subtopic

Oliver Wendell Holmes

OLIVER WENDELL HOLMES, JR. *and the* NATURAL LAW
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Among the many justices who have sat on the United States Supreme Court, Oliver Wendell Holmes stands out for his enduring influence on the Court's jurisprudence. Among his many accomplishments as a member of the Court was to help eradicate judicial reasoning based on principles of natural law or natural right. Hence, his thought is of great importance to any study of the history of natural law theory in American constitutional history.

Holmes's understanding of legal realism shows his relationship to the natural law and natural rights traditions. For Holmes, law and society are always in flux, and courts adjudicate with an eye to law's practical effects. Morality has nothing to do with law; it amounts to little more than a state of mind. There are no objective standards for determining right and wrong and therefore no simply just answers to legal questions. Legal adjudication has no natural or even constitutional basis; instead it comes down to weighing questions of social advantage according to the exigencies of the age. Holmes thus raises squarely a fundamental question: if the Constitution does not dictate anything that is not time-bound, is there any ground for faith in the Constitution, or liberal constitutionalism? The latter would seem to require an understanding that only promulgated and known laws whose meaning is stable over time can bind citizens, yet Holmesian legal realism denies the very possibility of such laws.

Holmes was heir to, and exponent of, intellectual doctrines that predated his tenure on the Court, and which were offshoots of the new "scientific" attitudes toward politics and human affairs. After the Civil War, pragmatism and social Darwinism came to dominate the American intellectual landscape, sweeping away all notions of natural law and natural rights and a constitutionalism dedicated to their defense. For both the pragmatists and social Darwinists, life and thought are directed to continuous change and adaptation to the environment. The test of the worthiness of any proposition is not its truth in and of itself (the standard of natural law theory), but its adaptive success ("survival of the fittest"), which is the engine of progress. Although Holmes is often depicted as an advocate of "judicial restraint," he oftentimes saw the need for courts to provide the creative responses dictated by the times.

As Holmes dismisses natural law, his jurisprudence as the science of positive law becomes merely a predictive tool along the lines of modern science. Well-trained lawyers, according to Holmes, become the oracles of the new legalism and indeed new constitutionalism. Under his definition of "truth" as that which is helpful or useful here and now, it is beyond lawyers' ability—as it is beyond the ability of anyone—to point to the constitutional truth of things. To know legal dogma is to be able to make predictions. "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of public force through the instrumentality of the courts."[1] This is far from Plato's notion in the Minos that law seeks to be a discovery of *what is*, or Aquinas's that proper human law must not conflict with the natural law, which is accessible to unaided human reason, or to the American Founders' written constitutionalism.

In what terms are we to understand what law's instrumentality—the courts—will actually *do*? Holmes claims that law reflects not logic but experience. Law cannot be understood to be syllogistic—i.e., the major premise of sound legal analysis being found in the law itself, the minor premise in the facts of the case. Such analysis implies judges can decide particular cases on the basis of right reason. Rather,

judges look to history and incorporate science—especially economic science—into their jurisprudence. Holmes's social Darwinism is exhibited in his view that judges express the wishes of their class at a particular historical point, albeit this view is in clear tension with his view that judges must decide cases fairly. The content and growth of law are determined as much by organic "forces" as by men.[2]

The actual grounds of decision, according to Holmes, are based on the "felt necessities" of the time; judges decide questions first, and find reasons for them *ex post facto*. There can thus be no logical necessity or reasoning about law, apart from calculations dictated by answers to questions of socioeconomic advantage. Holmes maintains that one of the problems of the common law prior to legal realism was that it had not been, in a certain sense, theoretical enough, i.e., not reliant enough on utilitarian social and economic theory, as opposed to insight into eternal questions of justice. In fact, the judge gives his conclusions "because of some belief as to the practice of the community or of a class, or because of some opinion as to policy….Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. . . . [O]ur law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident."[3]

The core of Holmes's legal realism—its pragmatism along with a confidence in, or grim acceptance of, the progress of History—is brought into relief by examining its insistence on the notion that courts must interpret and balance rights. The importance of this weighted judicial balancing is nowhere more evident than in Holmes's free speech jurisprudence. In *Schenck vs. United States*,[4] Holmes stated the famous "clear and present danger" test as a pragmatic doctrine that avoided inquiry into the content (that is, the nature) of speech and concentrated only on its likely effects. Prior to the articulation of this doctrine, the content of speech was considered of vital constitutional import.

In *Abrams vs. United States*[5]—decided just months after *Schenck*—a majority of the Court upheld the convictions of anti-government, anti-war radicals who advocated violence. Holmes dissented on the basis of his clear and present danger test. According to Holmes, free speech fosters free trade in ideas, and the test of "truth" is its ability to get accepted in the marketplace of ideas, which will happen when the market assesses its needs. Implicit in this is a genuine Darwinian confidence that society need not fear that which triumphs. The beliefs that will triumph in the long run are critical, not the constitutional or regime beliefs that have existed up to the present, much less a natural law that is not time-bound.

For Holmes, rights are willed by the dominant forces of an age and community. Whatever prevails is right, and therefore all political developments are good until they are no longer in ascendancy, and every regime is worthy until it is overthrown or crumbles. Judges themselves, as well as legislators, must to some large degree reflect dominant forces according to the state's position in History—understood not as a mere record of events, but as an inexorable process that dictates its own moral categories. Holmes was therefore a progressive in this Historical sense, rather than in his individual judgments, which could favor repressive law as well as progressive law. Holmes's thought can be said to reduce to a new "natural" law—a Darwinian process of triumph over lesser forms, or progressivism as legal theory.

In *Gitlow v. New York*,[6] Holmes makes an arresting claim: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." But if the Constitution is itself neutral or indifferent on this question, what is the basis for a constitutional ruling in favor of a First Amendment claim? Again, we are led to Darwinian experimentalism, albeit of a foreboding, fatalistic kind.

Holmes was often willing to show great deference to legislative judgments as the sovereign expressions of popular will. In *Lochner v. New York*,[7] Holmes dissented (on the grounds of constitutional neutrality) from a majority that held that state economic regulations limiting work hours were unconstitutional. He famously claimed "I strongly believe that my agreement or disagreement has nothing to do with the

right of a majority to embody their opinions in law . . . . I think the word liberty in the 14th amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . . .” But this modest conception of the judicial function in a democracy was not Holmes’s final word. Holmes’s jurisprudence suggests that the Supreme Court is to intervene where the legislative branch limits free speech, but not when it limits economic freedom. For Holmes, survival or progress might require activism or restraint, and reliance on either is purely an instrumental—or experimental—question.

Holmes notably claims, “When I say that a thing is true, I mean that I cannot help believing it. . . . But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations . . . .”[8] Even more radically, Holmes’s efforts to debunk the philosopher’s quest for “absolute” truth or the jurist’s for “natural law” lead him to suggest that the morality of even the greatest human struggles depends entirely on the outcome:

I used to say, when I was young, that truth was the majority vote of that nation that could lick all others. Certainly we may expect that the received opinion about the . . . [First World] war will depend a good deal upon which side wins (I hope with all my soul it will be mine), and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view.[9]

This account of natural law—or, more properly—an inexorable law of historical unfolding—paints it as nothing more than a dominant opinion. Holmes thereby lays the foundation for a judicial seeking-out and support of such dominant opinions, and, concomitantly, judicial adversity toward “weaker” opinions or entities that appear not to support the strength and growth of the social organism.

Racial improvement through eugenics was one outgrowth of early twentieth century progressivism, possessing as it did considerable faith in the ability of science and purportedly scientific administration to solve social problems. In one of his most notorious judgments, Holmes wrote the eight-to-one majority opinion in *Buck v. Bell*[10] that upheld a Virginia compulsory sterilization law. Holmes upheld the law on the grounds that those targeted by the law were treated with scrupulous procedural fairness. Decrying those who “sap the strength” of society, and contending, in reference to the affected litigant and her family, that “three generations of imbeciles are enough,” Holmes seemed to accept the eugenic arguments to the point of endorsing them on grounds of public policy. Holmes reasoned by analogy. He compared the hardships of sterilization with the sacrifices of soldiers in battle. Referring to the Civil War, he argued that if “the public welfare may call upon the best citizens for their lives,” surely those who “sap the strength of the state” could be called upon for a lesser sacrifice.

In his rejection of natural law and natural rights, and with it a liberal constitutionalism of limited state power, Holmes laid the groundwork for the contemporary era of jurisprudence, where judges came to look to their visions of the future more than to documents and doctrines of the past, and thus to take on a new and far more active role in the constitutional order.

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[1] Oliver Wendell Holmes, “The Path of the Law,” in Holmes, *Collected Legal Papers* (New York: Peter Smith, 1952), 167.

[2] Holmes, “The Path of the Law,” 179.

[3]Holmes, “The Path of the Law,” 181.

[4] Schenck v. United States, 249 U.S. 47 (1919).

[5] Abrams v. United States, 250 U.S. 616 (1919).

[6] Gitlow v. New York, 268 U.S. 652.

[7] Lochner v. New York, 198 U.S. 45 (1905).

[8] Oliver Wendell Holmes, "Ideals and Doubts," in Holmes, *Collected Legal Papers*, 304-05.

[9] Oliver Wendell Holmes, "Natural Law," in Holmes, *Collected Legal Papers*, 310.

[10] Buck v. Bell, 274 U.S. 200 (1927).

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