Links to other recent work by Professor Weinberg appear at the conclusion of this article.

HOLMES' FAILURE

Louise Weinberg[*]

96 Mich. L.R. 691 (1997)

I. PRELIMINARILY

I have just set down the March 1997 *Harvard Law Review*, with its centennial celebration[1] of Oliver Wendell Holmes' *The Path of the Law*.[2] *The Path of the Law* is a grand thing, in my view Holmes' best thing. But just the same, I find myself surprised that on this occasion none of its celebrants[3] raised what has always seemed to me a weakness of the piece, and of Holmes' much earlier book, *The Common Law*.[4] This is a weakness that is at once a reflection and a forecast of the failure of its author.

*****William B. Bates Chair for the Administration of Justice, University of Texas. A.B. 1964, Cornell; J.D. 1969, LL.M. 1974, Harvard. -Ed.

1. *See* Symposium, The Path of the Law *After One Hundred Years*, 110 HARV. L. REV. 989 (1997).

2. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457 n.1 (1897) ("An Address delivered by Mr. Justice [sic] Holmes, of the Supreme Judicial Court of Massachusetts, at the dedication of the new hall of the Boston University School of Law, on January 8, 1897.").

3. The contributors included William Fisher, Robert Gordon, Tracy Higgins, Martha Minow, Sheldon Novick, Richard Parker, Richard Posner, David Rosenberg, and G. Edward White. Similar symposia were held at the University of Iowa College of Law on January 25, 1997, and at Boston University on September 19-20, 1997. Commemorative articles from the Iowa symposium will be collected in THE LEGACY OF OLIVER WENDELL HOLMES, JR.: THE PATH OF THE LAW AND ITS INFLUENCE (Steven J. Burton ed., Cambridge University Press, forthcoming 1998), and articles based on the Boston University symposium will appear at 78 B.U. L. REV. (forthcoming June 1998).

4. O. W. HOLMES, JR., THE COMMON LAW (Boston, Little, Brown & Co. 1881).

Writers today do seem to have come to terms with a revised, rather mean Holmes.[5] But the particular failing I have in mind seems to have escaped remark. Yet I am beginning to think it more salient to an ultimate evaluation of Holmes than what is more typically being said.

(1997) 96 Mich. L.R. 692 In the brief remarks that follow, I will try to convey what I think it is that we have not quite been seeing in Holmes' thinking and work. I will try to identify and to bring into focus the flaw (for want of a better word, I have used "littleness") that undermined Holmes' work and made his ultimate failure inevitable. For I take it that Holmes was a failure. He failed to participate in the larger intellectual history of law in our century; failed, for the most part, to set his mark not only upon constitutional history but even upon the common law; and failed to come to grips with the big issues of his and our time. I will try to suggest how he could have suffered a failure of such magnitude notwithstanding his great talents and ambition. I will try to draw some connections between Holmes' limitedness and Holmes' life and judicial craft. I will add a few words in closing about the persistence of the Holmes legend.

II. A HOLMES ON THE SIDELINES

The Path of the Law is probably Holmes' greatest achievement. It is so thoroughly grown up.[6] It is the one work in which Holmes' voice is truly the voice of the future. *The Path of the Law* set a new style in thinking about law; it was a clarion call to twentieth-century American

---

5. In G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1409, 1460 n.264 (1990), a preeminent Holmes biographer and admirer points to a large body of "revisionist" work. Professor White does not deny Holmes' coldness but thinks "overstated" such characterizations as Grant Gilmore's "savage, harsh and cruel." *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 48-49 (1977). For similar treatment, *see* William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship*, 90 COLUM. L. REV. 809, 831 (1990). Significant Holmes debunkers include GILMORE, *supra*; Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254 (1963). For discussion, *see also* Gary J. Aichele, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE 61, 144 (1989).

6. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 270-77 (1970) (describing Holmes, in *The Path of the Law*, as "the completely adult jurist").

legal realism.[7] But reading it over is an oddly unsatisfying experience. There is a certain, well, *littleness* in the work. And the littleness of the work suggests a certain littleness of the man. To better convey my point, let me try to sort out its discrete, if overlapping and intertwined, strands.

First, there is the problem of the great issues. Holmes was nothing if not ambitious. In *The Path of the Law* the picture he set out to paint was the big picture. Yet that is precisely where he came up short. I am reminded of an encounter I had some years ago with a distinguished colleague. He was giving a talk on the "equity" of courts, an old-fashioned way of referring to judicial lawmaking. For the purpose he set up a hypothetical case. Incredibly, his hypothetical was about a "man who accidentally builds a house on the land of another." I say "incredibly" not because of the unlikelihood of the scenario, but because this was at a time when classes of thousands of litigants were seeking injunctions against violations of the Constitution or acts of Congress. Courts were ordering legislatures reapportioned, prisons reformed, hospitals shut down, populations of **(1997) 96 Mich. L.R. 693** schoolchildren transferred. I confess I could not refrain from suggesting to my colleague that he update some of his examples. Some time later, I learned that he had given the same talk elsewhere and indeed had updated it: his hypothetical was now about "a man who accidentally repairs the computer of another." For all his brilliance, my colleague's imagination was bogged down in old textbook posers about claims for restitution of gratuitous benefits, at a time when the world was caught up in claims for great political wrongs.

Holmes' ideas are stale, it seems to me, in just the way that my friend's ideas were. It pains me especially to be seeing *The Path of the Law*, an icon of realism and the modern, in this musty light. But there is nothing in the piece, or in the earlier study, *The Common Law*, or indeed in those other of Holmes' nonjudicial writings I have seen, about the great issues even of the times in which Holmes wrote. The Civil War was over, but the race and labor problems of the country were severe. Rural southern blacks had been reduced to conditions of servitude roughly approximating their condition under slavery. The later American Indian populations were struggling for survival. Our eastern coastal cities were

---

7. *See* LON L. FULLER, THE LAW IN QUEST OF ITSELF 52 (1940) (identifying Holmes as the progenitor of the "realist school").

teeming with poor European immigrants. Great financiers were accumulating untaxed wealth on an unimaginable scale. But the mind of Holmes was locked in a dusty law office, where a conscientious counselor advises his client how to avoid legal liability.

This in turn raises a second peculiarity of Holmes' work, the absence, from Holmes' thinking, of public and constitutional law. When he embarked on *The Common Law*, Holmes in effect confined his thinking for most of the rest of his life within the cramped compass and too-easy ground of private-law damages cases. The consequences were disastrous for him. Holmes' mind became so engaged with the narrow philosophical questions raised by private law that there was no room in it for public law. His imagination was deflected from larger issues, from more powerful mechanisms, and from constitutional theory. If he had a clue that the future of legal intellectual history would lie in constitutional, rather than common law theory, he shut his eyes to it. However modern *The Path of the Law* was in some respects, its author was looking backward.

At this point it is necessary to single out a third strand of Holmes' difficulties — the strand that has to do with morals. It is almost a commonplace to say that Holmes was amoral. His opinions **(1997) 96 Mich. L.R. 694** have a certain ruthlessness.[8] It seems obvious that there is a connection between the Holmes that was amoral and the Holmes that was the theorist of the separation between law and morals. I am not saying that Holmes was unaware of the moral force of law. He made it memorably clear how well he understood that when, in *The Path of the Law*, he wrote, "The law is the witness and external deposit of our moral life."[9] Rather, in trying to repeat one of the messages of *The Common Law*,[10] that law must be distinguished from morals,[11] Holmes was focusing on the *nature of the responsibility* the common law imposes. He was trying to show that the common law is a system of *liabilities*, not moral *duties*. The defendant at common law can break a contract or commit a tort simply by paying damages. This was a chief element of the separation between law and morals that was essential to Holmes' thought.

---

8. It seems *de rigeur* to refer here to Holmes' notorious "[t]hree generations of imbeciles are enough." *See* Buck v. Bell, 274 U.S. 200, 207 (1927).

9. Holmes, *supra* note 2, at 459.

10. *See, e.g.*, Holmes, *supra* note 4, at 162.

11. *See* Holmes, *supra* note 2.

Morals are what is right; but law, according to *The Path of the Law*, is only the monetary penalty of which a "bad man" must keep clear.[12] Holmes' "bad man" has to consult a lawyer to find out what he must keep clear of; the lawyer, in turn, must consult the latest[13] cases, those "oracles of the law,"[14] and on this basis must try to advise the "bad man." Seeing this, Holmes announces—it is a wonderful moment—that in this practical sense law is only "[t]he prophecies of what the courts will do in fact."[15]

But for me the far more telling moment in *The Path of the Law* is the moment when Holmes seems to have a fleeting insight that there are cases in which law and morals can become one. That is when equity will grant an injunction:

> I have spoken only of the common law, because there are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction, and will enforce **(1997) 96 Mich. L.R. 695** it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court.[16]

But now Holmes takes an electrifying step. Such cases, being rare, Holmes insists, are exceptional. He *dismisses* them, out of hand, forever, curtly, briefly, astonishingly, remarking only, "I hardly think it advisable to shape general theory from the exception. . . ."[17]

Having in this way separated private law from morals, Holmes equally casually separates the Constitution from morals: "[N]othing 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

---

12. *See id.* at 459.

13. "The use of the earlier reports is mainly historical. . . ." *Id.* at 458.

14. *Id.* at 457.

15. *Id.* at 461. This aphorism captures the way lawyers formulate advice from studying cases, but has been criticized as inapt for the description of law as fashioned in a court of last resort. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 138-44 (1961). Holmes might have replied that although lawyers must discern what the law is, judges make it; that is a different process.

16. Holmes, *supra* note 2, at 462.

17. *Id.* at 462.

law."[18] Here with a word or two he reveals how completely he has shut out from the world of his thought everything that would become central to ours. Nobody did this to Holmes—he put the blinkers on himself.

A further strand of Holmes' pathology also has to do with equity, but from a somewhat different angle. In his book, *The Common Law*, as well as in *The Path of the Law*, Holmes saw his task as transforming the complexity and richness of common law obligation into a formal theory of liability, one that would be thoroughly objective. Between these two writings, Holmes spent twenty years on his state's high court, dealing virtually exclusively with common law cases.

In these twenty long years, the treasury of Holmes' life became so filled with the small change of the common law that the author of *The Path of the Law* was one who could not imagine—and utterly failed to foresee—the triumph of equity.

Recall Holmes' momentary perception in *The Path of the Law* that in equity, law and morals could become one. Equity, then, spoiled the symmetry of Holmes' positivistic reasoning. So he willfully left it out of his thinking. And so he failed to see the potential uses of equity in the litigation of larger public issues. Stuck in his private-law universe, always examining law from the vantage point of his "bad man" defendant, Holmes did not perceive that for "great political wrongs,"[19] compensation in damages is meaningless. When the plaintiff comes to court to secure her right to vote, only injunctive relief has any utility. At least since 1908 it has been open **(1997) 96 Mich. L.R. 696** to the profession to counsel a client to go on the offensive and challenge law directly, in suits against government.[20] Eventually the structural injunction would become the characteristic remedy of American public-law litigation in the twentieth century. Whatever limits, toward the close of the century, the Supreme

---

18. *Id.* at 460.

19. This is from Holmes' opinion in *Giles v. Harris*, 189 U.S. 475, 488 (1903), discussed in a later segment of this essay. *See infra* text accompanying notes 79-87.

20. *Cf. Ex parte Young*, 209 U.S. 123 (1908) (holding that a federal court may enjoin enforcement of an unreasonable state regulation notwithstanding the Eleventh Amendment, and that in such cases the Constitution furnishes a private right of action).

Court has placed on the injunctive remedy,[21] the alternative of damages actions in its nature remains largely irrelevant to constitutional and other public-law litigation. But for Holmes to have foreseen this he would have had to break the charm of his lifelong engagement with the common law, and of his delusion, which his life until *The Path of the Law* had only confirmed, that equity was not worth thinking about.

This brings me to the strand of the problem that has to do with rights. *The Path of the Law* is superb on law as a prediction of a bad man's liabilities; but it is strangely silent on law as an assessment of even a bad man's rights against those with power over him. Predicting a client's potential liabilities may still be the ordinary business of a good many lawyers, but today our thinking is more rights-based. The separation between law and morals that was so essential to Holmes' thought closed his eyes to the moral thrust and tendency that can enter law when rights are asserted, particularly when fundamental rights are asserted. It is only a step from a positivistic outlook that separates law from morals to an unconcern for rights; and it is only a step from an unconcern for rights to an aversion to judicial review altogether.

Also closely connected with Holmes' eventual attitude toward judicial review was his view of policy. I mean the policies underlying law. *The Path of the Law* was not only a manifesto of American legal realism; it was also a powerful statement of the functionalist proposition that to interpret law is to discover social policy. Holmes announces in *The Path of the Law* that he will trace out "an ideal which as yet our law has not attained."[22] This ideal turns out to require a conscious turning away from outworn tradition and history, toward a search for the reasons of public policy that justify a **(1997) 96 Mich. L.R. 697** legal rule.[23] Public policy is the social good sought to be obtained by the rule.

---

21. For contemporaneous accounts of the Supreme Court's post-Warren Court assaults on the Warren Court legacy of public interest litigation, *see* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (early Rehnquist Court); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982) (late Burger Court); Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977) (early Burger Court).

22. Holmes, *supra* note 2, at 458.

23. This "ideal" would be realized "when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall

Yet for all Holmes' interest in the social policy underlying law, the question whether a particular law is just would have had little meaning for him. Not that the positivist's familiar point, that a law could be both "law" and immoral, was his point. Rather, the future use to which Supreme Court Justice Holmes would put his early interest in the policy of law would be *to sustain law against constitutional challenge*. If he could find a rational basis for a legislature's act, the inquiry, in his view, was at an end. We remember Holmes' Supreme Court years for his deference to the political branches, his fatalism in the face of political will.[24] This restrained, prudential Holmes is the same Holmes who, as a theorist, focused so closely upon the public policy underlying a rule of private law.

In sum, then, *The Path of the Law* may be a banquet of legal theory, but none of the really important guests are invited. And it appears that Holmes staged the banquet precisely to teach us to appreciate the feast without them. Looking at the author of *The Path of the Law*, we see a Holmes whose development seems to have been arrested by an exclusive interest in private law. Preoccupied by quotidian questions of tort or contract or property, blind to the possibilities of challenges to law, this was a man who, when a Supreme Court Justice, would exhibit a hostility to constitutional litigation and a distaste even for the older forms of defensive judicial review. His earlier focus on the policy underlying a rule of private law would become a conviction that law with a rational basis should be let stand. Eventually this, with Holmes' contempt for judicial power, would become his *idee fixe* that it was a judge's job to give the majority what it wanted.

But my point is not that the author of *The Path of the Law* would turn out to be illiberal, although that was true and important; what I am saying is that he would turn out to be *irrelevant*. Holmes had enormous gifts, and ambition to match them, but his mind seems to have busied itself with subjects too small for it. Holmes **(1997) 96 Mich. L.R. 698** reminds me

---

spend our energy on a study of the ends sought to be attained and the reasons for desiring them." *Id.* at 474.

24. *See, e.g.*, Richard A. Posner, *Introduction to* THE ESSENTIAL HOLMES at xii (Richard A. Posner ed., 1992) (arguing that, in Holmes' *Lochner* dissent and his other opinions on substantive due process, he created the theory of judicial self-restraint); *see also infra* note 65.

of Burke's epitomization of the younger Pitt: "Great parts but a little soul."[25]

I ask myself whether it is *fair* to expect Holmes to have concerned himself with larger questions. In *The Path of the Law*, Holmes was addressing law students. Legal education then, even more than now, was about private legal liabilities. The same excuse can be made for *The Common Law*, since the book was a distillation of lectures Holmes had given at Harvard. *The Path of the Law* was about the business of ordinary lawyering, not about great cases. "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves," Holmes says, in his Brahmin's humbled prose, "and hence it becomes a business to find out when this danger is to be feared."[26] Besides, in this smallness Holmes was a creature of his time. Writers in those days stuck to the common law, just as Holmes did, venturing into equity only to consider such contrivances as trusts or receiverships.[27] Holmes must also have been a captive, to some extent, of his Anglophilism. Despite a venerable, if weak, British public-law tradition, British writers in Holmes' day also confined much of their thinking to problems of private lawsuits. The English had the excuse of a national court of last resort that then, as now, was expected to decide uninteresting questions about conveyances and contracts. But of course Holmes had that excuse, too. Under the wrong turn taken in *Swift v. Tyson*,[28] the Supreme Court in Holmes' day was bogged down in cases as trivial as those that came before the House of Lords.

---

25. RUSSELL KIRK, EDMUND BURKE: A GENIUS REDISCOVERED 192 n.* (1967) (noting as the source for this characterization 1 JOSEPH FARINGTON, THE FARINGTON DIARY 212 (James Greig ed., 1923) (entry of July 19, 1797)).

26. Holmes, *supra* note 2, at 457.

27. I was interested to find that in his Holmes Lecture my former teacher, Benjamin Kaplan, remarked of *The Common Law*: "Holmes' entire treatment of Contract seems to me a little flawed by his failure to make sufficient connection with Equity." Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1834 (1983). Kaplan continued: "In the preface to the book [*The Common Law*, Holmes] says he is passing over Equity—a regrettable omission in a book of general theory." *Id.*

28. 41 U.S. (16 Pet.) 1 (1842) (holding that on nonfederal questions of a general nature, neither strictly local nor fixed by statute, federal courts were free to exercise an independent judgment on what the true general common law rule was), *overruled* by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

Perhaps the wonder is that despite these influences Holmes was able to say so much in the few pages of *The Path of the Law* that had to be said. The profession was still prerealist, still prepositivist about case law. But from the Holmes we all so much admire, a few **(1997) 96 Mich. L.R. 699** realist remarks in *The Path of the Law*, gratifying as they are, are not enough.

III. HOLMES IN HIS PRIME: THE LIFE "LIVED GREATLY"[29] BEFORE HOLMES' WASHINGTON YEARS

The hero we remember as returning again and again to the bloody battlefields of the Civil War[30] (heroically? fatalistically? prudently?) is the man we can also find seating himself repeatedly, however magisterially, on the sidelines of the battle for the future of American law. This is the man who ultimately saw it as his duty, as a Justice of the United States Supreme Court, only to facilitate the subordination of political minorities to popular will.[31]

In his younger days, Holmes lived in the shadow of his famous father, sensitive to the "Jr." in his name. Approaching the age of forty, Oliver Wendell Holmes, Jr. was only a law school instructor. A failed lawyer, he had authored some legal materials and served as editor for a proprietary

---

29. The paragraph from which this Holmesian phrase is taken is set out in a footnote in the final segment of this essay. *See infra* note 141.

30. Holmes was shot through the chest at Ball's Bluff, near Leesburg, Virginia, on October 21, 1861; in the heel at Chancellorsville, Virginia, on May 3, 1862; and in the neck that same year on September 17, at Antietam Creek near Sharpsburg, Maryland. Given the state of medical and surgical skill at that time, any of these wounds might have been fatal. These experiences are widely seen as central to Holmes' sense of himself and to his skepticism and fatalism as well as a certain sense of patriotic glory. Among the myriad accounts is EDMUND WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 743-96 (1963). Holmes memorably said of his war experiences that he had been "touched with fire." *See* Memorial Day Address of 1884, *in* THE OCCASIONAL SPEECHES OF OLIVER WENDELL HOLMES 15 (Mark DeWolfe Howe ed., 1962).

31. *But see* G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 634 (1982) (remarking that there is an apparent "discontinuity" between Holmes' understanding that case law is actively made and Holmes' "deference" to legislatures); *id.* at 670-71 (arguing that these opposing qualities are reconciled in Holmes' appreciation of the difficulties of making law that is not "gossamer").

law journal. In a desperate last bid for notice before the age of forty, he produced *The Common Law*, a workup of his lectures. *The Common Law* is so prim in tone and medieval in sensibility that even if it were not as wrong as it is it could not be read with pleasure today—even by those who retain a burning interest in objectified liability. But the book was a succes d'estime in its day. It brought the Harvard law school instructor a professorship, and shortly thereafter an appointment to the Supreme Judicial Court of the Commonwealth of Massachusetts. Yet we can now see that Holmes at forty was already the blinkered man who at sixty was to write *The Path of the Law*.

I see Holmes as settling into his private-law *metier* with *The Common Law*. I think he then became imprisoned in it, as it became **(1997) 96 Mich. L.R. 700** clear that he was to live out his life in the private-law atmosphere, however august, of the Massachusetts high court. Perhaps he *felt* imprisoned. Certainly in the twenty years between *The Common Law* and *The Path of the Law* we have what must be assessed, even by Holmes' fans, as a failure on the grand scale: over a thousand uninteresting opinions by Holmes during his tenure on the state bench. It is appalling that we can make these yield little or nothing that we care about today. It is a chicken-and-egg question whether his crabbed view of the common law or his stifled ambition was the worm within; his worm within had destroyed him long before his nomination to the United States Supreme Court.

I suggested just now that this disappointing common law judge was the same man as the author of *The Common Law*. I should have said that the judge was a lesser man. For all Holmes' earlier distinction in legal theory, his work on the Massachusetts court was flat and atheoretical. The transformative ideas Holmes had advanced in the book, and the tone of profound inquiry, went away. The functional analysis of legal rules upon which Holmes was to insist in *The Path of the Law*, the teleological search for the law's reason, probably the most powerful engine of legal analysis, simply is not a feature of Holmes' state judicial opinions. On the state high bench Holmes sifted the facts like a trial judge, making terse, conclusory pronouncements of law.[32] When not peremptory he was querulous. He culled citations in long strings from the briefs and contented himself with vague allusions when the briefs gave him no help.

---

32. For a similar reaction, *see* White, *supra* note 5, at 1477.

But more disappointing even than his failure to become the judicial theorist his writings had promised was his failure to take hold of the law and impress upon it some needed change, to enter into the living history of the common law and to make an originator's mark. From his years on the state court, although he might have had it in him, Holmes emphatically did not emerge as a Shaw, a Doe, a Cardozo, a Traynor.

One who surveys his contributions to the American common law and compares them with those, let us say, of Cardozo, cannot escape a sense of disappointment. Even his most ardent admirers will have to admit, I believe, that his influence as a judge—at least in the field of private law—fell far short of being commensurate with his general intellectual stature.[33]

Some notice should perhaps be taken of Holmes' Massachusetts dissents in labor cases, if only because of the background they provide **(1997) 96 Mich. L.R. 701** to his celebrated *Lochner* dissent. There is no question that, while on the state bench, Holmes did show a surprising openness to the rights of workers to organize[34] and to picket.[35] But, ironically, his labor cases typically were in equity. It is the mass of his common law opinions that justify the universally negative assessment of his twenty years on the state bench. It is among these common law opinions that one finds cases about which it is possible to go beyond that assessment and affirmatively say to Holmes, "J'accuse." Holmes had concluded in *The Common Law* that "[t]he general principle of our law is that loss from accident must lie where it falls."[36] Grant Gilmore once savagely pointed out that for Holmes, "ideally, no one should be liable to anyone for anything."[37] That is not quite fair; on the Massachusetts bench Holmes did quite often rule in favor of plaintiffs, perhaps simply to fall in with the majority of his brethren, as was his practice. But in the numbing succession of his dull opinions in dull cases, contract debtors and tort victims not infrequently do seem to have walked with eyes open into calamities to which, in his view, they had virtually agreed in advance.

---

33. FULLER, *supra* note 7, at 62-63.

35. *See, e.g.*, Vegelahn v. Guntner, 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting) ("[I]t cannot be said, I think, that two men, walking together up and down a sidewalk, and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force.").

36. *See* HOLMES, *supra* note 4, at 94.

37. GRANT GILMORE, THE DEATH OF CONTRACT 14 (1974).

Holmes can be found scolding these impudent unfortunates for their improvidence.[38] And he retains his old absorption in finding escapes for the "bad man." In one late Massachusetts case, we see Holmes giving an unconvincingly grudging construction to an act of Congress—a remedial statute begging for generous interpretation—with the consequence of denying the plaintiff, a member of the class Congress intended to protect, the benefit of the legislation.[39] **(1997) 96 Mich. L.R. 702** Then, too, Holmes' nabob distaste for the poor sometimes seems to surface.[40] It is true that in such cases Holmes typically purports to have Massachusetts law on his side. But Holmes, more clearly than others, surely understood that a high court sits with some freedom. It was open to one in his position to have moved his court toward its future. But for all Holmes' realism, his intellectual struggle with the common law had failed to equip him to leave decisional landmarks.

On the Massachusetts court Holmes seemed even to have misplaced his dazzling pen. When Holmes was nominated to the Supreme Court he had only the vaguest of good reputations; the nomination evoked considerable public comment on his inadequacies. Stung, Holmes privately ventured this response: "I hoped to see that they understood what I meant, enough not to bully me with Shaw, Marshall, and the rest. If I

---

38. *See, e.g.*, Sewell v. New York, N.H. & H.R. Co., 50 N.E. 541 (Mass. 1898) (Holmes, J.) (affirming a judgment for the defendant railway in a case of statutory liability for accident). Holmes commented:

> The case is the simple one of a boy riding headlong into a train, without taking any precaution, his mind at the time being full of something else. There is no evidence of due care on his part. . . . There is nothing to excuse him for not looking if he could see, or for not getting off his [bicycle], and advancing cautiously, if he could not see.

50 N.E. at 541 (citation omitted).

39. *See* Larabee v. New York, N.Y. & H.R. Co., 66 N.E. 1032 (Mass. 1902) (Holmes, C.J.). A federal statute provided that if a car was not equipped with automatic couplers that could be uncoupled without the necessity of men going between the cars, an employee injured thereby should not be deemed to have assumed the risk. *See* 66 N.E. at 1032-33. In Larabee, the car was equipped with an automatic coupler, but the tender was not, so that the coupling had to be done in the old way by a man having to go between them. *See* 66 N.E. at 1032. The court, in an opinion by then Chief Judge Holmes, reversing a judgment on a verdict for the plaintiff, held that a "tender" was not a "car" within the meaning of the statute. *See* 66 N.E. at 1033.

40. *See, e.g.*, Cotter v. Lynn & B.R.R., 61 N.E. 818 (Mass. 1901) (Holmes, C.J.) (sustaining a judgment for the defendant in a case of statutory liability for accident). Holmes wrote:

haven't done my share in the way of putting in new and remodeling old thought for the last 20 years then I delude myself."[41]

IV. INTERLUDE: HOLMES COMPARES HIMSELF WITH JOHN MARSHALL

There are a good many Holmes speeches in print, but there is one, much less famous than *The Path of the Law*, that I find especially revealing. On February 4, 1901, when Holmes was a sixty-year-old man—for all he knew in the twilight of his career—he recorded an "Answer to a Motion that the [Supreme Judicial] Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice." **(1997) 96 Mich. L.R. 703** The little speech in which he grants the "motion" gives us a rare chance to see what then Chief Judge Holmes had to say about the potentialities of decision in constitutional cases. It also lets us glimpse the old man as he takes his own measure.

It is at least suggestive of some deep disturbance that Holmes in these brief ceremonial remarks labors to make the great Chief Justice seem very small. He asks us to compare the big Civil War battles in which he, Holmes, fought, with the little skirmishes of the Revolution, and patronizingly adds: "Yet veterans who have known battle on a modern scale, are not less aware of the spiritual significance of those little

---

> The plaintiff was three years and ten months old at the time of the accident, and was trying to run across the street directly in front of the car when she was run down. There is no evidence that she used the care that would be expected of an adult, and therefore if there was negligence on the part of her parents in allowing her to be where she was she cannot recover. . . . [While] the limited powers of the poor must be taken into account . . . In drawing the line at which the defendant's responsibility shall begin, still, the other side must be considered also before a third person is made responsible for an accident, and this responsibility does not follow of necessity from the fact that the parents did the best they could.

61 N.E. at 818-19 (citations omitted). For a recent forgiving assessment of a few of Holmes' more doubtful tort cases, *see* John T. Noonan, Jr., *The Secular Search for the Sacred*, 70 N.Y.U. L. REV. 642, 652 nn.43 & 45 (1995).

41. Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Sept. 23, 1902), *in* I HOLMES' POLLOCK LETTERS 106 (Mark DeWolfe Howe ed., 1941).

fights."[43] Having established the littleness of the days of the Founders, Holmes draws an analogous bead on John Marshall. "If I were to think of John Marshall simply by number and measure in the abstract, I might hesitate in my superlatives, just as I should hesitate over the battle of the Brandywine. . . ."[44]

This is an extraordinarily condescending tone to take with Chief Justice Marshall, and Holmes tries to justify it, explaining that one "should be cosmopolitan and detached. . . able to criticize what he reveres and loves."[45] He makes the important exculpatory point that the Chief Justice was the beneficiary of good fortune, sheer accident. Marshall had the inestimable advantage of "being there," at the beginning, when all the big work was to be done. "[T]here fell to Marshall perhaps the greatest place that ever was filled by a judge. . . ."[46] One month later and the accident of a Jefferson appointee would have deprived the country of the "loose constructionist" that was needed then. Then, too, "time has been on Marshall's side. . . [T]he theory for which Hamilton argued, and [Marshall] decided, and Webster spoke, and Grant fought, and Lincoln died, is now our corner-stone."[47]

But, still taking Marshall's *small* measure, Holmes says, "I should feel a. . . doubt whether, after Hamilton and the Constitution itself, Marshall's work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice, and **(1997) 96 Mich. L.R. 704** the convictions of his party."[48] After offering this masterpiece of faint praise, Holmes—himself at that time helplessly pinned like a butterfly to the Chief Judgeship of the state court—gives way to a personal comparison:

---

42. Speech in Answer to a Motion that the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice, *in* THE OCCASIONAL SPEECHES OF OLIVER WENDELL HOLMES 131 (Mark DeWolfe Howe ed., 1962) [hereinafter John Marshall Speech].

43. *Id.* at 132.

44. *Id.*

45. *Id.* at 133.

46. *Id.* at 134.

47. *Id.* at 135.

> My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law. The men whom I should be tempted to commemorate would be the originators of transforming thought.[49]

After these excruciatingly self-justifying ruminations, Holmes provides a grudging acknowledgment of Chief Justice Marshall's greatness: "When we celebrate Marshall we celebrate at the same time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Constitution were declared to govern the dealings of man with man by the judgments and decrees of the most august of courts."[50] Indeed, "if American law were to be represented by a single figure, skeptic and worshipper alike would agree without dispute that the figure could be but one alone, and that one John Marshall."[51]

Surely this was a painful admission for the self-measuring, immeasurably ambitious Holmes. One thinks of Johannes Brahms' remark: "You cannot imagine what it is like to compose music while you hear the tramp of the footsteps of a giant like Beethoven behind you."[52] But Holmes had a Yeats-like way of ending a speech with something moving, and it is even possible that he drew easy tears from his listeners with his peroration, more about Old Glory than John Marshall:

> [T]his day. . . marks. . . The triumph of a man. . . [. H]is unhelped meditation may one day mount a throne, and without armies. . . may shoot across the world the electric despotism of an unresisted power. It is all a symbol, if you like, but so is the flag. . . . Yet, thanks to Marshall and to the men of his generation—and for this above all we celebrate him and them—its red is our life-blood, its

48. *Id.* at 134.

49. *Id.*

50. *Id.* at 133.

51. *Id.* at 134.

stars our world, its blue our heaven. It owns our land. At will it throws away our lives.[53]

(1997) 96 Mich. L.R. 705 Theodore Roosevelt said of this speech that it showed "a total incapacity to grasp what Marshall did" for his country.[54]

V. The SUPREME COURT AT LAST: THE LAST GREAT CHANCE

Holmes' own chance came at last in August, 1902, when Theodore Roosevelt, reassured by Henry Cabot Lodge, offered Holmes the nomination to fill Justice Gray's seat—the "Massachusetts" seat—on the Supreme Court. On November 5, Massachusetts Senator George F. Hoar wrote Chief Justice Fuller that he would not oppose Holmes, whom Fuller wanted. But Hoar warned that, although Holmes was a gentleman and a man of integrity, the Massachusetts bar considered him "lacking in intellectual strength."[55] At a farewell dinner for Holmes given by the Boston Bar, Holmes' peroration, with one too many references to the Civil War, seems to have embarrassed his hearers. "We will not falter. . . . We will reach the earthworks if we live. . . . All is ready. Bugler, sound the charge."[56] Within months, Holmes' brethren on the Supreme Court were criticizing him for "rapturous" passages in his opinions.[57] But Chief Justice and Mrs. Fuller would become lifelong friends of the Holmeses, and Fuller would come to admire the effect of Holmes' terse and enigmatic opinions when read in open court.

The truly awful thing is that having failed so completely in his prime, but having gallantly taken up his even greater chance in his old age, *Holmes proceeded to fail again*. The dissent in *Lochner v. New York*[58]

---

52. I have no source for this common quotation, but an oblique reference to it appears in Russell A. Stamets, *Ain't Nothin' Like the Real Thing, Baby: The Right of Publicity and the Singing Voice*, 46 FED. COMM. L.J. 347, 371 (1994).

53. John Marshall Speech, *supra* note 42, at 135.

54. WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910, at 280 (1950) (reporting a prenomination exchange between President Theodore Roosevelt and Massachusetts Senator Henry Cabot Lodge).

55. *See id.* at 285.

56. *Id.* at 287 (omissions in original).

57. *See id.* at 287-88.

was and is much admired, but it was not enough. As late as 1912, young Robert Taft famously refused a clerkship with Holmes because his father thought it would not add to what Harvard had already given him. All through the Chief Justiceships of Melvin Fuller and Edward White, for thirty long years Holmes labored on—a glutton for work—without substantial accomplishment. It is mostly in the final phase, and often in association with **(1997) 96 Mich. L.R. 706** Justice Brandeis, that we find the few cases to which we like to give prominence. For the most part Justice Holmes was one who stood back from the great battles.[59] Unable or unwilling to grasp the ring, he played little or no originating part, as he well might have, in what would become the greatest chapter in the legal-intellectual history of this century—the eclipse of private law by public law and the emergence of rights-based legal theory.

It is not hard to find an excuse for Holmes' uninteresting judicial performance. A conservative like Holmes is unlikely to have an expansive view of rights, certainly not in the milieu of the conservative courts on which he served. In the Massachusetts Court, Holmes' judicial passivity, his abiding view that the common law could change only interstitially and incrementally,[60] together with his compulsion to fix responsibility for injuries on the injured, would have made him incapable, for example, of reaching a modern theory of strict liability, just as, once on the Supreme Court, he was incapable of understanding liability without fault where it existed at federal common law.[61] Arguably it is inevitable that the truly

---

58. 198 U.S. 45 (1905) (invalidating a New York statute providing for a 60-hour maximum work week for bakers as an interference with liberty of contract in violation of the Due Process Clause of the Fourteenth Amendment); 198 U.S. at 74, 75 (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*.").

59. I find some agreement with this assessment in, for example, Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1018 (1997) ("Holmes is strangely disappointing. . . . [M]ore often than not he urges [legal actors] to be passive instruments of society's . . . ends rather than active forces to help refigure and transform those ends.").

60. This view was most memorably expressed in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (arguing that judges "are confined from molar to molecular motions"); *see also* Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19 (1995).

conservative judge can be remembered only for such things as fine language and prudential theory.[62]

Holmes was an oldish man of sixty-one when he was appointed to the United States Supreme Court. He did then feel something of a change to bigness; he experienced the expansion from little to great questions. "[The] augustness of the work. . . has made my **(1997) 96 Mich. L.R. 707** past labors seem a closed volume locked up in a distant safe,"[63] Holmes wrote. The Court was "a center of great forces."[64]

But he then proceeded to fritter away his three Supreme Court decades. I do not refer to his private life, to Holmes' continued pretty correspondence with English friends or, in the earlier years, his flirtatious gallantries or his chaste *amour* with Lady Castledown. I am talking about his work, his hundreds and hundreds of—alas—workaday opinions. Like his Massachusetts opinions, they were of as little interest then as today. In the cases in which Holmes did take a particular interest in assertions of constitutional rights, too often it was only to exercise or counsel judicial restraint in giving force to them.[65] Although, from time to time, he now did trouble to wield his wonderful pen, he remained, as he had been in earlier life, and as he had revealed himself to be in *The Path of the Law*, on the sidelines. He drew timidly back in case after case from the chances, such as they were, that were seized by his successors and even contemporaries, of playing a larger part.

---

61. *Compare* The Western Maid, 257 U.S. 419 (1922) (Holmes, J.) (holding that a shipowner could not be made to pay for damages incurred by the ship under previous ownership) *with* The China, 74 U.S. (7 Wall.) 53 (1868) (Swayne, J.) (holding that American law will impose liability upon a ship in rem even if the owner could not be held liable in personam and explaining the functions of the American rule). The latter case, rather than *The Western Maid*, is the law today. Admiralty liability in rem had been a particular bugaboo to Holmes in *The Common Law*. *See* HOLMES, *supra* note 4, at 26-33.

62. *See* Sheldon M. Novick, *Justice Holmes and the Art of Biography*, 33 WM. & MARY L. REV. 1219, 1242 (1992).

63. Letter from Oliver Wendell Holmes, Jr. to John G. Palfrey (Dec. 27, 1902), *excerpted in* G. Edward White, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 308 (1993).

64. Letter from Oliver Wendell Holmes, Jr. to Nina Gray (Jan. 4, 1903), *excerpted in* WHITE, *supra* note 63, at 308.

So the tragedy is that Holmes did not become "a great master in his calling" (if I may refer to his own peroration from *The Path of the Law*).[66] He caught only the remotest "echo of the infinite."[67] His life on the Supreme Court amounted in the end to a colossal waste.[68] Like Felix Frankfurter and Louis Brandeis, Holmes had the excuse of recoil, to which his own remembered dissent in *Lochner* gave a special impetus, from the Court's meddlings with **(1997) 96 Mich. L.R. 708** industrial regulation. Holmes also had the egregiously admired model of his contemporary, James Bradley Thayer, to reinforce his distaste for judicial intervention. But only Holmes' own limitations could account for an imaginative failure of such magnitude.

Looking back on this long final phase of Holmes' life, do we feel that his "unhelped meditation" might some day "shoot a despotism at the other end of the world," as he had said of Marshall? Did he make Old Glory's red a little more "our life blood?" He must have known that he was not finding his way to that sort of greatness. Holmes would remind us, in extenuation, that John Marshall had enjoyed the advantage of having been Chief, not Associate, and had been presented with the most glorious opportunities. But Justice Brennan would be Associate, not Chief, when thirty years later he would deliver *Baker v. Carr*.[69] Chief Justice Warren

---

65. "One could argue that Holmes was the first prominent expositor of the 'countermajoritarian difficulty' and the accompanying posture of judicial 'self-restraint' in constitutional cases that have dominated commentary on constitutional law issues for much of the twentieth century." WHITE, *supra* note 63, at 487. For other recent commentary, *see* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449 (1994).

66. Holmes, *supra* note 2, at 478.

67. *Id.*

68. Perhaps it is significant that of the successive authorized biographers, neither Felix Frankfurter, Holmes' acolyte, nor Mark DeWolfe Howe, his former clerk, and certainly not the disaffected Grant Gilmore, found that they had it in them to complete the work, although Howe did turn out two volumes covering the life through 1882. Harvard University gave up on the authorized biography project and released Holmes' papers in 1985. A number of full-length studies have appeared since. *See, e.g.*, WHITE, *supra* note 63; LIVA BAKER, THE JUSTICE FROM BEACON HILL (1991); AICHELE, *supra* note 5; *see also* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989). But as Professor Novick states in his preface, this does not assess the opinions. *See id.* at xvii. CATHERINE DRINKER BOWEN, THE YANKEE FROM OLYMPUS (1944), remains the most popular book on Holmes, but it is fictionalized.

would find his own opportunity in *Brown v. Board of Education*.[70] Holmes was on the Court that laid the groundwork for *Brown*—and for *Baker*, for that matter. The case was the great 1908 Fuller Court case, *Ex parte Young*.[71] Holmes was even a member of the majority in *Ex parte Young*. But it was Justice Peckham who was its author. Concededly Justice Peckham, the author of Lochner, was the natural author of *Ex parte Young*. *Ex parte Young* would be the vehicle for affirmative challenges, under *Lochner*, to state regulation. But in *Ex parte Young* Holmes might have taken the occasion to write a concurrence that would have outdone both Justice Harlan's dissent and Justice Peckham's opinion for the Court, just as he had outdone Justice Harlan's dissent in *Lochner*.

The truth is that Holmes did have chances for greatness on the Court and threw them away. What were the great issues of that time? Although one cannot expect a flood of litigation before a cause of action is made cognizable in courts, cases presenting broad opportunities, for example for racial justice, or at least for affording political participation, did come before the Court early in Holmes' tenure. The politics of the Court in that day made liberal decisions on such matters unlikely; and Holmes, unlike Justice Brennan, lacked the qualities that could cobble together five votes for a progressive decision from a regressive court. But Holmes, unlike the **(1997) 96 Mich. L.R. 709** first Justice Harlan, failed to seize the opportunities even of dissent. In all of Holmes' Supreme Court work there is nothing to compare with the first Justice Harlan's revered dissent in *Plessy v. Ferguson*.[72] There Harlan carved out his own constitutional space, and with it his immortality. Holmes, for all his personal magnetism, would not have exerted himself to carry a majority with him. But he had his chances at least to add his dissent to Justice Harlan's in such cases and to eclipse Harlan. I am thinking, to take an important example, of the *Berea College* case.[73] There, the Fuller Court sustained

---

69. 369 U.S. 186 (1962) (holding justiciable under the Equal Protection Clause the malapportionment of a state legislature).

70. 347 U.S. 483 (1954) (holding that de jure racial segregation in the public schools violates the Equal Protection Clause and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

71. 209 U.S. 123 (1908) (stripping Eleventh Amendment immunity from a state official who, acting in her official capacity, will, unless enjoined, violate the federal plaintiff's constitutional rights).

72. *See* 163 U.S. at 552 (Harlan, J., dissenting). For the argument that the first Justice Harlan's decency in civil rights cases did not extend to the civil rights of Chinese

the power of a state to require racial segregation in private schools. Justice Harlan, ironically the Court's one southerner, was again, as in *Plessy*, its sole voice of conscience:

> Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races? . . . [H]ow inconsistent such legislation is with the great principle of the equality of citizens before the law.[74]

But Holmes, concurring silently in the shameful judgment in *Berea College*, evidently chose to stick to his deferential principles. Who was "the great dissenter" then?

G. Edward White, cataloguing Holmes' excellences, once argued that Holmes, like Brandeis, at least saw a difference between judging and vindicating his own preferences.[75] That is the optimistic view generally taken of Holmes' determination to avoid interference with political will. But can we really be sure that Holmes' worst judgments did *not* vindicate his preferences? Holmes gloried in the role of the tough amoralist that his thinking had given him, not only because his thinking underlay it, and not only because of **(1997) 96 Mich. L.R. 710** the hard edge it gave his gaiety, but also because he was a snob. When a young man, he had written, "I loathe the thick-fingered clowns we call the people."[76] In his admired

---

Americans, *see* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996). I find little support for this. Justice Harlan apparently shared Chief Justice Fuller's view that the Chinese were "remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people. . . ." United States v. Wong Kim Ark, 169 U.S. 649, 731 (Fuller, C.J., joined by Harlan, J., dissenting). But Harlan struggled to secure the rights of Chinese immigrants. *See, e.g.*, Chew Heong v. United States, 112 U.S. 536, 560 (1884) (Harlan, J.) (interpreting the Chinese Exclusion Acts as consistent with preexisting treaty obligations, thus enabling a Chinese laborer to return to this country).

73. Berea College v. Kentucky, 211 U.S. 45, 58 (1908) (Harlan, J., dissenting). Justices Holmes and Moody concurred in the judgment. *See* 211 U.S. at 58.

74. 211 U.S. at 69.

75. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 177 (1976).

Abrams dissent, he described the subjects of that prosecution as "puny anonymities."[77]

But the great influence on Holmes' judicial performance always remained the hopelessly narrow system of his early thought. Holmes' theoretical preoccupation with the common law had marginalized equity in his mind, and with it public law. This thinking had always implied that challenges to the will of the majority not only were, but should be, the exception and not the rule. So Holmes, when the question was put directly to him again and again, stood by his old opinions. The author of *The Path of the Law* is the same man who believed that courts should vindicate the will of the majority unless the majority had been utterly irrational. This is the prudential Holmes whom Grant Gilmore found "frightening":

> [Holmes] reduced all of jurisprudence to a single, frightening statement: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, right or wrong." That is, if the dominant majority. . . desires to persecute blacks or Jews or communists or atheists, the law, if it is to be "sound," must arrange for the persecution to be carried out with. . . due process.[78]

This, indeed, is what Holmes was about when he would refuse to substitute his judgment for the legislature's. In other words, Holmes characteristically declined to engage in judicial review of legislation which might, in our view, indeed be unconstitutional. Sticking stubbornly to his old premodern ideas, and even going beyond them, he transmuted his conviction of the inconsequence of public law into a conviction of the impropriety of making public law.

In that obstinate conviction he flung away perhaps his greatest chance, when he authored the opinion in the Alabama elections case of *Giles v. Harris*.[79] *Giles* arose as a bill in equity. Holmes' customary

---

76. Letter from Oliver Wendell Holmes, Jr. to Amelia Jackson Holmes (Nov. 16, 1862), *in* TOUCHED WITH FIRE: THE CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864, at 71 (Mark DeWolfe Howe ed., 1946).

77. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

78. GILMORE, *supra* note 5, at 49 (footnote omitted) (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 36 (Mark DeWolfe Howe ed., 1963)). Gilmore adds: "The

blinkeredness need not have crippled his judgment here; recall Holmes' perception in *The Path of the Law* that law and **(1997) 96 Mich. L.R. 711** morals could intersect in equity. But Holmes would not permit the intersection here, dismissing it, as he had in *The Path of the Law*. Giles, a black plaintiff, had sued the Board of Registrars of Montgomery County, Alabama, in his own behalf and as a representative of a class of five thousand similarly situated voters, praying for an order compelling the defendants to register blacks on the voter rolls. Over Justice Harlan's strong dissent, Holmes, for the Court, held that the complaint failed to state a cause of action for which relief could be granted. "It seems to us impossible," he wrote, "to grant the equitable relief which is asked. . . . The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."[80]

That is an amazing statement if you put it side by side with the declaration in *Marbury v. Madison* that government officials cannot "sport away the vested rights of others."[81] It is true that Chief Justice Marshall made an exception in *Marbury* to its authorization of an officer suit[82] for

---

stalwarts of the post-Holmesian orthodoxy took from the master only what suited them; the disturbing and heretical aspects of his thought were ignored." *Id.* at 67.

79. 189 U.S. 475 (1903).

80. 189 U.S. at 486; *see also* Bailey v. Alabama, 219 U.S. 219 (1911) (striking down under the Thirteenth Amendment an Alabama peonage law criminalizing breaches of employment contracts); 219 U.S. at 245 (Holmes, J., dissenting) (arguing that there was "no reason why the State should not throw its weight on the side of performance"). *But cf.* United States v. Reynolds, 235 U.S. 133, 150 (1914) (sustaining an act of Congress outlawing peonage, as an effectuation of the Thirteenth Amendment) (Holmes, J., concurring). In his *Reynolds* concurrence, Holmes wrote that although there still seemed to him nothing in the Thirteenth Amendment to prevent a state from criminalizing breaches of employment contracts, he now was prepared to concede that the Alabama legislature could have foreseen that its law would lead to peonage:

> [I]mpulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain even though it will cause greater trouble by and by. The successive contracts . . . are the inevitable, and must be taken to have been the contemplated outcome of the Alabama laws. On this ground I am inclined to agree. . . .

235 U.S. at 150.

81. 5 U.S. (1 Cranch) 137, 166 (1803) (Marshall, C.J.) (stating that mandamus would lie to command the Secretary of State to deliver a commission). I am assuming that there is no important distinction between mandamus and an injunction when a court is to command an official to perform a ministerial act.

cases raising "political questions."[83] But if Holmes meant to put *Giles* in this "political questions" category he did not pause to explain why the ministerial duty of the registrars presented a "political question," when the ministerial duty of the Secretary of State in *Marbury* did not. A charitable reading of this **(1997) 96 Mich. L.R. 712** might be that Holmes could see no precedent for remedying a nontrespassory constitutional tort.[84] But within a few years the Court would decide *Ex parte Young*,[85] famously opening courts to injunctive claims of constitutional right. Why should the transformative sword, so anxiously pulled from the stone by Justice Peckham in *Ex parte Young*, have been beyond Holmes' grasp in *Giles*, only six years earlier? Wearing his customary blinkers, Holmes would have seen in *Ex parte Young* only the vehicle it undoubtedly was in the mind of Justice Peckham, its author, for anticipatory *Lochner* challenges to state regulation of business. That Holmes could see no further was part of his tragedy; Justice Harlan, who dissented in *Ex parte Young*, understood it perfectly:

> This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and state governments. It would enable the subordinate Federal Courts to supervise and control the official action of the States as if they were "dependencies" or provinces.[86]

That is, precisely, the power federal courts have today.

---

82. Marshall's approval of the officer suit device is seen again in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 850 (1824), in which a "party of record" rationale is used to evade the Eleventh Amendment.

83. *See Marbury*, 5 U.S. (1 Cranch) at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). I have argued in a symposium contribution that this "limitation" could have no application to questions in their nature judicial, and certainly not to questions requiring interpretation of the Constitution or other federal law. *See* Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887 (1994).

84. *See Giles*, 189 U.S. at 487-88.

85. It was not until *Ex parte Young*, 209 U.S. 123 (1908), that it was understood that an action might lie to remedy a nontrespassory constitutional violation. On this "theoretical metamorphosis," *see* LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER 772-74 (1994).

In *Giles*, Holmes was willing to consider, in this "new and extraordinary situation," some exception to the impotence he attributed to equity; but on further reflection Holmes thought he had no choice:

> If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong . . . by the people of a State and the State itself, must be given by them or by the legislative and political department of . . . The United States.[87]

To be sure, Holmes' pessimism in *Giles* was not unfounded. With or without the use of force, the efficacy of an injunction to right "a great political wrong" must depend, in the end, on consent. The Court's leadership might affect the terms of public discourse, but if "the conspiracy and the intent exist," confrontation, rather than consent, could be the consequence. Yet we now know that eventually, in a more favorable political climate, the Supreme Court would **(1997) 96 Mich. L.R. 713** indeed give relief from great political wrongs such as these,[88] and would authorize courts to supervise the electoral process, if necessary; and Congress would support the Court with the Voting Rights Act of 1965. With *Baker v. Carr*, at least we can say that American courts began in good faith to try to do what could be done by them to make the suffrage fairer as they saw it, as in *Brown* they began in good faith to try to desegregate the country. Both rulings depended only on taking the Constitution's guarantee of equal protection seriously. In hindsight, Holmes was too pusillanimous to play any role in that revolution, the apotheosis of public law through equity that *Young* and *Brown* and *Baker* came to represent.

Holmes did seem to grow somewhat in his later years. Contrast with the ill-fated *Giles* litigation the well-known damages case of *Nixon v. Herndon*.[89] There, under the Fourteenth Amendment, the Court held by

---

86. *Ex parte* Young, 209 U.S. at 175 (Harlan, J., dissenting).

87. *Giles*, 189 U.S. at 488.

88. *See* Reynolds v. Sims, 377 U.S. 533 (1964) (establishing the principle of "one person, one vote" for apportionment cases); Baker v. Carr, 369 U.S. 186 (1962) (approving, under the Equal Protection Clause, judicial intervention to remedy

Holmes that qualified black voters could sue state election officials for damages, on an allegation of a denial of the right to vote in a primary election. Despite Holmes' former pessimism about judicial power to right "great political wrongs," he could now say, "The objection that the subject matter of the suit is political is little more than a play upon words."[90] Holmes put on a little show of distinguishing damages from injunctions, citing *Giles v. Harris*. But he had silently joined long ago in the Court's defeat of Giles's own little-noted action at law.[91] No, it was Holmes himself who had changed. *Nixon v. Herndon* is an important case. But for Holmes it was too little, too late. Perhaps, as Holmes' tenure on the Court drew to a close, he had begun to see and—who can say?—to regret the lost great early chance. But deciding for *Giles* would have meant that big moral battles, as big as any in the Civil War, could be fought in the courts and in equity. This was the one development Holmes, from the beginning, had refused to consider. Private law, on which all of Holmes' scholarly reputation rested, would have seemed so pallid in comparison. Only a few years after **(1997) 96 Mich. L.R. 714** Holmes left the Court, Justice Stone would carve out, in a footnote, a new constitutional space for "discrete and insular minorities."[92]

Those who still cling to an imagined "liberal" Holmes, and admire Holmes for his dissent in *Lochner*, might remain puzzled by his dissent in the grand old case of *Meyer v. Nebraska*.[93] Notwithstanding *Meyer's* intellectual provenance in *Lochner*, and its seemingly improbable authorship by Justice McReynolds,[94] *Meyer* has become a fount of American liberties. One of the proper responses to *Meyer* now is probably to breathe out slowly and acknowledge the reality and importance of the right to contract read into the Due Process Clause in *Lochner*. What was

---

malapportionment of a state legislature); *see also* Terry v. Adams, 345 U.S. 461 (1953) (holding a pre-primary election by a white voters' association to be "state action" and an unconstitutional deprivation of black voters' right to vote).

89. 273 U.S. 536 (1927).

90. 273 U.S. at 540.

91. *See* Giles v. Teasley, 193 U.S. 146 (1904) (Day, J.). Justice Harlan's solitary dissent in this later case was without opinion.

92. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

93. 262 U.S. 390 (1923) (holding unconstitutional under the Due Process Clause of the Fourteenth Amendment a Nebraska statute forbidding schools from teaching modern languages other than English).

wrong with *Lochner* was not the concept of a substantive due process "liberty," but the Court's fatuous disregard of the equities, and of the relative strengths of the parties to an employment contract. Holmes' dissent in *Meyer* is hardly mysterious; it is linked to his dissent in *Lochner*. On a superficial level, one could be satisfied with the dissent in *Lochner* as an explanation for the dissent in *Meyer*. Both dissents exemplify Holmes' conviction that judges should not strike down as unconstitutional an act that a state legislature must have regarded as reasonable. What is sad about Holmes' *Meyer* dissent—apart from his inability to let the case reeducate him, as it does us, about *Lochner* and about liberty—is his blindness to the difference between *Lochner* and *Meyer*. The sixty-hour week he rightly would have sustained in *Lochner* was protective of vulnerable people. The ban on modern languages in the schools he wrongly would have sustained in *Meyer* would have regimented schooling in the service only of xenophobia. Holmes does make a good point in *Meyer* when he writes:

> Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school.[95]

(1997) 96 Mich. L.R. 715 Such a purpose should, indeed, satisfy what we would later think of as rational-basis scrutiny. But Justice McReynolds in *Meyer* was speaking the language of fundamental right. We have come to believe that in cases of alleged violation of fundamental right, a more restrictive scrutiny is needed than minimal scrutiny for rational basis alone. In fact, Holmes' dissent in *Lochner* had left some room for *Meyer* or any other case raising a fundamental right. Although he wrote in *Lochner*, "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," he added, "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

---

94. Were those champions of substantive due process, the "Four Horsemen" of the apocalypse of the early New Deal (Justices McReynolds, Sutherland, Van Devanter, and Butler) really closet liberals? *See* the witty and compendious Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997).

our people and our law."[96] But Holmes' dissent in *Meyer* is not the place to locate what was wrong with him. He was perhaps inattentive to the fundamental rights described in *Meyer*, but this aspect of *Meyer* began to be fully appreciated only with *Griswold v. Connecticut*.[97]

Today when one tries to find something good to say about Holmes, the natural thing to do is to go to the later First Amendment cases.[98] But one recalls, first, that although Holmes' "clear and present danger" test was a good thing, Holmes did not at first apply the test in favor of the speaker.[99] Although he did begin to **(1997) 96 Mich. L.R. 716** take his own test seriously enough to favor the speaker, notably in the celebrated *Abrams* dissent,[100] in any event the later First Amendment opinions

---

95. Bartels v. Iowa, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting in *Bartels* and in *Meyer*). I note that today the assimilationist perspective is coming under increasing attack. *Compare* NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW (1997) (arguing that assimilation is not fully attainable for black Americans) *with* NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT (1963) (taking an assimilationist view). *See also* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997) (arguing that assimilationist policies are coercive and demeaning); *cf.* Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) (disapproving regimentation in schooling).

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

97. 381 U.S. 479 (1965)(holding that the state may not penalize the use of contraceptives and recognizing a right of marital privacy under "the principle of . . . *Meyer*."

98. *See, e.g.*, Posner, *supra* note 24, at xii (arguing that in Schenck, Abrams, and Gitlow, Holmes laid the foundations not only for the modern view of free speech but also for the enhanced scrutiny generally afforded other non-economic rights today). William Van Alstyne comments:

> Mr. Justice Holmes . . . appears as judicial bete noir. . . . In each case we have looked at thus far . . . Holmes voted to sustain the state's regulation against every constitutional claim. And, quite obviously, he seems never to have championed first amendment rights.
>
> How can it be, then, that Holmes nonetheless came to be canonized as one of the greatest Justices ever to have served on the Supreme Court? Partly, indeed perhaps largely, because his view of the first amendment — and of the central meaning of freedom of speech — fundamentally and finally changed.

William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, LAW & CONTEMP. PROBS., Summer 1990, at 97 (citing my colleague, David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1303-20 (1983)).

belong so completely to the Amendment's prehistory[101] that they seem too flimsy a platform for the intended monument, even if there were not the embarrassment of the earlier cases.[102] And those cases *are* an embarassment. In *Patterson v. Colorado*,[103] for example, Holmes surely could have joined Justice Harlan in dissent, if he cared about free speech.[104] But Holmes, for the Court, held that the state could punish as a

---

99. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) (reviewing convictions under the Espionage Act of 1918 for circulating handbills urging resistance to the draft and asserting that conviction in such cases must be based on a showing of "clear and present danger" that the incitement was about to result in activity the legislature had a right to prevent, but nevertheless affirming the convictions).

100. Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) (breaking for the first time the Court's unanimity in these cases by urging a narrow construction of statutory intent and a closer inquiry into the imminence of danger).

101. My colleague Scot Powe refers to these cases as "the First Amendment Dark Ages." *See* L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1315 (1997). *See generally* another colleague's excellent new book, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

102. Holmes wrote the opinion for a unanimous Court in several cases sustaining convictions under the Espionage Act. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (using "clear and present danger" language); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919). The Court would not sustain such convictions today. *Cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding mere advocacy unpunishable in the absence of incitement directed to near-certain crime). Holmes dissented from affirmances of similar convictions in *Abrams*, 250 U.S. at 624-31 (1919), and *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (joined by Brandeis, J.). *See also* United States v. Schwimmer, 279 U.S. 644, 653-55 (1929) (Holmes, J., dissenting) (arguing that a Quaker should not be denied U.S. citizenship because of her pacifist beliefs). *But see* Whitney v. California, 274 U.S. 357, 379 (1927) (Brandeis, J., joined by Holmes, J., concurring on other grounds) (attempting to distinguish incitement from the mere advocacy in *Whitney*), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). *See generally* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941); Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984). Holmes was moved to strengthen his "clear and present danger" test some time between *Schenck* and *Abrams*, apparently through intercessions by Felix Frankfurter, Harold Laski, and Learned Hand, and in conversation with Zechariah Chafee. *See* WHITE, *supra* note 63, at 420-31. Efforts in this direction also are thought to have been made by some of Holmes' brethren and his wife. *See* Robert M. Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 372-73 (1981).

103. 205 U.S. 454 (1907); *see also* Fox v. Washington, 236 U.S. 273, 277 (1915) (Holmes, J.) (holding, for a unanimous court, apparently on the sole ground that the

constructive contempt an editor's publication of truthful information about a case. Again, the question arises: If the first Justice Harlan is not canonized though he could *see*, has it made sense to canonize Justice Holmes even though he could not?[105]

(1997) 96 Mich. L.R. 717 The second temptation for Holmes enthusiasts is to showcase Holmes' brilliant dissents in cases under *Swift v. Tyson*[106] and to attribute *Erie*[107] vicariously to Holmes instead of to Brandeis, or at least to crown Holmes with the laurels of intellectual progenitorship. This is a temptation one winds up resisting as well. For one thing, Holmes had no stomach for actually overruling *Swift*. Although he thought it "an unconstitutional assumption of powers . . . which no lapse of time. . . should make us hesitate to correct,"[108] he drew back from that suggestion, adding in the same opinion[109] that, for his part, he "should leave Swift v. Tyson undisturbed, as I indicated in *Kuhn v. Fairmont Coal Co.*"[110]

It is a further difficulty that Holmes' marvelous language about the "brooding omnipresence in the sky," reference to which would seem *de rigeur* in any attempt to crown him with these laurels, adorns a case in which Holmes, as it happened, was wrong. The case was *Southern Pacific*

---

statute was not too vague, that Washington state could constitutionally convict an editor for publishing an article encouraging disregard of a law against nude sunbathing).

104. *See Patterson*, 205 U.S. at 463-65 (Harlan, J., dissenting). Among other things, Justice Harlan argued that the Fourteenth Amendment incorporates the First Amendment. *See* 205 U.S. at 464.

105. For the view that—unlike Holmes' opinions—the first Justice Harlan's opinions lack the kind of theoretical underpinnings that would make him more consistently interesting to us, *see* WHITE, *supra* note 75, at 144.

106. 41 U.S. (16 Pet.) 1, 18-19 (1842) (holding that on nonfederal questions of a general nature, neither strictly local nor fixed by statute, federal courts were free to exercise an independent judgment on what the true general common law rule was), *overruled* by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

107. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (Brandeis, J.) (holding that federal courts must apply state law to state law questions and may not displace applicable state decisional law with a general view of the common law).

108. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

109. *See* 276 U.S. at 535. Of course, one might view this back-pedalling as statesmanly. *Cf.* Novick, *supra* note 62, at 1240 (characterizing Holmes' trepidation in the *Taxicab Case* as "Burkean").

Co. v. Jensen.[111] Recall that the federal courts had "pursued" an unconstitutional "course"[112] under *Swift*, displacing state common law—when it applied—with general common law. Holmes had gone on to say, in *Jensen*, not only that the common law was "not a brooding omnipresence in the sky," but also that "[i]t always is the law of some State."[113] But Holmes was simply wrong about this. Although the "general common law" remains unconstitutional,[114] it is *federal* common law that applies in admiralty cases like *Jensen*, now as then. Admiralty decisions, like other federal common law decisions, may freely borrow state law **(1997) 96 Mich. L.R. 718** where it is useful, but admiralty cases are simply not state-law cases.[115]

There is yet a third difficulty in chalking up *Erie* to Holmes. Holmes was an enthusiastic writer of opinions *under Swift*. He must have been as happy as a child in a sandbox, allowed to go back to his lackluster beginnings and to decide again—so often—the unresonating tort and contract cases to which he had devoted his powers for most of his life. Depressingly, Holmes had not grown or changed since reaching his astounding[116] conclusion that losses should lie where they fall. Arguably this law-should-never-be-enforced ideology should have disqualified him for judicial appointment. So he can be found again, in these "general" federal common law cases under *Swift*, predictably, for example, not allowing parents to recover for the wrongful death of their two children in

---

110. 276 U.S. at 535 (citing Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J., dissenting)).

111. 244 U.S. 205, 218 (1917) (Holmes, J., dissenting).

112. *See Erie*, 304 U.S. at 77-78.

113. *Jensen*, 244 U.S. at 222.

114. For the argument that general common law (general "rules" unidentified to a particular state) is unconstitutional in state as well as federal courts, *see* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 811-12, 819-20, 825 (1989) ("There is no general state common law, either.").

115. *See* WEINBERG, *supra* note 85, at 17 (arguing that Holmes was "mistaken" in *Jensen*); *see also* Weinberg, *supra* note 114, at 826 ("[T]he truth is that, in *Jensen*, Holmes was wrong."). I suspect that this is the reason Justice Brandeis did not quote Holmes' otherwise irresisitible "brooding omnipresence" language when referring in *Erie* to Holmes' attacks on *Swift*, but referred instead to Holmes' dissents in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-372 (1910) (Holmes, J., dissenting), and *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-536 (1928) (Holmes, J., dissenting). *See Erie*, 304 U.S. at 79.

a negligently placed open pool of chemicals.[117] In the case to which I refer, in order to save the defendant company from liability, Holmes not only had to (1) reverse an affirmed judgment on a jury verdict; and (2) displace applicable Kansas tort law, to which he did not refer; but also (3) *revise the preexisting general federal common law rule* on which the Kansas parents were relying.[118] But this Kansas case is unimportant. After all, the holding is unconstitutional and of no concern to anyone today. It had been hot on the day of the children's horrible death,[119] and there had been nothing to distinguish the pool from a swimming pool or its contents from clear water. In Holmes' view, of course, the applicable rule was that a landowner had no liability to infant trespassers. Holmes conceded that the pool might have been so certain to attract the children as to have had the legal effect of an invitation to them, although not to an adult. But there was no showing that they had entered the land *because* of the pool. (Holmes did not say why this last argument **(1997) 96 Mich. L.R. 719** was relevant to the attractiveness of the pool.) Justice Clarke, joined by Chief Justice Taft and Justice Day, dissented.[120] The pool would have been an "attractive nuisance," Clarke pointed out, under previous federal general common law; the Court's holding had overruled two Supreme Court cases.[121]

Holmes' reasoning in cases like this is somewhat at odds with one of his fundamental theses. To Holmes, a moral duty to refrain from doing a bad thing is not necessarily inferable from the legal duty to pay for the bad things one has done. Thus, in *The Path of the Law*, Holmes explained that the common law, in effect, gives a license to a "bad man" to do his worst, requiring only that he pay for any resulting damage. But having early insisted upon the separation of law and morals, Holmes, as we have seen, may have come to relish the role of tough amoralist. A rule placing the risk of a death trap on its child victim may have become so gratifying to

---

116. Professor Gilmore thought Holmes' characteristic unwillingness to impose liability in tort cases to be "astonishing" and his similar unwillingness in contract cases resting on reliance to be "monstrous." *See* GILMORE, *supra* note 37, at 16, 17.

117. *See* United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922).

118. Professor White also points out the inconsistency I note between such cases as *United Zinc* and Holmes' opinions attacking *Swift*. *See* WHITE, *supra* note 63, at 381-90; White, *supra* note 31, at 658-61.

119. Two rescuers were also seriously injured. *See* 258 U.S. at 278.

120. *See* 258 U.S. at 279.

this tough vanity that he could subordinate to it even the "bad man's" legal obligation to pay the costs of a "license" to maintain a death trap. Whatever the source of this dissonance, this is the Holmes that would come to have the fatal attraction of his ruthlessness.

But my point here is not that Holmes had a crabbed vision of the common law, although he did, but only that Holmes was up to his own ears in *Swift v. Tyson*, much too deeply for us to lay the garland of modern American legal positivism—as that position is understood after *Erie*—at Holmes' feet.

VI. IN CLOSING: HOLMES' LEGEND

It is not too much to say we are infatuated with Holmes, perhaps because generations of writers have told us that infatuation is the proper response to him. Except for John Marshall, Holmes would probably now top most lists of the great judges. He seems always withdrawn from us and mysterious to us, yet we are always drawn to him, even to his chilling indifference. The cult of Holmes is a phenomenon that seems to exist independently of Holmes' sad **(1997) 96 Mich. L.R. 720** performance.[122] Why? I do not think it is only Holmes' writing, although his writing, surely, has a great deal to do with it.[123]

> Time that with this strange excuse
> Pardoned Kipling and his views,
> And will pardon Paul Claudel,
> Pardons him for writing well.[124]

Holmes certainly could wield his pen. His opinions will go on being remembered—if only for his glittering aphorisms:[125] "Brooding

---

121. *See* 258 U.S. at 279 (Clarke, J., dissenting) (citing Union Pac. Ry. Co. v. McDonald, 152 U.S. 262 (1894); Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873)).

122. *See* WHITE, *supra* note 63, at 591 ("Holmes leads all American judges, and most American historical personages, in the amount of scholarly and popular literature he has engendered.").

123. *See, e.g.*, Novick, *supra* note 62, at 1248-49 ("Holmes is not important to us now as a great originator of ideas, but because . . . [i]n a nation that generally does not honor poets, Holmes was our Tennyson. . . .").

124. W.H. Auden, *In Memory of W.B. Yeats (d. Jan. 1939), in* THE ENGLISH AUDEN 241 (Edward Mendelson ed., Faber & Faber 1977) (1939).

omnipresence in the sky,"[126] "clear and present danger,"[127] "falsely shout fire in a theatre,"[128] "free trade in ideas."[129] The same can be said for his other writings: "The life of the law has not been logic: it has been experience,"[130] "the felt necessities of the time,"[131] "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[132]

But every now and then Holmes' voice is the overwrought voice of the "class poet,"[133] Holmes liked to sign off a speech or essay **(1997) 96 Mich. L.R. 721** with something inspirational, or at least lofty. At the end of *The Path of the Law*, Holmes reaches down from Olympus to hand on the torch of theory—of "the remoter and more general aspects" of the law. "It is through [the more general aspects] that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint

---

125. *Cf.* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 787 (1989) (referring to "glittering phrases"). *See generally* Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506 (1988).

126. *See* Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . . that can be identified. . . .").

127. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) (holding the First Amendment does not bar prosecution for attempting to obstruct the draft by circulating literature).

128. *See Schenk*, 249 U.S. at 52 ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

129. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The passage in which this phrase appears reads:

> But when men have realized that time has upset many fighting faiths, they may come to believe . . . 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. . . .

250 U.S. at 630.

130. HOLMES, *supra* note 4, at 1.

131. *Id.*

132. Holmes, *supra* note 2, at 461.

of the universal law."[134] That is a rather effusive paragraph to tack on to a speech to law students. No, it is not his language, or, I should say, not only his language, that explains Holmes' grip on our imaginations. Rather, I think what we are in love with is the Holmes legend itself.[135]

In his fine recent biographical study of Holmes, Professor White points out that Holmes won very little recognition until perhaps his eighth decade. "In an important sense he. . . contributed to that recognition," White adds, "by fostering. . . The relationships with Frankfurter, Laski, and others that led directly to the publiciz[ing] of his ideas and his opinions and the creation of his image as a 'great judge.'"[136] White points out that it was only after Holmes' retirement that he "came to be mythologized as a 'liberal' judge."[137] The late Grant Gilmore, too, insisted that Holmes' Olympian liberalism was a myth created by Harold Laski and Felix Frankfurter about the time of World War I.[138] Whether in this way or some other, it seems clear that Holmes, the towering legend, had already come into existence before the death of Holmes, the failed man. Toward the end of his life, if Holmes was "lionized," it was as the legend, not the Justice.[139] The late Charles E. Wyzanski, Jr. Once told

---

133. Holmes was named "Class Poet" upon his graduation from Harvard College in 1861. *See* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870, at 75 (1957).

134. Holmes, *supra* note 2, at 478.

135. On the role of the imagination in legal writers' engagement with or disaffection from Holmes, there is nothing better than Michael Herz, *"Do Justice!": Variations on a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996). *See also* the nice recounting of the same story by my colleague, Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1301 (1989) (reviewing MARK TUSHNET, RED WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)).

136. WHITE, *supra* note 63, at 376.

137. *Id.* at 333; *see also* Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 344 (1984) ("We are left with the question how a man . . . so illiberal could have become a patron saint of liberal reform over most of the first half of the twentieth century. . . .").

138. *See* GILMORE, *supra* note 5, at 48-49; *see also* David A. Hollinger, *The "Tough-Minded" Justice Holmes, Jewish Intellectuals, and the Making of an American Icon*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. (Robert W. Gordon ed., 1992). *See generally* G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576 (1995). A warning may be found in White's article: "Felix Frankfurter . . . passed from revered to ridiculed . . . In two . . . decades." *Id.* at 576.

me a story. Felix Frankfurter had remarked to Holmes that he, **(1997) 96 Mich. L.R. 722** Holmes, always looked so tall. Holmes had replied, "That is because, Felix, you always approach me on your knees."[140]

To his admirers then, as to us, Holmes was the romantic Brahmin who enjoyed the company of "progressives" and Jews, the old soldier with an elegant style of speech and dress, at once the charmer of women and the giant striving to "live greatly."[141] Who can compete with such an idol, lodged as it now is in our collective memories? Put together with his realist and positivist theories, it has made Holmes simply more interesting than any other figure in American law. Too many scholars have too much invested in him by now;[142] no amount of debunking can dislodge him from the special place we reserve for him. We cannot grant to less charismatic men—even to the far greater judges who were his contemporaries, like the first John Marshall Harlan, or Harlan Fiske Stone—anything like the homage we pay to Oliver Wendell Holmes.

But that was all presence, style—and is now legend. What has Holmes left us of substance? The flowering of constitutional litigation in our time has outlasted the Warren Court and the crisis of legal theory with which we tend to associate it. It will outlast the assaults of the Burger and Rehnquist Courts. It has created a new world view for American lawyers and a new world view for law the world over. Perhaps we can lay the credit or blame for this to the connection between law and morals that we seem increasingly to find. Legal writers today embrace moral argument, and courts adjudicating constitutional questions are clear that there are

---

139. There is a sensitive account in WHITE, *supra* note 63, at 484.

140. On Frankfurter's sycophancy where Holmes was concerned, *see* my colleague, Sanford Levinson, *Fan Letters*, 75 TEXAS L. REV. 1471, 1474 (1997) (reviewing HOLMES & FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934 (Robert M. Mennel & Christine L. Compston eds., 1996)).

141. Oliver Wendell Holmes, *The Profession of the Law*, *in* THE OCCASIONAL SPEECHES OF JUSTICE HOLMES, *supra* note 42, at 28-31 ("[T]o those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say . . . that a man may live greatly in the law as well as elsewhere . . . that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.").

142. For a totting up, *see* G. Edward White, *Investing in Holmes at the Millennium*, 110 HARV. L. REV. 1049 (1997). White concludes that "Holmes's stock continues to rise." *Id.* at 1054.

some public wrongs that courts ought to remedy. Chief Justice Marshall is forever relevant in this story in a way that Holmes is not.

Holmes early set himself implacably against such views, and never underwent a change of heart. His was a narrow mind, of narrow interests. His early intellectual engagement with the common law did not liberate but confined him, and his understanding even of the common law was already becoming obsolete in his lifetime. **(1997) 96 Mich. L.R. 723** He never became equally engaged in the larger questions, in public law. He understood the role of equity in giving the force of law to morals, but equity was uninteresting to him; he closed his eyes to it. He was incapable of foreseeing the triumph of equity and the future of constitutional history. In part because to Holmes law was liability, and because, accordingly, rights-based thinking was uncongenial, judicial review of legislation became almost intolerable to him. *Marbury* was unbearable. His dissents in cases like *Lochner* do reflect his surprisingly generous understanding of the problems of labor, but also confirm his distaste for judicial review.

Holmes' limitedness insured that nothing he did on the Supreme Court of the United States would cap the realist achievement of *The Path of the Law*. And so, although the Holmes we remember is the larger-than-life figure of the Holmes legend, the real Holmes ultimately became only a minor figure in the intellectual history of the common law, and failed to become an actor in the unfolding story of the common law itself. As a Justice of the Supreme Court, he became only an early contributor to the Court's prudential and First Amendment jurisprudence. To all the rest that we care about, Holmes was almost wholly irrelevant.

For other writings by Louise Weinberg, click on the following links:

"Our Marbury," 89 VIRGINIA LAW REVIEW 1235 (2003).

"Of Theory and Theodicy: The Problem of Immoral Law, in Law and Justice in a Multistate World: A Tribute to Arthur T. von Mehren," pp. 473-502 SYMEON SYMEONIDES (2002).

"This Activist Court," 1 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY 111 (2002).

"When Courts Decide Elections: The Constitutionality of Bush v. Gore [Symposium: Federal Courts and Electoral Politics]," 82 BOSTON UNIVERSITY LAW REVIEW 609 (2002).

"Of Sovereignty and Union: The Legends of Alden [Annual Federal Courts Issue]," 76 NOTRE DAME LAW REVIEW 1113 (2001).

"The Article III Box: The Power of 'Congress' to Attack the 'Jurisdiction' of 'Federal Courts' [Symposium: Restructuring Federal Courts]," 78 TEXAS LAW REVIEW 1405 (2000).

"Choosing Law and Giving Justice [Symposium: Tribute to Symeon C. Symeonides]," 60 LOUISIANA LAW REVIEW 1361 (2000).

"Fear and Federalism [annual constitutional law symposium]," 23 OHIO NORTHERN UNIVERSITY LAW REVIEW 1295 (1997).

"Holmes' Failure," 96 MICHIGAN LAW REVIEW 691 (1997).

"Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist [AALS Conference Symposium]," 56 MARYLAND LAW REVIEW 1316 (1997).

"The Power of Congress Over Courts in Nonfederal Cases," 1995 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 731.

"Political Questions and the Guarantee Clause [Rothberger Conference on Constitutional Law]," 65 UNIVERSITY OF COLORADO LAW REVIEW 849 (1994).

"The Federal-State Conflict of Laws: 'Actual' Conflicts," 70 TEXAS LAW REVIEW 1743 (1992).

"Against Comity," 80 GEORGETOWN LAW JOURNAL 53 (1991).

"The Monroe Mystery Solved: Beyond the 'Unhappy History' Theory of Civil Rights Litigation [Federal Courts Symposium]," 1991 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 737.

"Federal Common Law," 83 NORTHWESTERN UNIVERSITY LAW REVIEW 805 (1989). .

"Choice of Law and Minimal Scrutiny," 49 UNIVERSITY OF CHICAGO LAW REVIEW 440 (1982). [Anthologized in A CONFLICT-OF-LAWS

ANTHOLOGY 339 (Gene R. Shreve ed.; Cincinnati: Anderson Publishing Co., 1997).]

"The New Judicial Federalism," 29 STANFORD LAW REVIEW 1191 (1977). [Indexed in CONCEPTS OF FEDERALISM (William Stewart ed.; Lanham, MD: University Press of America, 1984).]