

## The Americanism of Justice Holmes

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*There is no obvious way to reconcile each of Justice Oliver Wendell Holmes, Jr.'s intellectual sides. There is the monstrous Holmes, who thought the world was meaningless, insignificant, and hopelessly violent. There is the tender Holmes, who jealously guarded the time he could spend enjoying literature, philosophy, and art. And there is the scholarly Holmes, who left behind a litany of influential judicial opinions and articles, as well as a classic book, The Common Law.*

*Although the gulfs between each of Holmes's sides can make reconstructing his thought seem daunting, the task is amenable to a fairly simple solution: Holmes leavened his dismal worldview with a sense of self that allowed him to think of life as valuable, and with a theory of cooperative combinations that opened the door to a better future. Using his famous dissent in *Lochner v. New York* as a case study, it becomes possible to see how Holmes built his constitutional jurisprudence from these basic premises.*

*Perhaps surprisingly, a close investigation of Holmes's *Lochner* dissent reveals that his worldview, his theory of combinations, and his sense of self led him to reject the doctrine of judicial supremacy.*

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*"I believe in the iniquitous doctrine of my country right or wrong.  
Don't throw me over for my speculative wickedness."*

*-Oliver Wendell Holmes, Jr.  
in a letter to Alice Stopford Green<sup>1</sup>*

#### INTRODUCTION

Justice Oliver Wendell Holmes, Jr. is an enigma. Even though his outsized influence on American law is beyond dispute,<sup>2</sup> his worldview and self-understanding seem to come from anywhere but here. Toward the end of his decades-long career on the bench, for example, he privately admitted to British political theorist Harold Laski, "I see no right in my neighbor to share my bread. . . . except so far as he in combination has power to take it."<sup>3</sup> The reason? He had rejected "all postulates of human rights"<sup>4</sup> in

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1. Letter from Oliver W. Holmes to Alice S. Green (Nov. 9, 1913), in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 22, 22 (Richard A. Posner ed., 1992) [hereinafter *THE ESSENTIAL HOLMES*].

2. See, e.g., Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 *J. LEGAL STUD.* 409, 424 tbl.6 (2000) (identifying Holmes as the third-most cited American legal scholar of all time).

3. Letter from Oliver W. Holmes to Harold Laski (July 23, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 140, 141.

4. Letter from Oliver W. Holmes to Harold Laski (Oct. 23, 1926), in 2 *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935*, at 887, 888 (Mark DeWolfe Howe ed., 1953) [hereinafter *HOLMES-LASKI LETTERS VOL. 2*].

favor of power, coercive or otherwise.<sup>5</sup> “Good and bad are of real significance only for the future where our effort is one of the instrumentalities that bring the inevitable to pass,”<sup>6</sup> Holmes explained with a shrug just before joining the Supreme Court.<sup>7</sup> “If there is a world it seems to me that one may surmise that our judgments of significance and worth have no meaning for it.”<sup>8</sup>

Coming from a place where moral feelings and value judgments were of little consequence, Holmes was content with more flitting breakthroughs into “illusory [experiences of] personal spontaneity or independence . . . .”<sup>9</sup> He saw that illusion in “less marked forms as consideration for the weak, charity to the poor, drunkenness, going to the play, painting pictures, etc.”<sup>10</sup> But the “ideal expression” of that illusion, he once unsettlingly told his old friend Ellen Curtis, was suicide.<sup>11</sup> If a priest sitting in a confessional had overheard Holmes, he would hardly expect to be listening in on a towering Supreme Court Justice. A lonely eccentric, maybe, or perhaps even a madman. But how could a distinguished judge think that way? How did Holmes keep his worldview and his self-understanding from poisoning his pen?

Given Holmes’s unexpected prominence as a legal thinker, it is only fitting that his dissenting opinion in *Lochner v. New York*<sup>12</sup> is as enigmatic as the man himself. Holmes’s dissent has become, without a doubt, holy writ in American courts.<sup>13</sup> One hundred twelve years on, judges continue

5. See, e.g., Letter from Oliver W. Holmes to Frederick Pollock (Feb. 1, 1920), in THE ESSENTIAL HOLMES, *supra* note 1, at 102, 102–03 (“I believe that force, mitigated so far as may be by good manners, is the *ultima ratio* . . .”).

6. Letter from Oliver W. Holmes to Alice S. Green (Oct. 1, 1901), in THE ESSENTIAL HOLMES, *supra* note 1, at 111, 111.

7. Holmes was nominated to the Supreme Court on August 11, 1902 and confirmed on December 4, 1902. See LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 339–56 (1991). His tenure on the Court spanned thirty years. See *id.* at 337–635.

8. Letter from Oliver W. Holmes to Alice S. Green (Oct. 1, 1901), in THE ESSENTIAL HOLMES, *supra* note 1, at 111, 111.

9. Sheldon M. Novick, *Justice Holmes’s Philosophy*, 70 WASH. U. L.Q. 703, 734 (1992) (quoting Letter from Oliver W. Holmes to Ellen Curtis (Jan. 7, 1901), in Oliver Wendell Holmes, Jr., Papers (on file with the Harvard Law School Library), <http://library.law.harvard.edu/suites/owh/index.php/item/36699695/8> [<https://perma.cc/DQA3-Q73K>]).

10. *Id.*

11. *Id.*

12. *Lochner v. New York*, 198 U.S. 45 (1905).

13. See, e.g., Jack M. Balkin, “*Wrong the Day it Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 692 (2005) (saying Holmes’s *Lochner* dissent “became the canonical rejection of the anti-canonical decision in *Lochner*”).

to rely on its prestige in even the biggest cases,<sup>14</sup> and many of the best-known scholars continue to sing its praises.<sup>15</sup> So it comes as a surprise when you thumb through the opinion and find that Holmes's great dissent is, according to law professor Cass Sunstein, positively soulless. In his influential 1987 article *Lochner's Legacy*,<sup>16</sup> Sunstein describes Holmes's dissent as "com[ing] close to modern interest-group pluralism, which treats the political process as an unprincipled struggle among self-interested groups for scarce social resources"<sup>17</sup>—a description I will argue hits the nail on the head.<sup>18</sup> So aside from the obvious rhetorical merits of Holmes's opinion,<sup>19</sup> it is not so easy to see how Holmes's dissent has earned the allegiance of generations.

In this Article, I tackle both the mystery of Holmes's worldview and self-understanding, and the riddle of his *Lochner* dissent. My working theory is that each question helps answer the other. Holmes's *Lochner* opinion provides a concrete example of how he applies his personal views, while his personal views give shape to his *Lochner* opinion. By setting the questions side by side, it becomes possible to get a better handle on each.

Of course, seeing inside Holmes's head is tricky. Despite leaving behind mounds of judicial opinions, scholarly writings, speeches, and letters to friends and admirers, his writing on the whole trends toward partial thoughts, vignettes, and abbreviated commentary on others' ideas. And as the question presented by his *Lochner* dissent suggests, even Holmes's best legal writing only gets you so far. In order to get to the essence of his thought, you have to consider his personal views. But that is where the difficulty lies. Whether we look to Holmes's weighty book *The Common Law* or to any of his carefully crafted articles, he never went to the trouble of fully explaining his worldview and sense of self. No matter where you look, a complete accounting of Holmes is just not there. We only have fragments.

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14. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (quoting Holmes's *Lochner* opinion favorably in a landmark same-sex marriage case).

15. For example, in 2012, highly regarded judge and legal scholar Richard Posner wrote: "Holmes's one-page [*Lochner*] dissent says everything that needs to be said to unmask any pretense that the majority was engaged in something that might be called legal analysis." Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 549 (2012).

16. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

17. *Id.* at 879.

18. See *infra* Section II.C (analyzing the mechanics of Holmes's *Lochner* dissent).

19. See, e.g., ALLEN MENDENHALL, OLIVER WENDELL HOLMES JR., PRAGMATISM, AND THE JURISPRUDENCE OF AGON: AESTHETIC DISSSENT AND THE COMMON LAW 54–61 (2017) (highlighting Holmes's use of style and sound in his *Lochner* dissent).

To complicate matters, the fragments we do have resist the big picture. Holmes enjoyed making points with sketches rather than with step-by-step arguments.<sup>20</sup> He tended to glide over his ideas as if they were familiar or well worn, even when they were not.<sup>21</sup> And although he took pains to maintain a plainspoken air, he often put things in a way that suggested a deeper or personal meaning. To mark his ninetieth birthday, for instance, CBS aired a radio broadcast of tributes to the venerable judge, as well as his response.<sup>22</sup> But rather than drawing a lesson from his career, Holmes meditated on the poetry of Virgil.<sup>23</sup> “Death plucks my ears and says, Live—I am coming,” warned the Roman bard, to which the old Yankee responded, “[T]o live is to function. That is all there is in living.”<sup>24</sup> As hard as Holmes’s message might hit us, it is difficult to understand what exactly he means. We can surely remember that life is functioning, but how do we incorporate that wisdom into anything else?

In order to uncover Holmes’s fundamental commitments, I take his advice on reading well. In a letter to British jurist Frederick Pollock, Holmes explained how he thought the great German philosophers should be read: “I believe that the real contribution of the [German] system-makers was one that was shared in by outsiders—*viz.*, a certain number of *aperçus* or insights. The systems disappear, the insights remain . . . .”<sup>25</sup> So we see that in Holmes’s mind, even some of the most technical and complex prose out there was best understood by zeroing in on a few essential insights. When you apply Holmes’s interpretive technique

20. See, e.g., Letter from Oliver W. Holmes to John C. H. Wu (Aug. 26, 1926), in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 186, 187 (Harry C. Shriver ed., 1936) [hereinafter BOOK NOTICES AND UNCOLLECTED LETTERS] (“When the Germans in the late war disregarded what we called the rules of the game, I don’t see there was anything to be said except: we don’t like it and shall kill you if we can.”).

21. See, e.g., Letter from Oliver W. Holmes to Frederick Pollock (Feb. 26, 1922), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932, at 89, 90 (Mark DeWolfe Howe ed., 1942) (“I always say that society is founded on the death of men—if you don’t kill the weakest one way you kill them another—and the romance of life is largely found on the same fact . . . .”).

22. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 462–66 (1993).

23. See *id.* at 463–64.

24. OLIVER W. HOLMES, *Justice Holmes’ First and Only Radio Address*, in BOOK NOTICES AND UNCOLLECTED LETTERS, *supra* note 20, at 142, 142. See also Oliver W. Holmes, Radio Address (1931), in THE ESSENTIAL HOLMES, *supra* note 1, at 20, 21 (reciting Holmes’s portion of the radio address).

25. Letter from Oliver W. Holmes to Frederick Pollock (Mar. 1, 1918), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 260, 261 (Mark DeWolfe Howe ed., 1941).

to his own catalog, you end up paying less attention to the particulars of what he is saying, and more attention to how it makes sense for him to say it. He becomes a rolling kaleidoscope of moods and observations—laid over only a handful of repeating patterns.

In this Article, I outline those patterns in three parts. In Part I, I focus on Holmes's worldview and self-understanding. I outline the major features of Holmes's worldview, including his theory of cooperative combinations, and I explain how his worldview gave shape and form to his sense of self. Although I believe that Holmes's worldview was explicitly devoid of meaning, I maintain that his sense of self allowed him to see individual life as meaningful, and that his theory of combinations suggested that social life tends to improve over time.

In Part II, I look at the mechanics of Holmes's *Lochner* dissent. I set the stage by recounting the rise of a legal doctrine called *the right to liberty of contract*. Then I identify what Holmes's dissent responded to by explaining how Justices Rufus Peckham and John Marshall Harlan respectively applied that right in *Lochner*. I then turn my attention to Holmes's dissent. I explain how Holmes's worldview informed his rejection of the right to contract and led him to dismiss the doctrine of judicial supremacy.

Finally, in Part III, I investigate how Holmes applied his self-understanding to his *Lochner* dissent. I argue that while Holmes's worldview is sufficient to explain the approach he took to *Lochner*, he augmented his reasons for taking that approach with the personal meaning he took from his sense of self. Holmes, it turns out, was not willing to leave a romantic view of life out of his jurisprudence. On the contrary, his jurisprudence combined a gloomy worldview with an inspiring faith in the American spirit.

In the end, I argue that Holmes's *Lochner* dissent has a distinctly sentimental side. It reflects Holmes's sad and sweet sense of Americanism. It salutes a hope that many Americans had locked away in their hearts. And it shows us who Holmes really was. But before I can draw the man out of the *Lochner* case, I must start at the beginning: Holmes's worldview and self-understanding.

### I. HOLMES'S WORLDVIEW AND SELF-UNDERSTANDING

In order to explain Holmes's basic outlook on life, I first have to borrow a couple of terms from biology. When biologists ask *why* an organism has certain features or traits, they take an *ultimate* perspective on it, and when they ask *how* an organism does something, they take a

*proximate* perspective.<sup>26</sup> Biologist Edward Wilson recently illustrated the distinction with an example.<sup>27</sup> To understand why we have hands rather than hooves or flippers, he explained, we must consider our evolutionary history.<sup>28</sup> But to understand how we actually use our hands, we have to consider their anatomy and utility.<sup>29</sup> So in rough terms, Wilson tells us that the ultimate perspective seeks out objective explanations covering evolutionary time, while the proximate perspective looks at how particular organisms function in real time.<sup>30</sup>

In a 1900 address to the Tavern Club, Holmes announced that his ultimate take on reality was positivistic: “Today the whole domain of truth concerning the visible world,” he told the Club, “belongs to science.”<sup>31</sup> Nineteen years later, in a letter to legal scholar Morris Cohen, he explained that he had adopted his worldview when he was young. Describing his general mindset as a “scientific way of looking at the world,”<sup>32</sup> Holmes gave Cohen his accounting of how he came to adopt it early in life. He initially based it, he recalled, on what he knew of the ambitions of Charles Darwin and the British philosopher Herbert Spencer, and what he thought their ideas implied about human nature and humanity’s place in the universe:

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26. See, e.g., ERNST MAYR, *THIS IS BIOLOGY: THE SCIENCE OF THE LIVING WORLD* 67 (1997). German-American biologist Ernst Mayr notes that in 1938, British biologist “John Baker was apparently the first author to distinguish clearly between ultimate . . . and proximate” biological explanations. ERNST MAYR, *THE GROWTH OF BIOLOGICAL THOUGHT: DIVERSITY, EVOLUTION, AND INHERITANCE* 68 (1982).

27. See EDWARD O. WILSON, *THE MEANING OF HUMAN EXISTENCE* 15 (2014).

28. See *id.*

29. See *id.*

30. See *id.* In his 1899 speech entitled *Law in Science and Science in Law*, Holmes laid out a general description of ultimate and proximate perspectives. Holmes explained that if you take your perception of a particular statue or symphony, from the ultimate view the only relevant observations you could make about them would be facts about their characteristics. But from the proximate view, when you consider how your mind actually processes the statue or symphony, it becomes relevant to observe how they make you feel. Holmes called observations of ultimate reality *quantitative determinations* and observations of proximate reality *qualitative judgments*. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 456 (1899). Justice Holmes’s speech is also reprinted in OLIVER W. HOLMES, *COLLECTED LEGAL PAPERS* 210 (1920) [hereinafter *COLLECTED LEGAL PAPERS*], as well as in *THE ESSENTIAL HOLMES*, *supra* note 1, at 185.

31. Oliver W. Holmes, Remarks regarding Dr. S. Weir Mitchell, given at a Tavern Club Dinner (Mar. 4, 1900), in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 119, 120 (Mark DeWolfe Howe ed., 1962) [hereinafter *OCCASIONAL SPEECHES*]. This speech is also available in *THE ESSENTIAL HOLMES*, *supra* note 1, at 48.

32. Letter from Oliver W. Holmes to Morris Cohen (Feb. 5, 1919), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 110, 110.

My father was brought up scientifically . . . and I was not. Yet there was with him . . . a certain softness of attitude toward the interstitial miracle—the phenomenon without phenomenal antecedents, that I did not feel. The difference [from the attitude of earlier times] was in the air, although perhaps only the few of my time felt it. *The Origin of Species* I think came out while I was in college. H. Spencer had announced his intention to put the universe into our pockets—I hadn't read either of them to be sure, but as I say it was in the air. I did read [British historian Henry Thomas] Buckle . . . [Ralph Waldo] Emerson and [British writer John] Ruskin . . . . Probably a sceptical temperament that I got from my mother had something to do with my way of thinking. . . . But I think science was at the bottom.<sup>33</sup>

Without much scientific training,<sup>34</sup> the statements Holmes left behind about his ultimate perspective are brief and vague. Luckily, he said enough to give us a sense of what he thought the world was like. In talking about his ultimate perspective, Holmes thought all living organisms (including people) were purely physical and subject to the same natural laws as everything else in nature.<sup>35</sup> He liked to refer to organisms' interactions as the *struggle for life*—which describes the idea that the instinct to survive creates conflicts between organisms that are often painful and deadly.<sup>36</sup> In Holmes's cosmos, humans were like any other animal: one way or another, they were constantly fighting for their share of the pie. However, rather

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33. *Id.* Although Holmes did not read Darwin or Spencer when he was in college, he read Darwin in his 60s, and Spencer soon after college. See MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841–1870, at 156 (1957).

34. Despite telling Cohen that he had not had a particularly science-based education, soon after college Holmes was exposed to the philosophy of science from his friend and mentor Chauncey Wright. See LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 201–32 (2001). Wright seemed to have a lasting impact on Holmes. In 1929, at the age of 88, Holmes held onto the opinion that Wright had “real merit.” Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 108, 108.

35. See, e.g., Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 108, 108 (“I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand.”); Letter from Oliver W. Holmes to Harold Laski (Jan. 11, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 107, 107–08 (“I regard [man] as I do other species (except that my private interests are with his) having for his main business to live and propagate, and for his main interest food and sex.”).

36. See, e.g., *The Gas Stokers' Strike*, 7 AM. L. REV. 558, 583 (1873) [hereinafter *The Gas Stokers' Strike*] (“The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with the monkeys, but is equally the law of human existence.”). Holmes's analysis of the Gas Stoker's Strike is also reprinted in THE ESSENTIAL HOLMES, *supra* note 1, at 120.

than being good or evil, the struggle for life is simply a fact about the world. “The withering of a leaf, the sickness of man, the struggle for life,” Holmes told Laski in 1926, “all are normal sequences of the datum—as are frauds and murders.”<sup>37</sup> “The world has produced the rattlesnake as well as me,” he told diplomat Lewis Einstein a dozen years earlier, “but I kill it if I get a chance, as also mosquitos, cockroaches, murderers, and flies. My only judgment is that they are incongruous with the world I want . . . .”<sup>38</sup>

Holmes’s belief in a purely physical world did not stop at observable phenomena. He applied it all the way down to human consciousness. “I believe,” he told Taiwanese jurist John Wu in a 1926 letter,

that our personality is a cosmic ganglion, that just as when certain rays meet and cross there is white light at the meeting point, but the rays go on after the meeting as they did before, so, when certain other streams of energy cross, the meeting point can frame a syllogism or wag its tail.<sup>39</sup>

“I [don’t] see why anyone should bother,” he told Cohen a few years earlier,

over the suggestion that consciousness is an epiphenomenon—It is the way the cosmos acts when it gets a certain knot in its guts—and I don’t perceive why there is any more right to think away consciousness than there is to think away nerve tissue—the total is the datum.<sup>40</sup>

But as cognitive scientist Steven Pinker observed in his 2002 book *The Blank Slate*, if consciousness has a purely physical basis, we are left with a staggering problem.<sup>41</sup> Accepting that configurations of matter explain the life of our minds—everything we experience and think and feel, including our most sacred, profound, and strongly felt beliefs—what are we to make of humanity’s meaning?<sup>42</sup>

Although Holmes plainly perceived this problem—“I doubt if a shudder would go through the spheres if the whole ant heap were kerosened,” he told Lewis Einstein in 1909<sup>43</sup>—he never attempted to solve

37. Letter from Oliver W. Holmes to Harold Laski (Aug. 20, 1926), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 76, 77.

38. Letter from Oliver W. Holmes to Lewis Einstein (May 21, 1914), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 114, 114.

39. Letter from Oliver W. Holmes to John C. H. Wu (May 5, 1926), in *BOOK NOTICES AND UNCOLLECTED LETTERS*, *supra* note 20, at 184, 185.

40. Letter from Oliver W. Holmes to Morris Cohen (July 21, 1920), in Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 *J. HIST. IDEAS* 3, 19 (1948).

41. See STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 191–92 (2002).

42. See *id.*

43. Letter from Oliver W. Holmes to Lewis Einstein (Aug. 19, 1909), in *THE ESSENTIAL HOLMES*, *supra* note 1, at xxv, xxvi.

it. Instead, he moved beyond it. “I am not running the universe,” he wrote in a 1912 letter to the Irish writer Canon Patrick Augustine Sheehan, “and am not called on to lie awake with cosmic worries.”<sup>44</sup> In a 1902 address at Northwestern University, Holmes evoked the ultimate perspective and expressed his feeling that it is incomplete: “[I]t might seem that the law of life is . . . that man should produce food and raiment in order that he might produce yet other food and other raiment to the end of time. Yet who does not rebel at that conclusion?”<sup>45</sup> Holmes’s solution was to supplement his ultimate perspective with the proximate perspective (the existential perspective of a mind functioning in real time). From that vantage point, the only things that matter are specific pursuits.<sup>46</sup>

A few major themes run through Holmes’s discussion of the proximate perspective, including two outward signs that a person is operating from a proximate point of view. The first sign Holmes talked about was the pursuit of something that is functionally useless.<sup>47</sup> Holmes

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44. Letter from Oliver W. Holmes to Patrick A. Sheehan (Oct. 18, 1912), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 7, 8; *see also* Letter from Oliver W. Holmes to Lewis Einstein’s Daughter (May 6, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 75, 75 (“I think it futile to ask what does it all amount to. . . . [T]here is no answer except that it is not our business to enquire.”).

45. Oliver W. Holmes, Address of Chief Justice Holmes at the dedication of the Northwestern University Law School Building (Oct. 20, 1902), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 272, 272. This speech is also reprinted in *THE ESSENTIAL HOLMES*, *supra* note 1, at 98.

46. *See, e.g.*, Letter from Oliver W. Holmes to Patrick A. Sheehan (Apr. 1, 1911), in *HOLMES-SHEEHAN CORRESPONDENCE: THE LETTERS OF JUSTICE OLIVER WENDELL HOLMES AND CANON PATRICK AUGUSTINE SHEEHAN* 40, 41 (David H. Burton ed., 1976) [hereinafter *HOLMES-SHEEHAN CORRESPONDENCE*] (“I look at man as a cosmic [insignificance], . . . except from a human and social point of view, working to some unknown end or no end, outside himself and having sufficient reasons, easily stated, for doing his best.”). Holmes’s use of the proximate perspective is among the least understood aspects of his thought. Law professor Brian Leiter has dismissed it as “silly mysticism and romantic wistfulness.” Brian Leiter, *Holmes, Nietzsche, and Classical Realism*, 37 (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory Working Paper No. 003, 2000), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=215193](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=215193) [https://perma.cc/Y34B-R3ZK]. Law professor Albert Alschuler has criticized it as a type of nihilism that attempts to find meaning through blind commitment. *See* ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 20–23 (2000). But I think Leiter and Alschuler are both wrong. As explained below, Holmes’s proximate perspective is both consistent with positivism and capable of adequately addressing the question of life’s meaning. *Infra* text accompanying notes 47–63.

47. *See, e.g.*, Oliver W. Holmes, Remarks regarding Rudolph C. Lehmann, given at a Tavern Club Dinner (Nov. 24, 1896), in *OCCASIONAL SPEECHES*, *supra* note 31, at 90, 91 (“[U]selessness is the highest kind of use. It is kindling and feeding the ideal spark without which life is not worth living.”). In his 1902 speech *Address of Chief Justice Holmes*, Holmes distinguished between humanity’s ultimate concerns and useless proximate pursuits,

keyed in on uselessness because when a person pursues a goal that has no practical benefit, it suggests the person pursues it as an end in itself. The pursuit is the reward.<sup>48</sup> Holmes vividly illustrated this sign in his 1896 speech, *Rudolph C. Lehmann*:

[One summer] I went down to see a man go through the [Niagara Falls] rapids on a boat of his construction. I got there a little late and the man was drowned before I arrived. Afterwards a lady talking of the accident said that if the attempt had promised any possible good to his fellow men the case would have been different, but that under the circumstances she could not see any justification for a pure waste of life. I replied, Madam, on the contrary precisely because it was not useful it was a perfect expression of this male contribution to our common stock of morality. . . . [Without this uselessness] life is not worth living.<sup>49</sup>

Holmes's second outward sign that a person is operating from the proximate perspective is the pursuit of something that is unattainable.<sup>50</sup> Like useless goals, unattainable goals do not pay, so when a person pursues them their motivation must be the experience of the chase. In explaining this idea to Laski, Holmes identified absolute truth and moral perfection as examples of such goals.<sup>51</sup> And like the pursuit of useless things, Holmes

and called that distinction the "double view of life." Address of Chief Justice Holmes at the dedication of the Northwestern University Law School Building (Oct. 20, 1902), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 272, 272–75.

48. See Letter from Oliver W. Holmes to Harold Laski (May 24, 1919), in 1 *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935*, at 207, 208 (Mark DeWolfe Howe ed., 1953) [hereinafter *HOLMES-LASKI LETTERS VOL. 1*] ("I desire a world in which art and philosophy, in their *useless* aspect, may have a place. I say useless, to mark the point that they are ends in themselves."); Oliver W. Holmes, Address of Chief Justice Holmes, at the dedication of the Northwestern University Law School Building (Oct. 20, 1902), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 272, 272–73 ("Art, philosophy, charity, the search for the north pole, the delirium of every great moment in man's experience—all . . . mean waste . . . . The justification of art is not that it offers prizes to those who succeed in the economic struggle . . . . The justification is in art itself . . .").

49. Oliver W. Holmes, Remarks regarding Rudolph C. Lehmann, given at a Tavern Club Dinner (Nov. 24, 1896), in *OCCASIONAL SPEECHES*, *supra* note 31, at 90, 90–91.

50. See, e.g., Oliver W. Holmes, The Soldier's Faith, Address to the graduating class of Harvard University (May 30, 1895), in *OCCASIONAL SPEECHES*, *supra* note 31, at 73, 76 ("[W]ho of us could endure a world . . . without the senseless passion for knowledge out-reaching the flaming bounds of the possible, without ideals the essence of which is that they never can be achieved?"). This speech is also reprinted in *THE ESSENTIAL HOLMES*, *supra* note 1, at 87.

51. See Letter from Oliver W. Holmes to Harold Laski (Apr. 6, 1920), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 115, 115 ("[Truth] postulates itself as a thing to be attained, but like other good ideals it is unattainable and therefore may be called absurd. Some ideals, like morality, a system of specific conduct for every situation, would be

thought the pursuit of unattainable things made life meaningful. As he told the Federal Bar Association in 1932: “Life seems to me like a Japanese picture which our imagination does not allow to end with the margin. We aim at the infinite and when our arrow falls to earth it is in flames.”<sup>52</sup>

As heady as useless and unattainable pursuits can be, it turns out that Holmes’s understanding of the proximate perspective encompasses much more. In going about their daily lives, people normally take a proximate view. When they do, they pursue things that are both useful and attainable.<sup>53</sup> Speaking from his own experience as a judge, Holmes said that when he considered a case, it did not trigger any abstract moral or philosophical feelings like egotism, selflessness, or a sense of duty.<sup>54</sup> He was merely fixated on the problem he was trying to solve, and he did his best to solve it.<sup>55</sup> In an 1897 speech called *George Otis Shattuck*, Holmes listed other examples of everyday efforts that take a proximate focus, including navigating the seas, contributing to a war effort, arguing a case in court, or running a company.<sup>56</sup> “If you want to hit a bird on the wing,” Holmes told the Suffolk Bar a few years later, “you must have all your will in a focus . . . you must be living in your eye on that bird. Every achievement is a bird on the wing.”<sup>57</sup>

Holmes thought day-to-day proximate thinking takes up the bulk of thinking people do.<sup>58</sup> After acknowledging that some people seem to live

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detestable if attained and therefore . . . must be . . . striven for on the tacit understanding that it will not be reached . . .”).

52. Letter from Oliver W. Holmes to the Federal Bar Association (Feb. 29, 1932), in *BOOK NOTICES AND UNCOLLECTED LETTERS*, *supra* note 20, at 143, 143. This letter is also available in *THE ESSENTIAL HOLMES*, *supra* note 1, at 20.

53. *See, e.g.*, Oliver W. Holmes, Remarks at a dinner given in Holmes’s honor by the Bar Association of Boston (Mar. 7, 1900), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 244, 247 (“The joy of life is to put out one’s power in some natural and useful or harmless way. There is no other.”). This speech is also reprinted in *THE ESSENTIAL HOLMES*, *supra* note 1, at 77, 79.

54. *See* Letter from Oliver W. Holmes to Patrick A. Sheehan (Mar. 21, 1908), in *HOLMES-SHEEHAN CORRESPONDENCE*, *supra* note 46, at 21, 22.

55. *Id.* (“[A] sense of responsibility is a confession of weakness. If I put all my powers into deciding the case . . . I neither feel responsibility nor egotism, nor yet altruism—I am just all in the problem and doing my best.”).

56. *See* Oliver W. Holmes, *George Otis Shattuck*, in *OCCASIONAL SPEECHES*, *supra* note 31, at 92, 95–96. This speech is also available in *THE ESSENTIAL HOLMES*, *supra* note 1, at 97.

57. Oliver W. Holmes, Remarks at a dinner given in Holmes’s honor by the Bar Association of Boston (Mar. 7, 1900), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 244, 247. This speech is also reprinted in *THE ESSENTIAL HOLMES*, *supra* note 1, at 77.

58. *See, e.g.*, Oliver W. Holmes, Remarks regarding Albert Venn Dicey, given at a Tavern Club Dinner (Nov. 4, 1898), in *OCCASIONAL SPEECHES*, *supra* note 31, at 106, 107

their lives with a predominant focus on useless or unattainable goals, he believed they were anomalies, telling Einstein on one occasion, “[W]hile I often feel like a worm when I read of men whose dominant motive is love for their kind, I console myself by thinking that most of the great work done in the world comes from a different type.”<sup>59</sup> In a 1925 letter to Wu, Holmes offered his own defense of the idea that most people simply focus on performing their daily work. “I [do not] believe the economic opinion . . . intimated [in the New Testament],”<sup>60</sup> Holmes remembered telling an acquaintance. “[T]o love my neighbor as myself [does] not seem to me the true or at least the necessary foundation for a noble life,” he continued.<sup>61</sup>

I [think] the true view [is] that of my imaginary society of jobbists . . . . Their job is their contribution to the general welfare and when a man is on that, he will do it better the less he thinks either of himself or of his neighbors, and the more he puts all his energy into the problem he has to solve.<sup>62</sup>

“[A] man who thinks he has been an egotist all his life,” he told Laski a few years earlier, “will find on the Day of Judgment that he has been a better altruist than those who thought more about it.”<sup>63</sup>

Although anyone’s attention can glide from the ultimate world to a “jobbist” proximate pursuit, exactly what the proximate view can offer is still hemmed in by the limitations imposed by nature. Even if everyone had a job, not everyone would benefit equally from any particular person’s work. People are still subject to the laws Darwin set down, and the struggle for life will always reward some more than it rewards others.<sup>64</sup>

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(“The interest of men is not money or beauty or truth but the pursuit of money or beauty or truth. And all experience the same vital pleasure—the one great pleasure and end of life—that of realizing their own spontaneous energy through whatever channel they are able to bring it out.”)

59. Letter from Oliver W. Holmes to Lewis Einstein (Jan. 15, 1915), in *THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903–1935*, at 105, 106 (James Bishop Peabody ed., 1964).

60. Letter from Oliver W. Holmes to John C. H. Wu (Mar. 26, 1925), in *BOOK NOTICES AND UNCOLLECTED LETTERS*, *supra* note 20, at 178, 178.

61. *Id.*

62. *Id.*

63. Letter from Oliver W. Holmes to Harold Laski (Dec. 9, 1921), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 115, 115.

64. See *The Gas Stokers’ Strike*, *supra* note 36, at 583 (“It has always seemed to us a singular anomaly that believers in the theory of evolution and in the natural development of institutions by successive adaptations to the environment, should be found laying down a theory of government intended to establish its limits once for all by a logical deduction from axioms. . . . This tacit assumption of the solidarity of the interests of society is very

But for Holmes, life's built-in necessity to compete was not only destructive, it was also the basis for pools of social stability and increased productivity.<sup>65</sup> In his 1885 address *The Law*, Holmes briefly surveyed human history from 30,000 feet and saw a series of "painful step[s]" and "world-shaking contest[s] by which mankind has worked and fought its way from savage isolation to organic social life."<sup>66</sup> On Holmes's accounting of the past, the instinct to survive drew people together into cooperative combinations so that they could more easily satisfy their needs and wants, and so that they would be better able to compete against other groups, people, and animals.<sup>67</sup> Even in a Darwinian world, Holmes believed, social life tends to expand the circle of people who benefit from a particular person's efforts.<sup>68</sup>

Although Holmes's theory as to how societies evolve contains a streak of optimism, he did not consider it to be starry-eyed. He thought the theory merely described the way things were. As he explained in his dissent in the 1896 Massachusetts case *Vegeahn v. Guntner*: "It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination."<sup>69</sup> And Holmes was right. During his adulthood, the United States' industrial and agricultural production grew

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common, but seems to us to be false."). This article is also reprinted in THE ESSENTIAL HOLMES, *supra* note 1, at 120.

65. See MENDENHALL, *supra* note 19, at 101 (arguing that Holmes viewed society as being "rife with conflict that necessitates eusociality, a behavioral condition in which members of a civilization learn to work together to secure healthier, safer lives for themselves and their posterity regardless of their divergent principles and fundamental disagreements").

66. Oliver W. Holmes, *The Law*, Remarks at a Suffolk Bar Association Dinner (Feb. 5, 1885), in OCCASIONAL SPEECHES, *supra* note 31, at 20, 22. This speech also appears in THE ESSENTIAL HOLMES, *supra* note 1, at 221.

67. See Holmes, *The Gas Stokers' Strike*, *supra* note 36, at 583 ("The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with the monkeys, but is equally the law of human existence."); OLIVER W. HOLMES, *Law and the Social Factor*, in BOOK NOTICES AND UNCOLLECTED LETTERS, *supra* note 20, at 138, 138 (arguing that in the course of history, society has been determined by "the mechanically determined outcome of the cooperation and clash of private effort").

68. See, e.g., Oliver W. Holmes, Remarks to the Essex Bar (undated), in OCCASIONAL SPEECHES, *supra* note 31, at 48, 49 ("Our country . . . is bound to the other nations more and more closely by wire and rail and steamer, by commerce, yes, and by sympathy, as the world grows more and more one").

69. *Vegeahn v. Guntner*, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

fourfold.<sup>70</sup> At the same time, huge disparities in wealth opened up between business elites and everyone else.<sup>71</sup> According to political scientist Howard Gillman, the pull of workers into expanding industries and the uneven accumulations of wealth “resulted in intensified battles between wage earners seeking a greater share of the wealth being produced and owners seeking lower labor costs.”<sup>72</sup>

So it is no wonder that one of Holmes’s most developed examples of combinations centered on the battles between organized labor and business leaders. As a judge, those battles often found him. When Holmes considered disputes between labor and capital, his starting point was always capitalism. He championed capitalism because he thought it was the best way yet devised to harness people’s natural tendencies to look after their own interests and to do so in combination with others.<sup>73</sup> In order to stay on top, business leaders have to outperform their rivals by accounting for what the public wants, what it is likely to want in the future, and how much it is willing to pay.<sup>74</sup> That means increasing accumulations of capital are signs that society is becoming more productive and more responsive to popular needs and wants.<sup>75</sup> Holmes sometimes illustrated this idea with a quip about investor Albert Nickerson. “He made a fortune in the stock market—and said one day—‘They talk of our leading the market. We only follow the procession ahead, like little boys. If we turn down a side street the procession doesn’t.’ Which I thought showed size.”<sup>76</sup>

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70. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 76 (1993).

71. *Id.* at 77.

72. *Id.*

73. See, e.g., Letter from Oliver W. Holmes to Harold Laski (July 16, 1926), in *HOLMES-LASKI LETTERS VOL. 2*, *supra* note 4, at 856, 856 (“[T]he capitalist regime [is] better than the proposed substitutes . . .”).

74. See OLIVER W. HOLMES, *Economic Elements*, in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 279, 280–81 (“[T]he ability of the ablest men under the present regime is directed to getting the largest markets and the largest returns. . . . [I]f every desirable object were in the hands of a monopolist, intent on getting all he could for it . . . they would be consumed by those who were able to get them and that would be the ideal result.”) This work also appears in *THE ESSENTIAL HOLMES*, *supra* note 1, at 128.

75. See Letter from Oliver W. Holmes to Franklin Ford (Apr. 6, 1911), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 138, 138 (“[As for] the problem [of] . . . adjusting production to the equilibrium of social desires . . . if every desideratum were in the hands of a separate monopolist bent on getting all he could for it, you would get an ideal result, if each monopolist knew his business, as he would have to keep his place. I confess that the present passion for disorganization seems to me, I won’t say amazing, but certainly foolish.”).

76. Letter from Oliver W. Holmes to Harold Laski (Apr. 22, 1922), in *HOLMES-LASKI LETTERS VOL. 1*, *supra* note 48, at 417, 418. Holmes used this quip sixteen years earlier in a

Holmes was perhaps never more clear about how well he thought capitalism captured mankind's natural tendency to combine with others than in his 1913 address to the Harvard Law School Association. "We are apt to contrast the palace with the hovel, the dinner at Sherry's with the working pail," he began,

[but] large ownership means investment, and investment means the direction of labor towards the production of the greatest returns . . . [W]e need to think things instead of words—to drop ownership, money, etc., and to think of the stream of products; of wheat and cloth and railway travel. When we do, it is obvious that the many . . . have substantially all there is . . . [and] that the function of private ownership is to divine in advance the equilibrium of social desires.<sup>77</sup>

Thirteen years earlier, in his dissent in the Massachusetts case *Plant v. Woods*,<sup>78</sup> Holmes similarly argued that capitalism's merits emerge when it is considered in light of the cold logic of anthropological fact:

The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude always. . . . It is only by divesting [sic] our minds of questions of ownership and other machinery of distribution, and by looking solely at the question of consumption,—asking ourselves what is the annual product, who consumes it, and what changes would or could we make,—that we can keep in the world of realities.<sup>79</sup>

Although Holmes thought capitalists could distribute goods and services more efficiently and effectively than anyone else, he was unwilling to put roadblocks up in front of other groups who had interests that were adverse to theirs.<sup>80</sup> It was always counterproductive, he thought, to interfere with the nonviolent activities of any combination.<sup>81</sup> In the 1904

letter to Pollock. See Letter from Oliver W. Holmes to Frederick Pollock (May 25, 1906), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 67, 68.

77. Oliver W. Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 291, 293–94. This speech is also reprinted in *THE ESSENTIAL HOLMES*, *supra* note 1, at 145.

78. *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900).

79. *Id.* at 1016 (Holmes, C.J., dissenting).

80. See, e.g., *id.* ("But, subject to the qualifications which I have expressed, I think it lawful for a body of workmen to try by combination to get more than they are now getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike.").

81. See, e.g., *Vegeahn v. Guntner*, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting) ("The only debatable ground is the nature of the means by which . . . damage [in pursuit of a larger market share] may be inflicted. We all agree that it cannot be done by force or threats of force.").

Supreme Court case *Northern Securities Co. v. United States*,<sup>82</sup> Holmes argued that the ancient law of the struggle for life described social instincts better than free market principles did.<sup>83</sup> In response to Harlan's plurality opinion, in which he maintained that the Constitution's Commerce Clause<sup>84</sup> empowers Congress to prohibit certain kinds of anticompetitive combinations,<sup>85</sup> Holmes wrote:

I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the [Hobbesian war of all against all] and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society.<sup>86</sup>

Eight years earlier in *Vegeahn*, Holmes similarly connected the struggle for life with combinations and opposed them both to the law of competition.<sup>87</sup> Business owners, he explained, have always been able to harm their competitors "in the battle of trade"<sup>88</sup> because it is "generally . . . accepted that free competition is worth more to society than it costs."<sup>89</sup> "I have seen the suggestion made," he continued,

that the conflict between employers and employees is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term "free competition," we may substitute "free struggle for life." Certainly, the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests.<sup>90</sup>

So under the heading of the struggle for life, Holmes was able to study the activity of capitalists and the activity of organized labor using a single set of assumptions. Everyone, he was convinced, combines to get more of what they want. The contests "between the effort of every man to get the

82. *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

83. *See id.*

84. U.S. CONST. art. I, § 8, cl. 3.

85. The law in question was the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, which prohibits every contract, combination, monopoly, or attempted monopoly in restraint of interstate trade or commerce. 15 U.S.C. §§ 1–3 (2012). Harlan only narrowed the sweeping language of the Act by interpreting it as enacting "the general law of competition." *N. Sec. Co.*, 193 U.S. at 338 (Harlan, J., plurality opinion) (quoting *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 569 (1898)).

86. *N. Sec. Co.*, 193 U.S. at 411 (1904) (Holmes, J., dissenting).

87. *Vegeahn v. Guntner*, 44 N.E. 1077, 1077 (Mass. 1896) (Holmes, J., dissenting).

88. *Id.* at 1081.

89. *Id.* at 1080.

90. *Id.* at 1080–81.

most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return,” Holmes wrote in *Vegelahn*, was only “[o]ne of the eternal conflicts out of which life is made up.”<sup>91</sup> No government, he added, could change that reality. “Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.”<sup>92</sup> “It seems to me futile,” he concluded, “to set our faces against [the] tendency [to combine]. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.”<sup>93</sup>

## II. THE MECHANICS OF HOLMES’S *LOCHNER* DISSENT

In Part I, I explained that Holmes broke the world up into a positivistic ultimate view and an existential proximate view, and used a theory of combinations to understand social life, including disputes between business owners and organized workers. In this Part, I use Holmes’s dissenting opinion in *Lochner* to illustrate how his jurisprudence was shaped by his acceptance of positivism and by his commitment to his theory of combinations. To do that, I first contextualize Holmes’s dissent by examining the rise of *liberty of contract*, a legal doctrine Holmes’s colleagues thought was critical to the *Lochner* case. Then I walk through the mechanics of *Lochner*’s majority opinion and main dissent, which his dissent responds to. My overall argument will be that the ultimate-proximate divide and the law of combinations provide the foundation on which Holmes built his *Lochner* opinion.

### A. *Liberty of Contract*

The right to liberty of contract is a now-defunct constitutional doctrine<sup>94</sup> that says the Due Process Clause of the Fourteenth Amendment

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91. *Id.* at 1081.

92. *Id.* In this passage, Holmes specifically made the case that allowing employees to combine was a matter of fairness. In doing so, he was in the mainstream of his day. Two years before *Vegelahn*, the presidentially appointed United States Strike Commission issued a report on the Pullman Strike in which it made the same argument: “[S]o long as railroads are . . . permitted to combine to fix wages and for their joint protection, it would be rank injustice to deny the right of all labor upon railroads to unite for similar purposes.” U.S. STRIKE COMM’N, REPORT ON THE CHICAGO STRIKE OF JUNE-JULY, 1894, at xxxi (1895).

93. *Vegelahn*, 44 N.E. at 1081 (Holmes, J., dissenting).

94. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–400 (1937) (overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), a case in which the Court applied the right to liberty of contract); JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING

protects “the right to purchase or to sell labor”<sup>95</sup> from unreasonable regulations.<sup>96</sup> However, because the Due Process Clause never mentions liberty of contract, understanding how that right came to be requires some explanation. As law professor David Bernstein noted in his 2003 article *Lochner Era Revisionism, Revised*, the right to contract arose from a brew of American constitutional theory, natural law, and Anglo-American historicism.<sup>97</sup>

“When leading postbellum lawyers considered American constitutionalism,” Bernstein explained,

they thought of it not as being solely the powers and prohibitions contained within the four corners of a document. Rather, they took a cue from British constitutional theorists, who posited that England had a “constitution” despite the absence of any such written document. American theorists argued that the United States, too, had an unwritten constitution, one that complemented and supplemented the written document. . . .

In England, the constitution only restrained the monarchy and was safeguarded by Parliament, leading to a system of legislative supremacy. In the United States, [however], the federal government was a government of limited and enumerated powers, restrained by a written Constitution and, many thought, natural rights, enforceable by the judiciary.<sup>98</sup>

Reconstruction and Gilded Age judges also enforced the unwritten constitution against the states. Before the country adopted the Fourteenth Amendment in 1868, “states were thought to be sovereign and could only be restrained by express constitutional provisions.”<sup>99</sup> However, not long after the Amendment was adopted, judges began to see it as initiating a new era in the federal government’s relationship with state governments.<sup>100</sup>

Specifically, postbellum judges believed the Fourteenth Amendment’s Due Process Clause—which prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law”<sup>101</sup>—required a new

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AMERICAN CONSTITUTIONALISM 144 (2003) (“After [the 1937 case] *West Coast Hotel*, . . . liberty of contract is never used again by the Supreme Court to strike a statute . . .”).

95. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (Peckham, J.).

96. *See id.* (Peckham, J.) (“Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State . . . and with such conditions the Fourteenth Amendment was not designed to interfere.”).

97. *See* David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003).

98. *Id.* at 31–32 (footnote omitted).

99. *Id.* at 32.

100. *See id.* at 31–35.

101. U.S. CONST. amend. XIV, § 1.

understanding of American federalism.<sup>102</sup> “[They] argued that the Clause gave courts the right and obligation to enforce against the states not just the largely procedural rights protected by the Magna Carta and long-standing Anglo-American traditions, but all fundamental individual rights deemed essential to the development of American liberty . . . .”<sup>103</sup> So whereas before the Fourteenth Amendment became law, the state legislatures and state courts were the “ultimate guardians of the people’s liberty at the state and local levels,”<sup>104</sup> after the Amendment was adopted, the federal courts became the final defenders of liberty. The Due Process Clause, judges thought, required them to directly enforce unwritten constitutional guarantees of liberty against the states.<sup>105</sup>

When judges enforced the unwritten constitution against the states, they saw themselves as protecting fundamental natural rights that “antedate positive law and that can be discovered through human reason.”<sup>106</sup> By 1905, when the Court decided *Lochner*,

a virtual consensus seems to have developed among the [Supreme Court] Justices that due process principles protected fundamental [natural] rights that were antecedent to government. . . . The main dispute in the Court was not over the existence of fundamental judicially-enforceable unenumerated rights, nor was the dispute primarily about the content of those rights. . . . Rather, . . . the Justices disagreed about how vigorously fundamental rights should be enforced against the states . . . .<sup>107</sup>

Despite the wide agreement on the revolution sparked by the Due Process Clause, the judges who wanted to follow through with the new federalism still faced a practical problem. There is no “set formula” for defining an unwritten natural right with enough specificity to resolve a particular dispute.<sup>108</sup> However, aside from Holmes,<sup>109</sup> every Justice on the

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102. See Bernstein, *supra* note 97, at 34.

103. *Id.*

104. *Id.* at 32.

105. See *id.* at 32.

106. *Id.* at 35.

107. *Id.* at 37–38.

108. *Id.* at 38.

109. In his *Lochner* dissent, Holmes mentioned the “fundamental principles as they have been understood by the traditions of our people and our law.” *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Bernstein characterizes that comment as Holmes’s “grudging[] acknowledge[ment]” that courts were required to apply fundamental natural rights against the states. Bernstein, *supra* note 97, at 38. However, as I explain *infra* Section II.C, with that comment Holmes was merely adding broad criteria to a reasonableness test.

*Lochner* Court found a way to overcome that problem through a process Bernstein describes as “an implicit legal historicism.”<sup>110</sup>

Judges of the *Lochner* period believed they could identify particular fundamental natural rights “through historical studies” rather than “rationalistic introspection.”<sup>111</sup> “One scholar,” Bernstein noted, “described the historicism of the *Lochner* era as the conceiving of law ‘as an evolving product of the mutual interaction of race, culture, reason, and events.’”<sup>112</sup> “Historicists of the time,” Bernstein went on to explain, “believed that ‘societies, social norms, and institutions are the outgrowth of continuous change effected by secular causes’ but that they ‘evolve according to moral ordering principles that are discoverable through historical studies.’”<sup>113</sup> So *Lochner*-era judges did not think of natural rights theory as a purely abstract system of limits on state power and constitutional guarantees. Instead, they thought of the theory “‘as confirmation of rights they thought were embedded’ in the Anglo-American tradition.”<sup>114</sup>

Aided by the new federalism set off by the Fourteenth Amendment and working from a base of natural rights and historicism, the 1890s Fuller Court developed the idea that the Due Process Clause recognizes a right to contract. As the Gilded Age gave way to the Progressive Era, “labor unrest and Populist agitation . . . fueled fears” among many of the country’s conservatives, business owners, and governing elite “of imminent Socialism . . . .”<sup>115</sup> In that climate, many jurists began to view “[t]he right to pursue an occupation free from unreasonable government interference” as a vital means of protecting “private enterprise.”<sup>116</sup> In the words of Henry Weismann, one of the attorneys who challenged the law at issue in

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110. See Bernstein, *supra* note 97, at 39.

111. *Id.* (quoting Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1435 (1990)).

112. *Id.* (quoting Siegel, *supra* note 111, at 1435).

113. *Id.* (quoting Siegel, *supra* note 111, at 1438).

114. *Id.* at 38 (quoting Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 83 (1991)).

115. *Id.* at 41; see also Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 792 (2009) (“The great issue in the *Lochner* era was labor and its association with socialism.”).

116. Bernstein, *supra* note 97, at 41–42; see generally David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1500–05 (2005) [hereinafter *Centennial Retrospective*] (discussing the press’s reaction to the Court’s *Lochner* decision); Nourse, *supra* note 115, at 778–79 (also noting the reception of the *Lochner* decision by the national press).

*Lochner*,<sup>117</sup> when the Court first struck down a labor law on liberty-of-contract grounds, they fired “a warning [shot] to the Radicals and Socialists . . . and [gave] inspiration to those who still believe in the old-time doctrines of Americanism.”<sup>118</sup>

Within the span of a few years, the Fuller Court would both introduce liberty of contract and defend it as a right protected by the Due Process Clause. The effort began with Justice Henry Brown’s opinion for the Court in the 1894 case *Lawton v. Steele*.<sup>119</sup> In *Lawton*, as part of a discussion on the extent of states’ inherent powers, Brown tossed in the idea that state legislatures “may not . . . arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.”<sup>120</sup> The following year in *Frisbie v. United States*,<sup>121</sup> Justice David Brewer sharpened Brown’s pronouncement by “conced[ing] that . . . among the inalienable rights” guaranteed by the Constitution “is that of the liberty of contract.”<sup>122</sup> But it was not until the 1897 case *Allgeyer v. Louisiana*<sup>123</sup> that the Court finally took full advantage of the new federalism, natural rights theory, and historicism, to make a full-throated argument that the Due Process Clause guarantees a right to contract.

Writing for the *Allgeyer* Court, Justice Rufus Peckham’s holding was relatively narrow: “[A] citizen of a state, under the [Due Process Clause, has] a right to contract outside of the state for insurance on his property.”<sup>124</sup> But in “broad dicta,”<sup>125</sup> he signaled to the nation that the Court was ready to invalidate laws under the Due Process Clause for violating the right to contract. “The liberty mentioned in [the Due Process Clause,]” Peckham wrote,

is deemed to embrace the right of the citizen . . . to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be

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117. See PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 111–28 (1998). Although in *Lochner* Weismann opposed the ten-hour provision, he was also instrumental in getting the law passed. See *id.* at 52–60.

118. *Centennial Retrospective*, *supra* note 116, at 1501–02 (quoting Henry Weissman, *Celebration of Victory* (1905), in *BAKERS REV.*, June 1905, at 41, 41).

119. *Lawton v. Steele*, 152 U.S. 133 (1894).

120. *Id.* at 137 (Brown, J.).

121. *Frisbie v. United States*, 157 U.S. 160 (1895).

122. *Id.* at 165 (Brewer, J.).

123. *Allgeyer v. Louisiana*, 165 U.S. 578 (1896).

124. *Id.* at 590–91 (Peckham, J.).

125. See Bernstein, *supra* note 97, at 44.

proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>126</sup>

Peckham then defended the new interpretation of the Due Process Clause with appeals to natural law and historicism. Peckham first characterized liberty of contract as an “inalienable right”<sup>127</sup> and said that it had been given to “all men . . . by their Creator.”<sup>128</sup> After that, he defended the right to contract as fundamental to Anglo-American freedom, calling it a “large ingredient in the civil liberty of the citizen,”<sup>129</sup> “one of the privileges of a citizen of the United States,”<sup>130</sup> and “a material part of the liberty of the citizen.”<sup>131</sup> The Due Process Clause, according to Peckham, required courts to enforce the fundamental and natural right to liberty of contract against the states. In his estimation, protecting American liberty meant complementing and supplementing the Due Process Clause with that right.

Although when the Court decided *Allgeyer* in 1897 it had yet to rely on the new doctrine, Peckham’s strong endorsement of it made it ready to use in future cases. And as it happened, *Lochner*—which came tumbling down the pike in 1905—was one of those cases.

#### B. *Peckham’s Majority Lochner Opinion and Harlan’s Dissent*

As in *Allgeyer*, Peckham wrote the majority opinion in the 1905 *Lochner* case.<sup>132</sup> There, he considered a challenge to a provision in New York’s Bakeshop Act that limited bakers to working ten hours per day and sixty hours per week.<sup>133</sup> For Peckham, the relevant legal framework began with New York’s general power to pass legislation—a power that exists “in the sovereignty of each State . . . somewhat vaguely termed *police powers*.”<sup>134</sup> Whereas in the early days of the Republic, states could pass laws limiting individuals’ liberty without federal supervision,<sup>135</sup> after the

126. *Allgeyer*, 165 U.S. at 589.

127. *Id.* (quoting *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring)).

128. *Id.* (quoting *Butchers’ Union*, 111 U.S. at 762).

129. *Id.* at 590 (quoting *Butchers’ Union*, 111 U.S. at 762).

130. *Id.* (quoting *Butchers’ Union*, 111 U.S. at 764).

131. *Id.* (quoting *Butchers’ Union*, 111 U.S. at 765).

132. *Lochner v. New York*, 198 U.S. 45 (1905).

133. *See id.* at 46 n.1 (1905) (reproducing the language of the ten-hour provision).

134. *Id.* at 53 (Peckham, J.) (emphasis added).

135. *See id.* at 73 (Harlan, J., dissenting) (describing the “inherent power of the States” as “embrac[ing] everything within the territory of the State not surrendered to the [Federal] Government” (quoting *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824))); *see also id.* at 56 (“It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. . . . Otherwise the Fourteenth Amendment would have no efficacy.”).

adoption of the Due Process Clause judges would review police-power laws to determine whether they invaded individuals' fundamental natural rights.<sup>136</sup> Noting that the courts had not yet exactly described<sup>137</sup> how fundamental rights fit together with states' police powers, Peckham checked off a few purposes for enacting police-power laws that were by then well established: "safety, health, morals, and general welfare of the public."<sup>138</sup>

After setting up a framework that used fundamental rights to limit the reach of states' police powers, Peckham laid out his test for determining whether a particular law was "within the police power of [a] State"<sup>139</sup> or whether it ventured into territory protected by a fundamental right.<sup>140</sup> A law is a "valid" police-power measure, Peckham explained in a critical passage, if it has a "direct relation, as a means to an end, and the end itself must be appropriate and legitimate."<sup>141</sup>

Peckham envisioned a clean distinction between a law that was a valid police-power measure, and a law that infringed a fundamental natural right. In the event a judge was presented with a Due Process challenge to a "border" law<sup>142</sup>—that is, a law that infringes a fundamental right for the ostensible purpose of achieving a recognized police-power objective—Peckham believed that an investigation of the underlying facts would show whether the law was valid.<sup>143</sup> If, as a matter of fact, the law genuinely furthers a police-power objective, then it had to be upheld as a law "the Fourteenth Amendment was not designed to interfere [with]."<sup>144</sup> The Due Process Clause, Peckham believed, allows for "legitimate" exceptions.<sup>145</sup>

When Peckham turned to the ten-hour law, it was obvious to him that by restricting the terms over which master bakers and bakers could bargain, the provision had "necessarily interfere[d] with the [fundamental natural]

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136. *See id.* at 57 (saying that the question of whether a police-power measure steps on a right guaranteed by the Due Process Clause "must be answered by the court").

137. *Id.* at 53.

138. *Id.*

139. *Id.* at 57.

140. *See id.* at 58 ("We think the limit of the police power has been reached and passed in this case.").

141. *Id.* at 57–58.

142. *Id.* at 54.

143. *Id.*

144. *Id.* at 53.

145. *Id.*

right of contract” mentioned in *Allgeyer*.<sup>146</sup> As a result, the law could only be upheld as valid if a factual inquiry revealed that an established exception applied. After brushing off the ideas that the ten-hour law could be “valid as a labor law” or valid as a measure to protect the public’s health,<sup>147</sup> Peckham announced that “[t]he law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker.”<sup>148</sup>

Peckham’s first order of business was to clarify that a law to protect workers’ health must apply to jobs that rise to an unusual level of unhealthfulness.<sup>149</sup> Although he never defined where that level was, he was willing to say that “[t]here must be more than . . . the possible existence of some small amount of unhealthiness.”<sup>150</sup> Having thus sketched his approach to the ten-hour provision, Peckham’s analysis was simple. Apparently relying on statistics contained in the appendix to the plaintiff’s brief,<sup>151</sup> Peckham rejected the idea that the baking trade rose to a level of unhealthfulness that would warrant interference with the right to contract:

In looking through statistics regarding all trades and occupations, it may be true that the trade of baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of baker has never been regarded as an unhealthy one.<sup>152</sup>

Because the baking trade was not an unusually unhealthy one, Peckham concluded, “the limit of the police power has been reached and passed in

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146. *Id.* Before coming to that conclusion, Peckham was careful to point out that the maximum-hours law was not intended to make up for bakers’ inability to freely exercise their wills. “[T]he statute was [not] intended to meet a case of involuntary labor,” Peckham wrote. *Id.* at 52. Furthermore, “There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations . . . . They are in no sense wards of the State.” *Id.* at 57.

147. *Id.* at 57.

148. *Id.*

149. *See id.* at 59. (“[T]he trade of baker . . . is . . . vastly more healthy than [other trades]. To the common understanding, the trade of a baker has never been regarded as an unhealthy one.”).

150. *Id.*

151. *See* David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in *CONSTITUTIONAL LAW STORIES* 325, 344 (Michael C. Dorf ed., 2004).

152. *Lochner*, 198 U.S. at 59. Peckham followed up his apparent reference to the appendix by saying, “To the common understanding, the trade of a baker has never been regarded as an unhealthy one.” *Id.* But by that point, Peckham had already mentioned a judge on the New York Court of Appeals who specifically thought otherwise. *Id.* at 58. So, the appendix provides better support for Peckham’s argument.

this case.”<sup>153</sup> “The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the [right to contract], both [of] employers and employe[e]s . . . .”<sup>154</sup>

Much like Peckham’s thinking started out with states’ police powers, so did Harlan’s in his main *Lochner* dissent. “[W]hat is called the police power of the State,” Harlan wrote in the opening line of his opinion, “has been uniformly recognized . . . by the . . . courts.”<sup>155</sup> Harlan also agreed with Peckham that there were areas that police powers could not go. The Due Process Clause protects certain natural rights, Harlan argued,<sup>156</sup> “which cannot be violated even under the sanction of direct legislative enactment.”<sup>157</sup> Harlan even echoed Peckham’s observation that the border between states’ police powers and fundamental rights had yet to be fully mapped out. The “boundaries of what is called the police power of the State,” Harlan explained as he opened his dissent, “extends at least to the protection of the lives, the health and the safety of the public.”<sup>158</sup>

But unlike Peckham, Harlan would not independently review facts to determine whether a police-power measure was valid. Rather than using Peckham’s means-end test, Harlan put his own test forward. “[T]he rule is universal,” Harlan said with the support of a handful of authorities, “that a legislative enactment . . . is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.”<sup>159</sup> He tied his deferential test to his own understanding of the new federal system created by the Fourteenth Amendment. Deference to state legislatures, Harlan maintained, “necessarily results from the principle that the health and safety of the people of a State are primarily for the State to

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153. *Id.* at 58.

154. *Id.* at 61.

155. *Id.* at 65 (Harlan, J., dissenting).

156. *See id.* at 73–74 (saying that “[t]he preservation of the [inherent] powers of the States is quite as vital as the preservation of the [federal government’s] power[.]” to “void [state laws] under the Fourteenth Amendment.”).

157. *Id.* at 68. In this passage Harlan actually said there is a *right to contract* that cannot be violated by direct regulation. He did not mention fundamental natural rights in general. However, at the beginning of his opinion, he said the right to contract was just one of the “inherent rights belonging to everyone.” *Id.* at 65. Consequently, it is clear that, like Peckham, Harlan thought fundamental natural rights in general limited the reach of states’ police powers.

158. *Id.* at 65. Later in his opinion, Harlan said the right to contract can “be subjected to regulations designed . . . to promote the general welfare or to guard the public health, the public morals or the public safety.” *Id.* at 67. Then towards the end of his opinion, Harlan echoed his original formulation, saying that states have the “inherent power . . . to care for the lives, health and well-being of their citizens.” *Id.* at 73.

159. *Id.* at 68.

guard and protect.”<sup>160</sup> To subject the states to more demanding supervision, he reasoned, would “enlarg[e] the scope of the Amendment far beyond its original purpose.”<sup>161</sup>

After establishing his framework, Harlan turned his attention to the maximum-hours law. Like Peckham, Harlan relied on *Allgeyer* for the idea that the right to contract put a limit on how far a state’s police power could go.<sup>162</sup> Unlike Peckham, however, he did not introduce the ten-hour provision as “necessarily interfer[ing] with the right of contract.”<sup>163</sup> Instead, Harlan began his opinion by presuming that the provision was a valid police-power measure to protect bakers’ health.<sup>164</sup> “If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity . . . . [T]he burden of [proving the statute is plainly and palpably unconstitutional] . . . is upon those who assert it to be unconstitutional.”<sup>165</sup> And that was a burden, Harlan argued, that could not be met.

Harlan made a straightforward case that the ten-hour law could not have plainly and palpably extended beyond New York’s police power. He first appealed to common experience. “[We] all know[] the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments . . . .”<sup>166</sup> Then he supported his appeal to general knowledge with a few authorities. Harlan quoted studies and statistics that characterized the profession of baking as “highly injurious to . . . health[;]”<sup>167</sup> that described bakers as being “of more delicate health than [other] workers[;]”<sup>168</sup> and that asserted shorter hours of work “improved health.”<sup>169</sup> Laymen’s experience, coupled with the support of a number of authorities, was all Harlan needed to be confident that the law

160. *Id.* at 73.

161. *Id.*

162. *See id.* at 65–66 (“[T]he State, in the exercise of its powers, may not unduly interfere with right of the citizen to enter into contracts . . . . This was declared in *Allgeyer* . . . .”); *see also id.* at 68 (“[T]here is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment . . . .”).

163. *Id.* at 53.

164. *See id.* at 69 (“[T]he statute must be taken as expressing the belief of the people of New York that . . . labor in excess of sixty hours during a week in [bakeshops] may endanger the health of those who thus labor.”).

165. *Id.* at 68 (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

166. *Id.* at 70.

167. *Id.* (quoting a translated passage likely from LUDWIG HIRT, *DIE KRANKHEITEN DER ARBEITER: BEITRÄGE FÖRDERUNG DER ÖFFENTLICHEN GESUNDHEITSPFLEGE* (1871)).

168. *Id.* (quoting an unidentified source).

169. *Id.* at 71 (quoting STATE OF N.Y., *EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF LABOR STATISTICS* 82 (1901)).

did not plainly and palpably go beyond New York's police power.<sup>170</sup> As a result, he could not help but conclude that the "[C]ourt will transcend its functions if it assumes to annul the statute of New York."<sup>171</sup>

C. *Holmes's Lochner Dissent*

While appeals to natural rights were critical in Peckham's and Harlan's respective resolutions of the *Lochner* case, Holmes was unable to follow along in their adventure. His positivism would not allow it. In his 1918 article *Natural Law*, Holmes broke down the belief in natural law into what he took to be its true origin: a readiness to draw unscientific conclusions from everyday experience and anthropological facts.<sup>172</sup> "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by all men everywhere,"<sup>173</sup> Holmes observed as he pursued natural-rights thinking to its root:

Reason working on experience does tell us, no doubt, that if [we wish to live in society], we can do it only on [certain] terms. . . . If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights.<sup>174</sup>

Rather than relying on natural law, Holmes used a theory of the judicial role to address specific conflicts that arose under vague constitutional provisions. Holmes borrowed the architecture of his theory from James Bradley Thayer—a law professor who had been a partner at the firm where he began his legal career.<sup>175</sup> In his influential 1893 article *The Origin and Scope of the American Doctrine of Constitutional Law*,<sup>176</sup>

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170. Harlan acknowledged that the question as to whether the ten-hour law protects bakers' health is one which "there is room for debate and for an honest difference of opinion." *Id.* at 72.

171. *Id.* at 70.

172. OLIVER W. HOLMES, *Natural Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 180, 181. Holmes's article is also reprinted in COLLECTED LEGAL PAPERS, *supra* note 30, at 310.

173. *Natural Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 180, 181.

174. *Id.* at 181–82. A couple of years earlier, in a letter to Laski, Holmes was blunter in his estimation of natural law, stating "[a]ll my life I have sneered at the natural rights of man." Letter from Oliver W. Holmes to Harold Laski (Sept. 15, 1916), in THE ESSENTIAL HOLMES, *supra* note 1, at xxiv, xxv.

175. See WHITE, *supra* note 22, at 95, 197.

176. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

Thayer rejected the doctrine of judicial supremacy—the idea that judges have the “authority to set [their] opinions about the correct meaning of the Constitution above those of Congress, the president, [and] the electorate.”<sup>177</sup> Instead, as legal scholar Larry Kramer has explained, Thayer’s article taught that the “primary authority to interpret the Constitution is outside the courts and that judicial authority to declare statutes unconstitutional is, at most, a subordinate, secondary check.”<sup>178</sup>

Despite how it may sound to modern ears, Thayer’s rejection of judicial supremacy was not new or even necessarily radical. It was instead a view of the American judiciary that had deep roots and historical support at the highest levels of government. Most of Thayer’s article, in fact, is an ordered collection of old statements about the judicial role, including views that had been aired out by Constitutional Convention delegates<sup>179</sup> and by Supreme Court Justices.<sup>180</sup> Although Thayer did not take the time to contextualize the numerous remarks he highlighted in his article, Kramer was happy to do the job for him. In his 2012 paper *Judicial Supremacy and the End of Judicial Restraint*,<sup>181</sup> Kramer explained that the sources Thayer relied on were part of a single and well-established school of constitutional thought he calls *popular constitutionalism*.<sup>182</sup> That school, Kramer wrote, had been “embraced and advocated” by none other than the Democratic-Republican Party, the party of Thomas Jefferson.<sup>183</sup>

Popular constitutionalism stands for the idea that the “primary authority to interpret . . . constitutional law rest[s] actively in the community . . . .”<sup>184</sup> And Jeffersonians, the original popular

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177. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 7 (2007).

178. Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 628 (2012); see Thayer, *supra* note 176, at 148 (“[T]he judicial question [of what the legislature may do] is a secondary one. The legislature in determining what shall be done . . . does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation.”).

179. See, e.g., Thayer, *supra* note 176, at 140–41 (quoting Constitutional Convention delegate James Wilson as saying that “laws might be dangerous and destructive, and yet not so ‘unconstitutional as to justify the judges in refusing to give them effect.’”).

180. See, e.g., *id.* at 141 (quoting Justice William Patterson as arguing that “in order to justify the court in declaring any law void, there must be ‘a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication.’”).

181. See Kramer, *supra* note 178.

182. See Kramer, *supra* note 178, at 622.

183. *Id.*

184. *Id.* (italics omitted). For a more detailed discussion of what Kramer means by popular constitutionalism, see Larry D. Kramer, “*The Interest of the Man*”: James Madison,

constitutionalists, would have thought the community had two means of asserting its prerogative. In the first instance, the community directly checked the constitutionality of legislation. If a legislature passed a law that most people rejected as unconstitutional, the community could push back on it “through protests, petitions, elections, and other forms of direct popular action.”<sup>185</sup> It was only as a secondary check that judicial review came into the picture.<sup>186</sup> Under the Jeffersonian theory, a judge acted as an “agent[] of the people.”<sup>187</sup> A judge’s proper role was merely to rule in accordance with the community’s understanding of what the Constitution meant. A Jeffersonian judge would only strike a law down as unconstitutional under “conditions of near certainty—because the [community] was capable of acting on its own and retained primary responsibility for doing so at all times.”<sup>188</sup>

In writing his article, however, Thayer had a purpose beyond merely digging up a bygone understanding of the judicial role. “[H]is particular point was to . . . restore the older, historically preeminent [Jeffersonian] idea of judicial authority—including its notions of self-restraint and deference—and to reject the Gilded Age Court’s pretensions to [judicial] supremacy.”<sup>189</sup> But in an effort to close the sale on an old theory, Thayer updated it to make it more palatable for his time. “[T]he idea of direct popular supervision—assumed and widely accepted in the Early Republic—no longer made sense [in Thayer’s day].”<sup>190</sup> So in advocating for popular constitutionalism, Thayer “[i]nstead . . . assumed that the political branches of government, and especially the legislature, offer the best expression of popular views.”<sup>191</sup> But even if Thayer thought it best to whittle the Jeffersonian theory’s first check on legislatures down to regular elections and ordinary lobbying efforts, he preserved the larger point in full: judges should defer to legislatures’ opinions as to what the Constitution means.

Mere days after Thayer published his article, Holmes wrote to congratulate him and express his agreement with his argument. “I have read your article,” Holmes told Thayer, “and . . . [s]ubstantially I agree

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*Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697 (2007).

185. Kramer, *supra* note 178, at 625.

186. A “minority” of Jeffersonian popular constitutionalists, however, thought “judicial review in any form was improper.” *Id.*

187. *Id.*

188. *Id.* at 625–26.

189. *Id.* at 628.

190. *Id.*

191. *Id.*

with it heartily . . . .”<sup>192</sup> Although Holmes suggested that Thayer may have read too much into old statements that spoke approvingly of judicial deference—statements that Thayer acknowledged could have been “mere courteous and smoothly transmitted platitude[s]”<sup>193</sup>—he had “no doubt” of the “usefulness of insisting upon” popular constitutionalism at a time when judicial supremacy had been advanced by “some of the other judges.”<sup>194</sup> Like Thayer, Holmes did not think judges should be in the business of applying elaborate constitutional theories to the particular cases they had to resolve. He instead thought judges should be ready to validate constitutional rationales that were broadly held, even if they did not agree with them.

When Holmes wrote to Thayer, he did not go so far as to say that Thayer’s article convinced him to accept any new major views. “[Y]our article . . . makes explicit,” Holmes wrote, “the point of view from which implicitly I have approached Constitutional questions . . . .”<sup>195</sup> Nevertheless, Holmes was proud to say that he had borrowed a key element of Thayer’s article for his own use. When Thayer compiled passages that demonstrated historical support for popular constitutionalism, he organized them so as to line up with two related propositions. After seeing what those propositions were, Holmes revealed that he would adopt them for his own use, telling Thayer, “I believe in your formula.”<sup>196</sup>

Thayer’s first proposition identified a judge’s proper role. When a judge considers the constitutionality of a statute, he should “merely . . . fix[] the outside border” of acceptable constitutional rationales.<sup>197</sup>

Well before Holmes read Thayer’s article, he believed that legislatures were worthy of respect because the most powerful groups in a community

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192. Letter from Oliver W. Holmes to James B. Thayer (Nov. 2, 1893), in David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 462 n.34 (1994).

193. Thayer, *supra* note 176, at 145.

194. Letter from Oliver W. Holmes to James B. Thayer (Nov. 2, 1893), in Luban, *supra* note 192, at 462 n.34. Compare LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 215 (2004) (saying that between Reconstruction and the New Deal, neither popular constitutionalism nor judicial supremacy had clearly gained the upper hand), with Keith E. Whittington, *Give “The People” What They Want?*, 81 CHI.-KENT L. REV. 911, 918–20 (2006) (arguing that between Abraham Lincoln’s and Franklin Roosevelt’s respective presidencies, judicial supremacy was the dominant view).

195. Letter from Oliver W. Holmes to James B. Thayer (Nov. 2, 1893), in Luban, *supra* note 192, at 462 n.34.

196. *Id.*

197. Thayer, *supra* note 176, at 148.

used them to demonstrate their power.<sup>198</sup> In his 1873 article *The Gas Stokers' Strike*,<sup>199</sup> for example, Holmes argued that people join all sorts of combinations to get more of what they want. Political combinations, he was careful to point out, are no different. In a short passage outlining his theory of legislative power, Holmes pushed the idea that because people instinctively look out for their own interests, nothing will ever stop them from passing laws that benefit themselves at a cost to others:

The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with the monkeys, but is equally the law of human existence. . . . [T]his is as true in legislation as in any other form of corporate action. . . . [W]hatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully.<sup>200</sup>

Because political combinations are simply outer manifestations of deep evolutionary drives, it would be “idle” to try to stop them.<sup>201</sup> “As long as . . . [human] instinct[s] remain[ ],” Holmes maintained several years later in *The Common Law*, “it will be more comfortable for the law to satisfy [them] in an orderly manner . . . . If it should do otherwise, it would become a matter for pedagogues, wholly devoid of reality.”<sup>202</sup> The lesson Holmes took from his scientific worldview was that power will always find a way to exert itself. To deny that is to deny how people have always behaved. So in *The Gas Stokers' Strike*, when Holmes concluded his discussion on what legislation is, he argued that the actual forces behind particular laws had to be respected: “The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.”<sup>203</sup>

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198. See, e.g., OLIVER W. HOLMES, *Cooley and Constitutional Limitations*, in BOOK NOTICES AND UNCOLLECTED LETTERS, *supra* note 20, at 97, 98–99 (“Where the sovereign power resides at any time, and what is the sovereign will, are questions of fact. But the old constitution is an admitted expression of the sovereign will, and that assures us that no other is authentic which does not come through certain channels. The courts may properly abide by that until they see that the new manifestation is not only unmistakable, but irresistible.”).

199. *The Gas Stokers' Strike*, *supra* note 36, at 582.

200. *Id.* at 107–08.

201. Letter from Oliver W. Holmes to Harold Laski (Sept. 15, 1916), in THE ESSENTIAL HOLMES, *supra* note 1, at xxiv, xxv (“Law also as well as sovereignty is a fact. If in fact Catholics or atheists are proscribed and the screws put on, it seems to me idle to say that it [ought not be] because [it goes against] a theory that you and I happen to hold . . .”).

202. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 213 (1881) [hereinafter *THE COMMON LAW*].

203. *The Gas Stokers' Strike*, *supra* note 36, at 583.

Thayer's second proposition was a reasonableness test. Statutes falling outside the border of acceptable constitutional rationales are those where legislators "have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."<sup>204</sup>

Thayer's reasonableness test ensured that a judge remained deferential on constitutional questions. If a judge should be ready to validate statutes backed by a variety of constitutional rationales, then he should only strike down laws that embody constitutional theories that no reasonable person could hold. Following Thayer's lead, Holmes would later use the reasonableness test for the same purpose.<sup>205</sup> But Holmes also had practical considerations in mind. In a 1912 letter to Sheehan, tucked away in a passage in which he described how his understanding of his role as a judge required a healthy dose of self-restraint, Holmes defended his habit of looking only at the modest question of reasonableness:

One of the queer aspects of duty is when one is called on to sustain or enforce laws that one believes to be economically wrong and do more harm than good—but as I think we know very little as to what the laws pronounced good; as there is no even inarticulate agreement as to the ideal to be striven for, and no adequate scientific evidence that this rather than that will tend to bring it about if we did agree as to what we want, I settle down on simple tests. I look at it like going to the theatre—if you can pay for your ticket and are sure you want to go, I have nothing to say.<sup>206</sup>

So for Holmes, Thayer's reasonableness test not only assured that a legislature's primary authority to interpret the Constitution would be left intact, it also humbly acknowledged that there were critical questions of political prudence and fact that courts had no way of resolving. As far as

204. Thayer, *supra* note 176, at 144.

205. According to law professor David Luban, "Holmes adhered to Thayer's [reasonableness test] . . . in several substantive due process dissents," including his dissents in *Bartels v. Iowa*, 262 U.S. 404 (1923); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); and *Coppage v. Kansas*, 236 U.S. 1 (1915). Luban, *supra* note 192, at 462 & n.33. As I explain *infra* text accompanying notes 214–32, Holmes used Thayer's reasonableness test in *Lochner*, as well.

206. Letter from Oliver W. Holmes to Patrick A. Sheehan (Nov. 23, 1912), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 27, 28; *see also* Oliver W. Holmes, Twenty Years in Retrospect, Remarks to a banquet of the Middlesex Bar Association (Dec. 3, 1902), in *OCCASIONAL SPEECHES*, *supra* note 31, at 154, 156 ("It has seemed to me that . . . we have few scientific data on which to affirm that one rule rather than another has the sanction of the universe, [and] that we rarely could be sure that one tends more distinctly than its opposite to the survival and welfare of the society where it is practiced . . ."). Holmes's *Twenty Years in Retrospect* speech is also reprinted in *THE ESSENTIAL HOLMES*, *supra* note 1, at 151.

Holmes was concerned, judges did not have special access to wisdom and knowledge everyone else lacked.

Holmes's *Lochner* opinion does not give us what we have come to expect from a Supreme Court dissent. As Judge Richard Posner has observed, Holmes's *Lochner* dissent "does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, [and] is not thoroughly researched."<sup>207</sup> Noting similar defects, law professor Akhil Reed Amar has complained that Holmes's dissent is actually not "helpful in explaining exactly what [interests] the Fourteenth Amendment [protects]."<sup>208</sup> What Posner's and Amar's criticisms fail to account for, however, is Holmes's Thayerianism.<sup>209</sup> Holmes had no reason to argue the Fourteenth Amendment compelled a particular outcome in the *Lochner* case. He instead thought his job was merely to decide whether the constitutional rationale behind the ten-hour law was reasonable. It was a simple process requiring only broad strokes. Once Holmes's *Lochner* dissent is considered in that light, the analytical merits of his argument become easier to see.<sup>210</sup>

In staking out a framework to analyze the maximum-hours provision, Holmes relied exclusively on Thayer's first proposition (that a judge should be deferential to widely held constitutional theories). Holmes was so convinced of its correctness that, in an opinion that is only a touch over 600 words, he repeated it three times. "I strongly believe," Holmes wrote in the

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207. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 285 (1988).

208. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 560 n.23 (2012).

209. Later, in a 2012 paper called *The Rise and Fall of Judicial Self-Restraint*, Posner notes Thayer's influence on Holmes. See Posner, *supra* note 15, at 525–28, 543. In his analysis, however, Posner characterizes Holmes's *Lochner* dissent as "invo[king] . . . a handful of cases" to demonstrate the reasonableness of the ten-hour provision. *Id.* at 543. However, as I argue *infra* text accompanying notes 214–32, Holmes actually identified two constitutional rationales that could justify the maximum-hours law, and argued for the reasonableness of those rationales by appealing to past cases and to three types of laws.

210. Law professor Barry Friedman has noticed the influence of Thayer's article on Holmes's *Lochner* dissent. According to Friedman, Holmes "recognized the existence of 'liberty to contract'" but thought it conflicted with the New York legislature's "right" to enact the ten-hour law. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1430 (2001) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)). Friedman argues that Holmes "resolved" the conflict in part by using Thayer's reasonableness test. *Id.* at 1430–31. However, as I argue in this Section, Holmes rejected both the right to contract and the natural law framework on which it was based, and instead relied on the vision of the judicial role Thayer laid out in his article. Holmes's *Lochner* dissent amounted to a straightforward argument that the legislature should have its way.

opening lines of his dissent, in “the right of a majority to embody their opinions in law.”<sup>211</sup> Then at the halfway mark, Holmes circled back to where he began: “[A constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment [as to] whether statutes embodying them [are unconstitutional].”<sup>212</sup> As he wound down his opinion, Holmes again directed his readers’ attention to Thayer’s first proposition: “I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion.”<sup>213</sup>

Having emphasized the idea that judges should do what they could to validate legislative majorities’ preferred constitutional theories, Holmes spent most of his energy on Thayer’s second proposition—the reasonableness test. In *Lochner* and elsewhere, Holmes added teeth to Thayer’s reasonableness test by describing what qualities a reasonable constitutional rationale should have.<sup>214</sup> Whereas Thayer would invalidate a law only when it was clear no rational person could think it was constitutional, in *Lochner* Holmes looked to see whether the constitutional theory behind it would “infringe fundamental principles as they have been understood by the traditions of our people and our law.”<sup>215</sup> He would only grant the reasonableness label to the maximum-hours provision if it was sufficiently consistent with his understanding of actual Anglo-American practices.

Holmes identified two distinct constitutional rationales for the maximum-hours provision and he defended them both as being consistent with American culture. The first ten-hour-law justification Holmes identified was one that appealed directly to a police-power objective all of his colleagues recognized as legitimate. “A reasonable man,” Holmes wrote in *Lochner*, “might think [the ten-hour provision] a proper [police power] measure on the score of health.”<sup>216</sup> In order to demonstrate his point, Holmes cited two newly decided cases in which the Supreme Court

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

212. *Id.* at 76.

213. *Id.*

214. See, e.g., *Tyson & Bro. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) (equating reasonableness with having the support of “a sufficient force of public opinion”); *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting) (equating reasonableness with the moral consensus of “civilized countries”); *Otis v. Parker*, 187 U.S. 606, 609 (1903) (Holmes, J.) (equating reasonableness with “relatively fundamental rules of right, as generally understood by all English-speaking communities”).

215. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

216. *Id.*

validated state measures that limited the terms people could bargain over out of concern for the health of some part of the population. First he cited *Jacobson v. Massachusetts*,<sup>217</sup> where the Court upheld a Massachusetts measure requiring vaccinations against smallpox because it was a reasonable regulation to protect Massachusettsans' health and safety.<sup>218</sup> Then he cited *Holden v. Hardy*,<sup>219</sup> where the Court upheld a Utah law that limited the number of hours miners and smelters could work because Utahns reasonably thought that the law was necessary to protect their health.<sup>220</sup> Both of these cases showed that Americans had accepted the idea that state governments could restrict the right to contract when enough people decided a health concern was more important. The ten-hour law, Holmes thought, was well within that tradition.<sup>221</sup>

The second constitutional rationale for the ten-hour law that Holmes defended as meeting the reasonable test was "paternalism,"<sup>222</sup> an ideology he referred to in private as socialism<sup>223</sup> and "qualified" versions of it, including turn-of-the-century Progressivism.<sup>224</sup> Holmes was willing to view a paternalistic law as being consistent with the liberty guaranteed by the Due Process Clause because he did not equate freedom with any particular method of protecting free will. *Freedom* was instead no different than any other moral feeling. It was an interested, often self-serving "generalization[] of the conditions of social welfare expressed in terms of emotion."<sup>225</sup>

Depending on their circumstances, two people living in the same community at the same time could have conflicting views of what it means

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217. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

218. *See id.* at 25–30 (Harlan, J.).

219. *Holden v. Hardy*, 169 U.S. 366 (1898).

220. *See id.* at 398 (Brown, J.).

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

222. *Id.*

223. *Compare* Letter from Oliver W. Holmes to Lewis Einstein (Nov. 24, 1912), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 66, 66 (describing public schools and post offices as "socialist"), with *Lochner*, 198 U.S. at 75 (listing "school laws" and "the Post Office" as institutions consistent with paternalism).

224. *See* Letter from Oliver W. Holmes to Lewis Einstein (Nov. 24, 1912), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 66, 66 (calling support for the policies favored by Progressive Party candidate Theodore Roosevelt a "yearning for Socialism, qualified or not"). The ten-hour law at issue in *Lochner* was passed as a result of the efforts of unionized bakers and Progressive reformers. *See, e.g.*, KENS, *supra* note 117, at 49–63.

225. Letter from Oliver W. Holmes to Felix Frankfurter (Apr. 8, 1913), in *HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934*, at 8, 8 (Robert M. Mennel & Christine L. Compston eds., 1996) [hereinafter *HOLMES & FRANKFURTER*].

to secure freedom. A laissez-faire advocate,<sup>226</sup> for example, could think that prohibiting employers from paying employees to work over a set number of hours unfairly limits employers' freedom to pursue profits.<sup>227</sup> Meanwhile, a paternalist could think that as a practical matter, systematic imbalances in bargaining power unfairly deprive employees of the freedom to contract for sensible caps on their work hours.<sup>228</sup> So as Holmes understood it, the idea of freedom is influenced by political opinions as to which groups should have more, and which should have less. As applied to the maximum-hours law at issue in *Lochner*, a paternalist would think that freedom meant tipping the scales in favor of bakers. The law was a way to secure bakers' practical liberty.

In his dissent, Holmes argued that the paternalistic take on bakers' hours met Thayer's reasonableness test because Anglo-American culture has a long history of chipping away at the freedom to contract in order to secure redistributive objectives. A reasonable man, Holmes wrote, could "uphold [the ten-hour law] as a first instalment of a general regulation of the hours of work."<sup>229</sup> The reasonableness of benefitting bakers by narrowing the terms their counterparts could insist on was proven by similar measures that state and federal governments had already put into place without complaint, including "Sunday laws," "usury laws," and "the prohibition of lotteries."<sup>230</sup> Holmes also cited *Otis v. Parker*,<sup>231</sup> a case in which the Court validated a California constitutional provision that prohibited speculation in stocks because Californians reasonably believed it was a dangerous practice.<sup>232</sup> Each of these initiatives, Holmes maintained, put limitations on the right to contract so that one group or another could obtain benefits they would not otherwise get. The maximum-hours law was no different.

Although Holmes spent most of his *Lochner* opinion on his Thayerian argument for the constitutionality of the maximum-hours provision, he

226. See *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (framing *Lochner* as a disagreement between paternalists and laissez-faire advocates).

227. See also Oliver W. Holmes, Draft of opinion of the Court, *Keokee Consol. Coke Co. v. Taylor*, 234 U.S. 224 (1914), quoted in G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87, 110–11 (1997) ("It now is recognized by . . . everyone . . . that as a fact freedom may disappear . . . through the power of aggregated . . . men . . .") (emphasis added).

228. See also *id.* ("It now is recognized by . . . everyone . . . that as a fact freedom may disappear . . . through the power of aggregated . . . money . . .") (emphasis added).

229. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

230. *Id.* at 75.

231. *Otis v. Parker*, 187 U.S. 606 (1903).

232. See *id.* at 610 (Holmes, J.).

added a few lines in which he directly criticized Peckham's line of reasoning.<sup>233</sup> These lines are the only indications in *Lochner* of what Holmes thought Peckham did wrong. Holmes's central charge against Peckham was that he failed to adequately distinguish between ultimate and proximate points of view.

To Holmes's mind, Peckham treated his proximate feeling of liberty—packaged as it was in the doctrine of the right to contract—as if it had the same authority as an ultimate fact. “This case,” Holmes began, “is decided upon an economic theory which a large part of the country does not entertain.”<sup>234</sup> Straightforward as it sounds, Holmes's opening statement actually targets two postulates underlying Peckham's notion of liberty of contract. The first postulate Holmes challenged was natural law. By calling the right to contract an “economic theory,”<sup>235</sup> Holmes defied Peckham's assumption that the right had the backing of a universal moral system. Instead, Holmes argued, it was merely a policy preference. The second postulate Holmes challenged with his opening line is the idea that history has confirmed the existence of a right to contract. By pointing out that “a large part of the country does not entertain”<sup>236</sup> the right to contract, Holmes was denying that historical experience was conclusive as to how desirable the policy of liberty of contract was.<sup>237</sup>

Holmes then undermined the authority of liberty to contract by listing a number of well-established American initiatives that did not jibe with the new right: “school laws,” “the Post Office,” and “every state or municipal [public project.]”<sup>238</sup> Holmes also listed the Court's recently decided *Northern Securities* case because in it the Court upheld a statute Holmes characterized as “cutting down the liberty to contract by way of combination.”<sup>239</sup> Together, these examples undermined both of Peckham's implicit postulates. Public schools, a government-subsidized postal system, and public projects undermine the right to contract's connection to natural law because they were broadly accepted despite “tak[ing people's] money for purposes thought desirable, whether [they] like[] it or not.”<sup>240</sup> Similarly, *Northern Securities* casts doubt on whether history had confirmed the right to contract's usefulness as an economic principle

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233. See *Lochner*, 198 U.S. at 75.

234. *Id.*

235. *Id.*

236. *Id.*

237. See *id.* (“If it were a question whether I agreed with [the right to contract] I should desire to study it further and long before making up my mind.”).

238. *Id.*

239. *Id.* (citing *N. Sec. Co. v. United States*, 193 U.S. 197 (1904)).

240. *Id.*

because it enacted a widespread understanding that “the general [economic] law of competition”<sup>241</sup> was more important than the freedom to enter into contracts.

In the end, Holmes’s main problem with Peckham’s opinion was that it clashed with his picture of the ultimate world. His general practice was to withhold unimpeachable authority from anything other than perceptible facts and verifiable scientific theories.<sup>242</sup> But Peckham took natural law and liberty of contract as starting points even though they had not been established as facts, and even though they had not been proven through experimentation and observation. To Holmes’s mind, natural law was nothing more than a collection of moral opinions, and liberty of contract was simply an economic opinion. And “[g]eneral propositions,” Holmes wrote in his *Lochner* opinion, “do not decide concrete cases.”<sup>243</sup> For Holmes, Americans’ habits were facts that had to be reconciled with any

241. *N. Sec. Co.*, 193 U.S. at 338 (Harlan, J., plurality opinion) (quoting *United States v. Joint Traffic Ass’n*, 171 U.S. 505, 569 (1898)).

242. See, e.g., Oliver W. Holmes, Remarks regarding Dr. S. Weir Mitchell, given at a Tavern Club Dinner (Mar. 4, 1900), in OCCASIONAL SPEECHES, *supra* note 31, at 119, 120 (“Today the whole domain of truth concerning the visible world belongs to science.”). Compare Oliver W. Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in COLLECTED LEGAL PAPERS, *supra* note 30, at 291, 292 (“Science has . . . made it legitimate to put everything to the test of proof.”), with Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 108, 108 (“I am far from believing [that there are phenomena for which no causes can be discovered], but I am entirely ready to believe it on proof.”). However, Holmes’s *Northern Securities* dissent—an opinion he wrote only a year before *Lochner*—is a prominent example of Holmes straying from his usual reliance on facts and scientific theories. In *Northern Securities*, Holmes argued that the Sherman Antitrust Act violated the Commerce Clause because he equated the reach of the Commerce Clause with his theory of combinations, and he thought the Act went beyond that limit. *N. Sec. Co.*, 193 U.S. at 411 (Holmes, J., dissenting). As a result, Holmes’s *Northern Securities* opinion rested on his unverified social theory, rather than on facts or on a scientific theory. Holmes seemed to be aware that he had gone beyond the bounds of positivism in that case, telling Laski,

I hope and believe that I am not influenced by my opinion that [the Sherman Antitrust Act] is a foolish law. I have little doubt that the country likes it and I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It’s my job.

Letter from Oliver W. Holmes to Harold Laski (Mar. 4, 1920), in HOLMES-LASKI LETTERS VOL. 1, *supra* note 48, at 248, 248–49.

243. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting); see also Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899) (“A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up . . .”). This speech is also reprinted in COLLECTED LEGAL PAPERS, *supra* note 30, at 210, as well as in THE ESSENTIAL HOLMES, *supra* note 1, at 185.

jurisprudential theory. Anything else, he said years later, would be a flight into fantasy:

It now is recognized by legislatures and courts as well as by everyone outside of them, that as a fact freedom may disappear on the one side or the other through the power of aggregated money or men; . . . and to suppose that every other force may exercise its compulsion at will but that government has no authority to counteract the pressure with its own is absurd.<sup>244</sup>

### III. THE ROMANTIC SIDE OF HOLMES'S *LOCHNER* DISSENT

In Part II my main goal was to unpack the critical elements of Holmes's *Lochner* dissent. I argued that Holmes took a positivistic worldview to his analysis of the *Lochner* case. I also isolated the individual arguments Holmes made in his *Lochner* dissent in order to show that in that case (1) he rejected judicial supremacy; (2) he used Thayer's two propositions; and (3) he criticized Peckham's majority opinion for failing the test of positivism. In this Part my goal is more academic. My overall argument is that Holmes connected his understanding of the judicial role to his own intellectual salvation. Although Holmes's personal faith was not the primary reason for his deference to legislatures' judgments, it allowed him to gather up the strength and willpower he needed to go through with what he understood to be his duty as a judge.

In a 1918 letter to the highly respected Judge Learned Hand, Holmes explained his personal spin on Thayerianism with a parable.<sup>245</sup> Holmes

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244. Oliver W. Holmes, Draft of opinion of the Court, *Keokee Consol. Coke Co. v. Taylor*, 234 U.S. 224 (1914), *quoted in* White, *supra* note 227, at 110–11. Although Holmes removed this passage from the final draft of his *Keokee* opinion after four of his colleagues objected to it, *see* Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, in *THE STATE AND FREEDOM OF CONTRACT* 161, 183 (Harry N. Scheiber ed., 1998), only months later he covertly made the same point in *Coppage v. Kansas*, 236 U.S. 1 (1915). In *Coppage*, the Court agreed with a liberty-of-contract challenge to a Kansas law, *id.* at 26 (Pitney, J.), while Holmes dissented, *id.* at 26–27. But rather than explain his reasons in his dissent, Holmes pointed to two previous Supreme Court cases where he favored the preferences of a legislative majority over the right to liberty of contract (*Lochner*; and *Adair v. United States*, 208 U.S. 161 (1908)), and to passages in two previous Massachusetts cases where he described his theory of combinations (*Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896); and *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900)). *Coppage*, 236 U.S. at 27. The point Holmes was making in *Coppage* was the same point he made in his draft opinion in *Keokee*: the right to contract is not an authoritative theory because it does not explain the facts of American culture.

245. Because both Hand and Holmes were Thayerians, *see, e.g.*, Luban, *supra* note 192, at 451, Holmes's letter is significant. The letter was part of a dialogue concerning free speech—specifically, whether a Thayerian judge should be less deferential to

used four characters to describe the different mentalities judges could take to their roles. As the story progresses, it becomes clear that the main distinction between his characters is their respective attitudes toward reformers. The implicit question Holmes presented with his parable is, how should a judge feel about a radical who seems poised to change the community around him? Holmes used his characters to sketch four distinct attitudes, which are as follows:

1. The official person would have had contempt for a radical like William Lloyd Garrison, who spent decades fighting for the complete and immediate end of slavery. Because Garrison preferred “the very structure of society [to] perish . . . than . . . [to] not have his way,”<sup>246</sup> the official person would not accept Garrison’s legitimacy. He would only be willing to accept the existing order.

2. The son of Garrison looks at Garrison with more understanding. He would argue that vital reforms always seem threatening at first, but that society inevitably adjusts.<sup>247</sup> From the son of Garrison’s perspective, Garrison’s radical campaign against slavery seemed threatening for a time, but when slavery finally ended the country was better for it. The son of Garrison, then, is optimistic about what radicals can offer the orthodox.

3. The philosopher would be willing to give more credit to Garrison than even the son of Garrison did. The philosopher would contend that a society’s overall evolution depends on conservative and radical forces’ battle for the future.<sup>248</sup> So unlike the son of Garrison, he would not view radicals as mere contributors to mainstream society. He would instead see them as the potential creators of the next orthodoxy.

4. The ironical man builds from the perspective of the philosopher—Holmes actually calls him “the ironical man in the back of the philosopher’s head.”<sup>249</sup> Even while agreeing with the philosopher that societies evolve through a series of paradigm shifts, the ironical man has a

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political-branch officials when those officials regulate speech. *See generally* THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 15–27 (2013); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *STAN. L. REV.* 719, 722–45 (1975); Frederic R. Kellogg, *Learned Hand and the Great Train Ride*, 56 *AM. SCHOLAR* 471, 478–86 (1987). For our purposes, and as I will argue in this Part, Holmes’s letter is noteworthy because he used it as an occasion to identify two different mindsets a Thayerian judge could have.

246. Letter from Oliver W. Holmes to B. Learned Hand (June 24, 1918), *in* Gunther, *supra* note 245, app. at 757.

247. *Id.*

248. *Id.*

249. *Id.*

secondary interest in social change: he makes the will of a majority something he finds personal meaning in supporting.<sup>250</sup>

The point of Holmes's story was to impress on Hand the idea that a Thayerian judge should understand his duties both from the perspective of the philosopher and from the perspective of the ironical man. He should understand both that the life of a society evolves outside of lawyers' theories of governments and that clearing the way for society to grow can be a meaningful activity in its own right.

As it happens, the three opinions of the *Lochner* case provide good illustrations of each of Holmes's four characters. The official person and the son of Garrison illustrate the limitations Peckham and Harlan respectively placed on New York's maximum-hours reformers. Meanwhile, the philosopher and ironical man provide two levels of insight into the approach Holmes took to his *Lochner* dissent. So by applying Holmes's parable to the *Lochner* case, we get a better picture of what lesson Holmes had in mind for each character.

#### A. *The Official Person*

Like the official person, Peckham was suspicious of reform. In *Lochner*, his assertive method of enforcing the right to contract against New York's legislature prevented the state's reformers from enacting maximum-hours laws in any industry the courts did not think of as exceptional. Outside of a few unusually unhealthy industries, Peckham argued, hours of work should not be left up to the "paternal wisdom" of state legislatures.<sup>251</sup> "It is unfortunately true that labor, even in any department," Peckham wrote, "may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities?"<sup>252</sup> Peckham thought not. In his estimation, allowing states to apply maximum-hours laws to any job that might threaten a worker's health would be too risky:

No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.<sup>253</sup>

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250. See *infra* text accompanying notes 259–306 (examining the significance of Holmes's ironical man).

251. *Lochner v. New York*, 198 U.S. 45, 60 (1905) (Peckham, J.).

252. *Id.* at 59 (Peckham, J.).

253. *Id.*

### B. *The Son of Garrison*

In *Lochner*, by only preventing maximum-hours-law reformers from directly challenging the right to contract, Harlan took the son of Garrison's perspective. Harlan accepted that reformers had legitimate reasons for wanting to limit the right to contract. In the decades before the *Lochner* case, Harlan wrote in his dissent, there had been "an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employe[e]s as to demand special precautions for their well-being and protection."<sup>254</sup> Striking a balance between workers' health and the right to contract, Harlan went on to say, "is *not* a question . . . in respect of which there . . . can be absolute certainty."<sup>255</sup> Without conclusive evidence one way or the other, Harlan reasoned that judges should be ready to uphold any workplace reform measure that had a "real or substantial relation" to health.<sup>256</sup> If a reform law could do that, Harlan would uphold it as consistent with the right to contract.

### C. *The Philosopher*

By putting almost no restrictions on reform laws, Holmes's Thayerian approach to new social movements mirrored the philosopher's point of view. As Holmes explained in the 1921 case *Truax v. Corrigan*,<sup>257</sup> judges should not be in the business of overriding popular reforms:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.<sup>258</sup>

While in *Lochner* neither Peckham nor Harlan would consider justifying the ten-hour law outside of the newly established liberty of contract

254. *Id.* at 66 (Harlan, J., dissenting) (quoting *Holden v. Hardy*, 169 U.S. 366, 391–92 (1898)).

255. *Id.* at 72 (emphasis added).

256. *Id.* at 69.

257. *Truax v. Corrigan*, 257 U.S. 312 (1921). In *Truax*, the Court held that an Arizona anti-injunction law violated the Due Process Clause's protections of liberty and property. *Id.* at 330 (Taft, C.J.). The Due Process Clause says that a state cannot "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The *Truax* Court also held that the Arizona law violated the Fourteenth Amendment's Equal Protection Clause. *Truax*, 257 U.S. at 334 (Taft, C.J.). The Equal Protection Clause says that a state cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

258. *Truax*, 257 U.S. at 344 (Holmes, J., dissenting).

orthodoxy, Holmes was willing to let New York's reformers abandon that paradigm altogether. If they had responded to prevailing bakeshop conditions with a paternalistic understanding of liberty, he would not use the Fourteenth Amendment to get in their way. The Constitution, he believed, was made for them too.

#### D. *The Ironic Man*

By far the most mysterious perspective Holmes listed in his letter to Hand was the ironical man in the back of the philosopher's head—a second angle from which a Thayerian judge could approach his duties. In his short parable, Holmes organized his four characters into a hierarchy. Holmes preferred the son of Garrison to the official person, and the philosopher to the son of Garrison.<sup>259</sup> Incredibly—because the philosopher seems to adequately explain the logic a Thayerian judge would use—Holmes preferred the ironical man to the philosopher.<sup>260</sup> For Holmes, it was not enough to accept the philosopher's insight that social evolution was far too complicated to predict. Rather, it was important to pursue the ironical man's project of turning a judge's duty into something that feels rewarding.

The ironical man was Holmes's method of personally investing himself in the spirit of a legislative majority. And in order to do that, he had to venture beyond the safety of his positivism.<sup>261</sup> Holmes's preferred alternative to positivism was his conception of philosophy.<sup>262</sup> As law professor Thomas Grey has explained, Holmes considered “philosophy [to] encompass[] all forms of broad and speculative thought that claimed intrinsic intellectual interest. Above all it included what we might call social theory—work involving broad generalizations about human society that rested loosely on scholarly findings, but which went beyond them to guide further research and speculation.”<sup>263</sup>

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259. See Letter from Oliver W. Holmes to B. Learned Hand (June 24, 1918), in Gunther, *supra* note 245, app. at 757.

260. See *id.*

261. See generally Oliver W. Holmes, Remarks regarding Dr. S. Weir Mitchell, given at a Tavern Club Dinner (Mar. 4, 1900), in OCCASIONAL SPEECHES, *supra* note 31, at 119, 120 (“Today the whole domain of truth concerning the visible world belongs to science.”). This speech is also reprinted in THE ESSENTIAL HOLMES, *supra* note 1, at 48.

262. See, e.g., Letter from Oliver W. Holmes to Patrick A. Sheehan (Dec. 15, 1912), in THE ESSENTIAL HOLMES, *supra* note 1, at 28, 29 (“[O]nly the philosophical side of things interests me . . .”).

263. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 841 (1989); see Letter from Oliver W. Holmes to Harold Laski (Feb. 6, 1925), in HOLMES-LASKI LETTERS VOL. 1, *supra* note 48, at 705, 706 (“I regard philosophy as simply the broader generalizations of thought that can't lift itself by the slack of its own breeches.”).

As early as 1886, Holmes had a fully formed idea of how he could enlist his philosophical ideas in the project of going beyond the raw facts of a case in such a way as to “live greatly in the law.”<sup>264</sup> In a lecture called *The Profession of the Law*, he asked a group of Harvard undergraduates, “What is [the work of a legal professional] to my soul?”<sup>265</sup> The answer, Holmes concluded, was finding what he called an “infinite perspective”<sup>266</sup>:

The main part of intellectual education is not the acquisition of facts, but learning how to make facts live. . . . The mark of a master is, that facts which before lay scattered in an inorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order, and live and bear fruit.<sup>267</sup>

Although lawyers and judges were bound to deal in facts, Holmes was telling the students that any practical grouping of facts could be philosophically mastered to an extent that could, at the very highest levels at least, be molded into something that is proximately rewarding.<sup>268</sup>

264. Oliver W. Holmes, *The Profession of the Law*, Lecture to Undergraduates of Harvard University (Feb. 17, 1886), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 29, 30. This speech is also available in *THE ESSENTIAL HOLMES*, *supra* note 1, at 218.

265. *Id.* at 29.

266. *Id.* at 30 (emphasis added).

267. Oliver W. Holmes, *The Use of Law Schools*, Speech before the Harvard Law School Association at Harvard University’s 250th anniversary (Nov. 5, 1886), in *OCCASIONAL SPEECHES*, *supra* note 31, at 34, 35–36. This speech is also reprinted in *THE ESSENTIAL HOLMES*, *supra* note 1, at 224. This passage comes from a speech called *The Use of Law Schools*—delivered the same year and place Holmes delivered *The Profession of the Law*. In *The Profession of the Law* itself, Holmes described the infinite perspective this way: “All that life offers any man from which to start his thinking or his striving is a fact. . . . [Y]our business as thinkers is to make plainer the way from some [fact] to the whole of things; to show the rational connection between your fact and the frame of the universe.” Oliver W. Holmes, *The Profession of the Law*, Lecture to undergraduates of Harvard University (Feb. 17, 1886), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 29, 30.

268. *See, e.g.*, Oliver W. Holmes, *The Law*, Remarks at a Suffolk Bar Association Dinner (Feb. 5, 1885), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 221, 224 (“[I]f a man is a specialist, it is most desirable that he should also [have broad interests]; that he should . . . be able not only to explain, but to feel; that the ardors of intellectual pursuit should be relieved by the charms of art . . .”). Holmes’s infinite perspective sheds light on another one of Holmes’s major intellectual influences: Ralph Waldo Emerson. *See, e.g.*, MENAND, *supra* note 34, at 23–25, 57–59. As Menand points out, Holmes’s infinite perspective echoed a passage in Emerson’s 1837 essay *The American Scholar*. *Id.* at 60. The passage reads as follows: “[S]how me the sublime presence of the highest spiritual cause lurking, . . . in [the] suburbs and extremities of nature; let me see every trifle bristling with the polarity that ranges it instantly on an eternal law . . .” Ralph Waldo Emerson, *The American Scholar*, in *THE ESSENTIAL WRITINGS OF RALPH WALDO EMERSON* 43, 57 (Brooks Atkinson ed., Modern Library 2000) (1837).

The essential facts *Lochner* presented Holmes with were simple. A legislative majority in New York, invoking the idea that it was unhealthy for bakers to work excessively long hours, passed a law limiting bakers to ten hours of work per day. In Holmes's hands, these humble facts were all he needed to "pass in reason from one part [of the universe] to another . . . by the path of the air,"<sup>269</sup> all the way up to something he could proximately connect with.

Holmes first lifted off from the *Lochner* facts with philosophy. The philosophical theory he used to explain reformers' efforts to enact the maximum-hours law, of course, was his law of combinations. Holmes believed that by backing the ten-hour law, New York's unionized bakers were behaving like any rational combination should. They were looking out for themselves, even if it came at the expense of others. If the bakers thought they could improve their lives by gathering up political support for the ten-hour provision, Holmes would not intervene. He saw no qualitative difference between limiting master bakers' practical freedom through legislation, and limiting it through collective action<sup>270</sup>—unions' traditional and more-or-less accepted method of applying pressure on employers.<sup>271</sup> Whether their aims were radical or not, the bakers and their Progressive boosters had proven their power.

Once Holmes had built a bridge from the bare facts of the *Lochner* case to the idea that the ten-hour law represented the will of a dominant combination, it was not hard for him to complete the circle on his infinite perspective. All that was left for Holmes to do was embrace the bakers' and Progressives' successful lobbying campaign with his own proximate truth. When Holmes had the ironical man tell Hand that we are all fated to

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269. Oliver W. Holmes, The Profession of the Law, Lecture to Undergraduates of Harvard University (Feb. 17, 1886), in COLLECTED LEGAL PAPERS, *supra* note 30, at 29, 30.

270. In fact, a year after *Lochner* was decided, American Federation of Labor-founder Samuel Gompers reported that "to a large extent" New York's unionized bakers had "secured the ten hour work day" by taking collective action. Samuel Gompers, Speech to Quarterly Meeting of Cigarmakers' Union No. 144 (Apr. 26, 1906), *quoted in* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 42 n.28 (1991).

271. *See generally* GERALD G. EGGERT, RAILROAD LABOR DISPUTES: THE BEGINNINGS OF FEDERAL STRIKE POLICY 24-225 (1967) (highlighting the judiciary's role in launching federal labor-relations policy between the great railroad strikes of 1877 and the Erdman Act of 1898); FORBATH, *supra* note 270, at 59-127, 193-98 app. B (discussing how courts addressed strikes, boycotts, picketing, and secondary actions from the Gilded Age through 1930); Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L.J. 461, 479-90, 493-518 (1989) (describing labor law as moving through three conceptual stages before the emergence of modern antitrust law in 1911 and the passage of the National Labor Relations Act in 1935).

“fight” our “Enem[ies,]”<sup>272</sup> he left a critical clue as to how he could have placed New York’s little bakeshop regulation within the ambit of his own proximate faith. As a judge, Holmes saw it as his duty to embrace a majority’s will with the discipline and recklessness of the ideal soldier. And for Holmes the ideal soldier had a name: Henry Abbott, a Union major he fought alongside as a young man, and someone he had “admired” and “loved.”<sup>273</sup>

Compared to Holmes’s other intellectual influences,<sup>274</sup> Abbott seems to come out of left field. He wrote nothing significant during his short life, and there is no evidence that he had any particular interest in the world of ideas. But Holmes saved Abbott a spot among his short list of heroes because of how he *lived*. As Pulitzer Prize-winner Louis Menand explained in his book *The Metaphysical Club*, Abbott was an exceptionally brave Unionist despite being indifferent to the Union’s articles of faith. Shortly after enlisting, Menand writes,

[Abbott] astonished himself by his own coolness under fire. It was a talent he had no idea he possessed, and in every engagement afterward he seems to have gone out of his way to place himself in the greatest possible danger.

But he was contemptuous of the cause for which he fought. He admired [General George B.] McClellan as a military professional and a Democrat, and complained continually of the political generals in the army. When the Emancipation Proclamation went into effect, . . . Abbott wrote [home] . . . to explain that “[t]he president’s proclamation is of course received with universal disgust.”<sup>275</sup>

Despite rejecting Abbott’s attitude toward slavery,<sup>276</sup> Holmes celebrated him in his moving *Memorial Day* speech twenty years after he

272. Letter from Oliver W. Holmes to B. Learned Hand (June 24, 1918), in Gunther, *supra* note 245, app. at 757.

273. Oliver W. Holmes, Memorial Day, Address before John Sedgwick Post No. 4, Grand Army of the Republic, in Keene, N.H. (May 30, 1884), in THE ESSENTIAL HOLMES, *supra* note 1, at 80, 85. Law professor G. Edward White has identified these comments as pertaining to Abbott. See WHITE, *supra* note 22, at 78–79.

274. Menand calls Abbott’s death “a touchstone in [Holmes’s mature] thought.” MENAND, *supra* note 34, at 54.

275. *Id.* at 40 (quoting Letter from Henry L. Abbott to Elizabeth Livermore (Jan. 10, 1863), in FALLEN LEAVES: THE CIVIL WAR LETTERS OF MAJOR HENRY LIVERMORE ABBOTT 160, 161 (Robert Garth Scott ed., 1991)).

276. See Letter from Oliver W. Holmes to Oliver W. Holmes, Sr. (Dec. 20, 1862), in TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861–1864, at 79, 79 (Mark DeWolfe Howe ed., 1946) [hereinafter TOUCHED WITH FIRE] (“I never I believe have shown . . . any wavering in my belief in the right of [the Union’s] cause . . .”); Letter from Oliver W. Holmes to John C. H. Wu (June 21, 1928), in BOOK NOTICES AND UNCOLLECTED LETTERS, *supra* note 20, at 196, 197 (“[I]n my youth I was an

was killed in the Battle of the Wilderness.<sup>277</sup> There, Holmes would recount “the awful spectacle of his advance [on] . . . the streets of Fredericksburg.”<sup>278</sup> Under Virginia’s pale December sun, Holmes told his audience, Abbott had shown his “few surviving companions” the face of God:

In less than sixty seconds he would become the focus of a hidden and annihilating fire from a semicircle of houses. His first platoon had vanished under it in an instant, ten men falling dead by his side. He had quietly turned back to where the other half of his company was waiting, . . . and was [soon leading a second platoon forward,] . . . in obedience to superior command, to certain and useless death . . . . The end was distant only a few seconds; but if you had seen him with his indifferent carriage, and sword swinging from his finger like a cane, you never would have suspected that he was doing more than conducting a company drill on the camp parade ground.<sup>279</sup>

The miracle Abbott performed was that of facing down the cruelty of ultimate reality with serenity and grace. He had little choice but to depend on the Union for his and his family’s survival. Born a Northerner,<sup>280</sup> he took up arms for the Federals purely out of loyalty to his side. And Holmes would not have it any other way. Violence, he believed, was human existence at its most honest and most elemental.<sup>281</sup> “[M]an’s destiny is to fight,” the ironical man said; “[t]herefore, take thy place on the one side or the other.”<sup>282</sup> In his famous 1895 speech *The Soldier’s Faith*, Holmes summed up his conviction that war is inescapable: “I believe that the struggle for life is the order of the world, at which it is vain to

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abolitionist and shuddered at a Negro Minstrel Show, as belittling a suffering race and I am glad I was and did.”).

277. See Oliver W. Holmes, Memorial Day, Address before John Sedgwick Post No. 4, Grand Army of the Republic, in Keene, N.H. (May 30, 1884), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 80, 84 (“In the Wilderness . . . [Abbott] fell.”).

278. *Id.*

279. *Id.* at 84–85.

280. See Robert Garth Scott, *Introduction* in *FALLEN LEAVES: THE CIVIL WAR LETTERS OF MAJOR HENRY LIVERMORE ABBOTT*, *supra* note 275, at 1, 1–2 (discussing Abbott’s early life and the Abbott family’s Massachusetts roots).

281. See, e.g., Letter from Oliver W. Holmes to Frederick Pollock (Feb. 1, 1920), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 102, 102–03 (“I do think that man at present is a predatory animal. . . . I believe that force . . . is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force.”).

282. Letter from Oliver W. Holmes to B. Learned Hand (June 24, 1918), in Gunther, *supra* note 245, app. at 757.

repine. . . . Now, at least, and perhaps as long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war.”<sup>283</sup>

Abbott’s display in Fredericksburg shook Holmes to his core because it proved he had put his duty to his homeland above all else—his life, his politics, and even his judgment. Holmes thought Abbott’s assault was sublime, Menand points out, specifically because he “exposed himself . . . to danger . . . despite knowing that the order to advance was stupid, and despite a complete antipathy toward the cause in whose name he was, for all he knew, about to die.”<sup>284</sup> For the rest of his life, Holmes would hold Abbott’s faith up as his north star: “I do not know the meaning of the universe,”<sup>285</sup> Holmes wrote in *The Soldier’s Faith*,

[b]ut in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, . . . and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.<sup>286</sup>

Under the guidance of Abbott’s example, Holmes was able to cobble a proximate faith together that could complete the circle on his infinite perspective. To Holmes, “[t]he great forces which insured the North success”<sup>287</sup> and the relative strength of “legions” held only the shallow significance of being the facts that directed the War’s course.<sup>288</sup> So, too, were the ideologies and the opinions<sup>289</sup> that made the Civil War

283. Oliver W. Holmes, *The Soldier’s Faith*, Address to the graduating class of Harvard University (May 30, 1895), in *OCCASIONAL SPEECHES*, *supra* note 31, at 73, 75.

284. MENAND, *supra* note 34, at 43. Privately, both Holmes and Abbott believed the Fredericksburg assault was ill-advised and reckless. See Letter from Oliver W. Holmes to Oliver W. Holmes, Sr. (Dec. 20, 1862), in *TOUCHED WITH FIRE*, *supra* note 276, at 79, 79 (calling Fredericksburg “an infamous butchery in a ridiculous attempt”); Letter from Henry L. Abbott to Caroline L. Abbott (Dec. 21, 1862), in *FALLEN LEAVES*, *supra* note 275, at 155, 155 (“[T]he men who ordered the crossing of the river [into Fredericksburg] are responsible to God for murder.”).

285. Oliver W. Holmes, *The Soldier’s Faith*, Address to the graduating class of Harvard University (May 30, 1895), in *OCCASIONAL SPEECHES*, *supra* note 31, at 73, 76.

286. *Id.*

287. Oliver W. Holmes, *Harvard College in the War*, Answer to a toast at Harvard University commencement (June 25, 1884), in *OCCASIONAL SPEECHES*, *supra* note 31, at 17, 17.

288. *Id.* at 17–18.

289. See, e.g., Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 108, 108–09 (saying that “persecution [came] easy” for Calvinists, Catholics, abolitionists, and prohibitionists because they “kn[e]w that [they] kn[e]w”).

inevitable.<sup>290</sup> A war and all the forces that feed it are merely a “horrible” opening into the eternal “tempestuous untamed streaming of the world.”<sup>291</sup> But mankind’s need for proximate meaning does not stop when the terrors of life are unleashed. To embrace violence and death like Abbott had was to turn the reality of life’s ugliness on its head. In the name of “roman[ce]” and “glory,”<sup>292</sup> he was able to “toss life and hope like a flower before the feet of [his] country.”<sup>293</sup> And that miracle is exactly where the ironical man picks up. “[T]he Enemy is as good a man as thou,” Holmes had the ironical man tell Hand, “but kill him if thou Canst.”<sup>294</sup>

Just as Holmes’s need for proximate meaning led him to adopt the ideal soldier’s belief in “my country right or wrong,”<sup>295</sup> it also led him to adopt his conception of the ideal judge.<sup>296</sup> The ironical man’s passion, like Abbott’s, was the secret of his personal redemption: regarding the mean and unforgiving reality of the ultimate world as a mere occasion to let his proximate light shine.<sup>297</sup> Because in Holmes’s cosmos all events were purely physical, he could embrace any of them as small parts of the whole.<sup>298</sup> With the figure of the ironical man, Holmes applied that willingness to embrace what exists to the cases that came to him as a judge.

290. See Oliver W. Holmes, Memorial Day, Address before John Sedgwick Post No. 4, Grand Army of the Republic, in Keene, N.H. (May 30, 1884), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 80, 80 (“[M]any of us . . . believed that the [Civil War] was inevitable.”).

291. Oliver W. Holmes, The Soldier’s Faith, Address to the graduating class of Harvard University (May 30, 1895), in *OCCASIONAL SPEECHES*, *supra* note 31, at 73, 80.

292. Oliver W. Holmes, Harvard College in the War, Answer to a toast at Harvard University commencement (June 25, 1884), in *OCCASIONAL SPEECHES*, *supra* note 31, at 17, 18.

293. *Id.* at 19. Holmes used these particular words to describe “men like” Robert Gould Shaw, a Union officer who died during the Civil War. *Id.*

294. Letter from Oliver W. Holmes to B. Learned Hand (June 24, 1918), in Gunther, *supra* note 245, app. at 757.

295. Letter from Oliver W. Holmes to Lewis Einstein (Oct. 12, 1914), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 101, 101.

296. In *The Common Law*, Holmes described an ideal legal regime in similar terms: “The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.” *THE COMMON LAW*, *supra* note 202, at 41.

297. See, e.g., Oliver W. Holmes, Commencement Address at Brown University (June 17, 1897), in *OCCASIONAL SPEECHES*, *supra* note 31, at 97, 99 (“It seems to me that this is the key to intellectual salvation . . . is to accept a like faith in one’s heart, and to be not merely a necessary but a willing instrument in working out the inscrutable end.”).

298. See, e.g., Civil War Diary of Oliver W. Holmes, *quoted in* *TOUCHED WITH FIRE*, *supra* note 276, at 23, 28 (“[W]hatever shall happen is best—for . . . *good & universal* (or *general law*) are synonymous terms in the universe—(I can now add that our phrase *good* only means certain general truths seen through the heart & will . . . .”).

Seeing the economic and political forces that made their way to the Court as mere facts of his environment,<sup>299</sup> Holmes could accept them as easily as he could accept any other corner of the universe. He endeavored to “sympathize[]” with the “social structure,” he once told Laski, “as [he did] in many of [his] literary and philosophical judgments.”<sup>300</sup> The truth of the ironical man, then, is that while he sees his country through a positivistic lens, he does not stop there. He goes further by deciding to think of it as good and right. He chooses to make the trajectory of his nation a part of who he is.

The ironical man, in short, simply describes Holmes’s method of taking the cases he encountered as a judge, and doing what he could to emotionally connect with the realities behind them. As he told the Suffolk Bar Association in 1885, a “civilized” professional “should [not only] have laid in the outline of the other sciences . . . he should [also] be passionate” about the facts he encounters.<sup>301</sup> And when Holmes wrote Hand to rank the philosopher’s realism below the ironical man’s romanticism, he was saying that a purely technical understanding of his work would be meaningless without a proximate connection to it. “A man of intellect,” he reminded Laski in a 1925 letter, “ought to . . . recogniz[e society’s] . . . unimportance as compared with his superlatives.”<sup>302</sup> In a 1911 address to Harvard College’s class of 1861, Holmes explained how the romance of war—which he felt as strongly in college as he did in the battlefield—showed him why it is vital to add a gloss of sentimentality to the realities of social life:

[W]e all of us have our notions of what is best. I learned in the regiment and in the class the conclusion, at least, of what I think the best service that we can do for our country and for ourselves: To see so far as one may, and to feel, the great forces that are behind every detail—for that makes all the difference between philosophy and gossip, [and] between great action and small.<sup>303</sup>

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299. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903) (Holmes, J.) (“[T]he taste of any public is not to be treated with contempt. It is a[] . . . fact for the moment . . .”).

300. Letter from Oliver W. Holmes to Harold Laski (Nov. 3, 1927), in *HAROLD-LASKI LETTERS VOL. 2*, *supra* note 4, at 990, 991.

301. Oliver W. Holmes, *The Law*, Remarks at a Suffolk Bar Association Dinner (Feb. 5, 1885), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 221, 224.

302. Letter from Oliver W. Holmes to Harold Laski (Mar. 26, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 49, 50.

303. Oliver W. Holmes, *The Class of ‘61*, Remarks at the Fiftieth Anniversary of Graduation (June 28, 1911), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 94, 94.

When Holmes considered a case from the perspective of the ironical man, he did everything he could to live up to that lofty standard. In 1902, mere weeks before joining the Supreme Court, he told the Chicago Bar Association that if a judge “aims at the highest, he must take risks. He must be superior to class prejudices and to his own prejudices. . . . He must throw down his naked thought . . . to take its chance for life.”<sup>304</sup> But above all, Holmes told his peers, a judge who aspires to greatness “must try to realize the paradox that it is not necessary to be heavy in order to have weight.”<sup>305</sup> Time has shown that in *Lochner*, Holmes hit that incredible mark. Despite being personally ambivalent about maximum-hours laws,<sup>306</sup> he put everything he had behind the Bakeshop Act, as well as the prevailing opinions that supported it. In an opinion that is as to-the-point as it is unpretentious, he managed to lift a tedious dispute over a New York bakeshop regulation up into something that moves us like poetry. What Holmes must have known, and what generations of lawyers have always known, is that in *Lochner* his beautiful soul sang at the same pitch as New Yorkers’ rude politics. On April 17, 1905, the day Holmes delivered his *Lochner* dissent, the ironical man was realized.

#### CONCLUSION

Eight years after the Court issued its *Lochner* decision, in a speech called *Law and the Court*, Holmes walked the Harvard Law School Association through his observations of the judiciary, his Americanist faith, and the arc of the nation. Throughout his discussion, his palpable concern was the rise and expected fall of the right to liberty of contract and other “doctrines that had no proper place in the Constitution or the common law.”<sup>307</sup> At the time he delivered his speech, Holmes had good reasons for

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304. Oliver W. Holmes, Despondency and Hope, Remarks at a dinner of the Chicago Bar Association (Oct. 21, 1902), in OCCASIONAL SPEECHES, *supra* note 31, at 146, 148. This speech is also available in THE ESSENTIAL HOLMES, *supra* note 1, at 149.

305. *Id.*

306. In 1907, Holmes privately told Sheehan, “I incline to believe a magazine article to the effect that before our clamorers for 8 hours (with which clamor I rather sympathize) know it, the Chinese with their endless gluttony for work, their honesty and their imperturbable patience will cut the white races out in the markets of the world.” Letter from Oliver W. Holmes to Patrick A. Sheehan (Sept. 17, 1907), in HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 46, at 18, 18–19.

307. Oliver W. Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School Association (Feb. 15, 1913), in COLLECTED LEGAL PAPERS, *supra* note 30, at 291, 295. This speech is also reprinted in THE ESSENTIAL HOLMES, *supra* note 1, at 145. Although Holmes never identified the right to contract by name, it was certainly on his mind. In his speech he referred to constitutional doctrines (1) that were recognized in the

being mindful of the forces that brought doctrines like the right to contract to the fore. During the decade and a half that followed *Allgeyer*, the Court was a restrained defender of the new right.<sup>308</sup> But by the time Holmes addressed his audience in 1913, liberty of contract seemed to be on its way out.<sup>309</sup> Rather than directly attacking the fading right, however, Holmes remained circumspect. Understanding that his colleagues were reliably hostile to labor<sup>310</sup> and suspicious of paternalist reformers,<sup>311</sup> Holmes was not ready to predict its demise. Instead, he contextualized the story of

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twenty years preceding 1913; (2) that were reactions to socialism; and (3) that he considered to be improper. *Id.* Based on these criteria, the right to contract fits the bill very nicely. See *supra* Section II.A (discussing the rise of the right to contract); *supra* text accompanying notes 112–15 (identifying the right to contract as a reaction to socialism); *supra* Section II.C (describing Holmes’s opposition to the right to contract).

308. See Bernstein, *supra* note 97, at 10 (“The first period [of the *Lochner* era informally began in 1897 with *Allgeyer*] and ended in about 1911, with moderate *Lochnerians* dominating the Court.”). But see Friedman, *supra* note 210, at 1449 (“The period immediately before 1890 was one in which the Court permitted a great deal of novel state regulation . . . . But all that seemed to change suddenly [between 1890 and the mid-1920s]. . . . [W]hat may seem [today] . . . to be a small absolute number of overrulings looked like a sea change to observers . . . at the time.”).

309. See Bernstein, *supra* note 97, at 10 (“[F]rom approximately 1911 to 1923, . . . the Court, while not explicitly repudiating *Lochner*, generally refus[ed] to expand the liberty-of-contract doctrine to new scenarios, and at times seem[ed] to drastically limit the doctrine.”). As law professor Jack Balkin notes, “[F]ollowing Harding’s election in 1920 and four new appointments to the Supreme Court, the Court revived the principles of *Lochner* in 1923 in *Adkins v. Children’s Hospital of the District of Columbia* [261 U.S. 525 (1923)].” Balkin, *supra* note 13, at 684–85 (footnote omitted). The *Lochner* era is often considered to have ended for good in 1937 with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See Balkin, *supra* note 13, at 685.

310. See JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910*, at 81 (1995) (“[T]he Fuller Court [of 1888 to 1910] was reluctant to sanction government intervention to strengthen the legal position of industrial workers and encourage the formation of labor unions”); David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 39 (2003) (asserting that the *Lochner*-era Court consistently invalidated “laws that it believed had no purpose other than to aid labor unions.”); Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985, 988 (2002) (book review) (“The *Lochner*-era’s philosophy may be best encapsulated in the Court’s recognition of a constitutional right of employers to fire union members. . . . [T]he Court rejected the legitimacy of any state effort to deal with unequal bargaining power . . . .” (footnote omitted)).

311. See David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 539 (1988) (“During the *Lochner* era, the Court [only] rarely, and grudgingly, allowed legislatures to make some paternalist inroads . . . at least in matters of contract.”); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249, 255 (1987) (saying that from 1888 to 1921 “[t]he Justices[] . . . devoted themselves tenaciously to rooting out paternalism whenever they perceived it.”); Sunstein, *supra* note 16, at 877 (“[T]here can be no doubt that most forms of redistribution and paternalism were ruled out [during the *Lochner* era].”).

doctrines like the right to contract within the ongoing ideological battle between those who were inclined to tradition and laissez-faire, and those who preferred reform and paternalism.

To Holmes, the story of doctrines like liberty of contract began with the backwards-looking legal framework to which laissez-faire capitalists and labor and paternalist activists had to take their disputes. “I told a labor leader once,” Holmes recalled in his speech, “that what they asked was favor, and if a decision was against them they called it wicked. The same might be said of their opponents. It means that the law is growing.”<sup>312</sup> But, he continued, it would be some time before labor and capital could both accept the legitimacy of the laws that applied to them. Although the law never fails to evolve with the problems it must resolve,

[i]t cannot be helped . . . that the law is behind the times. . . . [L]aw embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there is still doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field.<sup>313</sup>

In order to minimize the lag between what the law says and what most interested parties agree it should be, Holmes argued that “[w]e . . . need [an] education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.”<sup>314</sup> But Holmes was not bullish on his colleagues’ capacities to rise above their economic and political opinions. After thirty years on the bench, he told his audience that “[i]t is a misfortune [that] judge[s] read[] [their] conscious or unconscious sympath[ies] with one side or the other prematurely into the law.”<sup>315</sup> It was a problem, he regretted to say, he did not see ending anytime soon: “Judges are apt to be naif, simple-minded men, and they need something of [a] Mephistopheles.”<sup>316</sup>

During the two decades that saw the Court’s first recognition of the right to contract, and that saw its rise and eventual dip, Holmes thought the most significant barrier to the law’s continued evolution was his fellow judges’ fear of socialism. In his 1897 speech *The Path of the Law*, for example, he argued that

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312. Oliver W. Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in COLLECTED LEGAL PAPERS, *supra* note 30, at 291, 294.

313. *Id.* at 294–95.

314. *Id.* at 295.

315. *Id.*

316. *Id.*

[w]hen socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England . . . . [I]n some courts new principles have been discovered . . . which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right.<sup>317</sup>

Sixteen years later, when Holmes delivered his *Law and the Court* address, he had not changed his tune: “When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into” illegitimate constitutional and common-law doctrines.<sup>318</sup>

Holmes understood the gravity of his colleagues’ fears because he feared for the country’s future, too. “I feel what are perhaps an old man’s apprehensions,”<sup>319</sup> he revealed to the Harvard group. Convinced that socialists and Progressives had used “economic superstition”<sup>320</sup> to stoke the “present discontents,”<sup>321</sup> he predicted that it would be “a slow business for our people to reach rational views.”<sup>322</sup> He also worried that “competition from new races [and] . . . working men’s disputes” would “test whether we can hang together and can fight.”<sup>323</sup> And he suspected that the country was “running through the world’s resources at a pace that [it] [could not] keep.”<sup>324</sup> But unlike his fellow Justices, Holmes would not use his fears as an excuse to interfere with the country’s evolution, and he would not block the direction legislative majorities wanted to go with new constitutional doctrines like liberty of contract. A Thayerian through and through, he

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317. Oliver W. Holmes, *The Path of the Law*, Speech at dedication of new hall of the Boston University School of Law (Jan. 8, 1897), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 167, 184. This speech is also reproduced in *THE ESSENTIAL HOLMES*, *supra* note 1, at 160.

318. Oliver W. Holmes, *Law and the Court*, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 291, 295.

319. *Id.* at 296.

320. Letter from Oliver W. Holmes to Lewis Einstein (Nov. 24, 1912), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 66, 66.

321. Oliver W. Holmes, *Law and the Court*, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 291, 294.

322. *Id.* at 296, *reprinted in* *THE ESSENTIAL HOLMES*, *supra* note 1, at 148.

323. *Id.*

324. *Id.*

would instead carry out whatever instructions legislative majorities would send his way.<sup>325</sup>

As far back as 1893, Holmes agreed with Thayer's view that "[i]t is idle to rely upon Courts 'to save a people from ruin.'"<sup>326</sup> It was, for Holmes, a central reason for keeping to his hands-off theory of the judicial role, even as he sat atop the judicial branch. "I have no belief in panaceas and almost none in sudden ruin," Holmes told the Association members.<sup>327</sup> Instead, he explained,

I believe with Montesquieu that if the chance of a battle—I may add, the passage of a law—has ruined a state, there was a general cause at work that made the state ready to perish by a single battle or a law. Hence I am not much interested one way or the other in the [redistributive] nostrums now so strenuously urged. . . . For most of the things that properly can be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized.<sup>328</sup>

In *Lochner*, because Holmes did not think judges could save their societies, he did not share Peckham's objection to leaving the country "at the mercy of legislative majorities."<sup>329</sup> "Every opinion," he argued in his dissent, "tends to become a law."<sup>330</sup> The country had risen thanks to the "displays of intellect, force of character, and power of divination"<sup>331</sup> of nameless multitudes, and its destiny belonged to the same. "Everything tells in its due proportion, in the organic processes of social growth,"<sup>332</sup> Holmes told a Boston University crowd in 1890. "Nature knows no such thing as a force not counting for its full number of foot-pounds."<sup>333</sup>

325. In 1912, only a few months before his *Law and the Court* speech, Holmes recalled telling sitting president William Howard Taft that "if they could make a case for putting Rockefeller in prison I should do my part; but if they left it to me I should put up a bronze statue of him." Letter from Oliver W. Holmes to Lewis Einstein (Oct. 28, 1912), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 141, 141.

326. Letter from Oliver W. Holmes to James B. Thayer (Nov. 2, 1893), in Luban, *supra* note 192, at 462 n.34 (quoting Thayer, *supra* note 176, at 156).

327. Oliver W. Holmes, *Law and the Court*, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in *COLLECTED LEGAL PAPERS*, *supra* note 30, at 291, 295.

328. *Id.* at 295–96.

329. *Lochner v. New York*, 198 U.S. 45, 59 (1905) (Peckham, J.).

330. *Id.* at 76 (Holmes, J., dissenting).

331. Oliver W. Holmes, *Anonymity and Achievement*, Remarks at a dinner of the Alumni of the Boston University Law School (June 3, 1890), in *OCCASIONAL SPEECHES*, *supra* note 31, at 59, 59.

332. *Id.* at 61.

333. *Id.*

Fearing for the country's future, and unwilling to interfere with the Republic's course, Holmes would not tie his ironclad patriotism<sup>334</sup> to the fate of his nation or even to his culture. "There are half a dozen futures . . . for our civilization," Holmes once told the Irish historian Alice Stopford Green, "that seem to me equally probable and among them is the possibility of [one] cutting its own throat or of one going down hill in some way."<sup>335</sup> Instead, as he wound down his *Law and the Court* address, he offered his audience a hopeful philosophical picture of what the country could become:

I do not pin my dreams for the future to my country or even to my race. I think it probable that civilization somehow will last as long as I care to look ahead . . . I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand.<sup>336</sup>

But Holmes would not stop there. As he closed out his thoughts on the evolution of the country he loved, he offered some spiritual encouragement to his audience as well. The warrior country that "touched [him] with fire" as a young man,<sup>337</sup> he acknowledged years earlier in *The Soldier's Faith*, had been eclipsed by the interests of commerce.<sup>338</sup> Among every stratum of society "money [had become] the main thing."<sup>339</sup> "There are many, poor and rich," he said with a soft sadness, "who think that love of country is an old wife's tale, to be replaced by interest in a labor union, or . . . by a rootless self-seeking search for a place where the most enjoyment may be had at the least cost."<sup>340</sup> But no matter what would

334. See, e.g., Letter from Oliver W. Holmes to Felix Frankfurter (Mar. 27, 1917), in HOLMES & FRANKFURTER, *supra* note 225, at 69, 70 ("Patriotism is the demand of the territorial club for priority. . . . I go the 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.").

335. Letter from Oliver W. Holmes to Alice Stopford Green (Oct. 1, 1901), in THE ESSENTIAL HOLMES, *supra* note 1, at 111, 111.

336. Oliver W. Holmes, *Law and the Court*, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in COLLECTED LEGAL PAPERS, *supra* note 30, at 291, 296.

337. Oliver W. Holmes, Memorial Day, Address before John Sedgwick Post No. 4, Grand Army of the Republic, in Keene, N.H. (May 30, 1884), in THE ESSENTIAL HOLMES, *supra* note 1, at 80, 86 ("[T]he generation that carried on the war has been set apart by its experience. Through our great good fortune, in our youth our hearts were touched with fire.").

338. Oliver W. Holmes, *The Soldier's Faith*, Address to the graduating class of Harvard University (May 30, 1895), in OCCASIONAL SPEECHES, *supra* note 31, at 73, 73 ("[W]ar is out of fashion . . . . The aspirations of the world are those of commerce.").

339. *Id.* at 74.

340. *Id.*

become of the Empire, Holmes counseled the Harvard group to take solace in something that is far more valuable and far more enduring—the eternal flame that burns in the hearts of mankind:

The other day my dream was pictured to my mind. It was evening. I was walking homeward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman's Statue to the west the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall in Wagner's opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself the *Götterdämmerung* will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars.<sup>341</sup>

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341. Oliver W. Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in COLLECTED LEGAL PAPERS, *supra* note 30, at 291, 297.