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Most of us like to celebrate birthdays and anniversaries. I am no exception, and today it is my purpose to celebrate and note an important anniversary. It is sixty years since one of my predecessors, Justice Oliver Wendell Holmes, retired from his duties at the Supreme Court. His life and his work have been celebrated often and with good reason. Let me explain why.

Many believe that one of the most significant contributions made by Western legal doctrine is the concept of enlisting the judiciary as a partner in drawing the line between the individual and the power of the state. Justice Holmes was the chief architect of the application of our Bill of Rights to the states, and he set the standards for constitutional decision making. He used his incredible intellect to lay bare the policy choices in constitutional cases. He taught us that "the life of the law has not been logic: it has been experience" and that the Constitution "does not enact Mr. Herbert Spencer's Social Statics."

In 1901, a year before he took his seat on the Supreme Court of the United States, Oliver Wendell Holmes wrote: "The men whom I

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should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind."

Holmes was writing in half praise of Chief Justice John Marshall—he thought Marshall lacked an original mind—but he may well have been giving some thought to himself and to how he would be remembered when the time came to commemorate his life and work. It would be hard to come up with a more accurate prediction of how he would in fact be remembered nearly a century later. The world does pay for judgment, and the world got fifty years’ worth from Holmes—twenty on the Massachusetts Supreme Judicial Court, from 1882 to 1902, and then thirty on the Supreme Court of the United States, from 1902 to 1932. Of course, that is not the whole story. Other Justices have served comparable tenures and are barely remembered today. No one commemorates the career of Samuel Miller, who spent twenty-eight years on the Court, or William Johnson, who was a Justice for thirty years, or even Bushrod Washington, who sat on the Court for thirty-one years—these men have been forgotten by everyone except legal antiquarians. Even Edward White, who spent the last nineteen of his twenty-seven years on the Court as Holmes’ colleague and the last eleven of those nineteen as the Chief Justice, is largely lost to history.

Instead, Holmes is remembered exactly as he would have liked, as an “originator of transforming thought.” And his description of such people, that they “often are half obscure,” fits our memory of Holmes perfectly. It may sound a little odd to refer to Holmes as half obscure. After all, there is no figure in American legal thought whose life and whose writings have been more frequently examined. But when it comes to the influence of Holmes on our notions of the individual’s rights against the state, Holmes remains half obscure in a double sense. His contributions to our understanding of the Bill of Rights are unmistakable and were enough to move Justice Robert Jackson to refer to Holmes as one of the two “most liberty-alert Justices of all times.” But they coexist uneasily with a full picture of Holmes the man and Holmes the Justice. If much of Holmes’ thought is in full view today, because it continues to influence the way we conceive of the balance between the individual and the state, there is another portion, a less familiar part, that no longer exerts such an influence. And even within the sphere in which Holmes continues to inform our understanding of the proper balance between the government and its citizens, his influence is only half perceived.

3. OLIVER W. HOLMES, John Marshall, in COLLECTED LEGAL PAPERS 269 (1920, reprinted 1952) [hereinafter COLLECTED LEGAL PAPERS].
4. The other was Justice Brandeis. Terminiello v. Chicago, 337 U.S. 1, 29 (1948) (Jackson, J., dissenting).
by most. Certain of his contributions receive the entire spotlight, while others remain neglected.

I.

At the beginning, Holmes’ influence would have been nearly impossible to predict. When Holmes was appointed to the Court in 1902, he was an unlikely person to develop a jurisprudence of individual liberties. He was already sixty-one years old and was well known as a writer and a state court judge. He had published his most celebrated work, The Common Law, more than twenty years before. He was the author of innumerable articles and opinions. None of this work gave any indication that Holmes would have any particular interest in the rights of the individual.

Of course, Holmes can hardly be faulted for this. As a scholar, his interests ran to common law subjects like torts or contracts. As a state court judge, Holmes had little occasion to consider the Bill of Rights, which was understood at the time to limit the power only of the federal government, not the states. Most of his caseload concerned the same common law fields Holmes had explored as a scholar.

In the legal climate of the late nineteenth century, Holmes’ lack of interest in the Bill of Rights was the norm. Even in the federal courts, the Bill of Rights was rarely at issue. The Fourth Amendment, for example, which prohibits “unreasonable searches and seizures,” and which in the last three decades has accounted for a relatively large share of the Supreme Court’s caseload, was the subject of almost no litigation. As late as 1927, Felix Frankfurter could confidently assert (in an article about Holmes) that whether the police had violated the Fourth Amendment was one of a group of mundane questions that “are neither frequent nor fighting issues before the [Supreme] Court.” That Holmes took no interest in the Bill of Rights before he took his seat on the Court thus makes him no more or less than a man of his times.

Much of Holmes’ scholarly work had been devoted to debunking the widespread idea that human beings were born with “natural rights” that were conferred by God and could be derived from broad

5. Felix Frankfurter, Mr. Justice Holmes and the Constitution, 41 Harv. L. Rev. 121, 124 (1927).
moral principles. This was an idea that was basic to the jurisprudence of the time. In fact, it was an important element of the political philosophy underlying the formation of the nation itself; the Declaration of Independence, for example, speaks of inalienable God-given rights, the abridgement of which permits revolution. Yet Holmes disagreed quite strongly. He wrote:

The law talks about rights, and duties, ... and nothing is ... more common in legal reasoning, than to take these words in their moral sense, ... and so to drop into fallacy. ... Nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."

These are not the words of a man prone to an expansive reading of the Bill of Rights. Holmes continued to observe a rigid distinction between law and morality while on the Court. In 1918, Holmes explained that "[t]he jurists who believe in natural law seem to me to be in that native state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." He found such a view preposterous. "The most fundamental of the supposed preexisting rights," he wrote, "the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it."

That there were no natural rights did not mean there were no rights at all, of course; it only meant that the rights had to be embodied in a man-made law before they could be enforced. Holmes made this distinction clear in one of the first of his many letters to Harold Laski, in which Holmes admitted: "All my life I have sneered at the natural rights of man—and at times I have thought that the bills of rights in Constitutions were overworked—but they embody principles that men have died for. . . ."

Holmes' initial distinguishing mark on the Court was his series of dissents from opinions striking down social welfare legislation, and his view of the Court's limited role with respect to economic regulation may be his strongest legacy to current American jurisprudence. These dissents provided an occasion for Holmes to set out a theory of the Constitution that would enable the government to prevail over the individual most of the time. The most well known of these cases was the first, *Lochner v. New York*, decided in 1905, in which the

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8. *Id.* at 314.
Supreme Court of the United States struck down a state health measure limiting the working hours of bakers. Holmes' dissent includes the ringing words that have been studied by generations of American law students:

This case is decided upon an economic theory which a large part of the country does not entertain . . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.10

Holmes would repeat this theme in countless similar cases throughout his career. He dissented, for example, when the Court struck down a federal statute establishing a minimum wage for women11 and when the Court invalidated a state law forbidding employers from requiring their employees not to join labor unions.12 But his disagreement with his colleagues was not based on any concern for the health of bakers, or for the ability of women to earn a decent wage, or for rights of workers to join unions. In each of these cases, other Justices had written dissenting opinions voicing such concerns, but Holmes intentionally chose not to join them. Holmes' point was a different one—it was not that the law was properly aimed, but that the state had the power to pass the law regardless of its aim. "[S]tate laws may regulate life in many ways," Holmes wrote, "which we . . . might think as injudicious or if you like as tyrannical as this."13 As Holmes put it, the supposed "liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers,"14 was no more than a romantic ideal with no place in the rough and tumble world.

Holmes' often rigid majoritarianism shows up much more clearly in a group of cases we hear little about these days, because in these cases Holmes' majoritarianism coincides with an outcome modern minds generally find repugnant. I would like to make brief mention of three of them.

In Bailey v. Alabama,15 the Court considered a state law that

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11. Adkins v. Children's Hospital, 261 U.S. 525 (1923).
13. Lochner, 198 U.S. at 75.
14. Id.
15. 219 U.S. 219 (1911).
criminalized an employee's breach of an employment contract. This was an era when agricultural employees in the South often had to borrow money from landowners and agreed to work off the debt with their labor. The Court found that the law's effect was to create a form of slavery, in violation of the Thirteenth Amendment to the Constitution. Holmes dissented on the ground that the abolition of slavery did not limit the power of the government to compel an employee to continue working until he or she paid off his or her debts. In *Meyer v. Nebraska,* the Court refused to permit Nebraska to criminalize the teaching of languages other than English. Holmes again dissented. As he explained, "[n]o one would doubt that a teacher might be forbidden to teach many things...." A prohibition on the teaching of foreign languages was simply one aspect of the state's power to dictate what an individual might or might not learn.

Finally, in *Buck v. Bell,* the 1927 case that still serves as one of our most startling reminders of how quickly things change, Holmes wrote for a unanimous Court in upholding the power of the state to sterilize the mentally retarded. In words that sound chilling to the modern ear, Holmes explained:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. . . . Society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Throughout much of his tenure on the Court and in much of his scholarly work Holmes took a strong view of the power of the democratic state to legislate standards for personal conduct. Holmes' faith in eugenics and his affirmation of governmental power have been frequently criticized, beginning in Holmes' own day. But this is the part of Holmes' jurisprudence that exerts the least influence today. The Court has never cited *Buck v. Bell,* for instance, as support for any important proposition. It is in this sense that this part of

16. *Id.* at 245.
17. *Id.* at 247.
18. 262 U.S. 390 (1923).
21. *Id.* at 207. The bleak view of the world embodied in Holmes' opinion was also evident when Judge Learned Hand asked Holmes whether he regretted his childlessness. After some reflection, Holmes replied: "This is not the kind of world I want to bring anyone else into." LIVA BAKER, THE JUSTICE FROM BEACON HILL 228 (1991).
Holmes' jurisprudence has become "obscure"—it may still be re-called, but it no longer possesses any vitality.

II.

Putting aside his dissents of the Lochner era, Holmes' strongest influence on current constitutional interpretation is his view that the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. In the intervening years, the Court has incorporated all of the Bill of Rights, with only two exceptions, into the Due Process Clause. There is no question of the tremendous importance the Bill of Rights plays in our lives today.

Until the First World War the First Amendment was an extremely rare subject of litigation before the Court. Holmes wrote an opinion for the Court in one of these unusual prewar cases, Patterson v. Colorado,23 decided in 1907. One would hardly suspect that a decade later, the author would become the Court's leading exponent of the freedom of speech.

Mr. Patterson was the publisher of articles and a cartoon that accused the Colorado Supreme Court of having decided some recent cases in a corrupt manner. The Colorado court itself fined Patterson for contempt. Holmes had no difficulty dismissing Patterson's argument that the First Amendment gave him a right to express his opinion of the judges. Holmes explained that "the main purpose" of the First Amendment is only "to prevent... previous restraints upon publications"—it was not intended to "prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare."24

This view of the First Amendment—that it prevented the government from suppressing speech in advance, but permitted the prosecution of offending speech afterwards—was widely held at the time. It was not universally held; Justice Harlan dissented in Patterson and expressed the now orthodox opinion that the First Amendment carries force both before and after publication.25 Initially, however, Holmes took the narrower position.

By 1919, Holmes had changed his views.26 The case of Schenk v.

23. 205 U.S. 454 (1907).
24. Id. at 462 (emphasis in original) (quoting Commonwealth v. Blanding, 20 Mass. 313 (3 Pick. 304, 313, 314 (1825))).
25. Id. at 465.
26. For more detail on this transformation, see David S. Bogen, The Free Speech Metamorphosis of Mr. Justice Holmes, 11 HOFSTRA L. REV. 97 (1982).
United States\textsuperscript{27} involved the prosecution of a man who printed and circulated leaflets during the First World War, arguing that the government lacked the power to conscript soldiers to fight in Europe.\textsuperscript{28} In an opinion written by Holmes, the Court affirmed Schenk's conviction, but in a manner that revealed a broader understanding of the First Amendment than had ever been expressed by the Court: "It well may be," said Holmes, "that the prohibition of laws abridging the freedom of speech is not confined to previous restraints . . ."\textsuperscript{29} Here, Holmes expounded a view of the First Amendment that was revolutionary for the Court. "We admit," he wrote, "that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."\textsuperscript{30} The government could prosecute Mr. Schenk only because he expressed his opposition to the draft in wartime, when his words posed "a clear and present danger" to the war effort.

When it was written, Holmes' opinion marked a significant change. For the first time, the Supreme Court held that the First Amendment protects the rights of citizens in peacetime to criticize the government and to express their opinions on controversial public issues. Schenk was a landmark in this regard.

Later that year, in another case involving criticism of the government's conduct of the war, Holmes had further opportunity to express his views of the First Amendment. The defendants in Abrams v. United States\textsuperscript{31} had published articles asserting that the war was being fought for the benefit of the rich, but was not in the interest of workers. Despite pressure from some of the other Justices, who thought a separate opinion by Holmes would lend support to a radical cause,\textsuperscript{32} Holmes dissented in language that remains the classic exposition of the rationale for a right to freedom of speech. He wrote:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.\textsuperscript{33}

\textsuperscript{27} 249 U.S. 47 (1919).
\textsuperscript{28} For a detailed account of Schenk, see Jeremy Cohen, Congress Shall Make No Law (1989).
\textsuperscript{29} Schenk, 249 U.S. at 51.
\textsuperscript{30} Id. at 52.
\textsuperscript{31} 250 U.S. 616 (1919).
\textsuperscript{32} See Baker, supra note 21, at 537-38.
\textsuperscript{33} Abrams, 250 U.S. at 630.
In the end, it has been Holmes’ view of the freedom of speech that has prevailed.\textsuperscript{34} It took some time. In the 1920s, although the Court silently adopted Holmes’ view that the First Amendment protects the right to express unpopular opinions, Holmes was still disagreeing with the Court in cases involving criticism of the government right up until he retired.\textsuperscript{35} Even in the aftermath of the Second World War, when the Court finally explicitly adopted Holmes’ view that the government could not punish spoken beliefs that did not pose a “clear and present danger,” the Court continued to permit the government to prosecute those who advocated support for Communism or for the Soviet Union.\textsuperscript{36}

It was not until 1969, in the case of \textit{Brandenburg v. Ohio},\textsuperscript{37} that Holmes’ broad view of a constitutional right to express even the most noxious opinions finally took hold. In that case, the Court drew a firm distinction between the advocacy of beliefs, which receives constitutional protection regardless of the content of those beliefs, and the “incitement to imminent lawless action,” which can be prosecuted as a crime.\textsuperscript{38}

Even where speech is repugnant, and even where it might well lead to violence somewhere down the road, our Constitution protects the right of the speaker to be free from the government’s interference.

This is a legacy of Holmes that should not be underestimated. That anyone should be able to say whatever he likes, no matter how unsettling it may be to the people in power, is hardly an obvious proposition and is hardly universally accepted even today. There are many places where people are still thrown in prison for expressing views critical of the authorities. There were many more such places seventy years ago—and the United States was one of them—when Holmes wrote the opinion in \textit{Schenk} and \textit{Abrams}. The freedom to express unpopular or controversial ideas is a concept far too large to

\textsuperscript{34} On the evolution of Holmes’ views and their influence, see \textit{Gerald Gunther, Constitutional Law} 1019-20, 1040-41 (12th ed. 1991).


\textsuperscript{38} \textit{Id.} at 449.
attribute to any one person, but its timing in the history of American jurisprudence can be traced directly to Holmes.

Another vital modern legacy of Justice Holmes was his work in using the Equal Protection Clause of the Fourteenth Amendment to protect minority voting rights. He initiated the discussion in *Nixon v. Herndon.*

III.

There is one other contribution of Holmes that I want to mention—one which is noted less often but which is also very important. In our federal system of criminal justice, the local state courts handle most of the ordinary criminal cases. When a state prisoner has been denied his or her rights under the Constitution, however, the prisoner may seek a writ of habeas corpus in a federal court. This has been true for most of our history. But our current understanding of the scope of the writ—that is, the scope of the power of federal courts to intervene in state criminal prosecutions—derives substantially from Holmes. His influence can be seen quite starkly by comparing two cases, decided eight years apart.

The first is *Frank v. Magnum,* decided in 1915. Leo Frank was sentenced to death in the state of Georgia after having been convicted of a highly publicized murder. He may well have been innocent. Throughout his trial, the courtroom was packed with spectators inflamed by anti-Semitism, and an angry mob waited just outside the courtroom door. The danger to Frank and to the jurors, should Frank not have been convicted, was so apparent that at one point the judge and the jurors had to meet with the Chief of Police and the Colonel of the local militia to secure everyone’s safety. Unsurprisingly, the jury found Frank guilty.

Frank sought a writ of habeas corpus in the federal courts on the ground that he had been denied his constitutional right to due process of law, but the Supreme Court held he could not obtain one. The Court reasoned that Georgia provided an appeal from a conviction alleged to be the result of an unfair trial. Frank had in fact appealed, but the Georgia courts had found that his trial was fair. The majority concluded the federal courts lacked the authority to upset this finding. Once the state courts had determined Frank’s trial

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40. In 1867, Congress extended the writ to state prisoners held in violation of the Constitution. The current version of that statute is now codified at 28 U.S.C. § 2254.
41. 237 U.S. 309 (1915).
42. Hugo A. Bedou & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 Stan. L. Rev. 21, 115 (1987). The Governor of Georgia commuted Frank’s sentence to life imprisonment, but Frank was killed by a mob two months later. He was pardoned posthumously in 1986. *Id.*
was not unfair, that was the end of the matter.

Holmes dissented. As for Frank’s right to due process, Holmes explained that “[w]hatever disagreement there may be as to the scope of the phrase ‘due process of law,’ there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury.” And as for the more technical but equally important question of a federal court’s power to intervene where due process was lacking, Holmes chided his colleagues for their undue deference to the local courts. In his view, the federal courts’ “power to secure fundamental rights . . . becomes a duty and must be put forth.” As Holmes put it, “the supremacy of the law and of the Federal Constitution should be vindicated in a case like this.”

Eight years later, the composition of the Court had changed somewhat, and a similar case came to the Court. This time Holmes’ broader view of the power of federal courts to enforce the constitutional rights of criminal defendants commanded a majority. The case of Moore v. Dempsey involved the trial of a group of black men accused of killing a white man, a trial similar to Leo Frank’s a few years earlier. A mob surrounded the courtroom and threatened to lynch the defendants and the jurors if the latter did not find the former guilty. The entire trial lasted only forty-five minutes, and the jury took only five minutes to reach a guilty verdict. As in Frank eight years before, the state courts permitted an appeal, but found that the trial had not been unfair. This time, however, Holmes had the support of his colleagues in refusing to defer to the state courts. Where “the State Courts failed to correct the wrong,” he observed, nothing “can prevent this Court from securing to the petitioners their constitutional rights.”

This was a fundamental shift in the Court’s understanding of the power of federal courts to enforce the constitutional rights of accused criminals. Holmes’ broader view has stayed with us. While the Court has continuously tinkered with the finer points of the scope of habeas corpus, the fundamental point Holmes expressed in the Frank dissent and the Moore majority opinion has been repeatedly

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43. Frank, 237 U.S. at 347 (Holmes, J., dissenting).
44. Id. at 348-49.
45. 261 U.S. 86 (1923).
46. Id. at 91.
reaffirmed ever since.47

Holmes' influence in this area is not nearly as well known as his influence with respect to the freedom of speech, but it may be equally important.48 We have seen quite dramatic changes in criminal procedure in the United States over the last two generations. Many of these changes could not have taken place without a broad conception of the power of federal courts to ensure that individuals are treated fairly in the state courts. Without Holmes' broad view, the federal courts (including the Supreme Court) would simply have had no occasion to define the constitutional rights possessed by defendants in local prosecutions.

IV.

On Holmes' ninetieth birthday, the year before Benjamin Cardozo would replace Holmes on the Court, Cardozo had this to say about Holmes:

Men speak of him as a great Liberal, a lover of Freedom and its apostle. All this in truth he is, yet in his devotion to Freedom he has not been willing to make himself the slave of a mere slogan. No one has labored more incessantly to demonstrate the truth that rights are never absolute, though they are ever struggling and tending to declare themselves as such.49

Cardozo may have captured the paradox embedded in Holmes' views of the Bill of Rights. As we have seen, his statements of the values underlying the freedom of speech and the right to a fair trial marked him as the great liberal justice of his era. This side of Holmes' jurisprudence possesses more vitality today than even in his own times, as his dissenting opinions have come to define our jurisprudence in these areas. At the same time, as Cardozo noted, Holmes did not conceive of individual rights as absolutes. Where they conflicted with the rational preferences of the majority, it was the majority's will that prevailed. This side of Holmes' thought, the often rigid positivism that would have permitted the state to sterilize the mentally retarded or prohibit the teaching of foreign languages, exerts no similar influence. It is a matter of historical interest only; in terms of the current understanding of the relationship between the individual and the state, this side of Holmes' jurisprudence has slipped into obscurity.

Justice Holmes believed passionately in the democratic process and he generally refused to substitute his own judgment for the will of the people as expressed through legislation. At the same time, he

49. Benjamin N. Cardozo, Mr. Justice Holmes, 44 HARV. L. REV. 687 (1931).
applied the constitutional limits expressed in the Bill of Rights to the actions of government as a means of preserving the autonomy of the individual. As Professor Bert Neuborne puts it:

When a modern constitutional judge is confronted with a “hard” case, Holmes is at her side with three gentle reminders: (1) Intellectual honesty about the available policy choices; (2) disciplined self-restraint in respecting the majority's policy choice; and (3) principled commitment to defense of individual autonomy, even in the face of majority action . . . . The words may be different today; but Holmes wrote the music.50

Our celebration of Holmes' influence today pays the highest tribute to the breadth of his thought. Judges and scholars come and go, and the main body of their work may have an influence after they have gone. But Holmes' thought was so broad that even a small portion of it can cast the largest shadow.
