Mr. Justice Holmes--Humility, Skepticism and Democracy

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CHARACTER is fate and so is circumstance. A great man is one whose personal qualities satisfy the pressing needs of a particular tactical engagement in the continuing campaign of history. Early in the Twentieth Century Oliver Wendell Holmes brought to the Supreme Court of the nation two striking qualities, skepticism and intellectual humility—perfect solvents for the economic dogmatism which under the mask of Natural or Divine Law had permeated both bench and bar. In the preceding quarter of a century the judiciary had got into the habit of treating Adam Smith "as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of liberty were equated with theories of laissez-faire. . . . The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. This misapplication of the notions of the classic economists and resulting disregard of the perduring reach of the Constitution" was strangling the growth of the nation and frustrating the processes of democracy.

In origin laissez-faire was a reaction to mercantilism. It contemplated a termination of governmental handouts for business. The economy was to stand on its own feet independent of tariffs, monopolistic grants, special trading privileges and other public bounties. It was in this sense that Jefferson and Jackson—radicals in their day—had sponsored the philosophy of laissez-faire. But to fight one's battles under the enemy's banner is an old strategy. By the end of the Nineteenth Century businessmen had taken over laissez-faire for their own, twisting it into a defense against democratic efforts to regulate business for the protection of the public. For in the interim since Jackson's day de Tocqueville's prophesy had proven true; the masses refused "to remain miserable and sovereign." And so it happened, as Bryce observed in 1888, "one-half

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of the capitalists are occupied in preaching laissez-faire as regards railroad control, the other in resisting it—in tariff matters. ... Yet they manage to hold well together." Businessmen found their great spokesman in an English philosopher-biologist, Herbert Spencer, who incidentally was "rejected by professional philosophers as superficial and by scientists as ignorant." In his hands Darwin's struggle for existence and survival of the fittest became a natural law of social organization. As such it provided cosmic justification for the Robber Baron's greedy exploitation of the nation's human and geographic resources. "Their cupidity, it defended as part of the universal struggle for existence; their wealth, it hallowed as the sign of the fittest." Governmental interference for the protection of the public was a violation of nature and as such doomed to bring more hardship than good, for "the poverty of the incapable, the distresses that come upon the improvident, the starvation of the idle, and the shouldering aside of the weak by the strong, which leaves so many in shadows and misery are the decrees of a large, far-seeing benevolence. ..."2 As a present day Congressman put it, "Every one for himself, said the elephant, as he danced among the chickens."

When Mr. Justice Holmes took his seat upon the Supreme Court bench in 1902 this pseudo-laissez-faire had been absorbed into the law of the land, particularly into the due process clause of the Fourteenth Amendment. In its name the judiciary had frustrated numerous popular efforts to mitigate the more obvious abuses of the American industrial revolution. Specifically during the last five years of the Nineteenth Century the Supreme Court had destroyed or emasculated legislative attempts to control monopoly,3 prevent unfair railroad rates,4 tax income5 or regulate utilities6 and insurance companies.7 But while "laissez-faire" on the bench meant exemption of business from the processes of democratic government, it subjected workingmen to extra-democratic processes, namely, government by injunction.8 Thus the standard was double, working uniformly for the benefit of those who by popular

2. This and the foregoing non-footnoted quotations appear in Mason, Free Government in the Making c. 16 (1949).
4. Maximum Rate Case, 167 U. S. 479 (1897); Social Circle Case, 162 U. S. 184 (1896); Texas & Pacific Ry. v. I. C. C., 162, 197 (1896).
standards already had too many advantages. President Hadley revealed the temper of the times when he claimed that "the fundamental division of powers in the Constitution of the United States is between voters on the one hand and property owners on the other. The forces of democracy on the one side, divided between the executive and the legislature, are set over against the forces of property on the other side with the judiciary as arbiter between them..."—which was, of course, the way the wealthy looked at it. For to make "laissez-faire" the "arbiter" between democracy and property meant the latter would win all engagements. As Mr. Justice Holmes put it;

"I suspect that this fear [of "socialism" on the part of the "comfortable classes"] has influenced judicial action both here and in England. . . . I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside of the bodies of those instruments, 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."^{10}

The judicial genius of Holmes did not lie in a questioning of the new laissez-faire.\^{11} For while he was apt to express himself more subtly than spokesmen for the Robber Barons, it is clear that he was in fundamental agreement with them on the major tenets of Spencerian doctrine. The Justice was a true product of the age of Darwin. For him "the struggle for life is the order of the world . . . man's destiny in battle."^{12} He put his hopes in racial improvement, not in alterations of human institutions. Time after time he repeated Spencer's warning that in society, as in mechanics, there is no way to get something for nothing. Human efforts to ameliorate the "struggle for existence" merely beget new woes (or rather shift old ones) and society must inevitably foot the bill. Hence the deep Holmesian skepticism towards reform and especially reformers—"cock-sure of a thousand reforms," "the greatest bores in the world:"

"The social reformers of today seem to me so far to forget that we no more can get something for nothing by legislation than we can by mechanics as to be satisfied if the bill to be paid

9. Mason, op. cit. supra, c. 16.
11. 2 Holmes-Pollock Letters 309 (Howe ed. 1941). The acceptance of laissez-faire is implicit in many of his opinions and other writings.
for their improvements is not presented in a lump sum. Inter-
ststitial detriments that may far outweigh the benefit promised
are not bothered about. Probably I am too skeptical as to our
ability to do more than shift disagreeable burdens from the
shoulders of the stronger to those of the weaker. . . . I believe
that the wholesale social regeneration which so many now
seem to expect, if it can be helped by conscious, coordinated
human effort, cannot be affected appreciably by tinkering with
the institution of property, but only by taking in hand life and
trying to build a race. . . . The notion that with socialized prop-
erty we should have women free and a piano for everybody
seems to me an empty humbug. 13

". . . most even of the enlightened reformers . . . seem to me
not to have considered with accuracy the means at our disposal
and to become rhetorical where I want figures. The notion that
we can secure an economic paradise by changes in property
alone seem to me twaddle. I can understand better legislation
that aims rather to improve the quality . . . of the population.
If before the English factory acts the race was running down
physically I can understand taking the economic risk of passing
those acts—although they had to be paid for, and I do not doubt
in some way or other England was worse off for them, however
favorable the balance of account. I can understand a man's
saying in any case, I want this or that and I am willing to pay
the price, if he realizes what the price is. What I most fear is
saying the same thing when those who say it do not know and
have made no serious effort to find out what it will cost, as I
think we in this country rather inclined to do. 14

But, fundamentally in accord with the doctrines of laissez-faire,
Holmes had learned what Morris Cohen called "the great lesson
of life," namely, humility. And so, man and judge, he refused to
act as though he, or indeed anyone, held an exclusive compass of
truth:

"When I say a thing is true, I mean that I cannot help
believing it. I am stating an experience as to which there is no
choice. But as there are many things that I cannot help doing
that the universe can, I do not venture to assume that my in-
abilities in the way of thought are inabilities of the universe. I
therefore define truth as the system of my limitations, and leave
absolute truth for those who are better equipped. . . . To have
doubted one's own first principles is the mark of a civilized
man. 15

13. Holmes, Ideals and Doubts in Collected Legal Papers 305-306
(1920).
14. Reproduced in Lerner, The Mind and Faith of Mr. Justice Holmes
400-401 (1943).
15. Holmes, Ideals and Doubts in Collected Legal Papers 303, 307
(1920).
“Certitude is not the test of certainty. We have been cocksure of many things that were not so... What we most love and revere generally is determined by early associations... But while one’s experience thus makes certain preferences dogmatic for one’s self, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else.”

It is this humility, this refusal to read his own experiences and beliefs (what he called his “can’t helps”) into the Constitution, and his alertness in opposing judicial associates who, often unconsciously, did so, that constitutes the genius of Holmes. He did not confuse his personal distastes with constitutional necessity. And so when his associates read a pseudo-laissez-faire into the law of the land, and showed marked hostility to offensive speech, Holmes was apt to be in dissent. But he was outspokenly skeptical of the reforms involved in most of the great opinions which he wrote in support of legislative freedom to adopt them; as in the famous free speech dissents he openly disdained the ideas whose utterance he defended. Thus on a bedrock of humility and skepticism Holmes laid the foundation for an abiding democratic philosophy. “Just as he would allow experiments in economics which he himself viewed with doubt and distrust, so he would protect speech that offended his taste and wisdom. At bottom both attitudes came from a central faith and a governing skepticism. Since the whole truth has not yet been, and is not likely to be, brought up from its bottomless well, the first duty of an educated man was to doubt his major premise even while he continued to act upon it. This was the skeptical conviction with which he distrusted dogma, whether economic or intellectual. But his was never the paralyzing skepticism which easily becomes comfortable or corroding cynicism. He had a positive faith—faith in the gradual power to pierce nature’s mysteries through man’s indomitable endeavors. This was the road by which he reached an attitude of widest tolerance towards views which were strange and uncongenial to him, lest by a premature stifling even of crude or groping ideas society might be deprived of eventual wisdom for attaining a gracious civilization.”

In a word, free speech, press and assembly are indispensable tools of democratic self-government for they safeguard society’s thinking

16. Id. at 311.
17. Frankfurter, Mr. Justice Holmes and the Supreme Court 61-62 (1938).
process. And so it is one thing for judges to protect free expression from legislative mutilation, but to strike down the legislative fruits which free expression bears in the economic realm—wage and hour laws, for example—is something quite different. For neither democracy nor free expression have meaning, if judges are to substitute their views ("can't helps") for those adopted by a community whose channels of discussion and thought are unobstructed.

From that premise spring the two famous rules—clear and present danger and reasonable man—which Holmes urged for guiding and limiting judges in the exercise of their power of judicial review; the power, that is, to impede the forces of democracy, to block the rights of self-government. For it seemed to the Justice that, "as the decisions now stand, . . . [there is] hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable." 18

The more fundamental of Holmes' two famous rules was that designed to determine the bounds of what men may speak or write in a democratic society. To be sure the First Amendment speaks in absolute terms—"Congress shall make no law . . . abridging" free discussion. But life and society are dynamic processes which neither we, nor least of all the Founding Fathers, could hope to imprison in a phrase of a dozen words. In constitutions particularly it is the essence behind the words that counts; often "the letter killeth." The function of the great judge is to "preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time—at all hazards he must maintain that tolerable continuity without which society dissolves, and man must begin again the weary path up from savagery." 19

Looking behind the simple language of the First Amendment Holmes found in its free expression provisions a plain purpose—to safeguard society's thinking process, no more and no less. Thus he who seeks to debate public issues is protected, however outrageous a judge or legislature may find his views. But he who would incite improper action, though he do so via speech, has no claim to immunity from punishment or prohibition. Falsely crying fire in a crowded theater is not calculated to start an intellectual

discussion; it is no part of the process by which truth is brought up from its bottomless well; hence like other anti-social action, it is subject to public restraint. The extreme cases are always easy. It is at the penumbra that the line is difficult to trace. To distinguish between discussion words and "words that may have all the effect of force" Holmes, in the case of Schenck v. United States, devised the clear and present danger rule:

"... the character of every act depends upon the circumstances in which it was done. ... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

That was the first laconic statement of principle. Thereafter in a series of brilliant dissents and separate concurring opinions Justices Holmes and/or Brandeis spelled out some of its implications in language that is not apt to be forgotten.

It is noteworthy that after the Schenck case while Holmes and Brandeis were on the bench no other Justice supported the danger rule. In five more Espionage Act cases decided in 1919-1920 the Schenck decision was cited by the Court as controlling, but the danger test was not mentioned and none of the evidence was analyzed in danger terms. In each instance convictions were sustained. Thus for all but one of his associates Holmes' formula was at best an acceptable device for sending men to jail and nothing more. In the throes of World War I and its aftermath, when free speech was jeopardized by popular hysteria as never before in American history, a majority of the Justices were willing to uphold punishment for speech merely because of its supposed "bad


22. Debs v. United States, 249 U. S. 211 (1919); Frowerk v. United States, 249 U. S. 204 (1919); Abrams v. United States, 250 U. S. 616 (1919); Schaefer v. United States, 251 U. S. 466, 468 (1920); Pierce v. United States, 252 U. S. 239 (1920). In Gitlow v. New York, 268 U. S. 652 (1925) the court mentioned the danger test only to distinguish it to permit upholding a conviction.
tendency"—a complete repudiation, one submits, both of the language and the substance of the First Amendment. Progress marches with the sword of criticism and must of necessity threaten anguish for the status quo. From time immemorial its "tendency" has been "bad." And so Holmes saw "misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong. I think that we have suffered from this misfortune . . . and that this is another very important truth to be extracted from the popular discontent. When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law. Judges are apt to be naive, simple-minded men, and they need something of Mephistopheles. We too need 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."

But Mr. Justice Brandeis, more fervent, more loquacious and more disposed to stoop for detail than Holmes, gave the clear and present danger rule its ultimate formulation:

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine. . . . they knew that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form."

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of free speech to free men from the bondage

23. This position is seen most clearly in Gitlow v. New York, 268 U. S. 652 (1925).
of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

"Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society." 25

The upshot of Holmes' position then was that advocacy is to be free up to that last possible point where it merges into action so immediately dangerous that there is no opportunity for the democratic corrective of counter discussion. For the Justice knew all

too well that history is strewn with the maimed and tortured bodies of men who dared to question "eternal truths" which as it turned out were somewhat less than eternally true. "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out."

But the apercus, even the rhetoric, of the master often become dogma in the hands of his disciples. For Holmes, in contrast to some of his successors, the precept of clear and present danger was one of limited applicability. The Justice used it as a guide for judges in the application of espionage and criminal syndicalism statutes to particular factual situations—an adaptation of the common law principles of incitement to crime. Unfettered discussion is "essential to democracy," but inducing illegal action is not. The danger rule was Holmes' litmus for fixing the point at which words cease to be "keys of persuasion" and become "triggers of [illegal] action." But he neither held nor implied that incitement to crime was the only basis for restraint of utterance. That was merely a particular application of a general principle, namely, that democracy need not tolerate abuse or perversion of its freedoms.

Certainly there are many abuses which cannot be measured in terms of incitement and danger. When a state's interests in educating its youngsters in English was subsumed by the Court to a Lutheran parochial school teacher's interest in teaching and expressing himself in German, Mr. Justice Holmes dissented on reasonable basis grounds. He did not attempt to weigh the conflicting interests in danger test terms as some of his successors did in the comparable Flag Salute litigation. That the danger test


The public interest involved is much the same in both cases, though the private interests differ somewhat. The Flag Salute was treated as a problem of religious freedom, while in the Meyer case the economic interest of the teacher was emphasized, though there are clear civil liberty overtones. The emphasis on economics is explained by the fact that as of 1923 the Court had not yet been willing to bring civil liberty within the protection of the Fourteenth Amendment. When it did so two years later, the Meyer case and Pierce v. Society of Sisters, 268 U. S. 510 (1925) based upon it. "cleared the ground" for that result. Chafee, Free Speech in the United States 321-322 (1942).
reveals no imminent danger (abuse) in such circumstances is no more significant than failure of a barometer to disclose an impending avalanche. Holmes' danger test is meaningless in contexts where there is no problem of inducement or incitement to crime.

Of course the Constitution does not protect "force-words," but neither does it forbid majorities to be "foolish." It merely requires that dissenters be free to make the most of such "foolishness" argumentatively. Forbidding "free speech" in German did not hobble society's thinking process. No ideas were repressed. No one was denied liberty to participate in the political processes, nor to attempt to change public opinion. In short the purpose of the free expression clauses was not violated. Similarly on the Massachusetts Supreme Court Holmes upheld, as reasonable, state efforts to forbid certain political activities by policemen and to restrict speech-making on Boston Commons. Clearly the Justice distinguished between restrictions on ideas and mere regulation of modes of expression. Only when the governmental thrust was against an idea as such did Holmes apply the danger test—his purpose being to give ideas full protection up to that final point where they merge into misconduct. But when the public animus was not censorious in purpose or substantial effect, when it was directed merely against impropriety in terms of time, place or manner of expression, Holmes' criterion was the less stringent reasonable man test.

"Congress [like the states] certainly cannot forbid all effort to change the mind of the country." The democratic political processes require substantial opportunity for public discussion of all ideas. But those processes are not materially impeded when, for example, the public sets aside a park to furnish opportunity for repose free from political or religious polemics. The most that a court may ask in such circumstances is whether there are reasonable opportunities for adequate public discussion elsewhere.

When after a long period of neglect the danger approach was resurrected by a quartet of libertarians in the 1940's, the distinction between restraints upon a speaker's mind and restraints upon his

31. Holmes' vote in Pierce v. Society of Sisters, 268 U. S. 510 (1925) seems to indicate simply that he saw in Ku Klux Klan inspired legislation there involved more than a mere attempt to regulate modes of expression.
manners was lost. The resulting perversion of Holmes' danger test into a formula of general coverage is the source of the "Roosevelt Court's" civil liberty troubles, leading to such anarchic results as to make a mockery of trial procedure, \textsuperscript{34} privacy of the home, \textsuperscript{35} or safeguards against crooked labor organizers. \textsuperscript{36} It is one thing to hold with Holmes that clear and present danger justifies restriction. It is something quite different to hold that no restriction is permissible in the absence of imminent danger—which is just about the position of some members of the Roosevelt Court. The danger test simply is not sensitive to an avalanche of non-violent abuse, nor was it designed to be.

But if Mr. Justice Holmes tried to narrow the range of legislative restraints upon ideas, he sought simultaneously to leave broad scope for legislative experiments in economic control. His double standard was grounded both in the meaning of democracy (as we have seen) and the language of the Constitution. For the First Amendment speaks in far plainer terms than do the due process clauses. \textsuperscript{36a} Indeed any economic content which the Court "found" in due process it put there. Only very late in the history of that ancient concept did it become the embodiment of the dogmas of pseudo-laissez-faire. Such improvisation by the judicial process of inclusion and exclusion, such bald, unlimited Constitution-making by judges in defiance of universal democratic trends was more than Holmes could abide:

"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

For many, perhaps most, of its ardent advocates "state's rights" does not mean freedom for a state to govern itself. They use the

36a. As to Holmes' grounds for reading free speech into the due process clause of the Fourteenth Amendment, see Gitlow v. New York, 268 U. S. 652, 672 (1925) (dissenting opinion).
term merely as a club to beat Congress over the head. For when states do attempt positively to use their reserved powers, "states righters" are apt to be among the first to denounce the effort as an interference with "natural rights" of individuals. For Holmes, freedom for positive local self-government was real:

"We fear to grant power and are unwilling to recognize it when it exists. . . . when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. . . . But police power is often used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change."

"I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and the Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain. . . . The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."38

Unlike some who came before and after him, Holmes would not restrict due process to its orthodox procedural context. He may have thought it futile, to attempt so lost a cause. For whatever reason, the Justice confined his efforts to the more feasible task of objectifying and broadening the standards of substantive due process. Divorcing it from the "accident" of judges' economic predilection, he would fill its inherent "void" with content especially befitting a polity grounded on the total thinking processes of society. The Constitution was "made for people of fundamentally differing views." It guaranteed free expression of those views to facilitate formation of an informed consensus of opinion as the basis of government. When most members of the community after free discussion were in agreement upon the need for economic regulation, who were judges to interpose an improvised due process prohibition? Holmes would limit judicial interference in such cases to those rare instances when the democratic process of dis-

discussion and consensus had so misfired as to produce results that no reasonable man could support:

"I think that... the [due process clause of the] Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the [maximum hour for bakers] statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work."

If to a layman the reasonable man standard appears as slippery as judicial predilection, it is not so in the ancient tradition of the common law of which Holmes was master. Recognizing that judicial review was an established part of our constitutional system, the Justice knew all too well its tendency to degenerate into judicial supremacy. And so to respect the one and guard against the other he resorted to that tried and true principle of the common law which protects jury findings from intrusion by judges. Thus a legislative determination of economic relationships, like a jury verdict, must stand as against due process objections regardless of how erroneous it may seem to judges, unless they are prepared to hold that no reasonable person could have found as the legislature, or jury, did find. Thus Holmes equates the two great institutions of an ancient heritage of freedom. For him jury and legislature—the authentic voices of the people—have the same fundamental sanctity, the same substantial independence of judicial fiat. As the Justice's leading disciple put it, "In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our government be exercised with vigorous self-restraint." Just as it is a basic function of juries to temper general law with concrete justice as understood by the community, so it is a function of legislatures to conserve the Constitution by keeping it alive to popular aspirations.

Of course due process was not the only chink through which pseudo-laissez-faire crept into the Constitution. The division of powers between nation and states was also susceptible of interpretation in ways thoroughly compatible with the view that business-

39. See note 37 supra.
40. See Mr. Justice Frankfurter in A. F. of L. v. American Sash & Door
men should have special immunity from both congressional and local regulation. Thus when Congress sought to discourage the use of child labor by excluding its products from the channels of interstate commerce five members of the Supreme Court held that to be an undue interference with "states' rights."\textsuperscript{41} Here was a reversal of the Tenth Amendment, an expression of the concept that has been called dual federalism. For in effect the Court was saying that the reserved powers of the states limit, or measure, the expressly delegated powers of the nation. The Constitution provides the exact opposite. Mr. Justice Holmes, with three associates, dissented:

"The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in \textit{Champion v. Ames}. Yet in that case \textit{[as re the tariff]} it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."\textsuperscript{42}

To be sure when the national tariff come before the Court,\textsuperscript{43} its validity was sustained though, of course, it "meddled" with state affairs quite as much as did restrictions on the shipment of child made goods. Thus \textit{laissez-faire} on the bench accurately reflected the ambivalence of businessmen. For as Bryce had observed, "one-half of the capitalists are occupied in preaching \textit{laissez-faire} as..."
regards railroad control [or labor legislation], the other in resisting it—in tariff matters. . . .”

But if Holmes' Court took a dim view of national power when Congress sought to regulate business, its views on that subject were generous where such an attitude served to invalidate state economic controls. Thus when Pennsylvania undertook to prevent fraud in the local sale of steamship tickets, the Court found "direct" interference with the dormant commerce power of Congress. Holmes, Brandeis and Stone objected:

"The statute is an exertion of the police power of the state. Its evident purpose is to prevent a particular species of fraud. . . ."

"The statute is not an obstruction of commerce. It does not discriminate against foreign commerce. It does not affect the commerce except indirectly. Congress could, of course, deal with the subject, because it is connected with foreign commerce. But it has not done so. . . . Thus there can be no contention that Congress has occupied the field. And obviously, also, this is not a case in which the silence of Congress can be interpreted as a prohibition of state action. . . . If Pennsylvania must submit to seeing its citizens defrauded, it is not because Congress has so willed, but because the Constitution so commands. [We] . . . cannot believe that it does. . . ."

"In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems . . . [to us] too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached." 46

But it is not to be supposed that Holmes was insensitive to the

44. In Swift and Co. v. United States, 196 U. S. 375 (1905) a unanimous bench went along with Holmes in the most generous view of the national power to regulate business that the Court had ever taken. One suspects that some of the laissez-faire Justices must have felt compelled to do so for political reasons. The legislation in question was designed to protect farmers from sharp business practices at the stockyards. It would not have been politic to antagonize both farmers and workingmen. The Lochner case was decided during the same year. Adair v. United States, 208 U. S. 161 (1908) was soon to come. Both were bitter blows to labor.

Holmes' position in Northern Securities Co. v. United States, 193 U. S. 197, 400 (1904) does not result from a narrow view of the commerce power, but from the common law lawyer's strict interpretation of statutes. The latter position is perfectly compatible with a deep respect for democracy—when democracy speaks it must speak clearly, lest statutory "interpretation" become another vehicle for the assertion of judicial supremacy.


46. Ibid.
danger of the balkanization of America through state interference
with national affairs—nor that, like Chief Justice Taney, he
would leave such problems for adjustment by Congress. In a well
known paragraph he expressed his conception of the federal (as
distinct from the due process) limits on state activity:

"I do not think the United States would come to an end if
we lost our power to declare an Act of Congress void. I do think
the Union would be imperiled if we could not make that
declaration as to the laws of the several States. For one in my
place sees how often a local policy prevails with those who are
not trained to national views and how often action is taken
that embodies what the Commerce Clause was meant to end."48

"Experiments that an important part of the community desires, in
the insulated chambers afforded by the several States" were one
thing for Holmes; poaching on the national preserve was some-
thing else. That distinction is clear. But, initially at least, it is
startling to find the Justice, normally so deferential to legislative
processes, silently dissenting in Clark Distilling Co. v. Western
Maryland Railway. For there unbelievably the Court upheld
Congressional power to override a judicial finding as to what con-
stitutes undue local impediments on national commerce. How Con-
gress can authorize what the Court has found to be constitutionally
prohibited is a problem which the Court's opinion does not fully
explain, and which to this day, though accepted, has not been
elucidated from the bench. The tour de force presumably was too
much for Holmes.

Such in brief outline was the jurisprudence of Mr. Justice
Holmes. Its bedrock foundation was humility and skepticism. One's
private "can't helps" are not necessarily the final truth. Certitude
is not the test of certainty. Accordingly, the Justice stood for free
trade in ideas and the sanctity of economic legislation which em-
body those thoughts that prevailed in the competition of the
open market. Recognizing that all ideas are an incitement, that
many are "dangerous" to the status quo, he would outlaw only
those which in a given context threaten danger so immediately as
to prevent the normal curative process of competition with others.

47. The License Cases, 5 How. 504, 579 (U.S. 1847).
48. Holmes, Law and the Court in Collected Legal Papers 295-296
(1920).
49. See Truax v. Corrigan, 257 U. S. 312, 342-343 (1921) (dissenting
opinion).
50. 242 U. S. 311 (1917).
51. Prudential Life Ins. Co. v. Benjamin, 328 U. S. 408 (1946) and
cases cited therein.
Recognizing, too, that judicial review was an accepted part of our constitutional system, he was deeply aware of its abuse by his associates on the bench. And so he would restrict it (unless the Constitutional text was clear) to cases in which democracy had so misfired as to produce legislation that no reasonable person could support. Finally, the duality of a federal system induced his willingness to referee when a part interfered with the whole, i.e., when a state experiment spilled over the bounds of its insulated chamber and impinged upon supra-state interests which belong to the entire people as a national unit. All of Holmes' emphasis was upon freedom to dream, to experiment and to grow. Thoroughly grounded in the history of the common law, he had learned its great lesson well—only those institutions may hope for prosperous survival which accommodate the sense and aspirations of the people.

Epilogue

As the age of Victoria came to an end Holmes, John Dewey, Thorstein Veblen, Charles Beard, and James Harvey Robinson led a pragmatic revolt against formalism, abstraction and deductive methodology in the social sciences. They would wipe out the remnants of conceptualism and syllogistic reasoning by emphasizing that "the life of science, economics and law was not logic but experience. . . ." Dewey would free philosophy of metaphysics and dedicate it to social engineering. Veblen undercut the foundations of classical economics. "Robinson was an ally in the humanization of society and knowledge; Beard punctured myths about legal institutions which blocked social change; and Holmes recognized the legislative power of judges and challenged the view that law was a deduction from divinely ordained principles of ethics."52 What they had in common positively was a deep appreciation for the inductive methods of modern science, and the non-Euclidian impact of history, economics, and cultural environment upon human institutions and ideas. Working for the most part independently of one another, they were on occasion unwilling to accept each other's conclusions.53 It was not so much the logical coherence of their respective views that gave them victory—it was rather the manner in which their common approach promised freedom from the tyranny of anachronistic dogma and the rise of a more rational society. Having carried most of the field in the years prior to

52. White, Social Thought in America; The Revolt Against Formalism 11, 238 (1949).
53. Thus, for example, Veblen notwithstanding, Holmes accepted the major tenets of classical economics.
World War II, their accomplishments now seem commonplace. Indeed many have forgotten (a few have rejoiced in) the strictures against which Holmes and the others fulminated. And so it happens that now in the context of different problems we hear an occasional potshot at the things for which they stood.

What critics of the pragmatic revolt particularly resent is its positivism—its insistence that morality is not less moral, nor law less legal, for being the product of a human community right here on earth. Such criticism is based on the concept of an absolute—Natural Law—to which human moral and legal systems must conform at their peril. In short, only that ethics is truly binding which springs from some transcendently “natural” workshop. As a matter of history he who takes this position finds it necessary to recognize some authoritarian human agency (if only himself) to “interpret” his supermundane codes and characteristically deals somewhat sharply with dissenters. For it is the fate of closed systems of thought to be plagued with “heretics.”

The current attacks upon pragmatism in the social sciences recall the struggle of the physical sciences not so long ago to free themselves from the “eternal truths” of Aristotle and the confines of deductive reasoning. They are true to the tradition which runs from the condemnation of Socrates and the banishment of Galileo, down through the “anti-evolution” laws and the Monkey Trial, to the recent censoring of Alebrt Einstein as “an old faker.” It is important to notice that Holmes’ hecklers do not ground themselves on anything like the old Roman jus gentium form of natural law—an inductively derived and pragmatically tested common denominator of a host of different, earthly cultures. Theirs, rather, is a “brooding omnipresence in the sky,” a metaphysical construct reflecting (one suspects) the very parochial needs of a disintegrating Thirteenth Century European culture. Since then it has meant all things to all men which raises serious difficulties for those who fear that variation proves subjectivity.

Certainly in the confusing ideological conflicts of the cold war era, as in the troubled days of Aquinas, efforts to find comfort in an absolute compel sympathy. But can there be more in our absolutes

54. A constantly repeated theme in the latest attack upon Holmes appears to be that pragmatism offers no comfort or consolation. See Lucey, Holmes—Liberal—Humanitarian—Believer in Democracy?, 39 Geo. L. J. 523, 528, 529, 536, 538 especially, 555-557 (1951). But does the validity of a philosophy depend upon its ability to comfort or console? If Father Lucey thinks so, he is far more of a pragmatist than he purports to be. Reversing Hobbes, he apparently bases his natural law system on a pragmatic foundation.
than human fear and frustration put into them? Is there anything in the difference between "is" and "ought" than the familiar phenomena called cultural lag—yesterday's winged "ought" being the slovenly "is" of today and so on ad infinitum? In any case, surely "oughts" are the concern of law-making (legislative), not law-enforcing (courts), branches of government. Otherwise the "independence" of judges would be an affront to the basic principle of democratic self-government.

One of the latest of the potshots at pragmatism is the attack upon Holmes by Mr. Harold R. McKinnon of the San Francisco Bar.\textsuperscript{55} So thoroughly sound was the Justice in the context of his times that even Mr. McKinnon recognizes Holmes' "judicial work" was "right," insisting only that his "legal theory" was "wrong."\textsuperscript{56} It follows that a majority of the great dissenter's associates made "wrong" decisions though by Mr. McKinnon's standards they had the "right" philosophy.

Having demolished the infidel Holmes, Mr. McKinnon might profitably turn his attention to the true believers who sat with Holmes—those faithful advocates of Natural Law who differ with Mr. McKinnon on its meaning. Whose reading is it to be, Mr. Justice Sutherland's, Mr. McKinnon's or John Doe's? A democrat might answer, "That which prevails in the competition of a free intellectual market, i.e., what most people in the community will accept as just after opportunity for the intellectual cross-fertilization that comes with free discussion." But Mr. McKinnon has only contempt for the ethical views of "the people."\textsuperscript{57} The alternatives, of course, are anarchy or authoritarianism. It seems never to have occurred to our critic that both the people and their political representatives might have natural law insights—that judges do not necessarily have an exclusive monopoly in that realm. Indeed, if one insists upon medieval terminology, it may be said that Holmes' genius consists precisely in his attacks upon the judicial monopolization of natural law. For if the Justice's words are read in the context of time and place, it is clear that they were directed not so much against natural law as against the judicial perversion of it.


\textsuperscript{56} McKinnon, \textit{supra} note 55, at 345. See also 343, 344.

\textsuperscript{57} \textit{Id.} at 264, 343, 345.
To leap word-fences and come to grips with the reality that lies behind them is a lesson that young Oliver must have learned in the revolt which his father and "Uncle Waldo" Emerson led against the New England perversion of puritanism. The difficulty is that the great concept of natural law may be, and on the bench as elsewhere often has been, perverted into an elastic formulary to sugarcoat a narrow and sometimes selfish parochialism. It is one thing to press natural law against a king who purports to rule by divine right; to urge it in conjunction with judicial supremacy to frustrate democratic self-government is something quite different. To urge one's personal absolute as a norm against which to discuss earthly justice is quite different from insisting upon it as the only true and binding ethics. Finally, we may accept the idea of natural law without adopting the view that it is somehow "natural" only to judges and not to voters or their political representatives.

For Mr. Justice Holmes morality was not less moral for being the product of the human community in which he lived. He did not require the occult to bolster his sense of decency, nor to justify his faith in the perfectibility of man. He preferred to formulate his major premises not from preconceptions, but from experience and observation. True to the democratic tradition, he honored the inquiring mind—for him there were no heretics. His skepticism was in the ancient Greek tradition that questioning is the road to knowledge. He "had the moral courage to accept uncertainty and the intellectual humility to know that he could not know—This is Truth."[58]

58. I use the term as Att'y Gen. (now Mr. Justice) Jackson used it in his, The Struggle for Judicial Supremacy (1941).
59. See Rodell, Justice Holmes and His Hecklers, 60 Yale L. J. 620 (1951).