

The House that Built Holmes

BRAD SNYDER

Introduction

Justice Oliver Wendell Holmes Jr. is one of the few modern judges whose reputations have survived the twentieth century's culture wars relatively intact. Among his contemporaries Louis Brandeis, Benjamin Cardozo, and Learned Hand, Holmes was the first to become a judicial and cultural icon. Although Holmes's judicial reputation has fluctuated wildly since his death,¹ his

1. Holmes's list of critics is long. See, for example, Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000), 10; Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977), 49; Yosai Rogat, "Mr. Justice Holmes: A Dissenting Opinion," *Stanford Law Review* 15 (1962): 3–44; Yosai Rogat, "Mr. Justice Holmes: A Dissenting Opinion [continued]," *Stanford Law Review* 15 (1963): 254–308; [hereafter *A Dissenting Opinion III*]; Ben W. Palmer, "Defense against Leviathan," *American Bar Association Journal* 32 (1946): 328–32; and Ben W. Palmer, "Hobbes, Holmes and Hitler," *American Bar Association Journal* 31 (1945): 569–73. But so is Holmes's list of admirers. See, for example, Ronald K. L. Collins, ed., *The Fundamental Holmes: A Free Speech Chronicle and Reader: Selections from the Opinions, Books, Articles, Speeches, Letters, and Other Writings by and about Oliver Wendell Holmes, Jr.* (Cambridge: Cambridge University

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canonical status is unquestioned.² His opinions, like those of Brandeis, are often quoted in high-profile Supreme Court decisions.³ Popular historians continue to be fascinated with his life story.⁴

G. Edward White, the preeminent Holmes scholar of his generation,⁵ wrote a law review article about Holmes's and Brandeis's canonization arguing that they achieved "the status of professional and cultural icons in the decade of the 1930s."⁶ Their canonization, White asserted, began with a "grudging acceptance" and continued with "a dramatic upsurge in

Press, 2010), xiii; Frederic R. Kellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint* (Cambridge: Cambridge University Press, 2007), vi; Robert W. Gordon, "Introduction," in *The Legacy of Oliver Wendell Holmes, Jr.*, ed. Robert W. Gordon (Stanford: Stanford University Press, 1992), 4; Richard A. Posner, "Introduction," in *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, ed. Richard A. Posner (Chicago: University of Chicago Press, 1992), ix; Max Lerner, ed., *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (Boston: Little, Brown, 1943), 1; Charles Wyzanski, "The Democracy of Justice Oliver Wendell Holmes," *Vanderbilt Law Review* 7 (1954): 311–24; Fred Rodell, "Justice Holmes and His Hecklers," *Yale Law Journal* 60 (1951): 620–24; and Felix Frankfurter, "Oliver Wendell Holmes," in *Dictionary of American Biography: Supplement One, to December 31, 1935*, ed. Harris E. Starr (New York: Scribner, 1944).

2. A recent online Condorcet poll consisting of 196 voters ranked Holmes first among the "most important" twentieth-century American judges. http://www.cs.cornell.edu/w8/~andru/cgiperl/civs/results.pl?id=E_e9445a64ecc50510 (September 25, 2011). He was also the third most cited legal scholar of the twentieth century behind Posner and Ronald Dworkin. Fred R. Shapiro, "The Most-Cited Legal Scholars," *Journal of Legal Studies* 29 (2000): 424, table 6.

3. See, for example, *United States v. Schwimmer*, 279 U.S. 644, 655–56 (1929), quoted in *Christian Legal Soc. Chapter v. Martinez*, 130 S. Ct. 2971, 3000 (2010) (Alito, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting), quoted in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3092 n. 9 (2010) (Stevens, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 76 (Holmes, J., dissenting), quoted in *McDonald v. City of Chicago*, 3116 (Stevens, J., dissenting); *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 462 (1907), quoted in *Skilling v. United States*, 130 S. Ct. 2896, 2913 (2010); *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting), quoted in *Skilling v. United States*, 2956 (Sotomayor, J., concurring in part and dissenting in part); *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring), quoted in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 918 (2010) (Roberts, C.J., concurring); and *Blodgett*, 275 U.S. at 147–48 (Holmes, J., concurring), quoted in *Northwest Austin Municipal Utility District No. One v. Holder*, 129 S. Ct. 2504, 2506 (2009).

4. See, for example, Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus and Giroux, 2001), 3–69.

5. White's biography culminated more than three decades of Holmes scholarship. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993); and G. Edward White, "The Rise and Fall of Justice Holmes," *University of Chicago Law Review* 39 (1971): 51–77.

6. G. Edward White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations," *New York University Law Review* 70 (1995): 576.

the amount of commentary . . . beginning in the late 1920s and extending through Brandeis's death in 1941.⁷ White tied their canonization to the rise of modernist epistemology. "The crucial element in Holmes's and Brandeis's canonization, then," he wrote, "was the congeniality between their epistemological perspectives and those of commentators writing between the late 1920s and the early 1940s."⁸ White placed "[t]he elevation of Holmes's reputation in the late 1920s and 1930s" and described it as a "signal that modernist epistemology had begun to take root in the twentieth-century generation of legal reformers."⁹ White's canonization article recognized that Holmes was the quintessential twentieth century judge, and that many contemporary commentators tended to misconstrue Holmes's and Brandeis's jurisprudence in order to support their own reformist agendas.¹⁰

White's canonization article, however, underplays the role of Frankfurter and other young progressives in initiating Holmes's canonization. In other scholarship, White has emphasized that Holmes's "reputation grew, in part because of Frankfurter's endless championing of his virtues"¹¹ and that Holmes surrounded himself with "the company of younger intellectuals to perpetuate his reputation . . ."¹² White's canonization article failed

7. *Ibid.*, 577.

8. *Ibid.*, 585.

9. *Ibid.*, 589. White emphasized the influence of legal realists during this period. Others attributed the creation of the Holmes legend to the New Deal. See, for example, I. Scott Messinger, "Legitimizing Liberalism: The New Deal Image-Makers and Oliver Wendell Holmes, Jr.," *Journal of Supreme Court History* 20 (1995): 57–72.

10. White has recognized the "persistent investment on the part of commentators in the reputations of both Justices. . . ." White, "Canonization," 577.

11. G. Edward White, "Holmes As Correspondent," *Vanderbilt Law Review* 43 (1990), 1725. See, also, 1727 ("The dramatic upsurge of Holmes's reputation in the 1920s and 1930s testifies to how successfully Frankfurter performed that task."); G. Edward White, "Holmes's Life Plan: Confronting Ambition, Passion, and Powerlessness," *New York University Law Review* 65 (1990): 1460 ("Holmes's career came to be taken as a blueprint for enlightened judging by a group of early twentieth-century reformist intellectuals, the most prominent of whom was Felix Frankfurter, who can fairly be described as Holmes's mythmakers."); White, *Inner Self*, 363 ("One of the reasons for the close causal relationship between Frankfurter's 'discovery' of Holmes and the growth of Holmes' reputation was the ubiquity of Frankfurter's presence.") In his "Canonization" article, White briefly mentions but does not focus on Holmes's connection to Frankfurter, Laski, and other progressives. White, "Canonization," 590.

12. White, "Holmes As Correspondent," 1709. See also White, *Oliver Wendell Holmes*, 354–77 (discussing the relationship between Holmes and these young intellectuals); White, "Holmes's Life Plan," 1460, n. 264 ("Gilmore's claims that Laski and Frankfurter contributed significantly to fostering an idealized image of Holmes and that the origins of that image were 'about the time of World War I' are essentially accurate."); *Ibid.*, 1468 ("the attention of Frankfurter and his contemporaries thus raised for Holmes the possibility

to explore the key connection among these young intellectuals, why they gravitated to Holmes, and how, when, and why Holmes's canonization began.

This article argues that Holmes's canonization began in the 1910s with his association with young progressives who lived at and frequented a Dupont Circle row house known as the House of Truth. Felix Frankfurter, Walter Lippmann, and others with ties to Harvard or the *New Republic* turned the row house into the nation's capital's foremost intellectual and political salon. They invited Washington establishment figures for drinks and dinners. Holmes, who by the age of 70 had seen most of his closest friends and fellow Civil War veterans die, was a regular guest. And even though he did not subscribe to their progressive ideas, the members of the House of Truth adopted Holmes as their hero.

There are many different types of constitutional canons.¹³ The canonization of a judge, however, is different than the canonization of a judicial opinion. A judge is canonized the way that saints are canonized, achieving an iconic or sacred status. Most judicial opinions are canonized the way poetry or literature becomes part of the literary canon.¹⁴ A few opinions such as *Brown v. Board of Education*, however, achieve iconic or sacred status.¹⁵ Although I have previously bifurcated the constitutional canon into upper and lower canons,¹⁶ I now refer to two different types

that recognition of his contributions might be prolonged; that he had an added incentive to focus his energies on his work."); *Ibid.*, 1471 ("Finally, Holmes was obviously aware, from the first public tributes he received from Frankfurter and his contemporaries, that his friendships with them contained the possibility of securing him recognition on a wider scale than he had previously achieved."); and White, *Rise and Fall*, 56–61 (discussing progressive movement's impact on Holmes's reputation and its mischaracterization of him as progressive).

13. Balkin and Levinson have divided the constitutional canon into a "cultural literacy canon," a "pedagogical canon," and an "academic theory canon." See J. M. Balkin and Sanford Levinson, "The Canons of Constitutional Law," *Harvard Law Review* 111 (1998): 963. Ackerman divided the constitutional canon into "official" and "operational" canons and argued that we need to redefine the constitutional canon to include "landmark statutes" and "superprecedents." Bruce Ackerman, "The Living Constitution," *Harvard Law Review* 120 (2007): 1750–51. On the anticanon, see Jamal Greene, "The Anticanon," *Harvard Law Review* 125 (2011): 380–475; Anita S. Krishnakumar, "On the Evolution of the Canonical Dissent," *Rutgers Law Review* 52 (2000): 781–826; and Richard Primus, "Canon, Anti-Canon, and Judicial Dissent," *Duke Law Journal* 48 (1998): 243–303.

14. See, for example, Harold Bloom, *The Western Canon: The Books and School of the Ages* (New York: Harcourt, Brace & Company, 1994).

15. Brad Snyder, "How the Conservatives Canonized *Brown v. Board of Education*," *Rutgers Law Review* 52 (1999): 385–86. Balkin and Levinson describe *Brown* as "normatively canonical." Balkin and Levinson, "Canons of Constitutional Law," 998.

16. Snyder, "How the Conservatives Canonized *Brown*," 387–88.

of canons: the sacred canon and the literary canon. Holmes and other judges join the former, his classic judicial opinions and other writings the latter.

The beginning of Holmes's canonization matters because it represents another example of canonization-not because of philosophical agreement but because of political instrumentalism. My previous canonization article highlighted an example of canonization as political instrumentalism, arguing that conservatives canonized *Brown v. Board of Education*.¹⁷ Beginning with William Rehnquist's 1971 Supreme Court confirmation hearings, conservatives recognized that they could not participate in the constitutional conversation without affirming *Brown's* validity.¹⁸ As a result, conservatives were able to get confirmed to the Court and control *Brown's* interpretation.¹⁹

The House of Truth's and Holmes's mutual frustration with the Supreme Court led to his canonization. The House canonized him to launch a political attack on an antilabor Court. The Court had struck down state legislation under a liberty of contract theory and federal legislation based on a narrow conception of the Commerce Clause, legislation that would have furthered the House's progressive aims of leveling the playing field between labor and management. Rather than use the Court as an engine for social or political change, the progressives at the House of Truth viewed the Court as an obstacle. Their electoral hopes of constitutional change had ended with Theodore Roosevelt's failed 1912 presidential campaign. Canonizing Holmes replaced electing Roosevelt. With little hope in electoral politics or in finding five votes on the Court, the House of Truth's progressives clung to his dissents in *Lochner v. New York* and other labor cases. The House's canonization of Holmes exemplified nonjudicial constitutional change and an elitist version of popular constitutionalism.

Holmes participated in his own canonization because his association with the House of Truth's young progressives helped him achieve an elusive goal: immortality. At the age of 70, he was frustrated on the Court and considering retirement.²⁰ Despite having authored groundbreaking legal scholarship with *The Common Law*²¹ and *The Path of Law*²² and having

17. *Ibid.*, 383.

18. *Ibid.*, 431–37.

19. *Ibid.*, 472–93.

20. Holmes to Sir Frederick Pollock, December 18, 1910, in *Holmes–Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874–1932*, ed. Mark DeWolfe Howe (Cambridge: Harvard University Press, 1941), 1:172.

21. Oliver Wendell Holmes Jr., *The Common Law* ([Boston: Little, Brown, 1881]; reprint, Cambridge: Belknap Press of Harvard University Press, 2009).

22. Oliver Wendell Holmes, Jr., “The Path of Law” (1897), in Oliver Wendell Holmes, *Collected Legal Papers* (New York: Harcourt, Brace & Company, 1921), 167–202.

sat for nearly 20 years on the Supreme Judicial Court of Massachusetts (including several as chief justice), Holmes was a relatively obscure justice overshadowed by the reputation of his more famous physician–poet father. His “jobbist” philosophy, doing his job better than anyone else, had failed to win him widespread recognition. Although he never espoused their reformist ideas, Holmes liked his young friends and sought to please them with his opinions. He exemplified what political scientist Laurence Baum has described as “judges writing for discrete audiences.”²³ The progressives at the House of Truth, in turn, helped Holmes eclipse the reputation of his father and cement his judicial legacy.

The House of Truth has been the subject of only one scholarly article.²⁴ Several biographers have described the House and its members in a paragraph or two.²⁵ The House, however, is treated as a sideline, and most historians rarely explore more than the usual sources.²⁶ This article relies on a web of extensive correspondence to understand the House’s role in canonizing Holmes. This article was inspired not only by White’s canonization article but also by the following sentence from his bibliographical essay: “Despite the widespread acknowledgment of the significance Frankfurter, Harold Laski, and their ‘progressive’ contemporaries played in the transformation of Holmes’ reputation and arguably his rejuvenation on the Supreme Court, very little has been written on the relationships between

23. Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006), 22.

24. Jeffrey O’Connell and Nancy Dart, “The House of Truth: Home of the Young Frankfurter and Lippman,” *Catholic University Law Review* 35 (1985): 79–96. See Clay Risen, “The House of Truth,” *Morning News*, July 19, 2006 http://www.themorningnews.org/archives/profiles/the_house_of_truth.php (September 26, 2011).

25. Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009), 336–37, 339, 493; White, *Inner Self*, 357; Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne, 1991), 5–6; Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New York: HarperCollins, 1991), 490–92; Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (Boston: Little, Brown, 1989), 468–69, n.4; Leonard Baker, *Brandeis and Frankfurter: A Dual Biography* (New York: Harper & Row, 1984), 66–67; Michael E. Parrish, *Felix Frankfurter and His Times* (New York: Free Press, 1982), 51–53; H.N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981), 37; Ronald Steel, *Walter Lippmann and the American Century* (Boston: Little, Brown, 1980), 120–23; Joseph P. Lash, “A Brahmin of the Law,” in *From the Diaries of Felix Frankfurter: With a Biographical Essay and Notes*, ed. Joseph Lash (New York: Norton, 1975), 7–8 (hereafter *Diaries of Felix Frankfurter*); and Liva Baker, *Felix Frankfurter* (New York: Coward–McCann, 1969), 35–36.

26. Harlan B. Phillips, ed., *Felix Frankfurter Reminisces* (New York: Reynal, 1960), 105–12.

Holmes and his younger friends.”²⁷ This alternative narrative about the House of Truth’s role in Holmes’s canonization attempts to fill the void. Part I explores Holmes’s relative obscurity at the age of 70 and the origins of the House of Truth. Part II argues that members of the House of Truth began Holmes’s canonization and explains how and why it occurred. Part III argues that Holmes participated in his own canonization by, among other things, writing for his discrete audience at the House of Truth.

I. Truth and Mephistopheles

A. Holmes at 70

During his first 10 years on the Court, Holmes was one of nine relatively obscure justices. In March 1911, a small story on page 2 of the *Washington Post* acknowledged his 70th birthday with a photograph and five terse paragraphs. The story mentioned that Justice Harlan had placed a “bouquet of violets” on Holmes’s seat on the bench, that Holmes had served 9 years on the Court, that he had fought and been wounded in the Civil War, and that he had “rendered the famous decision on the beef trust case.”²⁸ The article said nothing about *The Common Law*, his *Lochner* dissent, or that he was any more renowned than the other eight justices. Several other newspapers mentioned Holmes’s birthday in a single small paragraph.²⁹ Boston was the only place where he had achieved celebrity status, largely derived from sharing his famous father’s name. In a 1911 series titled “Gems and Wit” and alluding to his father’s poems, the *Boston Globe* published some of the younger Holmes’s speeches.³⁰

As his 70th birthday approached, Holmes’s frustration began to grow. “I have not had as much recognition as I should like,” he wrote to one female correspondent.³¹ Holmes was so frustrated that, after 10 years on the Court

27. White, *Inner Self*, 606. For the best prior treatments of Holmes and his progressive friends, see *ibid.*, chap. 10; and David A. Hollinger, “The ‘Tough Minded’ Justice Holmes, Jewish Intellectuals, and the Making of an American Icon,” in Gordon ed., *The Legacy of Oliver Wendell Holmes, Jr.*, 216–28.

28. “Justice Holmes’ Birthday,” *Washington Post*, March 9, 1911, 2 (referring to *Swift & Co. v. United States*, 196 U.S. 375 [1905]).

29. “Justice Holmes Is 70,” *Atlanta Constitution*, March 9, 1911, 70; and “Justice Holmes 70 Years Old,” *Hartford Courant*, March 9, 1911, 13.

30. See, for example, *Boston Globe*, October 15, 1911, 4; *Boston Globe*, September 20, 1911, 14; and *Boston Globe*, August 20, 1911, 5.

31. Holmes to Clara Stevens, March 6, 1909, Oliver Wendell Holmes, Jr. Papers, Harvard Law School, reel 25, page 943, box 35, folder 20 (hereafter OWHP). See also Holmes to Canon Patrick Sheehan, September 3, 1910, in *Holmes–Sheehan Correspondence: The*

(and his pension secure), he considered retirement. “It soon will be time for me to resolve whether I will leave when I have done my years (Dec. 8, 1912),” he wrote, “but not quite yet.”³²

One source of frustration was his Court colleagues. In 1908, he wrote to Nina Chipman Gray, “I sit in my library and scribble away when I am not in Court, and as of old my brethren pitch into me for being obscure and when I go nasty I say that I write for educated men – of course, as if referring to some others than my interlocutor. So all is happy, and once in a while I get some recognition that makes up for all the stupidities and the popular admiration for all that I detest.”³³ By referencing “as of old,” Holmes revealed his sensitivity to criticism during his 20 years on the Supreme Judicial Court of Massachusetts.³⁴ After his Supreme Court nomination, newspapers described him as “more brilliant than sound” and “more of a ‘literary feller’ than one often finds on the bench.”³⁵ His new colleagues did not appreciate his literary qualities. In 1911, he complained to Nina Gray that his “brethren pulled all the plums out of my pudding and left it rather a sodden mess. Tis ever thus. I get in a biting phrase and of course someone doesn’t like it and out it goes.”³⁶ Three years later, he wrote to Nina’s husband, John Chipman Gray, “The brethren are kind, friendly, able men, but for the most part the emphasis of their interests and their ideals are not the same as mine, and I happen at this moment to be realizing that our conception of the best way to do things is not the same. I daresay it is all the better that it should be so and I try to profit by it, but at times I have to fall back on Luther’s Ich Kann nicht anders. [Here I stand. I cannot help it.]”³⁷ But even John Chipman Gray, one of

Letters of Justice Oliver Wendell Holmes and Canon Patrick Augustine Sheehan, ed. David Burton (Port Washington, N.Y.: Kennikat Press, 1976), 36–37 (questioning whether “my work is valued as I should like it to be”).

32. Holmes to Pollock, December 18, 1910, in Howe, *Holmes–Pollock Letters*, 1:172. “It all makes me speculate as to what I shall do—keep on or retire—when my 10 years are out if I am still alive and all right on Dec. 8, 1912. . . . I shan’t make up mind yet, but it is well not to wait until you go under fire to speculate on conduct.” Holmes to Baroness Moncheur, December 18, 1910, OWHP, reel 26, page 54, box 35, folder 24.

33. Holmes to Nina Gray, December 25, 1908, OWHP, reel 23, page 466, box 32, folder 3.

34. White, *Inner Self*, 291–97; and Mark Tushnet, “The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court,” *Virginia Law Review* 63 (1977): 1040.

35. *New York Evening Post*, August 12, 1902, 4; and *Boston Evening Transcript*, August 12, 1902, 4, quoted in White, *Inner Self*, 306, 552 n. 35–36.

36. Holmes to Nina Gray, March 18, 1911, at 2, OWHP, reel 23, page 531, box 32, folder 5.

37. Holmes to John Gray, May 10, 1914, at 1, OWHP, reel 24, page 525, box 33, folder 25.

Holmes's oldest and dearest friends, conceded to then-President Taft that Holmes's opinions "seem sometimes to lack lucidity."³⁸

At the age of 70, Holmes recognized that he needed new friends.³⁹ Gray, his last old friend from Boston and fellow Civil War veteran, was suffering from heart disease and died in 1915.⁴⁰ And Holmes's intensely flirtatious correspondence and possibly amorous relationship with a British noblewoman, Lady Clare Castletown, had ebbed.⁴¹

The celebrity of his father, a famous physician–poet who had died in 1894, loomed large.⁴² Holmes enjoyed a complex and, at times, competitive relationship with his father, who had discovered a cure for puerperal fever and had written many popular books including *Autocrat at the Breakfast Table*. Even after Holmes had joined the Supreme Court, people continued to confuse him with his more famous father.⁴³

In 1911, Holmes knew that, despite having written *The Common Law* by the age of 40, his historical legacy was in doubt.⁴⁴ He was not disappointed when he had been passed over as chief justice in favor of his colleague Edward White; Holmes insisted to friends that his own "ambitions are so wholly internal that such events move me personally but little, except that when I read the newspapers the total absence of any critical appreciation tends to make me gloomy"⁴⁵ Holmes's ambitions were to be

38. John Gray to William Howard Taft, November 9, 1912, William Howard Taft Papers, Library of Congress, reel 432, image 175.

39. Holmes wrote: "my living friends grow fewer." Holmes to John Henry Wigmore, March 8, 1911, OWHP, reel 26, page 63, box 35, folder 24.

40. John Gray to Holmes, June 15, 1913, at 1, OWHP, reel 24, page 482, box 33, folder 23.

41. Holmes's last visit to England and with Lady Castletown came in the summer of 1913. On their relationship, see John S. Monagan, *The Grand Panjandrum: Mellow Years of Justice Holmes* (Lanham: University Press of America, 1988), 71–94; and White, *Inner Self*, 230–52.

42. See Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years, 1841–1870* (Cambridge: Harvard University Press, 1957), 1–34; and White, *Inner Self*, 9–14.

43. Two years after joining the Court, Holmes was introduced to a Senator's wife, who remarked how much she had enjoyed his novel, *Elsie Vedder*. Holmes tried to explain that his father had written the book, but the Senator's wife said the justice was being "entirely too modest, and should not hide his literary light under a bushel. Justice Holmes sighed and resumed the sipping of his punch." "Justice Holmes Sighed," *Washington Post*, January 31, 1904, B3.

44. Holmes believed that *The Common Law* had satisfied his goal that "if a man was to do anything, he must do it before 40." Holmes to Mrs. Charles Hamlin, October 12, 1930, OWHP, reel 33, page 59, box 43, folder 28; and Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years, 1871–1882* (Cambridge: Harvard University Press, 1966), 8, 135.

45. Holmes to Lewis Einstein, December 19, 1910, in *The Holmes–Einstein Letters: Correspondence of Mr. Justice Holmes and Lewis Einstein 1903–1935*, ed. James Bishop

recognized among intellectual elites as “the greatest jurist in the world”⁴⁶ and not to be forgotten by history. He found an outlet for his frustration on the Court and a way of satisfying his ambitions with the House of Truth.

B. The House

Beginning in 1912, five young men turned a Dupont Circle row house at 1727 19th Street into a progressive salon. They threw lively, informal dinner parties, discussed their progressive ideas and the events of the day, and wooed attractive young women and high government officials with equal fervor. Three Supreme Court justices, one future United States president, ambassadors, generals, journalists, artists, lawyers, and many government officials frequented the parties; some became regular guests and even future residents. Holmes and his wife watched in awe one night as sculptor Gutzon Borglum sketched his idea for carving immortals into a mountainside on the dining room tablecloth; Herbert Hoover explained how he had orchestrated Belgian relief efforts during World War I; a French military officer brought tales from his country’s battles on the front lines. “How or why I can’t recapture,” original resident Felix Frankfurter recalled, “but almost everybody who was interesting in Washington sooner or later passed through that house.”⁴⁷

The House was more than a product of Frankfurter’s fond reminiscences. Its guiding spirit was a poet turned investment banker turned Indian affairs expert named Robert Valentine. During Theodore Roosevelt’s administration, Valentine ascended through the ranks of the Bureau of Indian Affairs. As the commissioner of Indian affairs under Taft, Valentine emerged as one of the administration’s leading progressive voices.⁴⁸ When Valentine’s wife returned to Boston with their ailing infant daughter, Valentine opened his home to four like-minded friends.

Peabody (New York: St. Martin’s Press, 1964), 57–58. Holmes often described his ambitions as “internal.” See, for example, Holmes to Nina Gray, December 15, 1910, OWHP, reel 23, page 521, box 32, folder 5; and Holmes to Sheehan, August 14, 1910, in Burton, *Holmes–Sheehan Correspondence*, 32.

46. Holmes to Sheehan, December 15, 1912, in Burton, *Holmes–Sheehan Correspondence*, 56. See also Howe, *The Proving Years*, 49 (“his aspiration was for intellectual eminence” and describing Holmes as “a calculator of action and a planner of accomplishment”).

47. Phillips, *Felix Frankfurter Reminiscences*, 106.

48. See, for example, “Taft Recalls Order Aimed at Catholics,” *New York Times*, February 5, 1912, 5; “Bars Catholic Garb at Religious Schools,” *New York Times*, February 4, 1912, 2; and Phillips, *Felix Frankfurter Reminiscences*, 105.

Winfred Denison, Valentine's Harvard undergraduate classmate, had served as Henry Stimson's lead prosecutor in the Southern District of New York's sugar fraud cases. Denison joined the Taft Justice Department as assistant attorney general in charge of customs prosecutions.

Loring Christie, a Canadian citizen and former president of the *Harvard Law Review*, worked at Stimson's law firm and then for Denison in customs affairs.

Eustace Percy was not a progressive, Harvard graduate, or lawyer. An attaché to the British ambassador and the seventh son of the seventh Duke of Northumberland (and a descendant of William the Conqueror), Percy brought a transatlantic perspective to their progressive ideas about domestic reform and World War I.

Felix Frankfurter had worked on the sugar fraud prosecutions with Denison and at Stimson's law firm with Christie, and bonded with Valentine. If Valentine was the House of Truth's guiding spirit, then Frankfurter was its one-man social networking site. Frankfurter wrote a dozen letters a day and made it his business to know everyone in Washington. He had come to Washington in 1911 to join his former boss, Henry Stimson, in the War Department as Stimson's "junior partner" and legal counsel for the Bureau of Insular Affairs.⁴⁹

Frankfurter connected the House of Truth to Holmes. Holmes had received a letter of introduction to the newly arrived Frankfurter from Harvard law professor John Chipman Gray.⁵⁰ Both Frankfurter and Christie initially lived only a block away from Holmes's house at 1720 Eye Street and spent many afternoons at the Holmes residence.⁵¹ Through their connection to Denison, Frankfurter and Christie soon moved into the House of Truth and brought Holmes into their orbit.

Holmes did not subscribe to the House's progressive ideas, but he was willing to listen. The name "House of Truth" characterized their relationship to Holmes (and was misattributed to him).⁵² They believed in an

49. Phillips, *Felix Frankfurter Reminiscences*, 56; and Lash, *Diaries of Felix Frankfurter*, 101–23.

50. Phillips, *Felix Frankfurter Reminiscences*, 58. Frankfurter had worked as Gray's research assistant the summer after graduating from law school. *Ibid.*, 23–24. The letter no longer exists, but the Holmes–John Gray correspondence is incomplete. Holmes referenced the letter in several extant letters. See, for example, Holmes to John Gray, May 10, 1914: 1, OWHP, reel 24, page 525, box 33, folder 25 ("Here I am very much alone except for some of the young fellows, especially Frankfurter whom you introduced to me . . .").

51. Phillips, *Felix Frankfurter Reminiscences*, 58. The 1912 D.C. city directory lists Christie at 1808 Eye Street and Frankfurter at 1801 Eye Street. *Washington D.C. City Directory* (1912), 416, 618.

52. Lash attributes it to Holmes, but O'Connell and Dart doubt this attribution. Lash, "A Brahmin of the Law," in *Diaries of Felix Frankfurter*, 8; and O'Connell and Dart,

objective “truth” through empirical data and scientific management of labor relations and a government run by experts. Holmes believed that truth was “the system of my (intellectual) limitations”⁵³ or “the majority vote of that nation that could lick all others.”⁵⁴ Ever since his three Civil War wounds, he adhered to a philosophy of intense skepticism. They admired his intellectual curiosity, charming conversation, and sense of fun. “The House of Truth is happier every time Mephistopheles crosses its threshold,” Denison wrote Holmes.⁵⁵ Mephistopheles, as Holmes often referred to himself,⁵⁶ admired their ambition, intelligence, and optimism about the future.

If flattery is the sincerest form of canonization, then the House of Truth and Holmes were perfectly matched. Denison and Frankfurter were expert flatterers; Holmes, vain and insecure, was susceptible to flattery. In May 1913, Holmes published a small book of his speeches and sent a copy to Denison. “You know what I think of the philosophy which pervades this book and sunny contact one has with you,” Denison wrote. “It has gusto and inspiration, and has given me a good pull on some hard places.”⁵⁷ That summer, as Holmes set off for his final trip to England, Denison sent him a telegram aboard the *S.S. Mauretania*: “A happy and trifling summer to you and the eager friends across the seas in the gay[e]ties and frivolities-do not entirely forget Truth and its abode and the squatters

“The House of Truth,” 79. Frankfurter could not remember who named it. Phillips, *Felix Frankfurter Reminisces*, 106. Holmes attributed it to Denison. Holmes to Nina Chipman Gray, November 6, 1919, at 2–3, OWHP, reel 23, page 684, box 32, folder 12.

53. Oliver Wendell Holmes, “Natural Law,” *Harvard Law Review* 32 (1918): 40 in Holmes, *Collected Legal Papers*, 310. See also Oliver Wendell Holmes, “Ideals and Doubts,” *Illinois Law Review* 1 (1915): 2, *ibid.*, 304–5 (“I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped.”); and Holmes to Learned Hand, June 24, 1918, OWHP, reel 26, page 486, box 36, folder 3 (“I don’t bother about absolute truths or even inquire whether there is a such a thing, but define the Truth as the system of limitations. I may add that as other men are subject to a certain number, not all, of my Cant Helps, intercourse is possible. When I was young I used to define the truth as the majority of that nation that can lick all others. So we may define the present war as an inquiry concerning truth.”).

54. Holmes, “Natural Law,” 40 in *Collected Legal Papers*, 310.

55. Denison to Holmes, March 3, 1913, at 1, OWHP, reel 31, page 231, box 41, folder 19.

56. See Holmes, “Law and the Court,” in *Collected Legal Papers*, 295 (“Judges are apt to be naif, simple-minded men, and they need something of Mephistopheles.”); Francis Biddle, *Mr. Justice Holmes* (New York: Scribner, 1942), 124 (“[Holmes] knew he himself had something of Mephistopheles.”); and Holmes to Nina Gray, October 23, 1910, OWHP, reel 23, page 506, box 32, folder 5 (“I am much pleased with my secretary, Olds. . . . I don’t quite know how far to introduce him to Mephistopheles . . .”).

57. Denison to Holmes, May 10, circa 1913, at 1, OWHP, reel 31, page 235, box 41, folder 19.

therein laboring here in its vineyard but repine as of today tunc pro nunc with the same old inspiration.”⁵⁸ The day before, Frankfurter wrote Holmes: “As I see your life-betting countenance, it tugs me hard to utter gratitude ever to mark the point. So—a ‘whacking’ trip to you!”⁵⁹

The House of Truth’s connection to Holmes consisted of more than Denison, Frankfurter, and the other original five residents. Like any Washington group house where people lived while working for the government, the House was a revolving door of residents and guests. The first House broke up in June 1914.⁶⁰ Valentine returned to Boston and started an industrial counseling firm; Frankfurter considered joining Valentine’s venture but accepted a professorship at Harvard Law School;⁶¹ Denison was named secretary of the interior for the Philippines; Christie joined the Canadian government; Percy returned to England.

The *New Republic* entered the breach. Two House of Truth regulars, Herbert Croly and Walter Lippmann, started the magazine in November 1914 and gravitated to Holmes. Holmes, who did not read newspapers, was one of the magazine’s first subscribers and most ardent readers. The *New Republic* became his primary source of news and the House of Truth’s primary outlet for its progressive ideas. “Progressivism of all kinds has fared badly,” the magazine’s first issue lamented after the November 1914 elections. “The Progressive Party has been reduced to an insignificant remnant.”⁶² The *New Republic* attempted to revive “non-partisan progressivism” that dominated the discussions at the House of Truth.⁶³

58. Telegram from Denison to Holmes, June 10, 1913, OWHP, reel 31, page 238, box 41, folder 19.

59. Frankfurter to Holmes, June 9, 1913, in *Holmes & Frankfurter: Their Correspondence, 1912–1934*, eds. Robert M. Mennel and Christine L. Compston (Hanover, NH: University Press of New England, 1996), 9.

60. Frankfurter to Francis Biddle, February 19, 1914, Francis Biddle Papers, Georgetown University Archives, box 2, folder 6 (“Won’t you shoot down here before the House breaks up in June.”).

61. Frankfurter to Holmes, July 4, 1913, in Mennel and Compston, *Holmes & Frankfurter*, 10.

62. *New Republic*, November 7, 1914, 3.

63. *Ibid.* The progressive movement is not easily defined, and “progressive” is not a synonym for liberal. There were many types of progressives. David Kennedy identifies the “semantic” problem that “[h]undreds, no doubt thousands, of public men in the first two decades of this century referred to themselves as ‘progressive.’” David M. Kennedy, “Introduction,” in *Progressivism: the Critical Issues*, ed. David M. Kennedy (Boston: Little, Brown, 1971), xii. The House of Truth generally consisted of “regulationists” who believed that experts could implement economic reform, particularly in the field of labor–management relations. Kennedy also describes Richard Hofstadter’s failure to recognize “regulationists like Theodore Roosevelt and Herbert Croly and Walter Lippmann as

The *New Republic* and impending United States involvement in World War I revitalized the House. Frankfurter, a frequent *New Republic* contributor, returned to the House in 1917 while working for Secretary of War Newton Baker; Lippmann also joined Baker's staff and moved into the House's top floor in late May 1917 with his new wife Faye Albertson (the house's first and only female resident);⁶⁴ Percy returned to the House and British Embassy as a member of the Balfour Mission.⁶⁵ Several of Holmes's law clerks, then known as secretaries, lived there. Other progressives, *New Republic* writers such as Francis Hackett and Harold Laski and London *Times* correspondent Arthur Willert, found their way into the House's and Holmes's domain.

The House of Truth, therefore, consisted of current and former residents (Valentine, Frankfurter, Denison, Lippmann,), *New Republic* editors and contributors (Croly, Lippmann, Laski, Frankfurter), and regular visitors and dinner guests (Brandeis, Hand, Holmes). Often, the three categories overlapped. Between Frankfurter at Harvard Law School and Croly, Laski, and Lippmann in the *New Republic*, Holmes gained two cheering sections. The House of Truth united them. Together Frankfurter, Croly, Laski, Lippmann, and other members of the House of Truth began Holmes's canonization.

II. How and Why the House Canonized Holmes

The progressives at the House of Truth canonized Holmes because they were frustrated with the Court's antilabor decisions and lacked a leader after the political fall of Theodore Roosevelt. They backed Roosevelt's ill-fated Bull Moose Party and 1912 presidential campaign. Valentine quit the Taft administration and endorsed Roosevelt.⁶⁶ Frankfurter nearly quit as well, but ultimately decided to continue working for Henry Stimson yet openly support Roosevelt.⁶⁷ In August 1910, Roosevelt attacked the

authentic progressives." David M. Kennedy, "Overview: The Progressive Era," *The Historian* 37 (1975): 462.

64. Steel, *Lippmann and the American Century*, 120–21.

65. Eustace Percy, *Some Memories* (London: Eyre & Spottiswoode, 1958), 53, 59.

66. "Resigns Office to Join Roosevelt," *New York Times*, September 11, 1912, 1; and "Will Follow Roosevelt," *Boston Globe*, September 11, 1912, 18.

67. Frankfurter to Stimson, September 10, 1912, Felix Frankfurter Papers, Library of Congress, box 103, folder "Stimson, Henry L. 1908–12" (hereafter FF-LC); Stimson to Frankfurter, September 19, 1912, *ibid.*; Frankfurter to Fanny Holmes, May 14, 1912, in Mennel and Compston, *Holmes & Frankfurter*, 10; Phillips *Felix Frankfurter Reminisces*, 54.

Court by criticizing *United States v. E.C. Knight* and *Lochner v. New York* as preventing federal or state regulation of big business.⁶⁸ Two years later on the campaign trail, he advocated the recall of judicial decisions and in rare cases judges. Roosevelt's failed Bull Moose campaign made him increasingly irrelevant on the American political scene. And he parted company with progressives over World War I-era concerns about civil liberties.⁶⁹

Despite the election of Woodrow Wilson in 1912, the House's progressives saw little hope of changing the Court through presidential politics. Wilson's first Supreme Court nominee was archconservative James McReynolds.⁷⁰ Progressives exulted over Wilson's next nominee, Louis Brandeis, and approved of his third nominee, John Hessin Clarke. But Clarke resigned after only five terms because of disillusionment with the Court, substantive disagreement with Brandeis, and to promote the League of Nations.⁷¹ And in the early 1920s the nominees of Wilson's pro-business Republican successors added more conservatives to the Court. The conservative composition of the Court did not substantially change for nearly 20 years until Franklin Delano Roosevelt's continued reelection.

The House's progressives were hopeful after the Court's 1908 decision in *Muller v. Oregon* upheld a maximum-hour law for women supported by Brandeis's fact-filled, eponymous brief. In 1916, Frankfurter took over for Brandeis as counsel for the National Consumers' League and argued and won *Bunting v. Oregon*, a 5–3 decision that upheld a maximum hour law and a companion case, *Stetler v. O'Hara*, a 4–4 tie that let stand a

68. Theodore Roosevelt, *The Nation and the States*, August 29, 1910, Denver, CO, <http://www.theodore-roosevelt.com/trspeechescomplete.html> (October 3, 2011); and Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review* 97 (2009): 778–85. The *New York World* sent Holmes a telegram in late August 1910 after Roosevelt had publicly attacked the Court based on two of its decisions, *E.C. Knight* and *Lochner*. Holmes replied with two words: "No comment." Holmes to Baroness Moncheur, August 31, 1910, 1, OWHP, reel 26, page 30, box 35, folder 23.

69. Roosevelt criticized a report Frankfurter had written for the Wilson administration about the trial of labor leader Tom Mooney for bombing a San Francisco parade, as adopting "an attitude which seems to me to be fundamentally that of Trotsky and the other Bolsheviki leaders in Russia; an attitude that may be fraught with mischief to this country." Roosevelt to Frankfurter, December 19, 1917, FF-LC, box 98, folder "Roosevelt, Theodore 1917–18 & undated."

70. John Milton Cooper, *Woodrow Wilson: A Biography* (New York: Alfred A. Knopf, 2009), 273 (describing McReynolds's nomination to the Supreme Court as "one of the worst blunders Wilson committed as president" and that "his other two appointments" were "men whose thinking was much closer to his own").

71. Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (New York: Simon & Schuster, 1965), 164–67, quoting Clarke to Woodrow Wilson, September 9, 1922.

minimum wage law.⁷² The Court, however, invalidated several labor laws (over Holmes dissents) in *Adair v. United States* in 1908, *Coppage v. Kansas* in 1915, *Hammer v. Dagenhart* in 1919, and *Adkins v. Children's Hospital* in 1923.

Adkins led Frankfurter, who had argued and lost the case invalidating a D.C. minimum wage law, to lose all hope in the Court. "[T]he possible gain isn't worth the cost of having five men without any reasonable probability that they are qualified for the task, determine the course of social policy for the states and the nation," he wrote Learned Hand.⁷³ Frankfurter never argued another case after *Adkins* and later recalled that it "struck the death knell not only of this legislation, but of kindred social legislation because it laid down as a constitutional principle that any kind of change by statute has to justify itself, not the other way around."⁷⁴

Even before *Adkins*, Frankfurter criticized the antilabor decisions of Chief Justice Taft in anonymous *New Republic* editorials⁷⁵ and privately questioned reliance on the Court to solve the nation's problems. After Holmes's opinion narrowly upheld a D.C. rent control law, Frankfurter expressed doubts about the Due Process Clause and concluded: "Not the least of the things that weigh with me is the weakening of the responsibility of our legislators and of our public opinion, or rather, the failure to build up a responsible public opinion. We expect our Courts to do it all."⁷⁶ Frankfurter's friend and House of Truth visitor Harold Laski was blunter. "I have nothing but dislike for the Supreme Court," Laski wrote Holmes before Frankfurter's argument in *Bunting v. Oregon*.⁷⁷ Later that year, Laski wrote: "Your brethren (six of them) have still a long way to go before they understand the meaning of a certain dissent in *Adair v. U.S.*"⁷⁸

72. On *Muller*, *Bunting*, and *Adkins*, see Phillips, *Felix Frankfurter Reminisces*, 94–104.

73. Frankfurter to Hand, April 11, 1923, Learned Hand Papers, Harvard Law School, box 104–10.

74. Phillips, *Felix Frankfurter Reminisces*, 103.

75. "Taft and the Supreme Court," *New Republic*, October 27, 1920 and "The Same Mr. Taft," *New Republic*, January 18, 1922, in Felix Frankfurter, *Law and Politics: Occasional Papers of Felix Frankfurter, 1913–1938*, eds. Archibald MacLeish and E.F. Pritchard (New York: Harcourt, Brace & Company, 1939), 37, 41.

76. Frankfurter to Holmes, April 18, 1921, in Mennel and Compston, *Holmes & Frankfurter*, 108.

77. Laski to Holmes, January 15, 1917, in Howe, *Holmes–Laski Letters*, 1:55.

78. Laski to Holmes, December 18, 1917, *ibid.*, 1:121. Holmes wrote: "I quite agree that the question what and how much good labor unions do is one on which intelligent people may differ—I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind; but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of

As frustrated as they were with the Court, the House's progressives did not look to the Article V amendment process. Frankfurter and Laski opposed a constitutional amendment to outlaw child labor and overrule *Hammer v. Dagenhart*.⁷⁹

Instead of trying to amend the Constitution or to seek judicial constitutional change, the House of Truth attacked the Court by canonizing Holmes. The House's progressives enjoyed Holmes's company and admired his intellect, but they also used him for their own political gain. The House of Truth created the image of Holmes as an oracle and viewed his dissents as trump cards that legitimized their political and constitutional vision.

A. Praising His Opinions

A key component of the House's canonization of Holmes was alerting the public to the rightness of his opinions and elevating his dissents into super-precedents. Before his canonization, newspapers had ignored his *Lochner* dissent in favor of Harlan's.⁸⁰ Scholars were quick to criticize *Lochner* but slow to latch onto Holmes's dissent.⁸¹ The press also ignored his other important dissents during the next 10 years, including *Adair* and *Coppage*.⁸²

the railroads and the country at large." *Adair v. United States*, 208 U.S. 161, 191–92 (1908) (Holmes, J., dissenting).

79. Laski to Frankfurter, March 7, 1925, at 2, FF-LC, box 74, folder "H Laski 1925–26"; Frankfurter to Florence Kelley, May 31, 1923, FF-LC, box 157, folder "National Consumers' Leagues 1923"; and Frankfurter to Stephen Wise, May 31, 1922, FF-LC, box 157, folder "National Consumers' League 1922."

80. On *Lochner*, see "New York 10-Hour Law Is Unconstitutional," *New York Times*, April 18, 1905, 1; "Law Can't Limit A Working Day," *Chicago Tribune*, April 18, 1905, 1; and "Bakery Law Invalid," *Washington Post*, April 18, 1905, 11.

81. Although scholars immediately criticized *Lochner*, see Ernst Freund, "Limitations of Hours of Labor," *Green Bag* 17 (1905): 411–17, Holmes's dissent did not begin to gain recognition until Roscoe Pound and other scholars began writing about it in 1909. See, for example, Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 480 (arguing that "the decisive objection to the position of the majority is put by Mr. Justice Holmes in a few sentences that deserve to become classical"); and Edward Corwin, "The Supreme Court and the Fourteenth Amendment," *Michigan Law Review* 7 (1909): 669–70 (describing Holmes's dissent as "more trenchant" than Harlan's, yet criticizing both).

82. On *Adair*, see "Can Discharge Man For Joining Union," *New York Times*, January 28, 1908, 1; "No Safety in Union," *Washington Post*, January 28, 1908, 1; and "High Court Blow for Union Labor," *Chicago Tribune*, January 28, 1908, 11. On *Coppage*, see "Employer Has Right to Bar Union Men," *New York Times*, January 26, 1915, 6; "Coercion Law Is Void," *Washington Post*, January 26, 1915, 15; and "Employers May Require Workers to Spurn Unions," *Chicago Tribune*, January 26, 1915, 17.

The House's publicity campaign targeted several intended audiences—legal academics, law students, and progressives and other political and legal elites—but it began with Holmes himself. The House's progressives indicated their approval of his opinions by extolling them in private correspondence and in his main source of news, the *New Republic*. "Felix and I have a complaint to make. We think it utterly unfair to assume that you are the only reader of your judgments . . .," Laski wrote Holmes. "I am under agreement with Croly not to introduce your phrases more than twice in any article and thrice in any number."⁸³ No one followed the Supreme Court more carefully in those days than Frankfurter. As a young scholar, he repeatedly praised Holmes's opinions, big and small, in national magazines⁸⁴ and the *Harvard Law Review*⁸⁵ and alerted Croly, Laski, and Lippmann to the big ones. Holmes appealed to the House of Truth's sensibilities, usually in dissent, on two subjects: 1) upholding federal and state labor laws; and 2) protecting civil liberties.

1. Labor Laws

The House's celebration of Holmes's dissents began with *Coppage v. Kansas*,⁸⁶ which invalidated the state's ban on yellow dog contracts under a liberty of contract theory.⁸⁷ Holmes did not believe that the "upward and onward" pro-labor legislation could accomplish much.⁸⁸ Legislative majorities, however, rendered his personal views irrelevant. As he wrote in his one-paragraph *Coppage* dissent: "Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of the opinion that there is nothing in the Constitution of the United States to prevent it, and that *Adair*

83. Laski to Holmes, July 22, 1916, in Howe, *Holmes–Laski Letters*, 1:6. Laski was well connected to the House of Truth and referenced its residents Eustace Percy and Loring Christie in multiple letters. See, for example, Laski to Holmes, December 16, 1916, *ibid.*, 1:42; and Laski to Holmes, March 24, 1918, *ibid.*, 1:143. See also "Education: Young Fellows," *Time*, June 1, 1931, 22 (connecting Laski to House of Truth).

84. See, for example, Felix Frankfurter, "The Zeitgeist and the Judiciary," *The Survey*, January 25, 1913, 543 ("Holmes has been a powerful influence in the changed attitude of the Supreme Court.").

85. See, for example, Felix Frankfurter, "The Present Approach to Constitutional Decision on the Bill of Rights," *Harvard Law Review* 28 (1915): 791 n.3, 792; Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," *Harvard Law Review* 29 (1916): 354 n.2, 359–60, n.20, 362 n.30, 370 n.58.

86. *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (Holmes, J., dissenting).

87. *Ibid.*

88. Holmes to Laski, December 13, 1916, in Howe, *Holmes–Laski Letters*, 1:42; *ibid.*, January 8, 1917, 1:51–52.

v. *United States* . . . and *Lochner v. New York* . . . should be overruled.”⁸⁹ His opposition to the majority’s “liberty of contract” decisions aligned Holmes with his young progressive friends.

The House’s progressives often signaled their interest in labor cases. Frankfurter thanked Holmes even before reading his *Coppage* dissent: “I’m stirred up about the case but not at all as an onward-and-upwarder I *am* stirred up about the decision as a student of constitutional law and how she is made I thoroughly dislike the majority decision, so perhaps it won’t be *lese* judiciary to say it on paper. I *was* happy when I saw you drive another spike into the *Adair* case. And I like your dissenting company.”⁹⁰ The *New Republic* quoted Holmes’s *Coppage* dissent and lauded him as “a judge who deals with things, not words, and who realizes that a document which is to rule a great people must in its very nature allow for a wide and growing field for experimentation”⁹¹ More than a year later and enrolled as a student at Harvard Law School, Laski wrote: “I have just read *Coppage v. Kansas* as the *New Republic* will show you—for the first time. Please let me send a salute of thanks.”⁹²

The House of Truth indicated its interest in the federal child labor law. Laski wrote him before the case had been decided: “I hope you wrote on the Child Labour law. I’d like to read you on that.”⁹³ In June 1918, Holmes dissented from *Hammer v. Dagenhart*,⁹⁴ which invalidated the law based on a narrow interpretation of the Commerce Clause.⁹⁵ Frankfurter commented before a copy of Holmes’s dissent had arrived: “I *am* troubled if the Court seeks to reconcile this decision with the *McCray* case. But I shall doubtless be enlightened when the text of the opinion comes.”⁹⁶ The *New Republic* opined: “No one, and particularly no lawyer familiar with prior rulings of the Court, can read the dissenting opinion of Mr. Justice Holmes and retain a reasonable doubt that the majority wholly misconceived the issue In an opinion of calm and luminous eloquence for which generations to come will be grateful, Mr. Justice Holmes makes short shrift of the wholly artificial issue of the

89. *Coppage*, 236 U.S. at 27 (Holmes, J., dissenting).

90. Frankfurter to Holmes, January 27, 1915, in Mennel and Compston, *Holmes & Frankfurter*, 25–6.

91. *New Republic*, January 30, 1915, 4.

92. Laski to Holmes, August 12, 1916, in Howe, *Holmes–Laski Letters*, 1:11; “Neutrality in Strikes,” *New Republic*, August 12, 1916, 28.

93. Laski to Holmes, May 12, 1918, in Howe, *Holmes–Laski Letters*, 1:155.

94. *Hammer v. Dagenhart*, 247 U.S. 251, 278 (1918) (Holmes, J., dissenting).

95. *Ibid.*, 276–77.

96. Frankfurter to Holmes, May 18, 1918, in Mennel and Compston, *Holmes & Frankfurter*, 72. See *McCray v. United States*, 195 U.S. 27 (1904) (sustaining Oleomargarine Act of 1886 prohibiting tax on artificial coloring).

majority opinion.”⁹⁷ The House’s publicity campaign seemed to be working; newspapers quoted Holmes’s dissent.⁹⁸

Holmes’s dissent in *Truax v. Corrigan*,⁹⁹ which invalidated an Arizona law that banned the use of labor injunctions to stop strikes and boycotts, also endeared him to pro-labor progressives. Labor injunctions vexed progressives such as Frankfurter, who later coauthored a book about them.¹⁰⁰ Holmes, who had published his four-paragraph dissent at Brandeis’s behest, made sure that Laski and Frankfurter knew about it.¹⁰¹ “I thought your dissent in *Truax v. Corrigan* quite one of the most perfect little gems you have fired off in months,” Laski replied. “I’m sure it will have its place in the classic literature of the law and it puts a new notch on my stick of pride.”¹⁰² Frankfurter wrote two unsigned *New Republic* editorials that excoriated the decision, quoted Holmes’s and Brandeis’s dissents, and predicted that “the name of this case is destined to become even more classic than the *Lochner* case.”¹⁰³

Holmes also dissented in *Adkins v. Children’s Hospital*,¹⁰⁴ which invalidated a D.C. minimum wage law for women as a “freedom of contract” violation under the Fifth Amendment’s Due Process Clause.¹⁰⁵ He consoled Frankfurter that “no one could have brought about a different decision.”¹⁰⁶ Holmes also sent a copy of his dissent to Laski, who replied: “If I were Frankfurter I should rest content that I had secured that dissent from you Please go on dissenting.”¹⁰⁷ The *New Republic* reprinted the dissent in its entirety.¹⁰⁸ “I was very sorry to have the Court go that way,” Holmes confided to Nina Chipman Gray. “Of course – some of

97. “States’ Rights vs. the Nation,” *New Republic*, June 15, 1918, 295.

98. See “Child Labor Law Upset by Court,” *New York Times*, June 4, 1918, 14; and “Child Labor Law Fails,” *Washington Post*, June 4, 1918, 11.

99. *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).

100. Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: Macmillan, 1930).

101. See Holmes to Laski, December 22, 1921, in Howe, *Holmes–Laski Letters*, 1:389; Holmes to Frankfurter, December 23, 1921, in Mennel and Compston, *Holmes & Frankfurter*, 132; Holmes to Laski, January 15, 1922, in Howe, *Holmes–Laski Letters*, 1:397.

102. Laski to Holmes, January 22, 1922, in Howe, *Holmes–Laski Letters*, 1:401.

103. “The Political Function of the Court,” *New Republic*, January 25, 1922, 236. See “The Same Mr. Taft,” *ibid.*, January 18, 1922, 191.

104. *Adkins v. Children’s Hospital*, 261 U.S. 525, 567 (1923) (Holmes, J., dissenting).

105. *Ibid.*, 545, 560–61.

106. Holmes to Frankfurter, April 13, 1923, in Mennel and Compston, *Holmes & Frankfurter*, 152.

107. Laski to Holmes, April 26, 1923, in Howe, *Holmes–Laski Letters*, 1:496–98.

108. “Dissenting Opinions in the Minimum Wage Case,” *New Republic*, April 25, 1923, 240; and “An Appeal from the Supreme Court,” *ibid.*, 228.

those who agree with me say nice things – I have had some other pleasant letters”¹⁰⁹

After *Adkins*, Holmes wrote Laski: “I am curious to see what the enthusiasts for liberty of contract will say with regard to liberty of speech under a State law punishing advocating the overthrow of government—by violence.”¹¹⁰ Holmes was referring to the oral argument in *Gitlow v. New York* later that week.

2. Civil Liberties

Nowhere was the House of Truth’s canonization of Holmes greater than with regard to civil liberties opinions. Before World War I, neither Holmes nor the House’s progressives was interested in free speech issues.¹¹¹ Many scholars have written about Holmes’s doctrinal shift on free speech—from affirming Espionage Act convictions in *Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States* based on his “clear and present danger” test to his impassioned dissents beginning with *Abrams v. United States* a few months later. David Rabban argued that the same factors that changed Holmes’s perspective changed the perspectives of his progressive friends: “postwar repression of radical speech” and Zechariah Chafee’s groundbreaking 1919 *Harvard Law Review* article, *Free Speech in War Time*.¹¹² Other scholars have suggested that, between the spring and fall of 1919, the House of Truth’s progressives may have played a more active role. Edmund Wilson wrote: “It may be that the influence of his new friends the liberals counted for something with Holmes in his opinions after the first World War in cases in which the issue of free speech was involved . . . the liberals of the post-World War period were now slaking Holmes’s thirst for intercourse with men of ideas. They stimulated and entertained him as well as gave him the admiration he craved.”¹¹³ G. Edward White agreed that “Holmes’s First Amendment jurisprudence is best explained by his

109. Holmes to Nina Gray, April 21, 1923, OWHP, reel 23, page 918, box 33, folder 1.

110. Holmes to Laski, April 14, 1923, in Howe, *Holmes–Laski Letters*, 1:495.

111. See, for example, *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) (interpreting free speech to be limited to freedom from prior restraints); and David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997), 232–42 (discussing Croly’s limited views of free speech).

112. Rabban, *Free Speech*, 342.

113. Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* (New York: Oxford University Press, 1962), 772–75.

personal experiences and relationships, which made him receptive to the ideas of progressive intellectuals”¹¹⁴

Even before Holmes decided *Schenck*, *Frohwerk*, and *Debs*, Laski alerted Holmes to progressive interest in these cases. “I see that you have some ‘free speech’ cases to listen to so that the next few weeks won’t be without excitement,” Laski wrote.¹¹⁵ Holmes was almost apologetic when the three decisions came down, particularly the one involving Socialist Party leader Eugene Debs. He sent the opinions to Laski and wrote: “I greatly regretted having to write them—and (*between ourselves*) that the Government pressed them to a hearing.”¹¹⁶ The initial progressive reaction was tepidly positive. “I read your three opinions with great care; and though I say it with deep regret they are very convincing,” Laski wrote.¹¹⁷ “Your analogy of fire in a crowded theatre is, I think excellent, though in the remarks you make in the *Schenck* case I am not sure that I should have liked the line to be drawn a little tighter about executive discretion.” A *New Republic* editorial, although not mentioning Holmes by name, agreed that *Debs* was guilty under the Espionage Act and that it was up to the president to pardon him.¹¹⁸ The editorial pleased Holmes.¹¹⁹

Criticism of Holmes’s *Debs* opinion, however, soon followed. Ernst Freund, a longtime progressive advocate for free speech, wrote in the *New Republic* that Holmes “takes the very essentials of the entire problem for granted, and intimates that they are conceded even by the defendant.”¹²⁰ Freund also found Holmes’s analogy about shouting fire in a crowded theater unhelpful in the political sphere.¹²¹ Holmes thought

114. G. Edward White, “Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension,” *California Law Review* 80 (1992): 391.

115. Laski to Holmes, November 8, 1918, in Howe, *Holmes–Laski Letters*, 1:170.

116. Holmes to Laski, March 16, 1919, *ibid.*, 1:190. For similar comments about hating to write *Debs*, see Holmes to Wigmore, June 7, 1919, OWHP, reel 30, page 526, box 36, folder 4; and Holmes to Baroness Moncheur, April 4, 1919, *ibid.*, reel 36, page 520, box 36, folder 4. See also Holmes to Pollock, April 5, 1919, in Howe, *Holmes–Pollock Letters*, 2:7 (“As it happens I should go farther probably than the majority in favor of [free speech], and I daresay it was partly on that account that the C.J. assigned the case to me.”).

117. Laski to Holmes, March 18, 1919, in Howe, *Holmes–Laski Letters*, 1:191.

118. Editorial, *New Republic*, April 19, 1919, 362.

119. Holmes to Laski, April 20, 1919, in Howe, *Holmes–Laski Letters*, 1:197.

120. Ernst Freund, “The Debs Case and Freedom of Speech,” *New Republic*, May 3, 1919, 14.

121. *Ibid.* On Freund’s pre-World War I commitment to free speech, see Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991), 64–65.

Freund's article was "poor stuff," drafted a letter to *New Republic* editor Herbert Croly criticizing the article, but never sent the letter.¹²²

During the spring and summer of 1919, the House of Truth played an active role in influencing Holmes's views. Learned Hand, a federal judge close to Frankfurter and the founders of the *New Republic* and a regular House of Truth visitor, disagreed with Holmes's opinions because they did not adopt Hand's "incitement" test in his opinion in *Masses Publishing Co. v. Patten*.¹²³ Hand and Holmes had debated the issue since a chance meeting on a train in June 1918 and continued their debate through private correspondence after *Debs*. Holmes wrote that "I am afraid I don't quite get your point"; nor did Holmes understand how the "incitement" test would have led to a different outcome in *Debs* or *Schenck*.¹²⁴

The influence of Hand, Laski, and the House's other progressives was undeniable. In March 1919 Hand wrote Holmes on his 72nd birthday, and Holmes replied: "Old fellows need encouragement almost as much as young and that which I have had from you and your generation and friends has put a new spirit into me."¹²⁵ Laski tried to put a new spirit into Holmes about free speech by arranging a July 1919 meeting between Holmes and Harvard law professor Zechariah Chafee.¹²⁶ Laski gave

122. Holmes to Laski, May 13, 1919, in Howe, *Holmes-Laski Letters*, 1:202 (containing an unsent letter from Holmes to Croly, May 12, 1919).

123. Hand to Holmes, c. late March 1919, OWHP, reel 61, page 574, box 80, folder 10; *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917); and Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994), 162–64.

124. Holmes to Hand, April 3, 1919, OWHP, reel 26, page 519, box 36, folder 4. The year before, Holmes wrote: "free speech stands no differently than freedom from vaccination." Holmes to Hand, June 24, 1918, *ibid.*, reel 26, page 486, box 36, folder 3.

125. Holmes to Hand, March 8, 1919, *ibid.*, reel 26, page 515, box 36, folder 4.

126. Chafee was not optimistic after the meeting. Chafee to Judge Charles F. Amidon, September 30, 1919, at 2, Chafee Papers, Harvard Law School, reel 3, page 11, box 4, folder 1 ("I have talked with Justice Holmes about the article but find that he is inclined to allow a very wide latitude to Congressional discretion in the carrying on of the war. He does not think it possible to draw any limit to the first amendment but simply indicate cases on the one side or the other of the line."). Holmes to Pollock, June 21, 1920, in Howe, *Holmes-Pollock Letters*, 2:45 (Chafee "is said to be a very good man. In the few minutes talk I had with him a year ago he seemed unusually pleasant and intelligent . . ."). For more on the influence of Chafee, Freund, Hand, and Laski on Holmes's views on free speech, see Rabban, *Free Speech in Its Forgotten Years*, 350–55; Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (New York: Viking, 1987), 218–28; Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton, 2004), 198–203; David S. Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," *Hofstra Law Review* 11 (1982): 97–189; and Fred D. Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," *Journal of American History* 58 (1971): 24–45.

Holmes a copy of Chafee's law review article, *Free Speech in War Time*, and informed Chafee that "we must fight on it. I've read it twice, and I'll go to the stake for every word."¹²⁷ Holmes also read and may have been influenced by Laski's new book, *Authority in the Modern State*.¹²⁸

The House of Truth swung to Holmes's side after he wrote what was perhaps his most famous dissent in *Abrams v. United States*.¹²⁹ He made sure that the House's progressives knew about it by mailing copies to Frankfurter and the dean of Harvard Law School, Roscoe Pound.¹³⁰ To Pound, Holmes wrote that he was "very much in the minority with my brethren but I should not despair of finding you on my side."¹³¹ Holmes also sent a copy to Walter Lippmann, who informed him that the *New Republic* was reprinting it "in full."¹³² Lippmann was so moved by the *Abrams* dissent that he asked Holmes "if you would send me a copy with something of your own written on it I shall treasure it and teach my children to treasure it."¹³³ The *New Republic* hailed "the remarkable dissenting opinion of Mr. Justice Holmes" and predicted it "is likely to bulk as important in future discussion of the judicial interpretation of legislation which limits freedom of speech as the same Justice's dissenting opinion in [*Lochner*] did in relation to judicial interpretation of laws which invoked the police power for the purpose of protecting the health and safety of wage-earners."¹³⁴

No one was prouder of Holmes's *Abrams* dissent than Laski. "I want to say in so many words that amongst the many opinions of yours I have read, none seems to me superior either in nobility or outlook, in dignity or phrasing, and in that quality the French call *justesse*, as this dissent in the Espionage case," Laski wrote two days after *Abrams*. "It is a fine and moving document for which I am deeply and happily grateful."¹³⁵ Laski asked for the original handwritten draft of the opinion, informed Holmes of

127. Laski to Chafee, July 23, 1919, Chafee Papers, reel 12, page 489, box 14, folder 10.

128. Holmes to Pollock, April 5, 1919, in Howe, *Holmes-Pollock Letters*, 2:8; Holmes to Laski, April 8, 1919, in Howe, *Holmes-Laski Letters*, 1:194; and Isaac Kramnick & Barry Sheerman, *Harold Laski: A Life on the Left* (New York: Allen Lane/Penguin Press, 1993), 125-27.

129. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). For Holmes on difference between *Debs* and *Abrams*, see Holmes to Pollock, December 14, 1919, in Howe, *Holmes-Pollock Letters*, 2:32.

130. Holmes to Pound, November 13, 1919, OWHP, reel 26, page 547, box 36, folder 5.

131. *Ibid.*

132. Lippmann to Holmes, November 13, 1919, OWHP, reel 35, page 347, box 46, folder 27; and "The Espionage Act Interpreted," *New Republic*, November 26, 1919, 377.

133. Lippmann to Holmes, November 18, 1919, OWHP, reel 35, page 348, box 46, folder 27.

134. "The Call to Toleration," *New Republic*, November 26, 1919, 360.

135. Laski to Holmes, November 12, 1919, in Howe, *Holmes-Laski Letters*, 1:220.

Croly's *New Republic* editorial, and concluded: "we all feel that you have restated the case for liberalism as even you have hardly ever done."¹³⁶ Finally, Laski informed Holmes that Pound "spoke to me with emotion about your dissent. He was certain that it would become a classic in the same sense as your *Lochner* case."¹³⁷

Frankfurter joined the Amen chorus about *Abrams*. "And now I may tell you the gratitude and, may I say it, the pride I have in your dissent . . . you lift the voice of the noble human spirit," Frankfurter wrote 2 days after it was announced.¹³⁸ A few weeks later, Frankfurter wrote: "I still read and rejoice over your dissents and Pound has stolen from me when he says your paragraphs will live as long as the *Aeropagitica*[sic]."¹³⁹ Frankfurter alerted Holmes to mostly favorable commentary¹⁴⁰ and used it in an unsigned *New Republic* editorial to defend him against the opinion's critics.¹⁴¹

Admiring letters from Hand and Pound gave Holmes "the greatest pleasure."¹⁴² "Sympathy and agreement always are pleasant but they are much more than that when they come from one that I have learned to think of as I do of you," Holmes wrote Hand.¹⁴³ Chafee wrote an admiring *Harvard Law Review* article about the dissent, an article that nearly cost Chafee his Harvard professorship.¹⁴⁴ Holmes bragged that his *Abrams* dissent delighted his progressive admirers and displeased "some of the respectable

136. Laski to Holmes, November 14, 1919, *ibid.*, 1:222.

137. Laski to Holmes, November 27, 1919, *ibid.*, 1:223. "Of course *Abrams v. U.S.* hits me closest. I think that dissent will influence American thinking in a fashion to which only your work in *Lochner* and the *Adair* case have rivalry." Laski to Holmes, April 2, 1920, *ibid.*, 1:256–57.

138. Frankfurter to Holmes, November 12, 1919, in Mennel and Compston, *Holmes & Frankfurter*, 75.

139. Frankfurter to Holmes, November 26, 1919, *ibid.*, 76.

140. For favorable commentary, see Zechariah Chafee, "A Contemporary State Trial: The United States versus Jacob Abrams et al.," *Harvard Law Review* 33 (1920): 747–71; Frankfurter to Holmes, April 19, 1920, in Mennel and Compston, *Holmes & Frankfurter*, 85; Frederick Pollock, "Abrams v. United States," *Law Quarterly Review* 36 (1920): 333, 337; and Frankfurter to Holmes, November 22, 1920, in Mennel and Compston, *Holmes & Frankfurter*, 97.

141. Frankfurter used Pollock's article to defend Holmes's *Abrams* dissent against "[e]minent lawyers and law writers. . . ." *New Republic*, December 8, 1920, in FF–LC, box 194, scrapbook "Writings 1913–1924," 96. Frankfurter was referring to Prof. Wigmore and Harvard overseer Thomas Nelson Perkins. Holmes to Frankfurter, November 30, 1919, in Mennel and Compston, *Holmes & Frankfurter*, 77.

142. Holmes to Pound, November 28, 1919, OWHP, reel 26, page 549, box 36, folder 5; and Holmes to Hand, November 20, 1919, *ibid.*, reel 26, page 548, box 36, folder 5.

143. Holmes to Hand, November 20, 1919, *ibid.*, reel 26, page 548, box 36, folder 5.

144. Chafee, "A Contemporary State Trial," 9; and Peter Irons, "'Fighting Fair': Zechariah Chafee, Jr., the Department of Justice, and the Trial at the Harvard Club," *Harvard Law Review* 94 (1981): 1205.

citizens of Boston But some of those whose judgment I most respect have said things that warmed my heart.”¹⁴⁵

After *Abrams*, the House’s progressives continued to praise Holmes’s civil liberties dissents. Of his dissent in *Milwaukee Social Democratic Publishing Co. v. Burlison*,¹⁴⁶ which allowed the post office to revoke the mailing privileges of the *Milwaukee Leader* under the Espionage Act, Frankfurter wrote: “What a ‘Magisterial’ opinion you wrote in the *Milwaukee Leader* case. You said it all in a few, pungent sentences. The more I studied the case—I discussed it with my seminar in Administrative Law—the less I can comprehend the Seven. I see ‘Great Causes’ are on.”¹⁴⁷ Frankfurter wrote in an unsigned *New Republic* editorial: “Mr. Justice Holmes with a few strokes of his pen brought down the house of cards of the majority opinion”¹⁴⁸

A few years after Attorney General A. Mitchell Palmer’s prosecution of suspected Communists and Socialists, Holmes’s *Gitlow* dissent¹⁴⁹ pleased his progressive friends. Holmes sent a copy to Frankfurter and wrote: “I gave an expiring kick on the last day (Brandeis was with me) in favor of the right to drool on the part of believers in the proletarian dictatorship—only a page—please read it.”¹⁵⁰ Holmes also sent a copy and wrote a similar sentiment to Laski, who congratulated him.¹⁵¹ The *New Republic* quoted the *Gitlow* dissent at length and concluded:

The victories of liberty of speech must be won in the mind before they are won in the courts. In that battlefield of reason we possess new and powerful weapons, the dissenting opinions of Justices Holmes and Brandeis. Out of this long series of legal defeats has come a group of arguments for toleration that may fitly stand beside the *Areopagitica* [sic] and Mill’s Liberty. The majority opinions determined the cases, but these dissenting opinions will determine the minds of the future.¹⁵²

145. Holmes to Ellen A. Curtis, December 7, 1919, OWHP, reel 26, page 554, box 36, folder 5.

146. *Milwaukee Social Democratic Publishing Co. v. Burlison*, 255 U.S. 407, 436 (1921) (Holmes, J., dissenting).

147. Frankfurter to Holmes, March 16, 1921, in Mennel and Compston, *Holmes & Frankfurter*, 106.

148. “Press Censorship by Judicial Construction,” *New Republic*, March 30, 1921: 124, in FF-LC, box 194, scrapbook “Writings 1913–1924,” 125.

149. *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). See Holmes to Einstein, July 11 1925, in Peabody, *Holmes–Einstein Letters*, 244; and Holmes to Pollock, July 18, 1925, in Howe, *Holmes–Pollock Letters*, 2:163.

150. Holmes to Frankfurter, June 15, 1925, in Mennel and Compston, *Holmes & Frankfurter*, 184.

151. Holmes to Laski, June 14, 1925, in Howe, *Holmes–Laski Letters*, 1:732; and Laski to Holmes, July 6, 1925, *ibid.*, 1:759.

152. “The *Gitlow* Case,” *New Republic*, July 1, 1925, 141.

Frankfurter passed along praise from Cardozo who said: "I find that I gain more from Holmes than from any one else, alive or dead. Pick up his opinions haphazard, even the early ones in Massachusetts, one finds them studded with sentences that illuminate the dark places. I find no equal inspiration anywhere."¹⁵³ Holmes replied: "I am deeply gratified by what Cardozo says. It is the final reward of one's labors when such men as he and you say well done. This is absolutely true. I care more for it than for office or for any other success."¹⁵⁴

*United States v. Schwimmer*¹⁵⁵ capped Holmes's reputation as a civil libertarian. The *New Republic* reprinted his dissent in full: "We feel that it sets out, far more ably than any words of ours can do, the attitude which any person who calls himself a liberal ought to take toward this decision."¹⁵⁶ Frankfurter, not at a loss for words, wrote:

I had assumed that you exhausted my capacity for being thrilled by magisterial utterance on behalf of sanity in your *Abrams* opinion. But you have done it again and anew. It was like real, prewar champagne to read your *Schwimmer* opinion and not because Mrs. Schwimmer matters at all to me. But the invigoration you give to spacious feeling and the confidence you intensify that man's optimism isn't a menace and may be a fillip to life mean, oh! ever so much to us.

It is a glorious piece of writing we so need the antiseptic play of your humor and wisdom.¹⁵⁷

Frankfurter also enclosed a *New York Times* editorial praising Holmes and Brandeis as "defenders of minorities, of not only theoretic but applied freedom."¹⁵⁸ Holmes replied: "You are generous as you always are and the article gives me more pleasure than articles often do. The things that you have praised show that I haven't lost my interest in the work."¹⁵⁹

153. Frankfurter to Holmes, June 30, 1925, in Mennel and Compston, *Holmes & Frankfurter*, 185.

154. Holmes to Frankfurter, July 2, 1925, *ibid.*, 186.

155. *United States v. Schwimmer*, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting).

156. "Justice Holmes and the Schwimmer Case," *New Republic*, June 12, 1929, 92.

157. Frankfurter to Holmes, May 29, 1929, in Mennel and Compston, *Holmes & Frankfurter*, 240. See also Holmes to Laski, May 30, 1929, in Howe, *Holmes-Laski Letters*, 2:1152 (relaying Frankfurter's praising of *Schwimmer*); and Laski to Holmes, June 4, 1929, *ibid.*, 2:1155 (praising *Schwimmer*). But also see Lippmann to Frankfurter, June 11, 1929, in Walter Lippmann, *Public Philosopher: Selected Letters of Walter Lippmann*, ed. John Morton Blum (New York: Ticknor & Fields, 1985), 241 (disagreeing with *Schwimmer* and Frankfurter's "assumption that a failure to agree immediately and whole-heartedly with Holmes, Brandeis, and Cardozo was a weird and strange procedure . . .").

158. "A Dissenting Opinion," *New York Times*, May 29, 1929, 28, quoted in Frankfurter to Holmes, May 29, 1929, in Mennel and Compston, *Holmes & Frankfurter*, 240.

159. Holmes to Frankfurter, May 31, 1929, *ibid.*, 240-41.

3. Conspicuous Silence

The House's progressives disagreed with Holmes's decisions in the form of conspicuous silence, silence that he sensed. This was particularly true after he authored the majority opinion in *Pennsylvania Coal Company v. Mahon*,¹⁶⁰ which invalidated a state law that prevented mining beneath improved land.¹⁶¹ Holmes wrote Laski: "Frankfurter generally writes to me about any important opinions of mine and he has been silent as to the one I sent you in which Brandeis dissented; probably feeling an unnecessary delicacy about saying that he disagrees."¹⁶² After nearly a month of silence, Holmes wrote Frankfurter:

It is delightful to hear from you again. I thought that perhaps you were frozen off by agreement with Brandeis and the *New Republic* in the case of the underground coal support and not willing to say so. That would be a great mistake (I mean, to feel shy on that account) although I have not seen the slightest reason to doubt the decision, but only to regret that I didn't bring out more clearly the distinction between the rights of the public generally and their rights in respect of being in a particular place where they have no right to be at all except so far as they have paid for it.¹⁶³

A *New Republic* editorial ghostwritten by former Brandeis clerk and Frankfurter protégé Dean Acheson pitted Holmes's "tolerant scepticism" about using "the police power to accomplish the purposes of condemnation and thereby get something for nothing" against Brandeis's "point of view of the power of the community to protect itself" and concluded that "Brandeis's view seems the superior statesmanship."¹⁶⁴ Holmes read the editorial, identified Acheson as the author, and "was not greatly impressed."¹⁶⁵

Holmes's most callous opinion, *Buck v. Bell*,¹⁶⁶ which upheld Virginia's compulsory sterilization law with the quip that "three generations of imbeciles are enough," did not prevent the House's progressive from canonizing him.¹⁶⁷

160. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

161. *Ibid.*, 416.

162. Holmes to Laski, January 13, 1923, in Howe, *Holmes-Laski Letters*, 1:473.

163. Frankfurter to Holmes, February 14, 1923, in Mennel and Compston, *Holmes & Frankfurter*, 150.

164. "Pennsylvania's 'Cave In' Law," *New Republic*, January 3, 1923, 136-37. Brandeis blamed Holmes's *Mahon* opinion on Holmes's secretary Robert Benjamin "accentuating the tendency of age to conservatism." Brandeis to Frankfurter, January 3, 1923, in "Half Brother, Half Son": *The Letters of Louis D. Brandeis to Felix Frankfurter*, eds. Melvin I. Urofsky and David W. Levy (Norman, OK: University of Oklahoma Press, 1991), 132.

165. Holmes to Laski, January 13, 1923, in *Holmes-Laski Letters*, 1:473.

166. *Buck v. Bell*, 274 U.S. 200 (1927).

167. *Ibid.*, 207. See, generally, Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore: Johns Hopkins University

They did not heap praise on the opinion in the same overwrought way they praised his opinions favoring labor and free speech, but they did not openly disagree with *Buck*, either. Holmes wrote Frankfurter: "I think my cases this term have been of rather a high average of interest e.g., the Virginia Sterilization Act."¹⁶⁸ There is no record of an immediate response.¹⁶⁹ At the end of the term, Frankfurter wrote: "I venture to say that no annual output has been more vigorous, nor sprightlier, and no batch will live longer than what you gave us this Term."¹⁷⁰ He went on to compliment several of Holmes's opinions, but not *Buck v. Bell*. In the *Harvard Law Review*, however, Frankfurter tried to put the best spin on *Buck* as one of several examples of a judge who "enforces statutes based upon economic and political theories which he does not share and of whose efficacy in action he is sceptical."¹⁷¹ Privately, Holmes did not seem so skeptical.¹⁷² He alerted Laski that *Buck* was coming and revealed clashes with other justices about his harsh rhetoric.¹⁷³ Laski mentioned *Buck* in passing but never praised it the way he did other Holmes opinions.¹⁷⁴

By praising his labor and free speech dissents, the House of Truth successfully raised Holmes's profile among people who read Supreme Court opinions: law professors and law students. And by including much of this praise in the *New Republic*, the House reached their fellow progressives as well as political elites who did not read Supreme Court opinions

Press, 2008); and Victoria F. Nourse, *In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics* (New York: W.W. Norton, 2008).

168. Holmes to Frankfurter, May 14, 1927, in Mennel and Compston, *Holmes & Frankfurter*, 212.

169. There is a danger in putting too much emphasis on Frankfurter's silence because Frankfurter may have destroyed many of his letters to Holmes. See Introduction, *ibid.*, xiv (explaining "numerical imbalance" of correspondence).

170. Frankfurter to Holmes, June 5, 1927, *ibid.*, 213.

171. Felix Frankfurter, "Mr. Justice Holmes and the Constitution: A Review of his 25 years on the Supreme Court," *Harvard Law Review* 41 (1927): 173. Other progressives, including Brandeis (who joined in *Buck*), praised Holmes's decision. David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011), 98.

172. "One decision that I wrote gave me pleasure, establishing the constitutionality of a law permitting the sterilization of imbeciles." Holmes to Einstein, May 19, 1927, in Peabody, *Holmes-Einstein Letters*, 267.

173. "I am amused (between ourselves) at some of the rhetorical changes suggested, when I purposely used short and rather brutal words for an antithesis, polysyllables that made them mad." Holmes to Laski, April 25, 1927, in Howe, *Holmes-Laski Letters*, 2:939. Holmes, who had tempered his language in prior opinions, kept his sharp rhetoric in *Buck*. "This time, though I had said, Never again, I did the same thing in a milder form, and now as then have to accept criticism that I think pretty well justified." *Ibid.*

174. Laski to Holmes, May 7, 1927, in Howe, *Holmes-Laski Letters*, 2:940.

but who cared about the Court as an institution. Recognition at law schools and among political elites let Holmes know that he would not be forgotten, that his dissents mattered, even if there was almost no hope that the Court would agree with them in labor and free speech cases. It is possible (though unknowable) that the House's progressives influenced the outcomes of his decisions or the frequency of his dissents in these areas. Either way, he knew he had an audience, and he played and responded to it.

B. Praising Their Work

The sinister thought has risen in my mind whether you young fellows were ironically trying how much the old man could stand in the way of flattering things, but of course I rejected it. In former days my friends amused themselves with getting a rise out of me (on things in general) but it was too easy. As to favorable comments I can stand a good lot—it is a privilege of age—and a fact of human nature—but I hardly need say that I believe in and reciprocate the affection that I get from men like you and Frankfurter too sincerely to have any real irony of fate.

Holmes to Laski, November 1916¹⁷⁵

The House of Truth's praise and flattery of Holmes was not a one-way street; Holmes facilitated his own canonization by reading and praising the work of his progressive friends. He read voraciously and obsessively, recording every book he read in a small, black book.¹⁷⁶ Beginning in the mid-1910s, he made it a point to read his friends' books and articles. They sought his praise and let him know that they valued his opinion. Holmes did not agree with many of their underlying ideas. He described himself as a "bettabilitarian," betting only "on the behavior of the universe in its contact with us" and remaining skeptical about ideas that could improve society.¹⁷⁷ But by reading progressive books and articles, not to mention the *New Republic*, Holmes showed that he was at least receptive to their ideas and an appropriate vessel for their adulation.

Holmes regularly read the House of Truth's work in the pages of the *New Republic*. Croly sent Holmes the magazine's first issue, and Holmes wrote a three-page critique in which Croly concurred.¹⁷⁸ Despite his criticisms, Holmes became so enamored of the *New Republic* that it became his primary

175. Holmes to Laski, November 1, 1916, *ibid.*, 1:33.

176. See OWHP, reel 61, pages 686–766, page boxes 1–3.

177. Holmes to Pollock, August 30, 1929, in Howe, *Holmes–Pollock Letters*, 2:252. For similar comments, see Holmes to Frankfurter, January 21, 1915, in Mennel and Compston, *Holmes & Frankfurter*, 24–25.

178. Holmes to Croly, November 22, 1914, at 1, OWHP, reel 30, page 363, box 40, folder 21; Croly to Holmes, November 15, 1914, at 1, *ibid.*, page 358.

sources of news. It was not only that he liked the writers, but also that he admired the writing. “[Y]ou young fellows in the *New Republic* show that we can write as well in this country as anywhere and fill me with courage even though you humble me personally,” Holmes wrote fellow Anglophile Frankfurter.¹⁷⁹ Holmes recommended the magazine to his oldest friends¹⁸⁰ and regularly praised six *New Republic* writers and House of Truth visitors: Croly, Frankfurter, Francis Hackett, Laski, Lippmann, and Philip Littell.

Holmes especially took to the magazine’s two biggest stars, Croly and Lippmann. Approximately 10–15 years older than his contemporaries, Croly was already a hero to the House’s progressives such as Frankfurter, by writing their mission statement with his book, *The Promise of American Life*.¹⁸¹ Both he and Lippmann became House of Truth regulars (and the latter a resident). In November 1914, Croly sent Holmes a copy of Croly’s new book, *Progressive Democracy*.¹⁸² Holmes also read Lippmann’s new book, *Drift and Mastery*.¹⁸³ Neither book persuaded him of anything other than the greatness of the writers. “Alas, my doubts attach to many of the shibboleths of the young—(your gifted lot of chaps),” Holmes wrote Frankfurter. “I don’t believe some of the things deeply implied in the writings of Croly and Lippmann, much as I delight in them and I almost need your encouragement not to think that I am an old hulk on the sands.”¹⁸⁴ To his oldest friend John Chipman Gray, Holmes praised Lippmann and Croly:

Do you know Walter Lippmann’s books—A Preface to Politics and (just out) *Drift & Mastery*? He is young—and one thinks at times proceeding on an inadequately founded faith—but Lord, how good a writer—what discernment of impalpables and enumeration of infinitesimals—What delightful cheek and what sound criticism for the meditation of the elders—a tip top jaw about the Sherman Act alongside of apparent satisfaction with what would

179. Holmes to Frankfurter, May 29, 1915, in Mennel and Compston, *Holmes & Frankfurter*, 30.

180. See, for example, Holmes to Lady Leslie Scott, March 7, 1915, at 1–2, OWHP, reel 26, page 289, box 35, folder 30; and Holmes to Einstein, August 12, 1916, in Peabody, *Holmes–Einstein Letters*, 136.

181. Phillips, *Felix Frankfurter Reminisces*, 88, 165; Felix Frankfurter, “Herbert Croly and American Political Opinion,” *New Republic*, July 16, 1930, 247, in MacLeish and Pritchard, *Law and Politics*, 305. Holmes described *The Promise of American Life* as a “very good book” with “keen criticism of our past and present.” Holmes to Lady Leslie Scott, July 30, 1910, at 1, OWHP, reel 26, page 26, box 35, folder 23.

182. Croly to Holmes, November 15, 1914, at 1, OWHP, reel 30, page 358, box 40, folder 21.

183. Holmes to Frankfurter, November 27, 1914, in Mennel and Compston, *Holmes & Frankfurter*, 23.

184. Holmes to Frankfurter, January 21, 1915, *ibid.*, 24–25.

be a silly sentence of Pound about the Courts, if it were meant as a summary, which I don't suppose. Superstitious as I think about capital and admirable discourses about labor. He is one of the lads that gives me courage for the future. He and Croly are on the *New Republic* about to appear for which I hope you subscribe.¹⁸⁵

To Lippmann, Holmes drafted a letter about *Drift and Mastery* "with some criticism and much praise, but it was unsatisfactory and so burned."¹⁸⁶ Instead, Holmes quoted from his letter to Gray.¹⁸⁷ Three days later, Holmes finished reading Lippmann's book and wrote him "while I have found no further ground for disagreement I have found much more to admire. It would have been a loss for this world if you had [given in] to your reaction after it was done."¹⁸⁸ As thanks for the book and sealing the bond of their new friendship, Holmes instructed Croly to give Lippmann a bound copy of Holmes's speeches "which may disclose in an accidental way here and there the readiness of my mind to accept most of your views."¹⁸⁹

Lippmann regularly visited Holmes at 1720 Eye Street. In contrast to the hot, cigar-smelling halls of Congress, Lippmann wrote in the *New Republic*, there is at least one place in Washington where things have an altogether different quality, and no one I think comes away from it unmoved. It is the house of Mr. Justice Holmes. When you enter, it is as if you had come into the living stream of high romance. You meet the gay soldier who can talk of Falstaff and eternity in one breath, and tease the universe with a quip.¹⁹⁰

The laconic Lippmann engaged Holmes in completely different types of conversations than the frenetic Frankfurter; Holmes did most of the talking.¹⁹¹

185. Holmes to John Gray, October 27, 1914, OWHP, reel 26, page 254, box 35, folder 29. For similar comments, see Holmes to Pollock, November 7, 1914, in Howe, *Holmes–Pollock Letters*, 1:223–4; and Holmes to Einstein, December 10, 1914, in Peabody, *Holmes–Einstein Letters*, 102.

186. Holmes to Lippmann, October 27, 1914, at 1, Walter Lippmann Papers, Yale University Archives, reel 165, box 2, folder 39 "Holmes, Oliver Wendell 1914–1916."

187. *Ibid.*, 1–3.

188. Holmes to Lippmann, October 30, 1914, at 1, Lippmann Papers, reel 165, box 2, folder 39 "Holmes, Oliver Wendell 1914–1916."

189. *Ibid.*

190. Walter Lippmann, "To Justice Holmes," *New Republic*, March 11, 1916, 156. Lippmann wrote Holmes: "I have tried to write for this week's *New Republic* what I felt to say. But of course I couldn't succeed . . . a lady to whom I showed the article said that the most serious fault was the omission of Mrs. Holmes. I told her it couldn't be done by mortal pen." Lippmann to Holmes, March 8, 1916, OWHP, reel 35, page 338, box 46 folder 27 (ellipses in original).

191. Holmes to Laski, November 25, 1916, in Howe, *Holmes–Laski Letters*, 1:37.

Holmes wrote: “If you found Croly solemn Lippmann has great gifts of silence. I like to talk with both of them, however. Their wisdom in the paper sometimes depresses me – perhaps it is also points of management in which they may be right.”¹⁹² Holmes’s forte was law and philosophy (with literature on the side); Lippmann’s was politics. They praised each other’s work. Holmes delighted in Lippmann’s visits.¹⁹³ In spite of their different generational perspectives about war, Holmes admired Lippmann’s next book, *The Stakes of Diplomacy*.¹⁹⁴ Lippmann sought Holmes’s critique of the *Atlantic Monthly* article that became his most famous book, *Public Opinion*.¹⁹⁵ Holmes never stopped reading Lippmann’s books.¹⁹⁶ “His writing is fly paper to me,” Holmes wrote Laski, “if I touch it I am stuck till I finish it. He writes so well—and sees so much that it is difficult to put into words”¹⁹⁷ Lippmann, in turn, idolized Holmes: “As for the greatest man I have personally ever known apart from Einstein himself, who I have met only once for a short time, I should perhaps say Mr. Justice Holmes”¹⁹⁸

Holmes befriended and read another *New Republic* contributor, Harold Laski. In July 1916, Frankfurter introduced Laski to Holmes during a visit to the justice’s summer home at Beverly Farms.¹⁹⁹ A socialist, instructor, and tutor in Harvard’s schools of history and government, and first-year student at Harvard Law School, the 23-year-old Laski stunned the 75-year-old Holmes with the breadth of his learning and precocity.²⁰⁰

192. Holmes to Clara Stevens, February 9, 1916, OWHP, reel 26, page 354, box 35, folder 32.

193. Holmes to Frankfurter, December 15, 1923, in Mennel and Compston, *Holmes & Frankfurter*, 164. Holmes to Hand, December 14, 1923, OWHP, reel 26, page 856, box 36, folder 13; and Holmes to Frankfurter, March 23, 1916, in Mennel and Compston, *Holmes & Frankfurter*, 49.

194. Holmes to Lippmann, November 22, 1915: 1, Lippmann Papers, reel 165, box 2, folder 39 “Holmes, Oliver Wendell 1914–1916.”

195. Lippmann to Holmes, November 18, 1919: 1–2, OWHP, reel 35, page 348, box 46, folder 27, in Lippmann, *Public Philosopher*, 132–33.

196. See, for example, Holmes to Frankfurter, February 24, 1932, in Mennel and Compston, *Holmes & Frankfurter*, 269; Holmes to Arthur Sutherland, November 19, 1929, at 41, in “Recollections of Justice Holmes, 1935,” Arthur Sutherland Papers, Harvard Law School Special Collections, box 24, folder 24–7.

197. Holmes to Laski, May 12, 1928, in Howe, *Holmes–Laski Letters*, 2:1055.

198. Lippmann to Lynn Weldon, March 23, 1931, in Lippmann, *Public Philosopher*, 271–72.

199. Frankfurter, Introduction, in Howe, *Holmes–Laski Letters*, 1:xiii; and Holmes to Einstein, July 11, 1916, in Peabody, *Holmes–Einstein Letters*, 132.

200. Holmes to Einstein, July 11, 1916, in Peabody, *Holmes–Einstein Letters*, 132 (“We had a visit from two young Jews who hit me where I live. Frankfurter, an old friend, Professor in the Law School, and Harold Laski, twenty-three, a young prodigy in knowledge

Laski became a regular House of Truth visitor and one of Holmes's most frequent correspondents. Holmes and Laski shared a deep skepticism, and both men often told tall tales.²⁰¹ Holmes wrote to Laski, "One thing that gave me much pleasure in your talk was that you had not an easy optimism and didn't believe that universal bliss would ensue if the world would only get a move on and obey when the *New Republic* says Hocus-Pocus-Presto-Chango, and God knows I have as deep a respect as anyone for the ability of Croly and Lippmann."²⁰²

Holmes frequently praised Laski's *New Republic* articles.²⁰³ Laski responded in kind, quoting a British friend who compared Holmes to Alexander Hamilton and described Holmes as "the Huxley of America."²⁰⁴ Laski's book *Studies in the Problem of Sovereignty* began by quoting one of Holmes's speeches, and the preface credited "the lesson to be learned from the constitutional opinions with which Mr. Justice Holmes has enriched this generation."²⁰⁵ Holmes read the first chapter "with very great pleasure and of course substantial agreement" and was "pleased and flattered" by the references.²⁰⁶ Laski dedicated his next book, *Authority in the Modern State*, as follows: "To Mr. Justice Holmes and Felix Frankfurter: The Two Youngest of My Friends."²⁰⁷ For private consumption, Laski wrote a biblical parody, *The Book of Oliver*: "And the young men loved him greatly and he returned

and intelligence."); and Holmes to Einstein, May 7, 1930, *ibid.*, 309 (describing Laski as a "very remarkable chap").

201. See, for example, Biddle, *Mr. Justice Holmes*, 12 (recalling Holmes clerks had to "listen to his tall talk"); Howe, *Holmes-Laski Letters*, 1:vi (conceding Laski's letters contain "exaggeration, distortion, and falsehood"); Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of Law* (New York: Viking, 1956), 334–35 n.* (claiming Laski faked excerpts of Holmes letters praising Stone); and Laski to Stone, January 27, 1938 & excerpts of purported Holmes letters, Harlan Fiske Stone Papers, Library of Congress, box 19, folder "Laski, Harold J."

202. Holmes to Laski, September 7, 1916, in Howe, *Holmes-Laski Letters*, 1:17. See Laski to Holmes, September 9, 1916, *ibid.* ("I am a Darwinian, and Croly, Lippmann *et al.* seem to me really theologians—for they believe either in goodness or in sin as original and they have what I take to be a pathetic trust in environmental change.").

203. See, for example, Holmes to Frankfurter, July 16, 1916, in Menell and Compston, *Holmes & Frankfurter*, 53 ("Laski's articles show his brilliancy and are in the fashion of the day.").

204. Laski to Holmes, October 23, 1916 in Howe, *Holmes-Laski Letters*, 1:30.

205. Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917), viii, ix–x.

206. Holmes to Laski, March 15, 1917 in Howe, *Holmes-Laski Letters*, 1:67.

207. Harold J. Laski, *Authority in the Modern State* (New Haven: Yale University Press, 1919), 10. The dedication greatly pleased Holmes. Holmes to Laski, March 7, 1919 in Howe, *Holmes-Laski Letters*, 1:188.

their love. But he guarded the secret places of his mind saying ‘I will not let them put one over one me.’”²⁰⁸

Of all the House’s progressives, Holmes was the closest to Frankfurter, the person most responsible for Holmes’s canonization and most desirous of Holmes’s praise.²⁰⁹ Initially, Frankfurter was much less prolific than the others. Holmes praised his small efforts: an American Bar Association article about the state of law schools (“Tip top, dear boy, tip top.”²¹⁰); Frankfurter’s eulogy after Robert Valentine died of a heart attack in 1916 (“beautiful and moving. Like each new thing that you have done since I have known you, it brings you a little closer into my mind and heart. Even your more optimistic outlook and prophecy for human destinies than I can venture upon makes you dearer to me. I think such a speech as that makes the world better.”²¹¹).

As Frankfurter became more established at Harvard and worked on bigger projects, his need for Holmes’s approval seemed to grow. After reading Frankfurter’s preface to his supervised study, *Criminal Justice in Cleveland*, Holmes wrote: “I congratulate you with all my heart. It seems to me a model. It expresses the scientific spirit with perfection and puts it with restrained and admirable force.”²¹² Frankfurter replied: “I cannot possibly convey to you what a word of professional commendation from you means to me. In all literalness, to have you touch me with your sword gives me more to go on than anything else that my work can possibly evoke . . .”²¹³ Holmes, even though he refused to intervene in their case, repeatedly praised Frankfurter’s *Atlantic Monthly* article/book arguing that Sacco and Vanzetti had not received a fair trial.²¹⁴ Frankfurter dedicated his next book, *The Business of the Supreme Court*, to “Mr. Justice Holmes, who, after twenty-five terms, continues to contribute his

208. “The Book of Oliver,” March 24, 1917, *ibid.*, 1:72.

209. See, for example, Holmes to John Gray, February 21, 1915, at 1, OWHP, reel 24, page 534, box 33, folder 25 (“The young fellows give me much pleasure – but the dearest of them, Frankfurter . . .”).

210. Holmes to Frankfurter, January 17, 1916, in Mennel and Compston, *Holmes & Frankfurter*, 43 (commenting on Felix Frankfurter, “The Law and the Law Schools,” *Reports of the American Bar Association* 40 [1915]: 365–73).

211. Holmes to Frankfurter, January 13, 1917, in Mennel and Compston, *Holmes & Frankfurter*, 66.

212. Holmes to Frankfurter, May 4, 1922, *ibid.*, 140.

213. Frankfurter to Holmes, May 16, 1922, *ibid.*, 141. Holmes praised Frankfurter’s other publications. See, for example, Holmes to Frankfurter, May 22, 1925, *ibid.*, 183; Holmes to Frankfurter, July 30, 1925, *ibid.*, 188.

214. Holmes to Frankfurter, March 18, 1927, *ibid.*; and Holmes to Frankfurter, September 9, 1927, *ibid.*, 216.

genius to the work of a great court²¹⁵ The clearest indication of Holmes's effect on Frankfurter came after Holmes dubbed Frankfurter's book, *The Labor Injunction*,²¹⁶ "first-class—really A-1."²¹⁷ Frankfurter replied: "For you to call my work 'really A 1' is to be knighted by the King! I'd rather have your 'well done' than any one else's in this wide world. You give me reward and spur."²¹⁸

In his later years when Holmes became too old to read and after his wife Fanny had died, his current and former secretaries (law clerks) read books to him day and night.²¹⁹ He put Frankfurter and other progressives on his reading list. He wrote Frankfurter: "My secretary has just finished reading aloud to me your Yale lectures—*The Public and Its Government*. I think them admirable and wish that every young man in the country might read them. Again and again they sting me with pleasure, not to speak of the almost awe I feel for your familiarity with so much as to which I feel myself ignorant."²²⁰ As a friend and mentor to these young men, he did not let his skepticism about their progressive ideas prevent him from marveling at their abilities. The House's progressives canonized Holmes knowing that he valued their work.

C. Soldier's Faith

The House's progressives canonized Holmes partly because his Civil War service reinforced his heroic image. He loved to tell war stories and reminded people in person and in letters when a particular day marked the anniversary of when he had been wounded at Ball's Bluff, Antietam, or Fredericksburg.²²¹ In his 1884 Memorial Day Address,

215. Felix Frankfurter and James M. Landis, *Business of the Supreme Court: A Study in the Federal Judicial System* (New York: Macmillan, 1928): v. The dedication pleased Holmes. Holmes to Frankfurter, November 11, 1927, in Mennel and Compston, *Holmes & Frankfurter*, 219; and Holmes to Frankfurter, November 26, 1927, *ibid.*, 220.

216. Frankfurter and Greene, *The Labor Injunction*.

217. Holmes to Frankfurter, March 5, 1930, in Mennel and Compston, *Holmes & Frankfurter*, 250. For additional positive comments, see Holmes to Frankfurter, March 25, 1930, *ibid.*, 253.

218. Frankfurter to Holmes, March 17, 1930, *ibid.*, 251.

219. See Interview of Alger Hiss by John S. Monagan, January 18, 1980: 2, 60–62, Monagan Papers, Harvard Law School Special Collections, box 1, folder 1-8; Interview of Thomas Corcoran by John S. Monagan, August 16, 1979: 25–26, *ibid.*, box 1, folder 1-3.

220. Holmes to Frankfurter, November 8, 1930, in Mennel and Compston, *Holmes & Frankfurter*, 259 (commenting on Felix Frankfurter, *The Public & Its Government* [New Haven: Yale University Press, 1930]).

221. See, for example, Holmes to Laski, October 22, 1922, in Howe, *Holmes–Laski Letters*, 1:456 ("Ball's Bluff 61 years ago, yesterday"); Holmes to Frankfurter, October

he wrote: "Through our great good fortune, in our youth our hearts were touched with fire."²²² Philip Littell wrote an entire 1915 "Books and Things" column about the Memorial Day Address in the *New Republic*.²²³ Holmes's 1895 address, *The Soldier's Faith*, another account of his Civil War experiences, made the biggest impact.²²⁴ *The Soldier's Faith* impressed Theodore Roosevelt, who seven years later nominated him to the Supreme Court.²²⁵ *The Soldier's Faith*, as much as any of his opinions, resonated with young progressives, 50 years after the end of America's bloodiest conflict.

The beginning of World War I made Holmes's Civil War service even more relevant in the eyes of the House of Truth. Loring Christie sought his counsel while serving the Canadian government in Ottawa during the war: "I have faith somehow that a world brought to its knees may learn some of the things that you learned in your dark days of half a century ago. For myself it seems I am not to be allowed to find the Soldier's Faith; I must content myself with hoping I may count a little here."²²⁶ Christie was torn between staying at home and fighting with the British on the front lines.²²⁷ A similar Christie letter to Frankfurter "deeply moved" Holmes, who counseled Christie "that it takes romantic faith to do unromantic things."²²⁸

Robert Valentine's widow, Sophia, found *The Soldier's Faith* comforting after her husband died in 1916 of a heart attack in Delmonico's in New York surrounded by his former housemates. Frankfurter wrote Holmes, "The other night, at Mrs. Valentine's request, I read to her from the Memorial Day address and from 'The Soldier's Faith.' It comforted her much, and gave her the strength and understanding and shared faith.

23, 1931, in Mennel and Compston, *Holmes & Frankfurter*, 266 ("Two days ago was Ball's Bluff day when I was knocked out 70 years ago . . .").

222. Oliver Wendell Holmes, *Memorial Day Address*, May 30, 1884, in Lerner, *The Mind and Faith of Justice Holmes*, 9–17.

223. Philip Littell, "Books and Things," *New Republic*, May 29, 1915, 100.

224. Oliver Wendell Holmes, *The Soldier's Faith*, May 30, 1895, in Lerner, *The Mind and Faith of Justice Holmes*, 18–25.

225. Letter from Roosevelt to Lodge, June 5, 1895, in *Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge, 1884–1918* ed. Henry C. Lodge (New York: Charles Scribner's Sons: 1925), 1:146. For Roosevelt's reasons for nominating Holmes, see Letter from Roosevelt to Lodge, July 10, 1902, *ibid.*, 1:517–19; White, *Inner Self*, 299–307; and John A. Garraty, "Holmes's Appointment to the U.S. Supreme Court," *New England Quarterly* 22 (1949): 291–303.

226. Christie to Holmes, March 6, 1915 at 1, OWHP, reel 31, page 73, box 41, folder 12. See Holmes to Frankfurter, April 16, 1915, in Mennel and Compston, *Holmes & Frankfurter*, 29.

227. Holmes to Moncheur, OWHP, December 30, 1915, reel 26, page 345, box 35, folder 31.

228. *Ibid.* See Christie to Frankfurter, November 21, 1915, at 2, FF-LC, box 43, folder "Christie, Loring C. 1915."

‘The man who wrote that,’ she said, ‘knew Robert before their hands met.’”²²⁹

After the United States entered World War I, Frankfurter pondered how best to serve his country. He sought Holmes’s advice, and Holmes replied:

Your discourse as to your own attitude in case of war seems to me to put it rightly and brings peace to my heart. But I hope, for the sake of the Law School and the Law, that it will not be necessary to make any serious break in your career. I agree, on the other hand, that now I should allow less than I did in my own case 50 years ago to the consideration of the special faculties that one may attribute to oneself as a ground for not taking the chances of war. And I only rejoice that if you have to serve, it is not likely to be in the field.²³⁰

Frankfurter became a major in the reserve corps of the Judge Advocate General’s office and later took a leave of absence from Harvard, lived in the House of Truth, and served as a special assistant to Secretary of War Newton Baker.²³¹

D. Milestones

Much of Holmes’s canonization had nothing to do with his judicial opinions or status as a Civil War hero. The House of Truth canonized him by recognizing his birthdays and judicial milestones. Privately, they praised him in letters on his March 8 birthday. Publicly, they continued to build his judicial reputation among law professors, law students, and political elites in the pages of the *Harvard Law Review*, other scholarly journals, and *New Republic* by celebrating his 75th birthday and his 20th year on the Court (and 40th year on the bench) and by collecting his essays and speeches into a book. Recognizing his birthdays and judicial milestones enabled the House’s progressives to reach other target audiences who did not read Supreme Court opinions: the mainstream media and average Americans who by the mid-1920s and early 1930s bought into the idea of Holmes as a wise old national hero.

1. 75th Birthday

Years later, Frankfurter described Holmes’s 75th birthday celebration as a “national event.”²³² This is a gross exaggeration, but it began the nonjudicial

229. Frankfurter to Holmes, November 16, 1916, in Mennel and Compston, *Holmes & Frankfurter*, 60.

230. See Holmes to Frankfurter, March 5, 1917, *ibid.*, 68.

231. Phillips, *Felix Frankfurter Reminisces*, 114–15.

232. Frankfurter, Foreword, *Holmes–Laski Letters*, 1: xiv.

aspects of the House of Truth's canonization. Walter Lippmann used the occasion to write his eloquent column about his visits to 1720 Eye Street and captured why the House's progressives regarded Holmes as their hero:

At seventy-five, a justice of the Supreme Court and a scholar known wherever the common law is studied, his heart is with the laughing sad men, who have mixed bitterness and beauty, and staked their souls on a gamble with life. He fought in the Civil War and was wounded; he has looked at death lightly, and known what it is to live dangerously. A sage with the bearing of a cavalier: his presence is an incitement to high risks for the sake of the enterprise and its memories. He wears wisdom like a gorgeous plume, and likes to stick the sanctities between the ribs.

He has lost nothing that young men have, and he has gained what a fine palate can take from the world. If it is true that one generation after another has depended upon its young to equip it with gaiety and enthusiasm, it is no less true that each generation of the young depends upon those who have lived to illustrate what can be done with experience. They need to know that not all life withers in bad air. That is why young men feel themselves very close to Justice Holmes. He never fails to tell them what they want to hear, or to show them what they would wish men to be.²³³

Beginning in 1914, Frankfurter was teaching at Harvard Law School. Although he nominally taught classes titled Public Utilities, Administrative Law, or Federal Jurisdiction, students received a healthy dose of Holmes.²³⁴ "Frankfurter's always giving you Holmes," a student complained to Laski. "They don't make much of Holmes in Minnesota."²³⁵

But Frankfurter and other esteemed law professors made much of Holmes. Frankfurter had persuaded the editors of the *Harvard Law Review* to dedicate their April 1916 issue to the justice in honor of his birthday.²³⁶ John Henry Wigmore, a Holmes correspondent and one of the nation's foremost legal scholars, wrote, "As I look over the long list of judges of American Supreme Courts, and even over the much shorter

233. Lippmann, "To Justice Holmes," 156. Lippmann concluded his impressions of famous men with this profile. Walter Lippmann, *Men of Destiny* (New York: Macmillan, 1927), 242–44. Lippmann's decision to conclude the book with this profile pleased Holmes. Holmes to Laski, September 1, 1927, in Howe, *Holmes–Laski Letters*, 2:976.

234. Frankfurter quoted Holmes on the title page of his Interstate Commerce Act casebook. Felix Frankfurter, ed., *A Selection of Cases under the Interstate Commerce Act* (Cambridge: Harvard University Press, 1915).

235. Laski to Holmes, December 16, 1916, in Howe, *Holmes–Laski Letters*, 1:42–4.

236. Holmes's photograph adorned the issue's first page. See *Harvard Law Review* 29 (1916): 565.

one of those who achieved eminence or possessed originality (and these two are not always the same), Justice Holmes seems to me the only one who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed.”²³⁷

Frankfurter, writing an article about Holmes’s constitutional opinions, put Holmes in the same category as John Marshall:

In their impact and sweep and fertile freshness, the opinions have been a superbly harmonious vehicle for the views which they embody. It all seems so easy, – brilliant birds pulled from the magician’s sleeve. It is the delusive ease of great effort and great art. He has told us that in deciding cases “one has to try to strike the jugular,” and his aim is sure. He has attained it, as only superlative work, no matter how great the genius, can be attained.²³⁸

Philosophers Morris Cohen and Eugen Ehrlich, and Roscoe Pound wrote articles using Holmes to explore larger themes.²³⁹ The April 1916 issue of the *Harvard Law Review* was Frankfurter’s proto-Festschrift to Holmes, a declaration that Holmes was more than just one of nine justices; he was a legal philosopher and judicial figure of historic proportions.

Holmes knew whom to thank for the *Harvard Law Review* articles. “Very few things in my life have given me so much pleasure,” he wrote Frankfurter. “I well know that I owe it to your constant kindness that I receive such a crowning reward, and I thank you from my heart.”²⁴⁰ Holmes’s gratitude extended to Pound and Wigmore.²⁴¹ Wigmore also dedicated an issue of the *Illinois Law Review* to Holmes and reprinted excerpts from his speeches.²⁴² Holmes delighted in Lippmann’s editorial “expressing the kindness of the young men for me,” alerted or sent copies of the *Harvard Law*

237. John H. Wigmore, “Justice Holmes and the Law of Torts,” *ibid.*, 601.

238. Felix Frankfurter, “The Constitutional Opinions of Justice Holmes,” *ibid.*, 698.

239. Morris R. Cohen, “The Place of Logic in the Law,” *ibid.*, 622–39; Eugen Ehrlich, “Montesquieu and Sociological Jurisprudence,” *ibid.*, 582–600; and Roscoe Pound, “Equitable Relief against Defamation and Injuries to Personality,” *ibid.*, 640–82.

240. See Holmes to Frankfurter, April 13, 1916, in Mennel and Compston, *Holmes & Frankfurter*, 51.

241. Holmes to Frankfurter, April 29, 1916, in *ibid.*, 52 (“Please express to Pound my high appreciation of the honor he did me by contributing to the April *Harvard Law Review*.”); Holmes to Wigmore, April 13, 1916, OWHP, reel 26, page 370, box 35, folder 32 (“The Law Review has come – and all that I can say is that your kindness brought tears to my eyes. I never expected such a reward and you have given me unmixed joy.”).

242. “To Justice Oliver Wendell Holmes: An Anniversary Obligation,” *Illinois Law Review* 10 (1916): 617.

Review to his friends and correspondents, and declared his past 75 years “a success”²⁴³ and that “the long struggle had not been in vain.”²⁴⁴

2. Collected Legal Papers

If Lippmann’s editorial and Frankfurter’s 1916 Festschrift began the House of Truth’s public canonization of Holmes, then Laski’s efforts to publish Holmes’s speeches and essays brought the justice national and international acclaim among scholars, judges, lawyers, and the lay public. In 1918, Laski had persuaded Holmes to write a short article attacking natural law for the *Harvard Law Review*.²⁴⁵ In a larger project, Laski intended to republish the Holmes canon in book form. In January 1920, Laski wrote Holmes that the manuscript had been completed and sent to the printer. “It’s been a great joy to me to re-read your things . . .,” Laski wrote. “The greatest of them is the ‘Path of Law,’ though there are touches in the 1913 speech which made me feel mean and humble. It is great to have a man who takes his profession so greatly.”²⁴⁶ Holmes returned the compliment to Laski. “I owe him thanks for gathering these little fragments of my fleece that I have left upon the hedges of life . . .,” Holmes wrote in the book’s June 15, 1920 preface. “A later generation has carried on the work that I began nearly half a century ago, and it is a great pleasure to any old warrior who cannot expect to bear arms much longer, that the brilliant young soldiers still give him a place in their councils of war.”²⁴⁷ The preface was a clear nod to the House of Truth. By late November 1920, Holmes began sending advance copies of the book, oddly titled *Collected Legal Papers*, to his friends at the House of Truth including Frankfurter, Croly, and Lippmann.²⁴⁸

The House of Truth crowd celebrated Holmes’s *Collected Legal Papers*. Croly and Lippmann, in consultation with Frankfurter, determined that

243. Holmes to Lady Asquith, June 28, 1916, OWHP, reel 26, page 382, box 35, folder 32. For similar comments, see Holmes to Einstein, July 11, 1916, in Peabody, *Holmes–Einstein Letters*, 133; and Holmes to Clara Stevens, May 13, 1916, OWHP, reel 26, page 375, box 35, folder 32.

244. Holmes to Moncheur, October 23, 1916, OWHP, reel 26, page 400, box 36, folder 1.

245. Oliver Wendell Holmes, “Natural Law,” *Harvard Law Review* 32 (1918): 40; Laski to Holmes, August 27, 1918, in Howe, *Holmes–Laski Letters*, 1:163. On Laski’s stint as the *Harvard Law Review*’s book review editor and his efforts to “keep the ship afloat” during World War I, see Zechariah Chafee, Jr., “Harold Laski and the Harvard Law Review,” *Harvard Law Review* 63 (1950): 1398–1400.

246. Laski to Holmes, January 14, 1920, in Howe, *Holmes–Laski Letters*, 1:233.

247. Holmes, *Collected Legal Papers*, v.

248. See, for example, Frankfurter to Holmes, November 22, 1920, in Mennel and Compston, *Holmes & Frankfurter*, 97.

Viscount Haldane should review *Collected Legal Papers* for the *New Republic*.²⁴⁹ Haldane admired Holmes, and the approval of the British would make Holmes proud.²⁵⁰ They also knew that it would be some time before Haldane's review came out, but that it would generate a lot of publicity. "[I]t is very likely that Walter Lippmann and I may want to [review it], too," Croly wrote Holmes.²⁵¹ Holmes was thrilled. "Of course, the old boy likes the appreciation, particularly from the youngsters," Frankfurter wrote philosopher Morris Cohen.²⁵²

A frequent Holmes correspondent and Frankfurter's former law school roommate, Cohen described *Collected Legal Papers* in his *New Republic* review as "an extraordinary book of thoroughly matured human wisdom."²⁵³ Cohen admired Holmes's "urbane or civilized scepticism" and "complete freedom from all the current cant phrases about liberty and equality, democracy and progress."²⁵⁴ Holmes wrote Cohen indicating "happiness" with the review that "makes life easier. An odd phrase for a man who will be 80 in March. It seems as if at that date one might tie up the past into a neat package, insure it with Cohen as valuable, and take an irresponsible rest. But as soon as a corner is turned the road stretches away again and ambition to go farther returns . . ."²⁵⁵ Philip Littell, in the magazine's "Books and Things" column, quoted four sentences from *Collected Legal Papers* as proof that they represented "'the finest modern English prose."²⁵⁶ Holmes appreciated Littell's "little side puff."²⁵⁷

249. Croly to Holmes, November 30, 1920, OWHP, reel 30, page 366, box 40, folder 21.

250. Holmes to Moncheur, April 4, 1919, *ibid.*, reel 36, page 520, box 36, folder 4 (quoting Haldane as calling Holmes "the greatest living legist"); Laski to Holmes, July 18, 1920, in Howe, *Holmes-Laski Letters*, 1:270 ("[Haldane] talked vividly of his crossing with you, of the dissent in *Abrams v. U.S.*, the influence of *The Common Law* . . ."); Holmes to Laski, November 17, 1920, *ibid.*, 291 (sending advance copies to the British, including "Pollock, Dicey, Haldane, Leslie Scott, and the British Academy").

251. Croly to Holmes, November 30, 1920, OWHP, reel 30, page 366, box 40, folder 21.

252. Frankfurter to Cohen, March 4, 1921, in Leonora Cohen Rosenfield, *Portrait of a Philosopher: Morris R. Cohen in Life and Letters* (New York: Harcourt, Brace & Company, 1962), 251.

253. Morris R. Cohen, "Justice Holmes," *New Republic*, February 2, 1921, 294.

254. *Ibid.*, 295.

255. Holmes to Cohen, January 30, 1921, at 1–2, OWHP, reel 30, page 37, box 40, folder 10 and in "The Holmes-Cohen Correspondence," ed. Felix S. Cohen, *Journal of the History of Ideas* 9 (1948), 27. For more on Holmes's delight about Cohen's review, see Holmes to Pollock, February 9, 1921, in Howe, *Holmes-Pollock Letters*, 2:64.

256. Philip Littell, "Books and Things," *New Republic*, February 23, 1921, 380.

257. Holmes to Clara Stevens, February 20, 1921, OWHP, reel 26, page 646, box 36, folder 7.

Throughout 1921, *Collected Legal Papers* generated scholarly reappraisals of Holmes's career in law reviews, political science journals, and several magazines.²⁵⁸ Law professors including Yale's Walter Wheeler Cook and Columbia's Thomas Reed Powell and Judge Learned Hand praised the book.²⁵⁹ They recognized that Holmes's speeches and writings placed him a cut above his brethren and made him a seminal legal thinker. They saw greatness in Holmes just as the progressives at the House of the Truth did. Frankfurter maintained his steady stream of flattery by discussing reviews with Holmes and sending him copies. "But I have been much surprised and a little worried by the outpouring," Holmes wrote Frankfurter. "Pride goeth before a fall and whenever anything sets me up, I expect very shortly to get taken down."²⁶⁰ Frankfurter replied, "When I read Luina [Mrs. Frankfurter] your expression of concern over the "outpouring" evoked by the essays, says she, in her innocence, 'Why doesn't he realize what he is and what he means to men.' Whereupon, I tried to explain to her how thoroughgoing your scepticism and how deep your humility."²⁶¹ Holmes was a skeptic, but not humble, and he was incredibly vain. The reception of *Collected Legal Papers* fed his ego and his vanity and cemented his reputation among legal elites.

Praise for *Collected Legal Papers* carried into March 8, 1921, Holmes's 80th birthday. Frankfurter arranged a letter from the Harvard faculty,

258. See Lord Bryce, "Notices of Books: Mr. Justice Holmes's Papers," *Journal of Comparative Legislation and International Law* 4 (1922): 119–20; Walter Wheeler Cook, "Review of Collected Legal Papers by Oliver Wendell Holmes," *Yale Law Journal* 30 (1921): 775–76; Hampton L. Carson, "Review of Collected Legal Papers by Oliver Wendell Holmes," Harcourt, Brace, & Howe 1920," *University of Pennsylvania Law Review* 69 (1921): 291–94; Robert Eugene Cushman, "Review of Collected Legal Papers, by Oliver Wendell Holmes," *The Mississippi Valley Historical Review* 8 (1921): 208–9; Julius Goebel Jr., "Review of Collected Legal Papers, by Oliver Wendell Holmes," *Virginia Law Review* 7 (1921): 494–95; Charles Noble Gregory, "Review of Collected Legal Papers, by Oliver Wendell Holmes," *American Journal of International Law* 15 (1921): 490–92; Learned Hand, "Review of Collected Legal Papers, by Oliver Wendell Holmes," *Political Science Quarterly* 36 (1921): 528–30; Charles Hough, "Review of Collected Legal Paper, by Oliver Wendell Holmes," *Columbia Law Review* 21 (1921): 296–98; Austin Kocourek, "Book Review," *Illinois Law Review* 16 (1921): 156–61; Edwin W. Patterson, "Book Review," *Iowa Law Bulletin* 6 (1921): 250–51; Francis S. Philbrick, "A Genial Sceptic," *The Freeman*, June 29, 1921: 378–79; Horace E. Whiteside, "Book Review," *Cornell Law Quarterly* 6 (1921): 353–62; Thomas Reed Powell, "Mr. Justice Holmes," *The Nation*, February 9, 1921: 238–39; and James H. Tufts, "The Legal and Social Philosophy of Mr. Justice Holmes," *American Bar Association Journal* 7 (1921): 359–63.

259. See previous note.

260. Holmes to Frankfurter, August 30, 1921, in Mennel and Compston, *Holmes & Frankfurter*, 122.

261. Frankfurter to Holmes, September 1, 1921, *ibid.*, 123.

“tipped off” Brandeis, orchestrated Haldane’s review, and “etc., etc., etc.”²⁶² Pound praised *Collected Legal Papers* in another *Harvard Law Review* volume dedicated to Holmes and declared that “the author of ‘The Path of the Law,’ and of the dissenting opinion in *Lochner v. New York*, may await the assured verdict of time.”²⁶³ Haldane wrote in his long-awaited *New Republic* review that “[e]very nation forms an intellectual type which is peculiarly its own” and considered Holmes “a striking example of it.”²⁶⁴ Both reviews, Holmes wrote, “show that I have achieved what I longed to do.”²⁶⁵ To another friend, he wrote: “For to one to whom intellectual ambition is the strongest the only reward that counts for much is when those whom he deems competent say that he has touched the superlative. And I have had more than I ever dared to hope”²⁶⁶ To yet another he wrote, “the people whom I should have chosen have said the things I should have wished but never dared expect. So (again in a sense) I call the job finished. I can’t better it, and while I shall keep on as before shall hold before myself as a further ideal to see if I can’t live to 90 and shine as a reminiscent and survivor”²⁶⁷

His father’s fame, however, still loomed in the lay public’s mind. The *New York Times* review, titled *A ‘Legal’ Autocrat*, claimed that Holmes’s modest preface “might have been written by his universally beloved father. One can pay his distinguished son no greater compliment than that . . . scattered throughout the pages of these ‘Papers’—most of which are concerned with strictly legal subjects—there are sentences and thoughts which are strongly reminiscent of the genial ‘Autocrat of the Breakfast Table’ and quite worthy of his happiest moods.”²⁶⁸ Interestingly, the author of *Collected Legal Papers* is listed as Oliver Wendell Holmes; he dropped the “Jr.” after his father’s death.²⁶⁹ Indeed, as his father receded into the

262. Frankfurter to Cohen, March 4, 1921, in Rosenfield, *Portrait of a Philosopher*, 251.

263. Roscoe Pound, “Judge Holmes’s Contributions to the Science of Law,” *Harvard Law Review* 34 (1921): 453.

264. Richard Burdon Haldane, “Mr. Justice Holmes,” *New Republic*, March 9, 1921, 34. For Holmes’s pleasure over the review, see Brandeis to Frankfurter, March 9, 1921, in Urofsky and Levy, *Half Brother, Half Son*, 68.

265. Holmes to Lady Scott, March 16, 1921, OWHP, reel 26, page 664, box 36, folder 7.

266. Holmes to Moncheur, May 2, 1921, OWHP, reel 26, page 677, box 36, folder 8.

267. Holmes to unknown, November 30, 1921, OWHP, reel 26, page 720, box 36, folder 9.

268. Frederick Trevor Hill, “A Legal ‘Autocrat,’” *New York Times*, April 3, 1921, 41. See also “Distinguished Sons of Distinguished Fathers,” *Washington Post*, July 17, 1921, 47 (describing Holmes as “the son of the great author” and that “Justice Holmes has inherited much of his father’s sane outlook on life and has a keen sense of humor.”).

269. Holmes, *Collected Legal Papers*; Oliver Wendell Holmes, *Speeches* (Boston: Little, Brown, 1913); but Oliver Wendell Holmes Junior, *Speeches* (Boston: Little, Brown, 1891). Holmes’s father died in 1894.

nineteenth century, the House of Truth's canonization of Holmes helped him eclipse his father's fame and enter the public's consciousness.

In Holmes's ninth decade, the House's publicity campaign began to reach the American people—not as a defender of labor and free speech but as a national treasure. In December 1922, Frankfurter celebrated Holmes's 20th anniversary on the Supreme Court and 40th anniversary on the bench with an unsigned *New Republic* editorial proclaiming “the judicial work of Mr. Justice Holmes is the symbol at once of the promise and fulfillment of the American judiciary” and concluding that “[b]ehind the sceptic is invincible faith.”²⁷⁰ “I do not know whether to recognize your friendly hand in the actual writing or not—that you are in some way responsible for it I hardly can doubt,” Holmes wrote Frankfurter. “Such a thing cannot but make one happy and feel as if the long day's task had not been in vain.”²⁷¹ Frankfurter then wrote a 1923 *Harvard Law Review* article titled, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, and included an appendix listing more than 500 of his opinions.²⁷² Frankfurter's *Harvard Law Review* article caught the attention of *Time* magazine²⁷³ and the *New Republic*, which declared: “The article deserves to be read not only by lawyers, who would presumably be technically interested in its contents, but by laymen to whom the traditional American system of law and government is a cherished inheritance.”²⁷⁴

In 1926, Frankfurter wrote another *New Republic* editorial honoring Holmes's 85th birthday: “The tender, wise, beautiful being who is Mr. Justice Holmes in himself redeems the whole legal profession.”²⁷⁵ The editorial left Holmes “at the moment dumb.”²⁷⁶ Lippmann also wrote an editorial for his new employer, the reformist *New York World*: “There is

270. “Mr. Justice Holmes,” *New Republic*, December 20, 1922, 84, in FF-LC, box 194, scrapbook “Writings 1913–1924,” 156a.

271. Holmes to Frankfurter, December 22, 1922, in Mennel and Compston, *Holmes & Frankfurter*, 149–50. For similar comments, see Holmes to Nina Gray, Dec. 26, 1922, OWHP, reel 23, page 884, box 32, folder 19; Holmes to Pollock, December 31, 1922, in Howe, *Holmes–Pollock Letters*, 2:108–9.

272. Felix Frankfurter, “Twenty Years of Mr. Justice Holmes' Constitutional Opinions,” *Harvard Law Review* 36 (1923): 909–39. For Holmes's reaction, see Holmes to Frankfurter, July 3, 1923, in Mennel and Compston, *Holmes & Frankfurter*, 154.

273. “Honor to Justice Holmes,” *Time*, July 16, 1923.

274. “Judges and Statesman,” *New Republic*, September 12, 1923, 62.

275. “Mr. Justice Holmes,” *New Republic*, March 17, 1926, 89, in FF-LC, box 195, scrapbook “Writings 1925–1928,” 26.

276. Holmes to Frankfurter, March 17 (or 27), 1926, in Mennel and Compston, *Holmes & Frankfurter*, 200. See, also, Brandeis to Frankfurter, March 14, 1926, in Urofsky and Levy, “Half Brother, Half Son,” 235 (suggesting the editorial “will add to his happiness”).

nothing we can say which will add to the fame of Mr. Justice Holmes wherever the law is studied. In every high court and in every law school throughout the world he is known and studied and revered as one of the few greatest minds who have dealt with the law in the course of last century."²⁷⁷ Frankfurter marked Holmes's 25th year on the Supreme Court with another lengthy *Harvard Law Review* article (and eventual book), *Mr. Justice Holmes and the Constitution*,²⁷⁸ which inspired Philip Littell's *New Republic* article praising Holmes's opinions as "English prose at its clearest and concisest."²⁷⁹ Lippmann wrote another *New York World* editorial in 1928 recognizing that Holmes had passed Roger Taney as the Court's oldest justice.²⁸⁰ Harvard Law School commissioned an official portrait of Holmes by Charles Hopkinson and unveiled it on March 22, 1930 with remarks by Learned Hand.²⁸¹ That same year, Harold Laski declared in *Harper's* on Holmes's 89th birthday:

Since John Marshall revealed to the American people what their new constitution might imply, none has so clearly molded its texture as Mr. Justice Holmes. He stands out in its history not merely as one of the two or three most significant figures in the record, but, also, as one of the supreme expositors of principle in the annals of the Common Law. To read his opinions is to capture once again something of the excitement a lawyer feels when he first reads a judgment of Mansfield or Jessel or Bowen. Here is law in the grand style, law as a part of the living fabric of life, law as literature as well as technic, law as philosophy not less than science. When, twenty-five years ago, John Morley visited America, he came back to affirm that in Mr. Justice Holmes America possessed the greatest judge of the English-speaking world.²⁸²

277. "Mr. Justice Holmes," *New York World*, March 8, 1926, 10, in OWHP, reel 41, page 488, box 54, folders 10–11; Lippmann to Holmes, March 10, 1926, *ibid.*, reel 15, page 185, box 16, folder 6 (enclosing articles by Lippmann and Hand in honor of Holmes's birthday and adding "my own deep appreciation for you").

278. Felix Frankfurter, "Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court," *Harvard Law Review* 41 (1927): 121–73. Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court* (Cambridge: Dunster House Bookshop, 1927). On Holmes's happiness over the article, see Brandeis to Frankfurter, December 20, 1927, in Urofsky and Levy, "Half Brother, Half Son," 314; and Holmes to Pollock, January 7, 1928, in Howe, *Holmes–Pollock Letters*, 2:211.

279. Philip Littell, "A Judge's Prose," *New Republic*, January 4, 1928, 195.

280. "The Oldest Justice," *New York World*, October 5, 1928, 12, in OWHP, reel 40, page 479, box 54, folders 10–11.

281. Learned Hand, "Mr. Justice Holmes," *Harvard Law Review* 43 (1930): 857–62.

282. Harold J. Laski, "Mr. Justice Holmes," *Harper's*, March 1930, 416.

Holmes wrote that Laski's article "moved me deeply."²⁸³ A year later, Laski wrote a tribute to Holmes in the *Yale Law Journal*.²⁸⁴ Frankfurter reviewed a collection of Holmes's dissenting opinions ("The fruit of his wisdom has become part of the common stock of civilization")²⁸⁵ and wrote a brief *Harvard Law Review* article about Holmes's early writings.²⁸⁶ To celebrate Holmes's 90th birthday, Frankfurter organized a Festschrift/book published in 1931 consisting mostly of former *New Republic* and *Harvard Law Review* articles by Frankfurter, Lippmann, Littell, Cardozo, and philosopher John Dewey.²⁸⁷ Frankfurter rejected former Attorney General George W. Wickersham's contention that "without exception the writers of all the essays in this volume represent a school of thought to which, in general, the majority of the Supreme Court has been consistently opposed."²⁸⁸

By the mid-1920s, the House's canonization of Holmes had spread from law schools and scholarly publications to the mainstream media and national political leaders. On June 3, 1924, President Calvin Coolidge awarded him the Roosevelt Memorial Association's gold medal for service. "For five minutes, Mr. President," Holmes replied, "you make the dream of a life seem true"²⁸⁹ Holmes's 85th birthday made the national newsreels and landed him on the cover of *Time* magazine, which labeled him "as venerable as his father."²⁹⁰ In 1929, President Herbert Hoover, a former House of Truth visitor, sent Holmes flowers.²⁹¹ "One profession that is more noble today than

283. Holmes to Nina Gray, February 26, 1930, at 2, OWHP, reel 24, page 362, box 33, folder 17. For similar comments, see Holmes to Pollock, April 6, 1930, in Howe, *Holmes-Pollock Letters*, 2:260-61.

284. Harold J. Laski, "The Political Philosophy of Mr. Justice Holmes," *Yale Law Journal* 40 (1931): 683-95; and Laski to Holmes, January 10, 1931, in Howe, *Holmes-Laski Letters*, 2:1303.

285. Felix Frankfurter, review of *The Dissenting Opinions of Mr. Justice Holmes*, *Virginia Law Review* 16 (1930): 743-44.

286. Felix Frankfurter, "The Early Writings of O.W. Holmes, Jr.," *Harvard Law Review* 44 (1931): 717-24.

287. Felix Frankfurter, ed. *Mr. Justice Holmes* (New York: Coward-McCann, 1931).

288. George W. Wickersham, review of *Mr. Justice Holmes*, *American Bar Association Journal* (September 1931): 613. Frankfurter wrote that if he and Wigmore "belong to the same 'school of thought,' then I should think the 'school' is sufficiently comprehensive for Mr. Wickersham also to find himself at home in it." Felix Frankfurter, Letter to the Editor, September 8, 1931, *American Bar Association Journal* (November 1931): 776.

289. Holmes to Einstein, June 4, 1924, in Peabody, *Holmes-Einstein Letters*, 226. For similar observations and comments, see Brandeis to Frankfurter, July 3, 1924, in Urofsky and Levy, "Half Brother, Half Son," 170; and Holmes to Clara Stevens, March 29, 1926, at 3, OWHP, reel 27, page 48, box 36, folder 17.

290. *Time*, March 15, 1926.

291. Holmes to Hoover, October 3, 1929, OWHP, reel 27, page 330, box 36, folder 26.

that of soldier is Dissenting Justice of the Supreme Court,” E.B. White wrote that same year in the *New Yorker*’s “Talk of the Town” section.²⁹² White was referring to Holmes and quoted from his *Schwimmer* dissent.²⁹³

A *New Republic* editorial declared Holmes’s 90th birthday “an event which belongs not to him but to the nation. It has been his supreme achievement to make the qualities of his mind the symbol of what we value most highly in the national life.”²⁹⁴ President Hoover sent him a publicly released letter.²⁹⁵ That night, Holmes briefly but memorably delivered a national radio address. The radio program, organized by editors from the Harvard, Yale, and Columbia law reviews, began with American Bar Association President Charles Boston, followed by Yale Law School Dean Charles Clark and Chief Justice Charles Evans Hughes.²⁹⁶ Holmes, however, stole the show with his brief concluding remarks. “There is time to hear the kind voice of friends and to say to one’s self: ‘The work is done,’” Holmes said while speaking into a live microphone from his second-floor study on 1720 Eye Street. “But just as one says that, the answer comes: ‘The race is over, but the work never is done while the power to work remains.’”²⁹⁷ He concluded by quoting a Latin poem: “‘Death plucks my ears and says, ‘Live—I am coming.’”²⁹⁸ After hearing his remarks, the national media embraced Holmes as an American hero.²⁹⁹ The front page *New York Times* story described him as a “soldier, lawyer, leader of public opinion, associate justice . . .” and

292. E.B. White, Comment, *New Yorker*, June 22, 1929, 11.

293. *Ibid.*

294. “Mr. Justice Holmes at Ninety,” *New Republic*, March 11, 1931, 87.

295. “Hoover Felicitates Holmes on Birthday,” *New York Times*, March 8, 1931, 16; and Holmes to Hoover, March 7, 1931, OWHP, reel 27, page 465, box 36, folder 29.

296. “Holmes, 90, Greets Nation Over Radio; Lauded by Hughes,” *New York Times*, March 9, 1931, 1; Holmes to Dean Clark, March 12, 1931, OWHP, reel 27, page 468, box 36, folder 29 (“You added so much to the happiness of my birthday that it would have been much less but for you. Everything went off delightfully and even the dread plunge in the unknown of the radio became a pleasure.”).

297. “Holmes, 90,” *New York Times*, March 9, 1931, 1.

298. *Ibid.*

299. Ring Lardner wrote: “In the opinion of the undersigned, who has had some slight experience in talking into a microphone, Justice Oliver Wendell Holmes did pretty well in his radio debut last night, at least well enough to be entitled to another trial. You must remember he is just a kid breaking in and it is no wonder his voice was a little shaky. With the right kind of teaching he ought to be ready to step in next fall and take charge of one of the minor games like Harvard and Bates or Army v. Ursinus.” “A Night Letter from Ring Lardner,” *Chicago Tribune*, Mar. 10, 1931: 3. See “Judiciary: A Little Finishing Canter,” *Time*, March 16, 1931, 18; Editorial, *Christian Science Monitor*, March 10, 1931, 16; “Mr. Justice Holmes at 90,” *Baltimore Sun*, March 9, 1931, 8; and “Justice Holmes at Ninety,” *Los Angeles Times*, March 10, 1931, A4.

the “series of tributes such as have rarely been paid to any man in his own lifetime.”³⁰⁰

The final act of House of Truth-inspired canonization during Holmes’s lifetime was a surprise visit from President Franklin Roosevelt on Holmes’s 92nd birthday and Roosevelt’s fourth day in office.³⁰¹ Frankfurter, a close Roosevelt adviser, arranged the meeting, a grand act of symbolism between Holmes, the longtime hero of progressives, and Roosevelt, the first president in nearly 20 years to give them hope for constitutional change. Roosevelt broke protocol by visiting the home of a private citizen. Joined by Eleanor, his son Jimmy, and Frankfurter at 1720 Eye Street, the president sat with Holmes for 40 minutes in his second-floor study.³⁰² The following year, Roosevelt, unwilling to brave the New England weather to see Holmes at Beverly Farms, wrote the retired justice a handwritten birthday note “wishing all good things for the most splendid and the wisest of all American Liberals.”³⁰³ Roosevelt paid his respects at Holmes’s funeral at Arlington Cemetery, standing

300. “Holmes, 90,” *New York Times*, March 9, 1931, 1

301. “Your kind thoughtfulness in coming here the other day sets me free to express my congratulations and good wishes to you. They are very sincere and follow seems to me a most fortunate beginning of the term. Old age has made it hard for me to write with this brief expression of confident prophecies for the future. With deep respect I am Your obedient servant. O.W. Holmes.” Holmes to Roosevelt, March 16, 1933, OWHP, reel 40, page 373, box 52, folder 29.

302. “At 5:30 Franklin, James, and I went to Justices Holmes. He is a fine old man with flashes of his old wit and incisiveness.” Eleanor Roosevelt to Lorena Hickok, March 8, 1933, at 3, Lorena Hickok Papers, Franklin Delano Roosevelt Library, box 1 “Mar–Nov.1933”; and “Memorandum by Frankfurter of a visit with Roosevelt on March 8, 1933, when the President asked Frankfurter to become Solicitor General,” March 15, 1933, in *Roosevelt & Frankfurter: Their Correspondence*, ed. Max Freedman (Boston: Little, Brown, 1967): 110–14. The document details lunch with Holmes, former secretary Thomas Corcoran, and current secretary Donald Hiss, including champagne during Prohibition and mentioning meeting at Holmes’s residence at 5:30 with Roosevelt, Mrs. Roosevelt, and Jimmy. See Phillips, *Felix Frankfurter Reminiscences*, 247; “Recollection of Donald Hiss,” in *The Making of the New Deal*, ed. Katie Louchheim (Cambridge: Harvard University Press, 1983), 36–38. Hiss recalled a “very animated” yet “very easy” conversation between Roosevelt and Holmes about swords Holmes’s maternal grandfather had used during the French and Indian War, and apocryphal words of advice to “stop the retreat, blow your trumpet, have them give the order to charge.” Interview of Donald Hiss, October 13, 1979 and June 3, 1980, Monagan Papers, Harvard Law School, at 6, 25, 43–45, box 1, folder 9. For other recollections, see Monagan, *Grand Panjandrum*, 1–3; Interview of Annie M. Coakley (Mary Donnellan), November 28, 1979, 36, Monagan Papers, box 1, folder 1–2; James Roosevelt & Sidney Shalett, *Affectionately, FDR: A Son’s Story of a Lonely Man* (New York: Harcourt, Brace & Company, 1959), 92; “President and Wife Call on Mr. Holmes,” *New York Times*, March 9, 1933, 17; and “The Presidency: The Roosevelt Week,” *Time*, March 20, 1933, 9.

303. Roosevelt to Holmes, March 8, 1934, OWHP, reel 40, page 2, box 52, folder 20.

next to a military aide beside Holmes's casket, and issued a public statement that the "Nation has lost one of its first citizens."³⁰⁴ The *New York Times* headline declared: "HOLMES IS BURIED AS NATIONAL HERO."³⁰⁵

During Holmes's lifetime, the House of Truth transformed "Mephistopheles" into a progressive icon and created an undoubtedly skewed portrait of the justice to suit their political ends. Holmes was much more of a skeptic and positivist than a civil libertarian. The differences between the real Holmes and the canonized Holmes were vast, differences that revealed fundamental flaws in Holmes's majoritarian judicial philosophy and also about the progressives themselves.

The House's progressives created the myth of Holmes as the champion of free speech that ignored everything before his *Abrams* dissent. Before *Abrams*, Holmes limited First Amendment protection of free speech to freedom from prior restraint.³⁰⁶ His opinions in *Schenck*, *Frohwerk*, and especially *Debs* affirmed harsh punishments of political speech. Most of the House's progressives, however, had little interest in free speech before post-World War I crackdowns on civil liberties. Even the great civil libertarian Brandeis had joined *Schenck*, *Frohwerk*, and *Debs* and wrote none of his canonical First Amendment opinions until after Holmes's *Abrams* dissent.³⁰⁷

Holmes's record on race was bad, but not all bad.³⁰⁸ He reminded his young friends that he had been "an abolitionist and shuddered at a Negro Minstrel Show, as belittling a suffering race and I am glad I was and did."³⁰⁹ His three Civil War wounds, however, supplanted his abolitionism with intense skepticism—particularly about constitutional notions

304. "Military Funeral to Honor Holmes," *New York Times*, March 7, 1935, 1. "At the grave in Arlington there was a brief pause until the White House car arrived. Supported by an aide the President walked slowly to the open grave." John Knox, "Some Correspondence with Holmes and Pollock," *Chicago Bar Record*, 222, in John Knox Papers, Georgetown University, box 1, folder 53. Frankfurter, who had spent the days before Holmes's funeral with Roosevelt, wrote: "I shall always associate his meaning for me with you, at the most poignant and triumphant hours of life." Frankfurter to Roosevelt, March 7, 1935, in Freedman, *Roosevelt & Frankfurter*, 257 (emphasis in original).

305. *New York Times*, March 9, 1935, 16.

306. *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 462 (1907).

307. See, for example, *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); and *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting).

308. On Holmes's lack of sympathy toward the rights of African-Americans, see Alschuler, *Law Without Values*, 56–58; White, *Inner Self*, 333–43; Rogat, *A Dissenting Opinion II*, 255.

309. Holmes to John C. Wu, June 21, 1928, in *Justice Holmes to Doctor Wu: An Intimate Correspondence, 1921–1932* (New York: Central Book Company, c. 1947), 48. For similar comments, see Holmes to Laski, November 5, 1926, in Howe, *Holmes–Laski Letters*, 2:893.

of equality. On the Court, he joined or wrote several opinions against black litigants, including several that perpetuated Jim Crow.³¹⁰ He nearly dissented from *Buchanan v. Warley*,³¹¹ which invalidated a Louisville statute intended to promote residential segregation, because it was a “manufactured case” that did not concern the “constitutional rights of blacks” (because the plaintiff was a white homeowner).³¹² In *Giles v. Harris*,³¹³ he deferred to majority rule and rejected a challenge to the Alabama Constitution disenfranchising black voters—considered by scholars to be one of the worst decisions about race in the Court’s history.³¹⁴ But in *Nixon v. Herndon*,³¹⁵ he wrote a unanimous opinion invalidating the Texas Democratic Party’s all-white primary, an opinion he delivered with “much joy.”³¹⁶

Holmes was more willing to protect racial and religious minorities from mob-dominated criminal trials—writing the majority opinion about the trials of black murder defendants after race riots in Phillips County, Arkansas, and dissenting from the Court’s affirmation of Leo Frank’s

310. *Gong Lum v. Rice*, 275 U.S. 78 (1927); *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151, 164 (1914); *United States v. Reynolds*, 235 U.S. 133, 150 (1914) (Holmes, J., concurring); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (Holmes, J., dissenting); and *Berea College v. Kentucky*, 211 U.S. 45 (1908) (Holmes, J., concurring in the judgment).

Then–Justice Hughes was more progressive than Holmes on race. Hughes criticized Holmes’s unpublished memo in *McCabe* as interpreting the Fourteenth Amendment as not prohibiting racial discrimination. See Hughes to Holmes, November 29, 1914, in Alexander M. Bickel and Benno C. Schmidt Jr., *History of the Supreme Court of the United States: The Judiciary and Responsible Government, 1910–1921*, vol. IX (New York: Macmillan, 1984). Even Frankfurter acknowledged that in *Bailey v. Alabama*, Hughes had “much better a nose . . . for the actual operation of peonage laws in the South than Holmes.” Frankfurter to Cohen, October 3, 1916 in Rosenfield, *Portrait of a Philosopher*, 248.

311. *Buchanan v. Warley*, 245 U.S. 60, 80–82 (1917).

312. Holmes draft *Buchanan* dissent, at 1, OWHP, reel 61, page 651, box 80, folder 12. For commentary of Holmes’s unpublished draft dissent, see Bickel and Schmidt, *History of the Supreme Court of the United States*, 592, 804–10; David E. Bernstein, “Philip Sober Controlling Philip Drunk: *Buchanan v. Warley* in Historical Perspective,” *Vanderbilt Law Review* 51 (1998): 855–56.

313. *Giles v. Harris*, 189 U.S. 475, 488 (1903).

314. Greene, “The Anticanon,” 429 (asserting that *Giles* “should be—the most prominent stain on the name of the Oliver Wendell Holmes”); Richard H. Pildes, “Democracy, Anti-Democracy, and the Canon,” *Constitutional Canon*, 17 (2000): 306 (describing it as “the most legally disingenuous analysis in the pages of the U.S. Reports”); Gerard Magliocca, “The Worst Supreme Court Opinion Ever?” *Concurring Opinions* blog, posted May 20, 2011 <http://www.concurringopinions.com/archives/2011/05/the-worst-supreme-court-opinion-ever.html> (October 20, 2011).

315. *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927).

316. Brandeis to Frankfurter, March 9, 1927, in Urofsky and Levy, “*Half Brother, Half Son*,” 278.

capital murder conviction.³¹⁷ Of the many progressives outraged over the unfair murder trial of anarchists Sacco and Vanzetti, Holmes wrote: "I cannot but ask myself why this is so much greater interest in red than black. A thousand-fold worse cases of negroes come up from time to time, but the world does not worry over them."³¹⁸

Holmes's relative lack of interest in protecting the equal rights of former slaves would not have troubled many of the House's progressives. One of their biggest blind spots was race.³¹⁹ Racial justice was not a salient issue for them. Brandeis has been often criticized for his voting record in race cases, as he joined many of the same decisions endorsing Jim Crow as Holmes did.³²⁰

The House's progressives canonized Holmes to attack a Court perceived to be hostile to labor and free speech. They successfully promoted Holmes to audiences including legal academics, law students, political elites, and eventually the American public. They praised his opinions that furthered their causes and overlooked *Pennsylvania Coal v. Mahon*, *Buck v. Bell*, his poor record on race, and his pre-*Abrams* decisions on free speech. The canonized version of Holmes reflected only the aspects of Holmes that the House's progressives wanted people to see.

E. Brandeis

Holmes's canonization is more than a product of the House of Truth's praising certain opinions and celebrating his birthdays and milestones; the young progressives had some help from one of their own inside the Court: Louis Brandeis. Before he joined the Court, Brandeis had been a regular visitor at the House of Truth.³²¹ After his nomination, he regularly

317. *Moore v. Dempsey*, 261 U.S. 86 (1923); and *Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). See Leo Frank to Holmes, July 10, 1915, OWHP, reel 31, page 363, box 43, folder 2.

318. Holmes to Laski, August 24, 1927, in Howe, *Holmes-Laski Letters*, 2:974. For similar comments, see Holmes to Laski, July 10, 1930, *ibid.*, 2:1265; and Holmes to Einstein, August 14, 1927, in Peabody, *Holmes-Einstein Letters*, 272.

The term after Holmes retired, Frankfurter wrote a *New York Times* article praising the Court's decision ordering new trials for the Scottsboro Boys. See Felix Frankfurter, "A Notable Decision," *New York Times*, November 13, 1932, E1; and *Powell v. Alabama*, 287 U.S. 45 (1932).

319. See, for example, Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (New York: Free Press, 1993), 182-218 (discussing the Progressive Movement's support for segregation).

320. Urofsky, *Louis D. Brandeis*, 639-40; and Christopher A. Bracey, "Louis Brandeis and the Race Question," *Alabama Law Review* 52 (2001): 859.

321. See, for example, Louis Brandeis to Alice Brandeis, November 23, 1913, in *The Family Letters of Louis Brandeis*, eds. Melvin I. Urofsky and David W. Levy (Norman, OK: University of Oklahoma Press, 2002), 224.

contributed ideas to the House of Truth and *New Republic* through his chief lieutenant, Frankfurter. Dubbed “the people’s lawyer” because of his work on behalf of progressive causes, Brandeis contributed to the House’s canonization of Holmes and to Holmes’s efforts to please his progressive friends.

Wilson’s nomination of Brandeis was like a member of the House of Truth joining Holmes on the Supreme Court. The House’s progressives rallied to Brandeis’s cause after Boston’s business establishment tried to block his confirmation.³²² Holmes had known Brandeis since the latter had arrived in Boston during the late nineteenth century to start a law firm with a former associate in Holmes’s law firm, Samuel Warren. About Brandeis’s nomination, Holmes remained publicly mum. Privately, he expressed some unease about the unseemliness of the confirmation fight.³²³ Once Brandeis joined the Court, however, all Holmes’s doubts disappeared.³²⁴

Even with Brandeis on the Court, the outcomes of the cases important to the House of Truth were the same; Brandeis usually joined Holmes in dissent in labor and post-*Abrams* free speech cases. Together they formed a formidable team and lasting friendship. Chief Justice Taft, an opponent of Brandeis’s nomination, believed that “[Holmes] is so completely under the control of brother Brandeis that it gives to Brandeis two votes instead of one.”³²⁵ Holmes and Brandeis did not always agree. But when they did, Brandeis brought out the most progressive side of Holmes. Brandeis often spurred Holmes to write important dissents, such as in *Hammer v. Dagenhart*³²⁶ and possibly in free speech cases.³²⁷

322. Frankfurter wrote two unsigned editorials: “Brandeis,” *New Republic*, February 5, 1916, 4–6 and “Brandeis and the Shoe Machinery Company,” *New Republic*, March 4, 1916, 117–19, in FF–LC, box 194, scrapbook “Writings 1913–1925.” Others included: Editorial, *New Republic*, March 11, 1916, 139 and “The Case Against Brandeis,” *New Republic*, March 25, 1916, 202–4.

323. See Holmes to Einstein, May 14, 1916, in Peabody, *Holmes–Einstein Letters*, 128; Holmes to Stevens, May 13, 1916, at 2, OWHP, reel 26, page 376, box 35, folder 32.

324. Holmes to Moncheur, December 4, 1916, at 1–2, OWHP, reel 26, page 404, box 36, folder 1.

325. Taft to Henry Stimson, May 18, 1928, at 2, Henry Stimson Papers, Yale University, reel 75, page 867 (writing about Holmes’s and Brandeis’s dissents in *Myers v. United States*). On Taft’s opposition to Brandeis’s nomination, see Urofsky, *Brandeis*, 438.

326. See, for example, Holmes to Moncheur, April 9, 1918, at 2, OWHP, reel 26, page 476, box 36, folder 3; Holmes to Laski, December 3, 1918, in Howe, *Holmes–Laski Letters*, 1:176.

327. See, for example, Holmes to Frankfurter, December 22, 1920, in *Holmes & Frankfurter*, 99 (“I didn’t agree with Brandeis first, that this wasn’t a war statute—it was passed and applied in time of war. It was none of the defendant’s business whether it would or would not be applied in time of peace, or would or would not be repealed then.”).

Holmes acknowledged Brandeis's influence to Nina Chipman Gray: "Sometimes my brother B. seems to me to see deeper than some of the others – and we often agree In two or three cases he has perhaps turned the scale on the question whether I should write—but in each of those I was and am more than glad that I did. Whether I have influenced him I don't know. But I believe I have stated fully one side of the account."³²⁸ Brandeis and Holmes often arrived at the same outcome in different ways. Brandeis famously liked facts and pioneered sociologically based jurisprudence; Holmes read philosophy and favored epigrams.³²⁹ Brandeis set a high bar and reinvigorated Holmes on the Court. Holmes treasured Brandeis's friendship and companionship.³³⁰

One striking aspect of Holmes's canonization is that it occurred largely because he surrounded himself with Jews (and mostly secular German Jews).³³¹ Brandeis, Frankfurter, Laski, Lippmann, and Morris Cohen contributed to his canonization. Holmes also corresponded with two British Jews, Laski and Lewis Einstein. Holmes's fellow Boston Brahmins, a term coined by his father, found it odd that Holmes had become philo-Semitic. This is particularly true of Holmes's female correspondents. "I am tickled at your 'If only you stay thoroughly Anglo-Saxon,'" he wrote Nina Chipman Gray. "I take the innuendo to be that I am under the influence of the Hebs. I am comfortably confident that I am under no influence except that of thoughts and insights."³³² Holmes was not anti-Semitic like many of his old friends,³³³ but he was very conscious of his new friends' Jewishness. He also trafficked in what today we would regard as stereotypes, believing his young Jewish friends to be more optimistic about

328. Holmes to Nina Gray, March 5, 1921, at 3, OWHP, reel 23, page 775, box 32, folder 15.

329. Holmes to Pollock, May 26, 1919, in Howe, *Holmes-Pollock Letters*, 2:13; and Holmes to Laski, May 18, 1919, in Howe, *Holmes-Laski Letters*, 1:204–5.

330. "Whenever he left my house I was likely to say to my wife, 'There goes a really good man.' In the moments of discouragement that we all pass through, he always has had the happy word that lifts up one's heart." Oliver Wendell Holmes, "Introduction," in *Mr. Justice Brandeis*, ed. Felix Frankfurter (New Haven: Yale University Press, 1932), ix.

331. Jerold S. Auerbach, *Rabbis and Lawyers: The Journey from Torah to Constitution* (Bloomington: Indiana University Press, 1990), 151 (describing increasing legal opportunities during World War I for "the older generation of German Jews" with newer Eastern European Jews relegated "to the lowest strata of professional life"). See, Hollinger, "The 'Tough Minded' Justice Holmes, Jewish Intellectuals, and the Making of an American Icon."

332. Holmes to Nina Gray, March 5, 1921, at 2–3, OWHP, reel 23, pages 774–75, box 32, folder 15.

333. "To me it is queer to see the wide-spread prejudice against the Jews. I never think of the nationality and might even get thick with a man before noticing that he was a Hebrew. You know the poem: 'How odd—Of God—To choose—The Jews.'" Holmes to Pollock, October 31, 1926, in Howe, *Holmes-Pollock Letters*, 2:191.

the future than his dour New Englanders.³³⁴ Whether his generalizations were true because of their religious backgrounds, because of geographical/generational differences, or not true at all, Holmes's Jewish friends spearheaded his canonization.

An enduring question is why the House's progressives chose to canonize Holmes before Brandeis. Or, put another way, why was Holmes number 1 in the House's hierarchy and Brandeis number 1-A? Brandeis, given his reputation as the "people's lawyer" and reformer willing to take on unpopular causes, seemed like the more natural candidate. He had mediated many labor disputes as "counsel to the situation" and believed in unionization and the rights of labor far more than Holmes did. Brandeis was also more of a political strategist than Holmes, having helped Woodrow Wilson with his antitrust platform in 1912 and participated in Zionist causes.

Several reasons favored Holmes. First, Holmes had been on the Court longer than Brandeis and when the House of Truth had begun. Second, Holmes's opinions contained epigrams that the House's progressives could reprint in law review articles and *New Republic* editorials. Third, Holmes possessed more charm and charisma than the cold and austere Brandeis; Holmes captivated the House's young progressives through witty conversation and cult of personality. Fourth, Brandeis was too similar to many of the House's Jewish progressives: outsiders striving to assimilate and become insiders. Brandeis, who described Frankfurter as "half brother, half son,"³³⁵ looked like them, talked like them, and aroused the same virulent anti-Semitism and charges of socialism or communism. Holmes, in contrast, was the perfect symbol: a Civil War hero, son of a famous Boston physician-poet, product of the Harvard white Anglo-Saxon Protestant establishment, regal in speech and bearing, and convivial in personality. No one would challenge his patriotism or accuse him of writing an opinion that aided or abetted the enemy. The House's progressives could attack the Court's antilabor and post-*Abrams* free speech decisions

334. Holmes to Laski, January 12, 1921, in Howe, *Holmes-Laski Letters*, 1:304-5 (asking "whether loveableness is a characteristic of the better class of Jews. When I think how many of the younger men that have warmed my heart have been Jews I cannot but suspect it, and put the question to you . . ."). For similar comments, see Holmes to Laski, May 8, 1918, *ibid.*, 1:152; Holmes to Einstein, January 5, 1919, in Peabody, *Holmes-Einstein Letters*, 180; and Holmes to Pollock, April 5, 1919, in Howe, *Holmes-Pollock Letters*, 2:8. Brandeis, however, made generalizations about Jews: "There is in the Jew a certain potential spirituality and sense of public service which can be more easily aroused and directed, than at present is discernible in American non-Jews." Brandeis to Frankfurter, October 13, 1929, in Urofsky and Levy, "Half Brother, Half Son," 395.

335. Brandeis to Frankfurter, September 24, 1925, in Urofsky and Levy, "Half Brother, Half Son," 212.

by canonizing Holmes and his dissents among law professors, law students, and political elites, without any fear of damaging his reputation.

III. The Willing Participant

Holmes participated in his own canonization because, far from damaging his reputation, he knew that the House's progressives could make it. He thirsted for recognition and understood that his association with the House of Truth was a way to achieve it. G. Edward White explored Holmes's "life plan to confront central driving forces within him and to harness them to achieve fame and power."³³⁶ Holmes admitted that he "confine[d] my aspirations to being the greatest legal thinker in the world"³³⁷ and prided himself on his "jobbist" philosophy: the most important thing in the world was doing his job well and doing it better than anyone else.³³⁸ Holmes's young male secretaries absorbed from his "jobbist" philosophy "that even to the ablest man distinguished success does not come easily and that if one's name is to be remembered gratefully by later generations it will be because one has stooped to drudgery in order to conquer the heights."³³⁹ Holmes's jobbist philosophy, however, nearly failed him. Doing his job well was not enough to achieve the prestige and immortality that he craved.

Holmes facilitated his own canonization in subtle ways: he sent the House's progressives copies of opinions that he thought would appeal to them; he read and praised their work; and he sanctioned the publication of *Collected Legal Papers*, recognized his young friends in the book's acknowledgements, and sent copies of the book to them and their colleagues.

Holmes's most important contribution to his canonization was the way he wrote his opinions with an eye and ear to his progressive friends. The dynamic between Holmes and the House of Truth exemplifies a judge writing for a discrete audience. Lawrence Baum has argued that there is "value of taking into account judges' interest in the esteem of audiences that are important to them" and "that a perspective based on judges' interest in the approval of their audiences can enhance our understanding of judicial

336. White, "Holmes's Life Plan," 1411.

337. Holmes to Nina Gray, December 2, 1910, OWHP, reel 23 page 517, box 32, folder 5.

338. Holmes to Moncheur, July 23, 1917, OWHP, reel 26, page 436, box 36, folder 2. For similar comments, see Holmes to Laski, March 26, 1925, in Howe, *Holmes-Laski Letters*, 1:723; and White, *Inner Self*, 296.

339. Mark DeWolfe Howe, "Mr. Justice Holmes and His Secretaries," *New York Times Magazine*, April 8, 1951, 44.

behavior”³⁴⁰ Holmes’s relationship with the House of Truth reflects many of the subgroups Baum identifies as potential judicial audiences: Court colleagues (Brandeis), legal academics (Frankfurter), judges on other courts (Hand), and the media (Croly, Lippmann, the *New Republic*).³⁴¹

Even before he had discovered the House’s progressives, Holmes wrote opinions for the intellectual elite. His 1906 term secretary Augustin Derby recalled: “His opinions were closely reasoned and condensed, requiring careful study for understanding. ‘I am writing for the expert,’ he said to me. The style was unique, and the choice of words considered with greatest care.”³⁴²

Holmes’s use of obscure language indicated that he wrote for an elite audience. He once instructed his 1913 term secretary, George Harrison, to look up a word:

Harrison looked it up in the dictionary and found a secondary meaning which made it possible to construe the sentence in such a way as to dispose of the contention.

Harrison: “All right, Mr. Justice, but I still think that there isn’t one man in a thousand who would understand the sentence that way.”

Holmes: “I write for that man.”³⁴³

Alger Hiss, Holmes’s secretary during the 1929 Term, recalled the justice laboring over an opinion: “Finally with an air of triumph he returned to his desk, completed the last few lines of the opinion and said proudly that ‘afflatus’ was just the right word. He was filled with pleasure that he had a word which could cause people to sit up and take notice. As an unnecessary precaution I was asked to ‘look out’ the word in his Century after its use had been irrevocably decided upon.”³⁴⁴ As soon as the opinion came out, Frankfurter asked Hiss about “afflatus.” Hiss replied: “Your shrewdness in hitting upon the word ‘afflatus’ in the justice’s

340. Baum, *Judges and Their Audiences*, 22.

341. *Ibid.*, 50–60, 101–4, 135–39.

342. Augustin Derby, “Recollections of Mr. Justice Holmes,” *New York University Law Quarterly* 12 (1935): 348.

343. W. Barton Leach to Holmes Secretaries, Meeting of Holmes’s Secretaries: Notes of Reminiscences, at 2, March 15, 1940, Francis Biddle Papers, Franklin Delano Roosevelt Library, box 14, scrapbooks: Solicitor General II–January 1940–August 1941.

344. Alger Hiss, “Observations on the processes followed by Justice Holmes in carrying out his judicial duties the October Term 1929,” June 1938, FF–LC, box 225, folder “Miscellany.” Holmes wrote: “The decisions under the revenue acts have little weight as against legislation under the afflatus of the Eighteenth Amendment.” *Danovitz v. United States*, 281 U.S. 389, 397 (1930).

opinion in the *Danovitz* case delighted O.W.H. immensely. As you guessed it was a word of art indeed. The judge would have liked to substitute ‘frenzy’ but after thought decided he could get immeasurable satisfaction out of ‘afflatus.’ The choosing of that word was Holmes at one of his most charming moments.”³⁴⁵

After Holmes’s 70th birthday, he had found a specific audience in the House of Truth’s progressives, a group of experts who appreciated his esoteric language, colorful epigrams, and intellectual shorthand. He was now writing for an intelligentsia who appreciated his opinions most, who quoted them, wrote articles about them in the *Harvard Law Review* and *New Republic*, and made him more famous than his father. Writing for his discrete audience at the House of Truth helped Holmes achieve what he most wanted (and what Posner says judges maximize): prestige.³⁴⁶ Holmes was not motivated by money or mass popularity but by the desire for a lasting reputation among his elite peers. Or, as he put it, “the only reward that counts for much is when those whom he deems competent say that he has touched the superlative.”³⁴⁷ The recognition that he sought was not only among legal elites but also elites in American society. He was deeply moved when he received the Roosevelt Medal in 1925, stole the show during the national radio program celebrating his ninetieth birthday, and enjoyed Roosevelt’s visit to his home on his 92nd birthday. The House of Truth’s progressives provided Holmes with both types of elite recognition and even the mass publicity that he claimed not to need but still wanted. Holmes had found an intellectual cheering section that spread the gospel of his greatness.

Holmes wrote most often for his audience at the House of Truth in dissent. His dissents resonated with them, consoled them in defeat, and gave them ammunition to build his reputation and to attack the Court’s doctrinal intransigence in labor and free speech cases. Fortunately for Holmes, he enjoyed writing dissents more than majority opinions. “One of the advantages of a dissent,” he wrote Laski, “is that one can say what one thinks without having to blunt the edges and cut off the corners to suit someone else.”³⁴⁸ Upon becoming chief justice, Taft agreed: “He has more interest

345. Hiss to Frankfurter, May 9, 1930, at 1–2, FFLC, box 145, folder “Holmes, Oliver Wendell 1929–30 Hiss, Alger, Lockwood, John.”

346. Richard A. Posner, “What Do Judges Maximize?” in *Overcoming Law* (Cambridge: Harvard University Press, 1995), 118–19 (arguing that judges maximize “prestige” [which is “distinct from popularity”] and “reputation” among “other judges . . . and with the legal profession at large”).

347. Holmes to Moncheur, May 2, 1921, OWHP, reel 26, page 677, box 36, folder 8.

348. Holmes to Laski, August 16, 1924, in Howe, *Holmes–Laski Letters*, 1:647. Holmes also wrote: “I have a little case—whether it will go or not I don’t know. As originally

in, and gives more attention to his dissents than he does to his opinions he writes for the Court, which are very short and not very helpful.”³⁴⁹ Holmes’s best-known opinions are his dissents not only because the House of Truth publicized them but also because his language and his epigrams could be as colorful as he wanted them to be.

Holmes knew which dissents mattered to Croly, Frankfurter, Hand, Laski, Lippmann, the *Harvard Law Review*, and the *New Republic*. They let him know which cases they were interested in by writing to him in advance of oral argument or before they had read certain opinions. He sent them copies of those opinions. He basked in their praise. And, in the area of free speech, his interest grew when theirs did. It is possible that the House of Truth’s interest in labor and free speech cases may have affected his votes in those cases. It is even more likely that the House’s interest in those subjects may have caused Holmes to write a full-fledged dissent rather than join one of Brandeis’s or (as was common then) simply note his dissent at the bottom of the majority opinion. As much as the House’s progressives played on his ego and vanity, he played on their enthusiasm and mutual frustration with the Court. He knew they would outlive him and carry on his legacy.

Fortunately for Holmes, he had several factors in favor of his canonization. First, he was fortunate to inherit an extraordinary set of genes that enabled him to live for nearly 25 years past his 70th birthday. His longevity gave his canonization a long incubation period. It allowed him to tackle many legal issues (economic regulation, labor relations, privacy, and free speech) with modern resonance and brought him to the attention of the young progressives who created and perpetuated the Holmes legend.

If, like his best friend John Chipman Gray, he had died in 1915 of a heart attack, Holmes would have fallen short of his goal of escaping his father’s shadow and achieving his own lasting fame. He would be known today for *The Common Law*, *The Path of Law*, and his *Lochner* dissent—great achievements all—but he would not be known as one of twentieth century America’s greatest jurists. He would largely be considered a nineteenth-century jurist on par with the first Justice Harlan.

Second, Holmes was savvy enough to recognize that he needed the progressives at the House of Truth as much they needed him. He cultivated and wrote for the approval of this discrete audience because he needed

written, it had a tiny pair of testicles but the scruples of my brethren have caused their removal and it sings in a very soft voice now . . .” Holmes to Frankfurter, October 24, 1920, in Mennel and Compston, *Holmes & Frankfurter*, 95. For similar comments, see Holmes to Laski, November 17, 1920, in Howe, *Holmes–Laski Letters*, 1:291.

349. Taft to Stimson, May 18, 1928, at 2–3, Stimson Papers, reel 75, page 867.

their approval to achieve what he had worked so hard and so long for: the elusive mystique and immortality that causes him to be the object of continued fascination by legal scholars and historians and to be quoted in high-profile Supreme Court opinions.

Conclusion

Holmes's canonization was born not only of mutual admiration, but also of mutual instrumentalism. The House of Truth canonized him to attack the Court's antilabor decisions, to contest the ascendancy of *Lochner* and liberty of contract theory, and to further their goals of an expert-run administrative and regulatory state. They canonized him because, as in all political and legal movements, the House's progressives needed a constitutional symbol of what the Supreme Court could be, and a voice to legitimize the constitutionality of their ideas.

After *Adkins*, the House's progressives lost faith in the Court. The beginning of Holmes's canonization exemplified an elitist attempt at popular constitutionalism.³⁵⁰ As the judicial branch provided little hope of constitutional change, the House's progressives began to canonize Holmes by praising his dissents and *Collected Legal Papers* and recognizing his judicial milestones in the *New Republic* and *Harvard Law Review*. Their canonization of Holmes reached multiple audiences: law professors, law students, political elites, and, by the mid-1920s and early 1930s, even the American people who neither read nor cared about his judicial opinions.

Holmes needed the House's progressives because, for 70 years, his joblist theory of out-working and out-performing his peers had failed to grant him the recognition that he felt he deserved. By furthering his own canonization and writing dissents that pleased his discrete audience, he could escape his father's shadow and attain his own elusive fame. Holmes needed the House's next generation of legal and political thinkers to carry on his legacy. Both sides got what they wanted out of the crucial beginnings of his canonization.

This alternative narrative explanation for the beginning of Holmes's canonization suggests that short-term political and legal goals motivate the canonization process. Canonization is often the product of constitutional self-interest and political instrumentalism. During the 1910s, the

350. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 215–17; and Nourse, "Tale of Two *Lochners*," 794–96.

progressives at the House of Truth needed to canonize Holmes to attack the Court's antilabor decisions, to kill off *Lochner* and liberty of contract theory, and to legitimize the constitutionality of their regulatory goals. But if canonization is initiated only as an act of political instrumentalism, how does it affect the canonized judge or opinion's long-term place in the constitutional canon? Today's Court may not be citing Holmes's dissents or *Brown* for the same reasons as the people who began the canonization process.

Canonization reinforces the Holmesian idea that constitutional law thrives on symbols. "We live by symbols," he said of John Marshall, "and what shall be symbolized by any image of the sight depends upon the mind who sees it."³⁵¹ *Lochner*, Holmes's dissents, and *Brown* are important constitutional symbols because of their positions in the canon or anticanon. How these symbols are manipulated plays a major role in the future of constitutional interpretation. The impetus behind the creation of these symbols illustrates why the beginning of Holmes's canonization matters and why the House of Truth's instrumental role in initiating his canonization is historically and constitutionally significant. The House's progressives needed ammunition to attack the Court's antilabor decisions; Holmes sought immortality; constitutional law gained an important and enduring symbol.

351. Oliver Wendell Holmes, *John Marshall*, in Holmes, *Collected Legal Papers*, 270.