R. Co.*, 263 U.S. 603 (1924).
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720. *In re East River Towing Co.*, 266 U.S. 355 (1924).
721. *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924).
722. *Dillingham v. McLaughlin*, 264 U.S. 370 (1924).
723. *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).
724. *Davis v. Corona Coal Co.*, 265 U.S. 219 (1924).
725. *People of State of New York v. Jersawit*, 263 U.S. 493 (1924).
726. *City of Opelika v. Opelika Sewer Co.*, 265 U.S. 215 (1924).
727. *U.S. v. The Thekla*, 266 U.S. 328 (1924).
728. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924).
729. *U.S. ex rel. St. Louis Southwestern Ry. Co. v. Interstate Commerce Commission*,
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730. *State of Missouri ex rel. Burnes Nat. Bank of St. Joseph v. Duncan*, 265 U.S. 17
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733. *Southern Utilities Co. v. City of Palatka, Fla.*, 268 U.S. 232 (1925).
734. *Lee v. Lehigh Valley Coal Co.*, 267 U.S. 542 (1925).
735. *U.S. v. The Coamo*, 267 U.S. 220 (1925).
736. *Atchison, T. & S.F. Ry. Co. v. U.S.*, 269 U.S. 266 (1925).
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738. *Yeiser v. Dysart*, 267 U.S. 540 (1925).
739. *Lederer v. Fidelity Trust Co.*, 267 U.S. 17 (1925).
740. *U.S. v. P. Lorillard Co.*, 267 U.S. 471 (1925).
741. *Standard Oil Co. of New Jersey v. U.S.*, 267 U.S. 76 (1925).
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743. *Direction der Disconto-Gesellschaft v. U.S. Steel Corporation*, 267 U.S. 22 (1925).
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748. *Olson v. U.S. Spruce Production Corporation*, 267 U.S. 462 (1925).
749. *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269 (1925).
750. *Cami v. Central Victoria*, 268 U.S. 469 (1925).
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753. *Flanagan v. Federal Coal Co.*, 267 U.S. 222 (1925).
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756. *Kaplan v. Tod*, 267 U.S. 228 (1925).
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758. *Fernandez v. Phillips*, 268 U.S. 311 (1925).
759. *Davis v. Pringle*, 268 U.S. 315 (1925).
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780. *U.S. ex rel. Hughes v. Gault*, 271 U.S. 142 (1926).
781. *Cole v. Norborne Land Drainage Dist. of Carroll County, Mo.*, 270 U.S. 45 (1926).
782. *R.H. Hassler, Inc. v. Shaw*, 271 U.S. 195 (1926).
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784. *Morse Dry Dock & Repair Co. v. The Northern Star*, 271 U.S. 552 (1926).
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786. *Sacco v. Hendry*, 1927 WL 27839 (1927) (this case was not reported in the United States Supreme Court Reports; therefore, only the Westlaw citation is available).
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804. *Gallardo v. Santini Fertilizer Co.*, 275 U.S. 62 (1927).
805. *Miller v. City of Milwaukee*, 272 U.S. 713 (1927).
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807. *Ingenohl v. Walter E. Olsen & Co.*, 273 U.S. 541 (1927).
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810. *Blodgett v. Holden*, 275 U.S. 142 (1927).
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812. *Westfall v. U.S.*, 274 U.S. 256 (1927).
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820. *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928).
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822. *Levy v. Industrial Finance Corp.*, 276 U.S. 281 (1928).
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824. *Ferry v. Ramsey*, 277 U.S. 88 (1928).
825. *U.S. v. Cambridge Loan & Building Co.*, 278 U.S. 55 (1928).
826. *Maney v. U.S.*, 278 U.S. 17 (1928).
827. *U.S. v. Lenson*, 278 U.S. 60 (1928).
828. *Delaware, L. & W.R. Co. v. Rellstab*, 276 U.S. 1 (1928).
829. *Equitable Trust Co. of New York v. First Nat. Bank*, 275 U.S. 359 (1928).
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831. *Boston Sand & Gravel Co. v. U.S.*, 278 U.S. 41 (1928).
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833. *Flink v. Paladini*, 279 U.S. 59 (1929).
834. *Nashville, C. & St. L. Ry. v. White*, 278 U.S. 456 (1929).
835. *Hobbs v. Pollock*, 280 U.S. 168 (1929).
836. *U.S. v. American Livestock Com'n Co.*, 279 U.S. 435 (1929).
837. *U.S. v. New York Cent. R. Co.*, 279 U.S. 73 (1929).
838. *Ithaca Trust Co. v. U.S.*, 279 U.S. 151 (1929).
839. *Wheeler v. Greene*, 280 U.S. 49 (1929).
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841. *Becher v. Contoure Laboratories*, 279 U.S. 388 (1929).
842. *Lash's Products Co. v. U.S.*, 278 U.S. 175 (1929).
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847. *Clarke v. Haberle Crystal Springs Brewing Co.*, 280 U.S. 384 (1930).
848. *Renziehausen v. Lucas*, 280 U.S. 387 (1930).
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851. *Danovitz v. United States*, 281 U.S. 389 (1930).
852. *Minerals Separation North American Corp. v. Magma Copper Co.*, 280 U.S. 400 (1930).
853. *Chesapeake & Potomac Telephone Co. v. U.S.*, 281 U.S. 385 (1930).
854. *Superior Oil Co. v. State of Mississippi ex rel. Knox*, 280 U.S. 390 (1930).
855. *Sherman v. U.S.*, 282 U.S. 25 (1930).
856. *U.S. v. Abrams*, 281 U.S. 202 (1930).
857. *Lektophone Corporation v. Rola Co.*, 282 U.S. 168 (1930).
858. *U.S. v. Wurzbach*, 280 U.S. 396 (1930).
859. *Corliss v. Bowers*, 281 U.S. 376 (1930).
860. *Klein v. Board of Tax Sup'rs of Jefferson County, Ky.*, 282 U.S. 19 (1930).
861. *Eliason v. Wilborn*, 281 U.S. 457 (1930).
862. *Wabash Ry. Co. v. Barclay*, 280 U.S. 197 (1930).
863. *Escher v. Woods*, 281 U.S. 379 (1930).
864. *State of Wisconsin v. State of Illinois*, 281 U.S. 179 (1930).
865. *State of Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930).
866. *Early v. Federal Reserve Bank of Richmond*, 281 U.S. 84 (1930).
867. *United States of America ex rel. Costas Cateches v. Day*, 283 U.S. 51 (1931).
868. *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401 (1931).
869. *U.S. v. Kirby Lumber Co.*, 284 U.S. 1 (1931).
870. *Carr v. Zaja*, 283 U.S. 52 (1931).
871. *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499 (1931).
872. *Flynn v. New York, N.H. & H.R. Co.*, 283 U.S. 53 (1931).
873. *Southern Ry. Co. v. Hussey*, 283 U.S. 136 (1931).
874. *Eckert v. Burnet*, 283 U.S. 140 (1931).
875. *Moore v. Bay*, 284 U.S. 4 (1931).
876. *Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437 (1931).
877. *Railway Express Agency v. Commonwealth of Virginia*, 282 U.S. 440 (1931).
878. *Frank L. Young Co. v. McNeal-Edwards Co.*, 283 U.S. 398 (1931).
879. *Northport Power & Light Co. v. Hartley*, 283 U.S. 568 (1931).
880. *Waite v. U.S.*, 282 U.S. 508 (1931).
881. *Uravic v. F. Jarka Co.*, 282 U.S. 234 (1931).
882. *Smooth Sand & Gravel Corporation v. Washington Airport*, 283 U.S. 348 (1931).
883. *Philippides v. Day*, 283 U.S. 48 (1931).
884. *McBoyle v. U.S.*, 283 U.S. 25 (1931).
885. *State of Alabama v. U.S.*, 282 U.S. 502 (1931).
886. *State Tax Commission of Mississippi v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931).
887. *International Paper Co. v. U.S.*, 282 U.S. 399 (1931).
888. *State of New Jersey v. State of New York*, 283 U.S. 336 (1931).

889. *U.S. ex rel. Polymeris v. Trudell*, 284 U.S. 279 (1932).
890. *Dunn v. U.S.*, 284 U.S. 390 (1932).

ENDNOTES

¹ See, e.g., Albert W. Alschuler, “From Blackstone to Holmes: Revolt Against Natural Law” and “Rediscovering Blackstone.” In the latter article, Alschuler states, “Scholars view the *Commentaries* as an illustration of the formal vision of law that Oliver Wendell Holmes and the legal realists condemned” (Alschuler, “Rediscovering Blackstone” 17).

² Consider Colin Koopman’s *Pragmatism as Transition*.

³ See generally Seth Vannatta’s *Conservatism and Pragmatism in Law, Politics, and Ethics* in which Holmes figures prominently in chapter seven.

⁴ Koopman’s work can be considered a synthesis of his two books in this area: *Pragmatism as Transition* (2009) and *Genealogy as Critique* (2013). Koopman provides a mini-bibliography of the seminal works in the field of genealogy and pragmatism in the first footnote to his article “Genealogical Pragmatism: How History Matters for Foucault and Dewey.”

⁵ This view is essentialized and represents a caricature of Blackstone’s thought, which is more like Holmes’s than certain commentators realize. Richard Posner characterizes Blackstone’s view as compatible with Holmes’s: “[W]hat is important and distinctive in Blackstone’s method is a view of law which embeds it firmly in the social and political conditions of its time, which sees law responding to the changing needs and circumstances of the social environment[.] [...] Law is presented by Blackstone not as a speculative abstraction or a collection of rules but as a functioning social system” (Posner 571).

⁶ See Richard Posner’s “Blackstone and Bentham” for a criticism of Bentham’s attack on Blackstone.

⁷ “What must be emphasized for Blackstone’s treatment is that he wished to set forth a systematic exposition of English law for teaching purposes. For Blackstone, law based purely on cases had no natural or inevitable or proper structure. To make law systematic (and to prevent English law from appearing uncouth) he had to treat substantive law separately from procedure. Blackstone wished to set English law forth as a system of rights.” (Watson 810)

⁸ See also *Julie P. Magee and Thomas L. White, Jr., in their official capacities as Commissioner of Revenue and Comptroller of the State of Alabama, Respectively, v. Daniel Boyd et al.*, (March 2, 2015) ___ So. 3d ___ (Ala. 2015), in which the majority, including Chief Justice Moore, overruled the holding in *Densmore v. Jefferson County*, 813 So. 2d 844 (Ala. 2001), by adopting the position that Chief Justice took in his dissent in *Densmore*.

⁹ Former President of the United States and Chief Justice of the United States Supreme Court William Howard Taft reportedly complained that Holmes “gives more attention to [...] his dissents than he does to the opinions he writes for the court, which are very short and not very helpful” (quoted in Lerner 132).

¹⁰ 448 U.S. 607 (1980).

¹¹ [No. 1130496] ___ So. 3d ___ (Ala. 2015).

¹² See generally Daniel Gross’s “New York’s Appellate Division: An Empirical Study of the Vindicated Dissents of the New York Appellate Division, Fourth Department, From 2000 to 2010” (examining vindicated dissents in just the Fourth Department of the New York Appellate Division). Examples abound from the United States Supreme Court. Consider the majority opinion in *Arizona v. Gant* (2009), which answered the call of the dissenters in *New York v. Belton* (1981) to revise the latter case’s interpretation of a vehicle search under the Fourth Amendment (*Arizona v. Gant* 338). See also *Lawrence v. Texas* (2003) in which the majority quoted from Justice Stevens’s dissent in *Bowers v. Hardwick* (1986) and then declared, “Justice Stevens’ analysis, in our view, should have been controlling [...] and should control here” (*Lawrence v. Texas* 578). Not all cases announce that they are vindicating a dissent by adopting its legal reasoning and rejecting the reasoning of the binding majority. An example is *Katz v. United States* (1967), which rejects the majority reasoning in *Olmstead v. United States* (1928) and thereby vindicates the dissents of Justice Holmes and Justice Brandeis, among others, without explicitly acknowledging the source of the vindication.

¹³ Most notably in the *Harvard Law Review* Supreme Court statistics, which, as of this writing, do not provide data for the era of Holmes’s tenure.

¹⁴ An early book on Holmes’s dissents, *The Dissenting Opinions of Mr. Justice Holmes*, anthologizes 57 dissents from Holmes’s tenure on the United States Supreme Court as if they were the sum of his dissenting output. That book was published roughly three years before Holmes retired and appears to have included only Holmes’s lengthy dissents and to have disregarded his shorter dissents, including some no longer than a paragraph.

¹⁵ E.g., Holmes’s unpublished and undelivered dissent in *Buchanan v. Warley*, 245 U.S. 60 (1917). The dissent was withdrawn before publication.

¹⁶ See Todd C. Peppers’s *Courtiers of the Marble Palace* at pages 30-35, 112-115, 130-132, 145-149, 156, 169, 186. Also see generally David J. Garrow’s article in *Cornell Law Review*: “‘The Lowest Form of Animal Life?’: Supreme Court Clerks and Supreme Court History.” Regarding a distinct shift in the way Supreme Court clerks were hired in accordance with a model developed by Justice Brandeis, see pages 1756-1766 of the co-authored article in *Vanderbilt Law Review* titled “The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?”

¹⁷ “The data suggest that the change in the number of cases is inversely related to the number of dissenting opinions. The fivefold increase in Supreme Court decisions in the 1860s was not accompanied by an increase in dissenting opinions. By contrast, the drop in the number of Supreme Court cases following the Judiciary Act of 1925 corresponds well with the increase in dissenting opinions. In addition, the Rehnquist Court heard fewer cases per year than any Court of the last 100 years [as of 2007], but nearly 50 percent of all opinions had a dissent; the Roberts Court appears to be following a similar pattern. This inverse relation suggests that it was more

likely the change in the type of cases that resulted in more dissenting opinions rather than the change in the number of cases.” (Henderson 326-27)

¹⁸ These tables are drawn from the statistics provided by *Harvard Law Review* following each term of the United States Supreme Court.

¹⁹ As I have stated already, Holmes sometimes wrote a dissent and joined a dissent in the same case, and for such cases, I have categorized Holmes’s writings as both “Dissenting Opinions Authored” and “Dissenting Opinions Joined.”

²⁰ Justice Marshall retired during the 1991 term, so I have omitted the statistics from 1991.

²¹ Chief Justice Rehnquist died in office on September 3, 2005; therefore, I have omitted the year 2005 from this table.

²² Justice Stevens left office on June 29, 2010, so I have not included any statistics from the year 2010.

²³ These numbers are low because Justice O’Connor retired before completing this term.

²⁴ M. Todd Henderson has examined trends in seriatim versus consensus among United States Supreme Court justices. He provides the following chart showing statistics for Chief Justices of the United States Supreme Court up until 2007 (Henderson 316):

Chief Justice	Dates of Service	No. of Cases	No. of Chief Justice Dissenting Opinions	Dissent Proportion (%)
Marshall	1801-35	1,187	3	0
Taney	1836-63	1,708	38	2
Chase	1864-73	1,109	33	3
Waite	1874-87	2,642	45	2
Fuller	1888-1909	4,866	113	2
White	1910-20	2,541	39	2
Taft	1921-29	1,708	16	1
Hughes	1930-40	2,050	46	2
Stone	1941-45	704	95	13
Vinson	1946-52	723	90	12
Warren	1953-68	1,772	215	12
Burger	1969-85	2,755	184	7
Rehnquist	1986-2005	2,131	182	9

Roberts	2005-present	104	3	3
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²⁵ Aichele does not back up his conclusion with correct or firm numbers but posits that of “the roughly one thousand opinions Holmes wrote during his tenure on the Supreme Court, only seventy-two were written in dissent” (151). Although his numbers are inaccurate, he comes close to correctly identifying the number of Holmes’s dissents. He does not mention the number of dissenting opinions that Holmes joined. Nor does he explain how he arrived at his numbers or provide citations for the sources from which he might have derived those numbers.

²⁶ Citing Ralph Barton Perry, *The Thought and Character of William James* (New York: George Braziller, 1954) at 90.

²⁷ 276 U.S. 518 (1928) (Holmes, dissenting).

²⁸ My addition.

²⁹ For remarks about how Stevens’s poetry seeks to overcome repose in the same way that Holmes’s jurisprudence seeks to overcome repose, see Thomas C. Grey’s *The Wallace Stevens Case*, and in particular pages 55, 85, 92, 94, 96, and 105.

³⁰ “There is strong reason to doubt the claim by Justice Holmes in dissent,” says Samuel Issacharoff (207), not least of which is that there were “grave deficiencies in his argument, as it related to the intended meaning of section 34” of the Judiciary Act (Crosskey 910). Another reason is that Holmes appears to formulate a “dogmatic rejection of general common law” (Waldron 54). Yet another reason is that “the positivism represented by Justice Holmes’s insights in the *Black & White Taxicab* case, the positivism that was apparently endorsed in *Erie Railroad*, is now regarded by most legal philosophers as crude and obsolete” (Waldron 54). William W. Crosskey claims that Holmes’s dissent contained “irrelevant” wording and accuses Holmes of reasoning anachronistically about the common law in the dissent (910).

³¹ “Justice Holmes dissented with observations that would be vindicated a few years later” (Anagnost 42).

³² *Gitlow v. N.Y.*, 268 U.S. 652 (1925).

³³ My addition.

³⁴ On November 23, 1905, Holmes wrote to Sir Frederick Pollock, “I am just turning to Santayana’s last two volumes of *The Life of Reason* which I like better than any philosophy I have read—or nearly so” (*Holmes-Pollock Letters Vol. I* 122). In a letter dated June 23, 1906, Holmes again wrote to Pollock about Santayana, this time noting some of the elements of superfluity at work in Santayana’s prose: “I write to Little Brown & Co. to send you Santayana—4 vols—but not big ones. My wife says that the critics are not so warm as I in praise of it. I liked it because the premises are so much like my own. I always start my cosmic salad

by saying that all I mean by truth is what I *can't help* thinking and that I have no means of deciding whether my can't helps have any cosmic worth. They clearly don't in many cases. I think the philosophers usually are too arrogant in their attitude. I accept the existence of the universe, in some unpredictable sense, just as I accept yours—by an act of faith—or by another can't help, perhaps. But I think the chances are much against man's being at the centre of things or knowing anything more than how to arrange *his* universe—according to his own necessary order. I dare say you will think Santayana something of an *improvisatore*, and say that he talks too much. But to my mind he talks like a civilized man, and with a good deal of charm of speech, though that also may weary, after you have caught his rhythm and trick. At all events his book was one which seemed to me to express the world as I should express it, more nearly than often befalls" (*Holmes-Pollock Letters Vol. I* 126-27).

In a letter dated December 5, 1913, he wrote to Lewis Einstein: "Last week while we were adjourned and my work being done I read with a great deal of admiration Santayana's '*Winds of Doctrine*'. Wonderful knowledge and easy criticisms of systems with many *aperçus* that I have shared without owing them to him. I said (considering his possible retention of his membership in the Catholic Church) that he stood on the flat road to heaven and buttered slides to hell for all the rest, so well does he state the fundamental scepticisms without committing himself" (*Holmes-Einstein Letters* 84). On June 13, 1918, he wrote this in a letter to Einstein: "I did reread Santayana's *Egotism in German Philosophy*, which a fellow sent to me the other day, with much more appreciation than the first time. I don't think it the best of his books, but he always hits me where I live with his prose. On his poetry I can't recite" (*Holmes-Einstein Letters* 167).

In a letter to Laski dated November 17, 1920, Holmes concluded by saying, simply, "Do you like Santayana's books? I do, though I believe Bill James didn't" (*Holmes-Laski Letters* 292). On December 17, 1920, Holmes wrote to Laski, "When I get a chance I want to read Santayana's new volume on *Character and Opinion in the U.S.* He generally hits me pretty near to where I live—even though one does not wholly like either him or his way of thinking. He is a philosopher very much after my own heart" (*Holmes-Laski Letters* 297). In a letter dated December 19, 1920, addressed to Justice Frankfurter, Holmes discussed reading Santayana along with William James: "I keep pretty close to books bearing on my general drift. I *have* read and with the usual pleasure Santayana's volume, *Character etc. in the U.S.* (a wonderfully keen appreciation of W. James in it). [...] I have received W. James's *Letters* which stir many old emotions in me, though I haven't read them—only opened here and there. Kimball (my secretary) wants me to reread W.J.'s *Pragmatism* that we may jaw. He has extracted more subtle [sic] significances than I remembered" (*Holmes-Frankfurter Letters* 98). On August 19, 1922, he wrote the following lines to Laski: "Have you read Santayana's *Soliloquies* ('Soliquities' my nurse called them)? His scepticism seems most akin to my own—his dogmas or preferences the results of a temperament and Catholic bringing up that we have a perfect right not to share and I don't. When he speaks of life as hideous I venture to see the Church rather than a free aesthetic judgment" (*Holmes-Laski Letters* 440).

On February 16, 1924, Holmes wrote a letter to Justice Frankfurter, stating, "I believe you sent me Santayana's *Unknowable*, which needs a second reading. His general way of thinking and mine have much in common—but he has a damned patronizing way of presenting himself—

reserving the right to a strictly private smile as if he also is an illusion” (*Holmes-Frankfurter Letters* 168). The next day Holmes wrote to Laski: “Frankfurter sent me a discourse of Santayana’s on the Unknowable. It needs reading twice. In a general way his thinking more than that of other philosophers coincides with mine. But he has a patronizing tone—as of one who saw through himself but didn’t expect others to” (*Holmes-Laski Letters* 594). One day in 1924, Holmes met with Bertrand Russell and discussed Santayana. As Holmes explained to Laski in a letter dated April 18, 1924: “I had just read Santayana’s *Scepticism and Animal Faith*. (By the way I think our starting point put in plain words would be about similar or the same, but there is such a mass of literary arabesques and variations that though the book may gain as literature, I think it is diminished in philosophical significance.) I spoke of the tone of patronizing irony—and thought it an echo of Catholicism. [Russell] said: more of the Latin—Santayana thinks the English good for football, but thinks that speculation should be left to the Latin races” (*Holmes-Laski Letters* 608). On May 22, 1924, Holmes wrote again to Laski: “Cohen and his wife lunched here on Sunday—and his remarks led me to take down Santayana’s *Life of Reason*, volume IV, *Reason in Art* and I am rereading it and also (on the same stimulus) *Huckleberry Finn*. There is such a dilution of literature in Santayana—so much pork for a shilling when he philosophises, that it makes me think by way of reaction how many mathematically compacted sentences would it take to give us all that is important. Yet I believe I am more in accord with the *motif* of his arabesque than perhaps with any other philosopher—who has expressed his system” (*Holmes-Laski Letters* 618).

On January 27, 1931, he signed off on a letter to Justice Frankfurter by saying that “The Burroughs and Santayana are waiting” (*Holmes-Frankfurter Letters* 261). He reacted strangely to reading Santayana in 1931, writing again to Justice Frankfurter in a letter dated February 7, 1931: “Santayana comes nearer to hitting me than most philosophers but I dislike him. He patronizes, as being rich with the past experience of a Catholic although no longer believing in the Church. He has the openness to all thought that is anti-dogmatic and yet he sneers like a dogmatist. I take back or qualify the ‘dislike’ above. He is a good sauce to have on hand, but not a food. He writes like a gentleman but I doubt if he quite is one. Good reading anyhow” (*Holmes-Frankfurter Letters* 262).

Elsewhere Holmes had much more to say about Santayana. These excerpts suffice to prove his longstanding interest in Santayana.

³⁵ On September 27, 1921, Holmes wrote to Harold Laski, “Thinking that I remembered the *New Republic* speaking of Eliot, presently unknown to me, as the greatest going poet I, or rather my wife, after my refusal bought a little volume. It reminded me of Bill Hunt (the artist) to a pupil—‘Oh, I see you want to do something damned smart right off.’ I am not prepared yet to say it is not pay dirt—but I suspect a good deal of watering will be needed to get any gold” (*Holmes-Laski Letters* 373). On November 22, 1929, Holmes wrote to Laski that “I was pleased by a side slash at T.S. Eliot (poet and critic—did you ever hear of him—I am told regarded by youth as its prophet) in a periodical *Life and Letters* which has good reading in it” (*Holmes-Laski Letters* 1196).

³⁶ In a letter dated December 15, 1923, Holmes wrote to Harold Laski, “Hardy is a deity whom I have not worshipped. I have not read his later books, and the earlier ones read long, long ago with pleasure but without so far as I remember adoration” (*Holmes-Laski Letters* 568). On September 8, 1925, having just read Homer’s *Odyssey*, Holmes wrote a letter to Sir Frederick Pollock, stating that the book had left him “blank,” adding, “I think of a novel by Hardy—a gent. whom I have left alone since I was young” (*Holmes-Pollock Letters Vol. II* 168).

³⁷ Holmes refers to Joyce’s *A Portrait of the Artist* in a letter to Harold Laski dated April 12, 1917 (*Holmes-Laski Letters* 78). He mentions that book again in a letter to Laski dated April 20, 1917 (*Holmes-Laski Letters* 80). On November 5, 1923, he wrote to Laski, “Then as to James Joyce I read his first book—I suppose—autobiographical of his own youth, and was struck by his use of dirty words as well as by his telling things that I hardly regarded as a gift to mankind, though I suppose he felt like Rousseau. I have seen that and *Ulysses* taken solemnly—but thus far have felt free to wait for *Ulysses*” (*Holmes-Laski Letters* 556). On May 16, 1925, he wrote a letter to Lewis Einstein alluding to Joyce’s *Portrait of the Artist* (*Holmes-Einstein Letters* 240). In a letter to Laski dated March 27, 1930, Holmes noted that he “read of few pages” of Joyce’s *Ulysses* (*Holmes-Laski Letters* 1236). Holmes then wrote the following lines in a letter to Lewis Einstein dated March 29, 1930: “I will ask you in your turn if you have read Joyce’s *Ulysses*? I haven’t and don’t intend to, but I have looked into it. A reputable critic in the *New Republic* calls him a great poet. He may be, but he has what seems to me an abnormal propensity for dirty words and disgusting images of the lesser sort. I should think he must be queer in the nob, and so, though I think it possible that I am laying a genius on one side, I shall not read on” (*Holmes-Einstein Letters* 307).

³⁸ In a letter to Harold Laski dated August 31, 1924, Holmes claimed that he had taken up “one of Kipling’s short stories” (*Holmes-Laski Letters* 653). On August 27, 1925, he wrote to Laski, stating, “Even Kipling will tear the word from the guts of the dictionary or from speech and make it his own” (*Holmes-Laski Letters* 781). On March 7, 1928, he wrote to Laski, stating, “I am not impressed at what you say about Kipling. Many years ago I made up my mind that he did not interest me—that his view of the universe was too simple—and since then I thought that he had a breakdown. But as a story teller, and in spite of you, as a verse writer, I think he makes a direct appeal to the simpler emotions which we never are too sophisticated to feel when a man has the gift—as he has. Also, where Stevenson laboriously selects a word and lets you feel his labor, Kipling puts his fist into the guts of the dictionary, pulls out the utterly unavailable and makes it a jewel in his forehead or flesh of his flesh with no effort or outlay except of the pepsin that makes it part of him. But I thought he was finished years back” (*Holmes-Laski Letters* 1034).

³⁹ In a letter dated March 14, 1925, Holmes wrote to Harold Laski that he had read “Sinclair Lewis’s new novel [*Arrowsmith*], which I thought brilliant in parts, but suffering from a tendency to sacrifice art to the thesis” (*Holmes-Laski Letters* 721). In a letter dated May 6, 1925, Holmes wrote to Lewis Einstein, “Have you read *Martin Arrowsmith*? I enjoyed it thoroughly with its exposure of university and uplift bunk. The writer, Sinclair Lewis of *Main Street* fame, passed through here only the other day, gay and mellowed by success and no longer thinking that people wished to patronize him” (*Holmes-Einstein Letters* 237). Holmes again mentioned Lewis

and *Arrowsmith* in a letter to Laski dated December 5, 1925 (*Holmes-Laski Letters* 803). Weeks later, on December 17, 1925, Holmes wrote another letter to Laski referring to Lewis as “a pretty big chap” (*Holmes-Laski Letters* 807). Holmes noted in a letter to Laski dated October 28, 1927, that he had read Lewis (*Holmes-Laski Letters* 987).

⁴⁰ Holmes wrote the following lines to Lewis Einstein in a letter dated July 28, 1928: “Also a book by a young American living in Paris (Hemingway), *The Sun Still* [sic] *Rises*, which excites some interest in others and in me. No events greater than going to a bull fight, much conversation without an idea in it, characterizing phrases replaced by damn and hell, no marked character, the chief interest of the parties food and drink with a discreet hint of fornication, and most of them drunk nearly every evening. I think of rereading the book to try to find out why it interests and why I suspect it to be a work of art” (*Holmes-Einstein Letters* 287). On January 30, 1929, he wrote to Einstein, “Did you ever read anything of Hemingway: *Men without Women*, *The Sun also Rises*? They would lend themselves to some remarks” (*Holmes-Einstein Letters* 293). Holmes read Hemingway at the recommendation of the author Owen Wister. A few weeks before his July 28, 1928, letter to Einstein, Holmes wrote the following lines to Sir Frederick Pollock in a letter dated July 12, 1928: “Owen Wister has sent me *The Sun Also Rises* by Ernest Hemingway, which he seemed to think of great promise when the writer got away from garbage. I haven’t read it yet, but it sounds brisker than [Hugh] Walpole” (*Holmes-Pollock Letters Vol. II* 226).

Just over a month later, Holmes wrote again to Pollock in a letter dated August 30, 1928: “Thinking of [Chekov] and of an American living in Paris, Hemingway, author of *Men Without Women* & *The Sun also Rises*, I wonder at the illusion that one is more real if one evokes sordid situations and bad smells, than if one invites one’s readers to fresh air and agreeable and even noble people” (*Holmes-Pollock Letters Vol. II* 227). On the same day, Holmes wrote the following lines in a letter to Harold Laski: “I have read some stories by Chekov (qu.sp.?) well told but squalid—not the swinish instinct you attribute to Hemingway, but none the less displeasing to me” (*Holmes-Laski Letters* 1091). He sent a similar note to Nina L. Gray: “I read a queer book by Hemingway (living in Paris) *The Sun also Rises* – The doings of some people in whom I felt no interest, whose talk was devoid of ideas and for want of discriminating words used damned and Hell, who continually got drunk and who had no events except to go to some bull fight in Spain, and yet I was interested – I think probably because the narrative had a masterly simplicity and fact followed fact of course” (Letter to Nina L. Gray).

On November 30, 1929, Holmes wrote to Laski, “Hemingway must be a clever writer for he interests me when I can’t see any reason for it (in *The Sun Also Rises*). Hemingway, I believe, is something of an athlete and Wister writes to me has been hurt lately in a bull fight – which seems good. I am told that he is one of the heroes of the young – as T.S. Eliot has been. I don’t yet see the need to get very excited about him – but it is well to keep one’s mind open to the fashions of the day. Every fashion is beautiful while it is a fashion” (*Holmes-Laski Letters* 1205).

On December 18, 1929, Holmes wrote again to Laski: “You mentioned sometime back, *Farewell to Arms* – by Hemingway. I couldn’t quite use the superlatives that you and some others have

used about it – but it has some thrilling power. The author interested me by the wonder that he raised in my mind, especially by another book, *The Sun Also Rises* – as to why and how he interests me – extremely ordinary people and extremely ordinary talk (noted with intensity, I admit) and yet I read on. He certainly is something of a writer – whether a very great one I still doubt — as I, with due and sincere modesty, doubt about the great lights among the modernist painters – hastening to add that I have seen but little of Cézanne – their goddess God” (*Holmes-Laski Letters* 1209).

Mentions of Hemingway appear in several more of Holmes’s letters, but this sampling suffices to show Holmes’s ambivalent interest in the man.

⁴¹ Holmes admitted in a letter to Justice Frankfurter dated October 23, 1931, that he “stopped Lawrence, *Lady Chatterley’s Lover*, in transition” (*Holmes-Frankfurter Letters* 266).

⁴² In a letter to Harold Laski dated November 7, 1932, Holmes wrote that “Owen Wister sent me a poem by Robinson Jeffers—*Thurston’s Landing*—some marks of power in it, but I don’t care for it—though the advertisements tell me that Jeffers is the greatest living American poet” (*Holmes-Laski Letters* 1416).

⁴³ Holmes read Sassoon at the recommendation of Lewis Einstein. He wrote the following lines in a letter to Einstein dated February 8, 1931: “Style, I think, is sound, a matter of ear. I liked Siegfried Sassoon’s book. No special comment to make” (*Holmes-Einstein Letters* 322).

⁴⁴ On July 6, 1924, Holmes wrote a letter to Laski promising “to try to get *A Passage to India*,” adding that “Fred Pollock mentioned it also, the other day” (*Holmes-Laski Letters* 631). Two months later, in a letter dated September 6, 1924, he wrote to Lewis Einstein, “Your recommendation of a *Passage to India* comes on top of so many from England and here that though I have resisted thus far I think I must yield and send for it to the Old Corner Book Store, Boston’s principal dispensing agent” (*Holmes-Einstein Letters* 229-30). The only evidence that Holmes actually read Forster comes from a letter to Laski dated August 22, 1930, in which Holmes mentions that he was “beginning to wallow in easy literature,” including “short stories by E.M. Forster” (*Holmes-Laski Letters* 1277).

⁴⁵ *Whitney v. California*. 274 U.S. 357 (1927).

⁴⁶ Citing Oliver Wendell Holmes, Jr., “Law in Science and Science in Law,” *Harvard Law Review* 12 1899: 443, 460; *Vegeahn v. Guntner*, 167 Mass. 92, 106 (1896) (Holmes, J., dissenting); and Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harvard Law Review* 10 1897: 457, 466.

⁴⁷ See, e.g., “Why (and When) Judges Dissent” by Lee Epstein, William M. Landes, and Richard Posner.

⁴⁸ “For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law” (Holmes, “The Path of the Law” 464).

⁴⁹ “[I]t is perhaps true that no case illustrates the metonymic nature of the constitutional canon better than *Lochner*. It has lent its name to an entire chapter of constitutional history: the so-called *Lochner* Era. But what exactly are the associated meanings to which the metonym points us? What do we mean when we accuse someone of ‘*Lochnering*’? Some modern commentators have suggested that the case’s metonymic meaning remains unclear; that it is difficult to say with any certainty what is wrong with *Lochner*. But this confusion is, I think, rhetorical, as scholars struggle to draw a principled distinction between the Court’s efforts to protect the liberty of contract in the early twentieth century, and its determination to enforce civil and reproductive rights under Earl Warren and Warren Burger. I suggest that, in truth, all of these uncertainties—the revilement, the revision, the distinctions, and the clarifications—are simply part of an ongoing battle to distill *Lochner*’s metonymic meanings within constitutional practice. They are a manifestation of the continuing struggle to reclaim or refine the ‘hard’ spot the case occupies in the constitutional riverbank; the perpetual effort to define what *Lochner* stands for, or, more importantly, what it stands against.” (Bartrum 347)

⁵⁰ “First, there is the problem of assessing Holmes’s popularity and the meaning to be attributed to his famous dissent in *Lochner v. New York*. Is the orthodox wisdom about Holmes’s dissent correct in portraying Holmes as an enemy of substantive due process? Was Holmes a modernist hero who helped to push us into the twentieth century, or was Holmes a troubled modernist thinker who was still caught up in the nineteenth century jurisprudence of his day? What explains the popularity of Holmes’s *Lochner* dissent in the progressive era, and why did it take so long for Holmes to be lionized?” (Minda 129-30).

⁵¹ “Professor Felix Frankfurter was the first to praise Holmes, with a eulogistic essay in the *Harvard Law Review* entitled *The Constitutional Opinions of Justice Holmes*. It took some time for others to follow suit, but during the late 1920s and early 1930s, a series of articles appeared in the *New Republic* and other progressive New Deal magazines hailing Holmes as the ‘idol’ of the progressive movement and casting him as ‘the great dissenter.’ The authors of these articles were members of the liberal elite who sought to promote the New Deal and embraced Holmes’s methodology as a means of reversing the Old Court’s jurisprudence and ushering in President Roosevelt’s reforms. It was this conscious desire to elevate Holmes that led Frankfurter to compare Holmes’s reasoning to John Marshall’s in one of his eulogistic *Harvard Law Review* essays about the Justice—for such comparison lent legitimacy to the progressives’ project to convince the nation and the Court of the New Deal’s consonance with the Constitution. Similarly, others praised Holmes’s ‘faith that ... our social system is one of experimentation subject to the ordeal of experienced consequences,’ and commented that ‘no judge who has sat upon the bench has ever been more progressive in his attitude.’” (Krishnakumar 792-793)

⁵² See Bork 45.

⁵³ “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution” (*Lochner* 53).

⁵⁴ “There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker” (*Lochner* 58).

⁵⁵ “We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee” (*Lochner* 59).

⁵⁶ “It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.” (*Lochner* 64)

⁵⁷ Richard Posner calls this sentence “the most famous sentence in Holmes’s dissent—one of the most famous in the history of law and as precious to those who think the statute bad policy as it is to advocates of regulating the employment relation” (267).

⁵⁸ “*Lochner* is never cited for its legal authority. Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on *Lochner* would be a pointless, if not a self-destructive, endeavor” (Primus 244).

⁵⁹ *Winters* 527.

⁶⁰ *Griswold* 1703.

⁶¹ *Roe* 709.

⁶² *Casey* 846-850.

⁶³ “Years later, a majority of justices vindicated Holmes’s minority position, and free expression became a constitutional ‘lodestar’” (Feldman 192).

⁶⁴ 249 U.S. 47 (1919).

⁶⁵ 249 U.S. 211 (1919).

⁶⁶ See generally Fred D. Ragan. See also Feldman 229-234.

⁶⁷ *Dickinson* 171.

⁶⁸ Some examples are *Dennis, Brandenburg* 451-52, *New York Times Co. v. Sullivan* 276, *Winters* 540, *Thornhill* 105, *Curtis Pub. Co.* 148-49, *First Nat. Bank of Boston* 790-91. These together represent a mere sampling; other United States Supreme Court cases reference *Abrams*.

⁶⁹ 313 U.S. 236 (1941).

⁷⁰ 291 U.S. 502 (1934).

⁷¹ 235 F. Supp. 817 (S.D.N.Y. 1964).

⁷² 20 Conn. L. Rpt. 292 [not reported in A.2d] (1997).

⁷³ 667 N.Y.S. 2d 886 [slip op. 97674] (N.Y. 1997).

⁷⁴ 226 N.J. Super 155, 543 A.2d 997 (1988).

⁷⁵ 211 A.D.2d 310, 629 N.Y.S.2d 254 (1995).

⁷⁶ 349 F.3d 517 (7th Cir. 2003).

⁷⁷ 252 Kan. 894, 850 P.2d 852 (Kan. 1993).

⁷⁸ Legal historian Harold J. Berman makes this very analogy in *Law and Revolution: The Formation of the Western Legal Tradition*: “From the eleventh and twelfth centuries on, monophonic music, reflected chiefly in the Gregorian chant, was gradually supplanted by polyphonic style” (Berman 7). Of significance to Holmes’s use of sound is Berman’s observation that early Germanic and Irish law was written as poetry or in proverbs so that the illiterate public, drawn by the sound of the law, could memorize the rules governing society (Berman 59).

⁷⁹ Holmes’s writings on the First Amendment, discussed later in the chapter, substantiate the peacefulness at the core of his jurisprudence of competition.

⁸⁰ White uses these labels to refer to both Holmes and Brandeis and in the context of describing the shifting views of Holmes and Brandeis since their time on the bench.

⁸¹ Former President of the United States and Chief Justice of the United States Supreme Court William Howard Taft reportedly complained that Holmes “gives more attention to [...] his dissents than he does to the opinions he writes for the court, which are very short and not very helpful” (quoted in Lerner 132). See also the mention of Taft in the introduction to this dissertation.

Richard Posner has likewise said the following about Holmes’s dissent in *Lochner*: “Would the dissent in *Lochner* have received a high grade in a law school examination in 1905? I think not. It is not logically organized, does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, is not thoroughly researched, does not exploit the factual record, and is highly unfair to Herbert Spencer, of whom most Americans nowadays

know no more than what Holmes told them in the *Lochner* dissent. The dissent also misses an opportunity to take issue with the fundamental premise of the majority opinion, which is that unreasonable statutes violate the due process clause of the Fourteenth Amendment; the dissent is silent on the origin and purpose of the amendment. Indeed, at the end Holmes seems to concede the majority's fundamental (and contestable) premise that the due process clause outlaws unreasonable legislation and to disagree merely with the conclusion that New York's maximum-hours law is unreasonable. The sweeping assertions at the beginning of the dissent are thus discordant with its conclusion. Read as a whole, the opinion does not clearly challenge *Lochnerism* but just the abuses of *Lochnerism*. It is not, in short, a good judicial opinion. It is merely the greatest judicial opinion of the last hundred years." (271)

See also the mention of this passage of Posner in the introduction to this dissertation.

⁸² "The canonicity of a dissent is not a function of the dissent itself but of the later court or courts that redeem it and make it canonical" (Primus 247).

⁸³ The literature on this subject is so vast that it could not be summarized here. Those interested in the topic might read the account presented by Thomas Healy in *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—And Changed the History of Free Speech in America*.

⁸⁴ The *Toledo* majority was overruled by *Nye et. al v. U.S.* (1941), which cites Holmes's *Toledo* dissent from which it draws some of its reasoning. The following cases have expressly recognized the overruling of the *Toledo* majority: *Atlanta Newspapers, Inc. v. State*, 101 Ga. App. 105, 113 S.E. 2d 148 (Ga. App. 1960); *In re Grogan*, 972 F. Supp. 992 (E.D. Vir. 1997); *U.S. v. Rangolan*, 464 F. 3d 321 (2nd Cir. 2006); and *Weidt v. State*, 312 P. 3d 1035 (Wyo. 2013). Of these, *Rangolan* and *Weidt* discuss Holmes's dissent.

⁸⁵ Holmes "rate[d] the professionalism and discipline of the soldier higher than the merits of any particular cause" (Menand 43-44).

⁸⁶ The dichotomy can be expressed as the difference between a static and dynamic view. Consider this passage, which is not strictly about the common law but about two interpretative modes: "Static and dynamic modes have in common that the lawyer appeals to history for *authority*; to the authority of an original text or tradition or founding moment, or to the authority of the course of history itself, that is to the changing circumstances or long-run evolutionary trends that dictate the need for a new rule or new interpretation. The past is *read* as if it were a legal text with binding force, even if what is being cited is not exactly a text, but a body of intentions or a collection of practices. The premise is that if we decipher the signs correctly, we can read out of them principles and precedents that ought to control current interpretations. The past can control the present because it is continuously connected with the present through narratives of stasis or tradition, or of progress and decline.

"The *critical* modes by contrast are used to destroy, or anyway to question, the authority of the past. They assert discontinuous breaks between past and present. In ordinary legal arguments perhaps the most familiar of these critical modes is the argument from obsolescence or changed circumstances; the argument that the original reasons or purposes of a rule have ceased to exist, or that the rule sprang from motives or a context that are no longer acceptable to

modern eyes, are rooted in ugly, barbaric, primitive conceptions or practices.” (Gordon, “The Struggle” 125)

C.f., Jeffrey G. Miller’s “Evolutionary Statutory Interpretation,” which “examines the seeming contrast between the legal doctrines that the interpretation of statutes can evolve over time and that the interpretation of statutes must be grounded only in their texts, which never change unless amended by Congress” (409).

Bernadette Meyler has explained that “Originalists’ invocations of the common law posit a fixed, stable, and unified eighteenth-century content, largely encapsulated in William Blackstone’s *Commentaries on the Laws of England*” (553).

On evolutionary common law within a constitutional context, see Jack M. Balkin’s “The Roots of the Living Constitution.”

⁸⁷ Consider these examples from arbitrarily selected court decisions bearing the phrase “at common law.” “Jury trial at common law was not applicable to all common law actions, but was grudgingly conceded by the crown as to some and when our Constitution was adopted, was inapplicable to cases at common law where property was taken for public use” (*Welch v. TVA* 98). “The coroner is not bound at common law to put down the effect of the evidence, in writing, in any case” (*U.S. v. Faw* 1052). “To play at any game is no crime at common law, even to play for money; therefore there can be no offence unless it be attended with such circumstances as would themselves amount to a riot, or a nuisance, or to actual breach of the peace without the playing” (*U.S. v. Willis* 699). “In the case of libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty, with the same effect as at common law (as is true in the case of a libel in personam), after his right to sue at common law had become barred” (*McGrath v. Panama R. Co.* 304). “In divining the generic, contemporary meaning, we look to a number of sources, including federal law, the Model Penal Code, treatises, and modern state codes. At common law, it was not necessary to allege or prove an act in furtherance of a conspiracy” (*U.S. v. Pascacio-Rodriguez* 4). I acknowledge that the phrase “at common law” has a long usage and that Sir Edward Coke himself employed the phrase.

⁸⁸ “One of the most important contemporary constitutional debates is whether the meaning of the Constitution may evolve in light of current circumstances, or whether the Constitution should be interpreted in accordance with how the text was originally understood by the public that ratified it” (Schor 961).

“The Constitution and the common law had a core of ‘principle,’ of fundamental unchanging meanings. But principles had to be adapted to changing circumstances, and above all, to the modernizing dynamic of historical evolution. The static and dynamic modes were ultimately reconciled through teleology: The assertion that basic legal principles were ‘working themselves pure,’ were gradually evolving from primitive, obscure or cluttered forms to the highest and best realization of themselves. The ‘Classical’ liberals who dominated legal thought

at the end of the 19th century needed a dynamic view of history because they knew perfectly well that the economic and political liberalism they espoused had not existed in any pure form at the Nation's founding." (Gordon, "The Struggle" 128)

[...]

"In their insistence that the 'rule of law is a law of rules,' the originalist-traditionalist jurists are, ironically, swimming against the main current of *traditional* American historical jurisprudence, that is common-law dynamic adaptationism, given content and direction by liberal modernization theory" (Gordon, "The Struggle" 132).

"[T]extualism and originalism remain inadequate models for understanding American constitutional law. They owe their preeminence not to their plausibility but to the lack of a coherently formulated competitor. The fear is that the alternative to some form of textualism or originalism is 'anything goes[.]' [...]

"In fact, however, the alternative view is at hand, and has been for many centuries, in the common law. The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices. The emphasis on text, or on the original understanding, reflects an implicit adherence to the postulate that law must ultimately be connected to some authoritative source: either the Framers, or 'we the people' of some crucial era. Historically the common law has been the great opponent of this authoritarian approach. The common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time. And it is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by 'we the people,' that best explains, and best justifies, American constitutional law today." (Strauss 879)

⁸⁹ "The common law method has not gained currency as a theoretical approach to constitutional interpretation because it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind. But our written constitution has, by now, become part of an evolutionary common law system, and the common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law." (Strauss 885)

[...]

[...] "Constitutional law in the United States today represents a flowering of the common law tradition and an implicit rejection of any command theory.

In a sense this should not be surprising. The common law is the most distinctive feature of our legal system and of the English system from which it is descended. We should expect that the common law would be the most natural model for understanding something as central to our legal and political culture as the Constitution." (Strauss 887)

[...]

"Properly understood, then, the common law provides the best model for both understanding and justifying how we interpret the Constitution. The common law approach captures the central features of our practices as a descriptive matter. At the same time, it justifies our current practices, in reflective equilibrium, to anyone who considers our current practices to be generally acceptable—either as an original matter or because they are the best practices that

can be achieved for society. The common law approach makes sense of our current practices in their broad outlines; but at the same time, it suggests other ways in which our practices should be modified.” (Strauss 888)

⁹⁰ “[W]hen English common law was being adopted in America there was sometimes a question as to how far certain statutes were to be regarded as inseparable from the customary common law” (Plucknett 309). “In Blackstone, early American lawyers encountered a legal authority who regarded precedent as the cornerstone of the common law, the principal bulwark against the usurpation of the rule of law by judicial tyranny” (Bader 8).

See also *Van Ness v. Pacard*. 27 U.S. (2 Pet) 137, 144 (1829): “The common law of England is not taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.”

⁹¹ “Identification of the role of the common law in providing a constitutional foundation does not suggest an intent to adopt a federal common law. Rather, the ‘common-law mind’ was a way of thinking, of using judicial authority to express abstract principles through the application of particular privileges and rights, such as trial by jury. It rested on consent created by long adherence to custom and precedent, and it was controlled by practice rather than abstraction.” (Konig 510-511)

[...]

“Common-law constitutionalism [...] provided both legitimacy and method. It meant a deference to the tacit consent that came only from long adherence to precedent and the refinement and perfection of law by common-law reasoning and decision making” (Konig 511).

⁹² “Holmes considered himself a Darwinist and concentrated his scholarly energies on the question of how law evolves. When Holmes was attending the meetings of the Metaphysical Club during the early 1870s, Chauncey Wright, the group’s leader who Holmes treated as a mentor, was in the midst of an extended, mutually supportive correspondence with Darwin.” (Blasi 25)

⁹³ E.g., Ben W. Palmer, “Hobbes, Holmes, and Hitler.” *American Bar Journal* 31 1945: 569-573; Ben Palmer, “Defense Against Leviathan,” *American Bar Journal* 32 1946: 328-332; Ben W. Palmer, “The Totalitarianism of Mr. Justice Holmes: Another Chapter in the Controversy,” *American Bar Journal* 37 1951: 809-811.

⁹⁴ E.g., Mark DeWolfe Howe, “The Positivism of Mr. Justice Holmes,” *Harvard Law Review* 64 1951: 529-546; Henry M. Hart, Jr., “Holmes’ Positivism—An Addendum,” *Harvard Law Review* 64 1951: 929-937; Mark DeWolfe Howe, “Holmes’s Positivism—A Brief Rejoinder,” *Harvard Law Review* 64 1950-51: 937-939.

⁹⁵ E.g., Albert W. Alschuler, “Descending Trail: Holmes’ Path of the Law One Hundred Years Later,” *Florida Law Review* 49 1997: 353-420; Linda E. Fisher, “Pragmatism Is as Pragmatism Does: Of Posner, Public Policy, and Empirical Reality,” 31 2001: 455-492; R. Blake Brown &

Bruce A. Kimball, "When Holmes Borrowed from Langdell: The Ultra Legal Formalism and Public Policy of Northern Securities (1904)," *American Journal of Legal History* 45 2001: 278-321; Barry Friedman, "History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner," *New York University Law Review* 76 2001: 1383-1455; David E. Bernstein, "Lochner's Legacy's Legacy," *Texas Law Review* 82 2003: 1-64; Mark Strasser, "Why Theories of Law Have Little or Nothing to Do with Judicial Restraint," *Colorado Law Review* 74 2003: 1379-1408.

⁹⁶ "He is one of the few jurists in American history whose career was long enough, and whose impact pervasive enough, to have functioned as a kind of repository of changing juristic attitudes. Holmes's role as a repository has in part been a function of the seminality of his thought and the memorable quality of his style, but it has also been a function of the deeply ambivalent character of his jurisprudence and the cryptic nature of his expressions." (White 440)

⁹⁷ "It was in thinly settled colonial America that the Commentaries received most acclaim. By 1776 nearly twenty-five hundred copies were in use here, one thousand five hundred of which were the American edition of 1772; a sale which Burke in 1775 in his speech on 'Conciliation with the American Colonies' said rivaled that in England." Julian S. Waterman, "Thomas Jefferson and Blackstone's Commentaries," *Illinois Law Review* 27 1932-33: 629-659. "It is part of the accepted wisdom of American history that Sir William Blackstone and his *Commentaries on the Laws of England (Commentaries)* have exercised a dominant and pervasive influence on America's political thought and legal development," Dennis R. Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," *New York University Law Review* 51 1976: 731-768. "Before the Revolution one thousand English sets [of Blackstone's *Commentaries*] at ten pounds a set were sold in American and many more American editions sold at the bargain price of three pounds a set. In fact, before the war broke out almost as many sets were sold in the American colonies as in England. The work had an enormous effect in America not because of the 'social consistency' of Blackstone's thinking, but because it was the only general treatise available in a land where well-trained lawyers were almost non-existent" (McKnight 401). Moreover, "during the period from 1789 to 1915, the authority of the *Commentaries* was cited ten thousand times in reported American cases" (McKnight 401). Americans' reverence toward Blackstone was not reciprocated: "While in Parliament from 1761 to 1770, he went along with all those restrictive measures which first enraged and then estranged the American colonists. Actually, he was very extreme in his anti-American bias, and he appeared among the most vociferous advocates of a harsh and uncompromising attitude towards America. It might be said that he definitely delighted in showing the colonists the rod" (Chroust 28-29).

⁹⁸ Coke stated, "And it appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and somtimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void" (Coke 275).

Cf. Hale's statement: "I come now to that other Branch of our Laws, the common Municipal law of this Kingdom, which has the Superintendency of all those other particular Laws used in the before-mentioned Courts, and is the common Rule for the Administration of

common Justice in this great Kingdom; of which it has been always tender, and there is great Reason for it; for it is not only a very just and excellent Law in itself, but it is singularly accommodated to the Frame of the English Government, and to the Disposition of the English Nation, and such as by a long Experience and Use is at it were incorporated into their very Temperament, and, in a manner, become this Complexion and Constitution of the English Commonwealth.” (Hale 45)

⁹⁹ To say that Blackstone was categorically opposed to legislation is hyperbolic. The mistake is understandable given Blackstone’s celebration of the common law. However, Blackstone notoriously declared that, “if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms [...] that is vested to with authority to control it” (Blackstone 91). Blackstone would seem to suggest here that a statute could be valid even if it does not correspond with divine or natural law, a position that contradicts his willingness to overturn any prior cases that do not comport with reason or divine law: “For it is established rule to abide by former precedents, where the same points come again in litigation; [...] [y]et this rule admits of exception, where the former determination is most evidently contrary to reason, much more if it be contrary to the divine law” (Blackstone 69-70). Michael Lobban explains that “Blackstone seems to have adopted [his] notion of parliamentary without fully realizing its difficulties for his natural-law arguments and his belief in the primacy of the common law” (326).

¹⁰⁰ See generally Holmes’s “bad man theory” in “The Path of the Law.”

¹⁰¹ “[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right” (Holmes, “The Path of the Law” 458). Here Holmes calls the law a “body of dogma or systemized prediction” (Holmes, “The Path of the Law” 458).

¹⁰² “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. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time. I once heard the late Professor Agassiz say that a German population would rise if you added

two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced. No one will deny that wrong statutes can be and are enforced, and we should not all agree as to which were the wrong ones.” (Holmes, “The Path of the Law” 460)

¹⁰³ “[N]owadays no one doubts that a man may be liable, without any malevolent motive at all, for false statements manifestly calculated to inflict temporal damage. In stating the case in pleading, we still should call the defendant’s conduct malicious; but, in my opinion at least, the word means nothing about motives, or even about the defendant’s attitude toward the future, but only signifies that the tendency of his conduct under the known circumstances was very plainly to cause the plaintiff temporal harm.” (Holmes, “The Path of the Law” 463)

¹⁰⁴ See Chapter three of this dissertation.

¹⁰⁵ “[T]he North [...] was anxious to leave transcendentalism behind. The generational shift from transcendentalism to pragmatism is well known. [...] A classic example is Oliver Wendell Holmes Jr., the son of Emerson’s good friend Oliver Wendell Holmes Sr. The younger Holmes left for a war he called ‘a crusade in the cause of the whole civilized world,’ but returned to announce, ‘I do not know what is true.’ Higher law lost its allure among the young men who fought a bloody war on its behalf.” (Levine and Malachuk 15-16)

¹⁰⁶ For more on progressive efforts to disenfranchise black voters, see Michael Perman’s *Struggle for Mastery*, Jack Temple Kirby’s *Darkness at the Dawning*, and Dewey W. Grantham’s *Southern Progressivism*.

¹⁰⁷ See generally Joseph Scotchie’s *Revolt from the Heartland*, George Nash’s *The Conservative Intellectual Movement in America Since 1945* at 186-92. For more tendentious accounts, see generally Justin Raimondo’s *Reclaiming the American Right* and Murray Rothbard’s *The Betrayal of the American Right*.

¹⁰⁸ Consider *Giles v. Harris* in which Holmes refused to grant relief from an Alabama law disqualifying many blacks from voting.