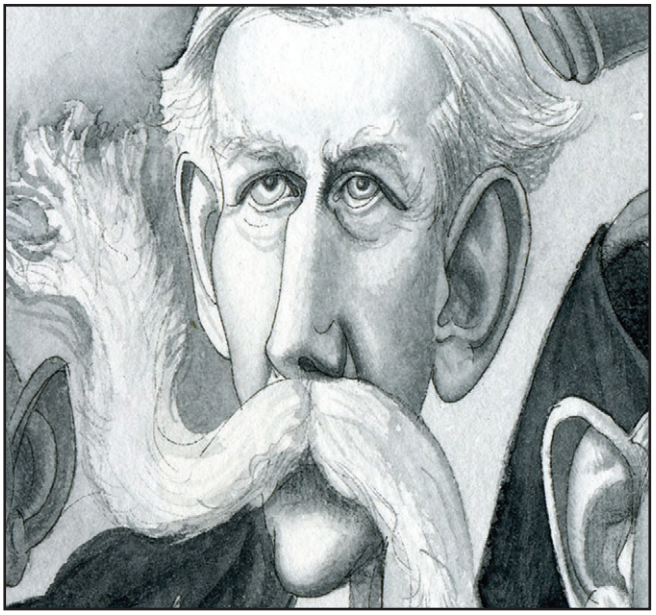
interfering with the individual's right to make such decisions. While interference with individual decision-making is certainly not altogether illegitimate in a limited government, freedom is the normal case and restraint the exception.

At best, Dewey argues, such a government secures to every individual the mere legal right to realize his spiritual potential, a right that for many is essentially worthless. "The freedom of an agent who is merely released from direct external obstructions is formal and *empty*," for unless he possesses every resource needed to take advantage of this broad legal opening, he will remain unable to exercise his freedom and thereby actualize his spiritual potential. While the law would "exempt [him] from interference in travel, in reading, in hearing music, in pursuing scientific research[,] . . . if he has neither material means nor mental cultivation to enjoy these legal possibilities, mere exemption means little or nothing." In view of this situation, the perpetuation of limited government would consign many, perhaps most, Americans to a condition of spiritual retardation.

If mere negative freedom is to be transformed into what Dewey calls "effective" freedom, accordingly, negative government must give way to positive government. That is, the legislative power of government must expand in whatever ways are needed—and hence however far proves necessary—to effect a wider and deeper distribution of the resources essential to the actualization of every American's spiritual potential. As Dewey presents it, and as subsequent political practice confirmed, this process is basically synonymous with the implementation of the positive conception of individual rights. In this new order, individuals are entitled to whatever resources they need to attain spiritual fulfillment. Because Dewey, like the progressives generally, regarded poverty as among the greatest constraints on spiritual development, a host of the new rights purported to enhance the material security of poorer Americans—e.g. the right to a job, a minimum wage, a maximum work day and week, a decent home (public housing), and insurance against accident (workers' compensation), illness (public health care), and old age (Social Security). Most of these rights were enshrined in federal law during the New Deal. Because access to education at all levels and to fine art are no less essential to spiritual fulfillment, Dewey also advocated generous public provision of these resources—and indeed the provision of both was a hallmark of LBJ's Great Society. Because all such resources are secured for those who lack them through the creation of new redistributive programs (which increase the burden on those who pay taxes) and the imposition of new regulations such as the minimum wage (which foreclose choices previously reserved to the individual), a politics of rights-as-resources inevitably erodes freedom in the founders' sense.

In sum, the core of Dewey's progressivism, socialism, or what subsequently became known (thanks in no small part to his efforts) as liberalism, is freedom understood as spiritual fulfillment. Because the embrace of this ideal necessitated a thoroughgoing reconstruction of the American way of living, primarily by means of the positive state, it revolutionized not only the founders' theory of limited government, but also their constitutionalism: for, as Dewey and Tufts candidly note, progressive judges have "smuggled in" many valuable reforms by devising "'legal fictions' and by interpretations which have stretched the original text to uses undreamed of." Dewey was hardly alone in encouraging this transformation, but few would deny the preeminent role he played in it. **NR**



The Curious Constitution of Oliver Wendell Holmes Jr.

BY BRADLEY C. S. WATSON

Oliver Wendell Holmes Jr. was appointed to the U.S. Supreme Court by Theodore Roosevelt, America's first progressive president. He served from 1902 to 1932, and his name remains familiar to this day. There is good reason for that, as Holmes stands out among Supreme Court justices for his enduring influence on constitutional jurisprudence.

Holmes set forth the essence of progressivism as a legal theory, though he was not primarily a theorist. Instead, he was a practitioner, so we must distill from his many arguments and judgments a coherent account of progressivism as a distinctly legal—as opposed to philosophical or political—movement (though it was certainly all three of these things). The legal aspect is important, because by the middle part of the 20th century, it was clear that the judicial branch of government was the one that would carry progressive ideology forward in the most comprehensive manner.

Holmes was heir to, and an exponent of, doctrines that permeated American intellectual circles during the late 19th and early 20th centuries. These doctrines were offshoots of the era's new "scientific" attitudes toward politics and human affairs. After the Civil War, Social Darwinism and pragmatism came to dominate

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the American intellectual landscape, sweeping away all notions of politics grounded in moral truths; in legal circles, they spawned a version of constitutionalism dedicated to their defense. By the early 20th century, the two doctrines had merged to form the compact and powerful ideology of progressivism.

For both pragmatists and Social Darwinists, life and thought are directed to continuous change, experimentation, and adaptation. The test of the worthiness of any proposition is not its truth in and of itself—a truth grounded in the nature of things—but its adaptive success ("survival of the fittest"). This process of endless change and adaptation is the engine of progress. Although Holmes is often depicted as an advocate of "judicial restraint," he saw the need for courts to provide creative responses dictated by the times. And for progressives, the times are always a-changin'.

For Holmes, law and society are forever in flux, and courts adjudicate mainly with an eye to the law's practical effects. For this reason, Holmes led the charge to eradicate judicial reasoning that was based on principles of natural law or natural rights. Morality, he felt, has nothing to do with the law; it amounts to no more than a state of mind. There are no objective standards for determining right and wrong, and therefore no "just" or "constitutional" answers to legal questions. Legal adjudication has no principled basis; instead it comes down to weighing questions of social advantage according to the exigencies of the age.

Holmes's view raises a fundamental question: If the Constitution does not dictate anything timeless and enduring, is there any ground for faith in the Constitution itself, or in classical-liberal constitutionalism? Such a constitutionalism, after all, would seem to require an understanding that only known and promulgated laws, whose meaning is stable over time, can bind citizens. Yet Holmesian "legal realism" denies the very possibility of such laws.

In a 1915 essay, Holmes writes: "When I say that a thing is true, I mean that I cannot help believing it. . . . But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations." Even more radically, Holmes's efforts to debunk the philosopher's quest for "absolute" truth or the jurist's quest for "natural law" lead him to suggest that the morality of even the greatest human struggles depends entirely on the outcome. In a 1918 essay titled "Natural Law," Holmes writes:

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

This account reduces what is called "natural law" to an inexorable process of historical unfolding and paints it as nothing more than a dominant opinion. Holmes thereby lays the foundation for a judicial seeking-out and support of such dominant opinions (even, it turns out, if they begin in foreign lands putatively more advanced than our own) and, concomitantly, a judicial aversion to "weaker" opinions or entities that appear not to support the strength and growth of the social organism.

When Holmes dismisses traditional concepts of natural law, his jurisprudence becomes merely a predictive tool along the lines of modern science. Well-trained lawyers, according to Holmes, become the oracles of the new legalism and indeed the new constitutionalism. To know legal dogma is to be able to make predictions. Under Holmes's definition of truth as that which is strongest or most useful in the here and now, it is beyond lawyers' ability—or anyone's—to point to the "constitutional" truth of things; the concept has no meaning.

In an influential 1897 essay titled "The Path of the Law," Holmes writes: "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of public force through the instrumentality of the courts." Such a claim is in significant tension with the understandings of law at the heart of the Western intellectual tradition. It is very far from Plato's notion that law seeks to be a discovery of *what is*, or Thomas Aquinas's notion that proper human law must not conflict with natural law, which is accessible to unaided human reason. It is also very far from the American founders' written constitutionalism, which was designed to protect the God-given natural rights of equal political beings.

In what terms are we to understand what the law's instrumentality—the courts—will actually *do*? Holmes claims that law reflects not logic but experience. Law cannot be understood to be syllogistic, with the major premise of sound legal analysis being found in the law itself and the minor premise in the facts of the case. If it could, then judges would be able to decide cases on the basis of right reason. Instead, judges must look to history and incorporate science—especially economic science—into their jurisprudence. Holmes's Social Darwinism is exhibited in his view that judges express the wishes of their class at a particular historical point. The content and growth of the law are determined as much by organic "forces" as by men.

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

The core of Holmes's legal realism—its pragmatism along with a confidence in, or grim acceptance of, the progress of

History—is brought into relief by examining its insistence that courts must interpret and balance rights. The importance of this judicial balancing is nowhere more evident than in Holmes's free-speech jurisprudence. In *Schenck* v. *United States* (1919), Holmes stated the famous "clear and present danger" test as a pragmatic doctrine that avoids inquiry into the content (that is, the nature) of speech and concentrates only on its likely effects. Prior to the articulation of this doctrine, the content of speech was considered of vital constitutional import.

In *Abrams* v. *United States* (1919)—decided just months after *Schenck*—a majority of the Court upheld the convictions of anti-government, anti-war radicals who advocated violence. Holmes dissented on the basis of his "clear and present danger" test. According to Holmes, free speech fosters free trade in ideas, and the test of "truth" is its ability to get accepted in the marketplace of ideas, which will happen when the market assesses its needs. Implicit in this is a Darwinian confidence that society need not fear that which triumphs. The beliefs that will triumph in the long run are what is critical—not the constitutional or regime beliefs that have existed up to the present, much less a timeless natural law.

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

In *Gitlow* v. *New York* (1925), Holmes makes this claim: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Yet if, as Holmes asserts, the Constitution is itself neutral or indifferent on this question, what is the basis for his constitutional ruling in favor of a First Amendment claim? Again, we are led to Darwinian experimentalism, albeit of a foreboding, fatalistic kind.

HOLMES was often willing to show great deference to legislative judgments as the sovereign expressions of popular will. In *Lochner* v. *New York* (1905), Holmes dissented (on the grounds of constitutional neutrality) from a majority that held that state economic regulations limiting work hours were unconstitutional. He famously claimed: "I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . I think the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion." But this modest conception of the judicial function in a democracy was not Holmes's final word. Holmes's jurisprudence suggests that the Supreme Court should intervene where the legislative branch limits free speech, but not where it limits economic freedom. For Holmes, survival or progress might require activism or restraint, and reliance on either is purely an instrumental—or experimental—question.

Racial improvement through eugenics was one outgrowth of early-20th-century progressivism, which placed considerable faith in the ability of science and purportedly scientific administration to solve social problems. In one of his most notorious judgments, Holmes wrote the 8-to-1 majority opinion in *Buck* v. *Bell* (1927), which upheld Virginia's compulsory-sterilization law. Holmes upheld the law on the grounds that those targeted by it were treated with scrupulous procedural fairness. Decrying those who "sap the strength" of society, and contending, in reference to the affected litigant and her family, that "three generations of imbeciles are enough," Holmes seemed to accept the eugenic arguments to the point of endorsing them on grounds of public policy. He reasoned by analogy, comparing the hardships of sterilization with the sacrifices of soldiers in battle. Referring to the Civil War, he argued that if "the public welfare may call upon the best citizens for their lives," surely those who sap the strength of the state could be called upon for a lesser sacrifice.

Following in Holmes's footsteps, a long line of progressive jurists have broken with the founders' Constitution—and with it, the very notion that human beings are creatures of a certain type, with transcendent purposes that do not change over time. In his rejection of natural law and natural rights—and thus of a classical liberal constitutionalism with limited state power—Holmes laid the groundwork for the contemporary era of jurisprudence, in which judges look to their visions of the future more than to the documents and doctrines of the past, and take on a new and far more active role in the constitutional order. The retrospective conception of the law—common or constitutional—hangs today by a bare thread.

There is a residual incoherence to the progressive jurisprudence that has followed Holmes. It alternates between two poles. On one hand, it expresses the desire to make decisions that are legitimate in the eyes of the community—decisions that respond to something like, in Holmes's words, the "felt necessities" of the age. On the other, it encourages decisions that oppose what it claims is illegitimate majority will. But neither pole is rooted in constitutional text, tradition, logic, or structure. Rather, they are both rooted in the judge's view of which necessities are most deeply felt and most likely to encourage social and personal growth. The practical result, in contemporary jurisprudence, is that art trumps economics, expression trumps the common good, subjectivity trumps morality, freedom trumps natural law, and will trumps deliberation. Such is the face of progressive jurisprudence, a face that now seems tremendously weather-beaten from its triumphal march of a hundred years' duration.

Having rooted itself so firmly in the historicist thought that guides America and—under different names—the Western world as a whole, and having gained so much strength and momentum on its virtually uninterrupted path, this jurisprudence will not be displaced anytime soon. Its success is marked by the fact that it no longer seeks victory, only legitimation in a constitutional order that is still at odds with it. **NR**