THE BIRTH OF CONTRACT: HOLMES, LANGDELL, AND 1880

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INTRODUCTION

The birth of what came to be known as classical contract law (which reigned from the late nineteenth century to the early twentieth century)[1] can be traced to 1880. That year, two giants of the law—Oliver Wendell Holmes, Jr., and Christopher Columbus Langdell[2]—announced their views of contract law, part of their effort to bring order to the chaotic common law. They sought to do so by sharply distinguishing contract from tort and by making contract law's focus promissory obligation and private lawmaking rather than the contract's particular subject matter.[3] They also agreed the enforceability of a promise should require a bargained-for exchange and that contract law should emphasize objective standards of liability.[4] These latter two principles provided classical contract law's foundation.[5] Their efforts, a continuation of a legal science tradition started in Europe to systematize the law on a theoretical basis,[6] helped achieve a revolution in U.S. private law in the late nineteenth century.[7]

Yet, at the same time, Holmes undermined the classical contract law

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[1] *See* Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854, 855 n.2 (1978) ("Classical contract law refers (in American terms) to that developed in the 19th century and brought to its pinnacle by Samuel Williston in THE LAW OF CONTRACTS (1920) and in the RESTATEMENT OF CONTRACTS (1932).").

[2] *See* Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. at ix, ix (Richard A. Posner ed., 1992) (describing Holmes as "the most illustrious figure in the history of American law."); Bruce A. Kimball, *Langdell, Christopher Columbus*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 323, 324 (Roger K. Newman ed., 2009) (describing Langdell as arguably "the most influential figure in the history of legal education in the United States . . . .").

[3] *See generally* ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE 1-42 (2007) (explaining the goals of classical legal thinkers with respect to contract law).

[4] *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (2d ed. 1995).

[5] *Id.* at 19-23, 47.

[6] M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 121 (1986). On the different meanings of "law as a science," *see* RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930, at 29 (1987). This Article refers to legal science as "the attempt to systematize legal activities on a theoretical basis" with the resulting "ordered body of knowledge . . . provid[ing] the foundation for postulating legal rules." *Id.*

[7] KREITNER, *supra* note 3, at 1.

foundation he helped establish, disagreeing with Langdell on what might, at first, have appeared as a minor dispute about the legal meaning of *promise.* It was this little crack, if it spread, that could cause classical contract law to collapse. This apparently insignificant disagreement disclosed that these two men—those most responsible for the birth of classical contract law in the United States—had different methods of legal reasoning, and this would, in fact, cause classical contract law's undoing in the mid-twentieth century, leading to what Grant Gilmore famously called "the death of contract."[8]

Holmes's and Langdell's life experiences, including their upbringing, education, and the persons they met, influenced them in ways that caused them to initially agree in their legal scholarship but that would eventually result in this significant disagreement that, after their deaths, changed the course of contract law. While each believed law could be viewed as a science,[9] their methods of legal science, although similar to a point, were ultimately different in a critical respect. Each followed a historical and organic approach to law that at the same time sought to identify fundamental legal principles,[10] combining aspects of the "historical school" of legal science founded in Germany by Friedrich Carl von Savigny with aspects of the analytical approach of the English legal scholar John Austin.[11] But Langdell's method of legal science combined this historical/analytical approach with logic, whereas Holmes's method combined a historical/analytical approach with one that continued to move law forward in support of social policy (i.e., what was considered expedient for the community).[12] Their disagreement was about this added element to a historical/analytical approach, revealed in their disagreement in 1880 over a single concept—*promise.* Their disagreement was not the result of mere disputes in borderline cases when applying a shared meaning of *promise.*

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[8] *See* GILMORE, *supra* note 4, at 1 (announcing that "contract" is "dead.").

[9] *See* OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 406, 412 (Sheldon M. Novick ed., 1995) [hereinafter 3 THE COLLECTED WORKS OF JUSTICE HOLMES] (stating that "the practical study of the law ought . . . to be scientific."); C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871) ("Law, considered as a science, consists of certain principles or doctrines.").

[10] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881) (asserting that "[t]he life of the law has not been logic: it has been experience . . . . The law embodies the story of a nation's development through many centuries . . . ."); LANGDELL, *supra* note 9, at vi (noting that "[e]ach of [law's] doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries.").

[11] *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 186 (2000) (noting that Holmes and Langdell used both the historic and analytic methodologies and that "[t]he two approaches were enough alike . . . . that Holmes, Langdell, and many others could employ both without contradiction.").

[12] *See* BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826-1906, at 111 (2009) (discussing the point of disagreement between Langdell's and Holmes's approaches to legal reasoning).

Rather, it was more fundamental—it was about how legal concepts should be given meaning in the first place.

This Article traces the origin and development of Holmes's and Langdell's different methods of legal reasoning, identifying the influences to which they were exposed prior to 1880 and analyzing how these influences caused them to disagree on the meaning of *promise*. As will be shown, their disagreement was rooted in the backgrounds they brought to the common goal of bringing order to the common law in the late nineteenth century. Holmes, later in life, said that "whatever atmosphere men are brought up in persists,"[13] and so it was with Langdell and Holmes. Their experiences up to 1870 would set them on the shared course to challenge convention, but by 1880 they would challenge convention in different ways. Underneath their superficially similar backgrounds (New England upbringing, Harvard College, Harvard Law School, commercial lawyer) lay important differences that led to the fissure in classical contract law that later caused its collapse.

Langdell's experience with the corruption of the New York legal system would lead to his desire for a legal science that gave primacy to logical consistency over social policy, as social policy meant judicial discretion, and judicial discretion could feed corruption.[14] Holmes's experiences were more varied and led to a series of influences that pulled in different directions. His family, his harrowing Civil War service, and his discussions with the brilliant thinkers in the famed Metaphysical Club would instill and reinforce in him a profound skepticism and a disdain for big ideas.[15] Yet his philosophical nature and desire for prestige—a quest for immortality—impelled him to chase after the answers of the universe and to make a mark with big ideas.[16] He developed a love for the common law system of deciding the case first and the legal principle second, yet he hated the common law's disorder, and he had a strong interest in classification.[17] He wanted to help the law progress, yet his Civil War experience made him fear changing the status quo too quickly. In 1880, Holmes, perhaps more of a syncretic than an original thinker,[18] would take all of these disparate and conflicting influences, experiences, and beliefs from the past forty years and

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[13] Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Feb. 17, 1920), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, at 82, 83 (Robert M. Mennel & Christine L. Compston eds., 1996) [hereinafter HOLMES AND FRANKFURTER*]*; *see also* OLIVER WENDELL HOLMES, *Natural Law*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 445-446 ("What we most love and revere generally is determined by early associations.").

[14] *See* Kimball, *supra* note 2, at 323 (noting that Langdell took from his years as a New York lawyer the principle of "the apolitical, scientific nature of law.").

[15] *See infra* Parts III, IV, and VIII.

[16] *See infra* Parts VI, VII, VIII, XI, XII, XIII, and XIV

[17] *See infra* Parts VI.

[18] Posner, *supra* note 2, at xx.

fuse them into a brand of legal science that was both strikingly similar to, and strikingly different from, Langdell's.[19]

I. SETTING THE STAGE: HUNTINGTON HALL (BOSTON, NOVEMBER-DECEMBER 1880)

In January 1880, Oliver Wendell Holmes, Jr., a Boston lawyer with a philosophical mind, started weaving together the themes from the various articles he had written over the past ten years.[20] His plan, like the man himself, was ambitious—to make sense of and bring order to the entire chaotic body of the common law,[21] so desperately in need of order due to its tremendous growth and the demise of the ancient writ system, the latter having long held the common law together.[22] His extraordinary intellect and unmatched work ethic gave reason to be optimistic about his chance of success.

But Holmes was in a race against time. The project arose in late 1879 when the Lowell Institute invited him to give a lecture series in November and December 1880 at Huntington Hall in Boston.[23] This, however, was not his only deadline. There was another, self-imposed one. He had long planned to write a book on the law[24] and believed "that if a man was to do anything he must do it before 40,"[25] and he would turn forty on March 8, 1881.[26] Despite being burdened with a full-time law practice, and apparently doubting he could actually bring his ideas together in time, he accepted the invitation by "the weight of a hair."[27] His goal was not simply giving the lectures but turning them into his long-planned book and having it published by his fortieth birthday.[28] Around January 1, 1880, Holmes dove into the project,

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[19] Posner has argued that Holmes "enriched where he borrowed; his creative imitation was a species of greatness. . . ." *Id.*

[20] G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 148 (1993); LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 252 (1991).

[21] STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 168 (2019)

[22] Brian Hawkins*, The Life of the Law: What Holmes Meant,* 33 WHITTIER L. REV. 323, 329 (2012).

[23] BAKER, *supra* note 20, at 252; *see also* BUDIANSKY, *supra* note 21, at 176 (noting the lectures were given in Huntington Hall). It is unknown when exactly the Lowell Institute extended the invitation, MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, at 136 n.3 (1963), but it was likely sometime in late 1879. Holmes wrote in his reading list for 1880 that he started work on the lectures "about Jan. 1." *Id*. Based on Holmes's note in his reading list, late 1879 seems most likely. *See id.*

[24] HOLMES, *supra* note 10, at 3.

[25] HOWE, *supra* note 23, at 135 (quoting letter from Oliver Wendell Holmes, Jr. to Mrs. Charles S. Hamlin) (Oct. 12, 1930) (on file with the Harvard Law School Library).

[26] *Id*.

[27] BUDIANSKY, *supra* note 21, at 168 (quoting letter from Oliver Wendell Holmes, Jr. to Baroness Charlotte Moncheur) (Jan. 9, 1915) (on file with the Harvard Law School Library).

[28] SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 157 (1989) [hereinafter HONORABLE JUSTICE].

devoting his nights to the task after long days of practicing law.[29]

Fortunately for Holmes, he had laid much of the groundwork for the upcoming lectures in his prior articles. As he described it, the articles had been part of a scheme "to analyse what seem to [be] the fundamental notions and principles of our substantive law, putting them in an order which is a part of or results from the fundamental conceptions."[30] Now, with less than a year before the lectures, the articles' themes would have to be hastily drawn together.[31] There was, however, a particular area of the private law that he had yet to explore in detail in his prior writings, but that would have to be covered if he wanted to make sense of the entirety of the common law—the law of contract.[32] It was not that he was completely unfamiliar with contract law,[33] but he had not given its details the deep philosophical thought he had given other private law subjects, such as torts and the law of possession.[34] Holmes would therefore have to research and write the contracts lectures from scratch, which he would do during the summer and autumn of 1880,[35] shortly before the lecture series started in November.

His general theory of the common law—developing over the past decade—had recently taken shape.[36] The question, however, was whether his research into contract law that summer and autumn would confirm or undermine the general theory he had been weaving. The answer would be that it would confirm it almost perfectly,[37] and at Huntington Hall he would announce the "true theory of contract."[38] Notwithstanding Holmes's lack of profound thinking about contract law before the summer of 1880, the series of three lectures he delivered on contracts on December 14, 17, and 21

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[29] BAKER, *supra* note 20, at 252.

[30] HOWE, *supra* note 23, at 25 (quoting letter from Oliver Wendell Holmes, Jr. to James Bryce) (Aug. 17, 1879) (on file with the Harvard Law School Library); *see also* OLIVER WENDELL HOLMES, JR., *Trespass and Negligence*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 76, 76 n.* (Sheldon M. Novick ed., 1995) (stating the articles were "parts of a connected scheme to analyze the fundamental conceptions of the law.").

[31] Sheldon M. Novick, *Editor's Introduction to* 3 THE COLLECTED WORKS OF JUSTICE HOLMES , *supra* note 9, at 3.

[32] HOWE, *supra* note 23, at 223; *see also* NOVICK, *supra* note 28, at 157 (noting that "[o]n the subject of ordinary contracts he had done nothing"); Novick, *supra* note 31, at 3 (noting that Holmes "had little contact" with criminal and contract law before preparing the lectures); WHITE, *supra* note 20, at 148 (noting that Holmes "would need to explore additional subjects, such as criminal law and contracts . . . .").

[33] For example, Holmes was a commercial lawyer. Sheldon M. Novick, *Holmes, Oliver Wendell, Jr.*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 2, at 271, 271.

[34] *See, e.g.,* HOLMES, *Possession*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 37; HOLMES, *Trespass and Negligence*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 76.

[35] HOWE, *supra* note 23, at 223.

[36] *See* BUDIANSKY, *supra* note 21, at 168 (noting that "[i]n a series of articles for the *American Law Review* in the late 1870s Holmes began to work out the basic ideas" of the common law).

[37] WHITE, *supra* note 20, at 172.

[38] HOLMES, *supra* note 10, at 238.

(lectures seven, eight, and nine overall)[39] were, in a word, astonishing,[40] and he concluded that contract was the common law's most important concept.[41]

On January 1, 1881, the *Boston Daily Advertiser* published Holmes's twelfth lecture, which was a summary of the first eleven.[42] The other eleven were published as his book *The Common Law* on March 3, 1881,[43] "widely considered the best book on law ever written by an American."[44] Holmes, by publishing his book of lectures on March 3, had also met his self-imposed deadline in the nick of time (just five days before his fortieth birthday).[45] He celebrated with a bottle of champagne, keeping the cork as a memento the rest of his life.[46] Upon the book's publication, his philosophical quest seemed to come to an abrupt end.[47] *The Common Law* would be his only book;[48] less than a year later, after a brief time as a professor at Harvard Law School,[49] he would become a judge on the Supreme Judicial Court of Massachusetts.[50]

Even before the lectures were published as *The Common Law* in March 1881, Holmes had reason to be pleased with them. They had drawn a large crowd, with younger men outnumbering older men.[51] The older generation was, however, well represented in stature,[52] and one such luminary was likely Christopher Columbus Langdell,[53] who had become dean of Harvard Law School a decade earlier,[54] at the same time Holmes began his intellectual journey in law. He would have taken particular interest in Holmes's contracts lectures. Langdell, who had originated the case method of law-school instruction and published the first law-school casebook a decade

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[39] BAKER, *supra* note 20, at 253.

[40] The word was Grant Gilmore's. GILMORE, *supra* note 4, at 6.

[41] HOLMES, *supra* note 10, at 163 (noting that "[p]ossession is a conception which is only less important than contract.").

[42] HOLMES, *Closure of the Lowell Lectures*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 104.

[43] BAKER, supra note 20, at 253.

[44] Posner, *supra* note 2, at x.

[45] BAKER, supra note 20, at 253; BUDIANSKY, *supra* note 21, at 177.

[46] BUDIANSKY, *supra* note 21, at 177.

[47] FREDERIC ROGERS KELLOGG, THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY x (1984); *see also* William W. Fisher III, *Oliver Wendell Holmes in* THE CANON OF AMERICAN LEGAL THOUGHT 21, 21 (David Kennedy & William W. Fisher III eds., 2006) (noting that "[w]hile a judge, he wrote a few pieces of scholarship . . . [b]ut, for the most part, he contented himself with his judicial responsibilities.").

[48] Allen Mendenhall, *Oliver Wendell Holmes Jr. is the Use of Calling Emerson a Pragmatist: A Brief and Belated Response to Stanley Cavell*, 6 FAULKNER L. REV. 197, 209 (2014).

[49] Holmes was hired in February 1882, but did not begin teaching until September 1882. HOWE, *supra* note 23, at 272-73. He resigned on December 9, 1882. DANIEL R. COQUILLETTE ET AL., ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY 396 (2015).

[50] Novick, *supra* note 33, at 272.

[51] BAKER, *supra* note 20, at 252.

[52] *Id*.

[53] LOUIS MENAND, AMERICAN STUDIES 38 (2002).

[54] KIMBALL, *supra* note 12, at 167.

earlier, was an expert in contract law.[55] He had even arguably come up with "the idea that there was such a thing as a general law—or theory—of contract"[56] and was one of the age's leading contract-law theorists,[57] perhaps even its first in the United States.[58] Just as Holmes had started to write his contracts lectures, Langdell, at the urging of his casebook publisher,[59] had published *A Summary of the Law of Contracts*, a mini-treatise derived from the cases in his casebook and previously published as the casebook's appendix.[60]

Langdell would have been particularly interested in Holmes's lectures not simply because he (Langdell) was a leading contracts theorist but also because he knew Holmes had recently attacked his method of legal reasoning and approach to legal science. In March 1880, Holmes, already at work on preparing for the Lowell Lectures but not yet the contracts lectures, had written a scathing review of the second edition of Langdell's casebook or, more specifically, the casebook's appendix summarizing the blackletter law.[61] It was in this review that Holmes, assailing Langdell's method of legal reasoning, first wrote that "[t]he life of the law has not been logic: it has been experience,"[62] what became "the most famous American legal quotation."[63]

Langdell was the perfect foil for Holmes's thesis that the common law could not be arranged in a purely logical fashion and its rules deduced by syllogisms. From the outset of his lectures, Holmes attacked Langdell indirectly, repeating that the life of the law had been experience, not logic.[64] But it was primarily Holmes's second contracts lecture (lecture eight overall), dealing with the elements of contract, where he made his main attacks on Langdell's theory of contract law.[65] In particular, it aimed at Langdell's concept of *promise*, which Langdell had used syllogistically to identify legal

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[55] Kimball, *supra* note 2, at 323-24.

[56] GILMORE, *supra* note 4, at 6. *But see* P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 399 (1979) (tracing the idea of a general law of contract to the French jurist Robert Joseph *Pothier*, who sought "to provide a uniform body of general principles which could be applied across France and could replace the mass of local, customary law, which had hindered the institutional and cultural unity of France.").

[57] Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 L. & HIST. REV. 345, 345 (2007); *see also* KIMBALL, *supra* note 12, at 84 (noting that "Langdell's scholarship during the 1870s . . . on contracts and sales . . . exercised seminal influence jurisprudentially" and that he was a "leading theorist on contracts during its 'golden age' in Anglo-American law.").

[58] WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 188 n.19 (1994).

[59] *See* C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 5 (TGS Publishers 2004) (1880) (stating that the publishers wanted the summary published separately due to demand).

[60] KIMBALL, *supra* note 12, at 102; LANGDELL, *supra* note 59.

[61] HOLMES, Book Note, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 102.

[62] *Id.* at 103.

[63] Steven J. Burton, *Introduction to* THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 1 (Steven J. Burton ed., 2000).

[64] HOLMES, *supra* note 10, at 5.

[65] *Id.* at 227-40.

doctrines he believed were incorrect, and which was a concept inconsistent with Holmes's "true theory of contract."[66] This disagreement over the legal meaning of *promise* more than anything else revealed their different methods of legal reasoning. But December 1880 is our end.[67] To trace the divergent influences that led to Langdell and Holmes's famous disagreement, we must start long before that, with a pauper scholar and a young Boston Brahmin.[68]

II. FROM PAUPER SCHOLAR TO WALL STREET LAWYER (LANGDELL, 1826-65)

The path to 1880 begins with Langdell, who was born on May 22, 1826 (nearly fifteen years before Holmes) and who was raised on a New Hampshire farm.[69] He grew up poor, in a family that suffered repeated tragedies.[70] His younger brother died as a child,[71] his mother died in 1833,[72] and his older brother ran away and then drowned.[73] His father became an embittered recluse, and in 1836 he split the family, sending Langdell to live with another family.[74] Several years later, his father had lost all his personal property (but not the farm),[75] and in 1840 Langdell returned to the farm, at the age of fourteen, to help his struggling father.[76]

Langdell dreamed of a better life. At the age of sixteen, he told his older sister that his dream was to go to college, though under the circumstances he did not see how it could happen.[77] Nevertheless, he hoped to be a so-called pauper scholar, the name for those ambitious boys from New England farming families who went to college because they expected no inheritance (usually because the farm would be left to their eldest brother).[78] These pauper scholars, however, would have to work, borrow, and save.[79] So Langdell taught school in New Boston and neighboring towns and then started working in the Manchester mills, all to save money hoping to go to Phillips Exeter Academy in Exeter, New Hampshire, an entryway to college.[80]

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[66] *Id.* at 238-40
[67] *See infra* Part XV.
[68] *See infra* Parts II and III.
[69] KIMBALL, *supra* note 12, at 11-12.
[70] *Id.* at 12.
[71] *Id.*
[72] *Id.* at 13.
[73] *Id.*
[74] *Id.*
[75] *Id.*; Bruce A. Kimball, *Young Christopher Langdell, 1826-1854: The Formation of an Educational Reformer*, 52 J. LEGAL EDUC. 189, 194 (2002).
[76] KIMBALL, *supra* note 12, at 14.
[77] *Id.* at 14-15.
[78] *Id.* at 15.
[79] *Id.*
[80] *Id.*

In 1845, at the somewhat mature age of nineteen, Langdell had saved enough and thus entered Exeter Academy, where he excelled.[81] But while there he ran out of funds, in part because he had been sending money to his father.[82] The only way to remain was to win a scholarship.[83] Despite his strong academic record, he did not get it,[84] and, sitting on the Academy steps, he burst into tears.[85] Fortunately, his older and younger sisters rescued his dream, supplying the money for him to stay,[86] and the next year he was awarded the scholarship.[87] But despite this extra money, his father's farm continued to be a financial drain,[88] and to stay at the Academy he still had to work menial jobs, scrimp on food, and share a room.[89]

There was, however, much for Langdell to be happy about. Exeter Academy was a turning point for him, the Academy being to him "the dawn of the intellectual life."[90] As Ralph Waldo Emerson would spark a flame in Holmes in the 1850s, Exeter would spark a flame in Langdell in the 1840s.[91] During his three years at the Academy, he had an insatiable appetite for study, borrowing more library books than almost any other student.[92] Considering Langdell's future, one book in retrospect stands out—John Locke's *Some Thoughts Concerning Education*.[93] In this book can be found the fundamental doctrines later guiding Langdell's legal philosophy, a philosophy based on inductive reasoning from court opinions to identify general principles of law.[94] Locke, following the advice of the French philosopher and moralist Jean de La Bruyère,[95] preached working with original sources and working from the particular to the general,[96] and Langdell likely took a method of learning from Exeter and from Locke (and thus indirectly from La Bruyère).

In 1848, at the age of twenty-two, Langdell's dream of being a pauper scholar was realized when he entered Harvard College.[97] As at Exeter, he excelled, ranking near the top of the class.[98] At Harvard, Langdell would be

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[81] *Id.* at 16.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 20.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 18.
[92] *Id.*
[93] *Id.*
[94] *Id.* On Locke's *Thoughts* and its significance, *see generally* NATHAN TARCOV, LOCKE'S EDUCATION FOR LIBERTY (1984).
[95] KIMBALL, *supra* note 12, at 19 n.34.
[96] *Id.* at 19.
[97] *Id.* at 20.
[98] *Id.* at 24.

exposed to the leading natural scientists in the United States, studying botany under Asa Gray[99] and zoology under Louis Agassiz.[100] If Exeter and Locke had taught Langdell a method of learning, Gray and Agassiz provided him with a way to later see similarities between legal science and natural science.[101]

In September 1849, the twenty-three-year-old Langdell started rooming with a lower classman named Chauncey Wright.[102] Brilliant in math and science,[103] Wright's role model was Socrates, and Wright loved to talk.[104] As Louis Menand writes, in college he had "a habit of turning up in his friends' rooms and sitting quietly, sometimes for hours, doing nothing in particular until someone asked him a question. Then he would begin to converse; and once he got going, people had a hard time stopping him."[105] His approach has been described as a "Socratic manner of prolonged and thorough discussion in which the vagueness of ideas could be exorcised . . . ."[106] One might wonder if Wright's brilliance in science and his dispassionate, logical, Socratic approach to discussion influenced Langdell's later views on legal reasoning and teaching, though, if they did, there was not much time for it. In late November 1849, Langdell left Harvard College to teach school during the winter, and he did not return, dropping out primarily because he could no longer afford it.[107] His teaching during the winter of 1849-50 was apparently a failure,[108] and he was now broke.[109] The early part of 1850 was a low point for Langdell.[110]

Instead of retreating back to his father's farm or the Manchester mills, however, Langdell returned to where he had been happiest, the place that had been the dawn of his intellectual life—the area around Exeter, and he clerked in an Exeter law office in 1850 and 1851.[111] Then, in September 1851, at the age of twenty-five, he returned to Harvard, entering Harvard Law School.[112] (Ironically, it was Langdell who later led the move to require incoming law students to either have an undergraduate degree or pass an entrance exam.)[113]

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[99] *Id.*
[100] *Id.* at 25.
[101] *Id.* at 24.
[102] *Id.* at 27.
[103] EDWARD H. MADDEN, CHAUNCEY WRIGHT 2 (1964).
[104] LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 206-07 (2001).
[105] *Id.* at 206.
[106] PHILIP P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 209 (1949).
[107] KIMBALL, *supra* note 12, at 29. Langdell, however, would resume his relationship with Wright in 1870, when Langdell became a professor at Harvard Law School. *Id.* at 199.
[108] *Id.* at 29-30.
[109] *Id.* at 30.
[110] *Id.*
[111] *Id.* at 31.
[112] COQUILLETTE, *supra* note 49, at 308.
[113] KIMBALL, *supra* note 12, at 39.

Unsurprisingly, he arrived poor and unkempt, and he slept on a classmate's couch.[114] Like at Exeter, whether he had the financial means to complete the program was in doubt.[115] But in late December 1851, he was awarded the law school's first tuition remission,[116] and in return he was assigned to assist Professor Theophilus Parsons with research for his contracts treatise.[117]

Harvard Law School would be another turning point in Langdell's life. If his time at Exeter had been the dawn of his intellectual life, his time at Harvard Law School would make it clear that his intellectual life would be devoted to the law. He developed an "almost fanatical and somewhat contagious enthusiasm" for studying law,[118] reputedly living in the library and having incessant discussions with classmates about the law.[119] These discussions displayed the flair of brilliance, so much so that by the beginning of his second year, he was considered the student body's "presiding genius."[120] In June 1853, he completed the two-year program,[121] but returned in September 1853 for a year as a graduate student[122] and then stayed an additional semester (fall 1854) as Parsons's chief research assistant.[123]

His work for Parsons might have helped Langdell come to think of contract law as a single body of principles, rather than as a mere collection of separate rules based on different types of contractual relationships (such as employment, insurance, or sales).[124] Parsons's treatise, for example, can be placed in an intermediate stage of the development of classical contract law.[125] Prior scholars had viewed contract law as merely an offshoot of property law.[126] They had also viewed contract law's specific rules as dictated by the nature of the parties' contractual relationship rather than by any general rules of contract.[127] Parsons, however, "reconceive[d] contract as deserving of an entire treatise, in which major categories are subsumed into a wide-ranging field."[128]

But it was Langdell's role as the law school's version of Chauncey Wright and a chance encounter on a cold day that would play the most important part in putting him on the path to 1880. In 1853 or 1854, a recent

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[114] *Id.* at 32.
[115] *Id.* at 33.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 35.
[119] *Id.* at 34.
[120] *Id.* at 35.
[121] *Id.* at 37.
[122] *Id.*
[123] *Id.* at 40.
[124] KREITNER, *supra* note 3, at 20.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

Harvard College graduate named Charles William Eliot went to the room of a friend who was enrolled in the Divinity School,[129] and at the time Langdell was renting a room in Divinity Hall.[130] In the colder months, poorer students like Langdell would spend time in the rooms of richer students who could afford wood or coal.[131] Eliot, when visiting his friend, heard a young man who was making notes for Parsons's contracts treatise standing and eating his supper in front of the fire.[132] Perhaps drawing on what Locke had taught him, Langdell was likely explaining how to study law inductively by reading the leading cases and deriving legal principles from them.[133] Years later, when Eliot (then a chemistry professor) became Harvard's president and needed a professor for the law school, he recalled Chris Langdell standing there in front of the fire, and "the remarkable character of that young man's expositions."[134]

After remaining to help Parsons on the second volume of his treatise, it was finally time for Langdell to make a living. He departed for New York City in December 1854,[135] the city seeming to be the best place to try and find work while living frugally.[136] He started practicing in 1855,[137] and when the Civil War began six years later, he was a successful Wall Street lawyer.[138] Although the Civil War tore the nation apart and New York City had draft riots in 1863,[139] the war had little impact on Langdell, by this time a successful attorney in his mid-thirties. The odds of Oliver Wendell Holmes, Jr., clashing with him in 1880 at Huntington Hall in Boston over theories of legal reasoning seemed long.

III. THE YOUNG BOSTON BRAHMIN (HOLMES, 1841-69)

Oliver Wendell Holmes, Jr.'s self-imposed age-of-forty countdown clock to achieve something worthwhile started when he was born in Boston on March 8, 1841.[140] His chances of achieving greatness were better than

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[129] KIMBALL, *supra* note 12, at 37-39; COQUILLETTE, *supra* note 49, at 308.
[130] KIMBALL, *supra* note 12, at 38.
[131] *Id.*
[132] *Id.* at 37, 38-39.
[133] *Id.* at 35. *See generally* Bruce A. Kimball, *"Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870-1883*, 17 L. & HIST. REV. 57, 76 (1999) (Langdell's approach to teaching law through cases can be understood in terms of the inductive method . . . .").
[134] KIMBALL, *supra* note 12, at 37.
[135] *Id.* at 41.
[136] *Id.* at 47.
[137] *Id.* at 42.
[138] *Id.*
[139] JOHN STRAUSBAUGH, CITY OF SEDITION: THE HISTORY OF NEW YORK CITY DURING THE CIVIL WAR 273-287 (2016).
[140] BAKER, *supra* note 20, at 47.

those of Langdell, who at the time was fourteen, helping his bitter and reclusive father run his hardscrabble farm.[141] In contrast to Langdell's situation, Holmes's father was willing and able to support his son's academic interests. His father was Oliver Wendell Holmes, Sr., a famous writer, doctor, and professor,[142] and the young Holmes was "fed a high-protein intellectual diet."[143] Holmes would be raised as a "Boston Brahmin," the name given by his father for "that distinctive local class of intellectuals and scholars . . . that regarded itself as the hereditary guardians of culture and morals for society."[144]

Holmes's parents instilled in him a lifelong skeptical nature.[145] Holmes later credited his mother more than his father with instilling in him a skeptical temperament,[146] but his father also impressed on the young Holmes the importance of challenging accepted beliefs, much as the elder Holmes had done with conventional medicine.[147] From his father, Holmes developed a scientific demand for facts to support assertions and a desire to reject views that had outlived their usefulness.[148] At the dinner table, the young Holmes heard his father challenge traditional religious beliefs,[149] as the elder Holmes had abandoned his own father's Calvinism in favor of Unitarianism.[150] Growing up in Unitarian Boston in the mid-nineteenth century contributed to Holmes's skeptical nature, as Unitarians took pride in unhampered inquiry into religious matters,[151] leading Calvinists to portray Unitarianism as a stage in a decline to general skepticism.[152] Along with this skeptical nature, his mother instilled in him a strong sense of duty.[153]

As Holmes grew up, his skeptical nature was further fed by his generation's emphasis on science, which, even before Charles Darwin's *On the Origin of Species* was published in 1859, was heading for a clash with revealed truths.[154] His generation's emphasis on science did not, however,

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[141] *See supra* notes 25-26 and accompanying text.

[142] Frederick C. Fiechter, Jr., *The Preparation of an American Aristocrat*, 6 NEW ENG. Q. 3, 6 (1933).

[143] BAKER, *supra* note 20, at 47.

[144] BUDIANSKY, *supra* note 21, at 24.

[145] BAKER, *supra* note 20, at 67.

[146] Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (Feb. 5, 1919), *in* Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. OF IDEAS 3, 15 (1948).

[147] BAKER, *supra* note 20, at 67.

[148] *Id.* at 60.

[149] *Id.* at 67.

[150] CATHARINE PIERCE WELLS, OLIVER WENDELL HOLMES: A WILLING SERVANT TO AN UNKNOWN GOD 20 (2020).

[151] C. H. Faust, *The Background of the Unitarian Opposition to Transcendentalism*, 35 MOD. PHILOLOGY 297, 311 (1938).

[152] *Id.* at 301.

[153] NOVICK, *supra* note 28, at 15.

[154] BAKER, *supra* note 20, at 67. Holmes later wrote that science was "at the bottom" of his skeptical nature. Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (Feb. 5, 1919), *in The Holmes-Cohen Correspondence, supra* note 146, at 15.

instill in him a particular interest in the natural sciences. Rather, his interest would be in the humanities, particularly art history and the standards for interpreting art.[155]

Being a member of a Boston Brahmin family also meant being raised in a socially and politically conservative environment,[156] and the young Holmes seemingly inherited a conservatism from his upbringing that he never shed.[157] Like his father and many of his social class, Holmes would later become unsympathetic with reformers,[158] possessing "a deeply ingrained conservative sense that sneered at ideals of equality and social justice."[159] His Boston Brahmin upbringing kept him surrounded by the elite and shielded from the sufferings of the less fortunate.[160]

Holmes entered Harvard College in the fall of 1857 at the age of sixteen.[161] Before the end of his freshmen year, he developed a particular interest in the writings of Ralph Waldo Emerson,[162] the leading figure of New England transcendentalism,[163] and who at the time stood at "the center of American cultural and intellectual life."[164] Holmes's parents and friends noticed his interest, as on his seventeenth birthday in March 1858 he received as gifts numerous Emerson books.[165] Holmes's skeptical nature likely drew him to Emerson, and Emerson surely fueled it with not only his own skepticism, but his courageous intellectual independence.[166] Emerson was to Holmes what Exeter had been to Langdell, and he sparked in Holmes a passion for philosophy.[167] In fact, Holmes hoped to become a man of letters (a scholar or an author) like Emerson.[168]

It was also clear that when Holmes read Emerson, Holmes decided he wanted to be like Emerson in the sense of being an intellectual agitator.

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[155] BAKER, *supra* note 20, at 91.

[156] *Id.* at 57.

[157] COSGROVE, *supra* note 6, at 98-99.

[158] *Id.*

[159] *Id.*

[160] BAKER, *supra* note 20, at 68-69.

[161] MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870, at 35 (1957).

[162] BAKER, *supra* note 20, at 84.

[163] SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 327 (3d ed. 2016). New England transcendentalism, which was influenced by German idealism and Romanticism, was an optimistic philosophy emphasizing self-reliance. *Id.* at 327-28.

[164] Robert E. Spiller, *The Four Faces of Emerson*, *in* FOUR MAKERS OF THE AMERICAN MIND: EMERSON, THOREAU, WHITMAN, AND MELVILLE: A BICENTENNIAL TRIBUTE 3, 3 (Thomas Edward Crawley ed., 1976).

[165] BAKER, *supra* note 20, at 50, 85.

[166] *Id.* at 84.

[167] Alexander Lian, *The Jobbist*, *in* THE PRAGMATISM AND PREJUDICE OF OLIVER WENDELL HOLMES JR. 9, 17 (Seth Vannatta ed., 2019).

[168] Novick, *supra* note 33, at 271; EDMUND WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 755 (Oxford Univ. Press 1966) (1962) (noting that Holmes "had even once thought of becoming a poet").

Emerson had famously challenged people to redefine their Christianity,[169] admonishing them to "go alone [and] to refuse the good models, even those which are sacred in the imagination of men . . . ."[170] He refused to be limited by the philosophers who had come before him, believing the "failings of past generations came from relying too much on the examples of the generations before them."[171] "Whoso would be a man," he said, "must be a nonconformist."[172]

Holmes later referred to Emerson as the "firebrand" of his youth, one of the sparks that started a flame in him.[173] Holmes's attraction to Emerson in the 1850s speaks volumes about what he set out to do when he gave his Lowell Lectures more than two decades later in 1880.[174] In fact, Holmes recalled passing Emerson on the street and running back to pay his respects, telling him, "If I ever do anything, I shall owe a great deal of it to you."[175] When Holmes was almost ninety, he wrote, "The only firebrand of my youth that burns to me as brightly as ever is Emerson,"[176] who "had the gift of imparting a ferment."[177] Emerson had much to do with what Holmes would say in 1880.[178] Following Emerson's advice, Holmes would not blindly follow those who came before him; he would strike out on his own and become an intellectual agitator.

Emerson's views also likely influenced the way Holmes later came to view the common law itself. Holmes had grown up loving the novels of Sir Walter Scott,[179] a leading figure in Europe's Romantic movement,[180] and both (the young) Holmes and Emerson were romantic idealists.[181] Emerson's transcendentalist philosophy was a "somewhat softened" version of Romanticism,[182] and America's gradual acceptance of romantic attitudes was

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[169] WELLS, *supra* note 150, at 23.

[170] RALPH WALDO EMERSON, *An Address (at Harvard Divinity School)*, *in* THE ESSENTIAL WRITINGS OF RALPH WALDO EMERSON 63, 75 (Brooks Atkinson ed., 2000) [hereinafter THE ESSENTIAL WRITINGS].

[171] Benjamin E. Park, *Transcendental Democracy: Ralph Waldo Emerson's Political Thought, the Legacy of Federalism, and the Ironies of America's Democratic Tradition*, 48 J. AM. STUD. 481, 487 (2014).

[172] EMERSON, *Self-Reliance*, *in* THE ESSENTIAL WRITINGS, *supra* note 170, at 132, 134.

[173] BAKER, *supra* note 20, at 84-85.

[174] *See infra* Part XV.

[175] BAKER, *supra* note 20, at 85.

[176] Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (May 20, 1930), *in* 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 264, 264 (Mark DeWolfe Howe ed., 1941) [hereinafter 2 HOLMES-POLLOCK LETTERS].

[177] Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Jan. 13, 1923), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLES AND HAROLD J. LASKI, 1916-1935, at 346, 347 (Mark DeWolfe Howe ed., abridged ed. By Alger Hiss 1963) [hereinafter 1 HOLMES-LASKI LETTERS].

[178] *See infra* Part XV.

[179] BAKER, *supra* note 20, at 50.

[180] *See* MAURICE CRANSTON, THE ROMANTIC MOVEMENT 88-90 (1994) (discussing Scott's influence).

[181] WELLS, *supra* note 150, at 30.

[182] BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 679 (1945).

due largely to Emerson's influence.[183] Romanticism, originating in the latter part of the eighteenth century,[184] had in part been a reaction against the established intellectual order—namely, the Enlightenment's stiff rationality.[185] While Scott's romanticism was a consoling, entertaining type,[186] Emerson helped fuel in Holmes the romanticism that was a reaction against the Enlightenment's excessive rationalism. Holmes's youthful idealism drawn from Scott would be destroyed by the Civil War, but Romanticism's rejection of the power of stiff rationality to achieve social progress would never leave him; Holmes's view of logic was and always would be thoroughly romantic. Like the Romantics, he would make use of logic to the extent it proved valuable but would not let it become the master of reality.[187] The Romantics had not rejected reason, "but they dethroned it, assigning it only the more menial services,"[188] and "[l]ike the Romantics, Holmes [would come to] regard[] reason as a valuable but insufficient tool for understanding the world."[189]

The Romantics also rejected the ideas of an unchanging universe and an unchanging human nature.[190] An "admiration for the timeless, the universal, and the general made way for a decided preference for the temporal, the local, and the individual; and the most obvious, indeed the only, explanation for the temporal, local, and individual seemed to them [to be] history."[191] This romantic concept was not only important in terms of change, but in terms of the form of society's creations having functional aspects, the idea of organic form. As one commentator has explained, "[a]t bottom . . . the idea of organic form holds that the form of any work of art—whether a poem, a sculpture or a building–should result from, and grow out of, the unique *idea* that caused the work to be created, rather than from preconceived notions of beauty."[192] Emerson similarly wrote that "[t]here are no fixtures in nature. The universe is fluid and volatile. Permanence is but a word of degrees."[193] Emerson had even applied this theory to law in 1844, refusing to revere a statute simply because it was a statute.[194] He viewed a statute as simply a form

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[183] Francis J. Mellen, Jr., *Ralph Waldo Emerson, Mr. Justice Holmes and the Idea of Organic Form in American Law*, 14 NEW ENG. L. REV. 147, 150-51 (1978); *see also* CRANSTON, *supra* note 180, at 145 (noting that Emerson made "romanticism a significant presence in nineteenth-century American culture. . . .").

[184] RUSSELL, *supra* note 182, at 675.

[185] BLACKBURN, *supra* note 163, at 418.

[186] CRANSTON, *supra* note 180, at 149.

[187] Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 497 (1998).

[188] Hans Eichner, *The Rise of Modern Science and the Genesis of Romanticism*, 97 PMLA 8, 17 (1982).

[189] Dailey, *supra* note 187, at, 497.

[190] Eichner, *supra* note 188, at 16.

[191] *Id.*

[192] Mellen, *supra* note 183, at 150.

[193] EMERSON, *Circles*, *in* THE ESSENTIAL WRITINGS, *supra* note 170, at 252, 252.

[194] EMERSON, *Politics, in id.* at 378.

adopted to serve a presently perceived purpose, that in time may come to no longer serve society's different purposes or become inconsistent with newly discovered information.[195] The Romantics also believed, however, that "art has the value it does, and realizes that value in particular objects and events, because and when it embodies individual creative genius."[196]

The dethroning of logic, the rejection of universal truth, the recognition of change, the use of history to explain the present, and the idea that form should follow function were all important romantic concepts that Holmes shared.[197] Holmes's later view of the common law can thus be seen in the ideals of Romanticism. Holmes would, however, also set out to prove through his work that he was a creative genius, and this desire for recognition perhaps influenced him more than anything else.

During college, Emerson rebuked Holmes for not taking his advice to heart, by not sufficiently challenging perceived wisdom. Spurred by his interest in Emerson, Holmes had been "fired . . . into reading Plato,"[198] as Emerson was a dedicated Platonist.[199] Emerson, however, had advised Holmes to "hold him at arm's length" and to say, "Plato, you have pleased the world for two thousand years; let's see if you can please me."[200] As a result of his studies of Plato, Holmes wrote an essay about him in the summer of 1860.[201] The essay (published in the fall) won a prize as the best undergraduate essay,[202] and Holmes, presumably proud of his work, gave a copy to Emerson.[203] Emerson, however, after reading it, replied, "When you strike at a king you must kill him."[204] Though Holmes was disappointed at the time, it was a lesson he never forgot.[205] Holmes likely recalled it when he gave his Lowell Lectures two decades later in 1880. One of those kings would be Langdell.

Although Holmes's romanticism and skepticism would lead him to reject fixed truths, his college years disclosed, at the same time, a somewhat conflicting preference for the universal and the general over the particular, and an interest in classification (a preference that would be important in 1880). This preference was disclosed by what might seem an unlikely

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[195] *Id.* at 379. *See also* BLACKBURN, *supra* note 163, at 15 (noting that "Emerson also showed a pragmatic streak, emphasizing the practical effects of ideas and principles.").
[196] RONALD DWORKIN, LAW'S EMPIRE 60 (1986).
[197] *See generally* Mellen, *supra* note 183.
[198] BUDIANSKY, *supra* note 21, at 61.
[199] BAKER, *supra* note 20, at 89.
[200] BUDIANSKY, *supra* note 21, at 61.
[201] BAKER, *supra* note 20, at 89.
[202] BUDIANSKY, *supra* note 21, at 60.
[203] BAKER, *supra* note 20, at 90
[204] *Id.*; BUDIANSKY, *supra* note 21, at 61.
[205] BAKER, *supra* note 20, at 90.

source—his love of art.[206] Holmes, whose childhood interest in art had continued through his college years,[207] published college essays on art, and, in his *Notes on Albert Dürer*, he provided "a classification of Dürer's works [and] sought to develop a general system or science of classification for art."[208]

As the young Holmes was discovering art and philosophy, absorbing the idealism stemming from Romanticism, and even writing in his essays that the decline of good art was caused by the rise of science,[209] the natural sciences were always in the background. Holmes had faith in science,[210] though its influence on Holmes was not that of giving him the idea that there were fundamental, unchanging truths to be discovered. Rather, it reinforced his skepticism about what was currently accepted as true and with being comfortable investigating to get to the bottom of things.[211] Holmes, in his college essay titled *Books*, referred to his generation as "almost the first of young men who have been brought up in an atmosphere of investigation, instead of having every doubt answered."[212] Science thus reinforced his romantic idealism, and in his article on Plato he harmonized idealism and empiricism by relegating their proper spheres to different intellectual pursuits.[213] Idealism, for example, was proper for the study of math and art, whereas empiricism was proper for studying the origin or truth of other objects.[214]

During his sophomore year, Darwin's *On the Origin of Species* was published.[215] Although Holmes did not read the book at the time[216] (consistent with his lack of interest in the natural sciences), he absorbed Darwin's ideas of evolution and natural selection,[217] and the idea of scientific inquiry exhilarated him.[218] It was not so much the particulars of Darwinism and the advances in the natural sciences that inspired Holmes, but the broader idea of

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[206] WELLS, *supra* note 150, at 30-31.

[207] BAKER, *supra* note 20, at 91.

[208] Michael H. Hoffheimer, *The Early Critical and Philosophical Writings of Justice Holmes*, 30 B.C. L. REV. 1221, 1243 (1989).

[209] *Id.* at 1241.

[210] MENAND, *supra* note 104, at 59.

[211] BAKER, *supra* note 20, at 67, 84.

[212] HOLMES, JR., *Books*, in 1 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 139, 140-41 (Sheldon M. Novick ed., 1995) [hereinafter 1 THE COLLECTED WORKS OF JUSTICE HOLMES].

[213] Hoffheimer, *supra* note 208, at 1237.

[214] *Id.* at 1239.

[215] BAKER, *supra* note 20, at 83.

[216] Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (Feb. 5, 1919), *in The Holmes-Cohen Correspondence*, *supra* note 146, at 15. Holmes did not read Darwin's book until 1907. BUDIANSKY, *supra* note 21, at 170, 486 n.49.

[217] BUDIANSKY, *supra* note 21, at 62.

[218] BAKER, *supra* note 20, at 84.

using scientific methods to challenge accepted beliefs, and thus as a tool to be used by skeptics.

Holmes's skeptical nature (and perhaps an underlying conservative sense) should not, however, be taken to mean that the young Holmes, the romantic idealist, did not have moral convictions.[219] After all, the Brahmins were "the hereditary guardians of culture and morals for society."[220] In fact, Holmes, as an undergraduate, had written in 1858 that "[t]he highest conversation is the statement of conclusions . . . on the great questions of right and wrong . . . ."[221] His mother (but not his father) was an abolitionist,[222] and during his senior year he became one too and even supported ending slavery by force, if necessary.[223] As Holmes later noted, the abolitionists that he associated with included both skeptics and dogmatists, so at the time he was being exposed to both skepticism and idealism.[224] And it was Holmes's moral convictions that would play an enormous part in his immediate future, ironically leading to his loss of moral convictions.

IV. THE CIVIL WAR

In November 1860, during Holmes's senior year in college, Abraham Lincoln was elected President[225] and, in response, southern states began seceding.[226] On March 4, 1861, four days before Holmes turned twenty, Lincoln was inaugurated,[227] and the following month, shortly before Holmes was to graduate, South Carolinians fired on Fort Sumter.[228] Lincoln called for volunteers,[229] and young Holmes's "intellectual adventures into art and philosophy" would be suspended.[230] In July 1861, as Holmes was walking down Beacon Street from the Athenaeum library with Thomas Hobbes's *Leviathan* under his arm, he passed the State House and someone told him

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[219] *See id.* at 95.

[220] BUDIANSKY, *supra* note 21, at 24.

[221] HOLMES, *supra* note 212, at 139.

[222] NOVICK, *supra* note 28, at 15.

[223] GARY J. AICHELE, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE 32 (1989). Holmes later stated he had been "a pretty convinced abolitionist." Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Nov. 5, 1926), *in* 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 118, 119 (Mark DeWolfe Howe ed., abridged ed. By Alger Hiss 1963) [hereinafter 2 HOLMES-LASKI LETTERS].

[224] Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (Feb. 5, 1919), *in The Holmes-Cohen Correspondence,* supra note 146, at 15.

[225] Daniel W. Stowell, *Lincoln, Abraham*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 2, at 337, 339.

[226] JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 235 (1988).

[227] BAKER, *supra* note 20, at 96.

[228] MCPHERSON, *supra* note 226, at 273-74.

[229] BAKER, *supra* note 20, at 96.

[230] *Id.* at 93.

that the Governor had commissioned him as an officer in the Twentieth Massachusetts regiment[231] (a commission he had sought).[232] He thus joined the Union army, writing later, "[t]hrough our great good fortune, in our youth our hearts were touched with fire."[233]

Although Holmes's war letters never expressly mentioned how his heart was touched with fire and why he went to war,[234] as noted, by this time he was an abolitionist.[235] Further, the concept of duty and honor were pervasive in Victorian America,[236] and Holmes, the romantic idealist, the admirer of Scott's novels, believed in a code of chivalry as much as anyone.[237] His decision to enlist thus likely resulted from a combination of his romantic idealism and a Victorian sense of duty; a moral belief that slavery was wrong and a belief that it was his duty to help eradicate it.[238]

Although Holmes had previously hoped to become a man of letters, he now wrote in his class album sketch upon graduation: "If I survive the war I expect to study law as my profession or at least for a starting point."[239] Beneath this plan was apparently his father, pushing him to become a lawyer.[240] Thus, if he survived, he would be a lawyer, not a man of letters. And survive he would, but barely.

Just as Holmes later wrote that "[t]he life of the law . . . has been

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[231] Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Nov. 2, 1916), *in* HOLMES AND FRANKFURTER, *supra* note 13, *at 58, 58.* Although Holmes would not read *Leviathan* until 1892, his Civil War experience would instill in him many of Hobbes's views, including "the view of human life as a ceaseless struggle for self-preservation and power; (2) the absolute nature of sovereign power; and (3) the positivist view of law, in contrast to natural law." Thomas A. Balmer, *Present Appreciation and Future Advantage: A Note on the Influence of Hobbes on Holmes*, 47 AM. J. L. HIST. 412, 427 (2005).

[232] Posner, *supra* note 2, at ix.

[233] HOLMES, *Memorial Day (Address)*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 462, 467.

[234] BAKER, *supra* note 20, at 97.

[235] *Id.* at 95.

[236] *See* JAMES M. MCPHERSON, FOR CAUSE AND COMRADES: WHY MEN FOUGHT IN THE CIVIL WAR 22-23 (1997).

[237] Catharine Pierce Wells, *Oliver Wendell Holmes, Jr., and the American Civil War*, 40 J. SUP. CT. HIST. 282, 283 (2015); WILSON, *supra* note 168, at 747 (noting that Holmes "had been almost as much carried away by the novels of Walter Scott as any of his Southern contemporaries . . . ."). *See also* Brad Snyder et al., *Justice Holmes and the Civil War*, 40 J. SUP. CT. HIST. 314, 321 (2015) (transcript of panel discussion) (remarks by G. Edward White) ("There is no question that when Holmes enlists he thinks his enlistment as a 'class' contribution, a kind of noblesse oblige on the part of he and his Porcellian colleagues at Harvard to go out and fight for this particular cause. This is why the term 'chivalry' comes up, a nineteenth-century version of the Knights of the Round Table in Holmes' consciousness."). Mark Twain believed Scott's romantic depiction of medieval combat and chivalry in *Ivanhoe* was responsible for the war. Erich Nunn, *A Connecticut Yankee in Dixie: Mark Twain's Reconstruction*, 9 THE MARK TWAIN ANN. 20, 20-21 (2011).

[238] *See* MENAND, *supra* note 104, at 4 (noting that Holmes "had gone off to fight because of his moral beliefs, which he held with singular fervor.").

[239] BUDIANSKY, *supra* note 21, at 75.

[240] *See* NOVICK, *supra* note 33, at 271 (noting that Holmes's "father insisted that [Holmes] take up the profession of law . . . .").

experience,"[241] he would write that "the generation that carried on the [Civil] war has been set apart by its experience."[242] For Holmes it would be the most important experience of his life.[243] He was a member of the unit later known as the Harvard Regiment due to its many Harvard graduates,[244] the regiment suffering the fourth-highest number of combat deaths in the Union Army of the Potomac.[245] Holmes was wounded three times, two of the wounds bringing him to the edge of death.[246]

His first action was at the Battle of Ball's Bluff in 1861,[247] a minor battle but a disaster for the Union forces.[248] Holmes, encouraging his company on during the battle, was shot in the stomach.[249] His colonel ordered him to the rear, but instead, in true romantic fashion, he rose, waved his sword, and rushed forward.[250] He was then shot in the chest.[251] Carried to the rear, he later wrote in his diary about his religious skepticism during this incident:

> [W]hen I thought I was dying the reflection that the majority vote of the civilized world declared that with my opinions I was *en route* for Hell came up with painful distinctness—Perhaps the first impulse was tremulous—but then I said—by Jove, I die like a soldier anyhow—I was shot in the breast doing my duty up to the hub—afraid? No, I am proud—then I thought I couldn't be guilty of a deathbed recantation—father and I had talked of that and were agreed that it generally meant nothing but a cowardly giving way to fear—. . . and so with a "God forgive me if I'm wrong" I slept.[252]

Even the prospect of imminent death would not shake his skepticism.[253]

At this point, the war had not diminished his fire to serve, his youthful morality and romantic idealism still intact, though perhaps they needed a boost. While convalescing in Boston after nearly being killed at

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[241] HOLMES, *supra* note 10, at 5.
[242] HOLMES, *supra* note 233, at 467.
[243] MENAND, *supra* note 104, at 3.
[244] RICHARD F. MILLER, HARVARD'S CIVIL WAR: A HISTORY OF THE TWENTIETH MASSACHUSETTS VOLUNTEER INFANTRY 9 (2005); BUDIANSKY, *supra* note 21, at 72.
[245] Snyder, *supra* note 237, at 314 (remarks by James M. McPherson).
[246] *Id.*
[247] BUDIANSKY, *supra* note 21, at 79.
[248] MCPHERSON, *supra* note 226, at 362.
[249] MILLER, *supra* note 244, at 70.
[250] *Id.*
[251] *Id.*
[252] TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861-1864, at 27-28 (Mark DeWolfe Howe ed., 1946).
[253] WELLS, *supra* note 150, at 39.

Ball's Bluff, he asked Emerson to send him his autograph; Emerson complied, and Holmes returned to the front with it.[254] Even as late as April 1864 (and after having been almost killed again in 1862 at the battle of Antietam), he wrote a letter describing the war as "the Christian Crusade of the 19th century . . . in the cause of the whole civilized world," stating that he planned to see it through, writing that "[i]t will not do to leave Palestine yet."[255] But there was also a hint that, by this point, Holmes's resolve was wavering, as he added that

> [i]f one didn't believe that this war was such a crusade . . . it would be hard indeed to keep the hand to the sword; and one who is rather compelled unwillingly to the work by abstract conviction than borne along on the flood of some passionate enthusiasm, must feel his ardor rekindled by stories like this [an article about a crusade he had been sent].[256]

The war's duration and its horrors did indeed test his passionate enthusiasm and his sense of duty. Throughout the war, Holmes's skepticism seemed to increase, and he particularly became a hater of big ideas that could not be proven true, but that would lead people to war. By 1863, his closest friend and role model in the army was no longer the abolitionist Penn Hallowell but Henry Abbott, who opposed the Emancipation Proclamation.[257] Holmes's enthusiasm for abolitionism dissipated,[258] and, despite Hallowell's urging,[259] he either rejected or did not apply for a commission as a major in the new Fifty-Fourth Massachusetts created in 1863, the first black regiment officially organized in the Union army.[260] In mid-1864, with no end in sight to the war, and his enthusiasm for abolitionism gone, he grew tired of risking his life and watching his friends die for a big idea.[261] On May 6, 1864, his new closest friend and role model, Abbott, was killed,[262] and not long after that Holmes was done. On June 7, 1864, Holmes wrote to his mother that

> I have been coming to the conclusion for the last six months

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[254] BAKER, *supra* note 20, at 125.

[255] Letter from Oliver Wendell Holmes, Jr., to Charles Eliot Norton (Apr. 17, 1864), *in* TOUCHED WITH FIRE, *supra* note 252, at 122 n.1.

[256] *Id.*

[257] Snyder, *supra* note 237, at 316 (remarks by James M. McPherson); MENAND, *supra* note 104, at 40.

[258] Snyder, *supra* note 237, at 319, 323 (remarks by G. Edward White).

[259] AICHELE, *supra* note 223, at 60, 62-63.

[260] BAKER, *supra* note 20, at 141; Snyder, *supra* note 237, at 315 (remarks by James M. McPherson); MENAND, *supra* note 104, at 45; AICHELE, *supra* note 223, at 60, 62-63. It is unknown why Holmes either rejected or did not apply for the commission. MENAND, *supra* note 104, at 45; Wells, *supra* note 237, at 301.

[261] AICHELE, *supra* note 223, at 64-66.

[262] MILLER, *supra* note 244, at 341.

> that my duty has changed—I can do a disagreeable thing or face a great danger coolly enough when I *know* it is a duty—but a doubt demoralizes me as it does any nervous man—and now I honestly think the duty of fighting has ceased for me.[263]

He did not seek to have his commission renewed when it expired, and he was discharged on July 17, 1864.[264]

Holmes returned from the war a changed man,[265] and to him the world would never seem quite right again.[266] His skeptical nature had been there when the war started, but war's horrors made it mature.[267] There was, however, more to it than just maturing. It also extinguished his romantic idealism. Menand argues that "[i]t made him lose his belief in beliefs [and] impressed on his mind, in the most graphic and indelible way, a certain idea about the limits of ideas."[268] He contends that "[t]he lesson Holmes took from the war can be put in a sentence. It is that certitude leads to violence."[269] If the fire that led Holmes to volunteer had been that of romantic idealism, that flame was indeed extinguished. The autograph of Emerson's that Holmes kept with him was effectively stained with blood, and the lectures Holmes would deliver in 1880, including the contracts lectures, would reflect this lost idealism. They would have no moral overtones.

While the war might have destroyed his belief in beliefs, one thing it did further instill in him was his devotion to duty, a professionalism to do your job as best you can, without worrying too much about the larger issues of why you were being directed to do a particular task.[270] While in 1864 Holmes might have come to believe that it was no longer his duty to fight, his service in the war for the prior three years at the same time instilled in him a great sense of doing one's duty. Thus, after the war, "Holmes now admired the soldier's faith not in an ideological cause [as it seemed before the war],

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[263] Letter from Oliver Wendell Holmes, Jr. to Amelia Lee Jackson Holmes (June 7, 1864), *in* TOUCHED WITH FIRE, *supra* note 252, at 141, 142-43.

[264] AICHELE, *supra* note 223, at 66.

[265] BAKER, *supra* note 20, at 157.

[266] MENAND, *supra* note 104, at 69.

[267] Mathias W. Reimann, *Holmes's* Common Law *and German Legal Science*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 75 (Robert W. Gordon ed., 1992).

[268] MENAND, *supra* note 104, at 4.

[269] *Id.* at 61. *See also* Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, *in* THE PATH OF THE LAW AND ITS INFLUENCE, *supra* note 63, at 31, 39 ("The lesson Holmes seems to have derived from his own Civil War experiences is that all passionate appeals to conscience and morality invariably resulted in the destruction of a fragile social order.").

[270] *See* Snyder, *supra* note 237, at 315 (remarks by James M. McPherson) (noting that "[p]erhaps the flame of a commitment to a cause with a capital 'C' had been transmuted into a commitment of a cluster of values described by such words as duty, honor, and professionalism.").

but [solely] in duty and honor."[271]

Holmes's Civil War experience appeared also to have led him to develop an appreciation for a well-functioning legal system, necessary to hold society together and keep it from descending into war.[272] He might have lost his belief in beliefs, but after the war he would see it as his duty to help save the country from the chaos of the common law. But if Menand is correct that one of the lessons Holmes took from the war was that certitude leads to violence,[273] then his Civil War experience would lead him to believe that a well-functioning legal system must reject certitude. He also, however, came to believe in the somewhat contradictory notion that the law should change slowly, sharing his generation's reluctance—after four harrowing years of war—to unsettle the status quo.[274] His loss in big beliefs—his lost romantic idealism—would mean that, when the time came for him to bring order to the chaotic common law, he would be unable to offer much of a solution as to how a common-law judge should actually decide hard cases, other than to adopt good policies that existing society could tolerate.[275]

Not only had the war stripped away his idealism, but it also led Holmes to the dark view that society was a competition among persons, with the strong prevailing at the expense of the weak. He became resigned to the "inevitability of struggle, suffering, and death,"[276] and came to place little value on human life.[277] Holmes had written during the war, "It is singular with what indifference one gets to look on the dead bodies in gray clothes wh[ich]

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[271] *Id.* at 316.

[272] Susan Haack, *The Pragmatist*, *in* PRAGMATISM AND PREJUDICE, *supra* note 167, at 173.

[273] MENAND, *supra* note 104, at 61.

[274] *Id.* at 59. *See also* Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 RATIO JURIS 26, 44 (2002) ("Holmes recognized that people were unlikely to follow a rule contrary to the society's fundamental beliefs. Thus, social policy itself imposes a limit on the progressive development of the law. Judges cannot get too far ahead of their society or the law will lose its effectiveness.").

[275] *See* HOLMES, *supra* note 10, at 36 ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."); *see also* Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343, 348-49 (1984); ("In the face of widespread if not general agreement that legal reasoning should, and could be supported in some way, he slipped into irrelevance on the subject. He was historically significant for his contribution to the subversion of an untenable orthodoxy; he gave no help to the succeeding effort at reconstruction."); Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 36 (1995) ("To Holmes, the judge's concern [in cases where there was a gap in the law] was not mainly with the substantive policies behind the competing doctrines but with considerations of present and future peace and stability. First, the case should be authoritatively resolved. Second, the resolution should allow ready prediction of how similar future disputes would be resolved—thus closing the legal gap. The judge's sovereign prerogative of choice in such cases thus came down to articulating which marginally implicated policy should take precedence in the interest of present peace and future predictability.").

[276] Seth Vannatta et al., *The Social Darwinist*, *in* PRAGMATISM AND PREJUDICE, *supra* note 167, at 81.

[277] COSGROVE, *supra* note 6, at 103. *See also* Posner, *supra* note 2, at xv (noting that Holmes had a "hard, even brutal side, conventionally ascribed to his Civil War experience . . . ." and that he was "[h]ostile to antitrust policy, skeptical about unions, [and] admiring of big businessmen . . . .").

lie all around,"[278] and that "it's odd how indifferent one gets to the sight of death."[279] He would extend this view drawn from the war to the business world, and as a commercial lawyer he "learned to view commerce as a form of combat and thereafter spoke of the owners of industrial enterprises as victors in the struggle for life."[280] The war did nothing to change any pre-war social and political conservatism Holmes possibly inherited from his upbringing, and after the war he exhibited a particular insensitivity to human suffering.[281] The evolutionism that had been in the air during his youth made it an easy transition for him to see war as a metaphor for life.[282] Although Holmes was never particularly interested in commerce[283] and admitted he knew little about it,[284] his economic views aligned with classical liberal economics[285] and laissez-faire,[286] and he later expressed disdain for social reform legislation.[287] Based on these views, and his belief in the slow change in law, it is tempting to label him a social Darwinist,[288] but he was perhaps a social Darwinist only in the sense that, after the war, he recognized "survival of the fittest" as a truism about society.[289]

Holmes came to believe that this view of competition among persons should apply not just to the business world, but also to the law. This meant that he was generally willing to defer to the opinion of the majority, if they

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[278] Letter from Oliver Wendell Holmes, Jr. to Oliver Wendell Holmes, Sr. et al., (June 2, 1862), *in* TOUCHED WITH FIRE, *supra* note 252, at 47, 50-51.

[279] Letter from Oliver Wendell Holmes, Jr. to Amelia Lee Jackson Holmes (Dec. 12, 1862), *in* TOUCHED WITH FIRE, *supra* note 252, at 47, 50-51.

[280] Novick, *supra* note 33, at 271.

[281] COSGROVE, *supra* note 6, at 103.

[282] BAKER, *supra* note 20, at 159.

[283] WELLS, *supra* note 150, at 29.

[284] COSGROVE, *supra* note 6, at 103.

[285] William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship*, 90 COLUM. L. REV. 809, 832 (1990).

[286] *See* COSGROVE, *supra* note 6, at 99 ("Unlike most of his era's business leaders, Holmes retained his trust in the perpetual beneficence of the market, believing the tenets of classical economics immutable in their validity. The constant questioning Holmes displayed toward most dogmas never affected his own economic faith."); Posner, *supra* note 2, at xv (noting that Holmes was a liberal in the nineteenth-century libertarian sense who believed in laissez-faire); HOLMES, *Economic Elements*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9 at 432, 432-33 ("[T]he objections to unlimited private ownership are sentimental or political, not economic. . . . I know of no way of finding the fit man so good as the fact of winning it in the competition of the market.").

[287] HOLMES, *Ideals and Doubts*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 442, 443.

[288] Vannatta, *supra* note 276, at 81; Vetter, *supra* note 275, at 363; CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 66 & n.* (2d ed. 2015); *see also* BLACKBURN, *supra* note 163, at 165 (describing social Darwinism as "the conclusion that we should glorify and assist [the] struggle [for natural selection], usually by enhancing competitive and aggressive relations between people in society . . . ."); RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 5-7 (Beacon Press rev. ed. 1955) (1944) (discussing the use of social Darwinism by laissez-faire conservatives to defend their economic view that competition leads to progress and to defend the status quo inasmuch as sound development is, like evolution, slow).

[289] Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1688-89 n.25 (2000). One difficulty with labeling Holmes a social Darwinist stems in part from the fact "[t]hat 'Social Darwinist' does not identify any single set of views but rather a number of such sets . . . ." Vetter, *supra* note 275, at 363 n.108.

had the political power to win the legislative battle and turn their beliefs into law.[290] After all, who was to say the winner in the political process was wrong, as Holmes had come to reject certitude. He perhaps came perilously close to simply believing that "might makes right,"[291] and in a democracy "might" often—but not necessarily—lay with what most people wanted. Thus, his legal theory would emphasize collective interests over individual interests.[292] While Holmes believed that his Lowell Lectures in 1880 presented an enlightened theory of law, the effects of the war on him meant that it would not be a theory showing concern for the weak.

While Holmes might have returned home from the war even more of a skeptic and having lost faith in big ideas, this did not mean he had lost interest in chasing after the answers of the universe. To the contrary, at this time he says his head was "full of thoughts about philosophy,"[293] and not long after returning home he visited his idol Emerson.[294] At the time, Holmes was apparently getting pressure from his father to stick with his pre-war plan to study law.[295] Although we do not know what advice Emerson gave him,[296] whatever Emerson told him did not cause him to stray from that path. Perhaps this meeting led him to suspect that being a man of letters would be too removed from the struggle of life,[297] or perhaps his father's pull was too strong, or perhaps it was a bit of both.

Sticking with the plan, Holmes entered Harvard Law School in October 1864[298] and approached his law studies with the same intensity Langdell had approached his own a decade earlier.[299] He left law school in December 1865 and began an apprenticeship[300] and in June 1866 was

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[290] For this view when he was a justice on the U.S. Supreme Court, see Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.").

[291] Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 AM. BAR ASS'N J. 569, 571 (1945).

[292] Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123, 1126 (1975).

[293] BAKER, *supra* note 20, at 163; BUDIANSKY, *supra* note 21, at 134.

[294] BUDIANSKY, *supra* note 21, at 134.

[295] Holmes later wrote that his father "kicked [him] into the law." BUDIANSKY, *supra* note 21, at 134, 167-68; *see also* AICHELE, *supra* note 223, at 70 ("The most significant influence . . . was Dr. Holmes's urging that his son pursue a legal education."); G. Edward White, however, believes that "[g]oing into the law was a way of distancing himself from his father." Snyder, *supra* note 237, at 324 (remarks by G. Edward White).

[296] *See* WELLS, *supra* note 150, at 80-82 (discussing the meeting and speculating about the advice Emerson gave Holmes).

[297] BUDIANSKY, *supra* note 21, at 134.

[298] NOVICK, *supra* note 28, at 96.

[299] BUDIANSKY, *supra* note 21, at 135.

[300] AICHELE, *supra* note 223, at 76-77

awarded his law degree.[301] When Holmes returned from a trip to England in the fall of 1866, he began studying for the bar exam and started clerking that October at one of Boston's top firms,[302] working primarily on matters involving breach of contract, personal injury, and corporate law.[303] In March 1867, he was admitted to the Massachusetts bar.[304] As the 1860s came to an end, a period in Holmes's life did as well.[305] He would soon be struck with a new sense of urgency, as his fortieth birthday was just over a decade away.[306] The next decade would be very different.

V. CLOACA MAXIMA

While Holmes was facing death on the battlefields of Virginia and Maryland, Langdell was brawling in the New York legal system.[307] New York might not have been Ball's Bluff or Antietam, but it presented its own challenges. Boss Tweed and Tammany Hall dominated New York's postwar city government, leading to corruption run amok.[308] The corruption extended to the legal system, and the years 1868 and 1869 were particularly bad ones for the New York judiciary's reputation.[309] A series of legal battles broke out over control of the Erie Railroad, with both the bench and the bar complicit in the proceedings' corruption.[310] In May 1868, a former classmate of Langdell's at Harvard Law School wrote:

> I saw Langdell not very long ago and found him . . . breathing out slaughter against the New York judicial system and judiciary. He declares "Counsel are retained in consideration of private and other '*influences*' with the judges and not in view of their abilities, learning, or experience! Democracy can reach no lower deep."[311]

Another former classmate of Langdell's wrote to Charles Eliot in December

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[301] Fiechter, *supra* note 142, at 18.

[302] AICHELE, *supra* note 223, at 86.

[303] *Id.* at 88. In 1865 and 1866, Holmes read Thayer's contracts treatise. Eleanor N. Little, *The Early Reading of Justice Oliver Wendell Holmes*. 8 HARV. LIBR. BULL. 163, 169 (1954).

[304] BUDIANSKY, *supra* note 21, at 153.

[305] AICHELE, *supra* note 223, at 94.

[306] *Id.*

[307] *See* KIMBALL, *supra* note 12, at 62 (discussing Langdell's legal practice in New York during the first half of the 1860s).

[308] STRAUSBAUGH, *supra* note 139, at 352. *See also* TERRY GOLWAY, MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN AMERICAN POLITICS 84-87 (2014) (describing Tweed's and Tammany Hall's increase in power in the late 1860s).

[309] KIMBALL, *supra* note 12, at 70.

[310] *Id.* at 70-71.

[311] *Id.* at 69.

1869 that Langdell "is out of relations with the present state of things in New York. He is disgusted with their courts and general mode of doing business."[312] A Wall Street lawyer wrote of the New York court system at the time: "[I]t is our *cloaca maxima* ["great sewer"], with lawyers for its rats. But my simile does that rodent injustice, for the rat is a remarkably clean animal."[313]

At this point, Holmes and Langdell still did not seem destined to meet at Huntington Hall in Boston in 1880. But then something happened in Cambridge, Massachusetts, in October 1869. Harvard University appointed a new president, Charles Eliot, the person who had been so impressed in the 1850s with a law student named Chris Langdell and his inductive approach to studying law.[314] Eliot was now a thirty-five-year-old professor of chemistry—a controversial pick for Harvard's president—and he set out to turn "the whole University over like a flapjack,"[315] an example of the post-Civil War's new spirit.[316] Part of this upending involved a detailed inspection of the university, including its law school.[317] Not liking what he found, Eliot sought out that impressive law student, traveling to New York in November 1869 and encouraging Langdell to join the law school faculty.[318] Eliot's timing was right. By this point, Langdell had had enough of the New York judicial system, and, in December 1869, he decided to leave the corruption behind and return to Harvard Law School, this time as a faculty member.[319] He was determined to be a reformer, and was committed to the ideal of an apolitical nature of law.[320] He was appointed Dane Professor on January 6, 1870,[321] and left for Boston in February.[322] Paths were starting to converge.

VI. THE JOURNEY BEGINS – SEEKING ORDER FROM CHAOS (1870)

The year 1870 was significant for both Langdell and Holmes. Not only had Langdell been named Dane Professor at Harvard Law School (and then dean), but that spring he started work on what would become his famous

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[312] *Id.*
[313] *Id.* at 71.
[314] *Id.* at 86.
[315] COQUILLETTE, *supra* note 49, at 284.
[316] BUDIANSKY, *supra* note 21, at 137.
[317] KIMBALL, *supra* note 12, at 86.
[318] *Id.*
[319] *Id.* at 75.
[320] Bruce A. Kimball et al., *"The Highest Legal Ability in the Nation": Langdell on Wall Street, 1855–1870*, 29 L. & SOC. INQUIRY 39, 39 (2004); Kimball, *supra* note 2, at 323.
[321] KIMBALL, *supra* note 12, at 87.
[322] *Id.* at 76.

contracts casebook,[323] the first part of which was published in October 1870, in time for fall classes.[324] The casebook displayed an empirical and historical approach to law.[325] It included only cases (no headnotes or commentary), and under each topic Langdell put the cases in chronological order and identified the court and the year of decision, even including overruled and conflicting cases.[326] This demonstrated Langdell's indebtedness to (or at least agreement with) the historical approach to legal science, which dated to the "historical school" founded in the early nineteenth century by Friedrich Carl von Savigny, the German jurist.[327] By organizing the cases around what he perceived as the main topics of contract law, Langdell also showed his desire to bring philosophical order to contract law through taxonomy.[328] By identifying the abstract dimensions of contract law as offer and acceptance (i.e., mutual assent) and consideration,[329] Langdell can be seen as emphasizing promissory obligation and exchange as the bases for contract law.

The influence of Locke's *Thoughts* from Langdell's days at Exeter was on full display, as his casebook included original sources (cases) and challenged students to work from the particular (cases) to the general (abstract principles of law).[330] On the title page, he put Sir Edward Coke's maxims, "many times *compendia sunt dispendia"* ("shortcuts are a waste of time") and *"melius est petere fontes quam sectari rivulos"* ("it is better to seek the sources than to follow the tributaries" or, stated somewhat differently, "it is better to go up to the wellsprings than to follow rivulets downhill.").[331] Langdell, in conjunction with his casebook, used the inductive Socratic method in the classroom "to develop in the student the expertise and self-confidence to infer, evaluate, and formulate legal doctrine and judgments autonomously, regardless of the weight of contrary authority."[332] Importantly, however, for Langdell, the casebook and the Socratic method were not simply

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[323] *Id.* at 88.
[324] *Id.* at 87-88, 97.
[325] *Id.* at 88-89, 91.
[326] *Id.*
[327] Hoeflich, *supra* note 6, at 106.
[328] *See* Simon Stern*, Detecting Doctrines: The Case Method and the Detective Story*, 23 YALE J. L. & HUMAN. 339, 351-52 (2011) (discussing Langdell's taxonomy).
[329] KIMBALL, *supra* note 12, at 84.
[330] *Id.* at 87.
[331] LANGDELL, *supra* note 9, at iii.
[332] KIMBALL, *supra* note 12, at 144; *see also* Kimball, *supra* note 133 at 61 ("[A]n important outcome of [Langdell's] early case method was the development of an independent, critical intellect in his students. Not at all a closeminded teacher who dogmatically transmitted a formalized orthodoxy to his students, . . . Langdell . . . not infrequently changed his mind in class, confessed his ignorance or uncertainty about points of doctrine, and asked his students to venture judgments and to challenge both his own views and those expressed by the judges and counsel in the case reports. He also, at times, informed his jurisprudence by 'careful observation' of extralegal factors.").

teaching devices for his students' benefit; they were an integral part of the process Langdell would himself use during the 1870s to develop his understanding of the common law of contracts through caselaw analysis, "a process that included advancing heretical criticisms, questions, errors, and revisions . . . ."[333] Used together, the casebook and the Socratic method constituted a monumental effort to use legal history, empirical data, and inductive reasoning to discover underlying order in what appeared on the surface to be a chaotic common law of contract.[334] For example, Langdell's casebook was the first text to be organized around mutual assent and consideration,[335] and Langdell could lay claim to being "the first theoretician of contract law in the United States."[336]

Langdell completed the first edition in October 1871, and included a thirteen-page index and a preface that explained his reasons for adopting the case method approach.[337] The preface revealed that his casebook was based on his belief that law could be treated scientifically, with the cases being the common law's specimens for investigation in the search for order.[338] When the scientific method was employed and the common law approached empirically and its specimens investigated, the common law's evolutionary nature was revealed.[339] Further, when inductive reasoning was then applied, it was discovered that "the number of fundamental legal doctrines is much less than is commonly supposed."[340] Many years later, in 1886, he would state that when becoming dean he viewed it as indispensable to establish that law is a science and that he believed the law library was to the study of law what the "laboratories . . . are to the chemists and the physicists, the museum of natural history to the zoologists, the botanical garden to the botanists."[341] Langdell had not forgotten what Asa Gray and Louis Agassiz had taught him about natural sciences when he was an undergraduate student.[342]

The year 1870 was not only a monumental one for Langdell; it was also a turning point in Holmes's professional life. In October 1870 (the same month Langdell published the first half of his casebook), Holmes became an editor of the *American Law Review* and published his first major essay.[343] Around this time, he also made what his biographer Mark DeWolf Howe

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[333] Kimball, *supra* note 133, at 124-25.
[334] *See generally id.*
[335] KIMBALL, *supra* note 12, at 94.
[336] LAPIANA, *supra* note 58, at 188 n.19.
[337] KIMBALL, *supra* note 12, at 90.
[338] LANGDELL, *supra* note 9, at vi.
[339] *Id.* (noting that "[e]ach of [law's] doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries.").
[340] *Id.*
[341] C. C. Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123, 123-24 (1887) (reprinting 1886 speech).
[342] *See supra* text accompanying notes 99-100.
[343] BAKER, *supra* note 20, at 202.

describes as "perhaps the most important decision of his professional life, the decision to leave his fellow adventurers and go forth into 'a deeper solitude' than he had yet known. It was to be the solitude of the thinker."[344] The decision stemmed from his philosophical nature, his reverence for the common law, and his frustration with the state of the common law that he found when he started practicing law.[345] His disillusionment with big ideas—stemming from the Civil War and abolitionism—likely also instilled in him a desire to "search for order."[346] Holmes, like Langdell, would seek to discover order within the chaos. Most importantly, however, Holmes developed a sense of urgency, as he had little more than a decade to make his mark by the age of forty.[347]

The young Holmes, who had started practicing law in the late 1860s, had developed a great admiration for the common law system that the United States inherited from England, coming to view the common law as encompassing society's collective wisdom rather than any one person's individual moral judgment.[348] This reverence for the common law system was on full display in October 1870, in the first of his major essays to appear in the *American Law Review*, "Codes, and the Arrangement of the Law."[349] This essay disclosed important characteristics of Holmes's legal thinking that would play an important role in the Lowell Lectures and would set him apart from Langdell.[350] The article addressed a current issue under much discussion—whether the common law should be codified,[351] as had been done in many other countries throughout the nineteenth century due to the tremendous influence of the French code.[352]

Holmes was against codification as a substitute for the disappearing writ system.[353] The article's first sentence was a thunderbolt: "It is the merit of the common law that it decides the case first and determines the principle afterwards."[354] He came down decidedly against any effort to fill the gap left by the demise of the forms of action with static legal principles that would

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[344] HOWE, *supra* note 23, at 4.

[345] *See* textual discussion *infra*.

[346] Horwitz, *supra* note 269, at 39.

[347] AICHELE, *supra* note 223, at 98.

[348] WELLS, *supra* note 150, at 197.

[349] HOLMES, *Codes, and the Arrangement of the Law*, *in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 212, at 212*; see also* KELLOGG, *supra* note 47, at 77 (noting the article was published in October).

[350] *See* HOLMES, *supra* note 349. *See also infra* Part XV.

[351] BAKER, *supra* note 20, at 203.

[352] France codified its law in the early nineteenth century. Jean Maillet, *The Historical Significance of French Codifications*, 44 TUL. L. REV. 681, 681 (1970). The French code then spurred codification in many other countries throughout the nineteenth century. Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U. L.J. 335, 342-43 (1953).

[353] Frederic R. Kellogg, *Holmes, Common Law Theory, and Judicial Restraint*, 36 J. MARSHALL L. REV. 457, 479 (2003).

[354] HOLMES, *supra* note 349, at 212.

serve as the major premise in a syllogism to decide a case.[355] Thus, as early as 1870, Holmes, in rejecting codification, was recognizing the importance of a dynamic legal system that used experience over logic to develop legal principles, and the importance of those legal rules being able to evolve through the collective effort of judges deciding individual cases.[356] He liked the idea of judges acting as lawmakers, writing in a book review that same year: "Perhaps the question on which the desirableness of a code depends is whether it is desirable to put an end to the function of the judges as law-makers. We confess we doubt it."[357] Holmes, however, also saw danger in the temptation to identify general principles of law that judges could use to easily decide future cases, believing such a simple application could not be done.[358] The next year, he wrote that if a case is new and valuable, "no one, not even the judge, can be trusted to state the *ratio decidendi* [i.e., the rule on which the court's decision was based]."[359] He also explained that "[t]he temptation in our practice is rather to content oneself too easily with general principles" and that "[t]he common law begins and ends with the solution of a particular case."[360]

But Holmes, a young lawyer trying to understand the common law, was at the same time frustrated by its disarray.[361] The disarray likely also offended his desire for orderly thinking and for generalization, traits he had displayed in his college writing about art. When he started practicing he found the common law to be nothing more than a "ragbag of details,"[362] "chaos with a full index."[363] As early as 1869, Holmes was also complaining that it would be better if there was a comprehensive summary of the law that treated a topic like fraud under the general topic of contract, rather than having the same topic (fraud) repeated in every textbook covering a specific type of contract.[364]

The common law's chaos seemed also to be worsening. While from

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[355] *Id.* at 213.

[356] *See* E. Donald Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 116-17 n.8 (1984) (asserting that Holmes's first article "displays a strong leitmotiv on the importance of 'experience.' Holmes wrote that the common law 'embodies the work of many minds,' which is an advantage which cannot be made up by 'any faculty of generalization, however brilliant.'") (quoting HOLMES, *supra* note 349, at 213).

[357] HOLMES, Book Notice, *in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 212, at 223, 223.

[358] *Id.* at 242.

[359] *Id.*

[360] *Id.* at 250.

[361] Reimann, *supra* note 267, at 76-77.

[362] OLIVER WENDELL *HOLMES, Introduction to the General Survey by European Authors in the Continental Legal Historical Series*, *in 3* THE COLLECTED WORKS OF JUSTICE HOLMES, *supra note 9, at* 439, 440 (noting that "[w]hen I began, the law presented itself as a ragbag of details.").

[363] HOLMES, *supra* note 357, at 223. The phrase came from Thomas Erskine Holland, but was quoted by Holmes.

[364] *Id.* at 206.

a strictly empirical standpoint the publishing of court opinions was presumably beneficial, by 1870 the amount of new caselaw was becoming unmanageable and increasing the disarray.[365] The common law's medieval writ system had itself been chaotic and the common law was still tinged with feudal notions.[366] The end of the writ system and its forms of action (spurred by the ability to amend pleadings) only increased the disorder and confusion, the writ system having been abolished in Massachusetts in 1852.[367] Further, industrialization, accompanied by its new financial structures and by western expansion, was calling out for new legal approaches.[368] At the same time, as a result of the writ system's lingering influence, the common law had become arbitrary, intricate, and solidified; it was chaotic, yet static.[369] Holmes was thus beginning his intellectual journey in a time of transition and uncertainty, when the law was moving from the ancient writ system and its rigid forms of action to caselaw, and was seeking to address the changes and needs of modern society.[370] He later said that "[t]here were few of the charts and lights for which one longed when I began. One found oneself plunged in a thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys."[371]

While Holmes revered the common law system and opposed codification, he was bothered by what had happened to it, by its thick fog of details. His fondness for classification made him dedicated to helping turn the common law into a well-arranged body of law. He even acknowledged that a benefit of a code was that, if it were under the control of one person, it could "make a philosophically arranged *corpus juris* possible."[372] He stated that the importance of such an arrangement, "if it could be obtained, cannot be overrated. . . . A well-arranged body of the law would not only train the mind of the student to a sound legal habit of thought, but would remove obstacles from his path which he now only overcomes after years of experience and reflection."[373] While it might have been to the merit of the common law that it decides the case first and the principle second, with the common law's focus on caselaw, analysis could often too easily get lost in the particulars of each case.[374]

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[365] BAKER, *supra* note 20, at 203.
[366] Hoeflich, *supra* note 6, at 102.
[367] WELLS, *supra* note 150, at 144-45.
[368] BAKER, *supra* note 20, at 203.
[369] Mellen, *supra* note 183, at 158.
[370] WELLS, *supra* note 150, at 143.
[371] HOLMES, *Address at Brown University Commencement, 1897*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 517, 518.
[372] HOLMES, *supra* note 357, at 213.
[373] *Id.* at 214.
[374] Reimann, *supra* note 267, at 78.

While Holmes disliked the common law's chaotic nature, he still welcomed the writ system's abolition as the writs had not reflected any substantive internal logic (i.e., they were not philosophically arranged) and were simply based upon an arrangement of procedural rules.[375] He believed that the writ system, owing its origin to historical causes, had itself been arbitrary and thus inhibited the development of a well-arranged body of law.[376] Holmes saw the writ system's abandonment as opening the door for a rational approach to developing such a body of law.[377] Efforts had previously been made to bring rational order to the common law, most notably by Sir William Blackstone in England in the eighteenth century (who, consistent with the times, believed English law embodied natural rights)[378] and then James Kent in the United States (the "American Blackstone") in the early nineteenth century,[379] but Holmes found their efforts worthless.[380] And if there was a prevailing view as to how to make sense of the common law, it was still for judges to apply natural law,[381] and that would not do for Holmes the skeptic.

Rather, his guide would be John Austin, the English legal and political theorist who had sought to bring order to the chaos through logical analysis,[382] focusing on the law "as it is" (so-called positivism) rather than what it "ought to be."[383] Holmes had read Austin's 1832 *Province of Jurisprudence Determined*,[384] and Austin's analytical and positivist approach appealed to Holmes; it was consistent with the scientific, empirical approach to which he had been exposed.[385] As stated by H. L. A. Hart, Austin's object in the book was "to identify the distinguishing characteristics of positive law and so to free it from the perennial confusion with the precepts of religion and morality which had been encouraged by Natural Law theorists and exploited by the opponents of legal reform."[386] From 1870 to 1873, Holmes would work

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[375] *Id.* at 78, 247 n.25.

[376] *Id.* at 77.

[377] *Id.*

[378] NIGEL E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 4 (3d ed. 2008). *See generally* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES (Univ. of Chi. Press, 1996) (1941) (arguing that Blackstone sought make the common law a coherent and rational system but within the confines of eighteenth-century England's existing moral and social values).

[379] Reimann, *supra* note 267, at 77. *See generally* JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847, at 269-306 (1939) (discussing Kent's *Commentaries on the Law of England*).

[380] Reimann, *supra* note 267, at 78.

[381] Mellen, *supra* note 183, at 158.

[382] KELLOGG, *supra* note 47, at 15.

[383] BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 11 (2004).

[384] Kellogg, *supra* note 353, at 458-59 n.7. Holmes read it as a law student and then reread it in the early1870s. WHITE, *supra* note 20, at 117.

[385] *See generally* WHITE, *supra* note 20, at 117 (discussing the shared attitudes of Austin and Holmes).

[386] H. L. A. Hart, *Introduction* to JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE

in the Austinian analytical tradition.[387]

For Holmes, however, the goal of bringing order to the common law should not succumb to the temptation to identify and rely on (i.e., use to deduce lower-level rules) what the Whig lawyer and politician Rufus Choate had, in 1856, called "glittering generalities."[388] Choate, fearing that the Republican Party's anti-slavery views would tear the nation in two, claimed that the Republican Party was relying on "the glittering and sounding generalities of natural right which make up the Declaration of Independence."[389] And as commentators have noted, Thomas Jefferson, in the Declaration, justified the conclusion that the colonists had a right to independence by using eighteenth-century logic; by using a syllogism whose major premise was based on self-evident truths.[390] Jefferson, who rejected metaphysical abstractions, believed—in Enlightenment fashion—that these self-evident truths could be empirically tested.[391] In contrast, nearly a century later, Lincoln used the contrary ideals of Romanticism and New England transcendentalism to give primacy to the same glittering generalities over the Constitution's protection of slavery.[392] Thus, both Enlightenment logic and romantic idealism could find irrefutable truth in glittering generalities.

But Jefferson's logic and Lincoln's romantic idealism would not do for the post-war Holmes. Much later, Holmes would mockingly equate "a throng of glittering generality" to "a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures."[393] Consistent with Holmes's view, a recent commentator has described a glittering generality as something that "sounds pretty and appealing, but it is either too general or too individualized

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USES OF THE STUDY OF JURISPRUDENCE, at vii, x (Hackett Publ'g 1998) (1832).

[387] HOWE, *supra* note 23, at 67-69; KELLOGG, *supra* note 47, at 25.

[388] HOLMES, *Misunderstandings of the Civil Law*, *in* Holmes, *supra* note 212, at 257, 260.

[389] William F. Dana, *The Declaration of Independence*, 13 HARV. L. REV. 319, 328-29 n.1 (1900) (quoting letter from Rufus Choate to the Maine Whig State Central Committee (Aug. 9, 1856), *in* 1 BROWN'S WORKS OF RUFUS CHOATE, 212, 215); *see also* CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 244-45 (Vintage Books 1942) (1922) (discussing Choate's motivation for using the phrase). The Declaration of Independence referred to "the Laws of Nature and of Nature's God" and stated, among other things: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). About Choate's phrase, Emerson commented: "Glittering generalities! They are blazing ubiquities!" ROBERT HENDRICKSON, THE FACTS ON FILE ENCYCLOPEDIA OF WORD AND PHRASE ORIGINS 300 (3d ed. 2004).

[390] DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 41-45 (1994); Wilbur Samuel Howell, *The Declaration of Independence and Eighteenth-Century Logic*, 18 WILLIAM & MARY QUARTERLY 463 (1961).

[391] GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 103 (1992).

[392] *Id.* at 90-120.

[393] HOLMES, *The Use of Law Schools*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 474, 477. Correggio was an Italian Renaissance artist, whose painting of the dome of the Parma cathedral included an "endless row of angels bearing dulcimers, viols, violins, and flutes." *Id.* at 54. LUCIA FORNARI SCHIANCHI, CORREGGIO 3, 54 (1994).

to have any practical, substantive meaning."[394] Nothing showed the war's change on Holmes more than his post-war disdain for the Declaration's glittering generality; it had been those glittering generality that had motivated Holmes the abolitionist to enlist.[395] Now they were romantic fallacies.[396]

Holmes the lawyer viewed such generalities as contrary to the beauty of the common-law system and something to which the civil-law code system had fallen prey. They also discouraged careful analysis of a legal issue. For example, Holmes wrote in 1871 that he doubted "the wisdom of making the civil law part of the course to be studied by beginners who intend to practise at a common-law bar [as] [t]here is ground for suspicion that it tends to encourage a dangerous reliance on . . . glittering generalities, and a distaste for the exhaustive analysis of a particular case, with which the common law begins and ends."[397]

He would thus seek to bring order to the common law, while shunning glittering generalities as the solution. Holmes the positivist also understood that while a well-arranged body of the law should be organized philosophically ("even at the expense of disturbing prejudices"), "science" (in the sense of a rational activity) could not determine the arrangement. The law was "essentially empirical" and thus "compromises with practical convenience are highly proper."[398]

To bring order to the common law he would, however, unfortunately need a command of its thick fog of details. So in late 1869, he plunged into the fog, agreeing to edit Kent's *Commentaries on American Law*.[399] What Holmes found there was reflective of the state of the common law, and he complained: "His arrangement is chaotic—he has no general ideas, except wrong ones—and his treatment of special topics is often confused to the last degree."[400] But Holmes's editing of the *Commentaries* showed he had a talent for systematizing the confused and disorganized common law.[401] When he completed the task in 1873, the tedious project had given him an extraordinary knowledge of the common law's details.[402]

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[394] Carli N. Conklin, *The Origin of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 195, 199 (2015).

[395] *See* MENAND, *supra* note 104, at 66 (noting that after the war Holmes "reversed, in effect, the priorities of his youth: he took the Constitution for his text and rejected the Declaration of Independence.").

[396] Mark DeWolfe Howe, *Introduction* to THE COMMON LAW, *supra* note 10, at xvi.

[397] HOLMES, *supra* note 388, at 260.

[398] HOLMES, *supra* note 349, at 214.

[399] WHITE, *supra* note 20, at 125.

[400] BUDIANSKY, *supra* note 21, at 164.

[401] HOWE, *supra* note 23, at 21.

[402] BUDIANSKY, *supra* note 21, at 166.

VII. KINDRED SPIRITS (1871-72)

If Holmes was unimpressed with Kent, he was impressed with Langdell. In April 1871, he reviewed Langdell's casebook, and he liked what he found.[403] Holmes wrote: "The chronological arrangement [of the cases] we have found to be most instructive and interesting. Tracing the growth of a doctrine in this way not only fixes it in the mind, but shows its meaning, extent, and limits as nothing else can."[404] Holmes used as an example Langdell's treatment of courts grappling over the past century with the issue of a contract being negotiated at a distance (such as by mail or telegraph)[405] and, specifically, when such a contract forms.[406] Holmes believed that Langdell's casebook, with its chronological order of the cases, confirmed a prior remark of Holmes's in the *American Law Review* "that judges know how to decide a good deal sooner than they know why."[407] Holmes also praised that the casebook covered "the whole law of contracts proper."[408] His only criticism (apart from the casebook lacking a full index) was that it included "some contradictory and unreasoned determinations which could have been spared."[409]

Importantly, though, Holmes in this criticism suggested a possible future disagreement with Langdell.[410] He wrote that "one surmises that a skeptical vein in the editor is sometimes answerable to the prominence given to the other side of what is now settled. But very likely he had deeper reasons and is right."[411] Here, Holmes showed that despite his own skeptical vein and his view of the law evolving, Holmes the positivist recognized that at any given moment, certain issues of law were "now settled."[412] He expressed concern that Langdell might believe settled doctrines had been decided incorrectly, though (for now) Holmes doubted it.[413] Also, in May 1871, Holmes perhaps expressed concern about the way Langdell was using the Socratic teaching method in class.[414] He wrote to his friend James Bryce, a

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[403] HOLMES, *supra* note 357, at 243.
[404] *Id.*
[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] *Id.*
[412] *See* LaPiana, *supra* note 285, at 828 ("Holmes had some reservations about Langdell's scholarship. Holmes approved the study of cases as the source of the law—as a place where the principles are found—but found Langdell's practice of the study defective.").
[413] *Id.*
[414] Letter from Oliver Wendell Holmes, Jr. to James Bryce (May 17, 1871) (on file with the Harvard Law School Library).

law professor at Oxford: "The common law training (e.g. in our law school) is to keep a student at the solution of particular cases. Just as Agassiz would give one of his pupils a sea urchin and tell him to find all about it that he could."[415]

Langdell thus might have shown signs to Holmes of believing there were "right" answers to legal questions as there were "right" answers to natural science questions, but Holmes likely believed it was too soon to know for sure.[416] Further, his comments to Bryce could be seen as in fact praising Langdell's approach.[417] They were immediately preceded by his statement that he thought "it would be dangerous to set a student at the civil law here [in the U.S.] as tending to let him satisfy himself with generalities."[418] Thus, Langdell's Socratic method, which kept "a student at the solution of particular cases," prevented a student from satisfying himself with "generalities."[419] For the most part, Langdell's approach to law thus appeared in line with Holmes.

Holmes's interest in how legal rules had developed was confirmed later that year in October in his second major essay, "Misunderstandings of the Civil Law."[420] This essay showed that, even though Holmes believed some legal issues were settled, he could be troubled by how that settled law came to be. Holmes discussed what he believed was "the illicit relationship of the common law and the civil law."[421] He believed that some civil law doctrines had been incorporated into the common law based on a misunderstanding of the civil law doctrines, "and later wholly perverted from their meaning and from reason."[422]

At this time, Holmes and Langdell were not only travelers on the same journey to bring order to the common law, but they were also kindred spirits. In January 1872, Holmes reviewed Langdell's completed casebook and wrote: "We have already expressed our very high opinion of this selection in noticing the first part . . . ."[423] Holmes noted that "[f]urther reflection and examination have confirmed us in our estimate."[424] Holmes reiterated his approval of the general nature in which Langdell treated the law of contracts: "The cases are referred to under the general principle of the law of contracts,

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[415] *Id.* Holmes biographer Liva Baker took it as a criticism. *See* BAKER, *supra* note 20, at 208.

[416] *See* HOLMES, *supra* note 357, at 243.

[417] *See* Letter for Oliver Wendell Holmes, Jr. to James Bryce, *supra* note 41.

[418] *See id.* Holmes's comment is consistent with his statement five months later in *Misunderstandings of the Civil Law* that the common law, unlike the civil law, begins and ends with "the exhaustive analysis of a particular case." Holmes, *supra* note 388, at 260.

[419] *See* Letter for Oliver Wendell Holmes, Jr. to James Bryce, *supra* note 414.

[420] HOLMES, *supra* note 388, at 257.

[421] *Id.* at 258.

[422] *Id.*

[423] HOLMES, *supra* note 357, at 273.

[424] *Id.*

which they illustrate, and this ought to be enough for lawyers."[425] Why, according to Holmes, ought this to be enough for lawyers? Because "[a]s is observed in the preface, 'the number of fundamental legal doctrines is much less than is commonly supposed . . . .'"[426] Holmes did note that the casebook was "a pretty tough *pièce de résistance* without a text-book or the assistance of an instructor,"[427] but that "[t]he students of the Harvard Law School are to be congratulated that they have the aid of Mr. Langdell's learning and remarkable powers in their task."[428]

Thus, as 1872 began, Holmes had shown admiration for the common-law system and an appreciation for its evolutionary nature. He also, however, discovered missteps in its development that led to incorrect results departing from reason. While he opposed bringing order to the common law through "glittering generalities" like those in the Declaration of Independence, he believed that the common law's number of fundamental legal doctrines were much fewer than supposed.[429] He also thought the law should be arranged according to broad subject matters based on legal principles, rather than categories based on facts. It would be this year, though, that would mark the appearance of what would become his most famous theory, the one most associated with his pragmatic nature—the so-called prediction theory of law. It was a theory that likely had much to do with Holmes's association that year with a group of brilliant, young intellectuals.

VIII. THE METAPHYSICAL CLUB AND THE PREDICTION THEORY OF LAW (1872)

In 1872, Holmes joined the now-famous discussion group in Cambridge, Massachusetts, called the Metaphysical Club.[430] The group most likely started in January of that year[431] and is credited with laying the foundation for pragmatist philosophy.[432] Formed by William James (Holmes's best friend) and Charles Sanders Peirce,[433] its members included, among others, Chauncey Wright (Langdell's former college roommate) and

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[425] *Id.*
[426] *Id.*
[427] *Id.* at 274.
[428] *Id.*
[429] *Id.* at 273.
[430] MENAND, *supra* note 104, at 201.
[431] Exactly when the Club started and met is unclear. Charles Sanders Peirce, in later recollections, variously stated "the early seventies," "1871," and "in the sixties." WIENER, *supra* note 106, at 19. Menand's estimated start date of January 1872, MENAND, *supra* note 104, at 201, seems the most likely based on the evidence.
[432] *See generally* MENAND, *supra* note 104.
[433] WELLS, *supra* note 150 at 118; *see also* MENAND, *supra* note 104, at 204 (noting that Holmes and James were best friends).

Nicholas St. John Green[434] (a lawyer and, since 1870, a full-time adjunct lecturer at Harvard Law School).[435] What the members had in common were a scientific frame of mind, skepticism of general propositions and grand theories, rejection of a priori propositions,[436] and a preference for collectivism over individualism.[437] And, like, Langdell, the members seemed to have a penchant for employing the Socratic method.[438] Exactly how much of an impact the Club had on Holmes's thinking is unclear, as it is unknown if he was a frequent participant at meetings; 1872 was a busy time for him with his law practice.[439] Nevertheless, at a minimum, Holmes's skepticism was surely reinforced by his interaction with the Club's brilliant thinkers.[440]

Of all the members, it was Wright and Green whom Holmes later credited with having the biggest impact on him.[441] Unlike Holmes, Wright had a truly scientific mind, and when Darwin's *On the Origin of Species* was published in 1859, he had treated it like Holmes treated Emerson's writings at the time.[442] Like Holmes, Wright was a positivist, and by positivism Wright meant a complete distinction between facts and values.[443] He also believed that the world was characterized by change and that our knowledge of it is always uncertain.[444] Although an evolutionist, he was not an optimist; he did not believe evolution meant the world was getting better,[445] and his extreme positivism led him to "a moral dead end" and virtual nihilism.[446] Wright convinced Holmes that moral questions were incapable of scientific proof[447] and Holmes also credited Wright for inspiring his so-called bettabilitarianism.[448] Nearly half a century later, he wrote that Wright had taught him to "not say *necessary* about the universe, that we don't know whether anything is necessary or not."[449] Holmes explained, "I describe

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[434] MENAND, *supra* note 104, at 201.

[435] KIMBALL, *supra* note 12, at 347; COQUILLETTE, *supra* note 49, at 406.

[436] AICHELE, *supra* note 223, at 96. An a priori proposition is a proposition that "can be known without experience of the specific course of events in the actual world." BLACKBURN, *supra* note 163, at 26.

[437] Note, *supra* note 292, at 1126.

[438] At a minimum, Chauncey Wright and Nicholas St. John Green used the Socratic method. *See* WIENER, *supra* note 104, at 209 (Wright); KIMBALL, *supra* note 12, at 347 n.3 (Green).

[439] MENAND, *supra* note 104, at 216.

[440] *See* KELLOGG, *supra* note 47, at 3 (noting that Holmes's legal philosophy developing in the 1870s must have been "tinctured . . . by his membership in the 'Metaphysical Club'").

[441] WELLS, *supra* note 150, at 125; Note, *supra* note 292, at 1123-24.

[442] MADDEN, *supra* note 103, at 16-17; MENAND, *supra* note 102, at 209.

[443] MENAND, *supra* note 104, at 207.

[444] *Id.*

[445] *Id.* at 209-10. The pre-Darwinian use of the word *evolution* meant progress. WILLS, *supra* note 391, at 109.

[446] MENAND, *supra* note 104, at 214. Nihilism is "[a] theory promoting the state of believing in nothing, or of having no allegiances and no purposes" BLACKBURN, *supra* note 163, at 331.

[447] WELLS, *supra* note 150, at 196.

[448] MENAND, *supra* note 104, at 217.

[449] Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Aug. 30, 1929), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 176, at 251 -252.

myself as a *bet*tabilitarian. I believe that we can *bet* on the behavior of the universe in its contact with us. We bet we can know what it will be."[450] Because of the Civil War, Holmes already believed that certitude leads to violence, and Wright now taught him that certainty "is not even necessary to life."[451] Wright's influence came at an important point, as recall that Holmes at this time was seeking to bring order to the common law through an Austinian analytical approach, but Wright helped Holmes view the law as merely a bet as to what a court would say the law was.

Green, like Wright, employed the Socratic method (though he apparently exhibited it to the point of coarseness), and Green was particularly intolerant of received authority.[452] With respect to Green's influence on Holmes, he would remind the members of the Club to follow the view of Alexander Bain (a contemporary Scottish philosopher) that a belief is simply a preparation for action.[453] As Menand observes: "Green thought that all beliefs have this purposeful character—that knowledge is not a passive mirroring of the world, but an active means of making the world into the kind of world we want it to be—and this was a point he insisted on in meetings of the Metaphysical Club."[454] Consistent with this view, Green was critical of the belief that legal concepts could be determinate and immutable, asserting that legal concepts were just tools, not actual entities.[455] In 1870, he had written a groundbreaking article on legal causation, arguing that "proximate cause" was simply a man-made concept to justify a decision to find (or not find) legal liability in a particular situation.[456] From Green, Holmes would take that a legal term is simply a concept whose application disguises a policy choice.

Holmes was perhaps also influenced by Peirce (the Club's co-founder) despite later downplaying his impact,[457] as Holmes's developing theories about the law were similar to Peirce's developing philosophical theories.[458] Peirce argued to the Club that "truth" was (as he would later put it in 1878) collectively determined, being "[t]he opinion which is fated to be ultimately agreed to by all who investigate . . . ."'[459] Peirce also, like Green,

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[450] *Id.*

[451] BUDIANSKY, *supra* note 21, at 151.

[452] KIMBALL, *supra* note 12, at 347 n.3.

[453] WELLS, *supra* note 150, at 128.

[454] MENAND, *supra* note 104, at 225.

[455] *Id.* at 223.

[456] Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870)*; see also* MENAND, *supra* note 104, at 224-25 (discussing Green's article).

[457] WELLS, *supra* note 150, at 125.

[458] Note, *supra* note 292, at 1124.

[459] *Id.* at 1125; CHARLES S. PEIRCE, *How to Make Our Ideas Clear* (1878), *reprinted in* CHARLES S. PEIRCE: SELECTED WRITINGS 113, 133 (Philip P. Wiener ed., 1958) (footnote omitted).

had reduced concepts to their operations.[460] Though Holmes did not credit Peirce with any influence, Holmes's communal view of law (that the common law arose from the community's collective wisdom) and his skepticism of a priori principles (i.e., his belief that there are no fixed principles upon which the legal system could be based) were similar to Peirce's more general view of truth.

Perhaps not coincidentally, in July 1872, while he was a member of the Club, Holmes first announced what would become his famous prediction theory of law. In a book review, he expressed doubt about whether the law "possessed any other common attribute than of being enforced by the procedure of the courts . . . ."[461] He asserted that "it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what . . . the judges, by whom it is enforced, *say* is his will. . . . The only question for the lawyer is, how will the judge act?"[462] Holmes's prediction theory of law broke from Austin's concept of sovereignty—which defined law as a command of a sovereign[463]—if the sovereign's commands were viewed as personal and subjective.[464] Under Holmes's prediction theory, the standard for what is law became in a sense communal and objective.[465] Holmes's prediction theory of law aligned with Langdell's focus on caselaw and its historical development. Langdell's approach has even been described as "not far from Charles S. Peirce's conception of 'belief' as the fallible and working consensus of a community of investigators who are gradually moving toward 'truth,' understood as 'the opinion which is fated to be ultimately agreed to be all who investigate.'"[466]

In October 1872, Holmes reviewed Langdell's casebook on sales, which had been published in its completed version in May 1872 (the first half was published in February 1871).[467] Holmes continued to be impressed with Langdell's approach, writing that "[t]hese books are conceived in the very spirit of the common law, of which the learned professor is so consummate a master. . . . [One] will find no legal study more delightful than that of tracing the history of opinion through the pages of these books."[468] While Holmes's positivism might at first appear inconsistent with his organic view of law, the

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[460] KELLOGG, *supra* note 47, at 58.

[461] HOLMES, *Review*, *in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 212, at 294-95.

[462] *Id.*

[463] BIX, *supra* note 383, at 12.

[464] Note, *supra* note 292, at 1127.

[465] *Id.*

[466] Kimball, *supra* note 133, at 76 (quoting PEIRCE, *supra* note 455, at 133); *see also* Daniel J. Boorstin, *The Humane Study of Law*, 57 YALE L.J. 960, 960 (1948) (arguing that the spirit of the American law school over the past seventy-five years had been predominantly pragmatic).

[467] KIMBALL, *supra* note 12, at 97-98

[468] Oliver Wendell Holmes, *Book Notice*, 7 AM. L. REV. 145, 145-46 (1872); *see also* KIMBALL, *supra* note 12, at 325-26 & n.79 (identifying Holmes as the author of the anonymous review).

two were in fact consistent, and fused together into his prediction theory of law. The law was what the courts said it was, and because the law was always evolving, one could not be sure of what the law was at any point until the court, only after the parties' dispute arose and it entered the legal system for resolution, told them what it was.

That same month (October 1872), Holmes showed that, despite having announced his prediction theory of the law three months earlier, he remained interested in using legal categories and general concepts to organize the common law from the top down. He saw this as a practical necessity if the law was going to be made knowable. In October 1872, he wrote in his third major essay, "The Arrangement of the Law—Privity," that "the end of all classification should be to make the law *knowable*; and that the system best accomplishes that purpose which proceeds from the most general conception to the most specific proposition or exception in the order of logical subordination."[469] Continuing to work in the Austinian analytical tradition, Holmes in this essay sought to organize the law into proper categories,[470] but, at the same time, he used history to explain the modern rules of privity.[471]

In April 1873, Holmes's positivist, empirical, and pragmatic view of law was illustrated in an essay he wrote about a gas-stokers' strike in London in December 1872 and, in particular, the subsequent criminal conviction of the principals for conspiracy.[472] In early 1873, a British magazine published an article in which the author took issue with so-called class legislation (legislation favoring the rich at the expense of the poor), including the laws that had been used to convict the strike's ringleaders.[473] Holmes co-wrote an essay about those proceedings,[474] an essay in which Holmes showed little interest in the proceedings themselves [475] but whose portion was a response to the class legislation article.[476] Holmes used it as an opportunity to set forth his theory of law. He believed that while the article in fact contained "much sense," it also included "some unsound notions of law."[477] Just as Holmes's war experience had led him to believe that certitude leads to violence,[478] this

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[469] HOLMES, *The Arrangement of the Law—Privity*, *in* HOLMES, *supra* note 212, at 303, 303 n.**. *See also* KELLOGG, *supra* note 47, at 95 (noting the article was published in October).

[470] Note, *supra* note 292, at 1123 n.7.

[471] HOLMES, *supra* note 469, at 306-15.

[472] OLIVER WENDELL HOLMES, JR., et al., *The Gas-Stokers' Strike*, *in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 212, at 323.

[473] Henry Crompton, *Class Legislation in* 13 THE FORTNIGHTLY REVIEW 207 (John Morley ed., 1873).

[474] NOVICK, *supra* note 28, at 431 n.22.

[475] *See id.* ("Holmes's portion does not address the case itself so much as respond to an article in the *Fortnightly Review*.").

[476] *Id.*

[477] Holmes, *supra* note 472, at 324.

[478] MENAND, *supra* note 104, at 61.

essay showed he also believed that a functioning governmental system must likewise reject certitude.

Holmes criticized both social Darwinists and utilitarians for their overconfidence about what is good legislation. In typical Holmes fashion, he used social Darwinism against the social Darwinists.[479] The social Darwinists had believed that legislation should only be enacted if the change makes some burden easier for society as a whole to bear, but Holmes believed this incorrectly assumed "the solidarity of the interests of society."[480] For Holmes, society involves clashing interests as part of the struggle for life, and legislation was just another aspect of this struggle. The social Darwinists had thus failed to recognize that legislation is itself an aspect of the survival of the fittest: "[I]n the last resort a man rightly prefers his own interest to that of his neighbors [a]nd this is as true in legislation as in any other form of corporate action."[481] If those in power (those with "*de facto* supreme power in the community") were able to make it law, in the long run it would aid the survival of the fittest, as "[t]he more powerful interests must be more or less reflected in legislation."[482]

Of course, Holmes conceded that the matter was complicated. For example, those with de facto supreme power might be able to have laws enacted that did not benefit the legislators themselves.[483] Legislators might also enact a law against the interests of those who are increasing in power (such that the legislators' exercise of power was in fact dangerous, due to the shifting balance of power and the legislators' power not being sufficiently "unquestioned," perhaps like the laws used against the gas stokers, who were unionized).[484] Legislators might overstep the willingness of those with de facto supreme power to benefit those without power.[485] But, in the end, as legislation was a product of groups of people competing with each other, the reality is that all one could hope for was that "the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum."[486]

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[479] *See* Kelley, *supra* note 289, at 1688 n.25 (noting that "Holmes used th[is] occasion to attack Herbert Spencer's theory of legislation in Spencer's THE STUDY OF SOCIOLOGY (serialized in 1872 and published in 1873). In doing so, Holmes used Spencer's own theories against him."). Herbert Spencer was a social Darwinist. *See* HOFSTADTER, *supra* note 288, at 31-50 (discussing Spencer's popularity in the U.S.). In 1895 Holmes wrote that "I doubt if any writer of English except Darwin has done so much to affect our whole way of thinking about the universe."). Letter from Oliver Wendell Holmes, Jr., to Lady Pollock (July 2, 1895), *in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 57, 58 (Mark DeWolfe Howe ed., 1941) [hereinafter 1 HOLMES-POLLOCK LETTERS].

[480] HOLMES, *supra* note 472, at 325.

[481] *Id.*

[482] *Id.*

[483] *Id.*

[484] *Id.*

[485] *Id.*

[486] *Id.*

Showing Wright's influence (and the influence of Romanticism), Holmes further chastised the social Darwinists for claiming to be evolutionists about society yet at the same time believing that a correct theory of government could be determined for all time by logical deductions from axioms.[487]

Holmes, however, was also implicitly critical of utilitarianism (the belief that laws should maximize overall well-being or satisfaction, i.e., "[t]he greatest happiness for the greatest number").[488] Holmes pointed out that utilitarians could not prove that their theory of legislation was correct, any more than the social Darwinists could.[489] Utilitarians could complain about "class legislation," but all legislation was a form of class legislation; all legislation "favors one class at the expense of another."[490] Further, utilitarianism could not be proven to be morally correct: "Why should the greatest number be preferred? Why not the greatest good of the most intelligent and most highly developed?"[491] To make this point, Holmes argued that utilitarianism, even if accepted in general, could not provide a clear answer to what was good legislation in any particular case because it was too difficult to determine for certain what laws would be best for society: "The greatest good of a minority of our generation may be the greatest good of the greatest number in the long run. But if the welfare of all future ages is to be considered, legislation may as well be abandoned for the present."[492] Holmes then concluded his assault on utilitarianism by returning to his positivism and what he believed was the true source of law: "If the welfare of the living majority is paramount, it can only be on the ground that the majority have the power in their hands.[493]

Holmes, however, at the same time, noted at the outset that the "class legislation" essay had included "much sense."[494] Holmes the positivist thus distinguished "law" and "sense." While Holmes's personal views (particularly with his pragmatic focus on consequences) were surely closer to utilitarianism[495] than natural law (which maintains there is a connection

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[487] *Id.* at 324.
[488] JEFFRIE G. MURPHY et al., PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 72 (rev. ed. 1990).
[489] *See* KELLEY, *supra* note 298, at 1754.
[490] HOLMES, *supra* note 472, at 325.
[491] *Id.*
[492] *Id.*
[493] *Id.*
[494] *Id.* at 324.
[495] *Compare* H. L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE 12 (1984) (asserting that Holmes was committed to "general utility as the purpose of law") *with* NOVICK, *supra* note 28, at 431-32 n.23 ("This brief essay [*The Gas-Stokers' Strike*] is . . . interesting because it makes pretty plain that Holmes rejected Utilitarian premises as inconsistent with evolutionism . . . . It is curious that despite Holmes's explicit and repeated rejection of Utilitarianism, some modern writers continue to describe him as in some degree its follower."); James Gordley, *When Paths Diverge: A Response to Albert Alschuler on Oliver Wendell Holmes*, 49 FLA. L. REV. 441, 442, 456 (1997) ("Some scholars think he was a utilitarian. They note correctly that Holmes was concerned with policy and with

between law and morality),[496] his skepticism seemingly precluded him from publicly adopting a particular political theory,[497] even if he was politically conservative and in favor of laissez-faire.[498] Perhaps Holmes had not fallen into virtual nihilism like Chauncey Wright, but his rejection of moral truth, his belief in communal standards, and his positivism seemed in combination as coming close to a legal philosophy of "might makes right."[499] This was consistent with Holmes's position in an 1871 book review: "[I]f the will of the majority is unmistakable, and the majority is strong enough to have a clear power to enforce its will, and intends to do so, the courts must yield, because the foundation of sovereignty is power, real or supposed."[500]

Holmes, as noted, believed that "in the last resort a man rightly prefers his own interest to that of his neighbors," and all that could be hoped was that through "the spread of an educated sympathy," the "*de facto* supreme power in the community" would "reduce the sacrifice of minorities to a minimum."[501] This was Holmes the positivist and the pragmatist who rejected metaphysics, not the political or moral philosopher, much as Niccolò Machiavelli in *The Prince* was a political realist, not a political or moral philosopher.[502] If, however, he was going to seek to bring order to the common law, his own views of good social policy would likely have to play a role, though so far they had not made an appearance in his major essays. But by distancing his view of law from political and moral philosophy, by coldly accepting the view that life was a competition among people, and by privately favoring laissez-faire, when Holmes took the stage in 1880 one could expect that his view of the common law of contract would not be one that reflected an "educated sympathy" for the less fortunate.

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the effects of rules on society. They then leap too readily to the conclusion that he conceived of these effects as a utilitarian would."). As his gas-stokers' strike essay shows when he pointed out that "[t]he greatest good of a minority of our generation may be the greatest good of the greatest number in the long run," Holmes was not an "orthodox" utilitarian in that "Holmes was skeptical about the possibility of accurate utilitarian evaluation." James Knudson, *The Influence of the German Concepts of* Volkgeist *and* Zeitgeist *on the Thought and Jurisprudence of Oliver Wendell Holmes*, 11 J. TRANSNAT'L L & POL'Y 407, at 415 & n.90 (2002). Richard Posner describes Holmes as a "tame utilitarian." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 241 (1990).

[496] MURPHY, *supra* note 488, at 11. Natural law was also based on the belief that "there were preexisting 'eternal' principles of law discoverable by men." Hoeflich, *supra* note 6, at 104.

[497] *See* DAVID H. BURTON, POLITICAL IDEAS OF JUSTICE HOLMES 19 (1992) ("[Nowhere in Holmes's work is there mention of a philosophy or theory of politics, no worked-out scheme of things, no design, major or minor in dimension.").

[498] Albert Alschuler argues that Holmes rejected both utilitarianism and its principal alternative, Kantianism. ALSCHULER, *supra* note 11, at 17-18.

[499] Palmer, *supra* note 291, at 571.

[500] HOLMES, Book Notice, *supra* note 357, at 268.

[501] HOLMES, *supra* note 472, at 325.

[502] *See* Max Lerner, *Introduction* to NICCOLÒ MACHIAVELLI, THE PRINCE AND THE DISCOURSES xxv, xxxi (Random House, Inc. 1950) ("Machiavelli rejected metaphysics, theology, idealism. The whole draft of his work is toward a political realism, unknown to the formal writing of his time.").

IX. EXTERNAL STANDARDS (1873)

In July 1873, the Metaphysical Club's influence was seen in Holmes's next major essay, "The Theory of Torts,"[503] in which he began developing a theory of liability based on external standards of conduct rather than a person's motives.[504] Holmes was particularly critical of Austin's approach to liability, which had been based on moral culpability and had analyzed negligence based on a person's state of mind.[505] Recall that Emerson had taught Holmes to keep role models at arm's length, and to ask whether they could please Holmes notwithstanding having pleased others.[506] Holmes, however, was still working in the Austinian analytical tradition and seeking a comprehensive arrangement of the law,[507] writing that "one of the evils of not having a comprehensive arrangement of the law [is] that we lose the benefit of such generalizations as a philosophical system would naturally suggest . . . ."[508]

X. A BREAK IN THE ACTION (1873-76)

"The Theory of Torts" would be Holmes's last major essay until 1876.[509] While he might have suspended his writing during the mid-1870s, his intellectual pursuits continued, though they took a new direction. The books he read during this time reflected an increased interest in legal history and in anthropology.[510] Meanwhile, at Harvard Law School, Langdell's focus on the common law of contracts and sales shifted, as he had administrative burdens and his scholarly interest moved from the common law to equity pleading.[511] One thing, however, did not change: Langdell continued to view the study of law as similar to that of the natural sciences, expressing in his 1873-74 annual report for the law school what he later (in 1886) confirmed was his belief upon becoming dean: "The work done in the Library is what

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[503] HOLMES, *The Theory of Torts*, *in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 212, at 326. *See also* BAKER, *supra* note 20, at 231 (noting that the article was published in July).

[504] KELLOGG, *supra* note 47, at 31-34. Morton Horwitz has argued that "Holmes's attack on moralism and subjective standards in tort law grew in part from a desire for stability that he shared with much of late-nineteenth-century American culture." Horwitz, *supra* note 269, at 39.

[505] KELLOGG, *supra* note 47, at 33.

[506] *See* text accompanying notes 169-172.

[507] KELLOGG, *supra* note 47, at 35.

[508] HOLMES, *supra* note 503, at 332.

[509] BAKER, *supra* note 20, at 231.

[510] KELLOGG, *supra* note 47, at 35.

[511] KIMBALL, *supra* note 12, at 99.

the scientific men call original investigation [and] [t]he Library is to us what a laboratory is to the chemist or the physicist, and what a museum is to the naturalist."[512]

XI. A FAILURE TO REASON: THE JUSTIFICATION FOR SCRUTINY AND REVISION (1876-77)

In 1876, Holmes returned to scholarship.[513] At age thirty-five, he had only five years left do to something important, and "to discover whether or not there were, as he believed there must be, unifying concepts threading through that massive body of material called the law."[514] His urgency returned. Like 1870, the year 1876 would mark a turning point, with his writings shifting from critical to constructive.[515] During the period starting in 1876, Holmes, consistent with his pre-college romantic influences, would come to conclude that the law could not be explained logically. Reflecting Nicholas St. John Green's influence, he would decide that liability could not be determined simply by applying words such as "right," "duty," "malice," and "negligence."[516] When his efforts culminated in 1880, Holmes's final view of the common law would now reject Austin's logical, closed, and essentially static system.[517] Rather, he would conclude that the law must be viewed as evolutionary and based on policy choices, rejecting the view that it could be explained by a priori postulates or that it is logically cohesive.[518]

His first essays upon returning to scholarship were two installments of "Primitive Notions in Modern Law," the first published in April 1876[519] and the second in July 1877.[520] These essays led Holmes to conclude that the current common law contained fundamental inconsistencies in rules arising from their historical origins (something he had discussed back in 1871 in "Misunderstandings of the Civil Law"), and that the more primitive the origins, the less rational and enlightened the rules were.[521] He wrote that

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[512] Christopher C. Langdell, *Annual Report of the Dean of the Law School*, 1873-74, *in* HARVARD UNIVERSITY, ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE, *quoted in* KIMBALL, *supra* note 12, at 349.

[513] BAKER, *supra* note 20, at 245.

[514] *Id.*

[515] KELLOGG, *supra* note 47, at 41.

[516] *Id.* at 47.

[517] *Id.* at 46.

[518] *Id.* at 46-47.

[519] HOLMES, *Primitive Notions in Modern Law, No. I*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 4; *see also* KELLOGG, *supra* note 47, at 129 (noting that the article was published in April 1876).

[520] HOLMES, *Primitive Notions in Modern Law, No. II*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 21; *see also* KELLOGG, *supra* note 47, at 147 (noting that the article was published in July 1877).

[521] WHITE, *supra* note 20, at 133-34.

"various considerations of policy which are not infrequently supposed to have established these doctrines, have, in fact, been invented at a later period to account for what was already there . . . ."[522] To Holmes, this did not necessarily mean that the rules were unsound,[523] but that it was enough "to justify scrutiny and revision."[524] This marked an important shift by Holmes from the Austinian analytical method he had used in the early 1870s.[525] Whereas Austin had sought to reconcile prevailing precedent based on logic, Holmes's historical approach now questioned "the value of precedents, merely as such."[526]

In the second installment in 1877, he showed how nonlogical elements had made their way into the law of succession,[527] writing: "How comes it, then, that one who neither has possession in fact nor title, is so far favored? The answer is to be found not in reasoning, but in a *failure to reason*."[528] Holmes's historical approach, like Langdell's, showed an indebtedness to (or at least agreement with aspects of) the "historical school" founded in the early nineteenth century by Savigny,[529] which had romantic elements.[530] Holmes was proud of his new direction, so much so that he sent Emerson a copy of the first essay, with a note stating:

> It seems to me that I have learned, after a laborious and somewhat painful period of probation that the law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die. Accept this little piece as written in that faith, and as a slight mark of gratitude and respect I feel for you who more than anyone else first started the philosophical ferment in my mind.[531]

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[522] HOLMES, *supra* note 519, at 5.
[523] *Id.* at 15.
[524] *Id.*
[525] KELLOGG, *supra* note 47, at 38-39.
[526] *Id.* at 39.
[527] *Id.*
[528] HOLMES, *supra* note 520, at 30 (emphasis not in Holmes's original).
[529] Hoeflich, *supra* note 6, at 106.
[530] Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 853 (1990); *see also* CRANSTON, *supra* note 180, at 47 (referencing Savigny's role in German Romanticism); Knudson, *supra* note 495, at 410 (noting that "[m]uch of German legal science can be traced back to German romantic philosophers . . . . [T]he German romantic philosophers helped pave the way for German legal science to entertain a romantic sense of history and view the study of history as indispensable to understanding the law."). Holmes read Sir Henry Maine's *Ancient Law* (twice) during the late 1860s, Kellogg, *supra* note 353, at 458-9 n.7, and it thus likely had at least some influence on Holmes's shift to a historical approach to law. *See* WELLS, *supra* note 150, at 110-11 (stating that this book in particular made an impression on Holmes).
[531] BAKER, *supra* note 20, at 251.

Around the same time, Langdell made it clear that his view of law as similar to natural science should not be misunderstood as suggesting it has "the demonstrative certainty of mathematics [or] acknowledge[s] truth as its ultimate test and standard, like natural science [does]."[532] Thus, even as Holmes started his shift from an Austinian analytical approach in 1876, there was no visible difference between Holmes's and Langdell's theories of law, as neither believed that law was based on a priori truths.[533] Holmes in fact continued to praise Langdell. Langdell sent Holmes the page proofs of his forthcoming book, *A Summary of Equity Pleading*, and then the final version when it was published.[534] This summary followed the historical and functional approach of his prior work,[535] and Holmes, reviewing it in July 1877, wrote that it was "one of the most remarkable books which has ever been written upon a legal subject by an American author."[536]

XII. THE THREAT OF KANTIAN ETHICS (1878)

Holmes was not the only one pleased with Langdell's casebooks. Langdell learned that his contracts casebook was selling out and that the publisher wanted a new edition, so in 1878 he started work on a second edition.[537] He would spend most of his time, however, writing a 131-page summary of contract law that would be an appendix to the casebook.[538] The principal impetus for the appendix was to address Holmes's criticism in 1872 that Langdell's casebook was "a pretty tough *pièce de résistance* without a text-book or the assistance of an instructor."[539] More importantly, however, the appendix would provide Langdell with the opportunity to use his tremendous knowledge of the development of Anglo-American contract law and his years of using his casebook and the Socratic method to help bring order to an important part of the common law.

What remained for Holmes after 1877 was to apply his new perspective to the whole body of the common law.[540] By this time Holmes had already started his move toward embracing external and objective

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[532] KIMBALL, *supra* note 12, at 350 (quoting C. C. LANGDELL, ANNUAL REPORT 1876–77, at 96–97).

[533] *See* KELLOGG, *supra* note 47, at 46; KIMBALL, *supra* note 12, at 350 (quoting C. C. LANGDELL, ANNUAL REPORT 1876–77, at 96–97).

[534] KIMBALL, *supra* note 12, at 100.

[535] *Id.* at 102.

[536] Oliver Wendell Holmes, Jr., *Book Notice*, 11 AM. L. REV. 763, 763-64 (1877). *See also* KIMBALL, *supra* note 12, at 99 (noting that Holmes was the author of the anonymous review).

[537] KIMBALL, *supra* note 12, at 100.

[538] *Id.*

[539] *Id.*

[540] KELLOGG, *supra* note 47, at 47.

standards of liability as the common law's unifying theme (introduced in his 1873 torts essay)[541] in contrast to subjective standards or ones based on moral fault (Austin's failing).[542] His skepticism prevented him from ever embracing natural law as a unifying theme, and his research into the law of possession for his next essay, "Possession,"[543] published in July 1878,[544] led him to conclude that Kantian ethics—whose thesis was that "no man may be looked upon as a means, but only as an end" and that respected individual autonomy[545]—threatened to invade the common law.

In Europe, the civil law of possession had been influenced by both Roman law and Kantian moral philosophy,[546] and viewed possession as based on ownership, and ownership in turn based on an intent to own the item.[547] This idea had then been "used to support the Kantian notion that freedom of the will was manifest in the law . . . ."[548] Holmes, however, had concluded that such a view was inconsistent with the common law, as a bailee (who has no ownership) had a possessory action.[549]

His concern went beyond the law of possession, however. Showing the influence of Green and perhaps also Peirce, Holmes saw in this the greater danger of courts incorporating into legal concepts (like the law of possession) external moral notions when those notions had nothing to do with the legal concept's origins, its development, or how it was in fact being used.[550] Wright's influence had also led him to reject the idea that there was such a thing as moral truth that could resolve legal issues. Kant's ethics were, after all, as one commentator has noted, "based uncompromisingly on the search for a single supreme principle of morality, a principle moreover that has rational authority, leading rather than following the passions, and binding on all rational creatures."[551] Consistent with the influence of pre-college Romanticism, Holmes rejected the idea that stiff rationality could illuminate the path to social progress. Further, the post-war Holmes believed that "glittering generalities"—such as the Declaration of Independence and its philosophy of natural rights—were simply too abstract to be used for

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[541] HOLMES, *supra* note 503.

[542] KELLOGG, *supra* note 47, at 47.

[543] HOLMES, *Possession*, *supra* note 34, at 37.

[544] KELLOGG, *supra* note 47, at 167.

[545] Howe, *supra* note 396, at xvi. Immanuel Kant, the eighteenth-century German philosopher whose moral philosophy was one of the major sources for modern liberalism, sought "to focus exclusively upon the question of how our actions impact upon the equal freedom of others," SIMMONDS, *supra* note 378, at 10, and which gave peremptory force to an individual's "rights" as "domains within which the individual will should reign supreme." *Id.* at 292.

[546] KELLOGG, *supra* note 47, at 49.

[547] *Id.*

[548] *Id.* at 50.

[549] HOLMES, *Possession*, *supra* note 34, at 43–44; KELLOGG, *supra* note 47, at 49–50.

[550] KELLOGG, *supra* note 47, at 50.

[551] BLACKBURN, *supra* note 163, at 259.

deducing particular legal rules.[552] Thus, a variety of influences alerted him to the problem of Kantian ethics threatening the common law, and because of his conservative political perspective this caused him alarm.

XIII. THE PARADOX OF FORM AND SUBSTANCE: DETHRONING LOGIC FOR POLICY (1879)

In July 1879, Holmes published "Common Carriers and the Common Law,"[553] in which he first stated his famous idea of a "paradox of form and substance" in the common law's development.[554] According to Holmes, the form of the common law's development appeared logical, with "each new decision" following "syllogistically from existing precedents."[555] Yet, some "precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten. . . ."[556] When these precedents continued to be followed, the result was to create confusion from a logical point of view.[557] But Holmes (who, recall, revered the common law system) wrote that "as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them . . . ."[558] Accordingly, "in substance the growth of the law is legislative," and legal doctrine was based on "[t]he very considerations which the courts most rarely mention, and always with an apology[:] . . . considerations of what is expedient for the community concerned."[559] Legal rules were thus "in fact and at bottom the result of more or less definitely understood views of public policy . . . ."[560] In sum, whereas the form of rules and their application appeared logical, the substance of the law and its application was based on considerations of public policy (i.e., "what is expedient for the community concerned"). In fact, public policy was "the secret root from which the law draws all the juices of life."[561]

According to Holmes, this paradox of form and substance revealed "the failure of all theories which consider the law only from its formal side,

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[552] HOLMES, *supra* note 388, at 260.

[553] HOLMES, *Common Carriers and the Common Law*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 60. *See also* KELLOGG, *supra* note 47, at 40 (noting it was published in July).

[554] HOLMES, *supra* note 553, at 75.

[555] *Id.*

[556] *Id.*

[557] *Id.*

[558] *Id.*

[559] *Id.*

[560] *Id.*

[561] *Id.*

whether they attempt to deduce the *corpus* from *a priori* postulates, or fall into the humbler error of supposing the science of law to reside in the *elegantia juris*, or logical cohesion of part with part."[562] The common law took the form of a static body of rules, but in fact it evolved based on new views of public policy, "for ever adopting new principles from life at one end, and . . . always retain[ing] old ones from history at the other,"[563] advancing like an inchworm. Thus, the law "is always approaching and never reaching consistency."[564] Tracing the history of a legal doctrine to illustrate this so-called paradox of form and substance enabled one to "consider the question of policy with a freedom that was not possible before."[565] Holmes had not banished the use of logic from his effort to bring order to the common law, but he dethroned it for policy. At the same time, and for better or for worse, Holmes sought to demystify the common law.[566]

XIV. AN ENLIGHTENED THEORY AND THE POWERS OF DARKNESS (1879-80)

At the end of 1879, Holmes wrote his final essay before the Lowell Lectures, an article titled "Trespass and Negligence,"[567] which was published in January 1880.[568] In this article, Holmes moved more clearly into advocating for what he believed was an enlightened theory of law, likely based on the threat of Kantian ethics he had identified in 1878.[569] Holmes discussed competing views of tort law, each with support in the caselaw—one that would hold a defendant liable only if they were morally blameworthy and the other that would hold the defendant strictly liable.[570] He continued to argue that the law bases liability on external standards and thus rejected a test based on moral culpability.[571] He also, however, rejected a test based on strict liability (i.e., act at your own peril), asserting that "the public generally profits by individual activity" and "[a]s action . . . tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."[572] Further, holding someone strictly liable is "redistribut[ing] losses simply on the ground that they resulted from the

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[562] *Id.*
[563] *Id.* at 76.
[564] *Id.* at 75-76.
[565] *Id.* at 75.
[566] P. S. ATIYAH, *Holmes and the Theory of Contract*, *in* ESSAYS ON CONTRACT 57, 65 (1986).
[567] HOLMES, *Trespass and Negligence*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 76.
[568] KELLOGG, *supra* note 47, at 225; WHITE, *supra* note 20, at 140.
[569] *See* HOLMES, *supra* note 567.
[570] *Id.*
[571] *Id.* at 91 ("A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards . . . .").
[572] *Id.* at 83.

defendant's act . . . ." and would offend society's sense of justice.[573] Holmes argued therefore that an alternative theory, one based on reasonable care, was preferable[574] and that this was, in fact, "the true theory of [tort] liability."[575]

According to Morton Horwitz, this alternative theory—based on an objective standard of reasonable care—would, Holmes believed, promote stability and order in the common law,[576] "split the difference between the unpalatable extremes of natural rights and legislative positivism [i.e., codification],"[577] and base the law on what society considered customary.[578] But while Holmes stated at the article's outset that its object was "to discover the general principles governing the liability for unintentional torts at common law,"[579] Holmes was also now making a policy argument based on his previously expressed preference for external and objective standards of liability and for laissez-faire.[580] His tone from prior articles changed, and, as one commentator has noted, he was making "an unreservedly contemporary statement, culled not from history nor authority, but rather from Holmes' own intellectual assumptions."[581]

Just as the invitation to give the Lowell Lectures arrived, Holmes the positivist started to make openly normative arguments. He would seek not only to bring order to the common law, but he would also seek to help create an enlightened theory of law, a system that was capable of identifying the wisest rules. He would be one of those "able and experienced men, who know too much to sacrifice good sense to a syllogism."[582] By tracing the historical development of the common law, he would identify the patterns of its development and its general principles, but at the same time help it continue its journey toward enlightenment.[583] Below the common law's chaotic surface could be found an evolutionary process, rather than a random process, if one only looked carefully enough, and it was an evolution toward enlightened

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[573] *Id.* at 84.

[574] *See id.* at 92 (asserting that the defendant should be "bound to use such care as a prudent man would do under the circumstances . . . .").

[575] *Id.* at 90.

[576] Horwitz, *supra* note 269, at 39.

[577] *Id.* at 47.

[578] *Id.* at 49.

[579] HOLMES, *supra* note 567, at 76.

[580] WHITE, *supra* note 20, at 142-43.

[581] *Id.* at 142.

[582] HOLMES, *supra* note 53, at 75.

[583] *See* Gordley, *supra* note 495, at 442, 446 ("The program was to move by rational enquiry from decided cases and particular rules to still more general rules, and then to the ends served by those rules and the reasons why these ends are desirable. By so doing, one could understand, criticize, and reformulate the rules themselves. . . . Holmes' program, then, has two aspects. On the one hand, we need not 'a ragbag of details,' but the 'highest generalizations,' the 'broadest rules,' and more theory. On the other, we need careful attention to the purposes the law serves.") (footnotes omitted). *But see* WHITE, supra note 20, at 134 (noting that "historicism was incompatible with the universalistic assumptions of analytical jurisprudence.").

policies.[584] It was up to scholars like Holmes to chart the progress and to keep the common law moving in the right direction.

Around the same time, in the fall of 1879, Langdell published the second edition of his casebook,[585] which included as an appendix a 131-page summary of the topics covered in the book.[586] Importantly, unlike the historical and functional approach that his summary of equity pleading had taken, this summary was not organized in the same manner,[587] and was designed to be "a concise statement and exposition of the doctrines involved in [the] cases."[588] Langdell had likely played a role in the Lowell Institute's fall invitation to Holmes to give a lecture series on the law,[589] but what Langdell did not know at the time was that Holmes, when he read Langdell's summary, found something alarming.

In March 1880, Holmes fired his opening shot at Langdell. Already preparing for the Lowell Lectures, but not yet those on contracts, he wrote a scathing review of the second edition of Langdell's casebook or, more specifically, its appended summary of the blackletter law.[590] Holmes found there a method of legal reasoning that troubled him greatly, and his tone in this review departed dramatically from his prior reviews of Langdell's work.[591] Langdell's treatment of the mailbox rule (the rule that an acceptance by mail is effective upon dispatch) in the summary was indicative of the problem.[592] Holmes had praised Langdell's historical treatment of the issue in the first edition of his casebook, but now Holmes took issue with the following statement by Langdell:

> It has been claimed that the purposes of substantial justice and the interests of contracting parties as understood by themselves, will be best served by holding that the contract is complete the moment the letter of acceptance is mailed; and cases have been put to show that the contrary view would produce not only unjust but absurd results. *The true answer to this argument is that it is irrelevant . . . .*[593]

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[584] *See* Gordley, *supra* note 495.
[585] KIMBALL, *supra* note 12, at 100.
[586] *Id.*
[587] *Id.* at 102.
[588] LANGDELL, *supra* note 59, at 5.
[589] Steven A. Epstein, *The Black Book and PreModern Law*, *in* THE BLACK BOOK OF JUSTICE HOLMES: TEXT TRANSCRIPT & COMMENTARY xliv (Michael H. Hoeflich & Ross E. Davies, eds. 2021).
[590] HOLMES, Book Notice, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 102.
[591] *Id.* at 102-104.
[592] *See id.* at 103 (referencing Langdell's discussion of the mailbox rule, but not by name).
[593] LANGDELL, *supra* note 59, at 27 (emphasis added to original, but emphasized by Holmes) (footnote omitted).

Holmes believed that Langdell's indifference to the purposes of substantial justice "reveals a mode of thought which becomes conspicuous to a careful student."[594]

To Holmes, this was a matter of tremendous importance. While the materials Holmes and Langdell were using to bring order to the common law were the same (English and U.S. cases), Holmes believed that if enlightened order was going to be brought to the chaotic common law, a proper method of legal reasoning must be used. Recall that Holmes, in his July 1879 essay, had contended that legal rules were based on public policy (i.e., "what is expedient for the community concerned"), and thus criticized theories attempting to deduce rules from a priori principles or from logic.[595] In Langdell's summary, Holmes detected a method of legal reasoning (Langdell's "habit of mind" and a "mode of thought") that he had come to reject and that he would refute in the Lowell Lectures.[596] Holmes had previously praised Langdell's casebooks for being "conceived in the very spirit of the common law,"[597] but now Holmes came to believe that Langdell's method of legal reasoning was contrary to the common law's spirit.

Holmes wrote in his March 1880 book review:

> Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris,* or *logical* integrity of the system as a system. He is, perhaps, the greatest living legal theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together. . . .
>
> [He is] entirely . . . interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law. The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of

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[594] HOLMES, Book Notice, *supra* note 590, at 103.
[595] HOLMES, *supra* note 553, at 75.
[596] *See infra* Part XV, Section B.
[597] Holmes, Book Notice, 7 AM. L. REV. 145, 145 (1872).

> a decision, not its consistency with previously held views. No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is. More than that, he must remember that as it embodies the story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs. As a branch of anthropology, law is an object of science; the theory of legislation is a scientific study; but the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.
>
> The preceding criticism is addressed to the ideal of the final methods of legal reasoning which this Summary seems to disclose. . . .
>
> [H]owever, even if Mr. Langdell's results should hereafter be overruled in particular cases . . . they must be either adopted or refuted, they cannot be passed by . . . .[598]

Holmes believed that Langdell's summary showed that the latter's theory of contract law failed not because it attempted to bring order to the common law of contract by deducing rules from a priori postulates (which it had not).[599] Rather, it committed the humbler error of trying to bring order by making the law logically cohesive and, in doing so, ignored considerations of public policy, which is "the secret root from which the law draws all the juices of life."[600]

Langdell was, however, in fact seeking to fulfill the call of U.S. commentators from earlier in the century. These commentators had decried the chaos of the common law and sought to make the common law more certain and predictable by treating law as a deductive science, with decisions deduced logically from general principles.[601] These calls for treating law as a deductive science had been fueled, in part, by the distrust of lawyers and "the increasing

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[598] HOLMES, *supra* note 590, at 103-04.

[599] *See id.*

[600] HOLMES, *supra* note 567, at 75.

[601] *See* Hoeflich, *supra* note 6, at 112-19 (discussing the rise in the early nineteenth century U.S. in the popularity of treating law as a deductive science); *id.* at 120 (noting that Langdell's concept of legal science echoed those of, among others, U.S. commentators in the early nineteenth century).

dissatisfaction of the public with the seeming chaos and uncertainty of law and the legal process,"[602] a dissatisfaction experienced by Langdell firsthand in New York.[603]

Among those who sought to treat law as a science, the variable was how to derive the general principles from which further deductions could be made.[604] The earliest legal scientists sought to derive the general principles from natural law, while some later legal scientists sought to derive them from each nation's history and society.[605] Langdell, like Holmes, sought to derive them from caselaw.[606] But Langdell and Holmes knew that there would have to be more to it than that.[607] If the common law was in a state of chaos, giving it order could not be as simple as inferring general principles from the mass of ever-growing caselaw. When push came to shove, tough choices would have to be made, and if the idea of a priori truths was off the table, either policy or logic would have to be given primacy. For Langdell, it was logic, and his work in the 1870s and the application of logic had led him to conclude there were certain "right" answers.[608]

Holmes believed it had, in fact, always been, and should continue to be, policy. Logic had been "nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements."[609] The common law's substance was based on justice, reasonableness, experience, felt necessities, and human needs.[610] To Holmes, Langdell—with his "final methods of legal reasoning"[611]—had committed the sin the Romantics had identified long ago about the Enlightenment thinkers: the application of logic to concepts to which it should not be employed. For Holmes, Langdell's legal science had become unscientific because it did not reflect reality.[612] Holmes liked Langdell's empirical approach and his historicism; he just did not like his rationalism.[613] The Lowell Lectures would mark the clash between two versions of legal science, each using cases empirically to identify legal rules and bring order to the law but differing on whether public policy or logic should be given primacy when the cases did not disclose a clear answer or disclosed conflicts in the rules.[614]

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[602] *Id.* at 119.
[603] *See supra* Part V.
[604] Hoeflich, *supra* note 6, at 121.
[605] *Id.*
[606] *See* LANGDELL, *supra* note 59.
[607] *See* KIMBALL, *supra* note 12, at 124-25; HOLMES, *supra* note 596, at 103.
[608] Kimball, *supra* note 133, at 124-25 ("[A]fter developing his understanding by surveying the cases (via his casebooks) in such fields as contract law and equity during the 1870s–a process that included advancing heretical criticisms, questions, errors, and revisions–Langdell arrived at what he regarded as 'right opinion' by the early 1880s.").
[609] HOLMES, *supra* note 596, at 103.
[610] *Id.*
[611] *Id.*
[612] *Id.* at 103-04.
[613] *See id.*
[614] *See infra* Part XV.

Holmes, referring to the summary in a letter to Frederick Pollock, later wrote: "A more misspent piece of marvelous ingenuity I never read . . . . [T]o my mind [Langdell] represents the powers of darkness. He is all for logic and hates any reference to anything outside of it, and his explanations and reconciliations of the cases would have astonished the judges who decided them."[615] Recall that as far back as 1871 Holmes had wondered if "a skeptical vein in [Langdell] is sometimes answerable to the prominence given to the other side of what is now settled."[616] Langdell now confirmed what Holmes had only suspected almost a decade earlier—that Langdell was not one of those "able and experienced men, who know too much to sacrifice good sense to a syllogism."[617] Holmes would later complain of "the narrow side of [Langdell's] mind, his feebleness in philosophising," and would even assert he had "rudimentary historical knowledge," and "was somewhat wanting in horse sense . . . ."[618]

Three months later, in June, Holmes began to work on his contracts lectures.[619] At the end of the month, Langdell, at the urging of his publisher,[620] published the summary separately from the casebook (hereinafter the *Summary*),[621] making only a few changes from the 1879 version,[622] thus ignoring Holmes's criticism. Its publication completed Langdell's decade of monumental publications on contracts and sales.[623] Another opportunity to refute Langdell's results in the *Summary* presented itself to Holmes in September, when he wrote a review of it.[624] With its separate publication from Langdell's casebook, Holmes had given it further study, something essential to preparing for his contracts lectures.[625] But Holmes punted, writing that "[i]t may be desirable, at a proper time, to give some reasons for different conclusions on many essential points; but that time is not the present."[626] That time would be at the end of the year, at Huntington Hall.

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[615] Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Apr. 10, 1881), *in* HOLMES-POLLOCK LETTERS, *supra* note 176, at 17.

[616] Holmes, Book Notice, *supra* note 357, at 243.

[617] HOLMES, *supra* note 553, at 75.

[618] Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (July 6, 1908), *in* HOLMES-POLLOCK LETTERS, *supra* note 176, at 140.

[619] Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (June 17, 1880), *in* HOLMES-POLLOCK LETTERS, *supra* note 176, at 14-15.

[620] LANGDELL, *supra* note 59, at 5.

[621] KIMBALL, *supra* note 12, at 102.

[622] *Id.* at 102 n.96.

[623] *Id.* at 102.

[624] Oliver Wendell Holmes, Jr., Book Notice, 14 AM. L. REV. 666, 666 (1880); *see also* Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning*, 25 L. & HIST. REV. 345, 366 & n.96 (2007) (identifying Holmes as the author of the anonymous review).

[625] *See* WHITE, *supra* note 20, at 172 (noting that Holmes's contracts lectures were "doubtless stimulated by his reading of Langdell's contracts casebook.").

[626] Holmes, *supra* note 624, at 666.

XV. HOLMES TAKES THE STAGE: THE LOWELL LECTURES (NOVEMBER-DECEMBER 1880)

Holmes's Lowell Lectures started on November 23, 1880.[627] He had three main objectives. First, he wanted to show that the common law had not developed logically but from experience.[628] Second, that the common law could not be given order based on a logical structure but only on public policy grounds.[629] Third, that this public policy should not be based on Kantian ethics respecting individual autonomy, but was, and should be, based on external and objective standards of liability,[630] an enlightened theory of law.[631] Holmes would be taking "the final step in a methodological progression from analytic jurist to historian to contemporary political theorist."[632] When he took the stage, he would bring with him the lessons of Emerson.[633] He was going to be an intellectual agitator, and if he was going to strike at a king (such as Langdell), he was going to try and kill him.[634]

A political agenda might be surprising for someone whose Civil War experience had caused him to "lose his belief in beliefs"[635] and led him to conclude that "certitude leads to violence"[636] and whose participation in the Metaphysical Club reinforced his skepticism. But if Holmes had lost his belief in beliefs and concluded that certitude leads to violence, it is surely only with respect to the types of beliefs that would lead people to kill, such as abolitionism. His skepticism was not going to keep him from advocating for what he believed was enlightened theory.

Holmes likely also believed that deciding what was true was a communal effort and that belief was "that upon which a man is prepared to act," and (from his skepticism) that today's truth was not necessarily tomorrow's. In his view, enlightened persons—Boston Brahmins like himself—were needed to help society make good choices and reject the

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[627] BAKER, *supra* note 20, at 252; BUDIANSKY, *supra* note 21, at 176. This Article will assume that Holmes's lectures, although "as actually delivered were a good deal simplified" from those later published in *The Common Law*, HOLMES, *supra* note 10, at 3, tracked the published lectures in substance.

[628] WHITE, *supra* note 20, at 153.

[629] *Id.*

[630] *Id.* at 154.

[631] *See id.* at 161 ("[O]n of his goals in *The Common Law* was an overt reorganization of substantive fields around principles that he thought salient and policies that he thought sensible."). Morton Horwitz has argued that "Holmes believed that only through objective legal rules could the law provide the certainty and predictability necessary to regulate an increasingly complex and independent society." Horwitz, *supra* note 269, at 32.

[632] WHITE, *supra* note 20, at 179.

[633] WELLS, *supra* note 150, at 23.

[634] *See supra* note 204 and accompanying text.

[635] MENAND, *supra* note 104, at 4.

[636] *Id.* at 61.

powers of darkness.[637] Holmes also believed in being involved in the fight to improve society.[638] He would have viewed it as chivalrous and his duty to advocate for enlightened law, and he hoped his views would influence the bench and the bar and thus the common law's evolution.[639] He wanted to bring order to the common law, but the task could not (and should not) be extricated from making policy choices and continuing the progress of the law, as that was the common law's very spirit. Last, Holmes was of course intensely ambitious, and he was unlikely to make his mark (by age 40) unless he argued for a new and enlightened theory of law. Therefore, the skeptic who did not believe in beliefs would need some big ideas when he took the stage at Huntington Hall. Recall, however, that Holmes, as a result of his Civil War experience, had come to believe that the law should change slowly, sharing his generation's reluctance to unsettle the status quo.[640] Thus, his ideas would have to be ones that he believed had a basis in existing law, and that simply helped move it forward in the enlightened direction in which it had already been moving.[641]

Holmes's three contract lectures in December fit his general scheme.[642] Like his lectures overall, his contracts lectures sought to accomplish several objectives. First and foremost, consistent with his longtime goal, he sought to bring philosophical order to the law of contract, just as he sought to do with the other areas of the common law.[643] Second, he sought to have contract law's substance be consistent with what he viewed as his enlightened and general theory of the common law. He would argue that what was "convenient" (a term meaning consistent with public policy and social values)[644] was appropriate for determining the rules of contract law rather than using logic derived from a priori principles. Third, for its substance, he sought to establish that what was enlightened and convenient for the United States in the 1880s were contract rules that deemphasized the notion of actual assent (too Kantian and moralistic), and should instead be based on external and objective standards.[645] Fourth, such enlightened contract rules should be based on the idea that a contract is simply an

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[637] *See* BUDIANSKY, *supra* note 21, at 24 (discussing the concept of a Boston Brahmin).

[638] *See id.* at 181.

[639] HOWE, *supra* note 23, at 246.

[640] MENAND, *supra* note 104, at 59.

[641] In this sense, Holmes can be viewed as participating in a process that Ronald Dworkin analogized to different authors each writing, in succession, the next chapter in a chain-novel. *See* DWORKIN, *supra* note 196, at 228-38.

[642] WHITE, *supra* note 20, at 172.

[643] BUDIANSKY, *supra* note 21, at 168.

[644] *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 14 (1983) (discussing the concept of "acceptability," i.e., "justice or convenience").

[645] HOWE, *supra* note 23, at 232. Morton Horwitz has argued that Holmes's focus on objective rather than subjective standards was an effort to find a middle position between natural rights and legislative positivism through the "mediating notion of custom." Horwitz, *supra* note 269, at 47.

agreement under which each party assumes a risk, and that liability should extend to, but no further than, the risks objectively assumed (harkening back to Holmes's "bettabilitarianism" and his political conservatism).[646] Last, contract law should be stripped of the vestiges of the so-called benefit-detriment test for consideration (which was inconsistent with the idea that a contract is an agreement to assume risks), and consideration's form should match its substance, requiring reciprocal inducement between the promise and the detriment.[647] When Holmes took the stage, he was going to argue for a modern law of contract.

When it came to the substance of his contract lectures, on the most important matters (the objective theory and the bargain theory of consideration) Holmes and Langdell had no disagreement. In fact, while Holmes has traditionally been credited with the triumph of the objective theory of contract (refuting the Kantian-inspired will theory of contract, with its focus on a subjective agreement of wills)[648] and formulating the bargain theory of consideration (reciprocal inducement between promise and detriment),[649] Langdell's biographer argues it was Langdell who was primarily responsible for those theories.[650] Irrespective of whether Langdell or Holmes (or both or neither) should receive credit, what is important for present purposes is that Holmes and Langdell agreed on these two principal features of what later came to be known as classical contract law.[651] With the imprimatur of the United States' contract law theorist at the time (Langdell) and the person who was about to become the United States' leading legal theorist (Holmes), classical contract law would be launched.[652]

As Holmes had previously disclosed, his problem with Langdell was the latter's mode of legal reasoning employed in the *Summary*.[653] From the beginning of the Lowell Lectures Holmes therefore separated himself from this mode of reasoning, quickly repeating from his casebook review that "[t]he life of the law has not been logic: it has been experience."[654] He believed that Langdell's mode of reasoning in the *Summary* had sometimes

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[646] HOLMES, *supra* note 10, at 235.

[647] *Id.* at 229-30.

[648] GILMORE, *supra* note 4, at 39, 45-47. *But see* Joseph M. Perillo, *The Origins of the Objective Theory of Contract*, *69 FORDHAM L. REV. 427, 428 (2000)* (arguing that an objective standard has always predominated).

[649] *See* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 224 (1990) ("The impetus in the United States for the modern doctrine of bargain consideration as the sole test came from the writings of Holmes . . . ."); GILMORE, *supra* note 4, at 21-23 (arguing that bargain consideration was introduced by Holmes). *But see* JOHN P. DAWSON, GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARISON 203 (1980) (challenging Gilmore's "somewhat surprising suggestion that bargain consideration was a 'revolutionary' invention by Justice Holmes which he first disclosed to the world in 1881.").

[650] KIMBALL, *supra* note 12, at 104-107.

[651] *Id.*

[652] GILMORE, *supra* note 4, at 15.

[653] HOLMES, *supra* note 596, at 103-04.

[654] HOLMES, *supra* note 10, at 5.

led him astray, causing him to drift into a Kantian subjective theory of contract. Later, in 1886, Holmes explained:

> I think that in enlightened theory, which we now are ready for, all contracts are formal, and that a tacit assumption to the contrary sometimes has led Mr. Langdell astray. I had this definitely in view in what I said . . . in my Common Law . . . . [I]n the nature of a sound system of law (which deals mainly with externals) the making of a contract must be a question of form, even if the details of our law should be changed. There never was a more unfortunate expression used than "meeting of the minds." It does not matter in the slightest degree whether minds meet or not. If the external expression on the one side and the other coincide, the fact that one party meant one thing and the other another does not prevent the making of the contract.[655]

Holmes thus later conceded that his aim in the Lowell Lectures was not simply to describe the law as he found it; it was to announce an "enlightened theory" of law ("which we now are ready for"), and that a "sound system" of contract law doctrines must be based on external standards, even if that meant "the details of our law should be changed."[656] Holmes even wrote as the last line of his preface to *The Common Law*: "If, within the bounds which I have set myself, any one should feel inclined to reproach me for a want of greater detail, I can only quote the words of Lehuërou, 'Nous faisons une théorie et non spicilège' ['We do a theory and not an anthology']."[657] Holmes would thus be straddling the normative/descriptive divide during his contracts lectures.[658]

A. *Using History To Clear the Way for the True Theory of Contract* (*December 14, 1880*)

Holmes's first contracts lecture might have appeared to be a dry, pedantic discussion of contract law's history, but it served as the critical foundation for his later policy arguments. By the time he left the stage on

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[655] HOWE, *supra* note 23, at 233 (quoting draft of letter from Oliver Wendell Holmes, Jr. to E. A. Harriman (Jan. 4, 1896)).

[656] *Id.*

[657] HOLMES, *supra* note 10, at 3.

[658] *See* ATIYAH, *supra* note 566, at 57 (noting that in Holmes's *Common Law* lectures he does not distinguish between a descriptive and a normative theory).

December 14, he had demonstrated four points about the doctrine of consideration (contract law's most important concept): it was an example of the paradox of form and substance; its evolution was based on experience rather than logic; its current substance was based on policy; and its current form was worthy of scrutiny and revision.[659] His very first statement—that "[t]he doctrine of contract has been . . . thoroughly remodelled to meet the needs of modern times"[660]—and his later statement that contract law had grown into its present "enlightened rules"[661] would support his later arguments that contract law should continue to evolve to meet the needs of modern society.

To clear the way in the next lectures for his view of a modern law of contracts, he argued in the first lecture that the origins of England's common law of contract had been "of pure German descent" rather than Roman law.[662] This enabled him to distance the common law of contract from the Kantian ethical gloss that the civil law jurists had put on Roman law and that was seeping into England's common law of contract.[663] Holmes's modern contract law could thus deemphasize the notion of subjective assent and emphasize external and objective standards.

Holmes also showed that the history of contract law had been one of evolution and a classic example of the paradox of form and substance. He masterfully traced the development of the then-current benefit/detriment test for consideration, which provided that consideration is any benefit to the promisor or detriment to the promisee.[664] The benefit side arose from the ancient practice of having witnesses present at the seller's delivery of property to a buyer, so as to avoid later unfounded claims by the seller that the buyer had stolen the property.[665] This procedural device, originally used simply to avoid unfounded claims of theft, led to the writ of debt (a writ for the recovery of a debt of money) requiring that the debtor have received a benefit from the creditor, i.e., that the delivery was a quid pro quo.[666] Over time, this quid pro quo requirement (which originated to protect against unfounded claims of theft) was extended to all contracts not under seal,[667] and thus an inversion took place—"what was an accident of procedure had become a doctrine of substantive law."[668] The evolution of the writ of debt with its requirement of

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[659] *See* textual discussion *infra*.
[660] HOLMES, *supra* note 10, at 195.
[661] *Id.* at 198.
[662] *Id.* at 198-200.
[663] HOWE, *supra* note 23, at 228; WHITE, supra note 20, at 172 & 528 n.78.
[664] HOLMES, *supra* note 10, at 198-226.
[665] *Id.*
[666] *Id.* at 204.
[667] *Id.* at 210-13.
[668] *Id.* at 209.

the debtor receiving a benefit was thus an example of the paradox of form and substance, with the form of the rule (a benefit received by the promisor) being retained and extended for substantive reasons.

But, as time went by, the writs of debt and covenant (the writ of covenant enforced promises made under seal) "ceased to be adequate" for the needs of society.[669] These writs did not provide redress when a person undertook to perform a task for another and performed it negligently, thus causing harm to the other (similar to a modern tort).[670] At first, the writ of trespass on the case filled the gap,[671] and in time a key feature of these particular types of claims came to be the defendant having assumed a duty by promising to perform and, after undertaking performance, performing the task badly.[672] That the defendant's promise was material to such claims led to the creation of "a new and distinct action of contract,"[673] and the modern law of contract, which was coming to focus on promissory obligation, would arise from there through another writ—the writ of assumpsit.[674] The writ of assumpsit's reach was extended beyond those of debt (with its requirement of a benefit to the debtor) to situations where there had been a promise and a mere detriment, and even to situations where there had been just a failure to perform as promised (rather than performing badly).[675] When a promise was later recognized as itself a detriment and thus as consideration, there arose the concept of bilateral contracts (a promise for a promise being legally binding before any benefit was actually provided or any detriment actually incurred), and assumpsit supplanted debt as the primary vehicle for enforcing contracts.[676] Holmes believed that while "[c]onsideration is a form as much as a seal," the modern concept of consideration had "foundation in good sense, or at least falls in with our common habits of thought . . . ."[677] Enforcing a mere promise for a promise made good sense to him.

By tracing contract law's evolution, Holmes showed that while the doctrine of consideration took on the appearance of a logical concept, its true evolution had been an example of the paradox of form and substance. Its present form was in fact based on society's needs. [678] As an example of the paradox of form and substance, the form of the current test was, however,

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[669] *Id.* at 215.
[670] *Id.* at 216-17.
[671] *Id.*
[672] *Id.* at 220-23.
[673] *Id.* at 222.
[674] *Id.* at 215.
[675] *Id.* at 224.
[676] *Id.* at 226.
[677] *Id.* at 215.
[678] *See id.* at 195 (noting that "[t]he doctrine of contract has been so thoroughly remodelled to meet the needs of modern times . . . .").

worthy of scrutiny and revision. His first lecture thus set the basis for maintaining in his next two lectures that the common law of contract had evolved into a vehicle for permitting persons to assume risks, and that it should continue to evolve in that direction. There was no reason not to continue contract law's growth in the direction of enlightenment and the needs of modern society, particularly because the writ system was disappearing, and the common law could thus be more easily shaped for the future.

Assumpsit's victory (in the seventeenth century over debt and covenant) meant, however, that the concept of a promise had become integral to contract, as assumpsit was based on the enforcement of promises.[679] Holmes had no desire to reverse this trend.[680] In fact, it has been argued that "the conception of contract with an exclusive focus on promise is a product of classical theorists' successful work."[681] Holmes could thus not avoid the concept of *promise*, conceding at the outset of his second contracts lecture—on the elements of contract—that "[t]he common element of all contracts might be said to be a promise . . . ."[682]

Holmes, however, showing his indebtedness to Green and perhaps Peirce, cared little for an abstract meaning of *promise*. He argued in the first lecture: "[T]o explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever came to frame a future tense. The nature of the particular promise which was first enforced in a given system can hardly lead to any truth of general importance."[683] "Promise" was, as Green had shown about "proximate cause" a decade earlier, just a concept, not an actual entity, and the community's opinion of this concept when it first originated could have no hold on the present.[684] The legal concept of *promise*, like the legal concept of *proximate cause*, could mean nothing more than the place courts had chosen to attach contractual liability. Recall that Peirce too had reduced concepts to their operations,[685] and here we thus possibly see Peirce's influence, with Holmes reducing the concept of *promise* to its operations. Holmes knew that a "promise," if given in law its general or a philosophical meaning, might come embedded with moral notions, which Holmes wanted to avoid as being inconsistent with his rejection of Kantian ethics and what he believed was the true common law theory of contract, which he was ready to announce in his next lecture. Promising was a

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[679] *See id.* at 227 ("The common element of all contracts might be said to be a promise . . . .").

[680] KREITNER, *supra* note 3, at 19.

[681] *Id.*

[682] HOLMES, *supra* note 10, at 227; *see also* ATIYAH, *supra* note 566, at 67 (arguing "that Holmes's whole approach . . . upgraded the importance of the promise.").

[683] HOLMES, *supra* note 10, at 198.

[684] *See id.*

[685] KELLOGG, *supra* note 47, at 58.

convention that, if treated as having been imported wholesale into contract law, would bring with it the convention's moral aspects and thus prevent the recognition of the true theory of contract.[686]

B. *The Common Law's True Theory of Contract: "Promise" as Assumption of Risk* (*December 17, 1880*)

Holmes started his second contracts lecture—on the elements of contract—with a discussion of consideration,[687] and here he set forth what became his famous bargain theory of consideration.[688] Repeating a test he had asserted as far back as 1871 in his essay "Misunderstandings of the Civil Law,"[689] he concluded that the true test of consideration was, or should be, that a detriment is consideration only if it is bargained for (that is, the promise and the detriment were reciprocal inducements).[690] It was an argument arguably consistent with what courts were already doing,[691] but also consistent with Holmes's political and economic conservatism. In any event, Holmes believed that this test captured the true substance of the modern doctrine of consideration, whereas the benefit/detriment test was simply its outdated form.[692] Under this modern doctrine, there was no place for protecting promisees who detrimentally relied on a promise but had not bargained for the promise and given something in exchange for it.[693] On this point, Langdell did not disagree.[694]

At the same time, Holmes emphasized that a bargained-for exchange was based on whether the parties had externally given the appearance of a bargain, rather than asking if they had subjectively intended a bargain.[695] Holmes had paved the way for this argument in his first contracts lecture when

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[686] For a modern argument that contract law is necessarily based on morality since it incorporates the convention of promising, *see* FRIED, *supra* note 288, at 7-27.

[687] HOLMES, *supra* note 10, at 227.

[688] *Id.* at 230.

[689] HOLMES, *supra* note 388, at 264-65.

[690] *Id.*

[691] DAWSON, *supra* note 649, at 203.

[692] HOLMES, *supra* note 10, at 227-32.

[693] *See* TEEVEN, *supra* note 649, at 226 ("Bargain consideration left no room for detrimental reliance, even though it played an important part in the genesis of the doctrine of consideration.").

[694] *See* LANGDELL, *supra* note 59, at 96 ("[I]t may be that the plaintiff changed his position on the faith of the promise, but that would not constitute a consideration for the promise."), 108-09 (arguing that recognizing detrimental reliance as a basis for enforcing a promise would render consideration unnecessary and eliminate the distinction between the common law and the civil law).

[695] HOLMES, *supra* note 10, at 230. If Holmes did not make this sufficiently clear in his lectures, this is certainly what me meant. In his copy of *The Common Law* he handwrote in this discussion that "[t]he whole doctrine of contract is formal & external." *Id.* n. "a" [editor's additional note].

he asserted that "consideration is a form as much as a seal."[696] The policy behind the modern doctrine of consideration was enforcing a bargained-for exchange, but the test for determining if there had been a bargained-for exchange should be determined by the external form the agreement took, not what the parties subjectively intended.

Holmes's bargain theory of consideration would prove highly influential and become one of the foundations of classical contract law,[697] but it was his discussion of the concept of *promise* where he voiced his disagreement with Langdell. Langdell did not disagree with the bargain test for consideration or with the objective theory of contract, but Holmes believed that Langdell's discussion of the concept of *promise* had led him astray, away from a theory of contract law based on external, rather than subjective, standards.[698] Langdell had incorporated rules of promising from outside the law, and his rationalism had caused him to fall in with Kantian ethics.[699]

Holmes started his discussion of the concept of *promise* with its definition in the Indian Contract Act of 1872,[700] a statute that had been designed to bring India's contract law into harmony with English contract law.[701] The English legal scholar Frederick Pollock had even included the Act's definition of *promise* in his 1876 contract treatise.[702] The Act provided that "[w]hen one person signifies to another his *willingness to do or to abstain from doing anything*, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal [i.e., offer]," and "[w]hen the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted," and "[a] proposal when accepted becomes a *promise*."[703] What Holmes took (or chose to take) from this was that the scope of promises, as that concept was used in contract law, should be limited to promises to perform (or not perform) an act *within the promisor's control*.[704]

Holmes saw a problem with this meaning of *promise*, one that, if accepted, would preclude parties from entering into binding contracts where one party was promising the occurrence of an event outside his control, since he would not be signifying his "willingness to do or to abstain from doing

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[696] *Id.* at 215.

[697] *See* TEEVEN, *supra* note 649, at 224 ("The impetus in the United States for the modern doctrine of bargain consideration as the sole test came from the writings of Holmes . . . .").

[698] *See* HOWE, *supra* note 23, at 233 (quoting draft of letter from Oliver Wendell Holmes, Jr. to E. A. Harriman (Jan. 4, 1896)).

[699] *See id*.

[700] HOLMES, *supra* note 10, at 233.

[701] Atul Chandra Patra, *Historical Background of the Indian Contract Act, 1872*, 4 J. INDIAN L. INST. 373, 395 (1962).

[702] FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 6 (1876).

[703] HOLMES, *supra* note 10, at 233-34 (emphases added).

[704] *Id.* at 234.

anything."[705] Holmes thought that limiting promises to those involving the promisor performing (or not performing) an act within their control was imbuing the legal concept of *promise* with external dogma based on morality.[706] He asserted that "[i]n the moral world it may be that the obligation of a promise is confined to what lies within the reach of the will of the promisor,"[707] but he believed this would not do for an enlightened theory of contract law. He thought that "a man may bind himself at law that any future event shall happen" and "can therefore promise it in a legal sense."[708] For example, Holmes believed that a man could promise it would rain tomorrow or that a third party would paint a picture,[709] each an event outside the promisor's control, and that a *promise*, in a legal sense, "is simply an accepted assurance that a certain event or state of things shall come to pass."[710]

Holmes supported his argument by pointing out that the concept of a *promise* being limited to promising an event within the promisor's control could not withstand logical analysis.[711] He argued that the only difference between a promise that it would rain tomorrow, a promise that a third party would paint a picture, a promise that the promisee would receive 100 bales of cotton, and a promise that the promisor would pay the promisee one hundred dollars, was "in the degree of power possessed by the promisor over the event," explaining:

> He has none in the first case. He has equally little legal authority to make a man paint a picture, although he may have larger means of persuasion. He probably will be able to make sure that the promisee has the cotton. Being a rich man, he is certain to be able to pay the one hundred dollars, except in the event of some most improbable accident.[712]

Holmes, by showing that the Indian Contract Act and Pollock's concept of *promise* could not be based on logic, thereby cleared the way for a broader concept that served the policies of a modern contract law.

Holmes thought the legal concept of *promise* concerned nothing less than the very "theory of contract."[713] By this he meant that the very theory of contract was (according to him) that a contract involves the parties assuming

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[705] *Id.*
[706] *Id.*
[707] *Id.*
[708] *Id.*
[709] *Id.* at 234-35.
[710] *Id.* at 235.
[711] *Id.* at 234.
[712] *Id.*
[713] *Id.* at 235.

the risk of the nonoccurrence of an event, rather than simply promising to use their best efforts to make it happen,[714] the latter concept being tinged with moral judgments. Holmes argued that "[t]he consequences of a binding promise at common law are not affected by the degree of power which the promisor possesses over the promised event," and "[i]f the legal consequence is the same in all cases, it seems proper that all contracts should be considered from the same legal point of view."[715] Thus, if promises could be made even though the promised event would be difficult for the promisor to cause to happen, then refusing to enforce a promise of an event completely out of one's control would be inconsistent with the prevailing theory of contract. Also, the general remedy for breach of a contract was not specific performance (an order to perform as promised), but simply the payment of damages, and thus there was no need to have a narrow concept of promise that was somehow linked with the idea that a promisor's actions are put under the promisee's will.[716]

Once one recognizes that promises were being enforced even though the promisor's ability to make the event happen was always to a certain extent out of the promisor's control, and that "[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass,"[717] the true theory of contract law was revealed. It is simply an agreement in which each party assumes the risk of paying damages if the promised event does not come to pass. The fact that the promisor was liable only for damages (and thus in a sense had an option to perform or to pay) was used by Holmes not as a justification to narrow the scope of legally binding promises, but to expand it. This broad concept of *promise* was consistent also with his laissez-faire views on economics as it increased the ability of parties to enter into binding contracts of exchange. Holmes might have wanted to strip legal rules of any dependence on a person's actual motives, but he was a believer in freedom of contract. The true theory of contract was based on parties voluntarily assuming risks, but this true theory was based on sound policy, not Kantian ethics and a natural right to autonomy. The fact that the results were the same did not mean their sources were.

Here, Chauncey Wright's influence on Holmes can be seen in two ways. First, Wright had taught Holmes that moral issues did not have answers that could be proven correct; therefore, any concept of *promise* based on morality could not be proven true, and thus could not provide indisputable answers to the legal questions that arose from the meaning of *promise*.

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[714] *Id.*
[715] *Id.*
[716] *Id.* at 235-36.
[717] *Id.* at 236.

Second, Holmes's view of a contract as an agreement under which each party assumes a risk was consistent with his "bettabilitarianism," which he had taken from Wright.[718]

If the true theory of contract was "the taking of a risk" (and nothing more), this had important consequences to Holmes for the proper determination of recoverable damages. At this point, it is necessary to take a step back and recognize what Holmes is doing, and to acknowledge the similarity of his approach to that of Langdell. Once Holmes had identified the true theory of contract as an agreement in which each party assumes a risk, he treats this like an axiom from which lower-level rules can be deduced. Holmes had not come to this true theory of contract from glittering generalities derived from a natural law concept of a "right" to contract (too Kantian). Rather, he believed it was based not only on caselaw precedent, but sound policy. Also, he was still seeking to create order out of the chaotic common law, and general principles (that were not too abstract) were thus necessary, or the common law would remain nothing more than chaos with an index. In this latter sense, Holmes was still working, to an extent, in the Austinian tradition of analytical jurisprudence, which was "concerned with defining legal concepts and working out their implications."[719]

For Holmes, this true theory of contract had "practical advantage[s],"[720] one of which was that the amount of recoverable damages should be limited to the risk assumed by the promisor. Holmes wrote in *The Common Law* that

> according to the opinion of a very able judge, which seems to be generally followed, notice, even at the time of making the contract, of special circumstances out of which special damages would arise in case of breach, is not sufficient unless the assumption of that risk is to be taken as having fairly entered into the contract.[721]

Holmes wrote that "[a]s the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary."[722] He acknowledged that parties, when contracting, typically contemplate performance rather than breach, and thus the extent of the damages of which the promisor assumed the risk was a matter of construction rather than

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[718] WIENER, *supra* note 106, at 182.
[719] ALSCHULER, *supra* note 11, at 86.
[720] HOLMES, *supra* note 10, at 236.
[721] *Id.*
[722] *Id.* at 237.

discovering actual agreement.[723] He believed, however, that "[t]he very office of construction is to work out, from what was expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered."[724] And, to his mind, "[t]he price paid in mercantile contracts generally excludes the construction that exceptional risks were intended to be assumed."[725]

This flowed, Holmes believed, from "practical good sense" and was also consistent with the "true theory of contract under the common law."[726] This was an important gloss on the seminal 1851 English case of *Hadley v. Baxendale*, where the court had limited the recovery of indirect damages to those that "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it."[727] Under Holmes's view, indirect damages should be further limited to those for which the breaching party had tacitly agreed to assume the risk.

Here, Holmes's similarity to the mode of legal reasoning he criticized in Langdell was striking. He criticized Langdell for trying to create a logical, internally consistent structure for contract law through use of the syllogism to deduce lower-level rules.[728] Holmes, after discovering (or announcing) the true theory of contract (a voluntary agreement to assume risks), then used that principle to similarly deduce the proper lower-level rules. [729] Whether a breaching party should be liable for foreseeable, indirect losses irrespective of whether they had tacitly agreed to be liable for them was (despite what Holmes suggested) not settled law at the time Holmes gave his lectures.[730] If Holmes believed the rule made good "practical sense" (which of course it must if it was deduced from the true theory of contract), then contrary precedent was bad law that should be rejected and discarded as part of the survival of the fittest.

Holmes's view that the true theory of contract was an agreement between parties regarding the assumption of risks also resolved for him another issue—whether there was consideration when, at the time of the agreement, the occurrence of the event being bargained over had already occurred (or not occurred), such that one party was not, *in fact*, assuming any risk. Holmes provided a hypothetical to frame the issue: "[S]uppose that there

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[723] *Id.*
[724] *Id.*
[725] *Id.* at 237-38.
[726] *Id.*
[727] Hadley v. Baxendale (1854) 156 Eng. Rep. 145, 151 (Ex.).
[728] *See* HOLMES, *supra* note 596, at 103-04.
[729] HOLMES, *supra* note 10, at 236-38.
[730] *See* Larry T. Garvin, Globe Refining Co. v. Landa Cotton Oil Co*. and the Dark Side of Reputation*, 12 NEV. L.J. 659, 670-75 (2012) (discussing the authority).

is no element of uncertainty except in the minds of the parties. Take, for instance, a wager on a past horse-race. It has been thought that this would amount to an absolute promise on one side, and no promise at all on the other."[731]

Here is where Holmes took aim at Langdell's concept of *promise*. Langdell, in the *Summary*, had taken the position that a promise, if it was conditional on the existence of some past or present fact, was not truly a promise if the fact had not existed, or did not exist.[732] This meant that it should not be consideration for a counter-promise, and thus the counter-promise was not binding. Langdell acknowledged, however, that case precedent had held that such a promise was consideration, but he believed this to perhaps be a situation of *communis error facit jus* (common error makes law).[733] Langdell's support for his position was the 1761 treatise by the French civil-law jurist Robert Joseph Pothier.[734] Langdell wrote that "if a wager be made by mutual promises upon a race which has already taken place, but the result of which is unknown to the parties, it is the losing party alone who promises, and he really receives no consideration for his promise."[735] The idea was that if there had already been the nonoccurrence of the condition, then at the time of contract formation there was no duty to perform and hence no detriment. Whereas, if the event was to happen in the future, there was at least a conditional promise, which was a detriment because the promisor could possibly have to perform.[736]

Three things were notable about Langdell's position. First, he acknowledged that it was inconsistent with case precedent, which was contrary to his typical scientific and inductive approach to law. Second, he revealed how he was different from the Holmes of 1880 by not expressing any concern that his narrow concept of *promise* might make for bad law on policy grounds. Third, he relied on a French civil-law jurist for his support, a jurist who had "worked in the natural-law tradition."[737]

But the differences between Holmes and Langdell were only matters of degree. As has been shown, Holmes and Langdell each believed in general principles having to be identified to bring order to the common law, and each believed there were not that many.[738] Holmes believed that the true theory of contract at common law was that the parties were simply agreeing to assume

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[731] HOLMES, *supra* note 10, at 238-39.
[732] LANGDELL, *supra* note 59, at 40, 119.
[733] *Id*. at 119.
[734] *Id.* at 119 & n.1
[735] *Id*. at 119.
[736] *Id.* at 41, 89.
[737] *See* Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267, 288 (2005) (noting that Pothier "worked in the natural-law tradition").
[738] HOLMES, *supra* note 357, at 273.

a risk—no more, no less.[739] Langdell appeared less interested in a normative theory of contract law, and instead wanted its structure to be logical. For Langdell, by using a concept of *promise* external to the law, judicial lawmaking would presumably be more constrained. Both characteristics that Langdell implicitly revealed that he wanted for the well-ordered system—the use of logic and incorporating generally-understood meanings for terms—were consistent with his paramount desire to bring order to the common law in a way that would reduce discretion (and thus the ability for corruption) in judicial decision making.

Holmes believed, however, that Langdell's position on the concept of *promise* was unsound.[740] In his third contracts lecture Holmes would acknowledge that *promises* "properly so called" are "undertakings that certain facts shall be true at some later time," rather than "undertakings that certain facts are true at the time of making the contract."[741] But to Holmes, using this definition of *promise* arguably meant that no contracts should be binding, as even with respect to future events, "if the happening or not happening of the event is subject to the law of causation, the only uncertainty about it is in our foresight, not in its happening."[742]

It was, however, primarily Holmes's pragmatic nature that would not permit him to let an external concept of *promise* stifle contract law's development. He believed that the legal meaning of *promise* should be useful, rather than based on some preexisting concept of promise. If the true theory of contract was that it involved assumptions of risk, then the legal meaning of *promise* should coincide with that general theory and make the theory work. Holmes wrote that "[c]ontracts are dealings between men, by which they make arrangements for the future. In making such arrangements the important thing is, not what is objectively true, but what the parties know."[743] As Green had reminded him, truth should be thought of as that which persons would act upon, and here parties would act upon their uncertainty. Past events could be just as uncertain to the parties as future events, and thus there was no practical reason to distinguish between them.[744] If the common-law judges, in their wisdom, had been using the word *promise* in law in a particular and in a useful way, then that was the truth of the legal concept, not some other truth held by someone else, particularly not a civil-law jurist like Pothier, who had worked in the natural-law tradition.

Holmes, in his second lecture, then discussed the mailbox rule, and

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[739] HOLMES, *supra* note 10, at 236, 238.
[740] *Id.* at 239.
[741] *Id.* at 260.
[742] *Id*. at 239.
[743] *Id.*
[744] *Id.*

whether an acceptance sent by mail should be effective upon dispatch or upon receipt, an issue over which courts had disagreed.[745] The issue involved whether an acceptance by return promise required receipt by the offeror, inasmuch as a promise could be thought of as not becoming effective until communicated to the promisee.[746] Holmes argued that "[i]f convenience preponderates in favor of either view, that is a sufficient reason for its adoption."[747] In other words, the answer should be based upon considerations of policy, and could not be deduced with logic. Holmes had already (in his review of Langdell's casebook and appendix) indicated his disagreement with Langdell's argument that whether the correct answer to the mailbox issue led to "unjust but absurd results" was "irrelevant."[748]

Holmes then, as he had in his review of Langdell's casebook and appendix, criticized Langdell's analysis of the issue. Interestingly, as might be recalled, when Holmes first reviewed Langdell's casebook in 1871, he had praised Langdell's inclusion of cases decided both ways on this issue, as it showed the common law's evolutionary nature.[749] But in the appendix and *Summary*, Langdell had taken the position that the courts adopting the mailbox rule had misunderstood the issue,[750] and gotten it wrong.[751] Following Hugo Grotius (the Dutch natural-law theorist),[752] Pothier (the French natural-law jurist), and James Dalrymple, Viscount of Stair (the Scottish natural-law jurist),[753] he argued that a promise, by its nature, was not a promise until it was accepted by (and hence communicated to) the promisee,[754] and the mailbox rule was inconsistent with this meaning.[755] If the offeror sought a counter-promise as the consideration for their promise, then the consideration was not provided until the counter-promise was received and read.[756] Langdell, for support that the mailbox rule was incorrect, again reached back to the civilians for good logic. He relied on the arguments by

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[745] *Id.* at 239.

[746] Charles Fried has referred to this issue as a "famous conundrum." FRIED, *supra* note 288, at 51.

[747] HOLMES, *supra* note 10, at 239.

[748] HOLMES, Book Notice, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 103.

[749] HOLMES, Book Notice, *supra* note 357, at 243.

[750] LANGDELL, *supra* note 59, at 22.

[751] *Id.* at 23-28.

[752] *See* BIX, *supra* note 383, at 79 (noting that Grotius was a Dutch natural-law philosopher).

[753] *See* William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1094-98 (2010) (discussing Stair's use of natural law); *see also* Stephen Bogle, Contract Before the Enlightenment: The Ideas of James Dalrymple, Viscount Stair, 1619-1695, at 1 (2023) (noting that "Stair adopted the language of the 'will' in his explanation of contractual formation, moving the focus from external factors, such as physical transfer or formal writs to an internal mental trigger.").

[754] LANGDELL, *supra* note 59, at 9. Thus, an offer was ineffective unless and until it had come to the offeree's knowledge. *Id.* at 26.

[755] *Id.* at 22. Treating an acceptance as effective upon dispatch could thus, in a sense, be thought to violate logic's law of noncontradiction.

[756] *Id.*

Merlin de Douai, who had been the procureur-general at the French Court of Cassation, in the case of *S. v. F.* (included in Langdell's casebook),[757] which Langdell called a "powerful argument,"[758] and the Scottish judge John Marshall, Lord Curriehill, dissenting in *Thomas v. James*[759] (also included in his casebook).[760]

Holmes had already made it clear that the legal meaning of *promise* should be based on policy, but he also sought to show that Langdell's reasoning on the mailbox issue was unsound. This was classic Holmes. To demonstrate that the issue addressed by the mailbox rule could be decided based only on policy grounds, he sought to establish that the logical argument made by Langdell was faulty.[761] Holmes pointed out that even under a receipt rule, the law was that an acceptance was considered communicated to the offeror "when it is delivered and accepted, whether it is read or not."[762] He wrote in *The Common Law* that "I cannot believe that, if the letter had been delivered to the [offeror] and was then snatched from his hands before he had read it, there would be no contract."[763]

Holmes's disagreement with Langdell went deeper, however, than whether logic or policy should provide the answer to the question. He believed that Langdell's concept of *promise* was inconsistent with an enlightened theory of contract. Further, for Holmes, an enlightened theory of law was one based solely on external acts, and not a party's actual state of mind.[764] For example, even beyond the mailbox rule he expressed displeasure with an emphasis on mutual assent, perhaps Langdell's most important contribution to contract law. Holmes believed that treating an acceptance as something different from the offeree providing consideration was too suggestive of a subjective standard of contract formation. He thus sought to deemphasize the role of offer and acceptance, arguing that the failure of a contract to form could always be accounted for based on something other than a lack of acceptance, typically a lack of "relation between the offer and consideration as reciprocal inducements each for the other."[765]

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[757] LANGDELL, *supra* note 9, at 155.

[758] LANGDELL, *supra* note 59, at 25.

[759] *Id.*

[760] LANGDELL, *supra* note 9, at 117. For a more detailed analysis of Langdell's reasoning in rejecting the mailbox rule, *see* Daniel P. O'Gorman, *Langdell and the Foundation of Classical Contract Law*, 70 CLEV. ST. L. REV. 459, 538-44 (2022).

[761] HOLMES, *supra* note 10, at 239-40.

[762] *Id.* at 240

[763] *Id.*

[764] HOWE, *supra* note 23, at 233 (quoting draft of letter from Oliver Wendell Holmes, Jr. to E. A. Harriman, 1896).

[765] HOLMES, *supra* note 10, at 238. Langdell, however, acknowledged that "the question whether an offer has been accepted can never in strictness become material in those cases in which consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration." LANGDELL, *supra* note 56, at 10.

With respect to the mailbox rule, Holmes argued that "the making of a contract does not depend on the state of the parties' minds, it depends on their overt acts. When the sign of the counter promise is a tangible object, the contract is completed when the dominion over that object changes."[766] Dispatching a letter of acceptance was putting a tangible object out of the offeree's dominion, and thus consistent with contract formation under the objective theory. For Holmes, external actions rather than states of mind formed contracts.[767] Langdell's desire for a logical structure to the law, and his ignoring public policy, had (Holmes believed) led him astray into a Kantian subjective theory of contract.[768] This was the type of faulty legal reasoning, a type of darkness, that Holmes banished from his enlightened theory of contract law.

C. *The True Theory Knows no Bounds* (*December 21, 1880*)

Holmes's third and final contracts lecture was on voidable contracts and included his most aggressive and ambitious effort to rid contract law of subjective and moral elements. He underscored that

> [t]he law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by the externals, and judge parties by their conduct. . . . [A]s has been said before in these Lectures, although the law starts from the distinctions and uses the language of morality, it necessarily ends in external standards not dependent on the actual consciousness of the individual.[769]

In this final contracts lecture, he argued that those doctrines that would prevent the formation of a contract or that would make it voidable—such as mistake and fraud—and which seemed to be based on a party's state of mind, can in fact be explained as implied conditions objectively attached by the parties to the deal.[770] But his specific disagreements with Langdell had already been voiced in the prior lecture, though he did have occasion to discuss the concept of *promise* again in terms of his discussion of conditions:

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[766] HOLMES, *supra* note 10, at 240.
[767] *Id.*
[768] *See* HOWE, *supra* note 23, at 233 (quoting draft of letter from Oliver Wendell Holmes, Jr. to E. A. Harriman (Jan. 4, 1896)).
[769] HOLMES, *supra* note 10, at 242, 253.
[770] *Id.* at 246.

> If the view were adopted that a condition must be a future event, and that a promise purporting to be conditional on a past or present event is either absolute or no promise at all, it would follow that in this case the defendant had never made a promise. He had only promised if circumstances existed which did not exist. I have already stated my objections to this way of looking at such cases, and will only add that the courts, so far as I am aware, do not sanction it . . . .[771]

He also reiterated that "[t]he distinctions of the law are founded on experience, not on logic,"[772] that it would be foolish for the law "to aim at merely formal consistency,"[773] and that "the law does not go on any merely logical ground . . . ."[774] For example, he contended that, with respect to whether what the parties had contracted for was something different in kind from its description in the contract: "[T]he qualities that make sameness or difference of kind for the purposes of a contract are not determined by Agassiz [the biologist and geologist] or Darwin, or by the public at large, but by the will of the parties, which decides that for their purposes the characteristics insisted on are such and such."[775] Just like common-law judges deciding on the meaning of *promise* for the rules of contract law rather than moral philosophers, the *parties'* expressed intentions mattered for contract interpretation (as their contract was in essence an act of private lawmaking), not someone else's. Of course, when Holmes said "the will of the parties,"[776] he surely meant their will as expressed externally. Whether there was a tension between the objective theory and an emphasis on the parties' intentions (and "the consequences attaching to the relation [having to] be voluntary")[777] was a matter for another day.[778]

On December 31, 1880, Holmes concluded his Lowell Lectures with a summary of the prior eleven and he stepped off the stage. He had taken forty years of experiences and influences and fused their often conflicting lessons into his own brand of legal science, a legal science very different from

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[771] *Id.* at 257 (footnotes omitted).
[772] *Id.* at 244.
[773] *Id.* at 256.
[774] *Id.* at 258.
[775] *Id.*
[776] *Id.*
[777] *Id.* at 237.
[778] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY, 1870-1960, at 35-36 (1992) (discussing the argument in the early twentieth century that "[o]bjectivism could not be reconciled with individual autonomy or voluntary agreement. In fact, it demonstrated that the existing law of contract had regularly subordinated individual freedom to collective determinations based on policy or justice.").

Langdell's. Yet his principal views on contract law's substance did not differ from those of Langdell, and classical contract law was thus born.

EPILOGUE: BEYOND 1880

The year 1880 would be the high-water mark for Holmes's and Langdell's efforts to bring order to the common law. Langdell's 1880 *Summary* would be "considered his most significant scholarly contribution."[779] In 1883, his eyesight started failing him and he stopped writing for five years.[780] By 1892 he was nearly blind.[781]

Holmes's Lowell Lectures were published as his book *The Common Law* on March 3, 1881.[782] In the fall of 1881, on the strength of the book,[783] President Eliot of Harvard offered Holmes a position as a professor at the Law School.[784] Holmes accepted, and in September 1882 he became a man of letters after all.[785] However, on December 9, 1882,[786] after just a few months of teaching in the fall, he abruptly resigned to join the bench.[787] Rejecting his life of letters, he later wrote that "academic life is but half life—it is withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister."[788] He joined the Supreme Judicial Court of Massachusetts in January 1882[789] to help make his theory of enlightened law the actual law.[790]

But, as Mark Tushnet notes, "[a]s time passed . . . Holmes saw that the cases before the court would give him no opportunity to coordinate change, and he became frustrated in his work."[791] When he left the court to join the U.S. Supreme Court in 1902, he was "disappointed that he had not been able

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[779] Kimball, *supra* note 2, at 323.
[780] *Id.* at 324.
[781] *Id.*
[782] BAKER, supra note 20, at 253.
[783] Novick, *supra* note 33, at 272.
[784] COQUILLETTE, *supra* note 49, at 394.
[785] *Id.* at 395.
[786] *Id.* at 396.
[787] BUDIANSKY, *supra* note 21, at 180-81.
[788] Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (July 15, 1913), *in* HOLMES AND FRANKFURTER, *supra* note 13, at 12, 12.
[789] Novick, *supra* note 33, at 272.
[790] *See* Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 976 (1977) ("Since at least 1878 . . . Holmes had thought that a judicial position would give him the opportunity to shape American law directly through adjudication.").
[791] *Id.* at 977*; see also id.* at 979 ("He had expected the job to be creative and intellectually stimulating, but it was not; he had expected the work to deal with the central aspects of American life and with the broad outlines of the functions of basic institutions, but it did not. . . . Holmes, who lacked interest in the interrelations between legal doctrines and the actual functioning of real economic and political institutions, found that his work dealt with completely ordinary, even dull cases . . . .") (footnote omitted).

to influence the law of Massachusetts in the ways he had hoped."[792] In 1900, he wrote:

> A thousand cases, many of them upon trifling or transitory matters, to represent 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 and invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical philosophical exposition, setting forth the whole corpus with its roots in history and its justification of expedience real or supposed![793]

Holmes sounded nostalgic for 1880. He was frustrated on the U.S. Supreme Court as well, and in 1910 considered retiring within the next two years.[794] He remained "a relatively obscure justice overshadowed by the reputation of his more famous physician-poet father."[795] He was known primarily for his dissenting opinions.[796]

Ironically, as the decades after 1880 passed, the center for driving legal change shifted from judges to law professors, due in large part to Langdell's innovations at Harvard Law School that revolutionized law schools.[797] In 1887, Harvard Law School created the student-edited law review, and other schools soon followed suit.[798] The age's leading contracts scholars quickly took advantage of the new outlet to spread their ideas.[799] It would be law professors uttering smart things from their cloisters that would build classical contract from the foundation laid by Holmes and Langdell in 1880. In 1931, the Association of American Law Schools published a volume of more than one hundred articles on contract law, totaling over 1,200 pages,[800] recently hailed as "the single most important collection of essays

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[792] BAKER, *supra* note 20, at 334.

[793] *Id.*

[794] *See* Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Dec. 18, 1910), *in* HOLMES-POLLOCK LETTERS, *supra* note 176, at 172, 172 ("It soon will be time for me to resolve whether I will leave when I have done my ten years (Dec. 8, 1912)").

[795] Brad Snyder, *The House that Built Holmes*, 30 L. & HIST. REV. 661, 666 (2012).

[796] Robert W. Gordon, *Introduction: Holmes's Shadow*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR., *supra* note 267, at 1, 3.

[797] *See* Kimball, *supra* note 2, at 324 (noting that "the reforms that Langdell introduced into Harvard Law School were regarded as exemplary, and virtually every university law school in the United States adopted them over the next two decades" and that his appointment is thus considered the beginning of the modern law school).

[798] E. Allan Farnsworth, *Contracts Scholarship in the Age of Anthology*, 85 MICH. L. REV. 1406, 1419 (1987).

[799] *Id.*

[800] SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LEGAL PERIODICALS (Ass'n Am. L. Schs., ed. 1931).

ever published on the common law of contract."[801] Judge Benjamin Cardozo of the New York Court of Appeals wrote the introduction, in which he noted that "the vanguard of the column which in our common law system was once led by the judges, is led by them no longer . . . . [T]he outstanding fact is . . . that academic scholarship is charting the line of development and progress in the untrodden regions of the law."[802] Cardozo explained the influence of the law reviews in ways reminiscent of Holmes's theory of the common law given in 1880: "The modern outlook . . . is bringing us to a recognition of the truth that an opinion derives its authority, just as law derives its existence, from all the facts of life. . . . Under the drive of this impulse, the law teacher and the law reviews are coming to their own."[803] In 1880, Holmes had demystified the common law, and the move from judges to law professors as the vanguards for legal change was a confirmation of his—at the time—radical insights. He likely did not foresee that by seeking the fight as a member of the judiciary, he would largely miss out on it.

But just like Langdell and Holmes had brought their experiences with them to 1880, what they said that year had an enormous influence on the future generations of law professors in the vanguard. With respect to contract law's substance, Langdell has been credited with launching the idea of a general theory of contract law and Holmes with giving the theory its broad philosophical outline.[804] The Holmes-Langdell construct would then be given its detail in the late nineteenth and early twentieth centuries not by a judge but by a Harvard law professor named Samuel Williston.[805]

Holmes and Langdell's different methods of legal science would also have a tremendous impact on those who followed them. Langdell's emphasis on logic led to an entirely distinct system of legal thought that has been called "classical orthodoxy,"[806] and which was grafted onto and became a part of classical contract law. And when law professors in the early twentieth century sought to tear down the classical contract law that Holmes helped found with Langdell in 1880, they turned to Holmes the man of letters for help, co-opting his anti-Langdell policy-oriented approach to judicial lawmaking set forth in *The Common Law*.

The leading contracts scholar in this movement to tear down classical contract law was Arthur Corbin, a Yale law professor from Colorado who

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[801] Peter Benson, *Introduction* to THE THEORY OF CONTRACT LAW: NEW ESSAYS 2 n.3 (Peter Benson ed., 2001).

[802] Benjamin N. Cardozo, *Introduction* to SELECTED READINGS ON THE LAW OF CONTRACTS, *supra* note 800, at vii, ix.

[803] *Id.* at x.

[804] GILMORE, *supra* note 4, at 15.

[805] *Id.*

[806] Grey, *supra* note 644, at 2.

brought to the east his earthy, pragmatic, Western skepticism.[807] This new generation of skeptics were, like Holmes before them, "suspicious of large, abstract, and integrated theories," and "they associated [them] with Eastern elegance and conceptualism."[808] Corbin, perhaps more than any, used Holmes's method of legal reasoning to reject the foundations of classical contract law Holmes helped establish, including the objective theory of contract and the requirement of bargain consideration.[809] With respect to the former, Corbin would argue that the rules of contract were often "based upon principles of justice, policy, and right, and not the expressed will of the parties."[810] This next generation, seeing nothing enlightened about classical contract law, advocated for its overthrow, ultimately leading to the so-called death of contract in the middle of the twentieth century, proving, as Holmes later acknowledged about *The Common Law*, that "[e]very original book has the seeds of its own death in it . . . ."[811]

Holmes surely did not regret his choice to leave academia;[812] by the time of his retirement from the U.S. Supreme Court in 1932, he had achieved deity-like status and the immortality he so craved.[813] But being on the U.S. Supreme Court meant there was little he could do to keep the common law of contract law that he and Langdell built in 1880 from evolving into something different. The pursuit of prestige came at a price.

CONCLUSION

Classical contract law was launched in 1880 because two giants of the law—Oliver Wendell Holmes, Jr., and Christopher Columbus Langdell—spent the 1870s seeking to bring order to the common law, and because they agreed on the two principal theories that would serve as its foundation (the

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[807] HORWITZ, *supra* note 778, at 49.

[808] *Id.*

[809] Barbara Aronstein Black, *Corbin, Arthur Linton*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 2, at 128; HORWITZ, *supra* note 778, at 49-50.

[810] HORWITZ, *supra* note 778, at 49-50 (quoting Arthur L. Corbin, *Discharge of Contracts*, 22 YALE L.J. 513, 515 (1913)).

[811] Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Feb. 1, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 177, at 135-36*; see also* OLIVER WENDELL HOLMES, JR., *Montesquieu*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 425, 425-26 ("[T]he greatest works of intellect soon lose all but their historic significance. The science of one generation is refused or out-generalized by the science of the next; the philosophy of one century is taken up or transcended by the philosophy of a later one . . . ."); Letter from Oliver Wendell Holmes, Jr. to Patrick Augustine Sheehan (July 17, 1909), *in* HOLMES-SHEEHAN CORRESPONDENCE 27 (David H. Burton ed., 1976) ("I regard pretty much everything, and especially the greatest things, in the way of books, as dead in fifty, nowadays in twenty years.").

[812] *See* BUDIANSKY, *supra* note 21, at 181 ("Holmes never looked back with an ounce of regret at leaving the law school.").

[813] G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 65 (1971)*; see also* Gordon, *supra* note 796, at 3 (noting that "[o]n his retirement from the Court at the age of 90, [Holmes] was celebrated as few judges have even been, beloved and revered as a national treasure.").

objective theory and the bargain theory). Langdell's experience with the corruption of the New York judicial system and Holmes's harrowing war experience led them each to believe in the importance of a well-functioning legal system. Their similar experiences led them both to apply their generation's scientific, empirical approach to the project of organizing the common law.

But, at the same time, their different experiences led them to see the threat to the common law differently. Langdell most feared the type of corruption he experienced in the New York judicial system, and thus gave primacy to logic over policy to reduce judicial discretion. Holmes, after years of increasing skepticism about the value of logic and fearing most a common law that would not respond to society's changing desires and needs, gave primacy to policy over logic. These different approaches to legal reasoning were revealed in what appeared to be a minor disagreement about contract law—the legal meaning of *promise*. But it was a fundamental disagreement about law—how legal concepts should be given meaning.

Langdell's method of legal reasoning would dominate for the next half century and provide the structure for classical contract law, but in the mid-twentieth century Holmes's method would be used to tear that structure down. Whereas Langdell's and Holmes's methods of legal reasoning had been the product of the influences to which each had been exposed prior to 1880, their methods in turn influenced succeeding generations of legal scholars.