
HOLMES AND DISSENT

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Holmes saw the dissent as a mechanism to advance and preserve arguments and as a pageant for wordplay. Dissents, for Holmes, occupied an interstitial space between law and non-law. The thought and theory of pragmatism allowed him to recreate the dissent as a stage for performative text, a place where signs and syntax could mimic the environment of the particular time and place and in so doing become, or strive to become, law. Holmes's dissents were sites of aesthetic adaptation. The language of his dissents was acrobatic. It acted and reacted and called attention to itself. The more provocative and aesthetic the language, the more likely it was for future judges and commentators to return to that dissent to reconsider Holmes's argument—the more likely, that is, that non-law might become law. In this sense, language for Holmes was not just a vehicle for law but also law itself. This paper argues that Holmes's dissents both reflect and revise pragmatist philosophy and that the proliferation of dissents has to do with American pragmatism. Focusing on *Lochner v. New York* (1905), *Abrams v. United States* (1919), and *Bartels v. Iowa* (1923), this paper shows that Holmes's dissents represent an aesthetic adaptation of pragmatism that allows Holmes's writing to become memorable not just for the ideas it articulates, but also for the *way in which* it articulates those ideas.

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Mark Tushnet calls Oliver Wendell Holmes Jr. a “great dissenter” in the constitutional tradition.¹ What is a great dissenter? How and why does Holmes qualify? Tushnet suggests that great dissenters are those judges whose dissenting views have been vindicated by history.² Great dissenters are also rhetoricians.³ Holmes meets both criteria. First, judges and professors of law have for generations cited Holmes’s dissents favorably, and in the coming years, according to Ariel Lief, we must “look for complete vindication of [Holmes’s] role as a dissenter.”⁴ Second, no less than Ralph Waldo Emerson or Henry James, pragmatists with whom Holmes corresponded during various stages of his life, Holmes understood the import and flexibility of language. Known for “his trenchant turn of phrase,”⁵ Holmes was a wordsmith who “crafted his opinions with great care, convinced that one day they would come under the scrutiny of legal commentators.”⁶ He gave “varied and eloquent expression to his philosophy of life and of the law.”⁷ Whereas some Supreme Court justices, most notably Chief Justice John Marshall, larded their purple prose with loose Latin and lawyerisms, Holmes hammered out succinct, hard-hitting prose that smacked of urgency and playfulness at once.

Lief would disagree with Tushnet’s characterization of Holmes as a “great dissenter.” Lief dismisses the title “great dissenter” as “a description which would grossly misrepresent [Holmes’s] position.”⁸ Holmes was not “a voice crying in the wilderness.”⁹ By this Lief means that Holmes dissented neither often nor alone.¹⁰ Holmes explained his intellectual independence, or anti-independence, in this way: “If I think that I am sitting at a table I find that the other persons present agree with me; so if I say that the sum of the angles of a triangle is equal to two right angles. If I am in a minority of one they send for a doctor or lock me up; and I

¹ Mark V. Tushnet, ed., *I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases* (Boston, Massachusetts: Beacon Press, 2008) at xi.

² *Ibid.* at xxii.

³ *Ibid.* at xxi-xxii.

⁴ Alfred Lief, *The Dissenting Opinions of Mr. Justice Holmes* (Buffalo, N.Y.: Fred B. Rothman Publications, 1999) at xi.

⁵ David Henry Burton, *Oliver Wendell Holmes, Jr.* (Boston: Twayne Publishers, 1980) at 8.

⁶ David Henry Burton, *Political Ideas of Justice Holmes* (London and Toronto: Fairleigh Dickinson University Press, 1992) at 11.

⁷ Lief, *supra* note 4 at ix.

⁸ *Ibid.* at ix-x.

⁹ *Ibid.* at x.

¹⁰ “While he has not hesitated on occasion to stand alone, this has rarely been his fate—only once, indeed, in the long period covered by this collection. In seventeen of the fifty-five cases here reported the decisions from which he dissented were reached by a bare majority of the court and in twenty others his dissent was shared by two of his colleagues.” *Ibid.* at x.

am so far able to transcend the to me convincing testimony of my senses or my reason as to recognize that if I am alone probably something is wrong with my works.”¹¹ If this sentence is representative of Holmes’s thinking, then Holmes was not a naysayer who stood by himself against other justices. Indeed, Holmes was more likely to concur than to dissent.¹² When he dissented, other justices joined his opinion even if they did not coauthor it. Lief, *contra* Tushnet, cites Holmes’s opening lines from *Northern Securities Company v. United States*, Holmes’s first dissent as a Supreme Court justice, as evidence of Holmes’s hesitance to dissent: “I think it useless and undesirable, as a rule, to express dissent, [but] I feel bound to do so in this case, and to give my reasons for it.”¹³ Despite his claim that Holmes was not a frequent or go-it-alone dissenter, Lief allows that “at the points where Holmes’ philosophy of life and of the law clashed sharply with that of the majority of his colleagues [...] [Holmes] found it necessary again and again, in many different aspects, in winged words, to expound and justify that philosophy.”¹⁴ Perhaps Lief carves out an alternate path between his and Tushnet’s position on Holmes’s dissents, one that does not essentialize Holmes as contrarian or conformist.

In what follows I will saunter down this alternate path—the path of the law?¹⁵—to arrive at a happy conclusion: that Holmes *was* a great dissenter, not because he dissented often but because he dissented well. Holmes saw the dissent as a mechanism to advance and preserve arguments and as a pageant for wordplay. Dissents, for Holmes, occupied an interstitial space between law and non-law. The thought and theory of pragmatism allowed him to recreate the dissent as a stage for performative text,¹⁶ a place where signs and syntax could mimic the environment of the particular time and place and in so doing become, or strive to become, law. The language of Holmes’s dissents was acrobatic. It acted and reacted and called attention to itself. The more provocative and aesthetic the

¹¹ Oliver Wendell Holmes Jr., “The Natural Law” (1918) 32 Harvard Law Review 40.

¹² “To make his record for non-conformity complete, it is only necessary to add the fact that the opinions in which he has concurred in its judgment of the court or in which he has concurred in its judgment far out-number, in the ratio of eight to ten to one, those in which he has felt it necessary to record his dissent.” Lief, *supra* note 4 at x.

¹³ *Ibid.* at xi. Lief abbreviates the quotation. I quote the fuller version of the sentence from the case. See *Northern Securities Co. v. U.S.*, 193 U.S. 197, 24 St.Ct. 436, 468 (1904).

¹⁴ Lief, *supra* note 4 at x-xi.

¹⁵ C.f., Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harvard Law Review 457.

¹⁶ C.f., Richard Poirier’s comment that writing “is more surely the representation of writing itself as an activity, of thinking rather than thought, a dramatization of *how* life may be created out of words.” Richard Poirier, “Why Do Pragmatists Want to Be Like Poets?” in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture*, ed. by Morris Dickstein (Durham, N.C.: Duke University Press, 1998) at 352.

language, the more likely it was for future judges and commentators to return to the dissent to reconsider Holmes's argument—the more likely that non-law might become law. In this sense, language is not just a vehicle for law but also law itself.¹⁷ Is it not surprising that the most memorable judicial opinions are language games—that poets and other literati influence our Supreme Court justices? The prose of Benjamin Cardozo, Holmes's poetic successor on the Supreme Court,¹⁸ echoes that of Matthew Arnold,¹⁹ and Cardozo stands as “the best writer of nineteenth century prose to sit on the Supreme Court in the twentieth century,”²⁰ or perhaps more profoundly as “The Literary Judge.”²¹ “The beauty of his language,” Arthur L. Corbin muses of Cardozo, “made it the perfect expression of his thought.”²² The pragmatist judge Richard Posner calls Holmes and Cardozo rhetoricians and poets,²³ perhaps because the good judicial opinion is a cousin²⁴ of

¹⁷ C.f. the poem of lawyer and pragmatist Wallace Stevens: “Not Ideas About the Thing But the Thing Itself,” in *Stevens: Collected Poetry & Prose* (New York, NY: The Library of America, 1997) at 451-52.

¹⁸ “We need more judges like Holmes and his equally poetic successor on the Supreme Court, Cardozo.” Daniel J. Kornstein, “The Double Life of Wallace Stevens: Is Law Ever the ‘Necessary Angel’ of Creative Art?” (1997) 41 *New York Law School L. Rev.* 1187 at 1294.

¹⁹ “Cardozo’s literary model was Matthew Arnold, the great nineteenth century poet, essayist, critic, and moralist. Matthew Arnold’s graceful and urbane manner of expressing himself had a profound appeal for Cardozo, as it did for many others, and echoes of Arnold’s Olympian prose resonate in the judicial opinions and other writings of his gifted admire, Benjamin Cardozo.” David A. Nelson, “The Nature of the Judicial Process Revisited” (1995) 22 *Northern Kentucky L. Rev.* 563 at 564.

²⁰ Nelson, *supra* note 19 at 564.

²¹ John K. Konenkamp, “The Literary Judge—Benjamin Nathan Cardozo” (2000-2001) 46 *South Dakota L. Rev.* 830. To those who would object to my characterization of law as poetic, I offer Richard Poirier’s comment that “[p]oetry must not be thought of as a mere storehouse of wisdom, a treasure trove. It is, rather, an exemplary act or instrumentality for the continuous creation of truth, an act that must be personal and private and never ending.” Poirier, “Why Do Pragmatists Want to Be Like Poets,” *supra* note 16 at 353. Poirier also says, “In the category of serious poetry I of course include prose, any kind of writing in which the words speak to one another, sometimes across great textual expanses or among several texts; they clarify, inflect, argue among themselves; they merge into metaphoric or tonal concentrations, then self-divide and branch out toward other concentrations and developments. *Ibid.* at 347.

²² Arthur L. Corbin, “The Judicial Process Revisited: Introduction” (1961) 71 *Yale L. J.* 195 at 195.

²³ Richard A. Posner, *Cardozo: A Study in Reputation* (Chicago, IL: University of Chicago Press, 1990) at 56-57.

²⁴ “The judicial opinion and the poem, at first blush, may appear mutually contrary: the judicial opinion asserts itself as stoic, conclusory and unyielding; the poem evolves as ethereal, non-committal and vulnerable. Readers of both may (justifiably) believe these opposing qualities define each genre. However, an alternative perspective exists of the (arguably) unlikely relationship between the judicial opinion and the poem.” Alyson Sprafkin, “Language Strategy and Scrutiny in the Judicial Opinion and the Poem” (2001) 13 *Cardozo Studies in Law and Literature* 271 at 271.

the good poem. And today Justice Antonin Scalia²⁵ has “perfected the ‘opinion as attack ad’ rhetoric, offering quotable criticisms that writers of op ed pieces can incorporate into their work without saying anything new.”²⁶ The function of language is interactive with law; judges like Holmes who realize this symbiotic relationship can harness the one to advance the other.

Because this essay relies on slippery signifiers—“dissent,” “pragmatism”—I will take pains to provide context and definition. This essay will describe the form and function of dissents and show how and why Holmes devised new ways of dissenting. During Holmes’s tenure on the Supreme Court, new technology and shifting social circumstances demanded that old legal concepts and frameworks adapt to the environment. Holmes sought to preserve familiar doctrines but to invest them with modified applicability. He sought continuity not only with the past but also with the future, inflecting his jurisprudence in clever ways. I hope that this essay itself inflects pragmatism in Holmesian fashion.

This essay focuses on three landmark dissents: *Lochner v. New York* (1905), *Abrams v. United States* (1919), and *Bartels v. Iowa* (1923). These dissents appear late in Holmes’s career and are representative of Holmes’s corpus, methodology, and jurisprudence. Interpreting the language of these dissents is tricky, for, as Thomas C. Grey notes, “all commentators agree [on] Holmes’ greatness as a prose stylist,” but when “combined with the range of competing interpretations of his work, even the brilliance of his prose suggests another unflattering account—Holmes the eclectic aphorist, whose purely literary talent for glittering phrases conceals a muddle of mutually inconsistent ideas.”²⁷ Grey’s claim notwithstanding, consistency is not part of Holmes’s jurisprudence, which is consistently inconsistent. “It was Holmes’s genius as a philosopher,” Louis Menand reminds us, “to see that the law has no essential aspect.”²⁸

²⁵ At least one writer has gone to great lengths to demonstrate the parallels between Holmes and Scalia. See Thomas F. Shea, “Great Dissenters: Parallel Currents In Holmes and Scalia” (1997) 67 Miss. L. J. 397.

²⁶ Tushnet, *supra* note 1 at xxii.

²⁷ Thomas C. Grey, “Holmes and Legal Pragmatism” (1989) 41 Stanford L. Rev. 787. Poirier levels this same charge against Emerson: “[T]he ‘Emerson’ who is said to have had such enormous influence on American life and American thinking is the aphoristic Emerson, which is not Emerson at all as I am able to understand him.” Poirier, “Why Do Pragmatists Want to Be Like Poets?” *supra* note 16 at 355.

²⁸ Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001) at 339.

Loosed from the moorings of sectaries and sycophants, Holmes's jurisprudence privileges the practical and experiential over the ideological. Grey himself hints at this point when he declares that "while there are indeed multiple and apparently clashing strands in Holmes' thought, most of them weave together reasonably well when seen as the jurisprudential development of certain central tenets of American pragmatism."²⁹ Holmes's pragmatism anticipates and perhaps even activates the incipient anti-foundationalism that would come to mark legal studies well after Holmes's death. It has everything to do with William James's assertion that a "pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action, and towards power."³⁰ Holmes is part of an anti-dogmatic³¹ tradition "held together by its aversion to absolutes and foundationalism, its fascination with contingency and process, its emphasis on the relationality of the real, its respect for the ordinary, and its delight in moments when the ordinary becomes 'other' and the habitual suddenly unfamiliar."³² In short, Holmes mediates between ideological extremes and prizes workaday practice over epistemological or ethical foundations.

American pragmatism was for Holmes the linchpin between fixity and flexibility. It was the consistent application (fixity) of the rule of adaptability (flexibility): a forward-looking program of determining law and policy based on the consequences of previous actions and the predicted utility of future actions. It was a contextual and responsive exercise in probability. It induced cooperation and diplomacy rather than moving people toward some preordained canon or rule. In that sense it jettisoned claims of objective or absolute truth and so disregarded abstract standards for the constitution and validity of law. Law for Holmes is not a metaphysical certainty—it is whatever works. It is also language: that medium of symbols which is always contingent. Holmes once pronounced that "word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color

²⁹ Ibid.

³⁰ William James, *Pragmatism* (Cambridge: Harvard University Press, 1975) at 31.

³¹ Cf. this quote by Holmes: "What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism." Holmes, "The Natural Law," *supra* note 11 at 41.

³² Giles Gunn, "Religion and the Recent Revival of Pragmatism," in *The Revival of Pragmatism*, Morris Dickstein, ed. (Duke University Press, 2008) at 411-12.

and content according to the circumstances and time in which it is used.”³³ This attention to language is crucial to our understanding of Holmes’s pragmatism and his dissents.

PART ONE: PRAGMATISM AND ITS DISCONTENTS³⁴

Pragmatism is about filtering theory, investing old syntax with new semantics, and recontextualizing paradigms to fit more recent—perhaps more practical—networks of discourse. Theory, for the pragmatist, is organic. It adopts and adapts to its sociopolitical environment as an organism evolves through natural selection. Because “pragmatism” is a slippery signifier, the meaning of which is contentious and contextual, I should clarify how I use the term vis-à-vis Holmes. I mean “pragmatism” to refer to legal pragmatism, which includes several loose tenets: that laws are never *faits accomplis* but relational strategies for negotiating social relations; that truth—and true law—is not absolute but provisional and reflective of human limitations that stand “in quantitatively fixed relations to earlier phenomena”;³⁵ that pieties of human perfectibility and moral certainty are dispensable;³⁶ that social law does not exist apart from human promulgation;³⁷ and that commonsense rather than formalistic and formulaic guidelines ought to motivate judges.³⁸ I take these tenets as given. I do not question their validity—at least not here. This essay is not an occasion for undoing or fine-tuning our understanding of legal pragmatism.

³³ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

³⁴ With apologies to Freud.

³⁵ Oliver Wendell Holmes Jr., “Ideals and Doubts,” in Louis Menand, *Pragmatism: A Reader* (New York: Vintage Books, 1997) at 170. C.f. Oliver Wendell Holmes Jr., “The Path of the Law,” in *The Essential Holmes*, Richard Posner, ed. (Chicago, IL: The University of Chicago Press, 1992) (“The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations”).

³⁶ Legal pragmatism’s “core is merely a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans. Among the pieties rejected is the idea of human perfectibility; the pragmatist’s conception of human nature is unillusioned. Among the conceptualisms rejected are moral, legal, and political theory when offered to guide legal and other official decisionmaking.” Richard Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2003) at 3.

³⁷ “It is the merit of the common law that it decides the case first and determines the principle afterwards.” Oliver Wendell Holmes Jr., “Codes, and the Arrangement of the Law” (1870) 5 *Am. Law Review* 1, reprinted in Sheldon M. Novick, ed, *The Collected Works of Justice Holmes*, Vol. 1 (Chicago, IL: University of Chicago Press, 1995) at 212. See also Louis Menand, *The Metaphysical Club*, *supra* note 28 at 338.

³⁸ Posner, *Law, Pragmatism, and Democracy*, *supra* note 36 at 49-52.

The term “pragmatism” was not in circulation during the early years of Holmes’s long career. A young Holmes would not have declared himself a pragmatist.³⁹ Nevertheless, the term “pragmatism” gained purchase as Holmes aged, partially because of the fame (or notoriety) of such pragmatist thinkers as Charles Sanders Peirce,⁴⁰ William James, John Dewey, Jane Addams, and George Herbert Mead. Writers on Holmes, most notably Richard Posner,⁴¹ have assigned this signifier—“pragmatist”—to Holmes’s methodology. That is in part because Holmes, a habitué of the Metaphysical Club, hobnobbed with eminent pragmatists who appear to have influenced him. He befriended Henry James and Henry Adams and knew Ralph Waldo Emerson—to whom the future justice remarked, “If I ever do anything, I shall owe a great deal to you.”⁴² For a time Holmes admired William James,⁴³ although their relationship was strained because Holmes and James shared affections for the woman whom Holmes would later marry. Holmes came to appreciate John Dewey⁴⁴ and George Santayana.⁴⁵ All of these men and women paved the way for legal pragmatism because they influenced Holmes.

³⁹ Louis Menand, *Pragmatism*, *supra* note 35 at xix-xx.

⁴⁰ For a comparison of Holmes and Peirce and their commitment to pragmatism, see generally Cathrine Wells Hantzis, “Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.” (1988) 82 *Nw. U. L. Rev.* 541.

⁴¹ Posner submits that Holmes’s works *The Common Law* and “The Path of the Law” “supplied the leading ideas for the legal-realist movement (more accurately, the legal-pragmatist movement)—the most influential school of twentieth-century American legal thought and practice.” Richard Posner, “Introduction,” *The Essential Holmes*, *supra* note 35 at xi.

⁴² Holmes to Patrick Augustine Sheehan, Oct. 27, 1912, *Holmes-Sheehan Correspondence*, David Henry Burton, ed. (Port Washington, N.Y., 1976) at 51.

⁴³ “The friendship between Oliver Wendell Holmes and William James began to unravel in the 1870s, not long after the Metaphysical Club ended its brief life. In part the unraveling was just the ordinary weakening of the bonds of young male attraction in the presence of a different kind of attraction. Holmes married Fanny Dixwell in 1872; James married Alice Gibbens in 1878. But in part it was the consequence of a decision by each of the friends that what seemed a stimulating difference of opinion was also a personal difference deep enough to make for incompatibility. In the dispute between James and Chauncey Wright—the dispute over whether our wishes and desires have any effect on the business of the universe—Holmes sided, unequivocally, with Wright. He came to think James incurably soft-hearted, and James, in response, came to think Holmes repellently hard-headed.” Louis Menand, *The Metaphysical Club*, *supra* note 28 at 337.

⁴⁴ “Holmes did not discover Dewey until the latter’s *Experience and Nature* was recommended to him by a young Chinese friend. He began it skeptically; it seemed to be so badly written. But he read it twice in the winter of 1926-27, and wrote his impressions in five letters over a period of a year and a half. ‘He seems to me,’ Holmes said, ‘to have more of our cosmos in his head than any philosopher I have read.’ Holmes reread the book in 1929 when a second edition appeared, and recommended it to Sir Frederick Pollock. The only clearly intelligible sentences Pollock professed to find in it were the two pages Dewey had quoted from Holmes.” Max Harold Fisch, *Classic American Philosophers: Peirce, James, Royce, Santayana, Dewey, Whitehead*, 2nd ed. (Fordham University Press, 1996) at 8.

Holmes's personality advertised pragmatism. He despised the pieties of human perfectibility and certainty not just because they offered precarious justifications for legal policy—and they did and often do—but because he “was privately dismissive of people whose views he found sentimental or pious.”⁴⁶ Holmes could be downright obnoxious in these prejudices. James Bradley Taylor wrote that Holmes was “with all his attractive qualities and solid merits, wanting sadly in the noblest region of human character—selfish, vain, thoughtless of others.”⁴⁷ These qualities have nothing to do with pragmatism, but they call attention to Holmes's dismissiveness of individuals who, to him, represented absolutism. Holmes did not just reject abstractions and truth claims; he made a display of doing so. His at times flamboyant personality publicized pragmatism as he made sure, through behavior and not just writing, that his posterity would remember what he said and where he stood.

Holmes's pragmatism is controversial⁴⁸ because it is so unlike that of his counterparts: Dewey, Peirce, and James. Grey problematizes our thinking about Holmes as a pragmatist by calling attention to Holmes's own ambivalence about landmark pragmatists:

[W]hile Holmes did express admiration for Dewey, he never made clear what it was that he admired. And his more specific remarks about pragmatism and the other well-known pragmatists were critical, often harshly so. He condemned James' version of pragmatism as ‘humbug’; and while he apparently knew little of Peirce's ideas, he did not think highly of what he knew. In the end, what Holmes said directly about pragmatism and its exponents does not by itself support placing him in the pragmatist camp.⁴⁹

⁴⁵ See, e.g., Roger Kimball, “The Contribution of George Santayana,” in *The Genteel Tradition in American Philosophy and Character and Opinion in the United States*, James Seaton, ed. (New Haven, CT: Yale University Press) at 190.

⁴⁶ Louis Menand, *The Metaphysical Club*, *supra* note 28 at 338.

⁴⁷ *Ibid.* at 347 (citing James Bradley Thayer, Memoranda book D, James Bradley Thayer Papers, Harvard Law School Library, L MS 2148, vol. 3, 144).

⁴⁸ Those unversed in the history and theory of pragmatism—i.e., most of the legal community—are likely to be stumped by Holmes's antifoundationalism. As Gary Minda notes, “[T]here is much about Holmes that we still do not understand. We are still trying to figure out why Holmes is such an important figure in the development of American law. We are still trying to make sense of the cryptic nature of Holmes's legal theory. We are still struggling to appreciate the significance of Holmes's role in the development of American jurisprudence.” Gary Minda, “Commentary: The Dragon in the Cave” (1997) 63 *Brooklyn L. Rev.* 129.

⁴⁹ Grey, *supra* note 27 at 788.

I do not have the space and time to tease out Grey's comments⁵⁰ or to unpack the differences between legal pragmatism and its non-legal variants. Holmes's legal pragmatism overlaps with so-called philosophical pragmatism such that discussing one is fruitless without discussing the other; a thoughtful treatment of Holmes must attend to multiple conceptions of pragmatism. Whatever Holmes took pragmatism to mean, his application of this methodology supports Richard Rorty's later claim that pragmatists "do not think inquiry can put us more in touch with non-human reality than we have always been, for the only sense of 'being in touch' they recognize is causal interaction (as opposed to accurate representation)."⁵¹

Contra philosophical pragmatism, which Posner deems "orthodox" pragmatism,⁵² legal pragmatism regulates social relations and focuses on the everyday. "Everyday pragmatists," Posner clarifies in his characteristically roundabout way, "tend to be 'dry,' no-nonsense types"⁵³—presumably the types who regard "adherence to past decisions as a (qualified) necessity rather than as an ethical duty."⁵⁴ Judges who ascribe their *modus operandi* to such anti-foundational and precedent-based techniques can transform the useful or convenient into the legal or operative. "An everyday-pragmatist judge," Posner submits, "wants to know what is at stake in a practical sense in deciding a case one way or another. . . . [He] does not deny the standard rule-of-law virtues of generality, predictability, and impartiality, which generally favor a stand-pat approach to novel legal disputes. He just refuses to reify or sacralize those virtues. He dares to balance them against the adaptationist virtues of deciding the case at hand in a way that produces the best consequences for the parties and those similarly circumstanced."⁵⁵ A pragmatist judge might dissent on the grounds that the majority opinion abstracts into airy flourishes

⁵⁰ I will, however, provide these telling lines by Posner: "One reason for the disconnect between philosophical pragmatism and legal and political practice is that the propositions that define pragmatism are propositions of academic philosophy, a field that has essentially no audience among judges and lawyers—let alone among politicians—even when philosophy is taken up by law professors (some of whom have a Ph.D. in philosophy) who think it *should* influence law. This gap between theory and practice might be thought to imply that judges should be educated in philosophy—with emphasis on pragmatism! I doubt that that is a good idea, even if judges are considered, as politicians would not be, educable in philosophy." Posner, *Law, Pragmatism, and Democracy*, supra note 36 at 11.

⁵¹ Richard Rorty, "Pragmatism as Anti-Authoritarianism," in *A Companion to Pragmatism*, Vol. 32, John R. Shook & Joseph Margolis, eds. (Malden, MA; Oxford; and Victoria, Australia: Blackwell Publishing Ltd., 2006) at 263.

⁵² Posner submits that "orthodox pragmatism has little to contribute to law at the operational level. It has become a part of technical philosophy, in which few judges or practicing lawyers take any interest." Posner, *Law, Pragmatism, and Democracy*, supra note 36 at 41.

⁵³ Posner, *Law, Pragmatism, and Democracy*, supra note 36 at 12.

⁵⁴ Posner, *Law, Pragmatism, and Democracy*, supra note 36 at 60.

⁵⁵ *Ibid.* at 12.

about “justice,” “rights,” and “equity.” Opinions that turn on such loaded terminology reveal more about judges’ personal ideologies than about the “meaning” of the terminology.

Dissents are not products of pragmatism, but they are conducive to pragmatism.⁵⁶ They emphasize the fallibility of law by suggesting that the majority or plurality opinion does not embody absolute or perfect legal principles. By conserving rules and practices that, although rejected in the case at hand, might prove workable in the future, dissents treat law as meliorative: a medium through which data and experience are transmitted, tested, preserved, revised, adjusted, and modified. If judicial opinions are the praxis—the locus where theory and practice converge—then dissents are where theory and policy collapse into a state of possibility.⁵⁷

⁵⁶ “Every judicial opinion misreads past precedent. No judge or group of judges can state unequivocally and without distortion the holding of a prior case or the precise rule to be applied in the case at hand. To find and apply a rule of law requires interpretation of past precedent, and the act of interpretation necessarily involves some degree of misreading. Antithetical criticism therefore should be applicable to all opinions—unanimous, majority, plurality, concurring, and dissenting.

Dissents are nonetheless an especially appropriate focus for antithetical analysis. The agonistic struggle by definition involves a certain element of isolation, because insofar as we are defined and determined by our predecessor's influence, we must, as part of the creative moment, separate our sense of identity from the past that constitutes our present. Breaking from the tradition, we find ourselves alone. This suggests that while both the majority and the dissent will misread precedent, the dissent will often present the more extreme misreading. In dissent, the Justice stands apart; similarly, in concurrence his theory will be his own, even while he agrees with the result.

It is possible, but less likely, that a majority opinion will advance a more radical misreading than a dissent, or even that a unanimous opinion, when viewed against its precedential background, will constitute a strong misreading. Collective misreadings do occur—the American Revolution, the Constitution, and several of the Amendments constitute strong collective misreadings on a grand scale—but they are much more difficult and consequently much less frequent. To be valued as great, one must stand out; while collective bodies do at times stand out as great, both the requirement of a radical break and the inherent exclusivity of the term suggest that ‘greatness’ will be found more often in an individual than in a committee. If the antithetical theory holds, then, revisions in the law will often surface initially in dissenting or concurring opinions, and only later, if they are truly strong, will they be incorporated into the mainstream.” David Cole, “Agon at Agora: Creative Misreadings in the First Amendment Tradition” (1986) 95 *Yale L. Journal* 857 at 869-70.

⁵⁷ “The use of a dissenting opinion as if it were a canonical authority indicates that the constitutional canon must be open to revision. After all, dissenting opinions could not possibly always have been authoritative. They must have been rejected positions at first and then at some later point found their way into a revisable canon. The fact that positions once rejected can sometimes become canonical raises the question of what distinguishes redeemed and redeemable rejected positions from rejected positions that never become authoritative. That question has been a popular one, and there is a profusion of literature on how and why certain dissents have become canonical. Most of those writings seek to identify formal, procedural, or circumstantial factors that contribute to the redemption and canonization of dissents. Moreover, they seek those factors in the texts or circumstances of the dissents themselves, assuming them to be properties of their

Holmes used dissents to refine and exposit legal pragmatism. Unlike most poets, whose writing does not automatically generate social change, Holmes's "poetry" automatically enacted social change. The medium through which Holmes expressed his "poetry" affected public policy.

Commentators have emphasized various aspects of Holmes's poetic pragmatism, including its prediction theory of law (in particular the "bad man theory"),⁵⁸ which entailed the divorce of morality from law; its utilitarianism,⁵⁹ which derived from the Englishmen Jeremy Bentham and John Austin;⁶⁰ its analytical positivism, which assailed purely notional theories of natural law;⁶¹ its consequentialism, which dovetailed with Benthamite utilitarianism;⁶² and its realism that couched law in terms of indeterminacy and arbitrariness.⁶³ A substantial body of law review articles has addressed these and other aspects of Holmes's pragmatism. Despite this attention, however, scholarship about Holmes's pragmatism has not satisfied scholars who cannot seem to reconcile Holmes's writings with the pragmatism of other self-proclaimed pragmatists (those whom Posner calls "orthodox"). *À la*

language, immanent ideas, or circumstances of authorship." Richard A. Primus, "Canon, Anti-Canon, and Judicial Dissent," *supra* note 57 at 244.

⁵⁸ "Holmes is often called a legal pragmatist on the basis of his "prediction theory" and his emphasis on experience in the evolution of law." Rand Rosenblatt, "Holmes, Peirce, and Legal Pragmatism" (1975) 84 *Yale L. Journal* 1123 at 1124.

⁵⁹ Holmes treated law as "a utilitarian instrument for the satisfaction of human desires." Grey, *supra* note 27 at 788.

⁶⁰ Holmes's "legal thought fit in with the utilitarian analytical jurisprudence of Bentham and Austin—the branch of nineteenth-century scientific positivism. But while ideas such as these are consistent with pragmatism, they are in no way distinctive to it." *Ibid.* at 795.

⁶¹ "Holmes's consequentialism contributed to the shift from a largely retrospective view of the judicial process to a more prospective view, and Holmes, more than anyone else, led the revolt against natural law." Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 103 (Chicago, IL: University of Chicago Press, 2000).

⁶² "[P]ragmatists applied the utilitarian test of consequences to theories, as well as to rules for action, on the ground that all beliefs were, directly or indirectly action-guiding and, accordingly, should be judged by their efficacy in leading the agent through experience successfully." Grey, *supra* note 27 at 803.

⁶³ "[I]t is true that Holmes was a central figure in the American movement known as Legal Realism, and it is true that that movement influenced the development of Critical Legal Studies (CLS)." Tim Griffin, "Introduction," in Oliver Wendell Holmes, Jr., *The Common Law* xxiv (Brunswick, NJ: Transaction Publishers, 2005).

Posner,⁶⁴ this essay about dissents does not try to prove or disprove strains of pragmatist thinking.

Dissents clarify not only how Holmes's pragmatism functions but also how it relates to networks of discourse. The contiguity between dissent and its opposite—consent or agreement—opens up a space for possibility. Holmes often situated himself in this liminal space. From here he could receive and transmit doctrine and cue judges to transform potentiality into actuality. He could even preserve that which was not doctrine but which might become doctrine. In a recent Supreme Court decision,⁶⁵ for example, both the majority and the dissent cite Holmes's dissents.⁶⁶ This intertextuality suggests that Holmes's dissents remain influential—so much so that they have become “law” decades after their authoring. Holmes appears to have realized how literary flair could call attention to dissents, increasing the likelihood that future judges would revisit dissents. If dissents could become theaters of performative text—a space of dramatic language—they could draw spectators. Dissents that rose to the level of literature could inspire and sustain re-readings. Law, especially case or judge-made law, is shaped by language, often the language of dissent or exception.⁶⁷ The more acrobatic the language of a dissent, the more likely that language will generate or become future law. Legal opinions congeal into canons just as literature congeals into canons.⁶⁸ To ensure their place in the canon, to preserve their argument for

⁶⁴ Posner says, “I couldn’t prove or disprove them if I tried, and . . . if one may judge by the interminability of philosophical debate, no one could.” Posner, *Law, Pragmatism, and Democracy*, *supra* note 36 at 10-11.

⁶⁵ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁶⁶ Writing for the majority, Justice John Paul Stephens cites to both an opinion and a dissent authored by Holmes. See *Kelo*, *supra* note 65 at 480 [citing Holmes’s opinion in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1931) (“the inadequacy of use by the general public as a universal test”)]; see also *Kelo*, *supra* note 65 at 487 [citing Holmes’s dissent in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (“The power to tax is not the power to destroy while this Court sits”). In *Kelo*, Thomas, dissenting, cites Holmes’s dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (“enact[s] Mr. Herbert Spencer’s Social Statistics”).

⁶⁷ C.f., Giorgio Agamben, *Homo Saver* (Stanford, California: Stanford University Press, 1998) at 1-29. This text interrogates Carl Schmitt’s notion of the state of exception.

⁶⁸ “In recent years, the constitutional canon has been a subject of growing interest and controversy among theorists as notable and diverse as Bruce Ackerman, Jack Balkin, Sanford Levinson, Philip Bobbit, William Rich, Richard Primus, and Suzanna Sherry. The thought, crudely put, is that there are certain texts apart from the Constitution—some are directly derivative, others are not—which resound so powerfully in our constitutional ear that they have hardened, in incompletely defined ways, into part of the fundamental law itself. This idea, in all of its permutations, is profoundly important for constitutional lawyers, particularly as our constitutional culture continues to quake, erupt, and reform along unforeseen and unforeseeable technological and communicative fault lines. After all, it is largely through the ongoing construction and reconstruction of the canon—the reconfiguration of Wittgenstein’s ‘fluid’ and ‘hardened’ propositions—that we accomplish modern

future judges, judges can write in a way that appeals to readers' sensation. Judges can disrupt habits and commonplaces of reading by stimulating sensation.

Arguing that fine, lasting art is what remains useful for future generations because of its "successive consequences" that are "indefinitely instrumental to *new* satisfying events," John Dewey posits that when art loses its utility or instrumentality, it is "quickly exhausted and satiety sets in."⁶⁹ The same can be said of dissents, which can be art: as soon as they lose their utility or instrumentality, dissents exhaust themselves and their potential to become law.⁷⁰ To avoid exhausting themselves, art and dissents must retain a sense of moving tendencies. This sense "supplies thrill, stimulation, [and] excitation" while maintaining a sense of completion, which "affords composure, form, measure, and composition."⁷¹ Just as works of art become classics that retain the "power to generate enjoyed perception or appreciation," so dissents become classics that attract judges and scholars.⁷² Dewey tends to speak of art narrowly in its capacity to bring about pleasure to particular individuals. But what happens when art is transmitted via media—legal opinions or dissents—that operate to control social relations and impact entire nations?

The meliorative processes of *stare decises* and the common law lend themselves to preserving and revising form, but only literary judges like Holmes can endow form

constitutional reform; or something akin to the five-staged 'constitutional moments' that Ackerman has so insightfully identified. And, as our discourse evolves to incorporate terms like 'superprecedent' and 'landmark statute,' it is critical that we continue to work towards a coherent theory of the canon and its function in constitutional practice." Ian Bartrum, "Constitutional Canon as Argumentative Metonymy," 18 *William and Mary Bill of Rights Journal* 327, 327-28 (2009).

⁶⁹ John Dewey, *Experience and Nature* (Mineola, N.Y.: Dover Publications, 1958) at 365.

⁷⁰ Dewey speaks of laws that become mere matters of form because they lose their ability to excite the reader: "Acts originally performed in connection with, say, the exchange of property, performed as part of the dramatic ceremony of taking possession of land, were not treated as mere evidences of title, but as having a mystic power to confer title.

"Later, when such things lose their original power and become 'mere matters of form,' they may still be essential to the legal force of a transaction, as seals have had to be affixed to a contract to give it force, even though there was no longer sense or reason in their use." Dewey, *Ibid.* at 376. The activities meant to appeal to the sensorial to illuminate law become merely vacant-seeming symbols once those activities become routine. Holmes's literary flair affords him wide latitude to prevent his dissents from become routine. His writing will not become a vacant-seeming symbol lost to history because it continues to be useful and instrumental: it continues to excite and provoke.

⁷¹ *Ibid.* at 376.

⁷² *Ibid.*

with a function: to excite or provoke. On this score, it bears quoting Dewey on form and art as if he were referring to judicial dissents: “‘Forms’ are not the peculiar property or creation of the esthetic and artistic; they are characters in virtue of which anything meets the requirements of an enjoyable perception. ‘Art’ does not create the forms; it is their selection and organization in such ways as to enhance, prolong and purify the perceptual experience.”⁷³ Holmes did not choose the form and framework of dissent, but he chose how to express himself within that form and framework. He selected and organized his syntax to arouse what Dewey calls perceptual satisfactions.⁷⁴ Holmes’s dissents are more than mere writing: they are stimuli. That is why they are canonized and occasionally become law.

PART TWO: THE DISSENT

A. BEAUTIFUL PARADOXES⁷⁵

Dissents are non-binding legal opinions written by judges who wish to register their disapproval of a majority or plurality opinion.⁷⁶ They define their content against some standard—the majority or plurality opinion—and announce themselves as exceptions.⁷⁷ Exceptions confirm and authorize rules at the same time that they call rules into question.⁷⁸ Although always part of the document proper—the decision as recorded on paper—dissents stand outside the law. They do not contain law except by reference to “the opinion.” They are not law but

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ “In the hierarchical world of legal authority, the notion of dissenting opinions as thus influential is at once paradoxical and intriguing. It raises numerous questions such as how particular dissents came to be renowned, why others were not, and what role the canonization of dissents has played in the development of American constitutional law. Yet the legal literature contains surprisingly little on the phenomenon of canonical dissents or dissenters.” Anita S. Krishnakumar, “On the Evolution of the Canonical Dissent” (2000) 52 Rutgers L. Rev. 781 at 783.

⁷⁶ “The practice of dissent in the Supreme Court dates back almost to the Constitution’s ratification, and judicial reversals of decisions issued over dissent surfaced as early as the mid-1800s. Yet, no dissents became canonized until the twentieth century.” Krishnakumar, *supra* note 75 at 783-84.

⁷⁷ “The canonicity of a dissent is not a function of the dissent itself but of the later court or courts that redeem it and make it canonical. [...]The canonization of dissent is largely a product of later courts’ normative approval; the courts that revise the canon by redeeming dissents do so chiefly on the basis of their view of the substantive merits of those dissents.” Primus, *supra* note 57 at 247-248.

⁷⁸ C.f., Agamben, *supra* note 67 at 1-29.

may and often become law.⁷⁹ Lawyers frequently cite dissenting opinions to distinguish their positions or to support a change in law; judges, likewise, frequently extract law from dissenting opinions.⁸⁰

Dissents are beautiful paradoxes. They acknowledge and defy the official decision while conserving arguments that supposedly have lost their practical bearing. Variations of these arguments are not yet, or may once have been, law. The paradox of a dissent is that it both reinforces and undermines the rule, the law. It is at once law and not law, suspended in a state of potentiality. From this potentiality—this liminality—springs forth the rhetoric necessary to maintain an illusion of legitimacy should a previous position, recorded in a dissent, become viable or desirable and eventually legal. In the common law tradition, putatively at least, all rules must derive from other rules, must have as their *telos* something more than human whim. Laws that do not maintain an illusion of legitimacy—that reduce law to the fashions and fancies of judges—lose credibility in the mind of the *polis*. Illegitimate laws are difficult to enforce without resort to tyranny. The *polis* does not respect illegitimate rules, and law is in a sense whatever the *polis* accepts, though custom and prescription, as law. If anything, the *polis* fears illegitimate rules, the enforcement of which entails force, fear, and violence. The *polis* resists illegitimate rules by the same mechanisms—force, fear, and violence—that the state employs to maintain supremacy. At first blush, dissents would seem to fly in the face of a legal system that prizes foundations. But what happens when foundations give way? What happens when the *polis* no longer accepts a supposed principle of law? What happens when the *polis* no longer believes in the

⁷⁹ “Prior to the New Deal, the Supreme Court was extremely reluctant to admit judicial error, let alone to overturn its earlier decisions. Indeed, it feared that doing either would undermine its legitimacy as final arbiter of the nation's law. The Court's unwillingness to impugn its earlier judgments in turn left little room for the vindication or subsequent canonization of its dissents. In fact, on the few pre-New Deal occasions where the resurrection of dissenting opinions might have been appropriate, the Court instead struggled so assiduously to distinguish its prior caselaw—dissents and all—that it eschewed association with dissenting opinions from the past.” Krishnakumar, *supra* note 75 at 785. Nevertheless, dissent came to be viewed differently after the New Deal: “The New Deal [...] forever changed the landscape against which dissenting opinions operated. As with the *Hepburn-Knox* and *Slaughter-House-Lochner* turnabouts, the New Deal Court's “switch in time” effected substantial constitutional change absent any formal amendment. This time, however, the change was preceded by a pronounced public and political rejection of the Old Court's economic rights jurisprudence that forced the recognition of past judicial error, and paved the way for the exaltation of those who had seen it coming.” *Ibid.* at 788.

⁸⁰ “[E]ver since the New Deal made possible the canonization of dissenting opinions, Justices who differ from the majority have had an incentive to dissent rather than compromise, in the hope that their vision might someday be vindicated or immortalized.” Krishnakumar, *supra* note 75 at 825.

efficacy of decisions like *Dred Scott v. Sanford*,⁸¹ *Plessy v. Ferguson*,⁸² or *Korematsu v. U.S.*?⁸³ Either the *polis* reasons that such decisions perverted or else mistook the proper foundations and principles, or the *polis* rejects foundations and principles as illusory. Holmes favors the latter position insofar as he pooh-poohs law as a metaphysical essence. He employs dissent as a strategy to destabilize efforts to essentialize law.

Dissents are like hyphens: in-between spaces where legality is uncertain. Dissents bridge law and non-law. They are the threshold of authority and legitimacy—two mutually reinforcing if not interchangeable concepts. They are, then, the ever-prospective crux of legality. Tushnet submits that judges dissent because other judges “were vindicated by history,” because the “nation came to see the wisdom of *their* [the judges’] constitutional views, and the errors of the majorities that temporarily prevailed.”⁸⁴ Accordingly, dissents are aspirational and precedential, rooted as they are in a history of un-rootedness.⁸⁵ Tushnet adds that “[o]nce we realize, as we must, that some dissenters were wrong at the moment they dissented and wrong thereafter, the story about dissent, and about how history decides who is the winner and who the loser, becomes more complicated.”⁸⁶ But complicated how? Because some dissents languish in a juridical purgatory, waiting to be admitted as law? In a way, yes. “[P]ublishing a dissent,” Tushnet claims, “might be damaging to the law itself” (and therefore complicated) because the “mere existence of a published dissent will give some people—those who agree with the losing side, for example—one reason to hold on to their belief about what the law

⁸¹ 60 U.S. 393 (1857) (holding that Congress did not have the power to create citizenship for slaves; that free slaves were not citizens as contemplated by the Federal or Missouri Constitutions; that the Missouri Compromise was unconstitutional; and that the right of property in slaves is affirmed in the Federal Constitution).

⁸² 163 U.S. 537 (1896) (holding constitutional the state mandate that private services that were “separate but equal” met the requirements of equal protection).

⁸³ 323 U.S. 214 (1944) (holding constitutional the exclusion order leading to the internment of the Japanese on American soil).

⁸⁴ Tushnet, *supra* note 1 at xi.

⁸⁵ “Redeemability [of a dissent] is better understood as a status conferred retrospectively by the later courts that restructure the constitutional canon by reversing yoked pairs. The yoked-pairs model implies that the possibility of redemption is built into the structure of dissents and of the constitutional canon. Reversing a set of yoked pairs involves a reimagining of the constitutional tradition. When such a reversal involves the redemption and canonization of a dissent, it often involves the reimagining of dissenting opinions and of the Justices who authored them. By reimagining a dissenting Justice and presenting him as a heroic figure, and by simultaneously reimagining the meaning of that Justice’s dissenting opinions, courts reshape the constitutional canon and construct authorities on which they can then rely in cases before them.” Primus, *supra* note 57 at 251.

⁸⁶ *Ibid.*

really is.”⁸⁷ Similarly, the appearance of disunity among judges weakens the import and impact of law as set down by the majority, especially if “at least some dissents may be explained as signals from judges to litigants about how to frame future similar cases to increase the chance of success for the argument the dissenting judge supports.”⁸⁸

The dissent is often a laboratory for experimentation, a place where new ideas (or creative insistences upon old ideas) are proposed and documented but not necessarily released upon the *polis*. Dissents are available to the *polis* in that they are public record, but they do not obtain to the *polis*, which may disregard them if it so pleases. Dissents, then, are mouthpieces for change, sometimes forward-looking change, sometimes backward-looking change. In either case, they point beyond themselves and toward the future, sometimes, if not always, incorporating the past. They represent what Rorty calls the accomplishment of pragmatism: the turn of human focus from eternity to futurity.⁸⁹ The implication of dissents is that law is a linguistic game subject to change; law is not a divination of God’s will or else the majority or plurality opinion would not be law.

Dissents are not static but always already in a state of “becoming,” although what they are becoming (perhaps irrelevant, perhaps legal) is always unknown. They toy with sameness and difference: they are like but not like law. Always understood in relation to similar networks of meaning—sedimentary case precedent, controlling statutes, influential law reviews, and the like—dissents imitate and transform the received discourse and ceremonial protocols⁹⁰ of judicial decision-making. They demand different levels of comprehension from different audiences: journalists, law professors, judges, lawyers, law students, and so on. Their success (when they are successful) turns on their underlying cognitive dissonance, their provocativeness, and their ability to tap into sensation.⁹¹

⁸⁷ *Ibid.* at xii.

⁸⁸ Vanessa Baird and Tonja Jacobi, “How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court” (2009) 59 *Duke L.J.* 183 at 186.

⁸⁹ Richard Rorty, “Pragmatism as Anti-Authoritarianism,” *supra* note 51 at 263.

⁹⁰ Acknowledging the authors of the majority opinion, maintaining a polite or else playful stance toward that majority opinion, citing proper case law and precedent—all part of the decorum, etiquette, or procedure of dissents.

⁹¹ “Dissents become canonical for the same reasons that majority opinions become canonical, namely, because of the views that later constructors of the canon take toward the holdings which can be attributed to those earlier opinions. Cases with little abiding significance disappear from casebooks, and their majorities fade as well as their dissents. And where opinions have continuing

Justice Clarence Thomas dissented in *Kelo v. City of New London* on the grounds that the majority had either misconstrued or misread “public use” to mean “public purpose,”⁹² two terms that, although similar in sound, evoke very different meanings that, when applied to actual people and situations, have very different consequences. My point in referencing Thomas (who cites Holmes!) is to suggest that judges are chronically aware of the nuances and implications language. Dissenting judges realize the import and impact of language upon jurisprudence; the more intelligent ones know that aestheticized dissents are likelier to remain in the public purview for years if not decades to come. The author of a dissent ensures—or could ensure—by way of language, what Joan Richardson calls “the successful survival of [text] by making it pleasurable.”⁹³ If dissents represent dead law, then poetry can reanimate the dead and bring old principles back to life. The more pleasurable a dissent, the more memorable it is; the more memorable a dissent, the more likely it will *prehend* law.

B. HOLMES’S DISSENTS AND HISTORICAL CONTEXT

“Each age knows its own ills,” Dewey declares, “and seeks its own remedies.”⁹⁴ The operative word here is “remedies.” Holmes felt that the remedy for social ills, which resulted in legal disputation, was experience—a word “with a number of associations,” but used by Holmes “in a particular sense.”⁹⁵ Holmes meant experience as “the name for everything that arises out of the interaction of the human organism with its environment: beliefs, sentiments, customs, values, policies, prejudices—what he called ‘the felt necessities of the time.’”⁹⁶ So cast, experience is the guiding organ of law, which is evolutionary. Law addresses or ought to address everyday human habits that correspond with future outcomes—that bring about predictable results. What is predictable for one generation is not predictable for the next because habits change over time.

importance, the canonical and the anti-canonical are both preserved, each drawing its significance from the other.” Primus, *supra* note 57 at 302-303.

⁹² *Kelo*, *supra* note 65.

⁹³ Joan Richardson, “Recombinant ANW: Appetites of Words” (2005) 13 *Configurations* 117 at 130. Richardson’s reference is to Darwin, who sought to make *The Origin of Species* a lasting text.

⁹⁴ John Dewey, “The Need for a Recovery of Philosophy,” in *The Essential Dewey: Pragmatism, Education, Democracy*, Larry A. Hickman and Thomas M. Alexander, eds. (Bloomington, IN: Indiana University Press, 1998) at 68.

⁹⁵ Menand, *The Metaphysical Club*, *supra* note 28 at 341.

⁹⁶ *Ibid.* (citing Holmes, “The Common Law” (1881), in *The Collected Works of Justice Holmes*, Vol. 3 at 115).

Holmes realized this fact all too well. During the course of his career both on and off the bench, he saw America through Civil War and Reconstruction, the opening of the transcontinental railroad, the admission of fourteen states into the Union, the invention of the Ford Model T, the assassination of two presidents, the implementation of suffrage for all citizens, Prohibition and its repeal, WWI, and on and on. Add to these the momentous events of Holmes's boyhood, and Holmes's life begins to seem representative of the life of post-Revolutionary and pre-modern America. Who better than Holmes to argue that changes in environment necessitate changes in law? Who better than Holmes to maintain that law is not fixed—that it is, was, and always will be developing according to sociopolitical settings? For Holmes, law at any given time is or ought to be a cumulative system of rules and regulations subject to the tendencies of an ethos or era. Law is based in experience; it is a constantly mutating organism.

Holmes's pragmatism has to do in part with Dewey's "never-ending quest to resolve the various tensions that intermittently threaten to disrupt the harmony of the individual's life career with those broader social conditions."⁹⁷ His pragmatism troped Emerson⁹⁸ by looking to history to resolve binary tensions and seeking third-ways between divergent paths.⁹⁹ Because law is not tied to some *telos* towards which society must work, it ought to be a lubricant for social relations: a mechanism facilitating as much cooperation and as little friction as possible. Law is negotiation and compromise occasioned by passing social circumstances. It is in this way provisional, an interim authority or place-marker. Those, like Thomas Jefferson¹⁰⁰ or William Blackstone, who purport that law is the complete grasp of absolute truth or the application of universal realities to human society not only

⁹⁷ Philip W. Jackson, "John Dewey," in *A Companion to Pragmatism*, John R. Shook and Joseph Margolis, eds. (Malden, MA: Blackwell, 2009) at 64.

⁹⁸ "The contextualist and anti-foundationalist aspects of American pragmatism have their roots in Emersonian thought. Emerson emphasized the need for American intellectuals to critically recreate*110 America through discourse and action. Emersonian thought emphasizes the importance of having a sense of historical consciousness which prefigures the contextual and anti-foundational aspects of pragmatism." Erin Rahne Kidwell, "The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review" (1998) 62 Alb. L. Rev. 91 at 109-110.

⁹⁹ "Ample evidence exists that Holmes favored the application of this pragmatic middle-road between conflicting paradigms of legal thought." Kidwell, *supra* note 98 at 98.

¹⁰⁰ See, e.g., Allen Mendenhall, "Jefferson's 'Laws of Nature': Newtonian Influence and the Dual Valence of Jurisprudence and Science" (2010), 23 The Canadian Journal of Law & Jurisprudence 319 (2010).

miss the mark but also the opportunity—the opportunity to improve, smooth, and pacify human interaction.¹⁰¹

Holmes worked at the nexus of practice and theory, law and art. His jurisprudence departed from received precedents and canons without dismissing the notions of precedent and canonicity, upon which all dissents—especially his—depend.¹⁰² A dissent that is not aesthetic is likely to be exhausted. Holmes, in keeping with his Darwinian worldview, poeticized the language of dissent to ensure that his arguments were not exhausted.

“[T]he aesthetic has a structure,” and this structure “is identical to whatever is meant by thinking during a particular historical moment, even if at the time it is initially encountered it is not recognized as thinking, but rather cast as a form of feeling in opposition to or in contrast to what is then commonly accepted as thinking.”¹⁰³ Joan Richardson, with Darwin, claims that the work of poetry “is to accommodate human beings to their creaturely actuality, stretching the perpetual vocabulary to provide space and form for the animal, for feeling, the aleatory, accidental, irrational element.”¹⁰⁴ Just as law is organic, molding and shaping at the same time it is molded and shaped, so poetry is organic—and more successful “the more it focuses attention [...] to enable its integration and expression within the *pitch/time* grid of a culture.”¹⁰⁵

Wallace Stevens, a lawyer-poet-pragmatist, spells out Richardson’s argument in the modernist American context. “It is,” he says, “one of the peculiarities of the imagination that it is always at the end of an era” because “it is always attaching

¹⁰¹ C.f., Rorty’s suggestion that if Dewey had read Freud, he would have seen Freud as “helpful in forcing us to stop looking outside the human community for salvation, and making us instead explore the possibilities offered by social cooperation.” Rorty, “Pragmatism as Anti-Authoritarianism,” *supra* note 51 at 265.

¹⁰² “Canonical texts, which we might see as having ‘hardened’ in the Wittgensteinian sense, make up the channels through which more ‘fluid’ propositions of constitutional meaning then flow. But precisely because these texts function as metonyms—not as narrow or literal statements of law—their propositional content will change as the associated concepts they connote are realigned within constitutional culture and practice. It is thus ever a two-way street: the canon channels the practice, but, in turn, the practice reshapes the canon. And, of real significance for practitioners, a deeper understanding of these processes may provide more sophisticated tools with which to exercise long-term influence on constitutional meanings.” Bartrum, *supra* note 68 at 329.

¹⁰³ Joan Richardson, *A Natural History of Pragmatism* (Cambridge University Press, 2007) at 224.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

itself to a new reality, and adhering to it.”¹⁰⁶ He adds, “It is not that there is a new imagination but that there is a new reality. . . . It exists for individuals according to the circumstances of their lives or according to the characteristics of their minds.”¹⁰⁷ For Stevens, the role of the poet “is not to be found in morals”;¹⁰⁸ likewise, for Holmes the role of the judge is not to be found in morality. Perhaps the role of pragmatist-poets, among whom I would number Holmes and Stevens, is to be anti-foundational; for Richard Poirier claims that “the central task of the pragmatist-poet [is] to ‘turn away from’” familiar and knowable forms of life and “even from your *own* creations, your *own* ‘facts,’ for fear that these, too, will become fixed and fixing.”¹⁰⁹ The antifoundationalist approach allows law to be an ongoing, constant corrective, just as poetry is always responsive and never unmediated by the social. Consider these telling words that follow the claim that judges can be poets:

In an age where the lines between poetry and literary interpretation are increasingly deconstructed, and in a legal culture that has seen Legal Realism evolve into Critical Legal Studies, it is not implausible to claim that Supreme Court Justices are creative. At a minimum, the Justices are creative insofar as the situations they face demand that a standing body of law be consistently reinterpreted and tailored to novel facts. It may often be impossible simply to fit the facts before them into the puzzle of the Constitution and case law; in landmark cases, it is clear, the Justices alter the puzzle itself and create law. Thus, while judicial legitimacy requires faithful adherence to precedent, legal development turns on creative acts. As a result, we call judges who follow precedent legitimate, but those who successfully break from it great.¹¹⁰

Holmes was great because he employed antifoundationalism as he exercised poetry in his legal positions—which were themselves pragmatic and responsive to community discourse—and called attention to dissent, which preserves arguments that otherwise would become exhausted. His dissents rescue arguments that could one day seem preferable to the arguments currently in force as law.

Holmes’s theories were tied to practice. That is to say, practice and theory were, for him, mutually reinforcing concepts. Holmes did not seek to marry theory and practice but to suggest that the two are always already one in the same. One might

¹⁰⁶ Wallace Stevens, “The Noble Rider and the Sound of Words,” in *Stevens: Collected Poetry & Prose*, *supra* note 17 at 656.

¹⁰⁷ *Ibid.*

¹⁰⁸ Stevens, *supra* note 17 at 660.

¹⁰⁹ Richard Poirier, “Why Do Pragmatists Want to Be Like Poets?” *supra* note 16 at 354.

¹¹⁰ David Cole, “Agon at Agora: Creative Misreadings in the First Amendment Tradition” *supra* note 56 at 858-59. Cole basis his entire article in the theory of Harold Bloom, who was himself influenced by pragmatism.

say of Holmes's "law" what Philip W. Jackson says of Dewey's "truth": "for the pragmatist, truth [law] is prospective. It lies in the future. It awaits verification. It is something [like the proposition in a dissent!] to be discovered through experimentation, not an empirical fact that is already established."¹¹¹ Dewey's brand of pragmatism is like Holmes's in that it is an open system, a process, a disciplined inquiry—an acknowledgment that things past determine things present, that neither past nor present stands outside time and space. Law, like language, is not constant or *a priori*. Nor does it spring out of a vacuum. It is "simply and empirically judicial behavior" insofar as "what judges *say* is law."¹¹² Put another way: "A rule may be written down, it may express the will of the sovereign, it may be justified by logic or approved by custom; but if courts will not enforce it, it is not the law, and lawyers who bet their cases on it will lose."¹¹³

Holmes's theories, as manifest in his legal opinions, demand classification because they are espoused in a methodology that refuses ideological or metaphysical stability. Holmes's methodology consistently rejects consistency. It resists claims to absolute truth and goes about its business as a scientist: diligent and thorough, testing what works and disregarding or postponing what does not. Writing is the judge's craft and industry. It is the tool by which he or she articulates policy and shapes or responds to social conflict. For Holmes, law, like language, is a social construction meant for use and application.¹¹⁴ Law is not preordained or immanent in the universe; it is plastic and posited and made up of words. As a linguistic construct, it is not a hidden absolute waiting to be discovered. After all, he who seeks finds—and finds what he wants. Judges purporting to excavate natural law principles from divine or moral order are really imposing legitimizing theories onto biases and preconceptions. Menand hones this point: "Holmes thought that learning the abstract legal doctrines on which judicial decisions are expressly based—what used to be called 'black letter law'—was therefore poor training for a lawyer. Judges do invoke these doctrines when they are explaining their decision, but (as Holmes was pointing out when he volunteered to use the same principle to decide a given case either way) the doctrines are never sufficient to account for the result reached."¹¹⁵ Although Holmes did not believe in doctrine

¹¹¹ Jackson, *supra* note 97 at 60.

¹¹² Menand, *The Metaphysical Club*, *supra* note 28 at 343.

¹¹³ *Ibid.*

¹¹⁴ "[L]aw, like language, is a practice, an interactive communicative enterprise that legitimizes particular acts or utterances based on their usage and acceptance within a specific community and context. It is, in other words, impossible to say what *McCulloch v. Maryland*, for example, 'means' in absolute terms; rather, to understand that text's constitutional significance we must look to how it is used in the constitutional conversation." Bartrum, *supra* note 68 at 328-29.

¹¹⁵ Menand, *The Metaphysical Club*, *supra* note 28 at 342.

as absolute truth, or perhaps *because* he did not believe in doctrine as absolute truth, he used dissents to store ideas that might become useful in the future. A later judge, looking for a convenient, practical, or uncontroversial way to decide the case at hand, might look to Holmes's stock of dissents to find an alternative solution. The judge would then trope Holmes's tropes, which are tropes of other tropes—and all of this troping would address current social conflicts whose resolution requires new prescriptions.

The remaining sections of this essay contextualize three landmark dissents according to their time and place in American history. These dissents show how Holmes's pragmatism relates to the dissent as a rhetorical medium. They show how Holmes enacts law with poetry, how his diction and syntax have the mechanical impact of exciting readers while at the same time signaling particular legal positions. Holmes writes to vast audiences—to those who have and those who have not been initiated into legal discourse. But his language is coded to appeal to specific groups and interests: judges, intellectuals, editors, men of industry, society women, and on and on. These appeals represent an “Emersonian vision of creative democracy,”¹¹⁶ a “constitutional experiment in popular sovereignty that is America.”¹¹⁷

The following dissents also evidence what Menand says of the word: “Each time it is used in a new sentence, each time it appears in the company of different other words, a word strikes out in a new semantic direction, but it also pushes off, so to speak, from the accumulated history of previous uses generated by its presence in the company of previous words.”¹¹⁸ Legal language carries heavy political freight in American law with its etymologies dating back to Roman law, British common law, and the New World judicial culture in which previously unthought-of disputes required resolution through Old World paradigms. The history and etymology of jurisprudence in America demonstrate that at some point language can graduate into law—but only when used by judges and others with coercive powers bestowed by the sovereign. The quality of words “constitutes a kind of energy, which the poet,” or the poetic judge, “with effort and vigilance, can harness, or channel, by making a composition of words that is alive to all the ways in which bits of language can hitch up to other bits of language, and also to the ways in which the hitching and unhitching alters the directions and the energies of all the

¹¹⁶ Kidwell, *supra* note 98 at 93.

¹¹⁷ *Ibid.*

¹¹⁸ Louis Menand, “Pragmatists and Poets: A Response to Richard Poirier,” in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Duke University Press, 2008) at 362.

bits involved.”¹¹⁹ Language can be poetry; poetry can be political; poetry can manipulate or persuade. Words are problematic; they can constitute law or command. Poetry can conceal the coercive nature of commands and beautify that which is not always beautiful.

PART THREE: A TRIAD¹²⁰ OF DISSENT

A. LOCHNER V. NEW YORK (1905)

Lochner is among the most famous if not most formative cases in American legal history.¹²¹ It is what “blissfully unversed” lawyers associate with “unbridled

¹¹⁹ Louis Menand, “Pragmatists and Poets: A Response to Richard Poirier,” *supra* note 118 at 362. Menand goes on to say the following: “The trap is the belief that by harnessing words in this sense you can get something out of them; or rather, that you can get out of them something you intended to get or wanted to get out of them, when in fact the more tightly your harness, the more it is the case that the words are getting something out of you instead. The danger, in short, is that you will invest, in the *form*, rather than in the process, of your writing, your sense of your self. There is a point at which you will be tempted to step back from the canvas, and in that moment of self-satisfaction, you will mistake as final and determinate what can only be indeterminate and forever vulnerable to future hitchings and unhitchings. And as with words, so with selves. Words have this duplicity because they cannot come to rest on some point of referential relation, on a relation to something that is not another word. And because no word is exempt from this condition, because there can be no word to serve as the anchor for other words, linguistic relations are irremediably unstable. You can see how it is that this way of thinking about poetry can be called pragmatist.” *Ibid.* at 362-63.

¹²⁰ I have very deliberately reserved this discussion for section three, which is itself divided into three parts, because of Charles Sanders Peirce’s attention to triads. Of this attention, Rorty claims, “[Peirce’s] God was a finite deity who is somehow identical with an evolutionary process which he called ‘the growth of Thirdness.’ This quaint term signifies the gradual linking of everything up with everything else through triadic relationships. Rather strangely, and without much in the way of argument, Peirce took all triadic relationships to be sign-relations, and vice versa. His philosophy of language was intertwined with a quasi-idealistic metaphysics.” Rorty, “Pragmatism as Anti-Authoritarianism,” *supra* note 51 at 259. Rorty adds that “James and Dewey both admired Peirce, and shared his sense that philosophy must come to terms with Darwin. But they sensibly paid little attention to his metaphysics of Thirdness.” *Ibid.*

¹²¹ “[I]t is perhaps true that no case illustrates the metonymic nature of the constitutional canon better than *Lochner*. It has lent its name to an entire chapter of constitutional history: the so-called *Lochner* Era. But what exactly are the associated meanings to which the metonym points us? What do we mean when we accuse someone of ‘*Lochnering*’? Some modern commentators have suggested that the case’s metonymic meaning remains unclear; that it is difficult to say with any certainty what is wrong with *Lochner*. But this confusion is, I think, rhetorical, as scholars struggle to draw a principled distinction between the Court’s efforts to protect the liberty of contract in the early twentieth century, and its determination to enforce civil and reproductive rights under Earl Warren and Warren Burger. I suggest that, in truth, all of these uncertainties—the revilement, the

judicial activism.”¹²² It is “a shorthand description of a court overreaching its constitutional authority and thwarting a majority will as represented in the legislature.”¹²³ Holmes positions himself—his dissent—against this so-called judicial activism and alongside the majority will. For that reason, the blissfully unversed legal community has always tried to tie Holmes to some label—conservative, progressive, and so on—to make sense of his dissent.¹²⁴ Putative “progressives” laud Holmes’s dissent for challenging the interests of big-business and industry and for sticking up for the “little guy” or the “worker,”¹²⁵ whereas putative “conservatives” celebrate Holmes’s dissent for its rejection of judicial activism and its deference to the legislature.¹²⁶ Self-described progressives and self-described conservatives are wrong on this score; in their attempts to appropriate Holmes to fit their particular causes, they miss the mark but enable the

revision, the distinctions, and the clarifications—are simply part of an ongoing battle to distill *Lochner*’s metonymic meanings within constitutional practice. They are a manifestation of the continuing struggle to reclaim or refine the ‘hard’ spot the case occupies in the constitutional riverbank; the perpetual effort to define what *Lochner* stands for, or, more importantly, what it stands against.” Bartrum, *supra* note 68 at 347.

¹²² Bartrum, *supra* note 68 at 348.

¹²³ *Ibid.*

¹²⁴ “First, there is the problem of assessing Holmes’s popularity and the meaning to be attributed to his famous dissent in *Lochner v. New York*. Is the orthodox wisdom about Holmes’s dissent correct in portraying Holmes as an enemy of substantive due process? Was Holmes a modernist hero who helped to push us into the twentieth century, or was Holmes a troubled modernist thinker who was still caught up in the nineteenth century jurisprudence of his day? What explains the popularity of Holmes’s *Lochner* dissent in the progressive era, and why did it take so long for Holmes to be lionized?” Minda, *supra* note 48 at 129-30.

¹²⁵ “Professor Felix Frankfurter was the first to praise Holmes, with a eulogistic essay in the *Harvard Law Review* entitled *The Constitutional Opinions of Justice Holmes*. It took some time for others to follow suit, but during the late 1920s and early 1930s, a series of articles appeared in the *New Republic* and other progressive New Deal magazines hailing Holmes as the ‘idol’ of the progressive movement and casting him as ‘the great dissenter.’ The authors of these articles were members of the liberal elite who sought to promote the New Deal and embraced Holmes’s methodology as a means of reversing the Old Court’s jurisprudence and ushering in President Roosevelt’s reforms. It was this conscious desire to elevate Holmes that led Frankfurter to compare Holmes’s reasoning to John Marshall’s in one of his eulogistic *Harvard Law Review* essays about the Justice—for such comparison lent legitimacy to the progressives’ project to convince the nation and the Court of the New Deal’s consonance with the Constitution. Similarly, others praised Holmes’s ‘faith that ... our social system is one of experimentation subject to the ordeal of experienced consequences,’ and commented that ‘no judge who has sat upon the bench has ever been more progressive in his attitude.’” Krishnakumar, *supra* note 75 at 792-793.

¹²⁶ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* 45 (New York: Free Press, 1990).

canonization of Holmes's dissent—the first such dissent to become canonized in American jurisprudence.¹²⁷

Lochner reached the Supreme Court as an appeal of a ruling by the Court of Appeals of New York, which held that an employer had violated a New York labor statute prohibiting employers from allowing employee bakers to work more than 60 hours per week or 10 hours per day.¹²⁸ The employer owned a biscuit, bread, and cake bakery, and he allowed—indeed required—a certain baker to work more than 60 hours in one week.¹²⁹ The employer was convicted of violating the labor statute.¹³⁰ He filed suit in the County Court of Oneida County, lost, appealed to the New York Supreme Court, lost, appealed to the New York Court of Appeals, lost, and then appealed to the U.S. Supreme Court.¹³¹ At the Supreme Court level, Justice Peckham, writing for the majority and reversing the New York decisions, held in favor of the employer. He reasoned that the right to contract free of government interference was a protected liberty under the Fourteenth Amendment,¹³² that the labor statute was not necessary to ensure the health and welfare of bakers,¹³³ that bakers' tasks were not so dangerous or unhealthy as to justify the legislature's interference with them,¹³⁴ and that restricting bakers' working hours had little relation to the statute's alleged purpose of enhancing the quality of bread.¹³⁵ Therefore, the labor statute disrupted the liberty to contract and impeded business activities in violation of the U.S. Constitution.

¹²⁷ Krishnakumar, *supra* note 75 at 788.

¹²⁸ *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905).

¹²⁹ *Ibid.* at 46-47.

¹³⁰ *Ibid.* at 47.

¹³¹ *Ibid.* at 47-51.

¹³² *Ibid.* at 53 (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution”).

¹³³ *Ibid.* at 58 (“There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker”).

¹³⁴ *Ibid.* at 59 (“We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee”).

¹³⁵ “It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to

Holmes disagreed with the majority. “This case is decided upon an economic theory which a large part of the country does not entertain,” he said.¹³⁶ Ever the pragmatist, he declared that he would not decide whether he agrees with the statute but that, if forced to do so, he would “desire to study it further and long before making up my mind.”¹³⁷ This comment, the pragmatist significance of which is lost on many legal commentators, is clearly a gesture towards Peirce, James, Dewey and their various inquiry-based methodologies. Critical of abstractions and ideological absolutes, Holmes “strongly believes that my agreement or disagreement has nothing to do with the *right* of a majority to embody their opinions in law.”¹³⁸ Because “rights” are for Holmes vague pieties with no corresponding substance or matter, their existence cannot be proved and thus reliance on them is both strange and revealing of judges’ predispositions. If a thing cannot be said to exist, and that thing determines the way a judge rules, then that judge owes decisions to a foundation that is ontologically and therefore logically suspect.

Holmes goes to great lengths to portray the Constitution as organic, responsive, and contingent, and to point out the flaws of claiming the Constitution as representative of any particular ideological schema. He says, for instance, that

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.¹³⁹

The Constitution, so interpreted, is adaptive, meliorating, and accommodating. It does not service the sociopolitical fetishes of particular groups but addresses and applies to all groups irrespective of ideology. It is, in short, an umbrella document that facilitates compromise. Therefore, Holmes explains that “[g]eneral propositions do not decide concrete cases” because decisions depend on “a judgment or intuition more subtle than any articulate major premise.”¹⁴⁰ Decisions, then, are not tied to grand ideological programs but to sensation and experience; and to the extent that sensation and experience are inadequate criteria

the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.” *Ibid.* at 64.

¹³⁶ *Ibid.* at 75.

¹³⁷ *Ibid.* at 75.

¹³⁸ *Ibid.* at 75, emphasis added.

¹³⁹ *Ibid.* at 75-76.

¹⁴⁰ *Ibid.* at 76.

for judgment, judges should rule so as not 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.”¹⁴¹ Here we can see the influence of Dewey’s democratic impulse.

Aware that the labor statute had origins in other, similar historical paradigms, Holmes directs readers’ attention to the fact that this statute is simply the latest in a long line of precedent from ancient Sunday and usury laws to more modern prohibitions on lotteries.¹⁴² A proper court opinion would revise and extend these antecedents to fit the contemporary industrial and economic context. A proper court opinion would also look to received models and patterns rather than making up untested rules anchored in improvable and improbable chimera like “rights.”

What did it mean for Holmes’s generation that America had long adhered to rules and regulations that stand in contradistinction to the majority’s newfound principle of liberty? Holmes states that the “liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by law schools, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.”¹⁴³ Holmes seems to be suggesting that the colorful principle of liberty that the majority discovered seemingly out of thin air actually contradicts many laws and institutions of the workaday world. If the majority’s discovery is a true first principle, an absolute foundation, then business relations as we know them must be revamped, dismantled, and rewritten, for they adhere to false principles and non-foundations. Holmes, in other words, informs the majority that its ruling would, if taken to its logical ends, mean the total collapse of life in America.

In what is perhaps the most famous and quoted line of the *Lochner* dissent, Holmes announces that the “14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”¹⁴⁴ I can think of few Supreme Court phrases that so locate readers in a particular ethos or era. Having contextualized the labor statute within an historical framework, Holmes launches into this remark about Spencer as if to trumpet the situational nature of the case. Holmes appears to have *prehended* later courts’ citations to his dissent “not as a justification for overturning the Old

¹⁴¹ Ibid.

¹⁴² Ibid. at 75.

¹⁴³ Ibid. at 75.

¹⁴⁴ Ibid.

Court's established line of precedent, but in recognition of its ultimate vindication and as an admonition against repeating the egregious mistakes of the *Lochner* era."¹⁴⁵ Holmes's dissent effectively canonized the pragmatist idea that "judges should not measure the constitutionality of legislation based on their agreement or disagreement with its substance."¹⁴⁶ Holmes, who, more than other justices, understood the varieties of American experience, realized how temporary were the fashions and fancies of the day; he anticipated both the canonization of his dissent as a "judicial reaction to the country's lived experience" as well as the changing times that would demonstrate "the vicissitudes of *Lochner*-style jurisprudence," which later courts rejected in an effort to follow Holmes and "guard against analogous mistakes in the future."¹⁴⁷ Holmes's attention to the experiential leads him down the path toward a Deweyian majoritarianism holding that "the majority have the right to 'rule' because their majority is not the mere sign of a surplus in numbers, but is the manifestation of the purpose of the social organism."¹⁴⁸ This attention to the experiential is not only a major mark of Holmes's pragmatism but also part of what makes the *Lochner* dissent "politically convenient for later generations of lawyers and judges" who use the case to attack both progressive and conservative policies.¹⁴⁹

Another mark of Holmes's pragmatism is his simultaneously diplomatic and poetic language. Aware of the sheer power of written words, Holmes remarks, profoundly if passingly, "Every opinion tends to become a law."¹⁵⁰ Words on a page, in other words, can come to control what the *polis* can or cannot do. It would seem to follow that dissents, which do not count as opinions, would secure for themselves the possibility of becoming law (or opinions) by appealing to the eye and the ear and therefore to the intellect. Holmes's most diplomatic sentences are those with qualifiers—"If it were a question whether I agreed," "or if you like as tyrannical," "may not," "some"—exhibited so that they signaled and reflected the process that Dewey would later, in a book Holmes often recommended,¹⁵¹ call a "tendency."¹⁵²

¹⁴⁵ Krishnakumar, *supra* note 75 at 789-90.

¹⁴⁶ *Ibid.* at 790.

¹⁴⁷ *Ibid.*

¹⁴⁸ JOHN DEWEY, 1 THE EARLY WORKS OF JOHN DEWEY, 1882-1898 234 (Jo Ann Boydston, ed.) (Southern Illinois University Press, 1969).

¹⁴⁹ Howard Gillmore, "De-Lochnerizing *Lochner*" (2005) 85 Boston Univ. L. Rev. 859 at 861.

¹⁵⁰ *Lochner* at 76.

¹⁵¹ See footnote 44.

¹⁵² Dewey, Experience and Nature, *supra* note 69 at 373.

“The idea of tendency,” Dewey explains, “unites in itself exclusion of prior design and inclusion of movement in a particular direction, a direction that may be either furthered or counteracted or frustrated, but which is intrinsic.”¹⁵³ Holmes’s discounting of a prior design for law represents itself in syntax that insists on rolling and tumbling forward as if toward some particular direction—but not a direction necessarily involving a “point or goal or culminating stoppage.”¹⁵⁴ Instead, Holmes’s aim seems to be the “perception of meanings such as flexibly directs a forward movement.”¹⁵⁵ Holmes follows his four long opening sentences, for instance, with diction that pitches headlong across the page, tripping over commas and at last running into a period: “It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.”¹⁵⁶ With impeccable timing, he then offers this short, clipped statement: “A more modern one is the prohibition of lotteries.”¹⁵⁷ This syntax variation results in a footstep-like rhythm supplemented by the regulated succession of “s” and “th” sounds: “settled,” “various,” “decisions,” “*this*,” “*that*,” “constitutions,” “state,” “laws,” “ways,” “as,” “legislators,” “*think*,” “as,” “injudicious,” “as,” “*as this*,” “*with this*,” “*with*,” “*the*.” Add to this alliteration the other alliterative combinations—“l” as in “laws,” “life,” “legislators,” “like,” “liberty”; “t” as in “It,” “court,” “state,” “constitutions,” “state,” “regulate,” “might,” “contract”; “r” as in “various,” “court,” “regulate,” “contract”; “w” as in “ways,” “which,” “we,” “which,” “with,” “with”—and this sentence begins to seem like poetry. Many rhymes and near rhymes—“ways” and “laws,” “with” and “this” and “injudicious,” “state” and “regulate,” “tyrannical” and “liberty”—complement this impression. The poetry itself seems to enact on the page what Dewey treats as the alternative to a complete stoppage: the end that is “an end-in-view and is in constant and cumulative reenactment at each stage of forward movement,” the end that is “no longer a terminal point, external to conditions that have led up to it,” the end that is “the continually developing meaning of present tendencies—the very things which as directed we call ‘means.’”¹⁵⁸ The poetry seems to draw attention to an end that is not an end at all. This is the process of “art and its product,” and at any given stage of the process, the elements of the process represent “a work of art.”¹⁵⁹ By saying things like “[t]he other day we sustained the Massachusetts vaccination law,”¹⁶⁰ Holmes

¹⁵³ *Ibid.* at 373.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Lochner* at 75.

¹⁵⁷ *Lochner* at 75.

¹⁵⁸ Dewey, *Experience and Nature*, *supra* note 69 at 373.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Lochner* at 75.

reminds his readers that this work of art is not some magisterial phenomenon sprung from the mind of a Romantic genius; rather, it is the product of the quotidian functions of ordinary business.

The beat and tempo of Holmes's sentences here testify to Jacques Lenoble's assessment of the musical metaphor in the pragmatist jurisprudential context: "Comme l'atteste la métaphor musicale, la qualité des variations s'exprime lorsque, au départ d'un theme connu, ells ouvrent sur des interpretations stimulantes et meme parfois déstabilisantes, révélant ainsi un visage nouveau de ce qui semblait déjà trop connu ("As evidenced by the musical metaphor, the quality of variation is expressed when, departing from a familiar theme, they open to the stimulating interpretations and even sometimes destabilizing [interpretations], thus revealing a new face of what seemed already too well known").¹⁶¹ Just as a particular piece of music borrows from and mimics other movements and sequences while enacting movements and sequences of its own, so Holmes's dissent refers to other laws while readjusting them to fit his particular time and place—except that Holmes's musicality occurs in the medium of dissent. His words dance across the page as if to a rhythm. It is this musicality that makes his dissent something besides mere objection: something likely to become law.

Lochner is memorable not, as one would expect, because of its holding, but because of its anti-holding or dissent.¹⁶² The dissent confirms that Holmes "served less as prophet or as conscience of the Court and more as the greatest—or only—literary figure of the *Lochner* Court" because he "used his words as weapons to puncture platitudes, expose the empty lawyers' rhetoric [...], and [...] clarify the true stakes and motives driving the justices' opinions."¹⁶³ His dissent is especially resonant in light of Tushnet's and Lief's remarks (cited at the beginning of this essay) about "great dissenters" and "vindication"; for Anita S. Krishnakumar calls this dissent "thoroughly vindicated."¹⁶⁴ Without becoming a work of art, without its musicality, this dissent probably would not have become the canonized text that it became.

¹⁶¹ Jacques Lenoble, "Au-delà du Juge: Des Approches Herméneutique et Pragmatiste à une Approche Génétique du Concept de Droit" (2007) 1 *European Journal of Law & Society* 1 [available at <http://www.ejls.eu/2/33FR.pdf>].

¹⁶² *Lochner* is never cited for its legal authority. Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on *Lochner* would be a pointless, if not a self-destructive, endeavor." Richard A. Primus, "Canon, Anti-Canon, and Judicial Dissent," *supra* note 57 at 244.

¹⁶³ Gerald Leonard, "Holmes on the *Lochner* Court" (2005) 85 *Boston Univ. L. Rev.* 1001 at 1003.

¹⁶⁴ Krishnakumar, *supra* note 75 at 789.

B. ABRAMS V. UNITED STATES (1919)

The *Abrams* dissent is another of Holmes's vindicated texts.¹⁶⁵ The facts of *Abrams* are less business-as-usual than the facts of *Lochner* because of their implications for a nation at war. The defendants, five Russian-born individuals, three of whom considered themselves rebels, revolutionists, or anarchists, were charged with conspiring to violate the Espionage Act of Congress when they published statements deemed disloyal to the United States, which, at the time of publication, was at war with Germany.¹⁶⁶ The defendants argued that the prosecution lacked the evidence needed to convict them of inciting resistance to the war and of curtailing the production of ammunition.¹⁶⁷ More broadly, the defendants argued that the Espionage Act was unconstitutional because it conflicted with the First Amendment.¹⁶⁸ Writing for the majority, Justice John Hessin Clarke employed the "bad tendency" test rather than the "clear and present danger" test, thereby holding that substantial evidence supported the finding that defendants incited violence and curtailed ammunition,¹⁶⁹ that the Court did not have to evaluate the sufficiency of the evidence as to each count,¹⁷⁰ and that the defendants had not convinced the court that their pamphlets merely intended to thwart setbacks to the Russian cause.¹⁷¹ Accordingly, the Court upheld the defendants' conviction.

Holmes dissented in what was later called "as strong a self-revision as American legal culture has known."¹⁷² The only sitting justice to have fought in the Civil War, the bloodiest of all America's conflicts, Holmes wrote with an uncommon authority on martial matters. Furthermore, his understanding of Peirce's essays on pragmatism may have influenced his writings about free speech, which conjure up associations with social Darwinism.¹⁷³ Because modern warfare was dangerously

¹⁶⁵ "Years later, a majority of justices vindicated Holmes's minority position, and free expression became a constitutional 'lodestar.'" Stephen M. Feldman, "Free Speech, World War I, and Republican Democracy: The Internal and External Holmes" (2008) 6 First Amend. L. Rev. 192.

¹⁶⁶ *Abrams v. U.S.*, 250 U.S. 616, 40 S. Ct. 17 (1919).

¹⁶⁷ *Ibid.* at 619.

¹⁶⁸ *Ibid.* at 618-19.

¹⁶⁹ *Ibid.* at 623.

¹⁷⁰ *Ibid.* at 624.

¹⁷¹ *Ibid.*

¹⁷² Cole, *supra* note 56 at 882.

¹⁷³ "The pragmatist view of free speech, if one could call it that, was set out in an essay written by Peirce entitled 'The Fixation of Belief,' to which Holmes was apparently exposed while in the Club. Peirce examined and rejected several ways in which an idea or belief could become accepted as true, including what he called the method of authority—namely, through 'an institution . . . which shall have for its object to keep correct doctrines before the attention of the people . . . having at the same time power to prevent contrary doctrines from being taught, advocated, or

new, and because communicative media had become more advanced, Holmes's dissent in *Abrams* seems to reflect new social circumstances. That Holmes dissented here is especially remarkable because in two previous decisions—*Schenck v. United States*¹⁷⁴ and *Debs v. United States*¹⁷⁵—Holmes affirmed convictions under the Espionage Act. Both mimetic and groundbreaking, his dissent is an exercise in fallibilism. “By dissenting in *Abrams*,” submits one law professor, “Holmes not only argued that the Constitution tolerated dissent, he also exemplified the dissent.”¹⁷⁶ Yielding to the pressures of the moment, adapting his thinking to placate critics of his earlier decisions,¹⁷⁷ Holmes nevertheless maintained extant legal propositions while revising¹⁷⁸ and repackaging them to suit the exigencies of the case at hand.¹⁷⁹ Indeed, Holmes's entire career was chameleon-like when it

expressed.’ Peirce preferred ‘the method of science.’ Applied to ideas, this method would begin with doubt about the validity of a certain idea; this would be followed by a period of testing and experimentation, what Peirce termed ‘the struggle to attain belief,’ and would only end when doubt was laid to rest, at least until some new information was presented that would cause new doubt.

One can easily see the parallel between Peirce's period of experimentation and Mill's belief that free speech was necessary to allow correction of wrong opinions and ideas, a parallel Holmes surely recognized. Another philosophical view that was closely related to Peirce's pragmatism, and which can easily be adapted to support free speech, is that of Social Darwinism, the belief that the superior cultural, social or ideological system is that which, like the biological species in Darwin's work, survives the struggle for life. This adaptation of Darwin's theory, like Peirce's pragmatism, had its roots in the scientific revolution of the late nineteenth century; both were attempts to transfer the perceived superiorities of the scientific method to the search for philosophical truth. Social Darwinism, like pragmatism, can be used to buttress the argument for free speech—ideas, like biological entities, should be free to struggle, unfettered by suppression, in the community, with those ideas that gain popular acceptance deemed to be the ‘survivors’ and thus superior. That Holmes was strongly influenced by Darwinist thought during the period is beyond doubt.” David S. Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes” (1982) 11 Hofstra L. Rev. 97 at 120-21.

¹⁷⁴ 249 U.S. 47 (1919).

¹⁷⁵ 249 U.S. 211 (1919).

¹⁷⁶ Robert Cover, “The Left, the Right, and the First Amendment: 1918-1928” (1981) 95 Md. L. Rev. 349 at 373.

¹⁷⁷ See, e.g., Fred D. Ragan, “Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and The Clear and Present Danger Test for Free Speech: The First Year, 1919” (1971) 58 J. Am. Hist. 24 (submitting that criticism during the *Debs* decision caused Holmes to change his mind). See also Stephen M. Feldman, *supra* note 165 at 229-234.

¹⁷⁸ In the dissent, Holmes “revised the test he had enunciated in *Schenck* by elaborating on the elements of proximity and degree.” Cover, *supra* note 176 at 884.

¹⁷⁹ “[T]he different tone of the *Abrams* dissent is not evidence of a marked change in Holmes' view of free speech, but is rather the product of Holmes' frustration at what he considered the misreading by critics and the public of his position in *Schenck*. The same constitutional standard that Holmes urged in *Abrams* to protect the defendant's speech was consistently applied in upholding the convictions in *Schenck*, *Frohwerk* and *Debs*. Tracing the development of Holmes' view of free speech throughout his legal career will demonstrate both that the major step was taken in *Schenck* and that the seeds of what became the “clear and present danger” doctrine were planted

came to interpreting the First Amendment.¹⁸⁰ Rather than belaboring the legal technicalities of the case, we will look chiefly at those moments of the dissent that smack of pragmatism.

Holmes describes each count against the defendants and then undertakes a close reading of the leaflets that brought about the defendants' conviction. The leaflets are no doubt provocative; as propaganda, though, they are not unpredictable. That Holmes attends closely to these texts might have something to do with his Dewey-like valuing of "speech for its role in a dynamic process in which shifting interest groups are vying for dominance in a continually changing world,"¹⁸¹ or it might simply be a response to the majority opinion that also undertakes a close reading. In either case, it is revealing that Holmes cloaks his commentary about truth in terms of language, especially in light of his closing paragraph professing 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."¹⁸² This line echoes Peirce and James and their treatment of human faculty as pure matter capable of ascertaining truth, which "is only the expedient in our way of thinking."¹⁸³ Another of Holmes's echoes of Peirce and James is couched in the vocabulary of epistemology: "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."¹⁸⁴ Recalling Jonathan Edwards,¹⁸⁵ Emerson,¹⁸⁶ James,¹⁸⁷ and *prebending* Stevens, Holmes here "distinguishes between an external reality, which humans are unable to understand (although the aspiration to understand the universe is a quintessential human characteristic), and a much more pragmatic notion of truth in the context of societal decision-making."¹⁸⁸ Holmes's assertion that truth is the valued currency of the "speech market" recalls James's belief that

early in Holmes' life, though Holmes' skepticism and his reluctance to depart from prevailing legal doctrine combined to prevent those seeds from bearing fruit until his seventies." Bogen, *supra* note 173 at 99.

¹⁸⁰ Bogen's article is remarkable in its breadth and attention to Holmes's biography as a catalyst for his decision-making. See generally Bogan, *supra* note 173.

¹⁸¹ Irene M. Ten Cate, "Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses" (2010) 22 *Yale Journal of L. and the Humanities* 35 at 39.

¹⁸² Abrams at 630.

¹⁸³ William James, *Pragmatism: A New Name for Some Hold Ways of Thinking, Popular Lectures in Philosophy* (New York: Longmans, Green, and Company: 1907) at 222.

¹⁸⁴ Abrams at 630.

¹⁸⁵ See Richardson, *supra* note 103 at 24-61.

¹⁸⁶ *Ibid.* at 62-97.

¹⁸⁷ *Ibid.* at 98-136.

¹⁸⁸ Cate, *supra* note 190 at 40.

truth “happens to an idea” and “*becomes* true, is *made* true by events,” and it affirms James’s claim that truth’s verity “*is* in fact an event, a process: the process namely of its verifying itself, its veri-fication.”¹⁸⁹ Truth, like currency, is evaluated by its ability to function in the marketplace and to become acceptable as a unit of exchange. The meaning of truth, like the meaning of currency, is always embedded in a seemingly endless chain of signification. Coins and bills are not value but metaphors for value. Standing in place of the *res*, always subject to appreciation and depreciation, they are ideas about worth but not worth itself.

Holmes’s references to truth are “best read as referring to choices made by majorities or dominant forces in response to internal and external challenges to the status quo,” and are best understood as “based primarily on [their] role in safeguarding a process by which decision-making factions can be formed.”¹⁹⁰ Accepting an idea in the marketplace means that a majority considers that the idea is acceptable and practical. An idea about truth *is* truth to the extent that it becomes legal tender. Whatever most people¹⁹¹ think is true at any given time is temporarily true. Put this way, Holmes’s take on an un-essentialized truth seems rather Deweyian because of the emphases on majoritarianism. Apropos this connection, we should consider the democratic overtones in Holmes’s proposition that “the expression of deviating opinions and ideas, no matter how objectionable they are believed to be, deserves protection because of the role of such speech in the pursuit of truth.”¹⁹² Looking at truth through a Deweyian democratic lens allows us to sidestep designs of general principles, just as Holmes does when he declares that “time has upset many fighting faiths” and “we have to wager our salvation upon some prophecy based upon imperfect knowledge.”¹⁹³ It allows us, furthermore, to see Holmes as keen on the idea that, in Dewey’s words, “a democratic society must, in consistency with its ideal, allow for intellectual freedom and the play of diverse gifts and interests in its educational measures.”¹⁹⁴

¹⁸⁹ William James, *The Meaning of Truth: A Sequel to Pragmatism* (New York, London, Bombay & Calcutta: Longmans, Green, and Co., 1914) at vi.

¹⁹⁰ Irene M. Ten Cate, “Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses” (2010) 22 *Yale Journal of L. and the Humanities* 35.

¹⁹¹ “One of Holmes’s guiding convictions was that the dominant forces in the society are entitled to have their way.” Vincent Blasi, “Reading Holmes Through the Lens of Schauer: The Abrams Dissent” (1997) 72 *Notre Dame L. Rev.* 1343 at 30.

¹⁹² Cate, *supra* note 190 at 36.

¹⁹³ *Abrams* at 630.

¹⁹⁴ John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: The Macmillan Company, 1916) at 357.

That truth is contingent¹⁹⁵ upon time, place, and popular will means that we do not have to be unconditionally bound to ideas that have become irrelevant or harmful.¹⁹⁶ It also means that we do not necessarily measure truth based on external *res* but on how well “truth” works. If it does not work, then it is not true and thus is not “it”; if it is not true and thus is not “it,” then it does not work. Certain things work in some contexts but not in others. When they work, they are true; when they do not work, they are not true. But we cannot know what works and what does not work unless we “come to believe even more than [we] believe the very foundations of [our] conduct that the ultimate good desired is better reached in free trade in ideas.”¹⁹⁷ Saying that ideas should compete in a marketplace is akin to saying that our knowledge of truth is incomplete and so needs constant updating and refining and weeding out of the practicable from the impracticable.¹⁹⁸ The opposite of a competitive marketplace would be a space where a truth claim has attained monopoly status such that all inquiry ceases. A Darwinian might say that this space lacks the requisite variation necessary to evolve.¹⁹⁹ In a competitive marketplace of ideas, no knowledge or truth is fixed.

¹⁹⁵ “Meaning and truth are dependent on experience and driven by the future, not the past. Whether the sun truly rises in the east and sets in the west is not determined and definitively answered by contemplating some “ideal” solar system beyond our capacity to experience. The answer begins in our prior experiences of sunrises and sunsets. Its confirmation only comes with the dawning of each new day.” Kidwell, *supra* note 98 at 96.

¹⁹⁶ “Thought, both analytical and intuitive, is seen as a perpetual dynamic of doubt and belief. It is a continuum of seeking and finding, testing and verification. The ideal of foundational knowledge, firm, fixed and immutable, is a mythical construct of humanity’s hubris and folly. What everyone truly gets by on, from the simplest to the genius, are reasonably grounded beliefs. These must be confirmed and reconfirmed, consciously and subconsciously, individually and communally. This process takes place wholly within the continuum of experience. Repeated verification of the “facts” of existence through experienceable phenomenon is required to maintain such reasonable systems of belief. This is so whether the system encompasses science, religion, law, ethics, aesthetics, or any other aspect of our individual and communal existence.” Kidwell, *supra* note 98 at 96-97.

¹⁹⁷ *Abrams* at 630.

¹⁹⁸ “An unregulated marketplace of ideas encourages free thought not so much by determining the equilibrium of the moment as by keeping low the barriers to entry, barriers that take the form not only of coercive sanctions but also social and intellectual peer pressures toward conformity. The sheer proliferation of ideas in a free market complicates perceptions in a manner that helps to weaken such barriers. In addition, the market metaphor makes a statement about the dynamic and chronically incomplete character of understanding and the value of intellectual contest and innovation.” Blasi, *supra* note 191 at 27.

¹⁹⁹ “The constructive, urgent role that speech can play in the evolution of beliefs under a pragmatist conception of truth insulates Holmes’s market metaphor from some of the standard criticisms to which it is subjected. The value of free trade in ideas does not depend on the assumption that there is an objective, perdurable truth to be discovered. It does not depend on the claim that personal beliefs are more or less independent of the believer’s social position, psychological propensities and needs, adventitious experiences, and ideological inheritance. Those assumptions might be implicit in a market metaphor that evoked a finely calibrated measurement of the equilibrium of well-

All thought is tested and tried. Its validity must be proven by practice—hence Holmes’s claim in *Abrams* that the Constitution “is an experiment, as all life is an experiment.”²⁰⁰

In “Natural Law,” Holmes opines that there “is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk,” and he adds that “this demand is at the bottom of the philosopher’s effort to prove that truth is absolute and of the jurist’s search for criteria of universal validity which he collects under the head of natural law.”²⁰¹ Holmes recalls these lines in the *Abrams* dissent when he submits, “If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition” because to “allow opposition by speech seems to indicate that you think the speech impotent.”²⁰² These words, besides poking fun at cocksure deontologists, call for embracing ideas with practical bearing and for rejecting ideas requiring or purporting to know absolute certainty. According to these words, then, judges ought to reject teleological principles maintaining that law is readily and conclusively knowable; rather, judges ought to treat law as an experiment constantly in need of improvement. Judges ought to look to the consequences of judicial decisions as instructive about future action and not as constitutive of meaning or revelatory about law. Law is neither definite nor secure; it is tentative and malleable. For that reason, we “should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”²⁰³

Holmes refers to “free trade,”²⁰⁴ “competition of the market,”²⁰⁵ and “wager,”²⁰⁶ signifiers of business and enterprise. These references stand out because they are juxtaposed with the defendants’ leaflets fulminating about the evils of capitalism. These references also exemplify how Holmes, like James and Emerson, had been,

grounded rational beliefs. They are not implicit in Holmes’s Darwinist invocation of ‘the competition of the market.’” *Ibid.* at 29-30.

²⁰⁰ *Abrams* at 630.

²⁰¹ Holmes, “Natural Law,” *supra* note 11 at 40.

²⁰² *Abrams* at 630.

²⁰³ *Abrams* at 630.

²⁰⁴ *Abrams* at 630.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

in Poirier's words, "thoroughly corrupted by the discursive modes of American corporate capitalism."²⁰⁷ "Corrupted" is too harsh and too tendentious a word, but the point is that just as James employs vocabulary such as "cash-value," so Holmes employs vocabulary that appeals to the discursive community with which he wishes to communicate: intellectuals,²⁰⁸ editors,²⁰⁹ and more importantly working class Americans curious about a high-profile Supreme Court case. We could remark of Holmes what Poirier remarks of James: "He is trying to sound like the readers he meantime wants to convert; to sound as if he's closer to the average guy than to the strong poet or philosopher."²¹⁰ Or instead we could remark of Holmes what Poirier remarks of Richard Rorty: "[H]e chooses, in the interest of social persuasion and social self-protection, to hint at strengths *other* than those of a strong poet or an appreciative reader of poetry. [...] He would rather imagine an audience not of writers or readers merely but of men active in the world, captains of finance, explorers, warriors, and the like."²¹¹ Holmes, being a justice on the U.S. Supreme Court, *would* have had all of these figures as his audience. More than Whitman, who purported to speak to and through the *polis*, Holmes had a truly vast and multitudinous (to borrow Whitman's wording) readership. Even those who did not read Holmes's dissent would have been affected by it because law, controlling and coercive by function, affects social relations, and because dissents always hover in the national state of exception.

²⁰⁷ Richard Poirier, "Why Do Pragmatists Want to Be Like Poets?" *supra* note 16 at 355.

²⁰⁸ "[T]he issue of free speech itself, which prior to World War I had not been a conspicuous feature of reform politics, began to galvanize the attention of progressive intellectuals during and after the war, as progressive journals such as *The New Republic* took up the cause of free speech. Earlier arguments conceptualizing speech as a constitutionally protected "liberty," which had previously been confined to specialist circles, widened in their reach and were reformulated. At the same time scholarship on the history and theory of the First Amendment began to surface more widely, most conspicuously in Zechariah Chafee's *Freedom of Speech*, a synthesis of earlier essays that was published in 1920.

[...] [S]everal individuals who were particularly interested in free speech issues communicated their views to Holmes in the years between 1918 and 1920. These individuals included Learned Hand, then a federal district judge, Zechariah Chafee, an assistant professor at Harvard Law School, and John Wigmore, the Dean of Northwestern University School of Law, who had been a longtime correspondent of Holmes'. Holmes *397 also began to discuss free speech issues with his regular correspondents, writing letters to Frederick Pollock and Harold Laski about First Amendment cases that had come before the Supreme Court." G. Edward White, "Justice Holmes and the Modernization of Free Speech Jurisprudence" (1992) 80 Cal. L. Rev. 391 at 396-97.

²⁰⁹ The most notable critique of Holmes's First Amendment jurisprudence prior to *Abrams* appeared in an article by Ernst Freund in *The New Republic*. See Freund, *The Debs Case and Freedom of Speech*, 19 *New Republic* 13 (1919), *reprinted in* 40 U. Chi. L. Rev. 239 (1973).

²¹⁰ Richard Poirier, "Why Do Pragmatists Want to Be Like Poets?" *supra* note 16 at 356.

²¹¹ *Ibid.* at 356.

A passing look at a few lines in the *Abrams* dissent demonstrates Holmes's poetic facility, to say nothing of his pragmatist interest in knowledge, intent, actions, and consequences. For instance, Holmes alternates between varying iambic and trochaic patterns in the following passage:

I am aware of course that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.²¹²

The iambic phrasing in particular—"I am aware," "the word intent as vaguely used," "means no more than knowledge at the time," "said to be intended will ensue," "Even less than that," "A man may have to pay," "may be sent to prison," "if at the time," and on and on—generates a rhythm (da-DUM-da-DUM-da-DUM-da-DUM) that calls attention to the philosophical labor taking place here. Discussions of acts, knowledge, and consequences, common to all criminal treatises, usually do not display the aphoristic flair displayed in these lines. The alliteration, rhymes, and near-rhymes—"man may have to pay," "at the time of his act he knew facts," "when words," "deed is not done," "does not do the act," "produce...proximate"—make Holmes's phrases more memorable, and memorability is essential to "the continuity of successful forms of expression in the evolution of thinking" and to the "context of language as an organic form."²¹³ One may be tempted here to recall a stanza by Emily Dickinson that uses iambic meter to make a point about dissent:

Great streets of silence led away
To neighborhoods of pause —
Here was no notice — no dissent —
No universe — no laws.²¹⁴

²¹² *Abrams*, 626-627.

²¹³ Richardson, *supra* note 103 at 6.

²¹⁴ Emily Dickenson, "Void," in *The Selected Poems of Emily Dickenson* 171 (Hertfordshire, UK: Wordsworth Editions, Ltd. 1994).

I risk overstating the point. But is it not remarkable that Holmes's choice of meter reflects Dickenson's lines about dissent and laws? Is it not remarkable that in Dickenson's poem stasis corresponds with a lack of law, and in Holmes's dissent, activity and competition—the opposite of stasis—correspond with would-be law? Perhaps these connections are coincidental. If so, they are no less remarkable. Indeed, they are more remarkable because they tap into some sensorial register that associates stasis with lawlessness or void and mobility with order or rulemaking. At the very least, Holmes's passage validates the thesis that he, like other pragmatist writers, “built an aesthetic outpost” in the pragmatist tradition and performed “in language the ritual responses requisite to keeping a community together, an aspect distinguishing [the pragmatist] line of American literary experiment.”²¹⁵

Holmes's discussion of truth in the *Abrams* dissent elides two enunciations of pragmatism: the epistemological and metaphysical which emanate from Peirce and James and which Stevens took up later, and the sociological and political which emanate from Dewey and Randolph Bourne and which Rorty took up later. Holmes's dissent brings together aspects of a philosophy that seems at times splintered. On the one hand, he signals a psychological and spiritual inheritance; on the other hand, he signals an anti-foundationalist sociopolitical inheritance. He “stresses the uncertainty of human knowledge and suggests that our system of government, and particularly the First Amendment, was devised to take that uncertainty into account by allowing freedom to change”; therefore, he also “indirectly rationalizes” his move “to a dissenting position from the unanimity of the previous majorities.”²¹⁶ His powerfully poetic rhetoric presents “something new and original—Holmes' vision of free speech—in terms that are established and accepted—the Constitution, and laissez-faire economics.”²¹⁷ In short, Holmes achieves a compelling synthesis of pragmatist thought while using the dissent to ensure that the legal profession is always “perfecting its literary forms, sloughing at length its metaphysics, and, by virtue of the untirable patience which is often a compensation, attaining great excellence in every branch of mental acquirement.”²¹⁸

Because of its rhetorical pageantry, the *Abrams* dissent demonstrates the power of language to graduate into law. This dissent “not only breaks from and misreads the authority of precedent, it ultimately becomes the authoritative precedent

²¹⁵ Richardson, *supra* note 103 at 3.

²¹⁶ Cole, *supra* note 56 at 886.

²¹⁷ *Ibid.*

²¹⁸ Charles Sanders Peirce, *Collected Papers* Vol. 4 (Cambridge, Mass.: Harvard University Press, 1934) at 251.

itself’—and not just any authoritative precedent but one that “gains more precedential power than the three unanimous opinions that preceded it.”²¹⁹ Indeed, quoting the “stirring” final paragraph of this dissent has become a “time-honored ritual.”²²⁰ It is the pragmatist emphasis on growth and change, presented in memorable diction and syntax, which succeeded in preserving the ideas of this dissent.

C. BARTELS V. IOWA (1923)

As far as Supreme Court opinions go, *Bartels v. Iowa*²²¹ is short and to-the-point, extending and confirming the principles released by the Court that very day in *Meyer v. Nebraska*,²²² a companion case to *Bartels* that is also short and to-the-point. In *Meyer*, the Court struck down a Nebraska law restricting the teaching of modern foreign-languages to students ranging from kindergarten to eighth grade. The majority in *Meyer* found that the law violated the Due Process clause of the Fourteenth Amendment because it infringed upon the liberty interests of teachers, who have a right to practice their profession without the state’s interfering in their business decisions that do not undermine the decisions of the state.²²³ There was, the Court reasoned, no link between the putative purpose of the law—to protect the welfare of children—and a threat to the public interest.²²⁴ Put another way, the law was arbitrary and not reasonably related to a legitimate state interest. It was

²¹⁹ Cole, *supra* note 56 at 887.

²²⁰ Blasi, *supra* note 191 at 1343.

²²¹ 262 U.S. 404, 43 S.Ct. 628 (1923).

²²² 262 U.S. 390, 43 S.Ct. 625 (1923).

²²³ “As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.” *Meyers* at 403.

²²⁴ “The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.” *Ibid.*

therefore unconstitutional. Holmes reserved his *Meyers* dissent—which maintained that this Nebraska law was constitutional—for the *Bartels* opinion. The Court in *Bartels*, addressing an Iowa law akin to the Nebraska law, reversed an Iowa Supreme Court decision upholding the criminal conviction of a teacher who taught German to his students.²²⁵ Holmes’s dissent, a response to both *Meyers* and *Bartels*, is a curious case of intertextuality: a rhetorically charged paragraph that applies with equal weight to two different cases simultaneously. The dissent is further refracted because it exhibits Holmes’s language-games within (and without) a decision about language.

“We all agree, I take it,” Holmes begins, “that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one.”²²⁶ The pronoun “we” seems unsettling because of its lack of a clear referent. Does Holmes mean “we” justices or “we” Americans, for example? A look at various opinions during Holmes’s era would suggest that “we” is widely and fluidly used to signify the assembled judges on the bench, but this is not a decisive or necessary reading of the phrase. Holmes then acknowledges an assumption on his part—“I take it”—thereby narrowing his audience to an even more particular set of people: those who agree with him or “us.” Because dissents are always in conversation with the majority or plurality opinion, we may, I think, suppose that Holmes’s “we” refers to the other justices and himself. But the qualifier “I take it” remains troubling. It cues the reader to assume the role of sympathizer and swiftly dismisses as irrelevant those who disagree with the law’s premise. This move makes sense if Holmes’s audience comprises the other justices, but if his audience is broader than that—the document is, after all, public record—then Holmes has strategically leapfrogged over a controversial issue, his excuse being that that issue is beside-the-point.

Having allowed himself freedom of entry and exit, Holmes claims that the “only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment.”²²⁷ In other words, Holmes’s self-assigned responsibility is to interpret and to apply the Constitution but not to determine the virtues or vices of laws subject to the Constitution. His dissent will not pivot on the aims or intent of the Nebraska or Iowa law because these *moral* concerns are irrelevant to the Fourteenth Amendment. Judges, for Holmes, should not impose their ethics upon law but should merely determine whether laws comport with

²²⁵ *Bartels* at 630.

²²⁶ *Bartels* at 412.

²²⁷ *Ibid.*

practicality and precedent. His dissent, then, will not address whether the Iowa law is good or bad—only whether it violates the Fourteenth Amendment. Holmes constructs himself as a neutral interpreter who *may* “appreciate the objection to the law”²²⁸ (“I think I appreciate the objection to the law”²²⁹) but who does not believe the judge’s role is to take sides on political or ethical issues “upon which men reasonably might differ.”²³⁰ If law is what judges want it to be, and if judges insist that law is a principle that, when applied, disrupts the *polis*, then law loses the respect of the *polis* and loses authority, which is another way of saying that it ceases to be law. A more chestnut way of stating this proposition is that law is in force only so long as the *polis* willingly submits to its authority. (This proposition bears a striking similarity to James’s comments on God.)

Holmes distances himself from the discursive communities enabling the language laws of Nebraska and Iowa and yet allows that he understands, or at least will not condemn, those communities’ shared values and beliefs. He refuses to claim privileged knowledge about what is morally right or wrong, perhaps because, as he wrote elsewhere, “Certitude is not the test of certainty. We have been cock-sure of many things that were not so.”²³¹ Holmes therefore situates himself between, on the one hand, the Supreme Court justices, and, on the other, the voters and legislatures of Nebraska and Iowa. Holmes becomes, in this way, a mediating figure who departs from the majority (whom he dubs “my brethren”²³²) with “hesitation”²³³ and “unwillingness,”²³⁴ but who also cannot bring his mind “to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching a desired result.”²³⁵ In contemporary legal parlance we might say that the law was narrowly tailored to serve a legitimate state interest.

Why might Holmes consider this statute narrowly tailored? First, because the statute “deals with the teaching of children,”²³⁶ and second because youth “is the time when familiarity with language is established.” Therefore, language is particularly important to the developing child or youth, and the state has an

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Holmes, “The Natural Law,” *supra* note 11 at 40.

²³² *Bartels* at 412.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

interest in the welfare of developing (double meaning intended) children and youths. If that proposition is true, as Holmes assumes it is, then cannot we, Holmes implies, imagine a situation where it would be reasonable to ensure that children learn English, lest they dislocate themselves from local cultures and communities or fall beneath national literacy standards? Is it conceivable that there is a reasonable purpose to pass such a statute?

Holmes's dissent turns on this concept: reasonability. "I am not prepared to say that it is unreasonable," Holmes submits, "to provide that in his early years he shall hear and speak only English at school."²³⁷ If it is not unreasonable, it might be reasonable, and "if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar."²³⁸ Holmes casts this statement as a double-negative probably because saying "it is not unreasonable" is less aggressive than saying "it is reasonable," especially since the implication of the latter phrasing—"it is reasonable"—is that the other justices are not reasonable enough to notice the reasonability of the law. Holmes, then, refuses to label either the judges or the Nebraskans and Iowans as unreasonable; for to say that this law exceeds the bounds of reason is to say that the voters and legislatures of Nebraska and Iowa are, all of them, unreasonable.

Holmes realizes the danger and difficulty, political or otherwise, inherent in a system where well-educated, politically connected judges in faraway courts relegate other communities—such as the citizens of Nebraska and Iowa—to a floating status outside the bounds of reason. The trouble with the majority opinion is, for him, the willingness of the other judges to dismiss as unreasonable the mores, cultures, and conventions of a particular set of people. Holmes may have had in mind James's criticism of a "monistic" form of government that adheres to "philosophy of the absolute."²³⁹ He may have recalled James's celebration of the "pluralistic form" or "radical empiricism" that refuses to treat populations as an "absolute totality" and instead "allows that the absolute sum-total of things may never be actually experienced or realized."²⁴⁰ The pluralism championed by James and Bourne²⁴¹ and associated with pragmatist thought could not possibly flourish or proliferate in a space where a centralized authority imposed purportedly universal principles onto communities lacking the agency to dissent. Where those communities lack such agency, Holmes supplies it—in *his* dissents.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ William James, *A Pluralistic Universe* (New York: Longmans, Green, and Co, 1909) at 43.

²⁴⁰ *Ibid.* at 43-44.

²⁴¹ See Randolph Bourne, "Trans-national America" (1916) 118 *The Atlantic Monthly* 86-97.

The *Bartels* dissent is an example of the fluidity of Holmes's ideas. His dissent takes the shape of the ethos of the heartland. The ethical consensus among Iowans and Nebraskans (and most non-New Englanders) that English language acquisition was fundamental to childhood education formed a reservoir of thought toward which the tributaries of Holmes's thought ran their course. The dissent exemplifies a diplomatic compromise between the elite communities represented by the Supreme Court justices, and the general heartland represented by the state statutes.²⁴² In a civil way, Holmes declines to side with the justices, conceding that he can "appreciate [their] objection to the law."²⁴³ He seems to suggest that he agrees with them but will not solemnize that agreement. Unwilling to let an elite minority dictate moral imperatives to a less power populace, Holmes allows that he is "unable to say that the Constitution of the United States prevents the experiment being tried."²⁴⁴

Here he gestures towards Emersonian creative democracy,²⁴⁵ his fidelity to experimentation and instrumentalism seems to involve an Emersonian "contemplative reflection"—as evidenced by his apparent vacillation between the justices' position and the position of the state legislatures—as well as "personal integrity and individual conscience as ameliorative agents for diminishing the effect of potential majoritarian abuses arising out of activist democracy."²⁴⁶ Holmes will not let personal opinions get in the way of a democracy "not seen as a fixed and immutable system" but as "being in flux, allowing for both regression and progress."²⁴⁷ He recognizes that the trouble with a judicial opinion is that "it is

²⁴² "The ameliorative aspect of pragmatism encourages and facilitates discourse between advocates of diametrically opposed modes of thought. The contextualist aspect acknowledges that all human inquiry and action is socio-culturally situated. The anti-foundationalist aspect rejects the notion that this socio-cultural context needs to be stripped away in order to firmly fix knowledge in a logical and ordered structure. These three aspects of pragmatism should not be thought of as separate and discrete elements. They intertwine, serving the larger purpose of fueling human inquiry and action." Kidwell, *supra* note 98 at 99.

²⁴³ *Bartels* at 412.

²⁴⁴ *Bartels* at 412.

²⁴⁵ "To speak then of an Emersonian culture of creative democracy is to speak of a society and culture where politically adjudicated forms of knowledge are produced in which human participation is encouraged and for which human personalities are enhanced. Social experimentation is the basic norm, yet it is operative only when those who must suffer the consequences have effective control over the institutions that yield the consequences, i.e., access to decision-making processes." Cornel West, *The American Evasion of Philosophy: A Genealogy of Pragmatism* 213 (Madison, Wisc.: The University of Wisconsin Press, 1989).

²⁴⁶ Kidwell, *supra* note 98 at 111-112.

²⁴⁷ *Ibid.* at 112

made by an individual but stakes a claim valid for everyone,²⁴⁸ unlike the dissent that ensures the perpetuation of inquiry. By turning his opinion on vocabulary such as “reasonable” and “experiment,” Holmes is himself experimenting. We continue to read the *Bartels* dissent for many reasons, one of which undoubtedly is its insistence on experiment in an experimental medium.

CONCLUSION

Three lines²⁴⁹ of pragmatist thought intersect in Holmes’s *oeuvre*. One marks thought as an organic form that develops over time and in response to changing environments and majority will; another marks truth as contingent and foundations as illusory; still another marks dissents as sites of aesthetic adaptation, places where the new is prehended and apprehended. Understanding the rhetorical nature of dissents is part of understanding dissents as adaptive organisms. Menand tells us that “Holmes spent much of his life trying to figure out where, if it wasn’t general principles, the judge’s decisions did come from.”²⁵⁰ He adds that Holmes “thought that this was a question it was impossible to answer, because in the end, we do not know, in any determinate way, where our judgments come from,” and finally that “[a]ll we can say is that we seem to have, as naturally associated beings, a powerful social incentive to rationalize and justify the choices we make.”²⁵¹

Menand is right: reason is a human impulse. Yet kinds of reasoning are habits that can be disrupted by aesthetic stimuli. The way we read dissents is important; we must ask what they do and not just what they mean.²⁵² To the extent that what they do is related to the steady accumulation of case precedent, we cannot say what these dissents will do to future readers living in different times and spaces.

The pragmatist claims not to know much about what is purported to be known by others. That is why he knows so much. In knowing that he does not and cannot fully know, he winds up knowing more than most. Holmes was a pragmatist. He claimed that he did not know what law was, and in not knowing he knew a great deal more than most. His stylistic and syntactical versatility—as manifest in the three dissents above—had the effect of enacting on the page the modifications

²⁴⁸ Dmitri N. Shalin, “Legal Pragmatism, an Ideal Speech Situation, and the Fully Embodied Democratic Process” (2004-05) 5 Nevada L. J. 433 at 439-440.

²⁴⁹ Recall the importance of triads to Peirce’s thought. See *supra* note 120.

²⁵⁰ Menand, “Pragmatism and Poets,” *supra* note 118 at 369.

²⁵¹ *Ibid.*

²⁵² This is Nicholas M. Gaskill’s recommended interpretive strategy in “Experience and Signs: Towards a Pragmatist Literary Criticism” (2008) 39 New Literary History 165-183.

that he proposed in the law. His texts performed what they codified, or sought to codify, as law. Holmes was not unique among pragmatists in his linguistic facility or syntactical strategy. He belongs to a tradition beginning with Jonathan Edwards and moving through Emerson, William James, Henry James, Wallace Stevens, and Gertrude Stein.²⁵³ Holmes's dissents continue to be cited and revisited despite the many changes that have taken place since he lived and wrote. By understanding Holmes's pragmatism, we may better understand the emerging legal principles owing to his vindicated dissents.

²⁵³ See generally Richardson, *supra* note 103.