1918-2018—100 YEARS OF *UN*NATURAL LAW OF JUSTICE OLIVER WENDELL HOLMES

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TABLE OF CONTENTS

I. PROLOGUE TO THE PROGRESSIVE REVOLUTION IN AMERICAN JURISPRUDENCE

A. Professor Cass Sunstein on J.B. Thayer—Holmes' intellectual mentor

B. Judge Richard A. Posner and 'The American Nietzsche'

II. CRITICISMS OF JUSTICE HOLMES

A. Professor Albert Alschuler's Dissent

B. Professor Allan Bloom Inside the Pagan Arena

C. Contriving a Demigod: Holmes vs. Picasso

III. ANALYSIS OF HOLMES' *NATURAL LAW*

A. Observations

1. Strawman No. 1—The Lovelorn Knight

2. Strawman No. 2—Demand for the Superlative: The Hegel-Holmes Dialectic

3. Strawman No. 3—Truth isn't Absolute

B. Neo-sophism in Hamlet and Holmes

C. *Un*natural Law Jurisprudence and the Foundations of the Progressive Revolution

IV. EPILOGUE: WILL THE ASCENT OF PRESIDENT DONALD J. TRUMP BE THE DECONSTRUCTION OF *UN*NATURAL LAW?

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A new untruth is better than an old truth.[1]

Laurence Tribe, America's leading liberal constitutional lawyer, argued in the Harvard Law Review in 1978 that religious views were inherently superstitious and hence less legitimate than "secular" ones.[2]

[To Justice Holmes] law was simply an embodiment of the ends and purposes of a society at a given point in its history.[3]

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[1] Letter from Oliver Wendell Holmes, Jr. to Harold Laski, (June 24, 1926), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 116 (Richard A. Posner ed., 1992) [hereinafter ESSENTIAL HOLMES].

[2] JONAH GOLDBERG, LIBERAL FASCISM 366 (DOUBLEDAY 2007); *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1272-84 (3d ed. 2001); Laurence Tribe, *Natural Law and the Nominee*, N.Y. TIMES, July 15, 1991, at A15; *See also* Ellis Washington, *Reply to Judge Richard A. Posner on the Inseparability of Law and Morality*, 3 RUTGERS J. OF L. AND RELIGION 1, n.26 (2001).

[3] G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 132 (3d ed. 2007). Professor White has interpreted Holmes' use of the word "logic" to mean the "formalistic, religion-based logic that reasoned downward syllogistically from assumed truths about the universe; the proposed counter-system was 'experience.' [This was] merely a fatalistic acceptance that law was not so much the embodiment of reason as a manifestation of dominant beliefs at a given time." Holmes reduced law to its lowest common denominator to mean "beliefs that have triumphed." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (Harvard Press 1963) (1881) [hereinafter HOLMES, THE COMMON LAW]. *See generally* THE HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 (M. Howe, ed., 1953). Holmes further remarked that "truth [is] the majority vote of that nation that could lick all others." Oliver Wendell Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 40 (1918). He also stressed that "when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way." OLIVER WENDELL HOLMES, JR., Letter to John C. H. Wu (Aug. 26, 1926) *in* JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPER 187 (Harry C. Shriver ed., 1936). Holmes further remarked,

> I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand. I believe that our personality is a cosmic ganglion; just as when certain rays meet and cross there is white light at the meeting point, but the rays go on after the meeting as they did before, so, when certain other streams of energy cross at the meeting point, the cosmic ganglion can frame a syllogism. or wag its tail.

RICHARD HERTZ, CHANCE AND SYMBOL 107 (1948).

I. PROLOGUE TO THE PROGRESSIVE REVOLUTION IN AMERICAN JURISPRUDENCE

The essential intent of this Article is quite simple. I will endeavor to provide a succinct, dispassionate, and historical critique of the greatest Progressive jurist in American jurisprudence, Justice Oliver Wendell Holmes (1841-1935). Holmes' iconic 1918 law review article *Natural Law*—in conjunction with his even more iconic 1897 Article, *The Path of Law*—almost singlehandedly caused a paradigm shift in the history of American constitutional law and jurisprudence. The new jurisprudence replaced the existing natural law worldview, which was based on natural nights, the God of the Bible, morality, and First Principles, as expressly founded by America's constitutional Framers and generally embraced by political conservatives in modern times, with a positive law jurisprudence established in legal positivism, Hegelian dialectical materialism, and Darwinian Evolution-Atheism.[4] Holmes' positive law jurisprudence has since been embraced and promoted by atheists, humanists, socialists, liberals, progressives, and a multitude of other ideologies on the political left, who since the 1960s have instituted a Socialist-Progressive worldview and have exercised a progressive, intellectual hegemony over all K-12 schools, colleges, universities, and virtually all law schools.[5]

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[4] *See generally* ROBERT D'AGOSTINO, DARWINISM IN THE CLASSROOM: CRITIQUING ORTHODOXY AND SURVIVING IN THE CURRENT ENVIRONMENT 1-15 (2006); THE OXFORD GUIDE TO PHILOSOPHY 365-69, 369-71, 189, 275-76, (Ted Honderich ed., 2005); ELLIS WASHINGTON, THE PROGRESSIVE REVOLUTION: HISTORY OF LIBERAL FASCISM THROUGH THE AGES, xix-xxxvii (2016). Regarding the idea of First Principles, *see* Ellis Washington, *On Aquinas First Principles: Ethics, Natural Law and Truth*, (Sept. 6, 2014) RENEWAMERICA.COM, http://www.renewamerica.com /columns/washington/140906.

[5] D'AGOSTINO, *supra* note 4; Ellis Washington, *John Dewey's Dunces*, WND.COM, (Jan. 25, 2013), http://www.wnd.com/2013/01/john-deweys-dunces/. Goldberg wrote how Progressive education and Progressive politics became an overarching American Socialist worldview: "Wilson's view of politics could be summarized by the world 'statolatry,' or state worship." "Wilson wrote approvingly in *The State*, 'does now whatever experience permits or the times demand.'" JONAH GOLDBERG, LIBERAL FASCISM 86 (2007) (note omitted).

Furthermore, I intend to give an apologetic on what I believe natural law to be,[6] or how Jefferson famously defined it in the Declaration of Independence, "the law of Nature and of Nature's God,"[7] and how in modern times natural law's integration of legality and morality must be reinstated, used, and taught again in our educational systems at every level—K-12, college, university, law schools, graduate schools—and respected in our courtrooms to regain the original intent of America's constitutional Framers. If the U.S. Constitution is to ever be redeemed from our present deconstructive "constitutional crisis" under an evolution-atheist and progressive worldview, then natural law and natural rights must be returned to predominance in all constitutional decision-making.

I refer to the year 1860 as Year One of the Progressive Revolution. In that year, Cultural Marxism and Evolution-Atheism morphed together to systematically infect every institution in American society, including all Judeo-Christian traditions and institutions that established Western civilization, via the Communist-Progressive establishment and the Democrat Party.[8] Historically, I now consider the year 1860 as the advent of evolution-atheism chronicled in the publication of Charles Darwin's *On the Origin of Species*, which was quickly adopted by many the European and American academic class.[9] Liberals, progressives, humanists, atheists, even Communists, anarchists, and totalitarians,

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[6] DAVID M. ADAMS, PHILOSOPHICAL PROBLEMS IN THE LAW 20 (1992) ("Natural Law consists of principles and standards not simply made up by humans but rather part of an objective moral order, present in the universe and accessible to human reason.").

[7] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[8] WASHINGTON, *supra* note 4, at xxiv-xxv.

[9] *See* A. G. Keller, *Law in Evolution*, 28 YALE L. J. 769, 772 (1919) ("Nobody who is informed has any doubt . . . [e]volution is a law of all life, social as well as organic."); David Dobbs, How Charles Darwin Seduced Asa Gray, April 28, 2011, https://www.wired.com/2011/04/how-charles-darwin-seduced-asa-gray/; Michael V. Hernandez, *A Flawed Foundation*, 56 RUTGERS L. REV. 625, 704-06 (2004). *See generally* Ellis Washington, *On Darwin and the Eternal Lie of Evolution Atheism, Part 1,* RENEWAMERICA.COM (April 18, 2015), http://www.renewamerica.com/columns/washington/150418. Year One of the Progressive Revolution isn't a firm year but used only for the purposes of this Article. Admittedly there were other precursor historical events that paved the way for Evolution Atheism replacing Western Civilization Judeo-Christian worldview including Marx's Manifesto, 50 years before Darwin's work, and the French Revolution, 70 years before Darwin.

accepted the unproven suppositions of evolution. They assumed evolution would put the death knell in the heart of the Judeo-Christian worldview, its institutions and churches, and finally deconstruct its moral influence over society it held for 2,000 years.[10] In other words, what I call the Progressive Revolution was actually a secular humanist counter-reformation or post-Enlightenment revolution for all those humanists in America and European society who felt (justly or not) that they had been held prisoner by 4,000 years of the so-called Judeo-Christian worldview dominating what Holmes called the "marketplace of ideas."[11]

Indeed, Oliver Wendell Holmes was a leading intellectual figure at the advent of the Progressive Age. He was the apotheosis of evolution-atheism during the Age of Darwin's evolution-atheism revolution, which is inseparable from the unnatural law jurisprudence of Holmes. But as a practicing New England Unitarian how did Holmes become so radicalized, so hostile to the God of his fathers? Many theorize that Holmes was physically and psychologically traumatized by his involvement as a thrice-wounded soldier in the Civil War.[12] His experiences may have transformed his moral and jurisprudential worldview. Holmes was the son of a Victorian-era Renaissance man, Oliver Wendell Holmes, Sr. (1809-1894), who was a medical doctor, lawyer, poet, writer, philosopher, and polymath, as well as being a central figure in Boston medical, intellectual and literary circles.[13] His mother, Amelia Lee Jackson (1818-1888), was a prominent abolitionist whose genealogy was also connected to blue-blooded New England aristocracy, including family friends such as Henry James Sr., Ralph Waldo Emerson, Longfellow, James Russel Lowell, William Dean Howells, and Charles Eliot Norton.[14] With the publication of his

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[10] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 14 (1990) ("The natural law project has never recovered from what Nietzsche called the death of God (at the hands of Darwin).").

[11] *See* D'AGOSTINO, *supra* note 4, at 1-15; Steven J. Heyman, *The Dark Side of the Force*, 19 WM. & MARY BILL RTS. J. 661, 689-90 (2011).

[12] *See* Hernandez, *supra* note 9, at 706-09; CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY 3-14 (1944); ALBERT ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES, 41-51 (2000).

[13] BOWEN, *supra* note 12, at 3-14.

[14] *Id.* These men (absent Emerson) formed "The Dante Club" and helped Longfellow translate Dante's *Divine Comedy*, published in 1867 in 3 volumes.

magnum opus *The Common Law* in 1881, Holmes established a reputation as a legal intellectual.[15] That reputation grew as Holmes almost single-handedly began transforming American legal thinking away from the formalism of natural law (promoted by America's first law school at Harvard and its dean during that era, Christopher Columbus Langdell), and toward legal realism, legal positivism, and a progressive worldview.[16] Holmes clearly declared his original intent in the opening lines of *The Common Law*: "The life of the law has not been logic; it has been experience."[17]

Holmes' legal worldview mandated a form of moral skepticism and evolution-atheism—both of which possessed an irrational, militant hatred toward the normative worldview of natural law and natural rights, which was the original jurisprudence of the constitutional Framers and the original political philosophy of America's founding documents, including the Declaration of Independence, the Constitution, and the Bill of Rights.[18] Justice Holmes' virtual one-man Progressive Revolution marked a momentous change in the history of American constitutional law and jurisprudence.[19] President Theodore Roosevelt, America's first Progressive executive, chose Holmes as his first Court appointment in 1902.[20] Holmes served on the Supreme Court until 1932; his term was during the Lochner era (1897-1937), the forty-year period

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[15] Richard A. Posner, *Introduction* to ESSENTIAL HOLMES *supra* note 1, at x ("The Common Law (1881) [is] widely considered the best book on law ever written by an American.").

[16] *See id*. at x; Catharine Pierce Wells, *Reinventing Holmes*, 37 TULSA L. REV. 801, 801-02 (2002); Thomas C. Grey, *Plotting the Path of the Law*, 63 BROOK. L. REV. 19, 19-21 (1997).

[17] HOLMES, THE COMMON LAW, *supra* note 3, at 5; For Holmes' meaning of the term "logic," *see* WHITE, *supra* note 3.

[18] *See* Washington, *supra* note 2, at 52-53; Hernandez, *supra* note 9 at 633 ("In the aftermath of the Civil War, Americans became deeply skeptical about the influence of Christianity on law and culture and thus were increasingly open to the influence of secular ideologies.").

[19] *See* Posner, *supra* note 15, at x for an excellent synopsis of Holmes' contributions to the 'marketplace of ideas' from 1866-1900.

[20] 26th U.S. President Theodore Roosevelt (1901-09), in first appointment to the U.S. Supreme Court chose Oliver Wendell Holmes, Jr. who in 1902 was 62 years old and served the next 30 years on the High Court.

which legal historians consider were last gasps of natural law jurisprudence in America.[21]

Like the German literary movement of early Romanticism *Sturm und Drang* (storm and stress), which created a new literary tradition based on an existential polarity of stress and tension, American society underwent tremendous philosophical and political upheavals in constitutional law between 1880 and 1940.[22] During these sixty years, intellectuals, politicians, and the courts mandated a militant progressive paradigm into law.[23] This paradigm deconstructed the former natural law worldview (the politico-legal foundation of America's Judeo-Christian tradition which had existed since the arrival of the Pilgrims and Puritans of the early 1600s) along with natural law's equally troublesome morality-legality synthesis.[24] The new paradigm replaced natural law's integration of law and morality with legal positivism and positive law's separation (or deconstruction) of law and morality.[25] For example, Holmes' dissent in *Abrams v. United States*, one of his many well-known verdicts, demonstrates an aggressive unnatural

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[21] *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); *See also* GERALD GUNTHER, CONSTITUTIONAL LAW 445 (12th ed. 1991); TRIBE, *supra* note 3, at 567, n.2; FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 97-137 (1938) (compiled list of 220 decisions of Holmes from the years 1890 and 1937). *But see* MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S 34–40 (2001) (positing a much lower number of actual due process decisions).

[22] *See* Nathan B. Oman, Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L. J. 1109, 1115 (2013).

[23] Posner, *supra* note 15, at x-xi.

[24] MAYFLOWER COMPACT, Nov. 21, 1620, https://www.britannica.com/topic/Mayflower-Compact (last visited Nov. 10, 2017). These so-called "Is-Ought" arguments favored among academics regarding what the purpose of the law *is* or *ought* to be have been debated by judges, politicians and scholars alike for many years. *See generally* Arnold Brecht, *The Myth of Is and Ought*, 54 HARV. L. REV. 811 (1941); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law,* 42 HARV. L. REV. 149 (1928); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); LON L. FULLER, ANATOMY OF THE LAW 175-86 (1968); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

[25] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("The best test of truth is the power of the thought to get itself accepted in the competition of the market."); Robin West, *Three Positivisms*, 78 B.U. L. REV. 791, 792-93 (1998).

law jurisprudence.[26] In this dissent, Holmes Darwinian jurisprudence considered the United States Constitution as "an experiment, as all life is an experiment" and thought that, as a result, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."[27]

During his tenure on the Supreme Court, Holmes systematically reinforced policies for government control of economic regulation, and he supported an expansive, new interpretation of freedom of speech under the First Amendment.[28] These judicial views, in addition to his idiosyncratic temperament and writing bravura, endeared him to supporters of progressive politics and socialist jurisprudence,[29] notwithstanding Holmes' profound skepticism of and disagreement with progressive politics.[30] His evolution-atheism and progressive jurisprudence defined the Progressive Age while transforming American jurisprudence.[31] His views influenced much of American legal thinking covering the first half of the twentieth century.[32] Furthermore, *The Journal of Legal Studies* acknowledges Holmes as one of the three most cited American legal scholars of the twentieth century.[33]

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[26] Abrams, 250 U.S. at 630 (1919) (Holmes, J., dissenting).
[27] *Id.*
[28] *Id.*; Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this. . . ."); Heyman, *supra* note 11 at 722-23; Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149, 157 (1995).
[29] *See* LOUIS MENAND, PRAGMATISM: A READER xxix (1997).
[30] *See* Jeffrey Rosen, *Brandeis's Seat, Kagan's Responsibility*, N.Y. TIMES, (July 3, 2010), http://www.nytimes.com/2010/07/04/opinion/04rosen.html?ref= opinion&_r=1.
[31] *See* Posner, *supra* note 15, at ix-xxxi.
[32] *See id* at xii ("In his opinions in *Schenck*, *Abrams*, and *Gitlow*, which launched the 'clear and present danger' test and the 'marketplace of ideas' conception of free speech, Holmes laid the foundations not only for the expansive modern American view of free speech but also for the double standard in constitutional adjudication that is so conspicuous a feature of modern constitutional law: laws restricting economic freedom are scrutinized much less stringently than those restricting speech and other noneconomic freedom. . . .").
[33] Fred R. Shapiro, *The Most-Cited Legal Scholars,* 29(1) J. OF LEGAL STUD. 409, 409–26 (2000).

Holmes' views, together with judicial majorities, finally broke the loyalist-liberal-atheist existential battle to undermine natural law jurisprudence.[34] In 1937, President Franklin Delano Roosevelt's Judicial Reorganization Act (i.e., FDR's court-packing plan), or the infamous "switch in time save nine," caused two previous conservative constitutionalists (Justice Robert J. Owen and Chief Justice Charles Evans Hughes) to suddenly break from the conservative Justices and begin supporting New Deal regulatory law.[35] These previously reliable conservatives rejected the Lochner era police powers jurisprudence in favor of evolution-atheism—a socialist, activist jurisprudence based on positive law and Nietzsche's "Will to Power."[36] Viewing Justice Holmes' *oeuvre* through his historical vantage point, Judge Richard Posner gave Holmes a pseudonym reminiscent of Nietzsche—the philosophical colossus whose death in 1900 marked the beginning of Modernity—calling him "The American Nietzsche."[37]

Posner likely considered Holmes to be the "American Nietzsche" because his scholarly writings and court opinions (particularly his dissents) virtually defined the anti-natural law, Humanism, and Globalism derivative of the Progressive Age.[38] However, I believe Holmes (and thus Nietzsche) to be more philosophically aligned with evolution.[39] Therefore, I consider Holmes the "American Darwin" who almost single-handedly replaced America's original natural law jurisprudence based on the original intent of the constitutional Framers.[40] Therefore, for over 100 years, natural law has been replaced by a militant, evolution–atheism jurisprudence in American constitutional law. I coined the phrase "Evolution-Atheism" to define the Progressive worldview of

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[34] *See generally* Ellis Washington, *The Shadow Power Behind the Supreme Court*, WND.COM, (March 9, 2012), http://www.wnd.com/2012/03/ the-shadow-power -behind-the-supreme-court/.
[35] *See* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 627-28 (1994).
[36] *Id.* at 628; *see also* FREIDRICH WILHELM NIETZSCHE, THE WILL TO POWER § 428 (1910).
[37] Posner, *supra* note 15, at xviii
[38] *Id.* at ix-xxxi.
[39] *See* WASHINGTON, *supra* note 4, at xxiv-xxv; Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 362-64 (1984).
[40] *See* Hovenkamp, *supra*, note 28 at 151-52.

so many philosophers, jurists, and politicians since 1860.[41] Having stood 6,000 years of human civilization on its head, the scientific community and much of the general public accepted Darwin's theory as a fact beyond argument.[42] Darwinism thus became the de facto Progressive Humanist gospel that replaced America's previous Judeo-Christian worldview.[43]

The 1870s were a pivotal transitional era in American philosophical and constitutional history, where a new Zeitgeist officially began to be systematically instituted throughout the Academy (i.e., Darwinism, evolution, naturalism, education atheism).[44] Here, Progressives who were essentially America's intellectual offspring of the Enlightenment Age atheists, freethinkers, and humanists, but also the loyalist of the American Revolution who sided against America with the British monarchy, found their newest home.[45] Starting at Harvard, they radically and aggressively instituted a Darwinian evolutionary worldview in law by the so-called "case law method"—examining actual cases and judicial opinions of what judges actually *said* about the law as the preferred approach for law students to study the law.[46] In this environment, Holmes ideas took root.

When Holmes published his revised edition of Chancellor Kent's famous *Commentaries on the Law of America,*[47] a new Progressive Age was ushered into the history of American law with young Holmes as one of this secularist movement's leading light.[48] This young intellectual and Civil War hero named Oliver Wendell Holmes, Jr. began to systematically forsake his New England Christian upbringing.[49] Before the Civil War, young Holmes had joined a Christian society at Harvard, and was a supporter of his

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[41] Washington, *supra* note 9.
[42] *See* Hernandez, *supra* note 9, at 705; Hovenkamp, *supra* note 28, at 152.
[43] *See* Vetter, *supra* note 39, at 347.
[44] *See* Hernandez, *supra* note 9 at 709; Hovenkamp, *supra* note 28, at 155.
[45] *See* Washington, *supra* note 2, at Part I & II. *See generally* Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J. L. & HUMAN. 311 (1992); Hernandez, *supra* note 9 at 631-33.
[46] *See* Gary D. Finley, *Langdell and the Leviathan: Improving the First Year Law School Curriculum by Incorporating Moby-Dick*, 97 CORNELL L. REV. 159, 162-64 (2011); Hovenkamp, *supra* note 28, at 151.
[47] JAMES KENT, COMMENTARIES ON AMERICAN LAW (Oliver Wendell Holmes ed., Boston Little, Brown, & Co. 12th ed. 1873) (1827).
[48] Posner, *supra* note 15, at x.
[49] *See supra* notes 12-14.

mother's abolitionist cause, but after the war, he became irrevocably changed—mentally, physically and spiritually.[50] Little has been written about the obvious psychological and traumatic effects the war had on Holmes, but it seems its result was that afterwards he believed in virtually nothing of the civilizational structures that shaped his early years.[51] Those beliefs were supplanted by those of Darwin and Nietzsche, atheism and nihilism.

A. Cass Sunstein on J.B. Thayer—Holmes' intellectual mentor

Harvard Law Professor Cass Sunstein, in his 2005 book, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*, wrote the following about the contemporary principle figure who shaped Holmes' jurisprudence worldview, Harvard law professor James Bradley Thayer:

> The concept of rational basis review can be traced to an influential 1893 article, "The Origin and Scope of American Constitutional Law" by Thayer. Thayer argued that statutes should be invalidated only if their unconstitutionality is "so clear that it is not open to rational question." Holmes, a student of Thayer's, articulated a version of what would become rational basis review in his canonical dissent in *Lochner v. New York*, arguing that "the word 'liberty' in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. [52]

Sunstein, a doctrinaire Progressive, is an expert in historical revisionism, whose writings often skillfully uses sophistic reasoning and Freud's Psychological Projection to both obscure the truth of his progressive radicalism by projecting the innate intellectual

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[50] *Id*.
[51] *Id.*
[52] CASS SUNSTEIN, RADICALS IN BLACK ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 44-48 (2005).

superiority of Democratic-Socialist jurisprudence (i.e., positive law, legal positivism), while concurrently deconstructing the Judeo-Christian moral worldview, characterizing it as myopic, fundamentalist, minimalist, and perfectionist.[53] For example, Sunstein wrote the following polemic against natural law by doing what most jurists have done for over 100 years—not mentioning natural law or natural rights:

> Does *anyone* have a principled commitment to judicial restraint? We can certainly identify an alternative to fundamentalism, minimalism, and perfectionism: *nonpartisan restraint*. Let us describe its advocates as *majoritarians*.
>
> Majoritarians are willing to give the benefit of every doubt to other branches of government—to uphold the actions of those branches unless they clearly violate the Constitution. Where fundamentalists would strike down federal and state legislation, majoritarians would want courts to stand aside. Where perfectionists would protect equality and dignity, majoritarians say that the elected branches should usually be allowed to do as they like. Majoritarians would permit the government to ban same-sex sodomy, or for that matter opposite-sex sodomy. They would also permit the government to create affirmative action programs, or even racial quotas designed to increase the number of African-Americans in colleges and graduate programs.[54]

Thus, right from the beginning of his thesis, Sunstein has used a logical fallacy to establish what Holmes championed as "a new untruth" while deconstructing a natural law worldview, or what Holmes called "old truth," as "majoritarians" versus "fundamentalism," minimalism, and perfectionism.[55] Thus, when Holmes writes in his letter to British Socialist Harold Laski that a "new untruth is better than an old truth,"[56] he demonstrates that

[53] *Id.* at 33-34, 96.
[54] *Id.* at 44.
[55] *Id*. at xii, 21, 23, 44, 49-51, 77, 232.
[56] HOLMES, *supra* note 1.

Holmes' and Sunstein's progressive jurisprudence is purposely based on the eternal lie of Darwin's evolution atheism. How else can any rational person explain Justice Holmes' techniques of historical revisionism throughout his entire *oeuvre*? Professor Sunstein, as with an overwhelming majority of today's legal academics, loves and venerates Justice Holmes' progressive jurisprudence.[57] For example, in the above passage, Sunstein redefined the Holmes anti-natural law paradigm, as he does throughout his legal analysis in this book.[58] This is analogous to the Biblical narrative where the Old Testament prophet Isaiah condemned the fraudulent Jewish religious hypocrites of his day: "*Woe unto them that call evil good, and good evil; that put darkness for light, and light for darkness; that put bitter for sweet, and sweet for bitter*!"[59]

This is exactly the type of legal positivist worldview based on logical fallacy and historical sophism in which Sunstein engages from the beginning to the end of his analysis in this book.[60] Therefore, once one cuts through his word play, Sunstein's arguments have a logical progression that is accessible by calling up, down; good, evil; constitutional, unconstitutional.[61] This is a logical fallacy that Sigmund Freud called "psychological projection" or "displacement." Displacement is "[t]he use of an aim or object other than the one really required or wished for, in order to relieve a tension partly or temporarily."[62] In the above passage, Sunstein demonstrates symptoms of Freud's displacement psychosis by scrupulously following Holmesian dialectic borrowed

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[57] Shapiro, *supra* note 33, at 409–426 (Justice Oliver Wendell Holmes is the third most cited American legal scholar of the 20th Century).

[58] SUNSTEIN, *supra* note 52, at xii, 21, 23, 44, 49-51, 77, 232. Throughout SUNSTEIN'S book, the author in order to prove his thesis, has to constantly conflate conservative judges and jurisprudence with "majoritarianism" and their derivative and equally irrelevant and misleading terms he uses in conjunction constitutionalist judges— fundamentalism, minimalism, and perfectionism.

[59] Isaiah 5:20 (King James).

[60] *See* Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J. L. & LIBERTY 347, 351-52 (2010).

[61] *See* André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate,* 12 GEO. J. L. & PUB. POL'Y 99, 130 (2014); Smith, *supra* note 60, at 386-88; Dru Stevenson, *Judicial Incrementalism: A Reply to Professor Sunstein*, 34 OHIO N.U. L. REV. 191, 193-94 (2008).

[62] ERIC BERNE, A LAYMAN'S GUIDE TO PSYCHIATRY AND PSYCHIATRY AND PSYCHOANALYSIS 303 (1st ed. 1957).

from Hegel's thesis-antithesis-synthesis paradigm to deconstruct and destroy all notions of absolute truth.[63] In other words, Sunstein's entire book is predicated on the Holmesian view that "a new untruth is better than an old truth" (i.e., moral skepticism). Thus, Holmesian skepticism can also be translated as a new evolution atheist jurisprudence; that is, as a lie. Apparently, Sunstein does not refer to himself as he actually is, philosophically—a communist-progressive jurist—but instead Sunstein considers himself a "nonpartisan majoritarian."[64] Therefore, whatever he writes following the progression of his Hegelian thesis-antithesis-synthesis has been established as *a priori* (from the stronger "logic"), which, like Holmes' Will to Power logic, is inevitable, thus undeniable.[65] Sunstein continues:

> No member of the current Supreme Court is a committed majoritarian. But this approach was embraced in one of the most important essays in the entire history of constitutional law, written by Harvard law professor James Bradley Thayer in 1893. Fundamentalists and minimalists alike have to come to terms with him. Thayer argued that because the American Constitution is often ambiguous, those who decide on its meaning must inevitably exercise discretion. Laws that "will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; . . . the constitution often admits of different interpretations; . . . there is often a range of choice and judgment." In Thayer's view, "whatever choice is rational is constitutional."[66]

Sunstein presents an example of historical revisionism. After criticizing conservative jurists as having anti-judicial restraint and being proponents of fundamentalism, minimalism, and perfectionism (which is what activist jurists on the left historically

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[63] *See* Ellis Washington, *Hegel's Dialectic in the Age of Obama*, WND.COM, (June 28, 2013), http://www.elliswashingtonreport.com/2015/03/29/on-hegel-using-dialectic-to-pervert-truth-and-history/.
[64] SUNSTEIN, *supra* note 52, at 48-50.
[65] Washington, *supra* note 63.
[66] SUNSTEIN, *supra* note 52, at 17.

have always been), Sunstein opens the door to the leftist judicial activist Garden of Eden, as it were, and their patron saint Thayer, presenting his logical constitutional jurisprudence, the "rational is constitutional" doctrine.[67]

Sunstein, citing Thayer, further argued "that courts should strike down laws only 'when those who have the right to make laws have not merely made a mistake, but have made a very clear one, so clear that it is not open to rational question.'"[68] Yet Thayer does not identify from *where* this constitutional wisdom would spring forth. To Sunstein and other progressives like Woodrow Wilson and Laurence Tribe (both living Constitution advocates), the Constitution is not very relevant here because mankind has evolved beyond placing its faith in creeds and covenants, except the Progressive creed. Sunstein continues:

> In asking for restraint, Thayer was emphasizing two points. The first is the fallibility of federal judges. When judges conclude that a law is unconstitutional, they are of course relying on their *own* interpretation; and they might be wrong. Judges are learned in the law certainly. But should we conclude that judicial interpretations are necessarily correct? Thayer was not questioning the judges' power to strike down unconstitutional laws. He was saying only that in exercising that power, judges should not be (too) sure that they are *right*.[69]

Thayer's second point was that a strong judiciary might harm democracy itself.[70] Constitutional disputes tend to be entangled with the deepest questions about what is fair and just.[71] He feared that if judges become too aggressive, the moral responsibilities of

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[67] *Id*. ("[T]here is often a range of choice and judgment. [In Thayer's view,] whatever choice is rational is constitutional.").

[68] *Id.* at 45.

[69] *Id.*

[70] *Id.* at 46 ("By 'harm' I am taking Thayer's arguments above to their next logical conclusion: 1) Judges are fallible; 2) There are judicial conclusions that may be incorrect; thus, 3) If judges are too sure that their judicial opinions are always right (when they are sometimes wrong) democracy or our Republic could be damaged.").

[71] *Id.* at 44, 46.

elected officials might weaken.[72] Those officials might ask if the judges would allow it instead of asking if it is constitutional.[73] If the latter question is not asked, democracy itself is at risk.[74]

Thayer, unlike Holmes and his followers (Brandeis, Cardozo, Frank, Tribe, Posner, et. al.), was at least willing to concede two critical points: 1) federal judges are not infallible, and 2) a strong judiciary might harm democracy itself.[75] On the first point, it is *ipso facto*; nevertheless, few leftist activist judges never felt the slightest contradiction (or what Posner called "self-restraint") that legislating from the bench is an impeachable offence and violates their sworn oath "to protect and defend the U.S. Constitution."[76] Thayer's second point about harming democracy itself is flawed on many levels. First, America was founded not as a "democracy," which the Framers considered tyrannical rule or a "mobocracy," but as a constitutional or democratic Republic.[77] Second, America's "original sin" was not slavery, but Chief Justice John Marshall's opinion in *Marbury v. Madison*.[78] Marshall's opinion perverted the Constitution and forever upset the tripartite separation-of-powers doctrine with his newly-created judicial review doctrine, which in modern times has evolved into a euphemism for judicial activism.[79] The *Marbury* case forever

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[72] *Id.* at 46. Sunstein, citing Thayer on this point, was arguing that "in exercising that power [to strike down unconstitutional laws], judges should not be (too) sure that they are *right*." In other words, judges then would be encroaching upon the enumerated powers of Congress (not the Judiciary) to make law.

[73] *Id.* at 46.

[74] *Id*. at 45-46.

[75] SUNSTEIN, *supra* note 74, at 46.

[76] *Id*.

[77] Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMINISTRATIVE L. REV. 611, 616 (2013) ("Ultimately, every modern government must maintain a delicate balance. On the one hand is 'mobocracy,' where the caprices of the uninformed masses dictate public policy. On the other is technocratic oligarchy, where a selected group of 'elitist' decisionmakers impose their 'enlightened' will upon the general populace.") (footnotes omitted).

[78] Marbury v. Madison, 5 U.S. 137 (1803).

[79] *See, e.g.*, David E. Marion, *Judical Faithfulness or Wandering Indulgence? Original Intentions and the History of Marbury v. Madison,* 57 ALA. L. REV. 1041, 1062-64 (2006); Stephen M. Shrewsbury, *Marbury v. Madison: The Origins and Legacy of Judicial Review*, 173 MIL. L. REV. 160, 161-62 (2002) (reviewing

shifted the balance of power to the Supreme Court, which Hamilton considered the least powerful of the three branches of government.[80] Jefferson was so incensed by Justice Marshall's decision that seventeen years after *Marbury*, he wrote his famous 1820 letter to his friend, William Jarvis, in which he stated, "*To consider the judges as the ultimate arbiters of all constitutional questions . . . would place us under the despotism of an oligarchy*."[81] Sunstein continued:

> Writing over a century ago, Thayer lamented that "our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the minds of legislators with thoughts of mere legality, of what the constitution allows." Indeed, things have often been worse, for "even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it." Thayer sought to place the responsibility for justice on democracy, where it belongs. "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."[82]

Sunstein refers to what he and conventional leftist historians consider to be the triumph of progressivism (i.e., Darwin's evolution-atheism) over natural law (i.e., conservatism's Judeo-Christian worldview) in the early 1900s.[83] This triumph was encapsulated with America's first progressive president, the Harvard alumni and Republican maverick, Theodore Roosevelt, who in 1902 enthusiastically nominated Oliver Wendell Holmes as his first appointment to the Supreme Court.[84] This fateful

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WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000)).

[80] THE FEDERALIST NO. 78 (Alexander Hamilton).

[81] ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 144 (1919) (quoting 12 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 162 (Paul Leicester Ford ed., 1905)).

[82] SUNSTEIN, *supra* note 52, at 46.

[83] *See generally* WASHINGTON, *supra* note 2, at Part II.

[84] *See supra* notes 19-20 and accompanying text.

appointment, over the next thirty years, would move the Court leftward, toward a progressive jurisprudence.[85] Holmes appointment would, over time, institute legal positivism above the original legal philosophy of natural law and natural rights.

When Thayer wrote that, "Our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the minds of legislators with thoughts of mere legality, of what the constitution allows," he was echoing one of the forefathers of legal positivism, John Austin, who characterized law as "the decree of the sovereign."[86] Under the evolution-atheist worldview, might makes right.[87] Holmes put a Yankee spin on Austin's Law-Truth paradigm, saying "the majority vote of that nation that could lick all others."[88] Whether you quote Austin, Thayer, Holmes, Sunstein, Posner, or Tribe, each man's understanding of law was essentially paying homage to Darwin, Marx, and Nietzsche. The latter characterized natural law as Christian and, therefore, a "slave morality" and only respected men of action who ruthlessly would wield power (outside of constitutional restrains) over the weaker, inferior peoples.[89] This is what Nietzsche meant by "Will to Power" and Holmes would become his chief acolyte during his tenure on the court.[90] Holmes' legacy looms large through every Progressive-Socialist judge and by many so-called conservative jurists which belies Sunstein's lament, "Thayer has no followers on the Supreme Court."[91] Sunstein is disingenuous here since at least five of the present nine sitting Justices (Ginsburg, Breyer, Kennedy, Kagan, Sotomayor) dutifully follow the Holmes' Progressive-Socialist jurisprudence.[92] No national leader, Republican or Democrat, is

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[85] *See supra* notes 25-32 and accompanying text.

[86] SUNSTEIN, *supra* note 52, at 46; *see* JOHN AUSTIN, THE PROVIDENCE OF JURISPRUDENCE DETERMINED 185-86 (Isaiah Berlin et al eds., 1954) (1832).

[87] POSNER, *supra* note 1.

[88] Holmes, *supra* note 3, at 40.

[89] *See* Marie Ashe, *Limits of Tolerance: Law and Religion After the Anti-Christ*, 24 CARDOZO L. REV. 587, 595-96 (2003); *See generally* WASHINGTON, *supra* note 4, at 252-53.

[90] *See supra* notes 35-38 and accompanying text.

[91] SUNSTEIN, *supra* note 52, at 47.

[92] *See* Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 19 n.1 (1995); Smith, *supra* note 60, at 349-50.

arguing for what Jefferson called "the despotism of an oligarchy."[93] But, Thayer had a strong influence on Holmes, the latter being his protégé.[94] Regrettably, a majority of judges, jurists and legal scholars today aspire, overtly or covertly, to be the modern embodiment of Holmes, who from a jurisprudential standpoint is the Founding Father of the Progressive Revolution.[95]

B. Judge Posner and the 'American Nietzsche'

Richard A. Posner, is a lecturer at the University of Chicago Law School, a former Chief Justice, and a recently-retired judge on the Seventh Circuit Court of Appeals.[96] In the introduction to his 1992 anthology, *The Essential Holmes*, Posner outlined the four areas of Holmes' major contributions as a Supreme Court Justice:

> In the Lochner dissent and other famous opinions opposing the use of the due process clause of the Fourteenth Amendment to prevent social and economic experimentation by the states, Holmes created the modern theory of federalism, the theory of judicial self-restraint [though here he was borrowing heavily from James Bradley Thayer], and the idea of the "living Constitution"—the idea that the Constitution should be construed flexibly, liberally, rather than strictly, narrowly. A better metaphor for Holmes' own view of the Constitution, however, is not that it is alive, but that it should not be allowed to kill the living polity in obeisance to the dead hand of the past. Since interpretation is a two-edged sword—a license for judicial intervention as much as for judicial forbearance—there is a latent

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[93] Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 276, 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

[94] BEVERIDGE, *supra* note 81, at 162.

[95] *See* Morris B. Hoffman, *Book Review*, 54 STAN. L. REV. 597, 603 (2001) (reviewing ALSCHULER, *supra*, note 12); Stephen B. Presser, *Some Thoughts on our present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, Jr., The Unborn, the Senate, and Us*, 1 AVE MARIA L. REV. 113, 113 (2003).

[96] Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

> tension between Holmes' emphasis on judicial restraint and his emphasis on flexible interpretation. And although he wrote pathbreaking opinions in defense of flexible interpretation, he also wrote a well-known essay on interpretation, reprinted in that chapter, that has provided ammunition to the advocates of strict interpretation. The sheer bulk of Holmes' oeuvre evidently precludes complete consistency, which may make the skeptical reader wonder whether there is, as my title posits, an "essential" Holmes."[97]

According to Posner, Holmes either single-handedly, or in large part, made several contributions to American jurisprudence. First, in his *Lochner* dissent, he promoted the idea of using the due-process clause of the Fourteenth Amendment to stop social and economic experimentation by the states (i.e., conservative policy initiatives), creating the modern theory of federalism.[98] Second, Holmes formulated the theory of judicial self-restraint and the idea of a living Constitution.[99] Ironically, although these contributions to American jurisprudence all originate from the left, Holmes decried their use by conservatives in his famous *Lochner* dissent.[100] This quite logically caused Posner to admit quite correctly that, "There is a latent tension between Holmes' emphasis on judicial restraint and his emphasis on flexible interpretation."[101]

Next, Posner moved beyond the *Lochner* era cases that both expanded the parameters of *Lochner*, when it suited the winning side Holmes was on, and cases that totally contradicted the central premise of *Lochner*, which Posner defined as "opposing the use of the due-process clause of the Fourteenth Amendment to prevent social and economic experimentation by the states."[102] Posner further wrote:

> In his opinions in *Schenck*, *Abrams*, and *Gitlow*, which launched the "clear and present danger" test

[97] Posner, *supra* note 15, at xii.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

> and the "marketplace of ideas" conception of free speech, Holmes laid the foundations not only for the expansive modern American view of free speech but also for the double standard in constitutional adjudication that is so conspicuous a feature of modern constitutional law: laws restricting economic freedom are scrutinized much less stringently than those restricting speech and other noneconomic freedoms. *Here, as in the case of interpretation, we again find Holmes seeming to work both sides of the street—rejecting the protection of economic freedom in Lochner, insisting upon the protection of freedom of expression in Abrams and Gitlow. It is a crooked path, still it is one that most judges and mainstream legal scholars have been content to walk with him*. He could have argued that freedom of speech had a soldier textual grounding in the Constitution than freedom of contract; but, consistent with his general although not uniform preference for flexible interpretation, he did not so argue. [103]

It seems that every time Holmes put pen to paper, he was essentially making legal history literally out of whole cloth.[104] Holmes created the "clear and present danger" test and the "marketplace of ideas" conception of free speech, which Posner poetically said, was the "[F]oundation not only for the expansive modern American view of free speech but also for the double standard in constitutional adjudication."[105] Yet true to Posner's characterization of Holmes' "latent tension" or duplicity inherent in his jurisprudence, he will write one thing in one case only to write the opposite in a majority opinion to his own previous dissent.[106] Posner rightly said, Holmes liked "to work both sides of the street—rejecting the protection of economic freedom in *Lochner*, insisting upon the protection of freedom of expression in *Abrams* and

[103] Posner, *supra* note 15, at xii-xiii (emphasis added).
[104] *See* Hoffman, *supra* note 95 at 603; Alfred S. Neely, *A Humbug Based on Economic Ignorance and Incompetence*, 1993 UTAH L. REV. 1 9-10 (1993); Hernandez, *supra* note 9, at 670-71.
[105] Posner, *supra* note 15, at xii.
[106] *See id*.; Neely, *supra* note 104, at 23 n.70.

Gitlow."[107] Few may agree with Alschuler's conception that Holmes "was not a demigod, but a man of flesh and blood under those robes,"[108] but Holmes entrenchment in working both sides of the street would in inevitably lead to the infamous switch in time that saved nine.[109] Posner further wrote:

> Holmes mounted an influential challenge to the idea that federal courts in diversity of citizenship cases (cases that are in federal court because the parties are citizens of different states, rather than because the case arises under federal law) should be free to disregard to common law decisions of state courts and make up their own common law principles to decide the case. The challenge succeeded, shortly after Holmes' death, in the *Erie* decision, which ended "general" federal common law.[110]

One of the biggest game-changer cases of the twentieth century is the *NLRB* decision, where Holmes' judicial legacy hovered over America's constitutional history like an ominous apparition speaking from the grave to revolutionize the leviathan power of the federal government.[111] Additionally, Posner cited the *Erie* case as a death knell to the common law, thus killing natural law also, which preceded the common law and influenced it.[112] In this sense, if *Erie* was the Armageddon of Holmes' life-long hatred of legality and morality, then his Harvard law review article, *Natural Law* was his apotheosis.[113] Posner continued:

> And finally, in his dissent in *Frank v. Mangum* and his majority opinion in *Moore v. Dempsey*, Holmes established the principle that state prisoners

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[107] Posner, *supra* note 15, at xii.
[108] *See* discussion *infra* Section II.A.
[109] *See supra* note 35 and accompanying text.
[110] Posner, *supra* note 96, at xiii.
[111] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); see Harry G. Hutchison, *Waging War on the "Unfit"? From Plessy v. Ferguson to New Deal Labor Law*, 7 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 36-37 (2011).
[112] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); Posner, *supra* note 96, at xiii.
[113] Posner, *supra* note 96, at xiii.

> convicted in violation of the Constitution could obtain a remedy by way of federal habeas corpus. Although Holmes' conception of the scope of habeas corpus for state prisoners was far more circumscribed than the modern view, it was an expansive interpretation of Habeas Corpus Act of 1867, under which these state prisoner cases were (and are) brought. [114]

Although Posner implicitly celebrates Holmes' expansions of habeas corpus rights for state prisoners, it seems as if the Ninth and Tenth Amendments no longer mean anything to Holmes and to his intellectual children like Posner and the many in the law academy today.[115] Thomas Jefferson famously said, "In questions of power, then, let no more be heard of confidence in man, but bind him from mischief by the chains of the Constitution."[116] This is a critical textual key to the original understanding of the Constitution by the Framers. Jefferson's words mean that neither Congress, the President, a judge, nor even a passionate prisoner's rights activist is above the federal Constitution.[117] Each of the states under the Ninth and Tenth Amendments has the sovereign authority to set its own parameters of habeas corpus. The only requirements being that they do not abridge existing federal law and the federal Constitution.

But in *Erie*, Holmes was not interested in irrelevant words written on parchment.[118] Holmes and his fellow progressives had a revolution to start, and they were not going to allow a little thing like the Constitution, God, and natural law stand in their way.[119] "In all four categories, the primary vehicles of Holmes' innovations were dissenting opinions that, often after his death, became and have

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[114] Posner, *supra* note 96, at xiii.
[115] *See* David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 379-82 (1996); Seth Rokosky, *Denied and Disparaged: Applying the "Federalist" Ninth Amendment*, 159 U. PA. L. REV. 275, 281-82 (2010).
[116] Thomas Jefferson, *The Kentucky Resolutions*, 544 (1798), *reprinted in* 4 ELLIOTT'S DEBATES, at 528-80 (2d ed. 1891).
[117] BEVERIDGE, *supra* note 81, at 162.
[118] *See supra* notes 104-106 and accompanying text.
[119] *See supra* Section I; *see also* Jack M. Balkin, *Wrong the Day it was Decided*, 85 B.U. L. Rev. 677, 685 (2005); Hernandez, *supra* note 9, at 671.

remained the majority position."[120] Speaking to this generation of would-be legal scholars, Posner was quick to caution that dissenting alone does not make one a great judge or legal scholar.[121] "Modern judges are quick to dissent in the hope of being anointed Holmes' heir, but they lack Holmes' eloquence and civility. Most of them do not realize that the power of Holmes' dissents is a function in part of their infrequency; he was careful not to become a broken record."[122]

Holmes said that "the word 'right' is one of the most deceptive of pitfalls" and "a constant solicitation to fallacy."[123] But while Justice Holmes rejected abstract rights in a normative/natural law sense (i.e., natural law), he regarded those rights actually "established in a given society" to have a different basis.[124] Holmes was particularly troubled by the notion that judges should be enforcing abstract rights for which there was no concrete societal basis established in a socialist-progressive worldview:[125]

> There is a tendency to think of judges as if they were independent mouthpieces of the infinite, and not simply directors of a force that comes from the source that gives them their authority. I think our court has fallen into the error at times and it is that that I have aimed at when I have said that the Common Law is not a brooding omnipresence in the sky and that the U.S. is not subject to some *mystic overlaw* that it is bound to obey.[126]

Holmes made his original anti-natural law statement that the common law "is not a brooding omnipresence in the sky" (i.e., of metaphysical origin) in *Southern Pacific v. Jensen*, where he explained that law is "the articulate voice of some sovereign or quasi-sovereign that can be identified."[127] Assertions of abstract

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[120] *See* Posner, *supra* note 15, at xiii.
[121] *Id.* at xiii.
[122] *Id.* at xiv.
[123] THOMAS SOWELL, INTELLECTUALS AND SOCIETY xiv (2009).
[124] *Id.* at xiv.
[125] *Id*. at xiv.
[126] Posner, *supra* note 96, at 236.
[127] Sothern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917).

rights by intellectuals in effect verbally transform themselves into self-authorized sovereigns (what Holmes called "mystic overlaw").[128]

II. Criticisms of Justice Holmes

A. Professor Alschuler's Dissent

Oliver Wendell Holmes is generally held as one of the greatest legal thinkers in U.S. history and the standard bearer of jurists on the Left. Richard A. Posner, an appellate court judge, prolific author, and lecturer at the University of Chicago Law School considers his 1881 book, *The Common Law* and his 1897 law review article, *The Path of Law* the greatest two examples of American legal scholarship by an American jurist.[129] His storied legal career included teaching at Harvard Law School, being a judge on the New York Court of Appeals (where Benjamin Cardozo succeeded him), and serving three decades on the U.S. Supreme Court (again seceded by Cardozo).

Albert W. Alschuler, a law professor at the University of Chicago Law School, analyzed the complexities of Holmes' personality that have been obfuscated by his hyperbolized reputation kept legend by legions of subsequent admirers, legal scholars of succeeding generations, all bowing without full reason and rationale to this singular American judicial icon.[130] It is beyond historical argument that Holmes' contributions as a legal scholar were meritorious and influential. Yet, according to Alschuler, his *oeuvre* was neither new nor original.[131] What history remembers most of the substantive work of Holmes exhibited an omnipresent dark side.[132] Putting Justice Holmes on Freud's psychiatrist couch, could the Holmes' Civil War experience have caused him to become a brooding skeptic and atheist?[133] Alschuler's comprehensive analysis of the unnatural jurisprudence of Holmes is both revelatory and compelling.[134] For example, Professor Alschuler at the beginning

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[128] Posner, *supra* note 15, at 230.
[129] *Id.*
[130] *See* ALSCHULER, *supra* note 12.
[131] *Id.* at 98.
[132] *Id.* at 139.
[133] *See supra* section I.
[134] *See* ALSCHULER, *supra* note 12, at 139; Presser, *supra* note 95, at 113.

of chapter of his book *Life Without Values* sets the historical stage of skepticism replacing realism at the dawn of the Twentieth Century:

> This introductory chapter provides background for the study. It focuses on legal thought after Holmes, describing the current state of American legal scholarship and noting the extent to which post-Holmes visions of law differ from pre-Holmes visions. The chapter argues that the post-Holmes visions of law are the product of a revolt against objective concepts of right and wrong rather than a revolt against formalism, and it suggests that in important respect, the path of the law since Holmes has been downward.[135]

Alschuler provided a rare legal historical analysis, exposing the man versus the myth accomplished through a balanced and thorough examination of the subject's thought revealed in his own words, judicial opinions, which 100 years later is still considered sacred scriptures by the Progressive Left and the overwhelming majority of current law academics.[136] I liked, especially, how his skeptical worldview is reflected in all of his judicial opinions; this is the crux of my argument. While I personally dislike the untruth over truth jurisprudence of Holmes, unlike most legal academics, I find his skeptical philosophy both obnoxious and historically destructive of enduring American jurisprudence principles, which as a judge he swore a sacred oath to uphold at pains of impeachment. Therefore, a great deal of what Alschuler views as Holmes' faults, mainstream judges, politicians, and law academics see as strengths and 'untruths' over 'truths' to be celebrated and emulated for a century now.[137]

Holmes' jurisprudence is the wellspring for much of American views about jurisprudence in modern times and can be

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[135] *See* ALSCHULER, *supra*, note 12, at 1 (footnote omitted).

[136] Presser, *supra* note 95, at 113.

[137] *See* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 266 (1989); ELLIS WASHINGTON, THE INSEPARABILITY OF LAW AND MORALITY: THE CONSTITUTION, NATURAL LAW AND THE RULE OF LAW 419-24 (2017); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 49 (1993).

summarized with these five points: 1) Holmes tuned everyone to a social view of law; 2) Holmes was perceived to advocate judicial restraint when conservative judicial activism was denounced by progressives; 3) Holmes advanced the idea of law as prediction, thus leading to the is/ought of legal realism; 4) Holmes urged a view of law from the perspective of a bad man, which led to a form of authoritarian control; and 5) Holmes argued for a thoroughgoing positivism and opposition to deconstruction of moral language in law.

B. Professor Allan Bloom Inside the Pagan Arena

In his book, *The Closing of the American Mind*, University of Chicago Professor Allan Bloom traced the development of liberalism from the Age of Enlightenment and the French Revolution, to social Darwinism, Marxist collectivism, and Nietzsche's nihilism.[138] These concepts were embraced by progressive intellectuals to undermine natural law and, using the machinery of the judiciary, to institute a systematic, deconstruction of Western civilization's Judeo-Christian worldview as the intellectual foundation of American law and jurisprudence:[139]

> The gradual movement away from [natural] rights to [sophistic] openness was apparent, for example, when Oliver Wendell Holmes renounced seeking for a principle to determine which speech or conduct is not tolerable in a democratic society and invoked instead an imprecise and practically meaningless standard – *clear and present danger* – which to all intents and purposes makes the preservation of public order the only common good.[140]

Allan Bloom's trenchant critique against Holmesian untruth/unnatural jurisprudence not only put him in his proper place in American intellectual history, but revealed some of the evolution

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[138] ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987).
[139] *Id.* at 28.
[140] *Id.*

atheist and even Freudian influences that animated—and ultimately perverted—Holmes judicial worldview.[141] Bloom wrote:

> [B]y his influential station in society as an abolitionist, Civil War hero, well-respected author, legal scholar, intellectual, Harvard professor and Supreme Court justice, was the key figure between 1870-1935 who helped transform American culture away from reliance on the founders who believed in transcendent principles to the vague world of randomness, meaninglessness and evolving standards of Darwinian evolution as the basis of all American laws.[142]

This passage, in essence, is the crux of this entire article, demonstrating how Holmes was like a giant fulcrum, with society pivoting on his intellectual legacy. Gone was the old natural law/natural nights paradigm of America's Framers that the Mayflower Compact mandated be the integration of legality and morality.[143] Now, if Holmes and his positive law paradigm had anything to say about it, Darwin's evolution-atheism would be the supreme and only guiding jurisprudence that would in any way direct the opinions of the Supreme Court. This would also explain why Holmes was so dogmatic and outspoken about this new jurisprudence radicalism he was propagating on America.[144] Bloom wrote:

> Behind [Holmes'] opinion there was an optimistic view about progress, one in which the complete decay of democratic principle and a collapse into barbarism are impossible and in which the truth unaided always triumphs in the marketplace of ideas. This optimism had not been shared by the Founders, who insisted that the principles of democratic government must be returned to and consulted even though the consequences might be harsh for certain

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[141] *Id.*; *See also* discussion *supra* Section I.
[142] *Id.* at 28-9.
[143] *See supra* note 24 and accompanying text.
[144] BLOOM, *supra* note 138, at 28.

> points of view. . . . What began in Charles Beards' Marxism and Carl Becker's historicism became routine. We are used to hearing the Founders charged with being racists, murderers of Indians, representatives of class interests. . . .[145]

Bloom attacked Holmes' atheism as derivative of Marxist materialism and leftist historical revisionism, which was existentially threatened by—and hostile to—the Judeo-Christian ideas of America's Founders and constitutional Framers.[146] Bloom also criticized Holmes' relativism and anti-intellectualism as sophism, which removes God from the center of society and replaces such deity with egalitarianism.[147] Egalitarianism is an entrenched moral and intellectual relativism that put all ideologies, policies, and philosophies on an equal level in what Holmes frequently referred to as the marketplace of ideas.[148]

This influence of Holmes on the law, courts, and society is universal and virtually unquestioned.[149] For example, the opinions of academics like Carl Becker's historicism-relativism and Charles Beard's Marxist *zeitgeist* and materialistic model of class conflict each acknowledge Holmes' Social Darwinist ideas.[150] Together, these men influenced generations of American scholars, educators, scientists, judges, politicians, and virtually every leftist pressure group operating today, as they are in some way indebted to the ideas of Holmes.[151]

B. Contriving a Demigod: Holmes vs. Picasso

In American history and the history of constitutional law and jurisprudence, Holmes achieved that rarest of rare distinctions of demigod status while he was alive, which has only multiplied exponentially since his death in 1935.[152] In other words, because

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145 BLOOM, *supra* note 138, at 28-29.
146 *Id.*
147 *Id.*
148 *Id.* at 422 n.9.
149 *Id.* at 422.
150 *Id.*
151 BLOOM, *supra* note 138, at 421-22.
152 *Id.* at 423-24.

his writings on philosophy and jurisprudence fit perfectly with the Darwinian Zeitgeist, anything he said was deemed by historical revisionists as a veritable pronouncement from Mount Olympus.[153] British historian Paul Johnson, in his book, *Creators*, wrote the following regarding another demigod from roughly from the same era, Pablo Picasso:

> It is rare indeed for the evil side of a creator to be so all-pervasive as it was in Picasso, who seems to have been without redeeming qualities of any kind. In my judgment his monumental selfishness and malignity were inextricably linked to his achievement. His creativity involved a certain contempt for the past which demanded ruthlessness in discarding it. He was all-powerful as an originator and aesthetic entrepreneur precisely because he was so passionately devoted to what he was doing, to the exclusion of any other feelings whatever. He had no sense of duty except to himself, and this gave him his overwhelming self-promoting energy. Equally, his egoism enabled him to turn away from nature and into himself without concentration which is awe-inspiring. It is notable that from about 1910, he ceased to be interested in nature at all. [154]

Johnson's characterization of Picasso can be adaptable in defining Holmes' place in the history of American jurisprudence. According to Johnson, Picasso's authentication raises another logical problem about Picasso's art. Without a signature and Picasso's personal authentication, such works were commercially valueless.[155] This sophistic state of affairs – who certain elites of society deify as "genius" or relevant on any particular subject – is reminiscent of Andy Warhol's quip that "art is what you can get away with."[156] If Picasso is "the art god of the left" as Paul Johnson

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[153] *Id.* at 423.
[154] PAUL JOHNSON, CREATORS: FROM CHAUCER AND DURER TO PICASSO AND DISNEY 257 (2007).
[155] *Id.* at 256.
[156] WASHINGTON, *supra* note 4, at 424.

believes, then surely Justice Holmes is the law god of the left.[157] Law, according to Holmes, is what you can get away with, thus expressing a truly skeptical and, as some would even say, a depraved worldview of the law.[158]

Holmes produced voluminous writings and opinions on jurisprudence that influenced much subsequent American legal thinking during his long lifetime in the public arena, including a veritable judicial consensus approaching biblical status in support of New Deal regulatory law, pragmatism, critical legal studies, and law and economics.[159] This seems to be the thinking of Judge Posner, when he labeled Holmes the American Nietzsche.[160] Like Darwin before him, and Nietzsche and Picasso concurrent with him, Holmes encapsulated what Hannah Arendt cynically called "the banality of evil."[161] History has shown that these men were deified much above their intellectual contributions by society largely because their ideas took society where they wanted to go at that time.

III. ANALYSIS OF HOLMES' *NATURAL LAW*

Before I undertake my formal critique of Holmes' article on natural law and in the spirit of full disclosure, let me state clearly at the onset that my understanding of natural law is, perhaps in every conceivable respect, diametrically opposed to Justice Holmes'. His version of natural law is, in essence, unnatural law, originating from the Age of Enlightenment (1650-1800), particularly the writings of Hobbes (Leviathan), Descartes, Locke, Voltaire, Rousseau, the French Revolution (1789-89) and the radical nineteenth-century social movement lead by Marx (communism, socialism), Darwin (evolution, social Darwinism, natural selection, eugenics), and Nietzsche (atheism, relativism, aristocracy paradigm, superman).[162] Other philosophies that animated Holmes' jurisprudence and

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[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Posner, *supra* note 15, at xviii; *See also* Seth Vannatta & Allen Mendenhall, *The American Nietzsche? Fate and Power in the Pragmatism of Justice Holmes,* 85 UMKC L. REV. 187, 188 (2016).
[161] *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 252 (5th ed. 2006); *See also* THE OXFORD GUIDE TO PHILOSOPHY, *supra* note 4, at 48-49.
[162] WASHINGTON, *supra* note 4, at 425.

philosophical worldviews include progressivism, utilitarianism, legal positivism, pragmatism and realism—philosophies which, to one degree or another, are all diametrically opposed to natural law and the Judeo-Christian worldview of the Framers.[163] I, on the other hand, am a doctrinaire conservative. I come out of a natural law tradition that descends from the biblical, Old Testament "higher law" that Corwin wrote so eloquently of and descends through Aristotle, St. Paul, St. Augustine, St. Thomas Aquinas, and down through Grotius, Puffendorf, Locke, Montesquieu, Blackstone, America's constitutional Framers, and to my teacher John Whitehead, founder of The Rutherford Institute.[164]

In Holmes' *Natural Law,* I find very little that is accurate, historical, useful, or relevant to a viable analysis of natural law or natural rights.[165] It is in actuality an unscholarly polemic for legal positivism, Darwinian atheism, and what I've repeatedly called u*n*natural law.[166]

A. Observations

> It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law. [167]

Allow me to confess at the onset of my legal analysis of Holmes' opus that I have never read an academic law review article

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[163] *Id.*
[164] *See generally* FULLER, *supra* note 24, at 175-86; Brecht, *supra* note 24; Corwin, *supra* note 24; Fuller, *supra* note 24; Hart, *supra* note 24.
[165] *See* Holmes, *supra* note 3 (*Natural Law* contains only one footnote, which appears in the title (likely an editorial attribution), to "FRANÇOIS GENY, SCIENCE ET TECHNIQUE EN DROIT POSITIF, PRIVÉ, PARIS, (1915).").
[166] *See* WASHINGTON, *supra* note 4, at 405-36.
[167] Holmes, *supra* note 3, at 40.

that did not contain one single footnote (absent the editorial citation in the title). Today, no law review editors would allow writing of this parochial type to masquerade as serious legal scholarship. What Holmes has done here amounts to a Socialist-Progressive infomercial: a duplicitous way for Holmes to rant and rage against natural law, not to inform, analyze, or seriously debate its intellectual merits. This is the primary reason why I titled this article "*Un*Natural Law."

Although Holmes' work has no footnotes, he does allude to several writers who are essentially forgotten today—Fabre, Bergson, Maeterlinck—as well as his own works, which presumably contributed to his ideas against natural law.[168] Why are footnotes especially important in academic writing? Because academic writers must subject themselves to intellectual scrutiny by their peers, and must verify all statements of opinion or fact stated in their articles with at least a footnote citing to authority that affirms or denies the declaration stated. Holmes obviously does not subscribe to this rule; a telling aspect of who Holmes, the man, is.

Everything in the Bible isn't derivative of the Bible. For example, even Saint Paul, who wrote over half of the New Testament, made references to extra-biblical sources including ancient, contemporary, and pagan philosophers, poets, and monarchs.[169] Holmes begins his article on natural law with a *non-sequitur* disguised as a metaphor, which has no discernible connection to the subject at hand.[170] It was as if Holmes wrote this work on the back of a cocktail napkin while having drinks with his colleagues at a local Boston pub. Where is the intellectual rigor? Where is the historical context? Where is the mention of the natural law/natural rights canon of former scholars and works dating back even before the transcendent trio Socrates, Plato, and Aristotle? As a sitting Supreme Court Justice, where is Holmes' trenchant analysis of natural law? Holmes' predilections are always toward the skeptical, sarcastic, cynical, and polemical against natural law, which, here, remind me of the popular writer and novelist of the period, Mark Twain. In my opinion, Twain was an egomaniac who,

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[168] *Id.* at 43.
[169] *Acts* 17:28 (King James) ("For in him we live, and move, and have our being; as certain also of your own poets have said, For we are also his offspring.").
[170] Holmes, *supra* note 3, at 40.

like Holmes, always felt obligated to offer an opinion about most subjects he knew little or nothing about.[171]

Holmes also resorts to a common and sophistic form of philosophical argumentation: logical fallacy—crafting a purposely flawed argument, based on an implausible intellectual premise, and then proceeding to knock down and disprove the illogical, false foundation or "red herring" you originally proposed.[172] I call these logical fallacies by Justice Holmes "strawmen." Throughout his article, Holmes sets up multiple strawmen and then proceeds to knock them down one by one.

1. Strawman No. 1 – The Lovelorn Knight

This medieval figure makes a passionate declaration that the object of his amorous conquest is the most beautiful woman in the world and therefore presumes that, "she is the best that God ever made or will make."[173] And if the knight is noble, he must be willing to fight for his subjective, but unverifiable declaration, even to the death. Holmes disingenuously proposes that this misguided metaphor is actually what natural law *is*, as opposed to what it *ought* to be.[174]

2. Strawman No. 2 – Demand for the Superlative: The Hegel/Holmes Dialectic

"There is in all men a demand for the superlative," Holmes writes, "so much so that the poor devil who has no other way of reaching it attains it by getting drunk."[175] I have learned through over thirty-five years of research and writing that if you listen carefully, your opponent will tell you quite clearly who they are based on what they fear. Here, Holmes does just that by using Hegelian dialectic (thesis-antithesis-synthesis) to achieve a "new"

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[171] *See Literary Criticism of Mark Twain*, LITERARYHISTORY.COM (Dec. 29, 2013, 11:58 PM), http://www.literaryhistory.com/19thC/Twain.htm.
[172] *See* WASHINGTON, *supra* note 4, at 427-28; OXFORD GUIDE TO PHILOSOPHY, *supra* note 4, at 288, 543-44.
[173] Holmes, *supra* note 3, at 40.
[174] Washington, *supra* note 2, at 4-10.
[175] Holmes, *supra* note 3, at 40.

truth, or "untruth."[176] Holmes said "[a] new untruth is better than an old truth." [177] Holmes' jurisprudence equates a theocratic worldview with the imbecilic meanderings of a lovelorn knight or a hapless drunk.[178] Holmesian skepticism does not appreciate the history of natural law; that it was the original philosophy of the Puritans, a Christian sect fleeing religious persecution in Europe. Natural law was also the original philosophy of America's Founding Fathers and the constitutional Framers, who mandated a synthesis between legality and morality.[179]

3. Strawman No. 3 – Truth is not Absolute

Holmes sentiment, "It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law,"[180] amounts to a perversion of natural law philosophy and its singular importance in the history of Western civilization, American jurisprudence, and the rule of law. Holmes started the arrogant and mistaken ideas of denigrating natural law theorists as merely naïve *subjectivists*.[181] In other words, God and the metaphysical are a crutch for the intellectually simpleminded who desperately cling to God without any rational validity. The subjectivist aspect of natural law arises despite logical contradictions, intellectual fallacies, and social evolution (i.e., science).[182] In other words, Holmes and many of his intellectual children earnestly believe that natural law theorists—and the original intent of the constitutional Framers—are purely "experimental" when confronted with the infallibility of social Darwinism, progressivism and liberal social policy.[183] Rather than

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[176] ESSENTIAL HOLMES, *supra* note 1, at 116.
[177] *Id.*
[178] Holmes, *supra* note 3, at 40.
[179] *See, e.g.*, D. Scott Broyles, *Doubting Thomas*, 46 IND. L. REV. 341, 346-52 (2013); James Lanshe, *Morality and the Rule of Law in American Jurisprudence*, 11 RUTGERS J. L. & RELIGION 1, 11 (2009).
[180] Holmes, *supra* note 3, at 40.
[181] Washington, *supra* note 2, at 39-41.
[182] *Id. See generally* Ellis Washington, *Social Darwinism in Nazi Family and Inheritance Law*, 13 RUTGERS J. OF L. AND RELIGION 173 (2011).
[183] *See* Washington, *supra* note 2, at 39-41; Washington, *supra* note 182.

presenting a convincing apologetic, they simply made it up as they went along.[184]

Eighty years after his death, I am more convinced than ever that but for intellectual revolutions—social Darwinism, pragmatism, humanism, and progressivism—occurring during the time Holmes grew up and came of age, we might not have ever heard of the name Oliver Wendell Holmes. At least, he might not be known as a respected justice of the U.S. Supreme Court, major legal philosopher, and progressive judicial icon.

In the second passage of Holmes' *Natural Law*, he quotes from his book *Common Law* with his characteristic glibness: "[T]ruth was the majority vote of that nation that could lick all others."[185] That person has in essence bought into the consensus liberal jurisprudence of modern times that has wholly integrated into contemporary law Darwin's theory of evolution (i.e., survival of the fittest and natural selection) and Nietzsche's dogmatic atheism and relativism encapsulated in his popular philosophies.[186] It also reminds me of the epigraph by G. Edward White, who said, "to Holmes law was 'simply an embodiment of the ends and purposes of a society at a given point in its history.'"[187] British legal philosopher John Austin and Oxford professor H.L.A. Hart would later characterize law in brutal Hobbesian and Darwinian tones, and Judge Posner would affirm Austin's view of power and law—He who is sovereign rules.[188] To these legal philosophers—Holmes, Hart, Woodrow Wilson, Posner, Tribe, Sunstein, Ogeltree—the Darwinian consensus view of law which dominates the academy today is pure brute force, survival of fittest, and domination by the sovereign over "We the People."[189]

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[184] *See* Charles Evan Hughes, Speech before the Chamber of Commerce, Elmira, New York (May 3, 1907), *in* ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906–1908, 139 (1908) ("We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.").

[185] Holmes, *supra* note 3, at 40.

[186] *See* Washington, *supra* note 182, at 177, 180, 221, 224-25; OXFORD GUIDE TO PHILOSOPHY, *supra* note 4, at 958, 659.

[187] WHITE, *supra* note 3, at 132.

[188] *See* Washington, *supra* note 182, at 182 n.18; AUSTIN, *supra* note 86, at 13, 23, 123-24, 169, 231, 262 (2d ed. 1861).

[189] *See* OLIVER WENDELL HOLMES, *Recent Letters to Dr. Wu*, *in* JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND

Accordingly, progressivism grew directly out of that same Zeitgeist of Marxist socialism, social Darwinism, and Nietzscheism.[190] These men became demigods, and their ideas were deified as a new gospel by the humanist academy who wearied of 2,500 years of Socrates, Plato and Aristotle and academic pursuits based on logic, reason, and God.[191] The new trinity, Marx, Darwin, and Nietzsche, would become the cult figures of the new progressive academy. Their worldview would triumphantly declare a new *Weltanschauung*, or worldview, based on evolution-atheism and will to power, in numerous essays, articles and books.[192] Thus, what I call the "Progressive Revolution" was designed to systematically deconstruct and destroy America's (and Western civilization's) Judeo-Christian worldview and institutions—that Western society shared from the time of Christ in the first century to the 1860's when the advent of Darwin's evolution atheism, or what Nietzsche called the "slave morality," began to suppliant our Judeo-Christian worldview.[193] Nietzsche, like Holmes and the Progressives, wanted to move civilization to a new age of the "master morality," and Darwin's brutal survival of the fittest would be enacted into every conceivable aspect of society.[194] Holmes would lead this new Progressive Revolution, this new gospel of evolution jurisprudence, into the twentieth century.[195]

PAPERS 149, 187 (Harry C. Shiver, ed., 1936) ("when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way.").

[190] Washington, *supra* note 182, at 175-80, 195-96, 222, 224 n.246, 225.

[191] HERTZ, *supra* note 3, at 284 (Holmes, controlled by Darwinian atheism jurisprudence, of necessity must place humanity's significance on the level with the lowest life forms: "cosmic ganglion" or nerve cell cluster).

[192] Washington, *supra* note 182.

[193] Washington, *supra* note 2, at 52 n.84.

[194] *See* Posner, *supra* note 15, at x-xi; Presser, *supra* note 95, at 113; NICKELL JOHN ROMJUE, THE BLACK BOX: DARWIN, MARX, NIETZSCHE, FREUD - STORIES (2007); WHITE, *supra* note 3; Washington, *supra* note 182.

[195] *See* Washington, *supra* note 2, at 4, 18-21; WASHINGTON, *supra* note 4 at 11, 20, 204. A state of universal psychosis reminiscent of English philosopher Thomas Hobbes's *Leviathan* worldview – *bellum omnium contra omnes* (War of all against all), an existential existence where life is "solitary, poor, nasty, brutish and short." THOMAS HOBBES, LEVIATHAN 76 (Edwin Curley ed., Hackett Publishing 1994) (1651).

When Holmes wrote that "our test of truth is a reference to either a present or an imagined future majority in favor of our view"[196] it means, to me, that truth to Holmes was rooted in skepticism and relativism. He was skeptical that truth even existed ("imagined future"), but if there is a "truth" it was morally or legally relative to "our test" or "in favor of our view."[197] Subjective or unilateral truth to Holmes hinges on this foundation "as the system of my (intellectual) limitations."[198] What makes truth subjective is "what gives it objectivity is the fact that I find my fellow man to a greater or less extent."[199] Holmes' perverse, nihilistic understanding of truth is predicated not by any substantive, immutable, or transcendent source but rests purely on consensus, academic collectivism, mass delusion, and what I call tyranny of the majority.[200] It is Darwin's survival of the fittest writ large. His aphorism of pure truth is put in cold, inhuman, mathematical terms: the sum of the angles of a triangle is equal to two right angles.[201] However, I could answer with an even greater truth: "In the beginning God created the heavens and the earth."[202] The Gospel of John characterizes the battle of worldviews in this manner: "He [Jesus] was in the world. The world was made by Him and the world knew Him not."[203] Does my objective-theism truth trump Holmes' subjective-atheism untruth? To a natural law theorist, the answer is yes, because using Aristotle's metaphysics paradigm, we immediately take the finite argument about right angles to the author of mathematics and beyond debate, namely to the infinite God.[204]

In conclusion, Holmes demonstrates his ignorance of natural law and contempt for the original intent of the Framers and original

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[196] Holmes, *supra* note 3, at 40.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] Stella Morabito, *How to Escape the Age of Mass Delusion,* THE FEDERALIST (June 8, 2015), http://thefederalist.com/2015/06/08/how-to-escape-the-age-of-mass-delusion/.
[201] Holmes, *supra* note 3, at 40.
[202] *Genesis* 1:1 (King James).
[203] *John* 1:10 (King James).
[204] Corwin, *supra* note 24. For quotes on how America's constitutional Framers venerated natural law together with God and the Bible as the foundation of the U.S. Constitution, *see generally* DAVID BARTON, ORIGINAL INTENT, THE COURTS, THE CONSTITUTION, AND RELIGION (5th ed. 2008).

jurisprudence when he contends that "[c]ertitude is not the test of certainty,"[205] for under a natural law paradigm it is impossible for certitude *not* to be the test of certainty, for what else could logically fill this foundation of moral society? Once again, to understand Holmes' unnatural law worldview you must take the opposite of his fundamental meanings. Here, "[d]eep-seated preferences [must] be argued about."[206] What else could you call his famous dissents but Holmes' own deep-seated or personal policy preferences masquerading as sound judicial reason founded in stare decisis (precedent).[207] Virtually nothing Holmes ever wrote from the bench complies with an actual natural law paradigm; it is unnatural law.[208]

B. The Rise of Neo-Sophism: Hamlet and Holmes

Divert, Distort, and Deconstruct are the 3-D's of the *Weltanschauung* of Justice Oliver Wendell Holmes and the progressive jurisprudence of evolution-atheism.[209] Holmes' jurisprudence is neither new nor innovative. Holmes' legal ideas are the systematic application of Hegelian dialectic to deconstruct America's Judeo-Christian worldview brick-by-brick and, upon the ashes, portray America's constitutional Framers' insistence on an integration of legality and morality (including all normative institutions like the Christian church) as utterly irrelevant.[210] When Holmes in *Natural Law* uses the word "cock-sure"[211] he is revealing his Yankee-Progressive bias against certitude in everything, including natural law or what Jefferson called "the Laws of Nature and of Nature's God,"[212] by mocking the historical Puritans as being "Puritanical" (i.e., dogmatic Christians who are presumably anti-evolution atheism), and thus irrelevant.

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[205] Holmes, *supra* note 3, at 40.
[206] *Id.* at 41.
[207] *Id.*
[208] Jeffrey Rosen, *One Man's Justice*, N.Y. TIMES (Dec. 17, 2000), http://www.nytimes.com/books/00/12/17/reviews/001217.17rosent.html (reviewing ALSCHULER, *supra*, note 12) ("I quite agree that a law should be called *good* if it reflects the will of the dominant forces of the community," Holmes wrote to Felix Frankfurter, "even if it will take us to hell.").
[209] Presser, *supra* note 95, at 113.
[210] *See generally* Washington, *supra* note 63.
[211] Holmes, *supra* note 3, at 40.
[212] THE DECLARATION OF INDEPENDENCE, para 1 (U.S. 1776).

Shakespeare's *Hamlet* is frequently perceived as a philosophical personality, explaining ideas that are presently defined as skeptical, existentialist, and relativist.[213] Hamlet expresses a subjectivist impression when he says to Rosencrantz, "there is nothing either good or bad, but thinking makes it so."[214] The most famous illustration of existentialism is Hamlet's "To be, or not to be" soliloquy speech.[215] Some literary scholars have thought Hamlet's use of "being" to refer to life and action, and "not being" to death and indecision.[216] Therefore, Hamlet follows the logical progression of Holmesian evolution-atheism jurisprudence, or what he considered the triumph of natural selection and survival of the fittest over the dead, superstitious worldview of Christianity, where "[a] new untruth is better than an old truth."[217] This is the crux of Holmes' worldview in all of its raw primitivism. It has an existential *leitmotif* echoing Rousseau's neo-primitive philosophy, Darwin's survival of the fittest, and Nietzsche's "God is dead" and will to power worldviews.

Furthermore, *Hamlet* echoes the modern skepticism championed by the French Enlightenment humanist and essayist, Michel de Montaigne (1533-92).[218] Before Montaigne's generation, humanists such as Pico della Mirandola (1463-94) had contended that man was the epitome of God's creation, formed in God's image and through free will could choose his own nature (good or evil). However, this existential worldview was later challenged with the publication of *Essais* by Montaigne.[219] Shakespeare's Hamlet was written between 1599 and 1602, just 20 years after Montaigne's

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[213] Alireza Mahdipour, *The Existential Idea of Self in Shakespeare's Hamlet: A Justification for the Renaissance Convention of Play-within-the-Play*, 49 RES. ON FOREIGN LANGUAGES: J. OF FAC. OF LETTERS AND HUM. 134, (2006) ("The major theme of Shakespeare's Hamlet is not parricide, incest, or even revenge. If it is hesitation, as generally believed, it may be argued that the play is intensely existentialist.").

[214] WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2, ll. 1257–58.

[215] WILLIAM SHAKESPEARE, HAMLET act 3, sc.1, ll. 55–87 (particularly line 55).

[216] Adam Kullman, *What Is the Meaning of "To be or not to be," Hamlet's Famous Quote?*, LETTERLPILE (Dec. 3, 2016), https://letterpile.com/books/What-is-the-meaning-of-To-be-or-not-to-be.

[217] ESSENTIAL HOLMES, *supra* note 1, at 116.

[218] W. THOMAS MACCARY, HAMLET: A GUIDE TO THE PLAY 49 (1998).

[219] MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS (M.A. Screech trans., Penguin Books 1993) (1580).

revolutionary work, *Essais*. Therefore, when Hamlet asks, "What a piece of work is a man?"[220] he is consciously affirming Montaigne's humanist ideas. However, academics differ on the question of if Shakespeare borrowed directly from Montaigne or if both writers were basically responding similarly to the Zeitgeist of the times.[221] Another correlation between Hamlet and Montaigne's humanism is when Hamlet was forthright to believe the prophecy of the ghost, yet appeases Horatio's admiration with the logical declaration: "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy."[222] In other words, Man (not God) is the center of all things. This is the motto of the Age of Enlightenment, (1600-1800), which started with that declaration and would end with the anti-Christian, anti-Church, humanist holocaust of the French Revolution 200 years later.[223]

The *leitmotiv* of Holmes' entire evolutionary legal philosophy hinges on the triumph of the Darwinian worldview over a Judeo-Christian worldview, which is encapsulated in two very sophisticated and failed philosophies of the past; 1) social Darwinism, and 2) moral relativism.[224] In other words, according to those like Justice Holmes and his adherents pushing the Progressive Revolution, who proscribe to a militant atheistic worldview, nothing has more intrinsic value than anything else.[225] Everything is relative. In the history of American law, Justice Holmes has been the prophet of the counter philosophy of atheistic relativism—the concept that points of view have no absolute truth or validity and have only relative, subjective values according to differences in perception and consideration.[226] Holmes writes, "[c]ertitude is not the test of certainty. We have been cocksure of many things that were not so. If I may quote myself again, property, friendship, and truth have a common root in time."[227] Here, Holmes is launching

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[220] WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2, l. 205.
[221] Ellis Washington, *On Montaigne: The Father of Psychological Essays*, RENEW AMERICA, (Oct. 18, 2014), http://www.renewamerica.com/columns/washington/141018.
[222] WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5, ll. 167-68.
[223] *See* BLOOM, *supra* note 138, at 158-62, 220 (French Revolution).
[224] Washington, *supra* note 2, at 38-39 (Moral Relativism); Washington, *supra* note 182, at 177, 180, 221, 224-25.
[225] HOLMES, *supra* note 3, at 149, 187.
[226] *See generally* WHITE, *supra* note 3.
[227] Holmes, *supra* note 3, at 40.

his characteristic Hegelian dialectical arguments against God, the Bible, and Christianity—against the Judeo-Christian traditions of intellectual thought that America's Framers embraced under the philosophy of natural law.[228] When Holmes writes, "[w]hat we most love and revere generally is determined by early associations,"[229] he is borrowing ideas of sociological jurisprudence from Harvard professor Roscoe Pound, who originated this discipline based on moral relativism and Darwin's evolution-atheist ideas.[230]

Other references to moral relativism and evolution-atheism in his efforts to pervert and debase natural law include his characteristically glib and folksy references, derivative of writer Mark Twain, to people's love of "rock[] crevices," "rocks," "barberry bushes," and "certain preferences" that they (Christians) "are fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief."[231] His "fighting" paradigm brings back the psychological trauma he suffered during the Civil War. Why does Holmes make such intellectually unsustainable claims, especially in a venerated academic law journal like Harvard Law Review? Comparing natural law, and the original intent of the constitutional Framers, with untutored savages who dwelled in rock crevices, or cavemen, is a baseless ad hominem attack with no logical basis in history.[232] Because in Holmes' ethic of social Darwinism "[d]eep-seated preferences cannot be argued about,"[233] unless one is willing to follow Darwin to his nihilist ends: natural selection, atheism, relativism, survival of the fittest, or in the words of Holmes

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[228] *See* ESSENTIAL HOLMES, *supra* note 1, at 116; Hernandez, *supra* note 9, at 706-09; THE OXFORD GUIDE TO PHILOSOPHY, *supra* note 4, at 369-71.

[229] Holmes, *supra* note 3, at 41.

[230] *See* ROSCOE POUND, THE HISTORY AND SYSTEM OF THE COMMON LAW, 18–19 (1939); Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. OF LEGAL EDUC., 441, 449 n.31 (1986) (on Pound's reliance on Holmes's Lochner dissent in the creation of Pound's so-called "sociological jurisprudence").

[231] Holmes, *supra* note 3, at 40-41.

[232] *See* HERTZ, *supra* note 3, at 107 ("I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand."). *See generally* BARTON, *supra* note 204; WHITE, *supra* note 3, at 157 (1976).

[233] Holmes, *supra* note 3, at 41.

channeling Nietzsche's Will to Power, "we try to kill the other man rather than let him have his way."[234] Holmes' legal skepticism is an existential war against America's Judeo-Christian traditions and institutions.

Harvard Professor Cass Sunstein was President Barack Obama's former Regulatory Czar and one of his most trusted advisors.[235] In 2008, he co-authored a book with Richard H. Thaler titled *Nudge: Improving Decisions About Health, Wealth, and Happiness*.[236] In it, he wrote about "deep-seated preferences" and stated that:

> People often make poor choices – and look back at them with bafflement! We do this because as human beings, we all are susceptible to a wide array of routine biases that can lead to an equally wide array of embarrassing blunders in education, personal finance, health care, mortgages and credit cards, happiness, and even the planet itself.[237]

Like a majority of the academic Left, Sunstein and Thaler hold Holmes as the standard bearer for constitutional jurisprudence.

Holmes' statement: "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by . . . all men everywhere,"[238] echoes a series of essays that I wrote a few years ago, *The Molech Paradigm, Part 2*, where I quoted from Jonah Goldberg's book *Liberal Fascism*.[239] In his book, Goldberg wrote, "Laurence Tribe, America's leading liberal constitutional lawyer, argued in the Harvard Law Review in 1978 that religious views were inherently superstitious and hence less legitimate than 'secular' ones."[240] This is a key progressive worldview of which Holmes, Pound, and Tribe

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[234] *Id.*
[235] Ellis Washington, *Cass Sunstein and His Lady Macbeth*, WND, (Apr. 2, 2011), http://www.wnd.com/2011/04/282105/.
[236] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).
[237] *Id.*
[238] Holmes, *supra* note 177, at 41.
[239] Ellis Washington, *The Molech Paradigm, Part 2*, WND (Mar. 19, 2011), http://new.wp.wnd.com/2011/03/276749/.
[240] GOLDBERG, *supra* note 2, at 366.

are perhaps three of the most prolific and influential exponents from a legal philosophical standpoint. Therefore, the argument between natural law and positive law erases any reliance on moral, ethical, or Christian worldviews and rules by labeling them bigoted, illegitimate, anti-intellectual, emotive, or "suspect."[241] This is a long-standing but sophistic tactic, a logical fallacy using Hegelian Marxist dialectical materialism arguments as the only "rational" paradigm; thus, natural law or normative arguments are vanquished before the first arguments are uttered.[242] Thus Holmes, now utterly confident in the triumph of his secular, evolutionary atheism jurisprudence, presents the *argumentum reductio*, or anti-thesis: the *ought* of natural law.[243] In other words, Holmes believes natural law is concerned about pie-in-the sky morality and dead saints, while Positive Law (i.e., legal realism, pragmatism, progressivism, atheism, evolution) focuses on what the law actually *is* as opposed to what the law *ought* to be.[244] Nietzsche framed the intellectual duality in brutal Darwinian terms—*slave morality* (natural law) vs. *master morality* (positive law).[245]

Holmes was apparently emboldened with the superiority of his legal positivist worldview, which was rooted in Darwin's evolutionary atheism, Marx's socialism, and Nietzsche's "Will to Power." Holmesian jurisprudence delights further in demeaning the naïve ideas of natural law, which are based upon mere "wishes"[246] (i.e., Christian myths, Freud's 'wish-fulfillment' theory[247]) whose "foundation is arbitrary."[248] "It is true that beliefs and wishes have a transcendental basis,"[249] Holmes writes, "in the sense that their

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[241] TRIBE, *supra* note 2, at 1272-84.
[242] *See generally* WHITE, *supra* note 3; Hegel, *supra* note 243.
[243] Holmes, *supra* note 165, at 41.
[244] *See* FULLER, *supra* note 24, at 175-86. *See generally* Brecht, *supra* note 24; Corwin, *supra* note 24; Fuller, *supra* note 24; Hart, *supra* note 24.
[245] *See* Tucker Culbertson, *Another Genealogy of Equality: Futher Arguments Against the Moral-Politics of Colorblind Constitutionalism*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 51, 59-60 (2008); *see also* Vannatta, *supra* note 160, at 196-97.
[246] Holmes, *supra* note 165, at 41.
[247] SIGMUND FREUD, *Schreber*, *in* 9 THE PELICAN FREUD LIBRARY: CASE HISTORIES II 132 (James Strachey & Angela Richards, eds., James Strachey, trans., Penguin Books 1987).
[248] Holmes, *supra* note 165, at 41.
[249] *Id.*

foundation is arbitrary."[250] Calling America's historical reliance on Judeo-Christian principles "arbitrary" is sophistic and derivative of several neurosis concepts by Sigmund Freud, including: "Displacement," "Transference," or "Psychological Projection."[251] Projection, also known as blame shifting, is a psychological theory in which humans defend themselves against unpleasant impulses by denying their existence in themselves—while attributing them to others.[252]

Throughout his article on natural law, Holmes utilizes this psychological technique against natural law theorists. Holmes' ahistorical worldview of Christianity, the Bible, and natural law—the three pillars of Western civilization—is based upon an arbitrary foundation of wishes. The result is that 6,000 years of human civilization and biblical history is irrelevant to Holmes.[253] All that matters to Justice Holmes' evolutionary jurisprudence is the triumph of Nietzsche's "Will to Power" theory over the "slave morality" of Christianity. This anti-intellectual, anti-historical worldview moves well beyond the realm of intellectual arrogance and hubris into delusional narcissism and megalomania, which drove his intellectual namesake Nietzsche to madness.[254] But for the triumph of a Darwinian, evolutionary jurisprudence over a biblical worldview since 1870, Holmes' anti-Christian bigotry would merit no rational reply other than a place on the ash heap of history. Yet, because he was a Supreme Court Justice and, more importantly, the intellectual forefather of evolutionary jurisprudence, he has reached demigod status where his words and ideas, no matter how ignorant, are deemed beyond reproach.[255]

After Nietzsche's will to power worldview that "truth [or law] was the majority vote of that nation that could lick all

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[250] *Id.*

[251] FREUD, *supra* note 247, at 132.

[252] 4 THE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY 1797-98 (Irving B. Weiner & W. Edward Craighead, eds., 4th ed. 2010) (for analysis on Freud's theories on Transference, Displacement, Psychological Projection).

[253] *See generally* WHITE, *supra* note 3; HONDERICH, *supra* note 4, at 369-71; Hernandez, *supra* note 9, at 631-33.

[254] *See, e.g.*, C.W. Maris van Sandelingenbacht, *Nietzsche Niëzky Nijinsky*, 24 CARDOZO L. REV. 1261, 1272 n.33 (2003); Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing,* 77 IOWA L. REV. 989, 1010 (1994).

[255] *See* Shapiro, *supra* note 33, at 409-26; ALSCHULER, *supra*, note 12, at 1.

others,"[256] Holmes, perhaps with one eye on the present protracted war that he, America, and most of the world was enduring, continued his evolutionary atheistic paradigm by defining the right to life as the "most fundamental of the supposed preexisting rights."[257] Jefferson, in his immortal Declaration of Independence, placed life, liberty and the pursuit of happiness as the trinity of natural rights guaranteed by America's new Declaration. Holmes, the atheist contrarian, put a Darwinian spin on this so-called right to life as "the predominant power [demanded] in the community."[258] Thus, the concept of "life" under Holmes' worldview meant survival of the fittest, natural selection, and "will to power." This animated him and drove his approach: his evolution-atheism obsession in every intellectual discipline, including politics, political philosophy, jurisprudence, and law. Having deconstructed a moral worldview as "arbitrary" and "naïve,"[259]

Holmes next brought Kant and Hegel to reconstruct his socialist utopian state upon the ashes of the previous Judeo-Christian civilization.[260] Holmes wrote that the right to life is only an interest, distinct and separate from morality which he categorized as "the sanctity disappears."[261] Following his atheist progression, Holmes next alluded to Machiavelli's amoral *end justifies the means* worldview writing, "that closing a hatch to stop a fire and the destruction of a cargo was justified even if it was known that doing so would stifle a man below."[262] Here, Holmes seems irritated that in this new century of the Age of Progressivism he should need to defend his humanist position grounded in positivism and pragmatism.[263] Holmes' "commonplaces"[264] (positive law, legal positivism) vs. necessary foundations of thought (natural law). It is the old *is* versus *ought* argument; according to Holmes, the former has triumphed as the fittest over the latter in both word and existential effects on civilization, law, and policy. Holmes, in a

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[256] Holmes, *supra* note 3, at 40.
[257] *Id.* at 42.
[258] *Id.*
[259] *Id.* at 41. *See* James W. Springer, *Natural Selection or Natural Law*, 3 GEO J. L. & PUBL. POL'Y 53, 57-58 (2005); Vetter, *supra* note 39, at 363-64.
[260] *See* Holmes, *supra* note 3*,* at 42.
[261] *Id.*
[262] *Id.*
[263] *Id.* ("It is idle to illustrate further.").
[264] *Id.*

letter to his close friend the British socialist intellectual, Harold Laski, wrote:

> My dear Laski, your remark about the "oughts" and system of values in political science leaves me rather cold. If, as I think, the values are simply generalizations emotionally expressed, the generalizations are matters for the same science as other observations of fact. If, as I sometimes suspect, you believe in some transcendental sanction, I don't. Of course, different people, and especially different races, differ in their values—but those differences are matters of fact and I have no respect for them except my general respect for what exists. Man is an idealizing animal—and expresses his ideals (values) in the conventions of his time. I have very little respect for the conventions in themselves, but respect and generally try to observe those of my own environment as the transitory expression of an eternal fact.[265]
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> The eighty-eight-year-old Oliver Wendell Holmes wrote to Harold Laski on September 15, 1929, just weeks before the stock market crashed plunging the world into depression. What are we to make of Holmes' statements? "Values," he says, are merely "generalizations emotionally expressed." As such, they are "matters for the same science as other observations of fact." They have no "transcendental sanction." Of course, different people, and, especially, different peoples (what Holmes calls "races").[266]

Unlike conventional positivists who would dismiss dissenting views as superficial, his beliefs about the law are "closely connected with one's general attitude toward the universe"[267] based on the nature/nurture argument of "early associations [nurture] and

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[265] ESSENTIAL HOLMES, *supra* note 1, at 116.
[266] Robert P. George, *Holmes on Natural Law*, 12 THE GOOD SOC'Y: A J. OF CIVIC STUD. 32, 32 (2003).
[267] Holmes, *supra* note 3, at 42-43.

temperament [nature]."[268] Overriding this analysis is Holmes' view that some men have the irrational "desire to have an absolute guide."[269] I use the world "irrational" for Holmes' skepticism, which instructs that "[m]en to a great extent believe what they want to."[270] Holmes' skepticism leads him to adopt an objectivist worldview that makes up laws and morality, as one goes and assigns a person's findings on "God." Because of this worldview, Holmes sees "no basis for a philosophy that tells us what we should want to want."[271] With Holmes, the *is* of necessity must always triumphs over the *ought*, in a similar vein that Darwin's natural selection or survival-of-the-fittest and Nietzsche's will to power and positive law of necessity must triumph over the slave morality of Judeo-Christian jurisprudence which is natural law.[272]

Like Zeus casting down lightning bolts from Mt. Olympus, or the irascible Don Quixote tilting at windmills, Holmes writes of "demanding the superlative"[273] and "cosmic truth, if there is such a thing" as "truth."[274] This is classic historical deconstructionism and moral relativism; of course, Holmes' corollary argument is that every educated person already knows there is no such a thing as "cosmic [metaphysical] truth."[275] Therefore, examining the Hegelian dialectic, it follows that all ideas or philosophical arguments based on eternal truth or natural law are superstitious, ridiculous, and hold no rational basis to a judge in a court of law. The argument culminates in his famous quote, "We do know that a certain complex of energies can wag its tail and another can make syllogisms."[276] Here, Holmes is much more rooted in the ideas of Darwin than was Nietzsche. When Holmes refers to the "French

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[268] *Id.* at 43.
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] These ubiquitous "Is-Ought" arguments favored among academics regarding what the purpose of the law *is* or *ought* to be have been debated by judges, politicians and scholars alike for many years. *See generally* FULLER, *supra* note 24, at 175-86; Brecht, *supra* note 24; Corwin, *supra* note 24; Fuller, *supra* note 24; Hart, *supra* note 24.
[273] Holmes, *supra* note 3, at 40.
[274] *Id.* at 43.
[275] *Id.*
[276] *Id. See generally* WHITE, *supra* note 3; THE HOLMES-POLLOCK LETTERS, *supra* note 3, at 2:36.

s[k]eptics"[277] he apparently means Enlightenment philosophers and atheists like Voltaire, Rousseau, Jean-Paul Marat, Sans-Cullotes, the Jacobins, and Robespierre.

Rather than bowing before a deity, Holmes would have humanity be "content" to hear "a clang from behind phenomena."[278] To do otherwise, to "employ the energy that is furnished to us by the cosmos to defy it" is, in his opinion, "silly."[279] This is reminiscent of Saint Paul's aphorism, "[T]he preaching of the cross is foolishness to them that perish."[280] The bottom line of Holmes' *un*natural law is a declaration of war against God and the underlying legal and political philosophy of the U.S. Constitution, which is based on the Bible, natural law, and the original intent of the constitutional Framers.[281]

I have saved for last the philosopher and metaphor that I think Holmes most relies upon in his evolutionary atheism jurisprudence, based on his legal skepticism and unnatural law critique of natural law. The philosopher Holmes relies upon most is Plato. According to Ben Dupre, in *The Allegory of Plato's Cave*:

> The cave represents "the realm of becoming"—the visible world of our everyday experience, where everything is imperfect and constantly changing. The chained captives (symbolizing ordinary people) live in a world of conjecture and illusion, while the former prisoner, free to roam within the cave, attains the most accurate view of reality possible within the ever-changing world of perception and experience. By contrast, the world outside the cave represents "the realm of being"—the intelligible world of truth populated by the objects of knowledge, which are perfect, eternal and unchanging. [282]

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[277] Holmes, *supra* note 3, at 43.
[278] *Id.*
[279] *Id.*
[280] 1 *Corinthians* 1:18 (King James).
[281] Hoffman, *supra* note 95, at 614.
[282] BEN DUPRE, 50 PHILOSOPHY IDEAS YOU REALLY NEED TO KNOW Ch. 2 (2013).

Holmes said as much when he wrote, "[t]hat the universe has in it more than we understand."[283] By extending the war metaphor he used at the beginning he is, in essence, saying that knowing what we know; "we still . . . fight" because "we want to live."[284] St. Paul wrote to the pagan Romans about the natural law (i.e., God's revealed law to mankind) written on their hearts.[285] To this superstitious claptrap that bore the intellectual foundations of Western civilization for 2,000 years, Holmes would quip, "unthinkable to which every predicate is an impertinence, has no bearing upon our conduct."[286] One could not achieve such a feat as the secularization of Western civilization unless one first substituted the original trinity of Western civilization—Socrates, Plato, and Aristotle—with Holmes' new trinity of the modern age—Darwin, Marx, and Nietzsche.

Holmes' evolutionary jurisprudence, rooted in materialism, atheism, and relativism, is antithetical to the original intent of America's constitutional Framers. Holmes' unnatural law is based not on the Framers' natural law, but on Holmes' militant evolution-atheism jurisprudence. Has the second decade of the twenty-first century turned the rule of law and the Constitution into a suicide pact against society which I, the conservative jurists on the U.S. Supreme Court (Clarence Thomas, John Roberts, Samuel Alito, and Neil Gorsuch), and most rational-minded people deduce is a most perverse, unconstitutional, and unnatural state of affairs indeed?

C. ***Un*natural Jurisprudence: The Foundation of the Progressive Revolution**

In conclusion, the history of American law, political philosophy, and jurisprudence from the Pilgrims and Puritans in the early 1600's to modern times turns on an existential choice. One either believes in a biblical worldview based on God, the Bible, natural law, individual freedom, Republican government, and *veritas* (truth), or in a naturalism/atheistic worldview rooted in Hegelian dialectical materialism, Darwin's evolution atheism, Marxist collectivist materialism, and the omnipotent socialist state.

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[283] Holmes, *supra* note 3, at 43.
[284] *Id.*
[285] *Romans* 1:20-25 (King James) (St. Paul's letter to the church at Rome was truly prophetic of the sophistic philosophies of man in modern times).
[286] Holmes, *supra* note 3, at 43.

There are no other choices. The two philosophical worldviews are antithetical to each other and therefore do not or cannot ever logically be juxtaposed or exist together as equals—either natural law will rule, or it will become a slave to positive law.

A concluding case in point; among a voluminous output of personal letters written by Holmes over six decades to various friends, colleagues, and associates, one letter to British political theorist, economist, author, and lecturer Harold Laski, stands out in bold relief as possessing a definite exposition of Holmes' intellectualism. This progressive man of letters frequently used the logical fallacy of Freudian psychological projection to judge others, including President Franklin Delano Roosevelt. Justice Holmes called FDR "a second-rate intellect, but a first-rate temperament."[287] It was Justice Holmes who was a second-rate intellect, yet the legions of modern legal scholars ignore Holmes' intellectual parochialism in order to promote his brand of jurisprudence, which in his letter to Harold Laski is quite evident:

> . . . I am interested by what you say of Gibbon. I too was vastly impressed by his sweep and mastery and his power of telling a story. I doubt if one can say that Maitland could have made such a picture had he lived at that time. *But what struck me was that he told me very little that I cared to hear*. The emphasis has changed, as it always does, and apart from the fact that much more is known upon the subjects that we do want to hear about, such as Christianity and the Roman law, he takes time in giving characters that I don't believe and am indifferent to, and a thousand details of wanderings, incursions and alarums that I forget as soon as read, but gives me nothing of the rise and decay of institutions. . . . *History has to be rewritten because history is the selection of those threads of causes or antecedents that we are interested in*—and the interest changes in fifty years. . . . Adam Smith is about as far back as Newman. His book seemed to me more like a treatise on life than political economy in a narrow

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[287] ROBERT M. GATES, A PASSION FOR LEADERSHIP, 171 (2016).

> sense. I didn't think Karl Marx the size to patronize him as a bourgeois intelligence, as I think he did.[288]

How did we get here? How did American society devolve in exactly 150 years (1787-1937)—from the time the constitutional Framers created the U.S. Constitution to Franklin Delano Roosevelt's threatened 1937 Judicial Reorganizing Act—from a Republic based on God, natural law, natural rights, and the integration of law and morality, to a nation that, since the publication of four especially pernicious books (Karl Marx's *The Communist Manifesto* (1848), Charles Darwin's *On the Origin of Species* (1859) and *The Descent of Man* (1871), and Friedrich Nietzsche's *Thus Spoke Zarathustra*), and Freud's *Three Essays on the Theory of Sexuality* (1905), has become an abyss of immorality, socialism, societal anarchy and tyranny?

When Holmes writes that "history has to be rewritten,"[289] he is echoing the communist Karl Marx whose aphorism was "The first battlefield is the rewriting of history."[290] American society can in large part thank the law academy and their patron saint, Justice Oliver Wendell Holmes, for the triumph of what I call the Progressive Revolution, which at present has replaced a biblical worldview with an evolution atheist one. For example, after publishing *The Common Law*, Holmes (then just a minor lawyer who had only practiced law for 15 years in Boston, Massachusetts) became a respected "legal scholar" overnight, as his radical ideas applying Darwinian evolutionary theory to the law led him to this tragic conclusion: "The life of law has not been logic, but experience."[291]

Holmes would later write that the law is not based on some sacred covenant between God and man (common law, natural law), but on the cynical concept of how much can I get away with before the law punishes me? (positive law, Pragmatism). The results? No fault divorce came in the early 1970's, giving anyone any reason (irreconcilable differences) to break the formerly sacred vow of marriage, which was historically one of the foundational pillars of civilization, one of the reasons why western culture and society is

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[288] ESSENTIAL HOLMES, *supra* note 1, at 56. (emphasis added).
[289] *Id.*
[290] ISAIAH BERLIN, KARL MARX: HIS LIFE AND ENVIRONMENT 99 (4th ed. 1996).
[291] HOLMES, *supra* note 3, at 1.

crumbling before our eyes.[292] Or since the judicial *coup d'état* in *Marbury v. Madison*, where the Court under Chief Justice John Marshall placed our Republic under what Jefferson called "the despotism of an Oligarchy."[293] Nevertheless, America was founded under Jefferson's "Law of Nature and of Nature's God" —a moral Republic founded under explicit Judeo-Christian traditions and established in Christian institutions.

Justice Holmes, the champion of legal positivism and progressive jurisprudence, on the other hand, has since circa-1900 instituted a new radical jurisprudence worldview: unnatural law or moral skepticism founded under the evolution-atheism of the Holmesian aphorism, stating "A new untruth is better than an old truth."[294] Holmes, speaking about the great English historian Gibbon, made the admission to Laski—"But what struck me was that he [Gibbon] told me very little that I cared to hear."[295] Holmes and his intellectual progeny aren't interested in enlightenment, but miseducation and indoctrination by force as the means/end Machiavellian paradigm to deconstruct and destroy America's Judeo-Christian traditions and institutions.

IV. EPILOGUE: WILL THE ASCENT OF PRESIDENT TRUMP BE THE DECONSTRUCTION OF *UN*NATURAL LAW?

The election of Donald J. Trump as the 45th President of the United States historically, politically, philosophically, and legally amounts to a nuclear bomb dropped on the Progressive Revolution which has the potential to systematically deconstruct the unnatural law of Justice Holmes.[296] History must be rewritten to

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[292] *See, e.g.*, Hernandez, *supra* note 9, at 633; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1844-45 (1985); Lynn D. Wardle, *Divorce Violence and The No-Fault Divorce Culture*, 1994 UTAH L. REV. 741, 762-63 (1994).

[293] Thomas Jefferson, *Letter to William Charles Jarvis, 28 Sep. 1820*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Jefferson/98-01-02-1540 (last visited Jan. 27, 2018).

[294] ESSENTIAL HOLMES, *supra* note 1, at 116.

[295] *Id*. at 56.

[296] *See, e.g.,* Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html; Edward Whelan, *Trump's Stellar Judges*, NATIONAL REVIEW (Jan. 22, 2018), https://www.

accommodate the Colossus Trump. Not even the great University of Chicago Law Professor Albert Alschuler could have predicted the rise of Donald Trump as President when he wrote his 1997 article.[297] We already see that the first nomination Trump put forth to replace the legendary originalist jurist Justice Antonin Scalia was Judge Neil Gorsuch. In *Cordova v. City of Albuquerque*, Gorsuch wrote:

> Ours is the job of interpreting the Constitution. And that document isn't some inkblot on which litigants may project their hopes and dreams . . . but a carefully drafted text judges are charged with applying according to its original public meaning. If a party wishes to claim a constitutional right, it is incumbent on him to tell us where it lies, not to assume or stipulate with the other side that it must be in there *someplace*.[298]

That same year, Gorsuch gave a lecture about his judicial philosophy, explaining that, in his view:

> [A]n assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function. That, yes, judges should be in the business of declaring what the law is using the traditional tools of interpretation, rather than pronouncing the law as they might wish it to be in light of their own political views, always with an eye on the outcome. . . .[299]

With President Trump replacing an originalist jurist like Justice Scalia with fellow originalist Judge Gorsuch, little is done to change the ideology or jurisprudence of the Court as it now sits. Despite being nominated by the great conservative Ronald Reagan in 1987, Justice Kennedy, the "swing vote," is more likely to side

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nationalreview.com/magazine/2018-01-22-0000/trumps-stellar-judicial-nominations.

[297] *See* discussion *supra* section II.A.

[298] Cordova v. City of Albuquerque, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J. concurring).

[299] Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 909 (2016).

with the progressive/activist left rather than his more conservative colleagues.[300] Several members on the Court are in their late seventies or early eighties including (at the time of this writing) Breyer (age 78), Kennedy (age 80) and Ginsburg (age 83). If Trump can serve two terms, he may nominate up to four Supreme Court Justices. Doing so could cement a nationalist/originalist jurisprudence on the Court for the next 50 years and bring an end to a century of progressive jurisprudence based on the unnatural law of Justice Holmes.

Given such changes, legal scholars and historians writing about America's jurisprudence may finally return to the original intent of the constitutional Framers. If so, the Court can return to Harvard University's original 1692 motto, *Veritas pro Christo et Ecclesia* (Truth for Christ and the Church), or to Saint Augustine's famous aphorism adopted by many subsequent natural law writers including Saint Thomas Aquinas and Martin Luther King, *Lex iniusta non est lex* (an unjust law is no law at all).[301]

Now we have come full circle to the dialectical inquiry Pontius Pilate made to Jesus at his trial 2,000 years ago— "What is truth?" Harvard's current motto, *Veritas* (Truth), was treacherously changed in the late 1800's from its original 1692 motto, *Christo* (Christ), *Ecclesiae* (Church), *Veritas* (Truth) (Truth for Christ and the Church). This was the great triumph of humanism, Marxism, progressivism, and particularly evolution atheism over America's Judeo-Christian traditions and institutions. Harvard's singular motto of *Veritas* gives credence to the sophistic idea that society can have "Truth" without Christ or the Church. This consensus view held by the political left in modern times brings to mind Holmes' apotheosis unnatural law jurisprudence admitted in his 1926 letter to friend Harold Laski – *A new untruth is better than an old truth.*[302]

George Washington University law professor Jeffrey Rosen best characterized Holmes' place in the history of American jurisprudence. He wrote:

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[300] *See* Ariane de Vogue, *Fearing his Retirement, Liberals Hope Anthony Kennedy Can Help Resist the Conservative Tide,* CNN (Oct. 2, 2017), http://www.cnn.com/2017/10/02/politics/anthony-kennedy-liberals/index.html.
[301] 4 THE ENCYCLOPEDIA OF LANGUAGE AND LINGUISTICS 2058, (R.E. Asher & J.M.Y. Simpson, eds., 1994).
[302] ESSENTIAL HOLMES, *supra* note 1, at 116.

> [A]lthough Holmes voted to uphold progressive laws, he also voted to uphold illiberal, even fascistic ones. He voted in favor of virtually all laws because of his radically restrained view of judicial authority. "I quite agree that a law should be called good if it reflects the will of the dominant forces of the community," Holmes wrote to Felix Frankfurter, "even if it will take us to hell."[303]

In the final analysis, to preserve and restore America's Judeo-Christian traditions and institutions, we the people must choose Einstein's natural law rationalism of "never do anything against conscience even if the State demands it" over Holmes' unnatural law skepticism and evolution atheism of "a law should be called *good* if it reflects the will of the dominant forces of the community." Such a law would be good, as Holmes wrote to Felix Frankfurter, "even if it will take us to hell." [304] History has repeatedly demonstrated that legality without morality will surely condemn humanity to Justice Holmes' unnatural abode of the damned. May God forbid.

In conclusion, I find it exceedingly difficult to satisfactorily end my chronicle of the battle between the Framers' natural law and Holmesian unnatural law because the battle rages on in modern times with humanity still standing at the precipice of the abyss. Therefore, I will allow Tennyson to declare the inevitable apotheosis of humanity with the concluding lines of *Ulysses*:

> Tho' much is taken, much abides; and tho'
> We are not now that strength which in old days
> Moved earth and heaven; that which we are, we are;
> One equal temper of heroic hearts,
> Made weak by time and fate, but strong in will
> To strive, to seek, to find, and not to yield.[305]

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[303] Jeffery Rosen, *One Man's Justice*, N.Y. TIMES (Dec. 12, 2000), http://www.nytimes.com/books/00/12/17/reviews/001217.17rosent.html.

[304] *Id.* (emphasis added); Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 249 (Mark DeWolfe Howe ed., 1953).

[305] ALFRED, LORD TENNYSON, *Ulysses*, *in* ULYSSES AND COLUMBUS 15 (H. Clement Notcutt ed., 1913).