WAR IS THE ULTIMATE RATIONALITY:
ASSESSING OLIVER WENDELL HOLMES, JR. ACCORDING TO
THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION

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To Mel: this ain’t quite art, but I finally made it out!
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Oliver Wendell Holmes Jr. poses a considerable dilemma for American scholars. Does he, or does he not, represent a judicial and political view that supports the traditional idea of American exceptionalism as expressed by the Declaration of Independence and the Constitution? It is important to understand Holmes’ view of America, in terms of law and political philosophy, in order to correctly assess his work as a judge and determine whether he has harmed or helped the country’s view of itself as exceptional and unique.

Holmes’ private letters, public speeches, and Supreme Court rulings indicate that his philosophy about human existence had a profound effect on his jurisprudence. His existential skepticism put law and the state before the natural rights of the individual and turned his democratic political philosophy into a power struggle between competing interest groups. Holmes saw the law as a way to validate his own effort, not as a means to regulate a healthy democratic society. Those who construe him as a model democrat and hero of progress for human betterment do not recognize that he cared only for the betterment of those most capable of producing a stronger and purer society.

The foundations of American political identity are the Declaration of Independence and the Constitution. During the Civil War, Oliver Wendell Holmes, Jr. lost his faith in these American ideals. The pragmatic mode that he found instead allowed him to approach life with purpose but without dogma or doctrine. (See Appendix)
The case of *Lochner v. New York* illustrates how Holmes approached the Constitution with indifference towards ends. The case also helps to open an initial window onto how he looked at the surface machinations of society: social groups, general civil rights, and economics.

The case of *Buck v. Bell* illustrates the eugenic climate in the early twentieth century. Holmes was sympathetic to eugenic ideals and iterates the sentiment of eugenicists that law should restrict the procreation of the unfit. The case leads to Holmes’ very candid thoughts about the worth of the individual before the state and the ultimate end of social perfection.

The free-speech cases of *Schenk, Frowherk, Debs* and *Abrams* show how Holmes, ironically, helped the cause of individual rights, not by opposing censorship laws, but by defining the occasions when they were just. From these cases comes insight into how Holmes’ view of law as force was very different from the traditional American view of law as a guide.

Holmes has had many critics and followers. Their assessments of him range from making him a true democrat to truly un-American. They help in understanding Holmes’ place in American thought.
The Source of American Identity

The political soul of America rests on the Declaration of Independence and the Constitution. Through these two documents the American people have established their independence from tyranny, their reliance on their government, and have tried to guarantee the future prosperity of their country.

The function of the Constitution is to allow the American citizens to rule themselves by establishing how they would let themselves be limited and controlled by their government. Though instituted by the people, the Constitution limits people’s reach into the government. The American law code is structured to allow the people a political voice while prohibiting them from turning their base, and often arbitrary, desires, into law. The Constitution guarantees that governing power is “derived” from those governed; the governing power is not those who are governed. The people elect the representatives who will direct and mitigate their collective will.1

The Constitution addresses the fundamental challenge of how to allow the people to effectively satisfy their public necessities while maintaining the sovereignty of a separate government force. The solution that Americans chose was to “constitutionalize necessity.” The Constitution not only establishes how American society deals with necessary changes, but it also establishes the methods for directing those processes that solve social problems. The Constitution guarantees that American society can change, but it also guarantees that governmental

1 Mansfield, America’s Constitutional Soul, 210-211.
functions are protected from the “passions” of the people. The government will always stay “at arm’s length” and be free of the tyranny of an unrestrained public.\textsuperscript{2}

Though intended for human happiness, the Constitution was not meant to be simply a machine created to manufacture that happiness. In order for the United States government to function correctly, it must take into account the necessity of human nature. Political thinkers, critics and experts have mistaken the satisfaction of competing interests as the betterment of society. Though the Constitution dictates how to go about finding solutions to problems, thinkers have assumed that all interests will necessarily be best served by passively allowing the articles of the Constitution to “automatically” rectify any competing claims. The nation’s founders saw the advantage of allowing diverse interests to flourish in order to discourage excessive power shifts, but they also believed that active and voluntary democratic participation was far more important as a virtue in and of itself and necessary for a healthy citizenry. Through voting and working in government, people will "bring forth" the virtuous republican spirit that the founders believed in, and individual pride, won by participating in a healthy political system, will translate into collective pride in society. Only by direct civic activity can someone cultivate the voluntary virtue that the Constitution relies upon for its success.\textsuperscript{3}

Political philosophy is the work of teaching this virtue. It is the work of teaching those entrusted with power the “principles of political right” that establish political power as “authority.” In America, the primary principle of political right is equality. The central theme of equality in the Declaration of Independence was,

\textsuperscript{2} Mansfield, \textit{America’s Constitutional Soul}, 212, 213.
\textsuperscript{3} Mansfield, \textit{America’s Constitutional Soul}, 213, 214-215.
according to Abraham Lincoln, a promise always on the way to fulfillment and a “political obligation” to make all Americans equal to one another with respect to “life, liberty, and the pursuit of happiness.” The proper form of justice is a government that is “loved and revered because it augments ‘the happiness and value of life to all people of all colors everywhere.’”  

To achieve this, more than sound laws are necessary. A moral people are needed to observe laws and reasonably carry out justice. A people woven out of everyday society, equal socially as well as politically, and with moral rectitude, would be the guarantee of the American experiment. They would be held together by a “political religion,” a mythos that Lincoln helped generate by equating Americans with the Patriarchs of the Old Testament. The faith of American greatness extended back into time immemorial, an “ancient faith” of “our fathers.” Lincoln transformed the union of people mentioned in the Declaration from a group of united individuals into a “union with ancestors and with posterity; it is organic and sacramental.” Americans found themselves in the depths of history, heirs to virtues found in the heart of all just men.  

Though America celebrates its ‘political religion’, public sentiment is the prime mover in a free society. Without tamed desires, the people have no reason to preserve their lofty values. American society requires a public sentiment that is not a brute, domineering force of specific interests, but a “central idea” that gives birth to all other secondary ideas. This idea is equality, and it is essentially transcendent.

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It was Lincoln’s hope that, by helping the people understand the transcendent nature of their country, they would follow its laws out of “reverence” and not fear.\(^6\)

The great test, then, for America to stay free, is popular sovereignty. It is a question of minority rights versus the prerogative of the majority; a question of how to enact a scheme, which in theory is “unanimously” supported by the community, but in reality, is enacted in the face of honest dissent. Rule by the people implies the protection of minority interests, and the recognition, by that minority, of the prerogative of the majority in establishing its preferred order. This respect is based on the belief that there is in all men an equality that precedes the authority granted to the sovereign that the sovereign must admit. It is the basic foundation of any form of self-government.\(^7\)

This American experiment was successful enough for G.K. Chesterton, from ‘across the pond’ in England, to remark that America is a “nation with the soul of a church.” He recognized that it was founded on a creed that all people can be equal through the promise of citizenship. To Americans, there is such a thing as citizenship; it is the foundation of the civic life of the people. Unlike every other country in the world, Americans are related, not by race or religion, but by their oath to uphold their political ‘experiment.’ America is more than a vessel, a melting pot, of individual interests: it is a national promise of equality and independence through active participation in self-governance for the increase of human virtue.\(^8\)

\(^6\) Jaffa, *Crisis of the House Divided*, 228, 231, 309.
\(^7\) Jaffa, *Crisis of the House Divided*, 30, 335, 348, 379.
\(^8\) Chesterton, *What I Saw in America*, 7, 8, 12, 16; Mansfield, *America’s Constitutional Soul*, 179.
American political philosophy is at the heart of American identity. The
Declaration of Independence furnishes the moral ideals that create the civic virtues
that allow the Constitution to work for man’s betterment. Citizenship is the
manifestation of and mechanism by which the people participate in the promises of
the founding. The whole system of American government is aimed at producing faith
in the American system of government. I shall argue that Oliver Wendell Holmes, Jr.
did not approach the law in a way that upheld these ideals. As a judge he was not
concerned with justice as a moral necessity, and he did not see American law as a
vital part of reifying the people’s faith in their government.

The Civil War pushed Holmes towards a pragmatic approach to life that
eschewed any moral grounding for action in favor of results. Through his opinions
of his most famous Supreme Court cases, his views about the Constitution, public
speeches and his personal correspondence, Holmes expressed a philosophy that did
not consider the relevance of American ideals and often ignored basic human values.
As a Supreme Court justice, Holmes advocated a view of American society that
neither the Declaration of Independence nor the Constitution were written to
realize.

Oliver Wendell Holmes, Jr. lived in a Boston society made in part by his own family.
Holmes, Sr. was grown from the “provincialism” of pre-Civil War Boston. The city
was, to him, “the thinking centre of the continent, and therefore the whole planet.”
To him, the “Boston point of view [was] pretty much the only point of view worth
representing.” He believed in the primacy of genteel society, and found it
preposterous to want to change the culture that had produced him and the circles
within which he moved. His “views on political issues therefore tended to be
reflexive: he took his cues from his own instincts and the prevailing tendencies, and
where these conflicted, he went with the tendencies.” For instance, he had no
problem revoking admission to black students at Harvard’s Medical School. He
opposed the abolitionists because he thought they were not only trying to “agitare”
Boston, but also trying to undermine the foundation of a solid society whose
structure necessarily required whites at the top. For Holmes, Sr. the world was the
way it was because that was how it was designed to work. He and his generation
had known relative peace; for them the world was stable and the social order
superlative. But in war, his son would come to an opposite conclusion: Stability is an
illusion. This lesson would relegate the gentlemanly world of antebellum Boston—
and antebellum America—to history. 9

Holmes, Jr., came from a generation that was tired of the fathers’ ways.
Holmes made himself a student of Emerson, not because, as his father had felt,
Emerson was a good man—well-bred, educated, enlightened, worth respecting—
but because Emerson had radical ideas that spoke to his own growing sense of
individuality. As the South turned violent, Holmes did what countless other
Northerners did: he became an anti-slavery crusader. For Oliver Wendell Holmes,
Jr., joining the Army to fight the injustice of slavery was the only means of self-
validation in a world that offered nothing but the well trod roads of his father and
grandfathers. War offered independence of spirit through collective solidarity. For

9 Menand, Metaphysical Club, 6, 7, 8, 16.
Holmes Jr., the spirit of solidarity and the moral assurance of crusade quickly disappeared before the reality of death within the nightmare of war.  

Suffering in the war was ubiquitous and unexceptional. Battlefields were clotted with the dead and dying. The broken and burning tools of carnage created a bedlam that virgin eyes quickly accepted as a new normal. This chaos became a heretofore-unknown necessity of life. It was by the scenes of destruction at Ball’s Bluff, Antietam, and Chancellorsville that Holmes learned a new philosophy for his life.

For Oliver Wendell Holmes, Jr., the moral causes of humanity were lost forever. He came to believe that “nobility of character consists in doing one’s job with indifference to ends.” He gained “the assurance that [one] had done [one’s] duty was a wholly adequate consolation.” It was far superior “to admire success more than purity of faith.” The necessities of battle made him abandon his belief that he was fighting the war in the name of goodness. In battle, all that mattered was efficiency, courage, giving all one had regardless of success or victory. The banners of righteousness may fly at full staff over hearth and home, but for Holmes the reality was, “Shall I stand the best chance if I try the pistol or the sabre on that man who means to stop me?” Sentiments and lofty moralism were useless; the immediate demands of combat were the only things that mattered. What he did was

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11 Fredrickson, *The Inner Civil War*, 87, 90.
valid not because he aimed at truth or tried to claim moral superiority but because he acted efficiently and effectively towards often unknown goals.\textsuperscript{12}

Holmes not only lost the basic human predilection for assuming moral superiority by taking up the banner of ‘moral causes’, he lost his belief in the very notion of ideas and ideals that make any cause worth fighting for. The cost of belief was annihilation: “Certitude leads to violence.” Or at best, mere fallacy: “Certainty is an illusion.” Holmes would no longer trust the attempt to get at truth. He consistently affirmed that for himself, truth was merely “the path that I have to travel” and for the larger world it “is just the name for what it is impossible for a person to doubt.” The universe had dissolved into a metaphysical mist, but that mist would condense into the solid core that would push Holmes through the rest of his life.\textsuperscript{13}

Echoing the words of General Garfield, Holmes remarked, “‘after the Civil War, the world never seemed quite right again.’” The “‘sense of the sacredness of life’” was gone forever. The horrors and discipline of the battlefield coagulated and solidified within him into a new concept of, and ground for, human experience. The universal man was to live high in the spirit of combat, pain, blind utility, achieving an end—any end—with bloody hands and broken bones. He was to keep going in a state of misery, fatigue and confusion. His only concern was how much blood and sweat he gave in the struggle. This was the greatest way of life. Accordingly, he came to disdain those who would cry out in flimsy emotions about the simpler

\textsuperscript{12} Menand, \textit{Metaphysical Club}, 37, 44, 54—Holmes quoted by Menand; Bent, \textit{Justice Oliver Wendell Holmes}, 90, 120.
\textsuperscript{13} Menand, \textit{Metaphysical Club}, 4, 61, 63; Holmes, “The Path of the Law,” 466.
hardships of the peaceful world; soldiers silently faced much more brutal conditions than the poor and lowly basking in the security of civilian society. He expressed explicit concern in his 1895 Memorial Day address about the growing tendency for Americans to prefer the soft life afforded by laissez-faire affluence and socialist utopianism to the manly rigor symbolized by the “sword-slashed faces” of the Heidelberg students at sport and the occasional broken necks of polo jockeys. As he noted at the end of that address, “As for [the Civil War generation], our days of combat are over… Whatever of glory must be won in the council or the closet, never again in the field. I do not repine.” Though the cannons of war are silent, the call to arms towards the next “struggle of life” had sounded and he dutifully dug into the trenches of law.14

Though Holmes was often acclaimed as a legal innovator, his conclusions stem from a foundation very different from those of his sympathizers. The case of *Lochner v New York* will begin to illustrate how he looked at the law and America in a fundamentally different way than expressed through the older tradition.

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**LOCHNER v. NEW YORK**

“The Fourteenth Amendment is a roughish thing.”—Oliver Wendell Holmes, Jr.\(^\text{15}\)

The case of *Lochner v New York* started with bread. In New York, at the opening of the twentieth century, the bread industry was a low cost, low profit manual labor industry, unlike the cracker industry, which benefited from large-scale mechanization, higher demand and large profits. Bakers could not afford to rent storefronts or independent buildings. They set up their bakeshops in the basements of tenement houses because they were not only cheap but offered stable flooring for the heavy ovens. But, these below ground locations were not sanitary. They were often next to sewage outlets and did not provide ventilation from heat and the flour dust that always hung in the air. Because of low profit, bakers often had to work extremely long hours in these conditions—anywhere from eighty to over a hundred hours a week. And because they were so exhausted, bakers did not take sanitary precautions and made bread with dirty utensils on dirty surfaces. They often worked shirtless and their sweaty, dirty skin would come into contact with their products. The situation was ripe for reform: poor working conditions, unsanitary practices, and low wages. However, what raised the most concern were the extremely long hours that the bakers worked.\(^\text{16}\)

In early twentieth century New York, workers in a majority of industries were hired daily or weekly for a set amount of money regardless of how many hours they worked. Advocates for shorter workdays used both moral and economic

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\(^{15}\) Holmes-Pollack Letters: vol. II, 137.

arguments to promote their cause. They said that the physical toll of manual labor and long hours deprived people of any opportunity to spend time with their families, read to become educated, and enjoy pastimes and hobbies. These were essential to humanity and civilized society. Industrial workers were not able to be the fully active and intelligent citizens that the American democratic-republic required, and that it was their right to be. Economically, employers would benefit because workers would be less tired, more productive and less likely to make mistakes or suffer injuries. Plus, by working employees less, more workers would have to be hired to sustain production levels, and, by earning wages, those workers would become new consumers. Reform would create a net increase in demand.  

Opponents had no trouble striking back. They argued that by keeping the working class busy, they were shielding them from their own evil behavior. With so much free time, the lower classes would succumb to the vices prevalent to their social standing—drinking, gambling, fornication and lewdness. Plus, even if economic arguments proved accurate, employers opined that by interfering with employer-employee relations, legislatures and judges would be attacking one of the most fundamental principles of a free society: freedom of contract.  

Employers owned their businesses and workers could sell their labor to whomever they wished, and to meddle in those micro affairs would dangerously overturn national tradition. Reformers rejected this argument saying that once workers were hired, they had no power to challenge working conditions or pay. State governments and the federal government already regulated businesses in

17 Kens, Judicial Power, 15-19.
18 Kens, Judicial Power, 17, 19.
whatever ways they saw fit and eight-hour work legislation had been passed in six states.\textsuperscript{19}

In New York, reform “experimentation” culminated in the Bake Shop Act of 1895, which limited how much a bakeshop owner could work his employees to sixty hours in a week, and no more than ten hours a day.\textsuperscript{20}

Though it involved workers’ rights, the Bake Shop Act was not initiated by organized labor. In the early twentieth century, labor was on the social and political fringe: they had no power to use or withhold, and they wanted to stay independent and radical. Organized labor had to legitimize itself before it could attempt something even as minor as the Bake Shop Act.\textsuperscript{21}

The Act was the result of the tenement reform movement gaining strength in New York City. Various groups had investigated basement bakeries and publicized the horrible conditions they found. The reform groups were not solely concerned with labor issues: they wanted to clean up tenement housing in particular. Tenement reformers proposed the bill, and a man named Henry Weissman was responsible for getting the support to pass it.\textsuperscript{22}

Weissman was a German baker turned union organizer who worked his way to New York to advocate for the Bake Shop Act. His eloquence in English and German garnered easy support for the bill. With one minor change allowing bakeshop owners themselves to work unlimited hours, the Act was passed unanimously by the New York legislature—which was controlled by the Republican

\textsuperscript{19} Kens, \textit{Judicial Power}, 19-20.
\textsuperscript{20} Kens, \textit{Judicial Power}, 25.
\textsuperscript{21} Kens, \textit{Judicial Power}, 49; 50-51.
\textsuperscript{22} Kens, \textit{Judicial Power}, 54-58; 60-61.
Party. It was a perfect way for the Republicans to unite regular and ‘machine’ party members, appease organized labor, shore up independents, and smash their Democrat opposition.23

Weissman’s political opportunism eventually broke his union connections but his eloquence brought him to the Republicans. Though he had studied law only part-time while running two of his own bakeries, he became an associate council for Joseph Lochner during his challenge of the Bake Shop Act. The New York Attorney General, Julius Mayer, was distracted by a land-holding case that would bring in millions for New York, so his inattention mitigated any of Weissman’s incompetence. Attorney General Mayer’s preoccupations and the Supreme Court majority’s Constitutional philosophy decided the case in Joseph Lochner’s favor.24

After appealing from the lower courts, Joseph Lochner found himself before the United States Supreme Court and a five-to-four majority of sympathetic minds. For New York bakers’ unions and dissenting Justices Harlan, White and Day, the question of the case was one of social welfare; for Joseph Lochner, the Court’s majority, and dissenting justice Oliver Wendell Holmes, Jr., it was a question of Constitutional authority.

Chief Justice Rufus Peckham gave the opinion of the Court. Peckham tested the Bakeshop act directly by the Fourteenth Amendment and found that it failed: “The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police

23 Kens, Judicial Power, 53-54; 59-60.
24 Kens, Judicial Power, 63; 111; 115, 128.
power.” Peckham reasoned that the law was not merely about defining what makes a “legal day’s work” but rather it put unlawful restrictions on how much a person was allowed to work, regardless of how much that person wanted to work. Each citizen of the United States was guaranteed Fourteenth Amendment protections unless those protections interfered with the “safety, health, morals, and general welfare of the public.” The question for the majority was which should prevail: the rights of individuals to buy and sell their labor as they see fit, or the right of the state to interfere in the citizens’ exercise of that right.25

Peckham stated, “There is no reasonable ground for interfering with the liberty of persons or the right of free contract, by determining the hours of labor, in the occupation of a baker.” The opinion states bluntly that bakers “are not wards of the state” who “are not able to assert their rights and care for themselves without the protecting arm of the state.” And it is an overly paternalistic state that the Court majority feared. He argued that any occupation may be unhealthy in some way: are we all to be mere wards of the state. Should the state, in its “paternal wisdom” regulate the hours of “bankers, brokers, real-estate”, as well as the hours of “doctors, lawyers, scientists, all professional men, as well as athletes and artisans?” Should the state regulate how many hours one can work under artificial light sources? Might there by another motive behind such legislation than merely public health, safety and morals? Peckham warns against the tendency to think that anything that is a health law has to automatically be upheld by the courts. The Court must

25 LOCHNER v. NEW YORK, U.S. 45.
consider what the actual effects of a law are, and not whether the intended consequences are enough to justify an infringement of Constitutional liberty.\textsuperscript{26}

Peckham does grant that, regarding physical work environments and labor procedures, the state has the right to regulate safety requirements. He admits that the Bake Shop Act does justly prescribe necessary safety requirements for work environments regarding drainage and plumbing, windows and ventilation, ceiling and floor stability. But, “there is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker.” It does not make sense to say “if a man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthy, and therefore, he shall not be permitted to do it.” Individual liberty of contract via the Fourteenth amendment was superior to what the New York legislature believed was necessary to ensure the health and safety of the baking industry.\textsuperscript{27}

Justices Harlan, White and Day believed otherwise. In dissent, the justices asserted that though each citizen of the United States is entitled to the fullest protection of their liberties, “there are manifold restraints to which every person is necessarily subject for the common good.” Courts have a duty to ensure that legislatures do not enact invasive laws that run counter Constitutional protections. But, they also have a duty to strike down laws that are clearly counter to the aim of public wellbeing or cannot, in any conceivable way, accomplish this aim by the procedure proscribed within the statutes. The Bake Shop Act of 1895 was not one of

\textsuperscript{26} LOCHNER v. NEW YORK, U.S. 45.
\textsuperscript{27} LOCHNER v. NEW YORK, U.S. 45.
those statutes. The Justices concluded that the Act was well within the legislature’s main prerogative of ensuring the health and safety of those who work in the baking industry and it was in no way an undue restriction on people’s right to contract.\textsuperscript{28}

The dissenting Justices acknowledged that the statute very well may have been enacted in order to even the field between employers and employees, but this did not invalidate the law. The Court had no opinion on proper relations between worker and business owners. It was the Court’s solemn duty to remember that legislatures are the mechanism by which the people embody their political wills. Unless a statute is “plainly and palpably beyond all question in violation of the fundamental law of the Constitution” than the Court has every duty to uphold it, regardless of the opinions of the Justices themselves.\textsuperscript{29}

For Holmes, Harlan’s dissent only scratched the surface of the real issue: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s \textit{Social Statistics}.” He believed that the Court majority decided the case “upon an economic theory that a large part of the country does not entertain.” According to Holmes, the Constitution does not function according to the primacy of a particular idea, whether that idea is about concrete public safety or abstract political principle. “A Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire...It is made for people of fundamentally differing views.” It is best if the Constitution did not serve any particular principle.\textsuperscript{30}

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By voting in favor of the Bakeshop Act, Holmes may have appeared to endorse the cause of progressive reform with the authority of the Constitution. However, his dissent proves that he saw reform as simply one of many interests that had prevailed in the American mind. He believed that whatever legislatures passed was necessarily legitimate because they are the will of the people. Unlike Lincoln, who held that public opinion was the most powerful force in society, Holmes believed that the will of the people was the most important factor. Lincoln’s view of public opinion was that it would influence what legislators did; Holmes believed that public opinion was what legislators were explicitly supposed to do.\textsuperscript{31}

Holmes saw legislatures as “unprincipled battlefields.” As the will of the people, whatever laws legislatures passed was almost always to be permitted, regardless of the effects. “A law should be called good if it reflects the will of the dominant forces of the community,” “even if it will take us to hell.” He told Sir Frederick Pollack “I enforce whatever Constitutional laws congress or anybody else sees fit to pass...I am so skeptical as to our knowledge about the goodness or badness of laws that I have no practical criterion except what the crowd wants.”\textsuperscript{32}

But, the crowd rarely considers the costs and benefits of what they want. Holmes criticized the people for advocating social policies without weighing their price. “Wherever we turn we find that what are called good laws are apt to be called so because men see that they promote a result that they fancy desirable, and do not see the result that has to be paid in reactions that are relatively obscure.”

“Personally, I like to know what the bill is going to be before I order a luxury.” But, in the end, “doubts as to the value of some of those rules [legislation] is no sufficient reason why they should not be followed by the courts.”\(^{33}\)

Holmes also did not see the point of socialist and collectivist reformers in going after the wealthy. He thought they entirely missed the point, and that their motives were reactionary. Their ideas rested only on “dramatic contrasts” of the rich and the poor: “look at the big house and the little one.” But, “the public reasons by pictures, not by statistics.” “The objections to unlimited private ownership are sentimental or political, not economic.”\(^{34}\)

In fact, as far as economic reform went, he believed that “the crowd now has substantially all there is, that the luxuries of the few are a drop in the bucket, and that unless we make war on moderate comfort there is no general economic question.” For Holmes, the main point was almost always economic and a matter of who consumed the most: “Who eats the wheat, wears the clothes, uses the railroads and lives in the houses.” The point that he expressed so often in public and private was that reformers had better look at “what do the luxuries of the few amount to?” “The luxuries that really impinge upon the necessaries are the luxuries of the many...” And, what, if anything, is actually gained and lost by the taxes on the wealthy? “Whatever form they [taxes] may take in their imposition, they must be borne by the consumer.”\(^{35}\)

\(^{33}\) Holmes, Jr., *Collected Legal Papers of O.W. Holmes*, 289; 307; 289.
Holmes saw social justice resolved in power: “A great fortune does not mean a corresponding consumption, but a power of command.” Some one has to control the wealth and it might as well be one man than many. The man with much wealth will be restrained by the public’s threat of force, for “if a man owned one-half the wheat in the country and announced his intention to burn it…the crowd would kill him sooner than stand it.” Capitalists must follow inherent economic rules, and it is the crowd that decides where the ‘procession’ goes. The capitalists “only follow ahead like little boys. If [they] turn down a side street, [society] doesn’t.”

Holmes had no sympathy for the lower classes or the masses. Even as far back as the Civil War, Holmes expressed an aristocratic distaste for the greater mass of people. In a letter to his sister Amelia, he said, “While I’m living en aristocrat I’m an out-and outer of a democrat in theory, but for contact, except at the polls, I loathe the thick fingered clowns we call the people—especial as the beasts are represented at political centres—vulgar, selfish and base…”

He cared even less for minorities, whom he never saw fit to favor in his judicial votes. In McCabe v Atcheson, T & SF Ry, he voted that a railway company could provide sleeping cars for whites and not blacks. In Giles v Harris, he said that it would make no sense to let a black man vote in an election by rules that the court just ruled illegal. He told Harold Laski that “when I was a sophomore I didn’t like the nigger minstrel shows because they seemed to belittle the race….’Now his nerves have grown firmer,’ as Mr. Browning says, and I fear you would shudder in your turn at the low level of some of my social beliefs.” It was perfectly natural for

37 Holmes, Jr., Touched With Fire: Civil War Letters, 71.
Holmes to allow Southern authorities to infringe on blacks if he thought that such authority was “the de facto dominant power in the community.”

The case of *Lochner v New York* shows sections of the American population fighting for social improvements, political supremacy, personal gain, economic liberty, and Constitutional philosophy. All sides had their own interests and opinions on the line. The State of New York decided that the baking industry needed to be overhauled, and for political reasons, the Republican Party made the Bake Shop Act law. Joseph Lochner saw the statute as an infringement on his right to free contract, and the Court agreed with him. The Court minority sided with the state saying that baking was a hazardous industry. The people on both sides of the issue fought for what they believed was necessarily right—they fought for what they valued.

Oliver Wendell Holmes, Jr. did not. He disregarded questions of social welfare and Constitutional protections. He did not care who did or did not benefit from the Bake Shop Act, or any other law. He was apathetic to causes, unlike everyone else involved. He said that the Constitution guaranteed that legislatures served the will of the people. However, Holmes’ ‘will of the people’ was nothing more than collective brute desire, not the sentimental force of public opinion that influenced good laws. By replacing Lincoln’s ‘political religion,’ with public desire, Holmes simply fed the fire of people’s passions that is one of the country’s biggest threats.

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By declaring that legislation is nothing more than the political embodiment of collective desires and admitting that he had no criteria for what made a law good, Holmes rejected the main premise of the founding documents. Where, traditionally, American law was seen as a way to further the people's faith in the American system by pointing to virtues higher than temporal demands, Holmes defined all legislation as a means to satisfy those demands. Holmes believed that if the people of New York wanted to experiment with work-hour legislation, it was not his place to argue. A philosophy that judges the merit of social experimentation by how much it doesn't cost society, and not by what it advances, is not the philosophy of American exceptionalism.

Deeper in the heart of Holmes' dissent in *Lochner* is a rejection, not of eighteenth century laissez-faire economic rights, but of the principle of natural rights and the inviolability of the individual before the state. His view on the conditions for individual rights is best illustrated by his majority opinion for the Court in *Buck v. Bell*. *Bell.*
BUCK v. BELL

“Law must take lessons from biology.”—Charles Davenport, Founder of the Eugenic Record Office, 1912

“Doesn’t this squishy sentimentality of a big majority of our people about human life make you puke? [That minority includes people] who believe there is an onward and upward—who talk of uplift—who think that something in particular has happened and that the universe is no longer predatory. Oh bring in a basin.”—Oliver Wendell Holmes, Jr., 1910

Oliver Wendell Holmes Jr.’s definition of equality is markedly different from that proposed by the Declaration of Independence. There is nothing that indicates that he believed in universal civic equality as evidenced by his sympathy and appreciation for eugenics.

The term eugenics has meant different things, but always implied the increase in the ‘quality’ of bloodlines for personal or social betterment. For the most adamant adherents, eugenics meant the propagation of only those deemed ‘more suitable’ for survival at the expense of the ‘less suitable’. To some it meant “scientific philanthropy” in which wealthy donors saw to the private and public support of the more fit, and restricted the funding and support of the less fit. Others saw eugenics in laissez-faire terms where undesirable groups would be left to dispose of themselves. The wealthy saw eugenics as a way to ensure the purity of their descendants. The middle classes saw in it a way to validate their ethics of “hard work and clean living”—since those that produce would survive—and as a way to see to the “intellectual, emotional and genetic” health of their children. Many in the

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40 Lombardo, Three Generations, No Imbeciles, 44.
41 Lombardo, Three Generations, No Imbeciles, 164.
lower classes saw eugenics as the long awaited “triumph of socialism” that would even out the variety and disparities in society.\textsuperscript{42}

By the beginning of the twentieth century, eugenics had become an established outlook on life. State fairs held “better-baby” and “Fittest Family” contests in “human stock” expositions. Social crusaders established programs to help couples become better parents for the eugenic health of their babies. Activists started anti-smoking programs and influenced temperance movements. They even warned about the eugenic hygiene of soldiers going to war. Around the country, families were sending in surveys to places such as the Eugenics Record Office (ERO), in New York state, so “experts” could analyze the eugenic health and purity of their family bloodlines.\textsuperscript{43}

The most extreme method of eugenics was prohibiting the ‘unfit’ from procreating. Initially, states passed laws that prohibited ‘unfit’ and ‘defective’ people from marrying. Eugenicists soon realized that a more aggressive approach was necessary and modern science could provide the justification for sterilization laws. Indiana was the first state to enact an involuntary sterilization law, though it pertained only to criminal inmates. Proponents of the law said that it would cut crime and save the state money. Only those prisoners who would benefit from sterilization would receive the operation. Eventually, public backlash and constitutional concerns caused Governor Thomas Marshall to suspend the practice.

\textsuperscript{42} Hasian, \textit{From Cradle to Grave}, 28, 31.
\textsuperscript{43} Hasian, \textit{From Cradle to Grave}, 28, 30; Cuddy and Roche, \textit{Evolution and Eugenics}, 13; Lombardo, \textit{Three Generations No Imbeciles}, 30, 31.
for over ten years. In 1927, Indiana was able to pass another sterilization bill by guaranteeing inmates’ rights.\(^44\)

Indiana’s law indicated that states might be able to eventually establish more comprehensive sterilization laws and eugenicists around the country began assessing each state’s “mental hygiene.” Virginia was one state with a deep eugenic concern.\(^45\)

Virginia has a long history of ensuring the betterment of its social character. As a colony, it was a society of the ‘well-bred’, which made sure that its mal-developed citizens were well cared for, but segregated. The first asylum in America was built in Williamsburg in 1773. Up until the twentieth century, Virginia kept people with a wide range of “social, psychological, and medical maladies” together with criminals in common institutions. Eventually, epileptics were given their own institution because the nature of their illness did not make them criminals. In 1906, Virginia established the Virginia State Epileptic Colony, for men, through the work of a prominent “political pragmatist” named Aubrey Strode. A year later, women who suffered from the vaguely defined condition of ‘feeblemindedness’ were admitted to the Colony.\(^46\)

Feeblemindedness covered a broad range of “congenital defects” from “the simply backward boy or girl…to the profound idiot, a helpless, speechless, disgusting burden.” Interest in the condition started in the nineteenth century’s “Purity Crusades” which tried to eradicate immorality, especially prostitution, which

\(^{45}\) Lintier, *A Century of Eugenics in America*, 32.
\(^{46}\) Lombardo, *Three Generations No Imbeciles*, 12-13, 15.
many believed was caused by the condition. “Purity Crusades” were matched in the twentieth century by calls for “social hygiene.” Eugenicists saw their cause as the answer and their claims of scientific authority wedded easily with Progressive desires to create politically efficient ways of dealing with social problems. Eventually, Progressives turned away from helping the feebleminded and towards protecting society from their “menace.”

With growing concern for the moral and financial costs that “mental defectives” were having on society, Virginia established a legal definition for ‘feeblemindedness’ that allowed the state to track and register such people. It also expanded the authority of doctors to “impose ‘whatever moral, medical, and surgical treatment’” they felt necessary. Revisions to the state’s guidelines for the Colony for Epileptics, passed in 1916, were vague enough to force colony inmates to be involuntarily sterilized—primarily women who were viewed as sexually promiscuous or degenerate. Only by holding such women past their childbearing years could eugenicists “clean up the rubbish” polluting Virginia.

The Colony quickly scheduled fourteen operations, but before proceeding, it wanted to make sure that the new provisions were constitutional. There were still concerns that people in institutions were being unfairly singled out. The Colony postponed all operations until a test case could be satisfactorily concluded, at the United States Supreme Court. Only Carrie Buck was kept on schedule for operation.

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The lower court and the Virginia state Supreme Court ruled in favor of sterilizing Carrie Buck. They believed that the law’s concern for the health of the patient was sufficient reason to promote sterilization. Because nothing in the legal record indicated that Carrie Buck was not feebleminded, she could legally be sterilized.50

The United States Supreme Court upheld the law. Oliver Wendell Holmes, Jr. gave the opinion of the Court. It was decided that the appellate record indicated Carrie Buck’s rights were preserved at every stage of the process, in accordance with the language of the Virginia statute. “There is no doubt that in that respect the plaintiff in error has had due process at law.” But, “the attack is not upon the procedure, but upon the substantive law.” Holmes agreed with the eugenicists that the ‘unfit’ should be kept from procreating, and he said so in the published opinion.51

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind...Three generations of imbeciles are enough.52 [emphasis added]

Holmes had no patience for equal protection arguments; they were “the usual last resort of constitutional arguments of this sort.” Once those in institutions were

50 Lombardo, Three Generations No Imbeciles, 150, 154.
51 Lombardo, Three Generations No Imbeciles, 167; BUCK v. BELL, 274 U.S. 200
52 BUCK v. BELL, 274 U.S. 200
sterilized, they could be released to make room for more ‘degenerates’ and in that way “the equality aimed at will be more nearly reached.” Justice Butler, alone, dissented without opinion.\textsuperscript{53}

The \textit{Buck} decision was merely a sampling of Holmes’ ideas about people and society. He did not believe that people could create a better society; he believed that society could create—manufacture—better people. Throughout his life he was very candid about what he thought it would take to make society better. If man wanted progress, to make the best of his situation on earth, he would have to take bold action. Politics was not enough; progress was a matter of feeding social vitality. Holmes laughed at reformers and Socialists who thought that progress was possible through “tinkering with property.” Humanity had to “take life in hand” and without remorse “restrict propagation by the undesirables and put to death infants that didn’t pass the examination.” “I should be glad, to speak Hibernianly—if it could be arranged that the death should precede life by provisions for a selected race to greatness and splendor by science.” The strong men of the Army, and the “weakling” with “genius” gave Holmes hope that “it would be possible to breed a race.” But, war was as good at sifting the useless from society as the haphazard slow march of time: “If you don’t kill the weakest one way you kill them another...the memorial tablets of war are as good as an addition of two hundred years in which men have lived and died in the place.” And law could be used to promote “the survival of a certain type of man.”\textsuperscript{54}

\textsuperscript{53} BUCK v. BELL, 274 U.S. 200
\textsuperscript{54} Holmes-Frankfurter Letters, 125; Holmes-Pollack Letters, vol. II, 36, 42, 90; Collected Legal Papers, 288-289, 296.
The future could only belong to those fit enough to enhance it. In a very pointed statement, Holmes said, “If a man does not contribute thought or beauty I do not rejoice at his multiplication...” He believed that there would be greater artistic flowering with “thinner populations,” and, being conscientious of the use of the world’s resources, he hoped that there was still enough time for the species to give its best. And its best was still better than a superfluity of humanity. “So far as my choice goes I would rather see a million fellahs go hungry...or a German corps wiped out, than lose what more or less we have lost...”55 (in World War I regarding “the world’s unique spiritual treasures.”)

Holmes did not believe that humanity was important and he found no justification for human exceptionalism. What mankind did was worth its attention; beyond that it was pointless to expect the rest of reality to care. He told Sir Frederick Pollack,

I guess that you think man a more important manifestation than I do. I suppose that such differences depend a good deal on the ultimate make up of different men and hardly can be argued about. Of course from the human point of view he is important; he hardly would live if he didn’t think so. Also I hasten to admit that I don’t dare pronounce any fact unimportant that the Cosmos has produced. I only mean that when one thinks coldly I see no reason for attributing to man a significance different in kind than that which belongs to a baboon or a grain of sand.56

Holmes had the consolation that “though in common with the dust we have all the importance there is, that of being part” of the cosmos. In this, Holmes found a modicum of hope: “To trust ourselves to the infinite in some form or another was

the lesson and achievement of life.” Because he believed that human existence had no purpose, he did not believe that the universe contained any form of truth.  

For Holmes, truth was simply the system of his own “intellectual limitations,” those things that he “cannot help believe”—his “can’t helps.” Everyone has his own opinion as to truth, held up by their idiosyncratic tastes. In Holmes’ view, a man expects that, with the proper education, everyone else will eventually come around to his peculiar point of view. “Objective truth is a pure ideal that if everyone was as clever and as educated as you they would agree with you and then the universe would be conquered.” But, agreement was seldom possible because “there are fundamental differences that make one man’s truth another man’s falsehood.”

There were, however, some things that he had to conditionally admit. He reasoned that “if I cannot prove that I am awake, I believe that my neighbor exists in the same sense that I do, and if I admit that, it is easy to admit also that I am in the universe, not it in me.” “I accept the existence of a universe, in some unpredictable sense.” “Of course the fact that mankind, or the part of it that we take into account are subject to the same can’t-helps as ourselves makes society possible...”

There is no justification for expecting reality to bow to the human ideals of “love, etc.,” because “the chances are much against man’s being at the center [of the universe] or knowing anything more than how to arrange his universe—according to his own necessary order.” Accepting what one finds in the world—“consciousness, purpose, significance, ideals”—without knowing the how or why of

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57 Holmes-Frankfurter Letters, 5, 35.
these things should cause no more panic than would the experience of a religious person not knowing the thoughts of God. Holmes was content to be “a mystic in the sense of believing [himself] to be an intelligible moment of the unintelligible” but dismissed any notion of being able to come to a “conversation with God.”

Holmes did not believe that the universe was bound by the finite capability of his intellect and he did not need the universe to give him any other reasons to live than those he formed for himself. Man is a simply a “cosmic ganglion”: “a momentary intersection of what humanly speaking we call streams of energy, such as gives white light at one point and the power of making syllogisms at the another, but always an inseverable part of the unimaginable…” Man is that part of the universe that makes of it “a spontaneity taking an irrational pleasure in a moment of rational sequence.” Humans are an instance of “consciousness—significance—beings with ideas” and we are too small for the rest of reality to notice. It is absurd to shrink at the vastness of everything simply because by mastering a few physical laws we feel that we have some transcendental significance.

How can man know anything anyway? “There is good reason for believing that there is more in the universe than we know or understand and probably more than we can understand.” Or, all the truth there is may be simply the “finiteness of man.” Either way, Holmes said, “I take little stock in trying to think outside the intellect as ditto outside time and space…”

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Holmes did not believe that he was “on the ground floor with God.” “I do not see how finite human beings can have an opinion whether they have struck bottom or are in some transitory form...I thought the root of the whole business was that you couldn’t predict anything until it had occurred.” “Possibility means something of the existence of which we have some evidence.” Therefore, Holmes described himself as a “bettabilitarian”: “I believe that we can bet on the behavior of the universe in its contact with us. We bet that we can know what it will be. That leaves a loophole for free will...the creation of a new atom of force, although I don’t in the least believe in it.” As he learned from Chauncey Wright, one cannot “predict necessity” of the universe.” Necessity only means “that any phenomenon stands in quantitatively fixed relations to antecedent phenomenon.” And as Holmes said of Hegel, he “can’t persuade me that a syllogism can wag its tail. I have yet to grasp the transit from timeless logic to phenomena in time.”

If Holmes had no faith or belief in anything, what moved him to do all that he ever did in his life? He believed that life was an end in itself and the measure of the value of life was struggle. “Repose is not the destiny of man” and “the line of most resistance is the one to choose.” “There is a certain advantage to difficulties, and [...] one sails better with the wind on the quarter than when it is directly astern.” Hardship is edifying but necessary for success: “Business in the world is unhappy, often mean, and always challenges your power to idealize the brute fact but it hardens the fiber and I think that is likely to make more of a man of one who turns it

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Struggle is an expression of vitality; vitality is man’s unique enjoyment.

“What a divine thing is adequate vitality—to be gay in the face of death, and, almost worse, ennui—to be capable, though a complex and civilized man, to lark like a boy and to rejoice over a bellyful of blubber.” “I do despise making the most of one’s time. Half the pleasures in life consist of opportunities one has neglected.” Man is full of a “superfluity of energy,” like “a kitten playing with its tail.” “Functioning is all there is—only our keenest pleasure is in what we call the higher sort.” Are there any ideas that are important than “victuals—procreation—rest and eternal terror” and gentlemanly exercise? Vitality: “The thing is to do it. Not to have people say that you have done it.”

What, then, is better than those acts done purely for themselves? They give no return but that of having done them. The absence of reward is what makes anything beautiful: “The ground of aesthetic pleasure is waste.” The merit of the quest is reduced when done for any reason other than the quest: how much more beautiful a cathedral that hides in an alley, how much more adventurous the expedition that embarks without foresight of gain.

And what a terrible vice it is to be denied one’s chance at the fight, the quest. It is better to have had a chance to reach the top of one’s endeavors than it is to

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66 Collected Legal Papers, 273.
worry about not having any more time on top beyond the moment of success. “If you are killed as a young one you feel that you haven’t had your chance...but when one has had a try at life, has shown what he can do, and has come to some understanding of himself, to die a little sooner is only to lose pleasure, not to miss the point of being.” If one is given one’s shot and can keep going, age is not an excuse to quit. “If one knows his place and makes way for younger men when he isn’t sure, it is better perhaps not quite to abandon interest in the sport of life.”

It is easy to see why Holmes gave the Court opinion that he did for the Buck case. He believed that progress was possible if the unfit were eradicated. Yet, he did not believe that progress itself necessarily meant that man himself would improve. There was nothing above the dictate of opinion to which man could defer: no truth, no sense of human dignity, and no virtue of peace. Life was struggle, satiation and a blind guess at order—a ‘bet’. To Holmes, Carrie Buck would only have had a place in American society if she could have ‘contributed thought or beauty’. She was not worthy of equal protection and enjoyment of the law. Equal protection meant equal sterilization for all of the unfit. Just as in the Lochner case, Holmes believed that the Virginia law was simply the people embodying their will, their passions and desires, in legislation. In this case, Holmes had the pleasure of upholding a pseudo scientific idea with which he agreed.

Holmes defined democracy by the process of contribution. Though he is easily seen as a champion of the free exchange of ideas, it is not because he believed that socially accepted opinions would make America better.
The first amendment is one of the hallmarks of American culture. Ironically, Holmes’ beliefs about America conflict with the notion that free expression is a defining characteristic of the nation; his view of law, in particular, puts him at odds with any belief in American exceptionalism.

The Supreme Court cases of *Schenk v. U.S.*, *Frohwerk v. U.S.*, *Debs v. U.S.*, and *Abrams v. U.S.* all deal with the question of American free speech during wartime. In *Schenck*, the defendant, as General Secretary of the Socialist Party, was convicted of conspiracy to obstruct the draft by delivering anti-war pamphlets to the public generally and newly conscripted recruits personally. In *Frohwerk*, the defendant was convicted of running a newspaper that violated the Act by trying to “cause disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States.” Eugene Debs was convicted of attempting to incite, with a public speech, insubordination amongst soldiers and recruits, and obstruction of the draft. In all but the case against Abrams, Holmes voted to uphold the Espionage Act of 1917. And in each of the three affirming cases he gave the opinion.  

Beyond these cases, Holmes had shown a predilection to side with government force over the rights of citizens to freely express their opinions. As a state judge, he ruled that a police officer had no right to talk politics while on duty; and libelous statements about a person were ‘privileged’ in a courtroom, but those same statements were contemptible in the public press. As a Supreme Court justice, Holmes believed that First amendment protections were not a guarantee of future

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expressed opinions, but only pertained to those already published. Holmes believed that governments had full authority to regulate speech on the grounds of “public welfare.”

Holmes’ reasoning behind upholding the three Espionage Act convictions was that a person’s proximity and intent were enough to justify his guilt. As he said in Schenck, “The character of every act depends upon the circumstances in which it is done.” “The question in every case is whether the words used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.” “If the act...its tendency and the intent with which it are done are the same, we perceive no ground for saying that success alone warrants making the act a crime.” In Frohwerk, he elaborated saying that possible close proximity was enough to establish guilt. “It is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.” As for intent, “Intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it” “even if no means were agreed upon specifically by which to accomplish the intent.” This reasoning must have been sufficient because, in Debs, Holmes did not expand on or clarify his criteria for upholding the First Amendment.

Holmes’ dissenting opinion in Abrams v. U.S. would seem to question everything that he stated was necessary for abridging First Amendment protections.

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69 Alschuler, Law Without Values, 69-70.
70 SCHENCK v. U.S.; FROHWERK v. U.S.
Abrams was convicted of violating the Espionage Act of 1917 by printing and distributing pamphlets that urged a protest against the U.S. government in general and Russians working for munitions companies in particular. Abrams did not want his fellow Russian-Americans to make weapons for the American forces that would be used against Bolshevik fighters in Russia. The front of some of the pamphlets were written in English and the back repeated the same message in Yiddish.

Whereas in the three previous cases, Holmes equated “advocacy” and “incitement” and did not specify terms of proximity, in Abrams, he applied a very exacting test for what qualifies as proximity between intent and results. “When words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed.” A person “does not do the act with the intent to produce [the desired consequence] unless the aim to produce it is the proximate motive of the specific act.” Holmes now believed that only specific results could be attributed to direct actions.71

Holmes’ advocates have suggested that he simply expanded his definition of acceptable speech while his critics claimed that he had changed his mind completely. Another suggestion regarding Holmes’ opinion in Abrams is that he was not so much concerned with judicial philosophy as he was personally influenced by flattering articles and private letters. Holmes also may have been influenced by the emerging progressive legal minds of men like Felix Frankfurter, Walter Lippmann, and Louis Brandeis, his fellow associate on the U.S. Court. This is not to say that Holmes agreed with their philosophies, but perhaps the idea of young, or at least

71 ABRAMS v. U.S.; Alschuler, Law Without Values, 76.
younger, and virile legal professionals massaged his philosophy of life as struggle and ceaseless work. As he told Frankfurter, “Even your more optimistic outlook and prophecy for human destinies than I can venture makes you dearer to me.”  

Holmes’ statements from his Abrams dissent seem to directly express faith in the American system:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.  

Though Holmes endorses the idea of free expression and thereby agrees with one of the fundamental values of American society, what he saw as the end result of a free exchange of ideas was not a better, or more American, America. American law, like all law, was helping to distill and refine society towards greater existential purity. A free exchange of ideas would not add greater depth to American society; it would simply separate the wheat from the chaff—it would “Upset many fighting faiths” and establish a ground of truth. Holmes believed that law was the cornerstone of this

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73 ABRAMS v. U.S.
process and that America was an incidental arena for this process of existential refinement.74

Holmes did not think that the United States deserved any special claim upon the earth, or in history. The United States worked because it had always worked; it did not have any special destiny. “I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and because I believe that the claim of our special code to respect is simply that it exists, it is the one to which we have become accustomed and not that it represents an eternal principle.” As he succinctly phrased it, “There is no mystic over law to which the United States must bow.”75

There was nothing sacred or poetic about national sovereignty. Each country was simply a “territorial club” and force was its sole claim to legitimacy. “I go whole hog for the territorial club and I don’t care a damn if it interferes with some of the spontaneities of the other groups,” such as “churches and trade unions.” Force is the necessary condition of sovereignty, either domestically or internationally. “Of course, the territorial club (i.e. the nation), while it lasts, must have the army. While it has the army the extent to which it will allow other clubs depends upon its will—subject to the chance that if it goes too far it will use its fighting power.” And Holmes was confident that if it came to blows the United States was strong enough to “crush those who set themselves against it.”76

74 ABRAMS V. U.S.
The demand of the United States government existed before the rights of its citizens. He concluded his speech honoring Chief Justice John Marshall with the bleak statement that “The flag is but a bit of bunting to one who insists on prose...It owns our land. At will it throws away our lives.” It is the country's prerogative to make claims to its citizens’ lives whenever it needs them. What, then, protects a person from this force? Nothing. Usually, it would be the law, but Holmes rejected the idea of the law as a protector of the people. 77

Holmes defined law as “the hypostasis of a prophecy,” that is, “the prophecies of what the courts will do in fact, and nothing more pretentious.” The law is not a system of rights and duties by which responsible citizens can interact within their communities. Laws, as laid down as statutes and in books, are “merely Sibylline leaves of prophecy as to when the public force will be brought to bear on you through the courts...And a statement of rights is merely part of these prophecies.” A duty is “little more than a convenient index, or mode of predicting the point of incidence of the public force.” Rights and duties are epicycles; a person's rights revolve around the larger concerns of the state. Therefore, Holmes did not believe in natural human rights. “I don't agree with the premises as to human rights.” “I don't believe that man necessarily is an end in himself,” and “I rebel at once” at the very idea. Natural rights aren’t natural because neither individual rights nor any other “concrete proposition is self-evident.” 78

77 Collected Legal Papers, 271.
Of course rights are important to people because they have come to expect them as the means to get what they want out of society. They will fight for them for the same reasons that “a dog will fight for his bone”: they want what they want.\(^79\)

Those bones, however, are also the prerogative of the nation. Holmes felt that national power trumped everything else, especially the sovereignty of individuals. And national power came from the force of law.

Law was essentially the marshal and bailiff of citizens. To understand the law, a person had to look at it as would a ‘bad man’, caring only about the consequences of his actions. The bad man does not care if an act is morally unsound; he only cares how much he is going to suffer for doing something illegal. The law is ‘the incidence of public force’ and does not offer any moral guidelines. Morality only obfuscates the real nature of the law as a judicial prophecy. In fact, Holmes wanted to completely rid the law of moral language—words such as *malice, intent, negligence, rights, and duties*—and replace it with a purely objective standard that dealt only with facts and definitions.\(^80\)

It was a judge’s prerogative to define the law and Holmes had a particular distaste for juries. “I don’t like to be told that I am usurping the functions of the jury if I venture to settle the standard of conduct myself in a plain case. Of course, I admit that a really difficult question of law is for the jury, but I also don’t like to hear it called a question of fact.” “I think there is a growing disbelief in the jury as an instrument for the discovery of truth.” Judges—not juries—decide law. “The man

\(^79\) *Collected Legal Papers*, 313, 314.
who wants a jury has a bad case” or he plainly “avows his inability to state the law.”
But, juries are helpful in that “they will introduce into their verdict a certain amount...of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community”—(in violation of their oath).\textsuperscript{81}

Holmes believed that legislatures expressed the political will of the society, and because any democracy exists to let the people express their political will, it follows that obstructing legislation would be denying people the democratic participation they have been guaranteed. He was adamant enough on this point to say publicly, “I do not think that the United States would come to an end if we lost our power to declare an act of congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several states.” He extended this deference to lower state courts as well, and lamented that the general practice of the federal courts was “to decide for themselves—of course expressing desire to follow state courts if they can.”\textsuperscript{82}

Ideally, judges would be perfectly impartial to interests outside of the dominant will of the community. The fewer concrete personal values a judge had, the better. “One who administers Constitutional law should multiply his skepticisms to avoid reading into vague words like 'liberty' his private prejudices of his class.” Statesmanship on the bench “suggests a more political way of thinking than is desirable.” It is given that judges would have to consider a law in the same

\textsuperscript{82} LOCHNER v. NEW YORK; Collected Legal Papers, 296; Holmes-Pollack Letters, vol. II, 214-215.
vein as legislatures did when they voted on it, but it seemed unnecessary to hold up a decision by trying to discern the wisdom behind legislation.\textsuperscript{83}

A judge’s duty was to make decisions based upon the most fundamental legal thinking. Superfluous digressions from the heart of legal analysis were anathema and Holmes developed his writing style accordingly. “Of course, the eternal effort of art—even the art of writing legal decisions—is to omit all of the essentials—‘The point of contact’ is the formula—the place where the boy got his finger pinched. The rest of the machinery doesn’t matter.” Holmes thought that a judge who plied his thoughts in a single short and great effort came closer to exposing real legal issues through his writing than one who took months to ‘consider’ his reasoning. “It seems to me that intensity is the only thing. A day’s impact is better than a month of dead pull.” Holmes thought that long opinions were merely ostentatious posturing: “One case...which I have disposed of in a comparatively few sentences...It occurred to me that some would think that it was not pompous and long winded enough for the matter involved.” In brevity lay a man’s legacy because “a man who takes half a page to say what can be said in a sentence will damned”—presumably by posterity.\textsuperscript{84}

It was the lawyer’s job to serve posterity by aiding the progress of society through the law. The law needed to change according to the desires of the dominant will within society, and Holmes felt that the great fallacy of contemporary lawyers was that they took the past as the justification for law’s present form. “It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have

\textsuperscript{83} Holmes-Pollack letters, vol. I, 127; Holmes-Frankfurter Letters, 160.
\textsuperscript{84} Holmes-Frankfurter Letters, 40; Holmes-Pollack Letters, Vol. I, 154, 243, 245.
vanished long since, and the rule simply persists from blind imitation." But, lawyers must give some attention to history in order to find out those rules the value of which they seek to “deliberately reconsider.” “Antiquarianism” should not obstruct the search for answers beyond simple tradition.85

If lawyers are to help society progress, they must first ask the right questions. The modern legal questions are what does society want; what will it cost; and how can it be attained? These answers lie in economics. “The black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. To his “microscopic eye for detail” the modern lawyer must unite an insight which tells him what details are significant.” “It is for science to determine, so far as it can, the relative worth of our different social ends and...it is our estimate of the proportion between these...that leads us to insist upon and enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy.” As this process sifts the useless away, the law becomes more accurate, articulate and civilized. “A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.” All of this will help in the unending work of “substituting a scientific foundation [in the law] for empty words.”86

To Holmes, the work of the lawyer was not only unending, but also heroic. The law offered Holmes the noble and heroic struggle that gave his life meaning.

When one starts to study law, one finds that it is an abyss of ugly details. As one continues, one finds that one is not alone and that there is a reason, a ‘drift’, to the current of one’s study. But, if one wants to reach new summits, one must leave one’s companions, enter alone along a darker path: “He must start for the pole” and uncover the knowledge that is his share in greatness. Once he has learned the lessons of his lonely quest, he must look finally to see himself in the universe; he must see that the laws of the world are demands upon himself as well. It is noble to study the law because “law is human—it is a part of man, and of one world with all the rest.”

Lawyers work for “unadvertised knowledge and silent devotion; dependence upon finding an appreciation which they cannot seek, but dependence proud in the conviction that the knowledge to which their lives are consecrated is of things which it concerns the world to know. It is the dependence of abstract thought, of science, of beauty, of poetry and art.”

This work is the development of the heroic heart of the lawyer; the law is “the moral development of a race.” It “embodies the story of a nation’s development through many centuries.” The law changes according to how its society changes and therefore Holmes’ famous proclamation: “The life of the law has not been logic, it has been experience.” Holmes did not believe that legal postulates could be logically deduced. How could they be, if they are the moral life of a society, and society always changes?

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88 Holmes, *Collected Legal Papers*, 47.
And not only the law changed. Everything else in society is merely a succession of fashions and trends. “Fashion, as I have long said, is a law of life” and so “everything is dead after twenty five years.” What is lively and novel at its arrival will “seem perfectly flat” in “fifty years.” What seemed “exquisite and passionate speech now produces somewhat the effect of the fashions of the same time—self-conscious and faded and more or less bogus.” Old habits die hard, and exploded ideas can still clamor for attention, or “float a lot of quibble and drool for centuries,” as has Shakespeare. “Only the classic simplicity of the naïf who know no better and of Mephistopheles who knows enough, last.” But when trends finally did die, Holmes felt reinvigorated with new possibilities and hoped that he had done enough in the cycle of trends, “putting in new and remodeling old thought for the last twenty years.” In the end, “When time is limited, new truth is entitled to a larger share of it than old greatness.”

Holmes may have thought that human life in society was simply a matter of trends, but those trends were an important part of the shaping and refining of civilization—the process of making real.

For Holmes, reality was actuality. Human life was only ever in the present tense. A person only becomes himself once he commits his life to action. Action leads to a real consequence and limits future possibilities. Living is the process of ridding ourselves of possibilities. We cannot be anything until we take those steps that guarantee that we cannot be anything else. “False infinite of youth, potentially everything because actually nothing. We become persons by the increase of

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negations—of infinite characteristics.” This ‘increase of negations’ makes us civilized because “Civilization is the process of reducing the infinite to the finite.”

What is this civilizing process?  

Man takes whatever particular and peculiar things he finds in the universe and constructs from them any system he can that allows him to function as he wishes. The world presents disparate facts that have to be strung together into a coherent system. “The only interest of a fact is that it leads to a theory and the only good of a theory is that it sums up facts.” They are simply self supporting, “They sit in one another’s lap in a circle and don't fall.” “I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn.”

What man makes of the universe is, of course, no use to the universe. Man's concepts only help him to function; they do not refer to truth or any reality outside of their intended purpose. “A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer.” The thinker has to “make plainer the way from something to the whole of things; to show the rational connection between your fact and the frame of the universe.” “Facts are the necessary peg to hang generalizations on, and give those who wield them a certain power.” From facts comes man’s ability to generalize and thus take the reigns of his existence.

From generalizations, man proceeds to action. With general propositions man can continue into greater schemes of complexity and become even more

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civilized. Ironically, once man has his generalizations, the world quickly becomes predictable. But, at that point, man can work, automatically, for the sheer joy of work without any thought of a goal. It is the work done without aim, done solely for itself that brings the “triune formula of the joy, the duty, and the end of life.” “The chief worth of civilization is that it makes the means of living more complex” and “more complex and intense intellectual efforts mean a fuller and richer life. They mean more life.”

The process continues. “To be civilized is to be potentially master of all possible ideas, and that means that one has got beyond being shocked.” What people think are questions of right and wrong, virtue and vice, morality and sin, are simply matters of degree. “All questions are ultimately matters of degree.” If there are opposing sides to a question, then there has to be an intermediate point: “North and South poles import an equator.” Morality confuses the distance between two extremes for a chasm so that “controversies are apt to be fierce in proportion to the nicety of the question.”

Holmes thought that man’s main intellectual end was to bring the individual facts of reality together into a coherent conceptual system that would allow him to make his way through life. The more complex the system, the more civilizing it would be. And as man reaches new heights of complexity, he gains new joy and fulfillment. Holmes believed that, for the grand thinker, the process was practically inevitable. “I have no doubt that the generalizing principle will prevail, as generalization so often prevails, even in advance of evidence, because of the ease of

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93 Holmes, Collected Legal Papers, 246, 248.
mind and comfort which it brings." Everything else below this complexity is
worthless. "The only simplicity for which I would give a straw is that which is on the
other side of the complex—not that which never has divined it."95

One of the vices, though, of this generalizing tendency was morality and
dogmatic belief. Holmes believed that morality was a social construction that served
to mitigate and relieve social tensions. "I think morals are the superior politeness
that absorbs the shock of force" and ethics are "a body of imperfect social
generalizations expressed in terms of emotions." "I don't think them cosmic
ultimates, or even the human." That is, there is no truth in morality. It is "a branch
of Oxford exquisiteness...and exquisiteness is a doubtful good, needing much battle
and sudden death the justify it." Morality is simply conditioning and teaches nothing
useful about how to actually get on in the world. "Whatever atmosphere men are
brought up in persists. The first impressions largely determine what they revere and
love or hate. And "it would be well if the intelligent classes could forget the word sin
and think less of being good. We learn how to behave as lawyers, soldiers,
merchants, or what not by being them. Life, not the parson, teaches conduct."96

Morality is simply good manners buffering the tensions between groups that
want to make inconsistent kinds of worlds," of which "I see no remedy except force."
Comprehensive moral systems—such as Hegelianism and Catholicism—trap people
in a faith by which "they see everything in its terms and can't get out." Morality
brings people certitude, as it did for the abolitionists of the nineteenth-century. But,

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96 Holmes-Frankfurter Letters, 83, 203; Holmes, Collected Legal Papers, 306; Holmes-
“certitude is not the test of certainty; “generally is [an] illusion”; and by it, “persecution comes easy.” Holmes believed that by becoming more civilized man could overcome this absurdity. And self-doubt was the first step: “To have doubted one’s own first principles is the mark of a civilized man.”

So, Holmes reached his entire life for civilization. The American system was merely the arena that he found himself in. The exchange of ideas that is guaranteed by the First Amendment was not, to Holmes, the key to freedom that Americans believe it is. To Holmes, the First Amendment was a winnowing machine: it guaranteed that the more desirable ideas would replace the less desirable in a chain of reducing American society, thought and sentiment to a useless generalization. He assumed that more general American society became, the more civilized it would be. He never expressed concern that a generic America would cease to be American.

As he stated in the Abram’s dissent, he believed that the Constitution was created so that American’s could safely carry out their wishes on a foundation of truth. But, Holmes believed that truth was impossible and therefore only common social experiences could serve the function of truth. Of course, all constitutions exist to secure the welfare and safety of citizens, but the American Constitution exists to call out of each citizen the civic pride that makes of America a nation transcending the base wants and desires of its people. To Holmes, America was not great, exceptional or different in any positive or hopeful sense. American law was simply a set of statutes that had to be followed in order to keep the social experiment going.

The experiment was collective effort to satisfy individual desires and a historical

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phenomenon that Americans had to presently contend with. Civic participation would not improve citizens or create a collective sense of pride. Pure civilization was the end of human actions.

Holmes was concerned with the infinite, not the principles of democratic-republican virtue that underlie the American ideal. How have critics responded to this irony of an American judge who read the law through a lens of distant social perfection, and was silent on the virtues needed to uphold the Declaration of Independence and the Constitution?
INTERPRETATIONS AND CONCLUSIONS

The Declaration of Independence and the Constitution are the primary source of America’s political identity. Yet, Holmes rejected the basic premise behind those documents, that Society and politics exist for the betterment of humanity. How, then, can Holmes be construed as a proponent of those documents?

Charles Wyzanski and Daniel Boorstin believe that Holmes was a model democrat. However, their assessments of him do not describe any distinct American values that he held.

Wyzanski applauds Holmes for freeing people from the anchor of moral certainty. By word and deed, Holmes showed that the greatest democratic citizen could be just as happy—if not more so—by fashioning his own idiosyncratic mores from “mundane minerals” of social experience. Holmes was enlightened enough to also refuse social certitude by understand that American progress would eventually outgrow the values of the founding. He, therefore, ruled in favor of legislation that would allow the country to adapt to the needs of the times. Homes was, ultimately, the epitome of the self made man who silently accepted that the universe was “too big, too multifarious, nay too mysterious to be comprehended.” He was but one man who was at home in the “oncoming adventure in ideas” that was democracy.98

For Daniel Boorstin, Holmes was simply a man trying to reconcile all the competing ideas that kept a free society alive. Holmes had to accept that the universe was too great to know and he was content with the few nooks that he could master. He was the representative liberal figure because of his “inquiring,

restless...mind, full of conflict and doubt—more interested in the multifarious than in the moral life” and always trying to reconcile his liberal intellect with his aristocratic heritage.99

In contrast Harold McKinnon believes that Holmes missed the key points of American tradition. His skepticism caused him to reject the natural rights tradition and accept the state as the ultimate authority over the lives of its citizens. Holmes’ mistake was to assume that natural rights are predefined and immutable, and therefore deducible. Natural rights themselves do not exist as a priori statutes. They are articles that must first recognize and fulfill transcendent a priori moral principles. They are rules for legislators to follow when building a society’s legal code. Holmes’ philosophy begets a world without morals where only the “transient opinion of the crowd” defines right and wrong and where the greatest virtue lies in the man who fights without purpose and enjoys sated desires.100

McKinnon thinks that Holmes’ followers have seen his relativism as the means to reshape American society after their own image. Holmes’ philosophy has helped to replace the “frontier individualism” of earlier times with a “cradling security” typified by modern Liberalism. Holmes will always be a present threat to the moral identity of the country and it will take constant work to remember that American law requires divine providence to ensure that America fulfills its moral duty to the world.101

100 Harold R. McKinnon, What Manner of Liberal, 92, 93, 95, 97, 98.
G. Edward White believes that the only way to realistically assess Holmes is not by looking at him according to dominant moral ideals—which change with time—but by holding him to the simple measure of his own humanity. Holmes had an extremely negative view of life that caused him to equate a human being with a grain of sand, and make of the world a place into which he would regret bringing another human life. In his isolated involvement with the world he came away with a peculiar set of values: “civilization, martial virtues, and in his own sense, democracy and even liberty.” “It is Holmes’ articulated refusal to take pride in being human that marks him as one of the least ‘heroic’ of America’s heroes.”\(^{102}\)

The most famous criticism of Holmes comes from Robert Faulkner in response to Holmes’ speech commemorating the 100\(^{th}\) anniversary of Chief Justice John Marshall’s appointment to the Supreme Court. Faulkner believes that by interpreting Marshall in social terms, Holmes mischaracterized his work and legacy as a judge. Faulkner believes that the country needs to establish a clear distinction between philosophy in the law and philosophy as intellectual exercise. He believes that the problems of modern America are in some part caused by a failure to recognize the difference between what is considered best for man in metaphysical terms and what is best for America as a unique country.\(^{103}\)

By thinking that a judge is supposed to rule the future with his thought, Holmes degrades the role of judges in American society. Holmes helped replace governing and statesmanship with social Darwinian struggle wherein might makes right, the best ideas are the ones that survive. Selfishness becomes the only basis for

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following the law. But realistically, says Faulkner, men follow the law, not from threat or coercion, but from a sense of social “equity” and basic human decency. John Marshall was the antithesis of Holmes’ pragmatic approach. He believed that the law and society worked only in so far as they served man’s noble ends. Marshall saw American law and the Constitution as serving man’s higher nature and aiding his happiness. Both institutions showed man the great future he could make for himself.104

“Holmes turned much of modern jurisprudence to the study of judicial decision-making, but left vacant its essence: a reasonable view of what constitutes justice in America, of the rights and duties of citizens and of the institutions of law, economics, and polity appropriate for the country.” Holmes placed the law higher than the state, and assumed that what so many statesmen before him had done was nothing but the inevitability of history. To Holmes, the judge who was to be, first, a great thinker who had to accept the burden of his contemporary time and place, but his aim was to be far beyond that—towards a realm of metaphysical purity. This is what separates Holmes from the judicial statesmen who have laid the path of American law. The statesman has to recognize his society as his limit; to go beyond that is to be a “thoughtless practitioner” concerned with philosophy, not governing. American law has always had a philosophy, and it will always need one, but it should be a philosophy that assumes the self-evident truths that have been recognized since the country’s founding.105

Wyzanski and Boorstin both see Holmes as a singular figure that represents the utmost expression of democratic living. Unfortunately, they do not articulate how Holmes represents or endorses the virtues of equality, peace, unity and civic faith that have defined the American experience and the nation's hopeful promise across the generations. Their generic portrait of a man lost in the tides of self-sufficiency and helpless before the anonymous throng of public sentiment is hardly a portrait of an American figure. Beyond that, American republican-democracy cannot accurately be called simply ‘an adventure in ideas.’ Wyzanski and Boorstin ignore the objection embodied by Faulkner’s critique: that Holmes replaced the statesman, on-guard against offenses towards the nation, with a philosopher-king turned judge. Holmes may be admired, as a man, for the traits that Wyzanski and Boorstin admire in him, but an American judge should have a profound sense of humanity, as White argues, and recognize that progress is more than permitting the reign of the people’s appetites.

In a perfect civilized society, different opinions would coexist; collective and common values would be broad enough that they would not interfere with the values of each citizen. Laws would be of such a nature that they would reflect the common moral identity of everyone and no one would feel displaced or infringed upon. There would exist a perfectly self-regulated market place of ideas wherein different opinions would flourish amongst each other for the sake of social well-being.
But this is an ideal; reality is the condition of man. Holmes was the ultimate realist. For him, civilization was a constant attempt to make the human species into something finite. By making choices, individuals and collective humanity chip away their possibilities and come closer to becoming a final and certain reality. However, Holmes did not think this process was meritorious. Though evolution happened, and in time humanity would be able to consciously control its evolution, Holmes was doubtful that it would matter. He cared about this conscious evolution because he thought that it was inevitable, not because he felt that it was imperative to improve the world. As he said, he saw the inevitable everywhere.106

Holmes saw life as a quagmire and humanity as a disorganized mess. Civilization was not a solution that would finally bring lasting order: it could only tidy-up the mess into slightly more manageable piles and clear away some of the more undesirable strains of thought. Man could “set some corner of his world in the order of reason” but not the whole universe. Man was impotent in the face of it. Each man had his ‘can’t-helps’ to act as makeshift buoys on his blind trek through life. There was nothing beyond what man could know by external experience.107

The world, as man found it, was not unified. By collecting and interpreting facts, humanity could create a rational concept about reality and intellectually bring it into a cohesive form by which it could map out its life. Specifics were good to establish general concepts that led man back to the specifics, but the general ‘wasn’t worth a damn’ as a statement of truth. Truth did not exist. The universe did not care about man, and the best that anyone could do was find heroic work, within which

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one could lose oneself and feel the battle of life—a battle in which the strongest and fittest survived.

American democracy was the battleground. Holmes found himself in the American system and so that was the system that he promoted. America itself was meaningless insofar as it tried to be something beyond a mere country. America had no special place in the world. It was strong, and perhaps more civilized than most countries, but it was empty of the moral and spiritual greatness that so many citizens, past and present, attributed to it. For Holmes, the needs of the state, backed by its martial resources, were the supreme demands. Each person’s life was a tool ever-ready at society’s disposal.

But, what the people wanted they should get. The majority sentiment was the source of law, and as ‘time upset many fighting faiths’ and sentiments changed, society and, inevitably, ‘truth’ would change. The greater mass of people may choose their values unwisely, but they must not be kept from satisfying their desires: that is why society exists.\(^{108}\)

Holmes believed that human life was meaningless, there was no truth in the universe, and the best life is the one wrapped in struggle. How did this happen? The effects of the Civil War on him cannot be underestimated. He thought that reason was one of man’s highest attributes, and yet claimed “War is the ultimate rationality.” He called war an organized bore and when the fighting commenced he

\(^{108}\) ABRAMS v. U.S.,
had no understanding or explanation for the orders he was entrusted to carry out.\textsuperscript{109}

Though he shared the sufferings of every other soldier, what had the most effect on him was his ability to \textit{articulate to himself} the unabashed reality of war. Many soldiers found ways to mitigate the their trauma through letters to loved ones, but most simply had no means to express their emotional and psychological pain. They were left “resisting and repressing” their trauma, asking themselves “why am I still alive?” When faced with the reality of dying, many wounded soldiers would utter or write important last words and give humble confessions of their religious faith. Holmes, oddly, when recovering from a possibly fatal wound, merely wrote to his father that he was content that he had done his job well and was ready to die if he should. He showed no profound affinity for the life he had lived.\textsuperscript{110}

Holmes, in his Civil war journals, talked candidly about those that died in battle, friends or superiors he respected. He told about the battle at “The Angle” and the horrible sight of the dead “five and six deep,” some still writhing. He wrote about a face-to-face encounter with Confederate soldiers while delivering dispatches, wherein his life was spared by a failed point-blank pistol shot. Even as late as 1884, Holmes recounted, in his Memorial Day speech, the specifics of incidences of close combat and the coin-toss of death.\textsuperscript{111}

When a man has to decide “shall I stand the best chance if I try the pistol or the sabre on that man who means to stop me?” he has found the basement of human

\textsuperscript{111} Faust, \textit{Republic of Suffering}, 36, 38, 56, 57, 58; Menand, \textit{Metaphysical Club}, 30; Holmes, \textit{Touched with Fire}, 116-117, 134.
experience. Holmes kept the normalcy of death alive in heart after the war.

Whatever commonplace desires to kill he had during combat translated themselves into his philosophy of struggle; the thrill and rush of fighting stayed alive long after the War ended.

In his youth he thought that life held meaning. Meaning motivated him to volunteer to help escort the abolitionist Wendell Phillips after a public speech, before the War; it motivated him to join the Army just weeks before his Harvard graduation. But, war showed him first hand just how flimsy values were and just how disposable life actually was. He led men to kill and die, and there was no idea big enough to justify that reality. Louis Menand summed up the lesson Holmes learned from the War: ‘Certitude leads to violence.’ As Holmes would tell Sir Frederick Pollack, “when you know that you know, persecution comes easy.” Holmes saw first hand the lives of good men thrown away by his country.  

It cannot come as a surprise that Holmes would have a negative and skeptical outlook on life, that he would deny the existence of God and truth, and think that life is conditional on whether or not the larger society wishes to throw it away. This was the reality he saw for three years. What is amazing is that Holmes, and those like him, found it within themselves to continue forward in their lives, have careers and families, and accept the horrors that war made them participate in.

However, the values—or lack thereof—that Holmes found in the world after the war are not the values that Americans have customarily looked to for national guidance. Unlike generations of Americans since the country’s founding, Holmes

explicitly denied anything special about America. He accepted America’s democratic system only because he found himself in it and had no convictions as to anything better. As a judge he believed that it was his duty to enforce the rules of the Constitution, not make them up to satisfy his own values, or promote them to actively encourage a belief in American exceptionalism. He appeared to be America’s champion because he would impartially vote in favor of ideas that he often despised. But his apathy towards the country’s greatness has to be taken into account when considering whether he voted as a judge to support America’s higher moral interests.

Holmes’ words can be used by anybody, positively or negatively, to justify his own point of view. Holmes took a place above all values and therefore he would necessarily appear to be supporting any values, even though he only wanted to see that the courts followed the rules of the game of law. By looking at Holmes as a judicial referee, and understanding that he did not believe that human happiness was the goal of law, it is easy to see how he could vote in favor of a ten-hour bake shop act and an involuntary sterilization act. People assumed that Holmes necessarily looked at the law according to human values—whether those values were labeled ‘liberal’ or ‘conservative.’ Holmes looked at the law as simply rules governing political and social activity, and human interests were secondary.

Americans do not want a system of law that looks at society indifferently and blindly casts its vote according to dispassionate rules. Americans want a law code that reflects their individual and very specific and detailed set of values; they want judges who are the statesman that Holmes abhorred. Americans, throughout their
history, have reflected a religious faith in their system, and a ‘sacramental’ devotion to their founding documents. Even Holmes’ supporters, who see him as an *American extraordinaire*, assume that he carried the same faith in the American way as they do. Holmes had faith in absolutely nothing. Though his judicial decisions may appear to reflect genuine American virtues, it is important to understand that the foundation of his judgments is very different from the foundation of American identity.

It may be hard to say that Holmes offered anything positively American to the American system, but I think that he does give the country one good lesson. He and the Civil War generation have shown us how to get on and live a human life when the world around us ceases to make sense.
Appendix: Holmes and Pragmatism

There are two types of pragmatisms in American thought. One, ‘Pragmatism’, was a quasi-metaphysical philosophy, and the other, ‘pragmatism’, is a functional approach to agreeably solve problems. Holmes has been associated with both even though he disdained the former, and worked by the latter out of necessity.

Though Holmes had loose associations with the group of post-Civil War thinkers called Pragmatists that included Chauncey Wright, William James, John Dewey, and Charles Pierce, he expressed contempt at being connected with the Pragmatic philosophy. He derided Pragmatism as a hopeful, quasi-religious trend reflecting Williams James’ faith in higher order. When critics reduced Pragmatism to “mincemeat” he was filled with “glee.” Holmes believed that Pragmatism was a philosophy that was trying to get at a larger, great-beyond of life; it offered nothing for him but the false notion that man was somehow greater than a grain of sand.113

It has been suggested that Holmes and William James had similar approaches to their disciplines. Caroline Pierce Wells mistakes Holmes as someone who cared about the social outcome of legal decisions. She believes that James’ concern for morality is evident in Holmes’ jurisprudence when she says that Holmes’ believed that law should reflect the “interests and values of the community as a whole” and judges should “consider what outcomes most accord with community norms of justice and sound policy.” Holmes did not believe this. He believed that law was the will of only the dominant force of a community. He did not believe that the law

should reflect the community’s will because it necessarily was the community’s will. Law had nothing to do with ‘the community as a whole’ nor should judges care about norms for ‘sound policy.’ If a law would take the community to hell, Holmes was fine with that. She sees in Holmes’ legal amorality a way to bring about the best state of affairs in a society by recognizing experience as a major factor in the ‘life of the law.’ She says, “Good law—non-arbitrary law—must be the result of an organized community practice...[and] arrive at a collaborative understanding of how human conflicts should be resolved.” Wells recognizes social compromise as a fundamental goal of ‘pragmatic’ law, but Holmes believed that only the stated aims of legislation were the goals of law.  

It is easy to see Holmes’ scientific, ‘commonsense’, amoral, and non-logical approach to the law as an endorsement of contemporary views about compromise and the best way towards a solution, but this type of hopeful reading does not take into account why Holmes judged ‘pragmatically.’ He was a skeptic and did not think that any real or lasting betterment was possible through social discourse or promoting a particular set of values. A pragmatic or functional approach to the law may provide better answers to social problems, but Holmes felt that social problems were solved by legislatures, not judges. His approach to ‘functionality’ was essentially judicial apathy towards specific social and political outcomes. A pragmatic and functional approach to the law, as Katherine Pierce Wells proposes, requires at least an idea of desired aims. It is ironic that Holmes would be

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associated with such a legal philosophy when he believed that it was his duty as a judge to be disinterested towards ends.\textsuperscript{115}

\textsuperscript{115} Katherine Pierce Wells, \textit{The Path of the Law and its Influences}, 221, 222, 223; Stephen Nunns, \textit{Acting Up}, 103.
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