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Chief Justice Holmes on the Science and Art (and Politics) of Judging

David J. Seipp

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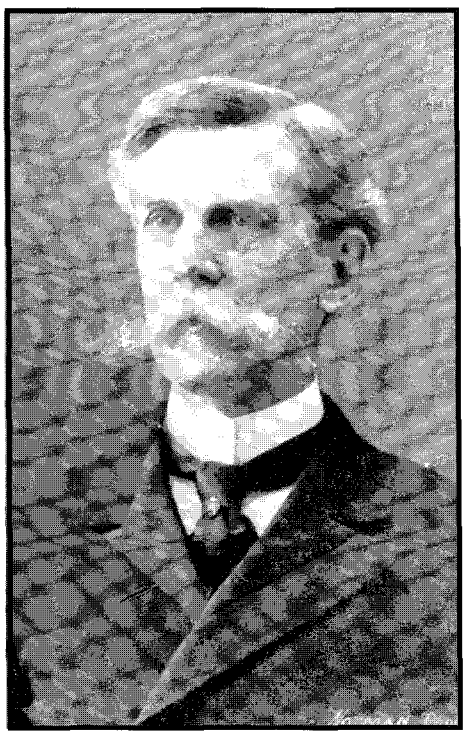
Oliver Wendell Holmes, Jr. (1841-1935), twenty-fifth Chief Justice of Massachusetts, needs no introduction to the readers of this journal. Son and namesake of one of America's most popular writers, he was at twenty-four a Civil War hero wounded three times in battle, and at forty a lawyer-scholar whose book of lectures *The Common Law* would win him international renown. At sixty-one he began three decades as the Great Dissenter on the U.S. Supreme Court, where he exposed the economic theory underpinning the dominant freedom-of-contract ideology. Between 1882 and 1902—between early promise and later fame—he served on the Supreme Judicial Court of Massachusetts.[1]

Oliver Wendell Holmes, Jr.



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Holmes's years as a state justice have received relatively less attention from biographers and legal scholars than his earlier and later career.[2] This article will focus on Holmes's brief tenure as Chief Justice of Massachusetts, from 1899 to 1902, on his extra-judicial writings before and during this period about how judges should decide cases, and on a few of his most notable decisions. Holmes counseled judges to confront explicitly the economic and social decisions they were making—though he could not

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1. Among recent notable biographies of Holmes are: SHELDON M. NOVICK, HONORABLE JUSTICE (1989); LIVA BAKER, THE JUSTICE FROM BEACON HILL (1991); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES (1993).

2. The chief exceptions are: Perlie P. Fallon, Note, *The Judicial World of Mr. Justice Holmes*, 14 NOTRE DAME LAW. 52 (1938); 163 (1939); Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975 (1977); Patrick J. Kelley, *Holmes on the Supreme Judicial Court: The Theorist as Judge*, *in* THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 275 (Russell K. Osgood ed., 1992); Patrick J. Kelley, *Holmes's Early Constitutional Law Theory and Its Application in Takings Cases on the Massachusetts Supreme Judicial Court*, 18 S. ILL. U. L.J. 357 (1994).

admit that these choices were inescapably political as well. On the occasions of his appointment in 1899 and his departure in 1902, contemporaries took stock of the chief justice and some found him wanting. Was Holmes truly great? Was he more brilliant than sound? Was his new method of deciding cases any better than what had come before? These are the questions left open by the chief justiceship of Oliver Wendell Holmes, Jr.

How Judges Decide Cases, and How Holmes Became Chief Justice

The Path of the Law. One of Justice Oliver Wendell Holmes's most famous works is *The Path of the Law*, his speech to the Boston University School of Law on January 8, 1897.[3] Holmes addressed that speech to practicing lawyers and law students, recommending that they take the "bad man's view" of law—in order to avoid the mistake of confusing law with morality. In the same speech, Holmes recommended that judges should acknowledge the real choices they made between competing economic interests—in order to avoid the fallacy of confusing law with logic. In a brief but memorable passage in *The Path of the Law*, Holmes warned judges not to follow old precedents blindly—"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[4]

This throwaway line, so often quoted since, is but one example of Holmes's remarkable gift for striking language. It was odd coming from Holmes, since he won his early renown by diving deep into the historical evolution of the common law[5] and he remained the only justice on his court who cited pre-1500 English cases.[6] His old friend, Harvard professor James Bradley Thayer, a fellow historian of the early common law, heard his speech and wrote to Holmes soon afterwards, warning that he shouldn't include that passage about Henry IV in his printed text.[7] Thayer worried that "the mob of judges who know so

3. Oliver Wendell Holmes, Jr., *The Path of the Law*, address at the dedication of a new hall, Boston University Law School (January 8, 1897), *in* 1 BOSTON L. SCH. MAG., Feb. 1897, at 1; *reprinted in* 10 HARV. L. REV. 457 (1897)[hereinafter *The Path of the Law*] ; *in* 9 JURID. REV. 105 (1897); *and in* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 167 (1920) [hereinafter COLLECTED LEGAL PAPERS]. A recent guide to the context of this speech is the present author's essay, *Holmes's Path*, 77 B.U. L. REV. 515 (1997).

4. *The Path of the Law*, *supra* note 3, at 474; COLLECTED LEGAL PAPERS, *supra* note 3, at 195.

5. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881) [hereinafter THE COMMON LAW].

6. *See, e.g.*, Braithwaite v. Hall, 168 Mass. 38, 39 (1897); Crocker v. Cotting, 170 Mass. 68, 70 (1898); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 74; 813 (1900); Seipp, *supra* note 3, at 532 (quoting Justice Barker's verses).

7. Letter from James Bradley Thayer to Oliver Wendell Holmes (Jan. 11, 1897) (on file with Harvard Law Library's Holmes Papers). Unless otherwise noted, all letters and other manuscript sources cited or quoted in this article are from this collection. *See* Seipp, *supra* note 3, at 533.

little" would take Holmes's speech as permission to ignore long-standing legal doctrines altogether. Holmes replied that he would print the speech "as she is spoke."[8] A month after the speech was printed, a Boston University faculty member, Judge Jabez Fox, printed a refutation of *The Path of the Law* in which he accused Holmes of abandoning the security of stare decisis in favor of contested economic theories.[9]

Law in Science and Science in Law. Holmes delivered his next major speech on January 17, 1899, in Albany, New York, shortly before he began to preside over the Supreme Judicial Court of Massachusetts. The occasion was the Annual Meeting of the New York State Bar Association. The invitation may have originated with Theodore Roosevelt, newly-elected governor of New York, who admired a militaristic speech that Holmes delivered in 1895 and had a mutual friend in Holmes's cousin, Henry Cabot Lodge.[10] Holmes chose as his title *Law in Science and Science in Law.* The speech was an extended reflection on the worth of history, the role of precedent, and the need for judges to choose honestly among competing social interests.[11]

The first half of Holmes's speech was a defense of legal history. Holmes romanticized the lonely law professor tracking down legal ideas in their earliest, most primitive forms. He gave examples from his own discoveries of archaic notions lurking in modern doctrines. Academic scholars like Thayer and James Barr Ames delved in musty volumes, Holmes said, not for the practical guidance that their findings would offer to modern judges, but rather to do legal history for legal history's sake, worthwhile precisely because it had no practical end in view. This is what Holmes meant by "law in science," the "scientific" as opposed to the "practical" study of law.[12] The assembled members of the New York bar must have thought this scholarly reverie an odd topic for their principal speaker to choose. The second half of Holmes's speech dealt with the more practical aspect of law, with judges and lawyers in his audience who every day had "to make up your mind at your peril upon a living question, for purposes of action."[13] The question was how to make these practical judgments.

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8. Letter from Oliver Wendell Holmes to James Bradley Thayer (Jan. 12, 1897).

9. Jabez Fox, *Law and Morals*, 1 BOSTON L. SCH. MAG., Mar. 1897, at 7.

10. *See* NOVICK, *supra* note 1, at 228; Seipp, *supra* note 3, at 520-21.

11. PROCEEDINGS OF THE TWENTY-SECOND ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION 97 (1899); *reprinted in* 12 HARV. L. REV. 443 (1899) [hereinafter *Law in Science & Science in Law*]; *and in* COLLECTED LEGAL PAPERS, *supra* note 3, at 210 (1920).

12. *Law in Science & Science in Law*, *supra* note 11, at 443-52; COLLECTED LEGAL PAPERS, *supra* note 3, at 210-24.

13. *Law in Science & Science in Law*, *supra* note 11, at 452; COLLECTED LEGAL PAPERS, *supra* note 3, at 224.

The answer, Holmes said, was not history alone:

> Every one instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the governing power of the community has made up its mind that it wants.[14]

Deciding what the community wants was hard for judges to do. "Judges commonly are elderly men"—Holmes at fifty-seven was the youngest on his bench—"and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."[15] Judges needed to scrutinize "the reasons for the rules we follow," and not be "contented with hollow forms of words merely because they have been used very often and have been repeated from one end of the Union to the other."[16]

And the answer was not logic alone. "The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics" but rather in consideration of "accurately measured social desires."[17] "Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice."[18]

The answer, Holmes said in 1899 as he had in 1897, was to compare "the worth, that is intensity" "of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant."[19] "[T]he real justification of a rule of law, if there be one, is that it helps to bring about a social end which we may desire" and therefore "[t]hose who make and develop the law should have those ends articulately in their minds."[20] "[W]hat

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14. *Law in Science & Science in Law*, *supra* note 11, at 452; COLLECTED LEGAL PAPERS, *supra* note 3, at 225.

15. *Law in Science & Science in Law*, *supra* note 11, at 455; COLLECTED LEGAL PAPERS, *supra* note 3, at 230.

16. *Law in Science & Science in Law*, *supra* note 11, at 460; COLLECTED LEGAL PAPERS, *supra* note 3, at 238.

17. *Law in Science & Science in Law*, *supra* note 11, at 452; COLLECTED LEGAL PAPERS, *supra* note 3, at 225-26. Holmes had earlier attacked judicial reliance on logic in Book Review, 14 AM. L. REV. 233-35 (1880); THE COMMON LAW, *supra* note 5, at 1; and *The Path of the Law*, *supra* note 3, at 465-66; COLLECTED LEGAL PAPERS, *supra* note 3, at 180-82.

18. *Law in Science & Science in Law*, *supra* note 11, at 461; COLLECTED LEGAL PAPERS, *supra* note 3, at 239.

19. *Law in Science & Science in Law*, *supra* note 11, at 456; COLLECTED LEGAL PAPERS, *supra* note 3, at 231. Holmes was expanding on a point he had made earlier in *The Path of the Law*, *supra* note 3, at 469, 474; COLLECTED LEGAL PAPERS, *supra* note 3, at 187, 195.

20. *Law in Science & Science in Law*, *supra* note 11, at 460; COLLECTED LEGAL PAPERS, *supra* note 3, at 238-39.

really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is stronger at the point of conflict."[21] Accurate measurement of these conflicting social desires at the root of every case was the "science in law" that Holmes wanted to see in the new twentieth century.

One of Holmes's examples in his 1899 address was the "fellow servant" doctrine of *Farwell v. Boston & Worcester Railway Co.* (1842).[22] Chief Justice Lemuel Shaw held in *Farwell* that an employer is not liable to an employee for injury resulting from the negligence of a fellow employee because the injured employee, as part of his contract of employment, "assumed the risk" of accidents caused by fellow workers. With the growing number of industrial accidents, the monstrous consequences of this doctrine had grown more and more apparent.[23] The Massachusetts legislature tried to soften its operation, but Holmes's court upheld the harsh doctrine.[24] Holmes said of the "fellow servant" rule:

> When we say that a workman takes a certain risk as incident to his employment, we mean that on some general grounds of policy blindly felt or articulately present to our mind, we read into his contract a term of which he never thought; and the real question in every case is, What are the grounds, and how far do they extend?[25]

Shaw made just such a policy judgment, but later judges merely repeated his phrases without reflecting on them. With his gift for the apt phrase, Holmes summed up his advice: "We must think things not words, or at least we must constantly translate our words into the facts for which they stand."[26]

Holmes's Own Opinions. The opinions that Holmes wrote on the Massachusetts court did not usually reflect the method he described in his speeches. Among his many opinions denying recovery in tort a typical one was *Holbrook v. Aldrich* (1897).[27]

21. *Law in Science & Science in Law*, *supra* note 11, at 460-61; COLLECTED LEGAL PAPERS, *supra* note 3, at 239.

22. 45 Mass. (4. Metc.) 49 (1842).

23. *See* Lawrence M. Friedman & Jack Landinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 59-69 (1967).

24. *See infra* text accompanying notes 181-84.

25. *Law in Science & Science in Law*, *supra* note 11, at 456; COLLECTED LEGAL PAPERS, *supra* note 3, at 232.

26. *Law in Science & Science in Law*, *supra* note 11, at 460; COLLECTED LEGAL PAPERS, *supra* note 3, at 238.

27. 168 Mass. 15 (1897).

Here is Holmes's description to a close friend, Clare Castletown, of his decision process and of the facts of the case:

> When I decide a case I try to look back through the commonly accepted postulates and to see exactly what the conflicting desirables are between which really I am choosing in the form of simply working out the logic of what is settled already. For instance when a child of 6 puts her hand into a coffee-grinder in a shop and gets her finger taken off and we say she can't recover because she was hurt in consequence of unlawful intermeddling, we are saying in effect that it is more desirable that property should be respected and protected even from a harmless touch than that one too young to look out for herself should have her finger kept on—not necessarily an absurd proposition but one which wouldn't be so popular if stated that way![28]

If this was Holmes's actual process of reasoning to the result in *Holbrook*, he certainly disguised it when he wrote the opinion for the court. *Holbrook* was decided in a cryptic, two-paragraph opinion. The background principle that a property-owner owed a duty of care to invitees, but owed nothing at all to trespassers, did not need repeating. The plaintiff lost, Holmes wrote, because "at the moment of the accident the plaintiff was not within the scope of the defendants' implied invitation, and therefore was entitled to no protection against such possibilities of harm to herself."[29] Contrary cases from other states allowing recovery when a defendant's dangerous machinery constructively "invited" children to play with it were distinguished with a typically Holmesian flourish: "Temptation is not always invitation."[30] Just why and when temptation differed from invitation—and why this child was not an invitee in the store—was left to the reader's imagination. Holmes's cryptic bon mot—for which he received a fan letter from a teacher of Torts at Boston University[31]—concealed more than it revealed.

Holmes's brief, conclusory opinion in *Holbrook v. Aldrich* was characteristic of the more than thirteen hundred opinions he wrote on the Supreme Judicial Court. Yet his private letter to

28. Letter from Oliver Wendell Holmes to Clare Castletown (June 18, 1897).

29. 168 Mass. 15, 16 (1897).

30. *Id.*

31. Undated letter from Melville Madison Bigelow to Oliver Wendell Holmes; *see* Seipp, *supra* note 3, at 525 n.65.

Clare Castletown suggests that in this case he was doing the sort of weighing of competing interests he spoke of in *The Path of the Law* and *Law in Science*. Was this what Holmes was recommending—for judges to decide a case one way and then write the court's opinion in completely different terms? In both speeches, Holmes seemed to say the opposite—that judges should now do explicitly what they have always done tacitly. Yet in his own opinions Holmes hardly ever wrote openly about choosing between competing social interests.[32] "Cryptic" is the word most often applied by later scholars to Holmes's opinions.[33]

Mark Tushnet, in an article from 1977, aptly described Holmes's typical opinions: "sequences of simple declarative sentences, followed by one or two citations, with the occasional unadorned observation that the case at bar is unlike an earlier one;"[34] "detailed recitations of the facts from which legal conclusions seemed to follow without the need for discussion, assumptions about legal rules without their explicit statement, and rejections of both legal claims and their factual predicates."[35] Tushnet proposed that the Supreme Judicial Court's tradition of unanimity and norm of collegiality prevented Holmes from trying out novel forms of legal analysis or reformulating legal doctrines in line with his own views. Instead, all he could do was to signal his new ideas occasionally and cryptically, in hopes that later generations of sympathetic and enlightened lawyers and judges would understand his clues.[36] Holmes himself spoke of "the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought."[37]

G. Edward White, in a 1982 article, offered a different explanation. Holmes, White proposed, had given up on the explanation of judicial choice. All explanations fell apart on reflection. Nevertheless, the judge had to decide. Choice between the competing social interests was essentially arbitrary. But that is what judges had to do. "What he had done was to see the internal conflict presented by a case, measure the competing social

32. Prof. Tushnet has identified three other Holmes opinions that explicitly discuss competing interests: Burt v. Advertiser Newspaper Co., 154 Mass. 238, 243 (1891); Pomeroy v. Inhabitants of Westfield, 154 Mass. 462, 465 (1891); Quinn v. Crimmings, 171 Mass. 255, 258 (1898). Tushnet, *supra* note 2, at 1014 & n. 193.

33. *See, e.g.*, Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 523 (1958) (Frankfurter, J., dissenting); Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 9 (1963); G. Edward White, *Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 649, 671 (1982).

34. Tushnet, *supra* note 2, at 979.

35. *Id.* at 985.

36. *Id.* at 984, 996, 1001.

37. OLIVER WENDELL HOLMES, Jr., *The Profession of the Law*, speech delivered at Harvard University, Feb. 17, 1886, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 28, 31 (Mark DeWolfe Howe ed., 1962) [hereinafter OCCASIONAL SPEECHES].

desires in his mind, and make an arbitrary choice."[38] Such opinions gave the bar precious little guidance as to how Holmes and his court would decide the next case that presented a similar choice.

Holmes himself acknowledged the difficulty of making these choices between competing social interests. He said in *The Path of the Law* that "certainty generally is an illusion" and that "judgment as to the relative worth and importance of competing legislative grounds" is "often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[39] In *Law in Science* he said, "in the law we only occasionally can reach an absolutely final and quantitative determination, because the worth of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to numbers and absolutely fixed." The judge must exercise the sovereign prerogative of choice immediately, making a rough and ready estimate of social needs and wants. "But it is of the essence of improvement that we should be as accurate as we can."[40]

One of those rare instances in which Holmes followed his own advice to lay bare the court's underlying policy choices was in his dissent in *Vegelahn v. Guntner* (1896), the opinion by which he was best known in the late 1890s.[41] It was a suit by an employer to enjoin striking workers from picketing the workplace. Justice Charles Allen wrote for the majority of the court, upholding a broad injunction against any conspiracy to do injurious acts to an employer, including conspiracy to persuade others not to enter into his employment.[42] It was rare for Massachusetts justices to issue dissents, but both Holmes and Chief Justice Walbridge Field did so here.[43] Holmes dissented in *Vegelahn* at length, arguing that the policy of allowing free competition should at least permit striking workers to discourage prospective job applicants from accepting jobs. Holmes wrote:

> The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely

38. White, *supra* note 33, at 652, 671.

39. *The Path of the Law*, *supra* note 3, at 466; COLLECTED LEGAL PAPERS, *supra* note 3, at 181. *See* Seipp, *supra* note 3, at 522.

40. *Law in Science & Science in Law*, *supra* note 11, at 456; COLLECTED LEGAL PAPERS, *supra* note 3, at 231.

41. 167 Mass. 92 (1896).

42. *Id.* at 99-100.

43. Holmes and Field also dissented together in Miller v. Hyde, 161 Mass. 472 (1894); Nash v. Minnesota Title Insurance and Trust Co., 163 Mass. 574 (1894); and Chase v. Henry, 166 Mass. 577 (1896).

> by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof.[44]

Holmes was a loyal Republican, but his dissent was pro-labor at a time when the contending positions of management (Republican) versus labor (Democrat) were at the forefront of national politics. The decision and dissents, issued just eight days before the McKinley-Bryan election of 1896, made headlines, and Holmes was said to have told a neighbor, "I have just handed down an opinion that shuts me off forever from judicial promotion."[45]

Holmes Presiding. In January 1899, probably a few days after Holmes's speech to the New York bar at Albany, Chief Justice Walbridge A. Field collapsed on his walk home from the courthouse.[46] Field was sixty-five years old, and had been on the court for nearly eighteen years, for eight of them as chief justice. He lingered with heart and kidney disease for six months, but never returned to active duty. Justice Charles Allen, for a long time the eldest and most senior associate justice, had resigned at age seventy-one on September 1, 1898. Allen took his pension and spent his retirement proving that Shakespeare, not Bacon, wrote the plays and sonnets.[47] This left Holmes as senior justice.

Holmes was fifty-seven years old when Field was struck ill. He was younger than any of the other associate justices then serving, but senior in service on the Supreme Judicial Court. Holmes therefore had the duty of assigning opinions and presiding at the bench—"bossing the show," as he wrote to a close friend.[48] Holmes wrote nearly all of Field's assigned decisions, along with his own. He took over opinions assigned to other justices when they took too long producing them.[49] Over the five months that followed Chief Justice Field's last opinion, Holmes

44. 167 Mass. at 106.

45. Letter from Richard W. Hale to Mark Howe, May 17, 1939, in Holmes Papers (quoting Arthur D. Hill). *See* Seipp, *supra* note 3, at 540-41.

46. *Remarks by Mr. Justice Barker, in* TRIBUTES TO WALBRIDGE A. FIELD 39 (1905) [hereinafter FIELD TRIBUTES]. Field issued his last opinion for the court on January 7, 1899. Reed v. Police Court of Lowell, 172 Mass. 427 (1899). He last presided at an argument of the Supreme Judicial Court on January 19, 1899. Dixon v. Williamson, 173 Mass. 50 (1899) and Sears v. Board of Aldermen, 173 Mass. 71 (1899) were argued that day.

47. *See* CHARLES ALLEN, NOTES ON THE BACON-SHAKESPEARE QUESTION (1900). In Holmes's memorial tribute for Chief Justice Field, he poked gentle fun at Charles Allen by listing "whether Bacon wrote Shakespeare" as the sort of question we could explore if we had eternity ahead. FIELD TRIBUTES, *supra* note 46, at 31; OCCASIONAL SPEECHES, *supra* note 37, at 77.

48. Letter from Holmes to Clare Castletown (May 12, 1899).

49. *Id.* On page 198 of Holmes's bench book, he listed 60 "cases from other Judges" in the first half of 1899, after his list of opinions assigned to himself.

issued more than twice as many opinions as any other justice, nearly 40 percent of the court's total.[50]

On April 15, 1899, Holmes wrote a touching letter to Chief Justice Field.[51] He wrote, "perhaps you wouldn't mind hearing from a cantankerous subaltern how much I appreciate and think of your invariable sweetness and kindness now that I am missing them." He joked, "I really think the bar has improved since I left it." He winked about hopping down to New York for "a dinner or two with agreeable girls." He ended this "effort to get a smile on your face" and turned to "dashing off my daily case." In May, one of the Boston newspapers speculated that Field might take advantage of the recently enacted pension scheme and retire at three-fourths of his salary.[52] The article said that Holmes, "the ranking man" on the court, was the most likely successor, though it also mentioned Justice Marcus Knowlton, railroad lawyer Solomon Lincoln, and Attorney General Hosea Knowlton as possible chiefs. Holmes privately expressed irritation that Field refused to retire, leaving the court understaffed and Holmes himself under immense pressure to do the work of both until the court's term ended.[53]

Walbridge Abner Field.

Courtesy of the Social Law Library, Boston.

Walbridge Field died at 9:45 p.m. on Saturday, July 15, 1899, at his home in Rutland Square, Boston.[54] Holmes, who was at his seaside summer home at Beverly Farms, an hour north of Boston, learned of Field's death in the next day's morning newspaper. Holmes wrote to his old friend Sir Frederick Pollock that Field had no "instinct for the jugular, but he had a fertile suggestive mind, good sense in the main, and the sweetest of

50. Counting cases from 172 Mass. 459 (Jan. 9, 1899) to 173 Mass. 517 (June 7, 1899). *See State's Great Loss*, BOSTON GLOBE, July 17, 1899, at 7.

51. Letter from Holmes to Walbridge A. Field (Apr. 15, 1899). This letter is misidentified in Harvard Law School's Holmes Papers, Series 12, Box 52, Miscellaneous Letters, as one to U.S. Supreme Court Justice Stephen J. Field.

52. *May Retire—Chief Justices Field and Mason—Judge Holmes May Succeed Former*, clipping from unidentified Boston newspaper, sent to Holmes on May 5, 1899, in Holmes Papers. The statute is 1899 Mass. Acts 310, § 2.

53. Letters from Oliver Wendell Holmes to Clare Castletown (May 12 and 19, 1899).

54. *Nestor of Bench*, BOSTON GLOBE, July 16, 1899, at 1; *Recent Deaths*, BOSTON EVENING TRANSCRIPT, July 17, 1899, at 7; Telegram from Robert A. Herter, Clerk of Supreme Judicial Court, to Holmes (July 16, 1899).

tempers."[55] Those words stuck in his mind. A reporter who tracked Holmes down at Beverly Farms reported him as saying of Field: "His death is too recent and his loss too great for a summing up of his valuable life now. I can only say at this time that Chief Justice Field was a man of great fertility of suggestion, excellent sense, and the sweetest temper in the world, and we shall all miss him greatly."[56] Later that week he acted as honorary pallbearer at Field's funeral, paired with U.S. Supreme Court Justice Horace Gray, a former chief justice of the state. Boston lawyer Louis D. Brandeis also attended the service.[57]

Holmes Appointed. The *Boston Globe*, two days after Field's death, reported that "it has been very generally assumed by members of the bar that Oliver Wendell Holmes, being the senior justice, would receive the appointment."[58] On July 26, 1899, Governor Roger Wolcott duly nominated him.[59] Holmes, still at Beverly Farms, wrote to one friend that he learned of his nomination from a *Boston Herald* reporter,[60] and to another that "it seems to have been generally expected and to be approved."[61] The *Evening Transcript* editorialized that the governor "has done the thing so obviously proper that he will not receive nor will he expect credit for special discrimination in this particular instance. The selection is ideal and we believe it is almost unanimously so regarded."[62] But a close friend wrote to him, "I know you have just a little the feeling that every man's hand was against you."[63]

Quoting extensively from his dissent in *Vegelahn v. Guntner*, the *Boston Herald* praised Holmes as "a radical, yet a practical one": "Strange as it may seem for a man of his environments, his legal opinions have leaned to the side of the laborer."[64] The *Herald* noted that the English House of Lords in *Allen v. Flood*[65] had recently reached the same result favored by Holmes. The more conservative *Evening Transcript* commented that Holmes's *Vegelahn* dissent showed his utter lack of bias: "What his personal sympathies might have been did not appear, and does not

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55. Letter from Holmes to Sir Frederick Pollock (July 16, 1899) *in* 1 HOLMES-POLLOCK LETTERS 95 (Mark DeWolfe Howe ed., 1941) [hereinafter HOLMES-POLLOCK LETTERS].

56. *Loss Too Great for Words*, BOSTON GLOBE, July 17, 1899, at 7.

57. *Justice Field's Funeral*, BOSTON EVENING TRANSCRIPT, July 19, 1899, at 4.

58. *State's Great Loss*, BOSTON GLOBE, July 17, 1899, at 7.

59. Letter from Roger Wolcott to Holmes (July 26, 1899).

60. Letter from Holmes to Nina Gray (Mrs. John Chipman Gray) (July 27, 1899).

61. Letter from Holmes to Sir Frederick Pollock (July 27, 1899) in 1 HOLMES-POLLOCK LETTERS, *supra* note 55, at 96.

62. *Our New Chief Justice*, BOSTON EVENING TRANSCRIPT, July 27, 1899, at 6.

63. Letter to Holmes from Nina Gray (July 28, 1899).

64. *New Chief Justice*, BOSTON HERALD, July 27, 1899, at 8; *reprinted as Judge Holmes' Opinions*, 60 ALB. L.J. 118 (Aug. 26, 1899).

65. [1898] A.C. 1.

matter."[66] A month earlier, the *New York Law Journal* observed, "Though on the great question of the proper attitude and policy toward so-called 'Labor' controversies we radically disagree with him, we heartily admire his judicial strength and usual sanity of view."[67]

While Holmes awaited confirmation, one of New York's most celebrated and disreputable lawyers, Abraham H. Hummel, praised him publicly as a "worthy son of a worthy sire."[68] Holmes's father, who died in 1894, was "known and appreciated in every corner of the civilized world" for his poetry and essays as "The Autocrat of the Breakfast Table." Hummel wrote in a New York paper on July 30, 1899, that Holmes Jr. was "not only a model judge on the bench, and a scientist in the law, but an artist and poet in his finer sensibilities as well." The outrageous exploits of Hummel and his partner William F. Howe in New York's criminal courts are chronicled in Richard H. Rovere's entertaining book subtitled *Their True and Scandalous History*.[69] Hummel had appeared before Holmes in 1894 while representing an actress sued by her manager in Boston.[70] His praise for Holmes in 1899 reminds us that, throughout Justice Holmes's lifetime, his father was more widely known than he was,[71] and his writing style was inevitably compared to his father's. The *Boston Daily Advertiser*, in applauding Holmes's nomination, drew precisely that parallel between the literary qualities of the son's opinions and those of the father's essays and light verse.[72] When the *Albany Law Journal* praised the appointment, it was one page after a note that the Supreme Court of Montana had cited with approval his father's most popular humorous poem, *The Wonderful One-Hoss Shay*.[73]

After the requisite one week's consideration, on August 2, 1899, the Executive Council unanimously approved Holmes's appointment. Holmes came to the council chamber, and, in the Governor's absence, Lieutenant Governor W. Murray Crane administered to Holmes the oath of office.[74] The promotion carried with it an increase in salary from $6500 to $7500 per annum, plus $500 extra for travel expenses.[75] Holmes received

66. *Our New Chief Justice*, BOSTON EVENING TRANSCRIPT, July 27, 1899, at 6.

67. *Two Types of Judicial Opinions*, N.Y.L.J. (June 28, 1899), clipping in Holmes Papers, *reprinted in* 60 ALB. L.J. 76-77 (Aug. 5, 1899).

68. *Holmes Shares Father's Fame*, SUNDAY TELEGRAPH (New York), July 30, 1899, at 6.

69. RICHARD H. ROVERE, HOWE & HUMMEL: THEIR TRUE AND SCANDALOUS HISTORY (1947).

70. Rice v. D'Arville, 162 Mass. 559 (1895).

71. *See* Seipp, *supra* note 3, at 518-19.

72. *The Chief Justiceship*, BOSTON DAILY ADVERTISER (clipping in Holmes Papers).

73. *Current Topics*, 60 ALB. L.J. 65, 66 (Aug. 5, 1899).

74. *Judge Holmes Sworn In*, BOSTON GLOBE, Aug. 2, 1899, at 2.

75. WILLIAM T. DAVIS, HISTORY OF THE JUDICIARY OF MASSACHUSETTS 177 (1900). In 1900 salaries were raised to $8,500 for the chief justice and $8,000 for associate justices, plus

letters of congratulation from around the world, from Henry James and Walt Whitman, from Louis Brandeis and Horace Gray, from U.S. Secretary of State John Hay and from humble courthouse messenger James Hussey. Field's widow wrote, "I know that if *my* Chief Justice from his high Heaven could send you a message of love, he would do it. . . . He loved his work, and gave his life for it, and I know you are glad he died Chief Justice of Massachusetts."[76]

Contrasting Field and Holmes. The old and new chief justices had very different styles of opinion-writing. Field dithered, and Holmes plunged. When Field died, the *Globe* reported that his "sensitive disposition" had always made writing opinions "a source of much worry" for him: "In many important causes he would recall the opinion and go over it again and again, to see that there was nothing in it which might be misinterpreted or be subject to a double meaning."[77] Eulogists agreed that Field had a "highly nervous temperament," that he laboriously investigated every issue and side issue, revised his opinions endlessly, severely criticized his own work, came slowly to conclusions, and glanced nervously around the courtroom seeking approval for his rulings.[78] Almost "too conservative," Field "held very strongly to the view that the existing order should not be changed lightly."[79] In *Vegelahn*, the 1896 decision that heralded Holmes's new departure, Field's dissent was based on the lack of precedent for a labor injunction.

Holmes's eulogy for his predecessor was more revealing than most. Field's mind, Holmes said, "was a very peculiar one."[80] He "seemed to me to think aloud, perhaps too much so." Field was unable to bypass any side issue, however unpromising. This would have been fine, Holmes said, "if we had an eternity ahead." As a result, "the Chief Justice did a vast deal of work which never appeared, in thus satisfying his conscience and in his unwillingness to risk leaving something out." In his tribute to Field, Holmes said that "in deciding a question of law, one has to consider the element of time. One has to try to strike the jugular and let the rest go."

$500 for travel. *Id.*

76. Letter to Holmes from Frances F. Field (Aug. 2, 1899).

77. *State's Great Loss*, BOSTON GLOBE, July 17, 1899, at 7.

78. FIELD TRIBUTES, *supra* note 46, at 10, 13, 16, 20, 28, 43, 60-61 (Alexander S. Wheeler, James R. Dunbar, Moorfield Storey, Herbert Parker, Hosea M. Knowlton, James M. Barker, John Noble).

79. *Id.* at 43 (James M. Barker).

80. FIELD TRIBUTES, *supra* note 46, at 51. The same text is printed in *Loss to Bar and State*, BOSTON GLOBE, Nov. 25, 1899, at 9; in Supplement, 174 Mass. 598-99; OCCASIONAL SPEECHES, *supra* note 37, at 76-77.

The contrast is clear in this description of Holmes's opinions, from a *Boston Herald* article reporting his appointment as chief justice.

> His opinions . . . are expressed in a fine literary style . . . and occasionally sparkle with wit. He has generally reasoned and explained the law of the case in hand, citing such cases as may have relation to it, without copying in a wholesale manner general rules. His opinions are almost always brief, and they are prepared generally with celerity. It has been said by some lawyers that his opinions are at times not clear. Perhaps the fault may be with the lawyers themselves, who, in following so much the old-fashioned forms and methods, become machines for formulas, and cannot get out of the rut in which they are accustomed to move. . . . He does not hesitate to make a precedent when he has none to follow.[81]

Holmes decided cases quickly, wrote short opinions, and left lawyers wondering what they meant. In his own words, an opinion should be "an unpretentious little thing virulent with originality and insights."[82] He and Field must have found each other's widely differing styles infuriating.

Holmes and Field had differed as well on what was becoming the most important judicial controversy of the day: judicial review of legislation affecting economic rights. First state supreme courts, then the U.S. Supreme Court, began striking down legislation that established maximum hours, minimum wages, and other terms and conditions of contracts and property ownership.[83] Holmes upheld broad legislative power in *Heard v. Sturgis* (1888), a bankruptcy case, over Field's strong dissent.[84] The issue was whether an award of compensation could be transferred to assignees in bankruptcy before Congress established the process by which such compensation could be awarded. Holmes persuaded a majority that "the law knows nothing of moral rights unless they are also legal rights" and so nothing

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81. *New Chief Justice*, BOSTON HERALD, July 27, 1899, at 8; *reprinted at* 33 AM. L. REV. 754-55 (1899).

82. Letter from Holmes to Andrew Inglis Clark (June 6, 1901).

83. *See, e.g.*, Ritchie v. People, 155 Ill. 98 (1895); Lochner v. New York, 198 U.S. 4 (1905); Coppage v. Kansas, 236 U.S. 1 (1913).

84. 146 Mass. 545 (1888).

changed hands until Congress acted.[85] Field insisted, "on grounds of natural justice," that "just demands" for compensation existed before the statutes that recognized them.[86] The U.S. Supreme Court reversed Holmes's decision in 1891.[87]

Also in 1891 the Massachusetts court decided *Commonwealth v. Perry*, striking down an 1891 statute that prevented textile manufacturers from withholding wages from workers for imperfections in their weaving.[88] Justice Knowlton's opinion for the court found the statute in conflict with the Massachusetts Constitution's right "of acquiring, possessing, and protecting property," which included the right to make reasonable contracts, and with the U.S. Constitution's protection against laws "impairing the obligation of contracts."[89] Holmes dissented with language that foreshadowed his later dissents in *Lochner v. New York*[90] and *Coppage v. Kansas*:[91]

> In truth, I do not think that that clause of the Bill of Rights has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the Constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so.[92]

Holmes said in *Law in Science* that judges should weigh the real, conflicting social and economic interests represented in the cases before them. But when the legislature had already struck that balance, Holmes usually took the position that the courts should not second-guess the legislature.[93] A Yale Law School lecturer wrote to Holmes in 1899 applauding his "efforts in the Court to

85. *Id.* at 548.
86. *Id.* at 555-56.
87. Williams v. Heard, 140 U.S. 529 (1891).
88. 155 Mass. 117 (1891).
89. *Id.* at 121.
90. 198 U.S. 4, 75-76 (1905).
91. 236 U.S. 1, 26-27 (1913).
92. 155 Mass. 124. Holmes's dissent in *Perry* was praised in Note, 5 HARV. L. REV. 287 (1891).
93. See Holmes's dissents in advisory opinions such as Opinions of the Justices to the House of Representatives, 155 Mass. 598, 607 (1892); Opinions of the Justices to the House of Representatives, 160 Mass. 586, 593 (1894).

combat the prevailing tendency to set aside as unconstitutional all legislation in the interest of the laboring classes."[94]

Differences of substance and of style mark the transition from Chief Justice Field to Chief Justice Holmes on the Supreme Judicial Court. But the more interesting contrast may be between what Holmes said judges should do and what he did himself. Holmes made brave pronouncements in his public speeches that judges should face directly and explicitly the real choices that they were making when deciding cases, choices between conflicting social and economic interests. But in his own opinions he rarely spelled out those choices, except when he was dissenting and exposing the failure of the majority to face their preconceptions. Holmes's typical opinions—brief, cryptic, and conclusory —gave scant guidance how his court would balance the competing interests in the next case before them.

Law and Politics. A year before he became chief justice, Holmes wrote to a close friend, "I've been in the midst of burning questions this week and last—some involving a good deal of money, and some, politics, as I'm told—but I am a lamb as to politics and I crack round with my decisions having no notion whom I am hitting in the political way."[95] Massachusetts prided itself on the separation of its courts from the political process. Judges were appointed, as they still are, by the governor, subject to approval by the governor's council, with lifetime tenure. Massachusetts remains one of the few states that have never experimented with an elective judiciary.[96] Holmes professed complete disinterest in the partisan politics of his day, and Boston's newspapers were eager to disavow any political basis for his promotion, but political and legal issues were very much interwoven during the years Holmes spent as chief justice.

In April 1899, a new volume of the *Harvard Law Review* opened with a speech delivered in 1853 to the Massachusetts Constitutional Convention by the famous ante-bellum lawyer Rufus Choate—said to be the greatest speech of his career.[97] It was a speech against the election of judges, and in it he observed:

> In constructing our judicial system, it seems to me not unwise . . . , if possible, to induce young lawyers to aspire to the honors of the bench, not by means of party politics, but by devoting themselves to the still and deep studies of this glorious science of the law. . . . How much wiser . . . to

94. Letter from Roger Foster to Holmes (Aug. 30, 1899).
95. Letter from Oliver Wendell Holmes to Clare Castletown (Jan. 18-21, 1898).
96. *See, e.g.*, SARI S. ESCOVITZ, ET AL., JUDICIAL SELECTION AND TENURE 44-45 (1975).
97. Rufus Choate, *The Tenure of Judicial Office*, 13 HARV. L. REV. 1 (1899).

> present motives to the better youth of the profession to withdraw from a too active and vehement political life; to conceive, in the solitude of their libraries, the idea of a great judicial fame and usefulness; and by profound study and the manly practice of the profession alone seek to realize it . . . .[98]

This sounds like an advertisement for Holmes's own path to the bench. Holmes never ran for political office,[99] unlike his predecessor Walbridge Field. Field won a very close election to Congress as a Republican in 1876, only to have his election contested by the Democrats and thrown out by the House of Representatives, then won back his seat two years later.[100]

The *Boston Evening Transcript*, paying tribute to the late Chief Justice Field, took the opportunity:

> to applaud the wisdom of Massachusetts in adhering to an appointive judiciary, in preferring that the governor should with all the care possible and with the benefit of the best advice, select judges, rather than that they should be elected in the fury of a political campaign and should reflect more the passions of a party than the reflections of a legist.[101]

Ten days later the same paper, applauding the governor's choice of Holmes, added that Holmes's appointment again "vindicated the appointive system which has been tenaciously adhered to in this State, after almost all her sister Commonwealths have thrown their judiciaries into politics."[102]

Of course, all was not sweetness and light. One kind of criticism of the Supreme Judicial Court reached something of a peak in 1899. The Essex and Middlesex Bar Associations, in a report published in 1900, warned that "there have been presented to the legislature, within a few years, by disappointed litigants, several petitions to remove from office judges of the Supreme Judicial and Superior Courts."[103] Both Holmes and

98. *Id.* at 24-25.

99. His friend Henry Cabot Lodge, chairman of the state Republican Central Committee, urged Holmes to run for Governor in 1883, as a likely route to the U.S. Senate. Holmes told Lodge, "I don't give a damn about being Senator." BAKER, *supra* note 1, at 285. Lodge reached the Senate in 1892.

100. FIELD TRIBUTES, *supra* note 46, at 57 (John Noble).

101. *Chief Justice Field*, BOSTON EVENING TRANSCRIPT, July 17, 1899, at 6.

102. *Our New Chief Justice*, BOSTON EVENING TRANSCRIPT, July 27, 1899, at 6.

103. ESSEX AND MIDDLESEX BAR ASSOCIATIONS, MISUSE AND ABUSE OF THE RIGHT OF PETITION

Field were particular targets of such petitions seeking their removal or impeachment. One petition sought to unseat the entire bench for "establish[ing] a privileged class within the laws; denying the people equality before the laws, and compelling the poor to submit to oppression and wrong."[104] The Judiciary Committee of the General Court unanimously rejected all such petitions as "based on trivial and groundless charges."[105] But when disappointed litigants resort to such extreme measures, their lack of respect for the judicial process is all too evident.

The quality of justice was very much on the public mind in July of 1899. American newspaper readers followed avidly the retrial in France of Captain Alfred Dreyfus.[106] Court-martialed for treason in 1895 and sentenced to Devil's Island for life, Dreyfus was brought back after years of popular agitation led by Émile Zola and others. He was convicted again in a widely-publicized trial, then immediately pardoned. Americans saw anti-Semitism in the initial court-martial, defense of military honor in the second conviction, and vindication of national honor in the pardon—everything but the legal rights of the individual. They said American courts would never show such partiality.[107]

For all the insistence that in Massachusetts politics had nothing to do with law and the administration of justice, still there it was. The political complexion of the Supreme Judicial Court in 1899 was not hard to figure out. Massachusetts had had six Republican and two Democratic governors between 1880 and 1900,[108] but neither Democrat managed to appoint a single justice to the court. Biographical directories identify all of Holmes's colleagues in 1899 as Republicans.[109] Holmes himself was appointed to the Supreme Judicial Court in December, 1882, by lame duck Republican governor John Davis Long after Benjamin F. Butler, a Democrat, was elected to succeed him.[110] Holmes,

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FOR THE REMOVAL OF JUDICIAL OFFICERS [2] (1900).

104. *Id.*, *quoting* petition of AugustinThompson.

105. *Id.* at [4]. *See* JAMES B. MULDOON, YOU HAVE NO COURTS WITH ANY SURE RULE OF LAW: THE SAGA OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 164-65 (1992).

106. *See* EGAL FELDMAN, THE DREYFUS AFFAIR AND THE AMERICAN CONSCIENCE, 1895-1906 at 27, 32-52 (1981).

107. A friend wrote to Holmes, "This affair of Dreyfus is filling all our minds.... [T]his re-condemnation in the face of all evidence is something like a personal sorrow. I feel for those Frenchmen and women who look upon the verdict with the same horror that we do." Letter to Holmes from Beatrice Chamberlain (Sept. 7, 1899). I cannot find any statement by Holmes about the Dreyfus affair.

108. 2 BIOGRAPHICAL DIRECTORY OF THE GOVERNORS OF THE UNITED STATES, 1789-1978 at 713-19 (Robert Sobel & John W. Raimo eds., 1985).

109. Biographical information on the justices from THE DICTIONARY OF AMERICAN BIOGRAPHY, THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY, and CONRAD RENO, MEMOIRS OF THE JUDICIARY AND BAR OF NEW ENGLAND (1900).

110. It has been suggested that Justice Otis Lord, Holmes's predecessor, was one of

who remained a loyal Republican, expressed relief when William McKinley defeated William Jennings Bryan in the election of 1896.[111] James Muldoon, in his entertaining anecdotal history of the Supreme Judicial Court, was probably right to suppose that in 1896 "no member of the Supreme Judicial Court voted for William Jennings Bryan."[112]

The politics of the time were divisive. The 1896 contest was fought in a nation still burdened by the sharp depression that had begun in 1893. Embittered farmers and desperate industrial workers tried to unite behind Bryan's campaign for increasing the money supply by free coinage of silver. These struggling forces inspired the characters of the scarecrow and tinman (and Bryan the lion) in L. Frank Baum's allegory *The Wonderful Wizard of Oz*. Business interests, united behind McKinley and the gold standard, prevailed in 1896. By 1899, Bryan was still stumping for free silver and the Republicans were still backing gold, but a new set of political issues had arisen. Republicans supported McKinley's annexation of Hawaii, Cuba, the Philippines, and Puerto Rico, while Democrats opposed the new American imperialism, especially when Filipinos rose in revolt against American occupation forces in 1899. Anti-imperialists, led by Boston lawyer Moorfield Storey, pointed out the incongruity of our nation holding colonial peoples in subjection as we had once been held. The Democratic party platform in 1900 also opposed business monopolies and injunctions against labor unions, and favored regulatory agencies and direct election of senators.

The same issues that enlivened national party politics came before the courts. The U.S. Supreme Court delivered a number of notable decisions in 1895 that favored business interests: exempting manufacturers from the Sherman Anti-Trust Act,[113] invalidating the Income Tax,[114] and enforcing injunctions against labor union activities.[115] In the last years of the century the Supreme Court upheld a state statute segregating railroad car passengers as "separate but equal,"[116] struck down state statutes regulating insurance companies[117] and railroad rates[118] as depri-

two justices who timed their resignations to deprive Governor-elect Butler of Supreme Judicial Court appointments. Letter from Charles Devens to Horace Gray (Dec. 19, 1882), *in* Holmes Papers; MULDOON, *supra* note 105, at 152. Butler went on to appoint the first African-American judge to the District Court, and the first Irish-Catholic judge.

111. NOVICK, *supra* note 1, at 178-79, 185, 223; Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 13, 1896).

112. MULDOON, *supra* note 105, at 161.

113. U.S. v. E.C. Knight Co., 156 U.S. 1 (1895).

114. Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895).

115. *In re* Debs, 158 U.S. 564 (1895).

116. Plessy v. Ferguson, 163 U.S. 537 (1896).

117. Allgeyer v. Louisiana, 165 U.S. 578 (1897).

118. Smyth v. Ames, 169 U.S. 466 (1898).

vations of contract and property rights without due process, and stripped the Interstate Commerce Commission of its rate setting powers.[119] State courts faced similar constitutional challenges to state regulatory initiatives and similar maneuvers against labor unions.

The Spanish-American War of 1898 and the sudden acquisition of the islands of Hawaii, Cuba, the Philippines, and Puerto Rico raised immediate issues for the U.S. Supreme Court. Did constitutional provisions extend to inhabitants of the newly-acquired islands, or in the popular phrase, did the Constitution "follow the flag?" Articles by leading academics taking various positions on this question preceded and followed Holmes's *Law in Science* address in the *Harvard Law Review*.[120] Holmes referred in a letter to "a recent exposition which I gave"—probably at a dinner party—"of the cosmical justification of our dealing with the Filipinos, if that is the right spelling."[121] The Supreme Court delayed deciding these questions until after President McKinley's re-election in 1900. In three *Insular Cases*, decided by five-to-four margins with no clear majority holdings, the Court seemed to say that the island territories were neither "foreign" nor part of the United States, nor protected by the Constitution until "incorporated" by Congress, whatever that meant.[122] The leading newspaper humorist of the day, Finley Peter Dunne, parodied the *Insular Cases* in a column ending with the famous words of Mr. Dooley, "no matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."[123]

It was easy for Dunne and his readers to see politics behind the justices' muddled choice among positions that had been in the two parties' platforms the previous November. It is not hard to see politics behind judicial decisions intervening for or against labor unions, or upholding or striking down state regulation of economic matters. Holmes was saying in his speeches that every judicial decision could and should be seen as a choice between

119. Interstate Commerce Comm'n v. Cincinnati, New Orleans and Texas Pac. R.R.., 167 U.S. 479 (1897).

120. C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899).

121. Letter from Holmes to Ellen A. Curtis (Jan. 7, 1901). Henry L. Higginson in a letter of congratulations on his nomination added a word for Holmes's wife Fanny: "Poor Mrs. Judge! Does she care to receive all the queer judges from Manila and Santiago?" Letter from Henry L. Higginson to Holmes (July 28, 1899).

122. De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901). The cases were argued on Jan. 8-11, 1901 and decided on May 27, 1901.

123. Finley Peter Dunne, *The Supreme Court's Decisions* (1901), *in* MR. DOOLEY'S OPINIONS 26 (1906); *reprinted in* MR. DOOLEY ON THE CHOICE OF LAW 52 (comp. Edward J. Bander 1963).

two conflicting social desires. This, too, could be seen as a matter of politics, but the culture of judging in Massachusetts and Holmes's own disavowal of political motivations make it clear that Holmes intended this choice between conflicting social desires to be a nonpartisan one.

Holmes's Term as Chief Justice, and the Substance and Style of Judging

The crushing press of work on the Supreme Judicial Court left Chief Justice Holmes little time to ponder the role of politics in law. His larger-than-life personality expressed itself on the bench in ways that always impressed and sometimes shocked or amused those who came before him. The cases he decided were small, local matters, often trivial in scale, not the great national issues of the day. Nevertheless, Holmes dared to consider his body of opinions on the Supreme Judicial Court an achievement that touched greatness.

Caseload and Workload. Holmes chose to receive his commission on September 12, 1899, at the opening of the Supreme Judicial Court for Berkshire County at Pittsfield, where he had spent the happy summers of his youth.[124] The court had shed much, but not all, of its trial jurisdiction since 1880.[125] During his three years as chief justice, Holmes and a rotating group of four of the six associate justices started each new term of the court in September by travelling as a full bench to sit, for one or two weeks each, at Pittsfield, Greenfield (or Northampton), Springfield, Worcester, Plymouth, Taunton, and Salem. They then spent the last eight weeks of the calendar year sitting at Boston. They resumed in January, sitting at Boston for another fourteen weeks through the end of April. In addition, the justices all met eight times a year at Boston for consultations. Then, in May, Holmes sat as a single justice in one or another county, on a rotating basis, hearing interlocutory appeals.[126] As chief justice, Holmes was relieved of the duty of sitting as a single justice in equity during the summer. Even so, it was a hectic pace. Holmes wrote to a friend in 1901 that he encountered so many distractions and "botherations from fiddling fools" that he "can't get down to regular work before 11[:30] or 12 many days" though he still managed to turn out about one opinion a day, "rushing

124. *Judge Holmes's New Duties*, BOSTON EVENING TRANSCRIPT Sept. 12, 1899, at 13; *Wilcox's Tribute Was Unexpected*, BERKSHIRE EAGLE, Sept. 12, 1899, at 1.

125. Roger Wolcott, *Inaugural Address*, in 1899 Mass. Acts at 594, 615-16; Russell K. Osgood, *The Supreme Judicial Court, 1692-1992: An Overview*, *in* HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT, 11, 23 (Russell K. Osgood, ed.,1992).

126. *See, e.g.*, CALENDAR OF ASSIGNMENTS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT FOR THE YEAR BEGINNING SEPTEMBER 1, 1900, AND ENDING AUGUST 31, 1901.

along through the thin ice of rather small cases."[127]

Before he came to preside over the court, Holmes would often compose chatty letters to friends while he was on the bench listening to oral argument, and he seemed a bit bored by it all.[128] " I hate to find myself with just enough work to spoil a day and not enough to fill it."[129] In 1897 he wrote to a friend that he was "tearing through cases a deuced sight faster than I can write you," so that he could "get as many [new cases] assigned to me" as possible. "I should like to decide every case—and write every judgment of the court, but I'm afraid the boys wouldn't see it."[130]

Once he began "bossing the show," however, his letters more frequently expressed mounting fatigue and overwork: "I have been working late and hard since my return from Springfield . . . and go to Worcester 8[:30] a.m. Monday for the most dreaded week of the year."[131] "I have had such a steady drain upon my intellectuals that I shrink from any and everything that I lawfully can avoid."[132] "I really am rather seedy. . . . I have not an idea in my head. I have just finished writing opinions and . . . I have been at it too hard."[133] "I am firing away at high pressure with breach loading speed . . . . All there is is a nervous spasm."[134] "I have been working like a mad man this week and still have not finished."[135] "I am mad with work and high pressure . . . . We are smashing through the docket and everything is going with a whiz. On Monday I fairly thought myself into a headache."[136]

Holmes's years as chief justice were his peak of judicial productivity. In his sixteen and one-half years as an associate justice of the Supreme Judicial Court, Holmes had written 963 opinions for the court, roughly 58 per year. In just three and one-half years as chief justice, he wrote 367 opinions for the court, or about 93 per year.[137] The total number of cases decided by the court remained about the same over the whole period, averaging 361 in the period 1883 to 1898, and 369 in the period 1899 to

127. Letter from Holmes to Ellen A. Curtis (May 15, 1901).

128. *E.g.*, Letter from Holmes to Nina Gray (Oct. 2, 1986); Letter from Holmes to Clare Castletown (Jan. 15, 1897); Letter from Holmes to Nina Gray (Jan. 22, 1897). Holmes wrote at least one such letter from the bench as chief justice: "I am now listening to an argument which is to determine who shall be Mayor of Worcester—an impertinent distraction when one is writing to a lady." Letter from Holmes to Ellen A. Curtis (Jan. 7, 1901). The case was O'Connell v. Mathews, 177 Mass. 519 (1901).

129. Letter from Holmes to Clare Castletown (Nov. 9, 1896).

130. Letter from Holmes to Clare Castletown (Feb. 11, 1897).

131. Letter from Holmes to Nina Gray (Sept. 30, 1899).

132. Letter from Holmes to Owen Wister (Jan. 18, 1900).

133. Letter from Holmes to Owen Wister (Feb. 15, 1900).

134. Letter from Holmes to Henry James (Dec. 24, 1900).

135. Letter from Holmes to Ellen A. Curtis (Oct. 4, 1901).

136. Letter from Holmes to Ellen A. Curtis (Dec. 4. 1901).

137. *Oliver Wendell Holmes: A Memorial*, 298 Mass. 575, 606 (1937) (Rugg, C.J.). Holmes also wrote twelve dissenting opinions on the Supreme Judicial Court.

1902.[138] Holmes wrote to Pollock in December 1899, "I thus far have had more to do than ever . . . partly from my own fault in assigning perhaps rather a lion's share to myself."[139] Later, during twenty-nine years on the U.S. Supreme Court, Holmes wrote 400 majority opinions and 66 dissents, averaging a mere sixteen per year.[140]

At the end of each court term, Holmes added up the cumulative total number of his opinions. In the midst of his first year as chief justice, as the century ended and he reached age fifty-nine, Holmes had an opportunity to take stock of his life and career. On March 7, 1900, at a dinner for 300 given in his honor, Holmes told the Boston Bar Association:

> I ask myself, what is there to show for this half lifetime that has passed. I look into my book in which I keep a docket of the decisions of the full court that fall to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime! A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalize it all and write it in a continuous logical, philosophic exposition, setting forth the whole corpus with its roots in history and its justifications of expedience real or supposed![141]

The joy of searching for a general theory and testing it, Holmes said, had now given way to "the pure pleasure of doing the work." Doing the work was the joy, the duty, and the end in itself. "We are all very near despair," he told the Boston lawyers, "through long years of doubt, self-distrust, and solitude." Yet he dared believe that "the long and passionate struggle has not been quite in vain."[142] Here was a weary and overworked judge. In a memorial address later that year he said, "The work here has

138. Statistical Table in *Fourth Report of the Judicial Council of Massachusetts*, Public Document No. 144, Nov. 1928, at 80, *reprinted in* 14 MASS. L.Q. 80 (1929).

139. Letter from Holmes to Frederick Pollock (Dec. 1, 1899) in 1 HOLMES-POLLOCK LETTERS, *supra* note 55, at 98.

140. *Id.*

141. Oliver Wendell Holmes, Jr., Speech at a Dinner Given for Chief Justice Holmes by the Bar Association of Boston (March 7, 1900), *in* COLLECTED LEGAL PAPERS, *supra* note 3, at 245.

142. *Id.* at 248-49. Holmes's speech was printed in all five Boston daily newspapers

killed some men who took it too hard."[143]

Holmes seems to have imposed his own rigorous pace on his fellow justices as well. Recall in his memorial tribute to Field the impatience he expressed with his predecessor's dithering.[144] Most of the surviving correspondence between Holmes and his colleagues is perfectly cordial, but Justice James M. Barker's letter to his chief on May 6, 1901, strikes a discordant note:

> I do not object to your doing the work assigned to me, as suggested in your letter [of the 4th May]. I shall go on writing my cases in the order in which they were assigned to me, and shall not reach those which you may write before I see you.
>
> Let me say that since January 1, 1900 there have been but four weeks in which I was not either holding circuit, attending consultations, or writing cases, and that hereafter when the long vacation comes, whether the cases assigned to me are written or not, I shall take the vacation.
>
> Let me also say that in my opinion the judge who has four months of Boston Equity in one calendar year has too much.
>
> I have never done less than my share of work . . . and have no desire to shirk, but I have come to the point where I intend to work only a reasonable number of hours upon one day, and only a reasonable number of days in the year.[145]

Barker closed his letter with a backhanded compliment to his chief "both for your enthusiasm to have the work kept up and your readiness to do work assigned to others." Holmes could not force every member of his court to keep up his own frantic pace.

In this age before law clerks and word processing, perhaps the most notable feature of Holmes's experience as chief justice was the constant, exhausting press of business. There was little time for applying new theories of judicial decision making, little time for concurring or dissenting opinions, little time for politicking or gathering additional information about conflicting social

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on his birthday. *E.g.*, *Chief Justice Holmes Honored*, BOSTON DAILY POST, Mar. 8, 1900, at 1.

143. *The Honorable William Crowninshield Endicott*, 177 Mass. 607, 614 (1900) (Holmes, C.J.). Endicott (1826-1900) served as associate justice of the Supreme Judicial Court from 1873 to 1882, before Holmes joined the court, retiring because "he found the labor of writing too great." He then accepted appointment as Secretary of War.

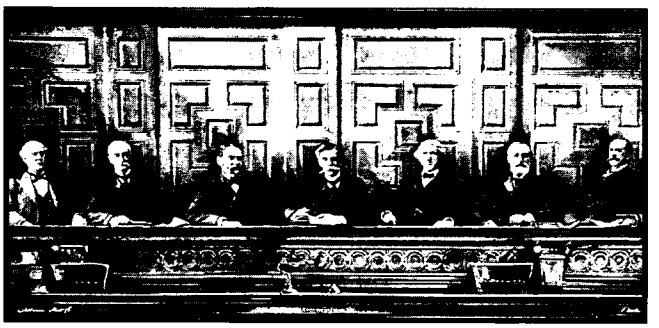
144. *See supra* text accompanying notes 80-82.

145. Letter to Holmes from James M. Barker (May 6, 1901).

interests. Holmes's leadership on this court seems mainly to have been an administrative role of urging on the justices to keep grinding out the opinions, as he did, one a day.

Appearances. Holmes as chief justice both enhanced the dignity of the Supreme Judicial Court, and detracted from it. He had a sense of occasion and ceremony, but also an impatience with solemnity and a willingness to shock the stuffed shirts. After his death, a memorial tribute recalled his manner on the bench of the Supreme Judicial Court:

> Nobody who sat on this court in my time had quite such a daunting personality—to a young lawyer at least. He was courteous, but his mind was so extraordinarily quick and incisive, he was such an alert and sharply attentive listener, his questions went so to the root of the case, that it was rather an ordeal to appear before him. In arguing a case you felt that when your sentence was half done he had seen the end of it, and before the argument was a third finished that he had seen the whole course of reasoning and was wondering whether it was sound.[146]



Supreme Judicial Court, 1899-1902.

Courtesy of the Supreme Judicial Court.

Holmes's letters from the 1890s, written from the bench during arguments, paint the same picture. "[A] speaker takes 10 minutes to say what you see is coming in two minutes."[147] "I hope I shall be supposed to be taking notes."[148]

> Meantime I am listening to a dull speaker on the last day of a tiring but successful sitting . . . . I am getting to be as good as J[ulius] Caesar in doing two things at once. Pretty different things too, especially if you throw in an attentive manner calculated to make counsel think you are taking

146. *Oliver Wendell Holmes: A Memorial*, 298 Mass. at 595 (James M. Morton).
147. Letter from Holmes to Clare Castletown (Jan. 15, 1897).
148. Letter from Holmes to Nina Gray (Jan. 22, 1897).

notes of the argument, and do take notes too.[149]

He intimidated the young lawyers in court and amused the ladies at home, all at the same time.

Soon after Holmes's promotion, the new court photograph was taken. Holmes posed himself leaning forward, holding a book open before him with eyeglasses in his hand, smiling with one eyebrow lifted. Tall and trim with a magnificent moustache, he adopted a far more natural, lively look than the straight-backed, frozen stares of court photographs before and since.[150] The justices were all attired in business suits, but that was about to change.

While Holmes was chief justice, the Supreme Judicial Court resumed wearing judicial robes on the bench. Their predecessors had worn silk robes, black or scarlet, from 1761 at the insistence of Chief Justice Thomas Hutchinson, and ceased in 1792 when the diminutive Chief Justice Francis Dana refused to wear them, though Justice William Sumner warned, "the Court will never be able to resume them."[151] On January 15, 1901, Boston lawyer Causten Browne presented a petition from thirty-four prominent members of the Suffolk bar asking the court "to consider the expediency of adopting the gown."[152] No reasons are given. Perhaps it was because the New York Court of Appeals had recently incurred some publicity for doing the same. On March 5, 1901, three days before his sixtieth birthday, Holmes and his fellows opened the court in brand new robes.

There is no reason to think that Holmes had any hand in originating the idea or the petition, but he set about arranging the procurement of the new costume. Horace Gray, Chief Justice of Massachusetts until 1882 and in 1901 a Justice of the U.S. Supreme Court, offered the loan of his robe, "as a pattern." It was copied from Chief Justice John Jay's, he wrote, a lighter model "with inner sleeves dispensing with any coat."[153] Holmes wrote back with thanks, but said that he had seen federal judge Francis Cabot Lowell's robe and ordered copies from Jordan Marsh. He hoped that the secret could be kept and "we shall astonish the bar

149. Letter from Holmes to Clare Castletown (Jan. 29, 1897).

150. *Pictures of the Full Bench of the Supreme Judicial Court of Massachusetts*, 9 MASS. L. Q. [7-14] (NOV. 1923); NOVICK, *supra* note 1, at 230-31.

151. Andrea L. Devlin, *"It Is Well That Judges Should Be Clothed in Robes,"* 2 SUP. JUDICIAL CT. HISTORICAL SOC'Y J. 123, 125 (1996); F. W. Grinnell, *The Constitutional History of the Supreme Judicial Court of Massachusets from the Revolution to 1813*, 2 MASS. L.Q. 359, 425-26 (1917).

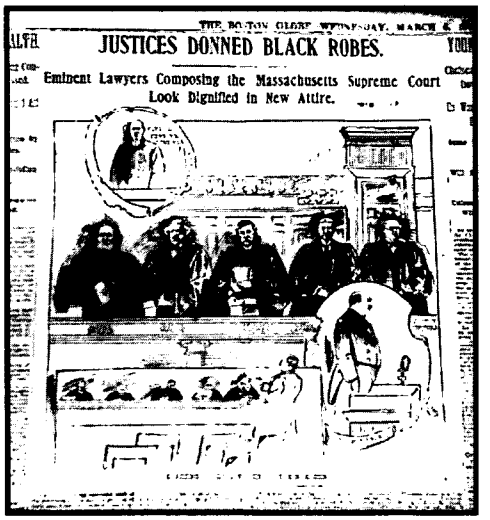
152. Letter to Holmes from Causten Browne (Jan. 15, 1901) and accompanying Petition.

153. Letter to Holmes from Horace Gray (Jan. 29, 1901). Interested readers can sew such a gown from the meticulous, detailed instructions given in *On Monday*, BOSTON GLOBE, Dec. 7, 1901, at 9.

on the first Tuesday of March."[154]

A visiting clergyman, invited to deliver an invocation, had to show the bewildered justices how to put on their gowns.[155] Holmes wrote to a friend, "The gowns became ancient history before 2 p.m. and I rather think by keeping quiet until it was over we have avoided a tempest in a teapot such as they had in N.Y. One of the Justices told me he twigged 2 men drawing us. I didn't notice and forgot about it almost at once."[156] There were no gold stripes on his sleeves. The next day's newspapers had sketches and bemused commentary. Holmes was quoted as saying that robes "would add somewhat to the ceremony and dignity" of proceedings, and "inconvenience no one but the justices themselves." A prominent lawyer said, "It is desirable that the judges should, at least, have the appearance of learning."[157] One can hear Holmes's chuckle about the whole episode.

Courtesy of the State Library of Massachusetts.


JUSTICES DONNED BLACK ROBES.

Eminent Lawyers Composing the Massachusetts Supreme Court Look Dignified in New Attire.

Artist's drawing of the Court as they sat in their new robes. From the morning edition of the *Boston Globe*, March 5, 1901.

John Marshall Day. I have written elsewhere about Holmes's occasional inclination to shock conventional morality.[158] He delighted to attend risqué theater performances and to read "French" novels of the type that must be slipped into one's pocket if ladies were present.[159] He is reputed to have remarked in these years that he wished lawyers appearing before the Supreme Judicial Court could copy these novelists in their ability to suggest much by saying little.[160] He couldn't resist having his little jokes from the bench.[161] Holmes had his best opportunity to startle the stolid just a month before the robing episode. The occasion was "John Marshall Day," February 4, 1901, the hundredth anniversary of Marshall's elevation to the bench. Bar associations organized commemorations all across

154. Letter from Holmes to Horace Gray (Feb. 20, 1901).

155. NOVICK, *supra* note 1, at 231.

156. Letter from Holmes to Ellen A. Curtis (Mar. 5, 1901).

157. Andrea L. Devlin, *supra* note 151, at 125-26 (1996). It is said that Holmes kept the same robe until about 1924, when news reports in Washington that Chief Justice Rugg of Massachusetts was about to succeed Holmes provoked him to order a brand new robe to wear. John P. Carey, *Proceedings of the Annual Meeting*, 50 REPORT OF THE MAINE STATE BAR ASSOC. 169 (1961).

158. Seipp, *supra* note 3, at 536, 551-52.

159. *E.g.*, Letter from Holmes to Georgina Pollock (July 31, 1902) in 1 HOLMES-POLLOCK LETTERS, *supra* note 55, at 101.

160. SILAS BENT, JUSTICE OLIVER WENDELL HOLMES 16 (1932).

161. *E.g.*, Letter from Holmes to Clare Castletown (Jan. 10, 1898).

the country.[162] The Boston ceremony was the largest public event staged by the Supreme Judicial Court while Holmes was chief justice.

The state's judges, leading lawyers, and law professors crowded the courtroom. Governor W.M. Crane sat at Holmes's right among the full complement of justices, and the lieutenant-governor and speaker of the house were also present. Attorney General Hosea Knowlton, speaking on behalf of the bar, delivered an eloquent address, a paean to the godlike Marshall.[163] Knowlton intoned that destiny, "the hand of an overruling Providence," guided this patriot genius to transform a weak and insignificant court into "the most august and powerful tribunal in the civilized world." Marshall, "not merely a great and learned judge" but "the creator of constitutional government," singlehandedly "asserted the supremacy of his court over the legislative department." As the nation gathered to commemorate him, the Supreme Court was about to decide the *Insular Cases*, to "pronounce the decree which shall bind or expand, as the case may be, the wings of national ambition." Knowlton led the crowd in a collective "shudder at the contemplation of what might have been the destiny of the nation had an appointment of chief justice been made a few months later by that apostle of the anti-Federalists, Thomas Jefferson."

All this "deification" of Marshall was too much for Holmes. As chief justice, it fell to him to respond on behalf of the bench. His address, half the length of Knowlton's, sounded a cacophony of odd notes.[164] Holmes first belittled the American Revolution, "mere skirmishes" in the estimation of "those of us who took part in the Civil War." He would also "hesitate in my superlatives" about John Marshall. "[P]art of his greatness consists in his being *there*," in the right place at the right time. Circumstance gave John Adams rather than Thomas Jefferson the opportunity to appoint a chief justice. Holmes doubted whether "Marshall's work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice and the convictions of his [political] party." Like all of Holmes's speeches, this one was about himself:

> My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors

162. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 209-10 (1986).

163. JOHN MARSHALL: THE TRIBUTE OF MASSACHUSETTS 3-12 (1901), also in Supplement, 178 Mass. 619, 619-24 (1901).

164. *Id.* at 15-20, also in 178 Mass. at 624-28; in his OCCASIONAL SPEECHES, *supra* note 37, at 87-91; and in his COLLECTED LEGAL PAPERS, *supra* note 3, at 266-71.

> would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law. The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind.

Holmes deigned to compare his own incremental tinkering on Massachusetts common law with Marshall's constitutional thunderbolts. He tried to excuse his "little revolt" from the day's sentiments by saying that one "should be able to criticize what he reveres and loves." Holmes concluded by restoring Marshall to his pedestal, "the greatest place that ever was filled by a judge." But he could not resist adding, "We live by symbols,[165] and what shall be symbolized . . . depends upon the mind of him who sees it."

Further speeches were made that afternoon at Harvard University, and later at a banquet at the Algonquin Club. Knowlton's and Holmes's speeches were printed in all five of Boston's leading daily newspapers.[166] Holmes wrote four months later to an Australian judge about "the universal deification of Marshall on Feb. 4" which he thought "rather indiscriminate."[167] In the same letter, he again contrasted his own judicial opinions with those in the tradition of Marshall:

> I hope when you write constitutional doctrine you will not emulate some of our judges who having only half a page to say take 50 pages to say it in. I was remarking yesterday to one of my brethren that we appreciate the boa constrictor but not the asp here. For my part I prefer an un-

165. Felix Frankfurter quoted this line of Holmes's so often that his wife wished Holmes had never said it. Felix Frankfurter, *Acceptance of American Bar Association Medal, in* FELIX FRANKFURTER: A TRIBUTE 7 (Wallace Mendelson ed., 1964).

166. *Man for the Crisis: John Marshall's Life and Deeds*, BOSTON HERALD, Feb. 4, 1901, at 1-2; *Chief Justice Marshall*, BOSTON EVENING TRANSCRIPT, Feb. 4, 1901, at 1, 5; *Bar's Tribute: Memory of Chief Justice Marshall Honored*, BOSTON GLOBE, Feb. 4, 1901, at 7; *Marshall as the Federator*, BOSTON POST, Feb. 5, 1901, at 8; *Olney on Marshall*, BOSTON DAILY ADVERTISER, Feb. 5, 1901, at 1, 8.

167. Letter from Holmes to Andrew Inglis Clark (June 6, 1901). Holmes had written three years before about "the spongy longwindedness" of constitutional opinions "of the JJ. who seem to think that the memory of Marshall and the nature of the theme requires an intolerable amount of bread to devlish little sack." Letter from Holmes to James Bradley Thayer (Dec. 11, 1898).

> pretentious little thing virulent with originality and insights to those swelling discourses padded with quotations from every accessible source.

The contrast of Holmes's opinions with his predecessor Field's comes to mind again here. Only one commentator, writing in September 1902, quoted Holmes's speech on Marshall as "audacious, unconventional words" that "disturb conventional circles."[168] Another reader of Holmes's impertinent speech, however, was Theodore Roosevelt, about to be inaugurated as Vice President. And he hated it.[169]

The Run of Cases. Holmes not only stepped up the pace of his opinion-writing when he became chief justice, he also wrote new kinds of cases. In 1931, Felix Frankfurter and Henry Hart sorted all of Holmes's Massachusetts opinions under topical headings.[170] According to their categorization, in the years 1899 to 1902 when Holmes presided over the Supreme Judicial Court, he wrote far more opinions than he had before on due process of law, taxation, corporations, public utilities, and procedure, and far fewer opinions on criminal law, husband and wife, and partnership. In the largest categories of torts, property, contracts, and evidence cases, the proportion of opinions before and after Holmes began to preside remained the same. Some of these shifts may reflect changes in the court's overall docket, and some may reflect the kind of cases a chief justice was expected to write, and some may reflect Holmes's personal choice as assigning justice.[171]

The body of Holmes's judicial writing between 1899 and 1902 resists characterization, but here goes. Chief Justice Holmes continued to write his brief, cryptic opinions, one a day. His opinions often issued only weeks or days after the argument. By and large, decisions below were affirmed, tort plaintiffs lost, debts had to be paid, statutes proved constitutional, and governmental activities of every kind at every level were upheld.[172] Often, Holmes would point out that crucial distinctions were

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168. George P. Morris, *Oliver Wendell Holmes: Jurist*, 26 AM. MONTHLY REV. OF REVS. 307, 309 (1902).

169. See *infra* text accompanying note 234.

170. Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 799 app. II (1931) (list of opinions delivered as an Associate Justice and Chief Justice of the Supreme Judicial Court of Massachusetts, Jan. 1883 to Dec. 1902). I have compared numbers of cases 1882-98 and 1899-1902.

171. *See* Tushnet, *supra* note 2, at 980-81 & n.15.

172. Fallon, *supra* note 2, at 59-60, 62-63, 67, 96, 164-68, 173, 181-85.

"questions of degree,"[173] not of "mathematical logic."[174] Even as chief justice, with the power to pick and choose whatever cases he wanted, Holmes was writing the small change of the common law, skating over "the thin ice of rather small cases."[175] During these years he adjudicated a $3 dispute over delivery charges,[176] the market value of an antique upholstered lounge,[177] and a slip on a banana peel at North Station.[178] One of the last opinions he wrote as chief justice, *Nason v. Tobey*, begins "This is an action for the conversion of some manure."[179] In two paragraphs, Holmes took the opportunity to announce general propositions about the economic and legal relationship between landlords, tenants, and manure,[180] but still manure is manure.

Modern readers will be struck by the number of personal injury victims Holmes turned away. Many of these were workers injured on the job. The "fellow servant" rule put in place by Chief Justice Shaw in 1842 continued to leave workers largely responsible for their own safety. Holmes wrote in all about eighty opinions on this question, most of them holding that the worker had "assumed the risk" of his own injury.[181] Massachusetts enacted the Employers' Liability Act of 1887, attempting to relieve injured workers from this doctrine, but in a number of opinions Holmes limited the operation of the act.[182] In his very last opinion as chief justice, he upset a verdict compensating a railroad worker for a mangled hand, on the basis that a railroad "tender," the small wagon carrying water and coals that followed close behind the engine, did not fall into the definition of "any car" or of "any locomotive, car, or train" in an 1893 statute requiring automatic coupling devices, which the tender in question did not have.[183] This was jurisprudence of the head, not the heart.[184]

Plant v. Woods. The only case that attracted widespread

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173. *E.g.*, Browne v. Turner, 176 Mass. 9, 12-13 (1900); Joseph v. George C. Whitney Co., 177 Mass. 176, 177 (1900); Commonwealth v. Peaslee, 177 Mass. 267, 272 (1901); Commonwealth v. Rogers, 181 Mass. 184, 186 (1902).

174. *E.g.*, Smith v. Postal Telegraph Cable Co., 174 Mass. 576, 577 (1899); Bumpus v. French, 179 Mass. 131, 133 (1901).

175. Letter from Holmes to Ellen A. Curtis (May 15, 1901).

176. Way v. Dennie, 174 Mass. 43 (1899).

177. Bradley v. Hooker, 175 Mass. 142 (1900). The market value was not the value that a quick auction would set.

178. Goddard v. Boston & Maine Railroad, 179 Mass. 52 (1901). Holmes disposed of this one in forty-one words.

179. 182 Mass. 314 (1902).

180. *See* Fallon, *supra* note 2, at 180-81.

181. *Id.* at 182.

182. *See id.* at 184-85. The statute is 1887 Mass. Acts. 270.

183. Larabee v. New York, New Haven & Hartford R.R., 182 Mass. 348 (1902).

184. *See* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 136-37, 229-30 (1997).

notice for Holmes in his years as chief justice was one in which he was the lone dissenter. *Plant v. Woods* was a dispute in Springfield between rival labor unions of painters and decorators.[185] Plaintiffs, a breakaway faction from the defendant national union, sought to enjoin the defendant union from striking or boycotting the plaintiffs' employers in order to compel the plaintiff union to reunite with the defendants. The majority of the Supreme Judicial Court, speaking through Justice Hammond, held that such a boycott or strike would be illegal. The employer "may reasonably expect" that a strike would result in injury to property, to persons, and to business, although none had taken place yet. A strike would directly infringe individual workers' "right to dispose of one's labor with full freedom." Citing *Vegelahn v. Guntner*, the majority concluded, "Such conduct is intolerable, and inconsistent with the spirit of our laws."

Holmes opened his dissent by pointing out that the English House of Lords had agreed in *Allen v. Flood* with his previous dissent in *Vegelahn*.[186] He suggested that the majority in this case would agree with him that a strike or boycott for the purpose of raising wages, unaccompanied by violence or breaches of contract, would be legal. Although in economic terms, Holmes said, a labor union could only increase its members' wages by impoverishing other workers, "I think the strike a lawful instrument in the universal struggle of life." The opinions were issued on September 5, 1900, and were quoted extensively in the newspapers.[187] The timing of the Supreme Judicial Court labor decisions, if not the result, certainly must have seemed "political." *Vegelahn*, with Holmes's first "radical" pro-labor dissent, was handed down a week before the McKinley-Bryan election of 1896, seven months after it was argued. *Plant v. Woods*, in which Holmes renewed his dissent, came out a month before the McKinley-Bryan rematch of 1900, nearly a year after the argument.

Storti's Case. Holmes's second notable case as chief justice involved an execution for murder. Murders always excite public attention, but not usually for their legal issues. Lizzie Borden took an ax in 1892, and was acquitted, so her case never reached the Supreme Judicial Court. John C. Best was brought to trial on circumstantial evidence for the death of his neighbor Bailey in 1900, and was convicted after he made an incriminating remark to his brother-in-law during an adjournment in the trial. Holmes upheld the verdict on all counts.[188] It was another murder that

185. 176 Mass. 492 (1900).

186. *Id.* at 504.

187. *Trade Union Restrained*, BOSTON EVENING TRANSCRIPT, Sept. 7, 1900, at 10; *Union Restrained*, BOSTON DAILY ADVERTISER, Sept. 7, 1900, at 5.

188. Commonwealth v. Best, 180 Mass. 492 (1902); *id.*, 181 Mass. 545 (1902).

led Holmes to decide whether electrocution was cruel and unusual punishment. Luigi Storti, an Italian immigrant, took an ax and killed a fellow countryman named Michele Calluci at 57 Charter Street in the North End on November 7, 1899, coincidentally the day Governor W. Murray Crane was elected. The jury found Storti guilty of murder in the first degree on July 1, 1900, and, in the first of three opinions he was to write for this case, Holmes affirmed the conviction.[189] On January 4, 1901, Storti was sentenced to "suffer the penalty of death by the passage of a current of electricity through your body . . . during the week commencing Sunday, April 7, 1901."[190] Massachusetts had provided for death by electrocution in an 1898 statute,[191] and Storti's was the first capital offense committed after the statute came into effect.

In the first week of April, Governor Crane and his council refused to commute the sentence, Storti made his first public statement—that he acted in self-defense, and his health failed dramatically.[192] At the proverbial eleventh hour, Storti received a month's reprieve and a new lawyer, W.M. Stockbridge, who on April 30 filed a writ of habeas corpus. Stockbridge argued that electrocution was "cruel and unusual" in violation of art. 26 of the Massachusetts Declaration of Rights. When New York State first used its electric chair on August 6, 1890, to execute William Kemmler, the *New York Times* reported a "ghastly" botched mess, with Kemmler still breathing after the first application of current and his hair and skin smoldering after the second try—"a legal crime."[193] On May 4, in single justice session, Justice Loring denied Storti's writ of habeas corpus.[194] The full bench heard argument on May 6, and on May 7, 1901, Holmes issued the opinion *In re Storti*.[195] This was indeed swift justice.

Holmes saw this case as a question of the constitutionality of a statute, and true to form he upheld it. Two weeks earlier, he had delivered an advisory opinion that voting machines would not contravene the constitutional requirement of "written ballots."[196] Here was another modern mechanical improvement frivolously opposed on formalistic grounds. The legislature had replaced

189. Commonwealth v. Storti, 181 Mass. 545 (1901).

190. *Storti Will Die in Electric Chair in April*, BOSTON POST, Jan. 5, 1901, at 3.

191. 1898 Mass. Acts 326, § 6.

192. *Must Die*, BOSTON GLOBE, Apr. 3, 1901, at 1, 7; *Storti Statement*, BOSTON HERALD, Apr. 5, 1901, at 1, 2; *Storti Seemed to Be Dying*, BOSTON GLOBE, Apr. 6, 1901, at 1, 3.

193. *Far Worse Than Hanging*, NEW YORK TIMES, Aug. 7, 1890, at 1, *reprinted in* THE DEATH PENALTY: A LITERARY AND HISTORICAL APPROACH 81-85 (Edward G. McGehee & William H. Hildebrand eds., 1964). *See* People *ex rel.* Kemmler v. Durston, 119 N.Y. 569 (1890); *In re* Kemmler, 136 U.S. 436 (1890).

194. *Reprieve Ends Saturday*, BOSTON EVENING TRANSCRIPT, May 6, 1901, at [4].

195. 178 Mass. 549 (1901).

196. Opinion of the Justices to the House of Representatives, 178 Mass. 605 (1901).

hanging with electrocution "precisely because it is instantaneous," intending to cause death "as swiftly and painlessly as possible," to prevent rather than "caus[e] other pain to the person."[197]

> The word "unusual" must be construed with the word "cruel" and cannot be taken so broadly as to prohibit every humane improvement not previously known in Massachusetts. . . . The suggestion that the punishment of death, in order not to be unusual, must be accompanied by molar rather than molecular motion[198] seems to us a fancy unwarranted by the constitution.

As to the argument that anticipating electrocution caused Storti mental suffering, this was but the "general fear of death" and the law meant that it should be felt.

Newspapers printed that Storti would die within days,[199] and Holmes wrote to a lady friend, "I have had polite remarks as to the Storti decision which pleased me."[200] But Stockbridge did not give up. He next applied on May 11 for a writ of habeas corpus in federal court, alleging violations of the Fourteenth Amendment and of a treaty between the United States and Italy. District Judge Lowell denied the application on the spot.[201] Another petition filed on May 23 was denied the next day by Circuit Judge Putnam as "frivolous."[202] On May 27, however, Justice Horace Gray allowed an appeal to the U.S. Supreme Court, and Storti's execution was stayed until the fall.[203] While that appeal was pending, Holmes disposed of another fruitless petition for habeas corpus, this one challenging a new statute that gave the warden a right to approve some categories of visitors to prisoners awaiting execution.[204]

The Supreme Court handed down *Storti v. Massachusetts* on December 2, 1901.[205] The federal application for habeas corpus was "absolutely frivolous," Justice Brewer wrote, and such collat-

197. 178 Mass. at 553.

198. Holmes liked this phrase, using it later in Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting): "[J]udges do and must legislate, but . . . they are confined from molar to molecular motions."

199. *No Escape for Storti*, BOSTON EVENING TRANSCRIPT, May 7, 1901, at 1; *Statute Valid*, BOSTON GLOBE, May 8, 1901, at 1; *Penalty is Legal*, BOSTON HERALD, May 8, 1901, at 1.

200. Letter from Holmes to Ellen A. Curtis (May 15, 1901).

201. *Last Resort for Storti*, BOSTON GLOBE, May 11, 1901, at 1.

202. *In re* Storti, 109 F. 807 (1901).

203. *Saves Storti*, BOSTON GLOBE, May 28, 1901, at 1.

204. *In re* Storti, 180 Mass. 57 (1901).

205. 183 U.S. 138 (1901). *See Doom Sealed*, BOSTON GLOBE, Dec. 2, 1901, at 1; *Storti Case Decided at Last*, BOSTON EVENING TRANSCRIPT, Dec. 3, 1901, at 8.

eral attack on state court proceedings should not be used for purposes of delay. Boston newspaper readers, who had been kept informed all year about Luigi Storti's health, appetite, state of mind, and sleep schedule, could finally read of his execution at Charlestown State Prison, in a converted barber's chair, on December 17, 1901. "The body of Storti surged up against the tightly buckled straps, which creaked and strained under the pressure, the veins in his neck and wrists and face swelled," and he died.[206]

Chief Justice Holmes's experience in the Civil War gave him a fatalistic attitude toward human life and death. The last words in his odd, mocking tribute to John Marshall saluted the flag of the nation that "at will . . . throws away our lives."[207] He had "contempt for the sentimental attitude" displayed by other judges.[208] The human carnage he saw each day reflected in tort suits for personal injuries and wrongful death did not move him. His opinions are marked by their detachment—from sentimental feelings, from partisan politics, from moralizing and from speechifying. In an opinion he wrote, "No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right,"[209] and in a letter, "A moral view is a dangerous means of judging."[210]

How Holmes Got to Washington, and the Question of Law versus Justice

When he was sworn in as Chief Justice of Massachusetts, Holmes had little chance of appointment to the U.S. Supreme Court. A series of unexpected events during the next three years put him on the uncertain path to Washington. On the broader national stage, Holmes's performance as chief justice was scrutinized on an explicitly "political" basis as well as on the quality of his opinions, and it pained Holmes to submit to such scrutiny. When Holmes took his leave of the Supreme Judicial Court, he was no nearer to the "science" of accurately measuring competing social and economic interests that he had called for in 1899.

To the Supreme Court. In 1897, Holmes told one of his closest friends, "They never appoint more than one from New England and politics count so much etc. etc. that a man would be a donkey" to bother about hoping for such an appointment.[211] The

206. Newspaper report quoted in Hiller B. Zobel, *The Undying Problem of the Death Penalty*, 48 AM. HERITAGE 64, 67 (Dec. 1997).

207. 178 Mass. at 628; COLLECTED LEGAL PAPERS, *supra* note 3, at 271.

208. Letter from Holmes to James Bradley Thayer (Dec. 1, 1898).

209. Stack v. New York, New Haven & Hartford R.R., 177 Mass. 155, 158 (1900).

210. Letter from Holmes to Alice Stopford Green (Oct. 1, 1901), *in* THE ESSENTIAL HOLMES 111 (Richard A. Posner ed., 1992).

211. Letter from Holmes to Clare Castletown (Dec. 8, 1897).

"Massachusetts seat" on the Court, first held by William Cushing and later by Joseph Story and Benjamin Curtis, had been occupied by Horace Gray since 1882, the year that Holmes joined the Supreme Judicial Court. Cushing and Gray had both been chief justices of the Supreme Judicial Court at the time of their appointments. Gray was the half-brother of one of Holmes's oldest and closest friends, John Chipman Gray of Harvard Law School and the firm of Ropes & Gray. Holmes lunched with Justice Gray when he visited from Washington.[212]

Horace Gray's health started to fail as early as 1894, and his share of the work of the Court gradually dropped off from 1896 onward. His resignation could have come at any time. Already in June 1899, legal observers were comparing Gray's expansive, pedantic style of opinion writing with Holmes's cryptic brevity. "Mr. Justice Gray's opinions," said the *New York Law Journal*, "are scientific, legal essays, taking the case at bar as a timely text, and in the end deciding it" in the manner of "the old school of judicial composition" exemplified by John Marshall.[213] Holmes, by contrast, followed "the English judicial model" and "takes it for granted that his readers know or will look up the general law of the subject down to date, and considers only such cases as may directly affect the point at issue."[214] Holmes's more modern style should prevail, the writer thought.

President McKinley had an appointee in mind to fill the "Massachusetts seat" if Gray should resign, and it wasn't Oliver Wendell Holmes. McKinley's choice was Alfred Hemenway, one of Boston's most prominent private practitioners. Two years older than Holmes, Hemenway in 1879 formed a partnership with John Davis Long, later the governor of Massachusetts who appointed Holmes to the Supreme Judicial Court.[215] A leader of the Boston bar, Hemenway helped found the Boston Bar Association in 1876 and served on the executive council of the American Bar Association.[216] From 1897 onward, John D. Long was McKinley's Secretary of the Navy. He secured from the President a formal offer to nominate Hemenway, which Hemenway indicated that he would accept.[217] Holmes probably

212. Letter from Holmes to Nina Gray (Aug. 29, 1899).

213. *Two Types of Judicial Opinions*, N.Y.L.J. (June 28, 1899), clipping in Holmes Papers, *reprinted in* 60 ALB. L.J. 76 (Aug. 5, 1899).

214. *Id.* at 77. Holmes "used to say of Gray that the premise of the opinion and the conclusion stood forth like precipices, with a roaring torrent of precedents between them, but he never quite understood how Gray got across." FRANCIS BIDDLE, MR. JUSTICE HOLMES 103 (1942).

215. Hemenway wrote to Holmes when he was appointed chief justice, "I urged your appointment to the bench nearly twenty years ago, and you have fulfilled my high expectations." Letter to Holmes from Alfred Hemenway (July 27, 1899).

216. CONRAD RENO, MEMOIRS OF THE JUDICIARY AND BAR OF NEW ENGLAND 345-46 (1900).

217. PROCEEDINGS IN THE SUPREME JUDICIAL COURT AT BOSTON IN MEMORY OF ALFRED

knew that he had no chance of this appointment while McKinley was in the White House.

Events compounded to frustrate Hemenway's expectations. First, Long's rather insubordinate assistant secretary, young Theodore Roosevelt, quit his job to ride into battle with Spain in 1898. By January 1899, Roosevelt was the popular, reform-minded governor of New York. In November 1899, McKinley's vice president, Garret A. Hobart, died in office. The Republican Convention that nominated McKinley for re-election in 1900 also nominated Theodore Roosevelt for vice president, so it was said, to get "that damned cowboy" and his reformist energy out of Boss Platt's New York. On September 6, 1901, seven months after his second inauguration, William McKinley was shot while attending the Pan-American Exposition in Buffalo, New York. He died eight days later, and Theodore Roosevelt became president at age forty-two. Roosevelt felt no obligation to honor McKinley's choice of Hemenway for the Massachusetts seat. Holmes had first come to Roosevelt's notice in 1895 for a jingoistic speech he gave at Harvard.[218]

From *Theodore Roosevelt the Citizen,* 1903. Courtesy of the Social Law Library, Boston.

Justice Horace Gray suffered a paralytic stroke on February 3, 1902, at seventy-three years of age, leading to immediate press speculation that Holmes would (or would not) be appointed.[219] Like Walbridge Field, Gray lingered in office[220] until July 9, 1902, when he finally sent his resignation to President Roosevelt from his summer home at Nahant. One of Roosevelt's closest political friends was Henry Cabot Lodge, the junior senator from Massachusetts. In March 1902, long before Gray resigned, Lodge was maneuvering to get the Supreme Court appointment for his longtime friend Holmes.[221] Already on April 3, 1902, a friend in

HEMENWAY, MAY 19, 1929 at 11 (Moorfield Storey); *Oliver Wendell Holmes: A Memorial,* 298 Mass. at 594-95 (Oct. 9, 1937) (James M. Morton, Jr.); DOUGLAS LAMAR JONES ET AL., DISCOVERING THE PUBLIC INTEREST: A HISTORY OF THE BOSTON BAR ASSOCIATION 65 (1993).

218. *See* Seipp, *supra* note 3, at 520-21. Roosevelt wrote to banquet organizers in March 1900 that he "had a peculiar regard" for Holmes but could not attend the dinner in his honor. Mark DeWolfe Howe notes of Boston Athenaeum MS. L173, in Holmes Papers.

219. *Notes,* 36 AM. L. REV. 238 (Mar.-Apr. 1902).

220. Letter to Holmes from Richard Olney (May 31, 1902) saying that Gray was recovering and all the speculation about Holmes's appointment was without foundation.

221. WHITE, *supra* note 1, at 299.

England was replying to some indication from Holmes about "the idea of your perhaps going to Washington."[222] Still it remained a very chancy thing, more than ever a matter of politics.

As soon as Holmes's name began to be mentioned as Gray's possible successor, opposition arose. Eben S. Draper, a Boston textile manufacturer, wrote to his senators that appointment of "our present Chief Justice" would be "a very serious mistake,"[223] that Holmes was "erratic, . . . not a safe man for such an important position."[224] Draper suggested several other candidates, notably Boston's eminently "safe" federal judge, Francis Cabot Lowell.[225] A much greater potential obstacle was the very senior senator from Massachusetts, George Frisbie Hoar, the chairman of the Senate Judiciary Committee.

Hoar had a long history of opposing Holmes. In 1878, early in his first Senate term, he blocked Holmes's appointment to the federal bench by President Hayes.[226] In 1882, Hoar argued unsuccessfully against Holmes's appointment to the Supreme Judicial Court. In 1899, he wanted his nephew Samuel Hoar appointed chief justice.[227] In 1902, Hoar said of Holmes:

> [H]is accomplishments are literary and social, and as an investigator of the history of jurisprudence, and not judicial. He lacks strength. . . . [A]ll the strong men of the profession thought his appointment [as chief justice] a distinct lowering of the standards of our Supreme Court. . . . In his opinions he runs to subtleties and refinements, and no decision of his makes a great landmark in jurisprudence or serves as a guide for the courts in after cases. . . . It will be a pity if the Democratic judges . . . while a minority in numbers, shall be believed by the people to comprise the solid strength of the bench.[228]

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222. Letter to Holmes from Alice Grenfell (Apr. 3, 1902). The letter to which she was replying is lost.

223. Letter from Eben Draper to George F. Hoar (Feb. 28, 1902), *quoted in* BAKER, *supra* note 1, at 719.

224. Letter from Eben Draper to Henry Cabot Lodge (Mar. 7, 1902), *quoted in* John A. Garraty, *Holmes' Appointment to the U.S. Supreme Court*, 22 NEW ENG. Q. 291, 293 (1949).

225. BAKER, *supra* note 1, at 343.

226. 1 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 419 (1903).

227. Letter from Holmes to Harold Laski (Apr. 5, 1925) *in* 1 HOLMES-LASKI LETTERS 727 & n.4 (Mark DeWolfe Howe ed., 1953).

228. Letter from George F. Hoar to Henry Cabot Lodge (July 29, 1902), *quoted in* Garraty, *supra* note 224, at 297-98.

> Judge Holmes is an accomplished and agreeable gentleman, with a charming literary style . . . [but I have] never heard anybody speak of Judge Holmes as an able judge. . . . [Holmes was regarded] as a man of pleasant personal address . . . but without strength, and without grasp of legal principles.[229]

> The best lawyers of Massachusetts, almost without exception, believe that while he has . . . excellent qualities, he is lacking in intellectual strength, and that his opinions carry with them no authority merely because they are his. We have contributed from New England some very tough oak timbers to the Bench, State and National. Our lawyers in general, especially those in the country, do not think that carved ivory is likely to be as strong or enduring, although it may seem more ornamental.[230]

As if such sentiments were not enough, Hoar had his own candidate to replace Justice Gray, his nephew Samuel Hoar, a prominent Boston railroad lawyer. As senior senator and chair of the Judiciary Committee, Hoar would have every expectation of blocking Holmes's appointment once again.

Draper's opposition—and Hoar's—can certainly be ascribed to Holmes's notorious dissents in the two labor cases, *Vegelahn v. Guntner* and *Plant v. Woods*.[231] They may also have feared Holmes's reluctance to strike down "socialistic" state legislation on constitutional grounds.[232] Roosevelt had altogether different doubts about Holmes. The President didn't mind Holmes's labor dissents. Despite criticism from "the big railroad men and other members of large corporations," he wrote to Lodge, "I am glad

229. Letter from George F. Hoar to Henry Cabot Lodge (Aug. 11, 1902), *quoted in* Garraty, *supra* note 224, at 299.

230. Letter from George F. Hoar to Chief Justice Melville W. Fuller (Nov. 5, 1902), *quoted in* WILLARD L. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1888-1910, at 285 (1950).

231. *See supra* text accompanying notes 41-45 and 185-87.

232. *E.g.*, Commonwealth v. Perry, 155 Mass. 117, 124 (1891); Opinions of the Justices, 155 Mass. 598, 607 (1892). *See* Mitchell D. Follansbee, *Mr. Justice Holmes—A Judge with Imagination*, 11 AM. LAW. 7, 66 (1903) (an address to the Legal Club of the City of Chicago, Nov. 10, 1902). Follansbee noted Holmes's willingness to uphold the coming "state socialism," the new "paternal form of government" then being advanced in Massachusetts. *Id.* at 67. Also, "it is whispered" among the Massachusetts bar that "he is too much of a scholar, too dogmatically logical, too quick to take an all-around view of a case." *Id.* at 10.

when I can find a judge who has been able to preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients."[233] Holmes was sufficiently progressive for Roosevelt's tastes. The President was less happy about Holmes's recent speech in honor of John Marshall. It showed "a total incapacity to grasp what Marshall did" and was "unworthy of the subject." Holmes seemed to sneer at Chief Justice Marshall for having had "the convictions of his party," when that was exactly what a Supreme Court appointee needed. Roosevelt asked Lodge for assurance that Holmes was "in the higher sense, in the proper sense, . . . a party man . . . entirely in sympathy with our views," especially on the crucial issue of the *Insular Cases*, the government's constitutional authority to rule and tax Cuba, the Philippines, and Puerto Rico. Gray had been one of the administration's five-to-four majority on several issues. Would Holmes side with the four for "reactionary folly" or with the four for "the great national policies for which we stand"?[234] Was Holmes sufficiently political? Would he, in Mr. Dooley's immortal words, follow "th' iliction returns"? On July 19, Lodge assured Roosevelt that Holmes "had always been a Republican" and on July 26 that he was "our kind right through."[235]

On July 19, Holmes wrote to a friend, "I am as out of politics as it is possible to be—so much so that if I were willing instead of profoundly unwilling to pull wires for myself in case Gray resigns I hardly should know what to do. I am a recluse, almost, in this country and don't go into the world."[236] Roosevelt invited Holmes to visit him secretly at Oyster Bay on July 24, 1902, two weeks after receiving Gray's resignation. When he arrived, the President was out yachting and Holmes had to entertain the young Roosevelt children at dinner with stories of the Civil War.[237] The following morning, Holmes finally met the President and was offered the nomination. He was instructed to tell no one but Senator Lodge.[238]

Roosevelt announced Gray's resignation and Holmes's nomination from Oyster Bay late in the afternoon on August 11, 1902. Boston reporters tracked Holmes down at his summer home in Beverly Farms, as they had done in 1899. Every Boston newspa-

233. Letter from Theodore Roosevelt to Henry Cabot Lodge (July 10, 1902), quoted in WHITE, *supra* note 1, at 300. While he was composing this letter, Roosevelt received Gray's letter of resignation. BAKER, *supra* note 1, at 347.

234. *Id. See supra* text accompanying notes 120-23.

235. Letters from Henry Cabot Lodge to Theodore Roosevelt (July 19 & 26, 1902), *quoted in* Garraty, *supra* note 224, at 296, *and in* BAKER, *supra* note 1, at 348.

236. Letter from Holmes to Clara Sherwood Stevens (July 19, 1902).

237. Letter from Holmes to Nina Gray (Aug. 17, 1902).

238. Letter from Holmes to Henry Cabot Lodge (July 25, 1902).

per reported that Holmes had first heard of his appointment from its reporter, and that Holmes would accept it. "When will you resign your present position?" asked the *Post*. "Hardly before the Senate approves the President's nomination," Holmes said. "It must be confirmed by the Senate, you know."[239] To the *Transcript*, Holmes said, "we are really well up to date in the consideration of our cases" on the Supreme Judicial Court.[240] The *Globe* reported that the only other serious contender for the seat was Samuel Hoar, and "[h]ad Senator Hoar thought it proper to push the name of his nephew, he would undoubtedly have been appointed."[241] To the *Daily Advertiser* Holmes said, "I do not like to be interviewed, and I have nothing to say, except that you are the first to inform me of my appointment."[242]

The Senate was still in recess. Hoar was furious when he found out that President Roosevelt had been persuaded by Lodge to appoint Holmes,[243] but Hoar found himself outmaneuvered. He could hardly announce that the Chief Justice of Massachusetts was unfit to be a judge, especially when Hoar's alternative candidate was his own nephew. His scathing criticisms of Holmes were confined, thus far, to private correspondence. Nevertheless, when the Senate Judiciary Committee resumed business, Hoar would be in charge.

Holmes's closest friends knew that his appointment was not assured. He received two letters written the day after Roosevelt's announcement. Nina Gray wrote "I am in suspense wondering what is to happen. Will Mr. Hoar put his finger in the pie, or will you have what you want (or at least what you wish to have offered to you)—this too?"[244] Brooks Adams wrote, "I am pleased that you have overcome your enemies. . . . [Y]ou have been traduced by many who could not understand your worth and who have called you unsafe, visionary, and socialistic. There has been a long period this summer when I almost gave up hope."[245] The nomination began a new period of anxiety for Holmes.

Press opinion about Holmes's nomination to the Supreme Court was generally favorable. Most of the nation knew him only as the son and namesake of the great poet. Sprinkled amidst the abundant public praise for his brilliance, his learning, his sterling

239. *Mr. Holmes Will Accept*, BOSTON POST, Aug. 12, 1902, at 1.

240. *Holmes Succeeds Gray*, BOSTON EVENING TRANSCRIPT, Aug. 12, 1902, at 3.

241. *Logical Successor*, BOSTON GLOBE, Aug. 13, 1902, at 2. Samuel Hoar is also mentioned as the runner-up in *Judge Holmes Will Wait*, BOSTON EVENING TRANSCRIPT, Aug. 12, 1902, at 3.

242. *He Will Accept*, BOSTON DAILY ADVERTISER, Aug. 12, 1902, at 1.

243. Letter from George F. Hoar to Theodore Roosevelt (July 28, 1902), *quoted in* WHITE, *supra* note 1, at 304.

244. Letter to Holmes from Nina Gray (Aug. 12, 1902).

245. Letter to Holmes from Brooks Adams (Aug. 12, 1902).

integrity, his famous father, and his three Civil War wounds, some criticisms emerged. The *New York Evening Post* pronounced him "not a great judge, . . . but more of a 'literary feller' . . . brilliant rather than sound."[246] The *New York Times* also agreed that he was not a jurist of the first rank.[247] Some papers predicted he would be an anti-imperialist, a champion for the laborer, and no servant of the plutocracy.[248] Boston's own conservative *Evening Transcript* balanced praise with critical commentary. It summarized his "strange" and "radical" dissent in *Vegelahn* and quoted some of the more "startling" passages from his 1897 *Path of the Law* speech at Boston University, including his "bad man's point of view" that "morals should be wholly divorced from law" and his "queer doctrine" about "committing a contract."[249] The *Transcript* editorial summed up, "His striking originality of mind will help him when it does not hinder."[250]

Holmes found that he deeply resented every hint of criticism. He sent thanks for the many warm congratulatory letters he received, but to his closest friends he painted a much darker picture:

> There have been powerful influences against me, because some at least of the money powers think me dangerous, wherein they are wrong. The N.Y. Evening Post I see says that I have not been a great Judge, being brilliant rather than sound. . . . [M]ost of its criticism has been pointedly incompetent . . . .[T]he incompetence and inadequacy of the ordinary talk while expected is annoying, whether praise, as it generally is, or blame.[251]

> I have hardly looked at the papers, but the little that I have seen has been incompetent and sometimes wounding . . . . One that I saw suggested that I was not a great judge—brilliant rather than sound. Another that I was not in the first rank . . . . [O]ne has been breaking his heart to do the work

246. *Remaking the Supreme Court*, NEW YORK EVENING POST, Aug. 12, 1902, at 4.

247. Paraphrased in *High Praise for Holmes*, BOSTON EVENING TRANSCRIPT, Aug. 13, 1902, at 1.

248. Several papers paraphrased in *id.* and in various articles, BOSTON EVENING TRANSCRIPT, Aug. 12, 1902, at 3.

249. *The New Federal Supreme Court Justice*, BOSTON EVENING TRANSCRIPT, Aug. 12, 1902, at 3. *See* Seipp, *supra* note 3, at 516-17.

250. *Chief Justice Holmes's New Honors*, BOSTON EVENING TRANSCRIPT, Aug. 12, 1902, at 6.

251. Letter from Holmes to Frederick Pollock (Aug. 13, 1902), *in* 1 HOLMES-POLLOCK LETTERS, *supra* note 55, at 103-04.

> as well as he could, and has hoped . . . that he has not been wanting in greatness, but longs to see his hopes confirmed. . . . One is always so near to despair that it does not take much to bring in the black humor.[252]

> The principal and rather absurd thing is the depth of gloom in which I was plunged for a time on what so far has been a triumph because the incompetents who copied each other in the newspapers more frequently pronounced my style good than me a great judge. . . . I hesitatingly and timorously [was] beginning to believe my last 20 years a success [but] a little advice or cold comment will pull down more than reams of praise will build up.[253]

> I . . . must vent a line of unreasoning—rage I was going to say—dissatisfaction is nearer. There have been stacks of notices of me all over the country and the immense majority of them seem to me hopelessly devoid of personal discrimination or courage. . . . And now as to my judicial career they don't know much more than that I dissented in *Vegelahn v. Guntner* and as that frightened some money interests, . . . it is easy to suggest that the Judge has partial views, is brilliant but not very sound, has talent but is not great, etc., etc. It makes one sick when he has broken his heart in trying to make every word living and real.[254]

Holmes could hardly bear the thought that politicians, businessmen, and journalists were evaluating his body of judicial opinions, and perhaps finding him not as great a judge as he thought himself to be.

The U.S. Supreme Court resumed in October, and the Senate did not return until December. With the Court understaffed, Roosevelt wanted to make a recess appointment, which the Senate could later confirm or reject. Meanwhile Marcus Knowlton, Holmes's "natural and fit successor" as chief justice according to

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252. Letter from Holmes to John Chipman Gray (Aug. 17, 1902).

253. Letter from Holmes to Clara Sherwood Stevens (Sept. 8, 1902).

254. Letter from Holmes to Frederick Pollock ([Sept.] 23, 1902), *in* 1 HOLMES-POLLOCK LETTERS, *supra* note 55, at 106.

the *Springfield Republican*,[255] urged Holmes to resign at once (so that a successor—himself—could be appointed before a new governor might take office).[256] John Lathrop, also on the Supreme Judicial Court, warned Holmes not to resign, however, fearing that "you may find yourself out in the cold" because Senator Hoar "may think that his nephew Sam is the only man fit for the place." Lathrop added that Horace Gray had not resigned his chief justiceship in 1882 until the Senate confirmed him.[257] What should Holmes do?

Holmes wrote three frantic letters to Senator Lodge, begging him to persuade Roosevelt to let Holmes stay on the state court until the Senate acted.[258] He started the new term in Boston, lying awake nights trying not to think about the fate of his appointment in the Senate.[259] On November 5, Hoar was still protesting Holmes's unfitness, this time in a private letter to Chief Justice Fuller,[260] but Fuller privately backed Holmes.[261] On November 21, Holmes urged Fuller to press Senator Hoar to speed up the confirmation process, noting "the Senator wanted his nephew to be appointed and I am afraid that he does not like me."[262] Holmes did not let go of the chief justiceship of Massachusetts until he had the U.S. Supreme Court firmly in his grasp.

On December 2, 1902, President Roosevelt formally transmitted his nomination of Holmes to the Senate, and Lodge asked Fuller to urge Hoar to confirm Holmes immediately.[263] Two days later the Senate confirmed him. Two days after that, the justice arrived in Washington,[264] and on December 8, as he stepped forward to take the judicial oath, Holmes handed the Reporter of Decisions a telegram for the Marshal of the Supreme Court to forward to Governor Crane, remarking that he could not very

255. *Court Division Unchanged*, BOSTON EVENING TRANSCRIPT, Aug. 12, 1902, at 3 (quoting the SPRINGFIELD REPUBLICAN, Aug. 12, 1902).

256. *See* Letter from Holmes to John Chipman Gray (Aug. 17, 1902); Letter from Holmes to Frederick Pollock (May 17, 1925), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 55, at 161.

257. Letter to Holmes from John Lathrop (undated). *See* Letter from Holmes to John Chipman Gray (Aug. 17, 1902).

258. Letters from Holmes to Henry Cabot Lodge (Aug. 19, 21, 23, 1902).

259. Letter from Holmes to Nina Gray (Oct. 10, 1902).

260. Letter from George F. Hoar to Chief Justice Melville W. Fuller (Nov. 5, 1902), *quoted supra* note 230.

261. Fuller anonymously arranged for the printing of *A Compliment to Chief Justice Holmes*, 35 CHICAGO LEGAL NEWS 141 (Oct. 18, 1902). *See* Letter from Melville W. Fuller to John Morris (Oct. 16, 1902), *quoted in* WILLARD L. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1888-1910, at 282-83 (1950).

262. Letter from Holmes to Melville W. Fuller (Nov. 21, 1902). Lodge urged Fuller to do the same on December 2, 1902.

263. Letter from Henry Cabot Lodge to Melville W. Fuller (Dec. 2, 1902), quoted in KING, *supra* note 261, at 286.

264. *On Monday, Justice O. W. Holmes Will Take His Seat*, BOSTON GLOBE, Dec. 7, 1902, at 9.

well be a justice of two courts at the same time.[265] The telegram was his resignation as chief justice. So, at the last possible moment, ended Oliver Wendell Holmes's service on the Supreme Judicial Court.[266]

Triumph, despair, anxiety in equal parts marked Holmes's transition from Chief Justice of Massachusetts to Associate Justice of the U.S. Supreme Court. His career, his reputation, all of his relentless work on the Supreme Judicial Court suddenly came into the sharp and pitiless focus of public scrutiny. Had he been brilliant? Had he been great? Had he been sound? Out of thirteen hundred opinions, only two seemed to matter—and those were dissents. On October 21, 1902, while awaiting confirmation, he told the Chicago Bar Association:

> A judge in our day . . . has his share of obstacles to overcome, and none the less if his decision is beyond appeal. If he aims at the highest, he must take his risks. He must be superior to class prejudices and to his own prejudices. . . . He must throw down his naked thought, unswaddled in pompous commonplaces, to take its chance for life. He must try to realize the paradox that it is not necessary to be heavy in order to have weight.
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> . . . Who dares flatter himself that he fills the requirements which I imagine for a great judge? All that I venture to say for myself is that I have done my best with delight for twenty years . . . and that perhaps after all I have not failed.[267]

Greatness and failure, lightness and weight, were all that Holmes could think of, while his advancement depended on the personalities, politics, and prejudices of the moment. Problems of justice, law, and how judges should decide cases still remained.

Justice or Law? On December 3, 1902, the eve of his Senate confirmation, Holmes dined at a farewell banquet given by the Middlesex Bar Association. He told the lawyers that they would judge his twenty years' work more "from the accident of your professional needs than from any general aspect of a man's work."[268] He said that he had "tried to see the law as an organic

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265. CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 65-66 (1942). Crane left office a month later, but not before appointing Marcus Knowlton as the next chief justice of Massachusetts.

266. *Memoranda*, 182 Mass. 350 (1903).

267. OLIVER WENDELL HOLMES, Jr., *Remarks at a Dinner of the Chicago Bar Association*, Oct. 21, 1902, *in* OCCASIONAL SPEECHES, *supra* note 37, at 148-49.

268. *Farewell to Holmes*, BOSTON HERALD, Dec. 4, 1902, at 1, 10; *Bar Honors Chief Justice*

whole . . . as a reaction between tradition on the one hand and the changing desires and needs of a community on the other" and had tried "to express not my personal wish, but the resultant, as nearly as I could guess, of the pressure of the past and the conflicting wills of the present." But he said again, as he had in 1897, that "certainty is an illusion, that we have few scientific data" to affirm one rule rather than another. Here are themes from *Path of the Law* and *Law in Science*, the new method of judging by weighing competing social and economic interests.

Holmes's last words at this banquet, his last as Chief Justice of Massachusetts, struck a martial note:

> To have the chance to do one's share in shaping the laws of the whole country spreads over one the hush that one used to feel when one was awaiting the beginning of a battle. . . . One looks down the line and catches the eye of friends—he waves his sword—it may be the last time for him or them—but the advance is about to begin. . . . We will not falter, we will not fail. We will reach the earthworks if we live, and if we fail we will leave our spirit in those who follow, and they will not turn back. All is ready. Bugler, blow the charge.[269]

Here was vintage Holmes, but the younger members of his audience exchanged amused glances at the time and snide remarks when it was over.[270]

The really telling moment, I think, happened just as Holmes was leaving that banquet. As the story goes, someone called out, "Now justice will be administered in Washington!" Holmes is supposed to have called back, "Don't be too sure. I am going there to administer *the law*."[271] Learned Hand is another of those who later made similar, innocent remarks to Holmes about "doing justice," and got much the same reply.[272] "I hate justice," he said many times to his brethren, because it meant "shirking

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Holmes, BOSTON POST, Dec. 4, 1902, at 1, 3; *Hearty God Speed*, BOSTON GLOBE, Dec. 4, 1902, at 3; *Justice Holmes Confirmed*, BOSTON EVENING TRANSCRIPT, Dec. 4, 1902, at 6. The speech is also reprinted in OCCASIONAL SPEECHES, *supra* note 37, at 154-57.

269. OCCASIONAL SPEECHES, *supra* note 37, at 157.

270. KING, *supra* note 261, at 287 (quoting recollections of Dixon Weston, who was present).

271. BUTLER, *supra* note 265, at 50-51. In *Oliver Wendell Holmes: A Memorial*, 298 Mass. at 600 (Arthur D. Hill), this exchange is remembered "on his way to the courthouse."

272. LEARNED HAND, THE SPIRIT OF LIBERTY 306-07 (1960). *See* Michael Herz, *"Do Justice": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 113 & n.9, 133 n.78, 146-61 (1996) (quoting many variations of the story).

thinking in legal terms."[273] Was this just another witty impertinence, a stock riposte, or did Holmes mean something by the difference between law and justice?

He may have meant a counsel of modesty, that his job as a judge was not to produce the right answer, but merely to produce *an* answer, on time, to settle a dispute one way or the other. His predecessor Walbridge Field worried for too long, Holmes thought, about every possible argument on each side. The truly just result, Holmes may have meant, is the sort of answer we could reach only if we had eternity ahead. His predecessor Horace Gray distinguished every precedent from every jurisdiction. The opinion that would persuade everyone of its justice was again something that Holmes thought no judge could write. Holmes prided himself on the hectic pace he achieved on the Supreme Judicial Court, on grinding through the cases as quickly as they were argued. Sensitive about what his reputation would be, he asked to be judged by the whole body of work he had produced, by the law that he had created, not by the justice of any individual result.

Conclusion

Far too much is known about our state's twenty-fifth chief justice, Oliver Wendell Holmes, Jr., and far too little. The documentary evidence of Holmes's life is enormous. This article has only scratched the surface of what can be known of Holmes's day-to-day experience and thoughts from 1899 to 1902. The mundane details of his life show that the stately progress of Holmes's career was by no means inevitable. I have focused attention here on Holmes's promotions in 1899 and 1902, because these were the occasions when his contemporaries attempted to characterize his style, substance, and impact as a judge. These are good stories, worth telling because they suggest that happenstance and personality quirks might have had more to do with Holmes's promotions than the merits of his judicial decision making.

In the bitter controversies on the Supreme Court from 1905 to 1937—it is hard to call them anything but political controversies—between conservative and progressive justices, Holmes was the hero of the winning side, canonized first by Felix Frankfurter and then by the entire American law professoriate. Senator Hoar's pronouncement in 1902 that Holmes was "without grasp of legal principles," sounds today like an economic

273. Letter from Holmes to Ellen A. Curtis (Dec. 14, 1919), *quoted in* CHARLES P. CURTIS, A COMMONPLACE BOOK 27 (1957); Letter from Holmes to John C.H. Wu (July 1, 1929), *in* JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921-1932, at 53 (1947).

forecast for booming markets in October 1929—hopelessly, comically wrong. For most of the twentieth century, suggestion that Holmes was anything but the ideal American judge was *lèse majesté*, an offense against the American civic religion. All this worship does not make Holmes any easier to understand.

Oliver Wendell Holmes, Jr., remains an enigma. He was a passionate stoic, a romantic cynic, a virtuous flirt, an activist practitioner of judicial restraint. He recognized, at the time he became chief justice, that judging really just meant determining which of two competing social or economic interests was the stronger, and giving effect to that interest. How anyone with a mind like Holmes's could detach himself and his own beliefs from the choices he made is the enigma that emerges most powerfully from these pages. He really thought that he could ignore his own preferences and those of his political party and social class when he did this, that he could simply be the channel through which social forces are translated into legal judgments. And perhaps he could, for he was no ordinary judge.