

# OLIVER WENDELL HOLMES JR. IS THE USE OF CALLING EMERSON A PRAGMATIST: A BRIEF AND BELATED RESPONSE TO STANLEY CAVELL

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## I. EMERSONIAN PRAGMATISM

## II. CIRCLES

A. *The Revisionary Relationship between Past and Present*

B. *The Role of Individual Agency within the Ongoing Cultural Enterprise*

C. *The Endlessness of Growth and Expansion*

## III. EMERSON'S INFLUENCE ON HOLMES

This essay investigates the relationship between Ralph Waldo Emerson and Oliver Wendell Holmes, Jr. in the context of the common law. Holmes's Emersonian writings, in particular his dissents, fall within the theoretical framework of agonism, which Harold Bloom refers to as a revisionary and Emersonian "program."<sup>1</sup> Agonism as a political and aesthetic theory maintains that sites of contestation can be productive rather than destructive; it suggests that confrontational relationships can be at once mutually offsetting and generative. Drawing from the Greek word for an athletic competition, agonism applied to rhetoric underscores the importance of mutuality to conflict. For example, writers struggling against other writers understand and admire, yet seek creatively to outdo and overcome, their competition. The common-law

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<sup>1</sup> HAROLD BLOOM, *AGON: TOWARDS A THEORY OF REVISIONISM* 51 (Oxford Univ. Press 1982).

system substantiates this theory insofar as every case answers an anterior case and creates a succession of precedents marked by strong judges and justices struggling against their predecessors.

Pluralism is an agonistic paradigm that enables a multiplicity of adversarial forces to interact and thereby to produce aesthetics through reciprocal opposition. Bloom uses the concept of agon to explain how and why strong writers and poets compete with their influential predecessors. Agonism, in Bloom's sense of the term, is an inventive, troping struggle and the source of emergent forms and orders. It is an ongoing, pragmatic, non-teleological struggle that does not culminate in an ideal end-state but that develops in relation and response to present settings and conditions. Furthermore, agonism passes down inherited forms, ideas, and language to subsequent generations much as the common law passes down inherited rules and practices. Thus, I submit that Emerson and Holmes were both pragmatic champions of descendent agonism, the former in the American literary tradition and the latter in the American common-law tradition that is distinct from its British precursor.

To claim Emerson as the fountainhead for any form of pragmatism, let alone Holmes's, is divisive, so this essay begins in Part I by surveying the literature on the subject. In Part II, this essay follows James M. Albrecht's work on Emerson to suggest that Holmes's jurisprudence, as articulated in his vision of the common law, represents Emersonian pragmatics. Holmes accomplishes Emersonian pragmatics by employing and developing antagonisms, negotiating the competing dualities of monism and pluralism, and tapping into a literary and philosophical inheritance to creatively reenergize it. In so doing, this essay does not insist that Emerson *is* a pragmatist but that reading Emerson pragmatically helps to contextualize the jurisprudence of Holmes.

Three features of Emerson's essay "Circles" correspond with Holmes's common-law jurisprudence: the belief in a revisionary relationship between the past and the present, the emphasis on individual agency shaped by ongoing cultural enterprises, and the speculations about the endlessness of growth and expansion. Finally, Part III describes the connection between Emerson and Holmes and proposes that Holmes instantiated an Emersonian agonism that reached out to future judicial audiences to advance the common-law system. This essay assumes that readers already possess a working familiarity with the distinctive features of

Holmes's jurisprudence and of his general beliefs about the nature and function of the common law.<sup>2</sup> Nothing in this essay should be taken as agreement with Holmes's views.

This essay also abides by Bloom's dictum that "[e]very word in a critic's vocabulary should swerve from inherited words."<sup>3</sup> Therefore, it expands upon a thesis already put forth by Francis J. Mellon, Jr.:

[A] fundamental change in American aesthetic thought in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries heralded a corresponding change in other intellectual disciplines, including law, in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries; and . . . Oliver Wendell Holmes, Jr., whose aesthetic beliefs had been strongly influenced by . . . Emerson, was a leader in the change in the legal doctrine because he, sooner than most of his contemporaries, understood and accepted the aesthetic change.<sup>4</sup>

I do not merely reformulate the established connection between Emerson and Holmes but instead revise it to adumbrate how Holmes is, to borrow a phrase from Bloom, one of the "pragmatists of agon [who] have been . . . the Americans of Emerson's tradition," as well as how his dissents signal "the American religion of

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<sup>2</sup> See generally OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881). "*The Common Law* is first of all an account of legal change, and its object in this respect is to exhibit the workings of Darwinian evolution in law." Jan Vetter, *The Evolution of Holmes, and Holmes and Evolution*, 72 CAL. L. REV. 343, 362 (1984). "Holmes's model of common-law evolution describes the law as an information system that evolves according to a logic that is separate from the will of the individual judges. . . . Holmes's description of the common law as a cybernetic system raises the prospect not only that the law evolves, but that law is a form of artificial or social intelligence that is capable of learning about the environment." E. Donald Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 115 (1984). "Holmes uses common-law history in roughly the same way that Darwin used observations of animals and plants in nature, as raw material to be searched for evidence of patterns of gradual, evolutionary transformations. . . . For Holmes, common-law evolution, based in part on a rough analogy to Darwin's theory of natural selection, was a way of describing the common law as a product of legal systems, as opposed to the creation of individual judges. Evolutionary metaphors would give Holmes a means of explaining how the common law could be wiser than the judges who made it." *Id.* at 120.

<sup>3</sup> BLOOM, *supra* note 1, at 21.

<sup>4</sup> Francis J. Mellon, Jr., *Ralph Waldo Emerson, Mr. Justice Holmes and the Idea of Organic Form in American Law*, 14 NEW ENG. L. REV. 147, 148 (1978-79).

competitiveness.”<sup>5</sup> What Emerson did for aesthetics and philosophy (and the philosophy of aesthetics) Holmes did for common-law theory and practice, which can be aesthetic and philosophical. Emerson’s essay “Circles” exemplifies the agonistic model Holmes used for the common law; curious readers can find in Emerson’s *oeuvre* similar parallels with common-law theory that would be repetitive to analyze when “Circles” alone is representative. Agonism explains Holmes’s Emersonian dissents as vehicles for enacting a pragmatist variety of common-law theory and for facilitating growth in the legal system. By focusing on agonism in the context of Holmes’s common-law theory, this essay answers a question formulated by Stanley Cavell: “What’s the use of calling Emerson a pragmatist?”<sup>6</sup> One such use for those who are aware of the connection between Holmes and Emerson is a better understanding of Holmes’s theories of the common law and an explanation for why Holmes dissented with memorable style.

### I. EMERSONIAN PRAGMATISM

Cavell’s question has been recycled again and again with different answers, most recently in Albrecht’s *Reconstructing Individualism: The Pragmatic Tradition from Emerson to Ellison*, the first chapter to which is titled, “What’s the Use of Reading Emerson Pragmatically?” The question suggests there is something to gain or lose by labeling Emerson a pragmatist; the various answers to the question seem to be couched not in terms of what is to be gained or lost but in terms of whether it is fair or accurate to number Emerson among the pragmatists.

To examine this question in light of Holmes is to learn to some degree what is to be gained or lost; for in Holmes the question becomes less a detached and theoretical academic exercise and more an engaged interaction with the binding legal precedents and governmental developments that have a felt and quantifiable impact on society. “Academic life is but half life,” Holmes wrote to Justice Felix Frankfurter about his decision to leave Harvard to pursue the life of a jurist, “a withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them

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<sup>5</sup> BLOOM, *supra* note 1, at viii.

<sup>6</sup> Stanley Cavell, *What’s the Use in Calling Emerson a Pragmatist?*, 18 CARDOZO L. REV. 171 (1996), available at HeinOnline.

from a cloister.”<sup>7</sup> To apply these “smart things” to what he called the “[b]usiness in the world” was to put them to the test of practicality and to have at stake not only his personal reputation but also the beliefs on which his personal reputation was built.<sup>8</sup> Holmes’s pragmatism stands, at least in part, for the proposition that the quotidian operations and interactions of the working public demonstrate in practice what use it is to choose to believe one theory rather than another.<sup>9</sup>

Holmes, like Emerson, who was banned from speaking at Harvard for more than 20 years after delivering his Divinity School Address, fled orthodox religion and university life. Holmes claimed to have left his academic post because “the choice seemed to be between applying one’s theories to practice and details or going into another field.”<sup>10</sup> To ask what use it is to call Emerson a pragmatist in light of Holmes’s emphasis on applied theory is all the more meaningful and important once it is shown that Emerson’s influence on Holmes, and the law, is not limited to abstract cultural tendencies, about which we must speculate, but embedded in the complex regulatory apparatuses of the law that can be measured empirically. If Holmes is an Emersonian and his jurisprudence obtained to society through definite laws that controlled everyday human relations, then Holmes, more than anyone, reveals the practical answer to the vexed question of what use it is to call Emerson a pragmatist. Inasmuch as Hilary Putnam is correct that the central tenet of pragmatism has been the primacy of practice,<sup>11</sup> Holmes’s judicial opinions and dissents, with their Emersonian aesthetics and ideas, are the most promising place to begin testing the thesis that Emerson was a pragmatist.

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<sup>7</sup> Letter to Felix Frankfurter, (July 15, 1913), in *HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934*, 12 (Robert M. Mennel & Christine L. Compston eds., Univ. Press of New Eng. 1996).

<sup>8</sup> *Id.*

<sup>9</sup> RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 12 (Harvard Univ. Press 2003) (“An everyday pragmatist in law, an everyday-pragmatist judge for example, wants to know what is at stake in a practical sense in deciding a case one way or another”). Posner attributes the “characteristics that gave rise to everyday pragmatism in the United States” to both Holmes and Emerson, among others. *Id.*

<sup>10</sup> Letter to Harold Laski, (Nov. 17, 1920) in *HOLMES LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, VOL. 1* 291 (Mark DeWolfe Howe ed., Harvard Univ. Press 1953).

<sup>11</sup> HILARY PUTNAM, *PRAGMATISM: AN OPEN QUESTION* 52 (Blackwell Publ’g 1995).

At first blush it seems odd to call Emerson a pragmatist. His notion of self-reliance and faith in the integrity of personal impressions flies in the face of Peirce's consensus based methodology for ferretting out truth. Unlike Peirce, who thought knowledge was produced by interacting communities of scientific inquirers,<sup>12</sup> Emerson viewed society as having a corrupting and not a clarifying influence on individual thought.<sup>13</sup> Truth, for Emerson, preceded the social unit, whereas for Peirce it depended on the social unit.

Moreover, Emerson's transcendentalism does not easily align with pragmatist methods of empiricism, fallibilism, instrumentalism, or verificationism. It appears monistic in its purported universalism, exaggerated idealism, and diverse tropes of unification and harmony. Nevertheless, his ideas and language resonated with pragmatists and can and ought to be pragmatically interpreted. This essay has not set out to *prove* that Emerson was *the* fountainhead of American pragmatism because he was a forerunner to many schools of American thought, and his disparate ideas gave purchase to a number of budding philosophies that are incompatible with pragmatism. Holmes more than anyone reveals the Emersonian qualities of pragmatism as well as the indebtedness that legal pragmatism owes to Emerson.

Albrecht prefers to read Emerson pragmatically rather than to pigeonhole Emerson as an idiosyncratic pragmatist or as the father of pragmatism. A pragmatic reading of Emerson reveals that the "consistency of Emerson's vision lies precisely in its con-

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<sup>12</sup> See generally C.S. Peirce, *Some Consequences of Four Incapacities*, 2 THE JOURNAL OF SPECULATIVE PHILOSOPHY 140 (1868); C.S. Peirce, *The Fixation of Belief*, 12 THE POPULAR SCIENCE MONTHLY 1 (1877); C.S. Peirce, *How to Make Our Ideas Clear*, 12 THE POPULAR SCIENCE MONTHLY 286 (1878). Excerpts of these essays are available in PRAGMATISM: A READER (Louis Menand ed., Vintage Books 1997).

<sup>13</sup> This generalization is supported by essays such as "Self-Reliance" and "Nature," and I maintain for reasons that cannot be quickly summarized that Emerson remained a champion of individualism, albeit in different manifestations, during his entire life. For opposing or undercutting viewpoints, see MICHAEL LOPEZ, EMERSON AND POWER: CREATIVE ANTAGONISM IN THE NINETEENTH CENTURY (N. Ill. Univ. Press 1995); ROBERT MILDNER, *The Radical Emerson?*, in THE CAMBRIDGE COMPANION TO RALPH WALDO EMERSON 49 (Joel Porte & Sandra Morris eds., Cambridge Univ. Press 1999); CHARLES E. MITCHELL, INDIVIDUALISM AND ITS DISCONTENTS: APPROPRIATIONS OF EMERSON, 1880–1950 (Univ. of Mass. Press 1997); STEPHEN E. WHICHER, FREEDOM AND FATE: AN INNER LIFE OF RALPH WALDO EMERSON (2d ed., Univ. of Penn. Press 1971); and Sacvan Bercovitch, *Emerson, Individualism, and the Ambiguity of Dissent*, 89 SOUTH ATLANTIC QUARTERLY 623 (1990).

traditions, in his characteristic habit of confronting, articulating, and exploiting the antagonistic facets of human experience.”<sup>14</sup> This agonism is precisely where Holmes and Emerson converge. As noted elsewhere Holmes was “consistently inconsistent”<sup>15</sup> and instantiated agonistics by authoring judicial dissents that neutralized majority or plurality opinions so that the law could remain open for expansion.<sup>16</sup> Of Holmes’s consistent inconsistency, Louis Menand proclaims, “It was Holmes’s genius as a philosopher to see that the law has no essential aspect.”<sup>17</sup> Albrecht makes a similar observation regarding Emerson: “to read Emerson pragmatically can help us to appreciate the anti-absolutist attitudes expressed in his writings.”<sup>18</sup>

“Instead of depicting Emerson, as Cavell fears, as a merely incipient or incoherent pragmatist,” Albrecht says, “reading Emerson pragmatically provides the clearest refutation to the central assumption that has been used to assert the incoherence of his thought: the charge [...] that the potential pluralism of his individualist ethics is undermined by the absolutist optimism of his early idealism and his later fatalism.”<sup>19</sup> To demand that Emerson is a pragmatist is to set him up for failure, misunderstanding, or disappointment; for his mode of thinking and lines of reasoning (or anti-reasoning) do not meet the goals and expectations of thinkers like Peirce or James and their progeny. It is not that Emerson was interested in an altogether different assembly of thought—although he was prone to issue words about transcendental and totalized

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<sup>14</sup> JAMES M. ALBRECHT, RECONSTRUCTING INDIVIDUALISM: A PRAGMATIC TRADITION FROM EMERSON TO ELLISON 51 (2012).

<sup>15</sup> Allen Mendenhall, *Holmes and Dissent*, 12 J. JURIS. 679, 683 (2011).

<sup>16</sup> See generally Thomas P. Campbell, Jr., *The Separate Judicial Opinion and the Growth of the Law: Holmes’s Dissent in *Vegeahn v. Gunter**, 1 HOFSTRA LAB. L. F. 215 (1983). Campbell examines one of Holmes’s dissents “for the purpose of tracing the growth of the law as it changed to meet an emerging need of society.” *Id.* at 216. Consider David A. Strauss’s comments on the career of the *Abrams* dissent: “Holmes’s opinion was a dissent. It made no law. The principle of Holmes’s *Abrams* opinion became law, but only because later opinions gradually adopted Holmes’s approach over the course of the next half-century. That approach had broad cultural resonance and, ultimately, it seemed to work well. In these ways, the development of free speech in the United States followed the model of common law evolution that is the defining feature of our living constitution.” DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 64 (Oxford Univ. Press 2010).

<sup>17</sup> LOUIS MENAND, *THE METAPHYSICAL CLUB* 339 (Farrar, Straus & Giroux 2002).

<sup>18</sup> ALBRECHT, *supra* note 14 at 51.

<sup>19</sup> *Id.* at 31.

essences that seem irreconcilable with the pluralism and multiverse theories of James and his followers—but that he struck “an anti-absolutist balance that lies at the heart of his vision [...] of human power and agency as existing in an antagonistic relation within and against the limits of our material existence.”<sup>20</sup> This claim is not self-contradictory. It signals the “coexistence of monistic and pluralistic strands in Emerson’s thought.”<sup>21</sup> Emerson employed monistic signifiers—“the Soul,” “God,” and “Providence” are three Albrecht names<sup>22</sup>—because they were the popular implements available to him at his time and place and could be made into new and more complex expressions of the realities found in his changing environment.

Emerson was not a monist but a “transitional figure” whose thinking represents an “emerging pragmatism” as well as the “residues of an obsolete idealism.”<sup>23</sup> He did not regard the universe as divided into mutually exclusive, absolute dualisms but explored the messiness and meanings in between supposed dualisms. Therefore, his optimism is not about perfect answers to difficult questions or about realizing the absolute nature of complex phenomena, but about locating “the morality of our world in a potential thrust that must be realized with the aid of human actions [and that] prefigures the attitude of meliorism that is central to both James’s and Dewey’s pragmatism.”<sup>24</sup>

Albrecht’s insights into the pluralistic quality of Emerson’s thought represent valuable returns from the scholarly investments made by earlier researchers on Emerson’s alleged pragmatism. Among them are Russell B. Goodman, Giles Gunn, Richard Poirier, Cornel West, Joan Richardson, and Jonathan Levin. Even earlier Kenneth Burke noted that “we can see the incipient pragmatism in Emerson’s idealism”<sup>25</sup> and that “Emerson’s brand of transcendentalism was but a short step ahead of an out-and-out pragmatism.”<sup>26</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 35.

<sup>22</sup> *Id.*

<sup>23</sup> ALBRECHT, *supra* note 14 at 35.

<sup>24</sup> *Id.* at 41.

<sup>25</sup> KENNETH BURKE, *A GRAMMAR OF MOTIVES* 277 (Prentice-Hall, Inc. 1952).

<sup>26</sup> KENNETH BURKE, *I, Eye, Ay, in LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD* 186, 191 (Univ. of Cal. Press 1966).

Goodman analyzed Emerson as “America’s first Romantic philosopher,”<sup>27</sup> the counterpart to Wordsworth, Coleridge, and Carlyle<sup>28</sup> whose idealism would influence William James and later John Dewey and Cavell.<sup>29</sup> Gunn examined while contributing to the “critical renaissance” of American pragmatism in the 1990s,<sup>30</sup> he suggested that Emerson cast a long shadow “at the commencement of the pragmatist tradition in America”<sup>31</sup> and that Emerson belonged to a family of writers that included Henry James, Kenneth Burke, John Dewey, Frank Lentricchia, and others. To reach this conclusion Gunn adopted a more “diffuse” definition of pragmatism that went beyond the philosophical tradition of Peirce, Dewey, George Herbert Mead, Sidney Hook, Morton White, Richard Bernstein, John McDermott, and Richard Rorty.<sup>32</sup> He attended to aesthetically charged political texts presented not only by Emerson but also by W.E.B. DuBois, James Baldwin, Flannery O’Connor, Elizabeth Hardwick, Poirier, Cornel West, Clifford Geertz, and Stanley Fish. Gunn left behind “James’s somewhat restricted focus on the nature of knowledge and the meaning of truth” and turned instead to literary and cultural works that affected social issues.<sup>33</sup> Gunn’s focus on the social indicates a debt to Dewey. That Emerson is a pragmatist is somewhat implied or tacit in Gunn’s account. Gunn’s discussion is not about what elements of Emersonian thought evidence pragmatism, but about how Emerson influences Henry James Sr. and his sons William and Henry, who in turn influenced a host of other writers. Furthermore, it was about how Emerson spearheaded an American tradition of strong poets and transmitted optimism to subsequent writers, and how Emerson cultivated aesthetic rhetoric and anticipated progressive sociopolitical thought.

If Gunn is a bridge between classical philosophical pragmatism and neopragmatism of the aesthetic variety, then Poirier was

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<sup>27</sup> RUSSELL B. GOODMAN, *AMERICAN PHILOSOPHY AND THE ROMANTIC TRADITION* 35 (reissue ed., Cambridge Univ. Press, 1990).

<sup>28</sup> *Id.* at 34.

<sup>29</sup> *Id.* at 34, 68.

<sup>30</sup> GILES GUNN, *THINKING ACROSS THE AMERICAN GRAIN: IDEOLOGY, INTELLECT, AND THE NEW PRAGMATISM 2* (Univ. of Chi. Press 1992).

<sup>31</sup> *Id.* at 17.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 4.

neither classical philosophical nor neopragmatist, eschewing as Poirier did the logics and empiricism of Pierce and James as well as the political agitating of some of Gunn's subjects. Poirier concentrated above all on the literary and cultural aspects of pragmatism: not that these aspects are divorced from politics, only that their primary objective is aesthetic or philosophical rather than partisan or activist.

Poirier sought to "revitalize a tradition linking Emerson to, among others, [Gertrude] Stein, and to claim that new directions can thereby be opened up for contemporary criticism."<sup>34</sup> Poirier, like Gunn, was frank about his attempt to expand the pragmatist canon that purportedly began with Emerson. "As Emerson would have it," he explained, "every text is a reconstruction of some previous texts of work, work that itself is always, again, work-in-progress."<sup>35</sup> This constant, competitive process of aesthetic revision gives rise to a community of authors whose mimetic activities gradually form and reform a canon that resembles and functions like the constantly reformulating legal principles in Holmes's evolutionary paradigm for the common-law system: "The same work gets repeated throughout history in different texts, each being a revision of past texts to meet present needs, needs which are perceived differently by each new generation."<sup>36</sup> Poirier heralded Emerson as the writer who "wants us [...] to discover traces of productive energy that pass through a text or a composition or an author, pointing always beyond any one of them."<sup>37</sup> Emerson's superfluity, or the "determination to show that excess is more important than necessity [and] energy more lasting than any meanings it may toss out to the intellectually sedentary,"<sup>38</sup> finds expression in Holmes's energetic dissents, which simultaneously authorize and undermine the majority opinion and create more judicial options for future judges and justices consulting the textual record for the right rule in the present situation.<sup>39</sup>

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<sup>34</sup> RICHARD POIRIER, *POETRY AND PRAGMATISM* 17 (Faber & Faber 1992).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 17–18.

<sup>37</sup> *Id.* at 38.

<sup>38</sup> *Id.* at 37.

<sup>39</sup> By multiplying the options for future judges and justices, Holmes seems to seek the variety on which evolutionary systems purportedly advance. "[Holmes] points out that error in the transmission of a legal principle from one case to another can also introduce

Cornel West explored the radical implications of pragmatism to democracy in the works of Emerson, Peirce, William James, Dewey, Sidney Hook, C. Wright Mills, W.E.B. DuBois, Reinhold Niebuhr, Lionel Trilling, Robert Unger, and Michel Foucault. Unlike the interpreters of pragmatism discussed above, West extended the pragmatist canon from America to the European continent and professed a radical preoccupation with knowledge, power, control, discourse, and politics;<sup>40</sup> like the previous interpreters, however, he acknowledged the family resemblances among disparate pragmatist thinkers and their ideas and so, in Nietzschean or Foucaultian fashion, undertook a “genealogy” of their traditions.

“My emphasis on the political and moral side of pragmatism,” West explained, “permits me to make the case for the familiar, but rarely argued, claim that Emerson is the appropriate starting point for the pragmatist tradition.”<sup>41</sup> West’s emphasis on pragmatism as a “new and novel form of indigenous American oppositional thought” resonates in the context of Holmes’s new and novel form of judicial dissent from the majority and plurality opinions of the U.S. Supreme Court and lends credence to the proposition that Holmes is an Emersonian agonist.<sup>42</sup> Holmes’s jurisprudence was oppositional, in other words, although not radical in the sense that West means. West credited Emerson with enacting “an intellectual style of cultural criticism that permits and encourages American pragmatists to swerve from mainstream European philosophy,” and Holmes’s dissents likewise moved American jurisprudence away from its British origins—especially from Blackstonian paradigms of the common law—and towards an oppositional paradigm modeled off theories of Darwinian struggle.<sup>43</sup>

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variation into the law. When a precedent is applied correctly from one case to another, a legal idea has reproduced; when the legal idea is misapplied (either intentionally or unintentionally), a mutant or variation has been introduced into the law. The new legal type may or may not win out against competitors in cases in the future.” Elliott, *supra* note 2, at 122.

<sup>40</sup> CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 3 (Univ. of Wis. Press 1989).

<sup>41</sup> *Id.* at 6.

<sup>42</sup> *Id.* at 8.

<sup>43</sup> *Id.* at 9. “For Holmes, the political struggle was closely analogous to natural selection—even an exemplification of it. The strongest would win. Not that they necessarily *deserved* to win, though he wanted the ‘imbeciles’ to lose by not being allowed to reproduce and though he contemplated the Darwinian character of the social struggle with

Richardson borrows the phrase “frontier instances” from Darwin (who borrowed that phrase from Francis Bacon) to trace the continuity of pragmatism in American life and thought. Bacon’s argument “proceeds by amplification, a gesture mimetic of Pragmatism itself, each essay illustrating what happened over time to a form of thinking brought over by the Puritans to the New World.”<sup>44</sup> She treats pragmatism as a unique American philosophy and as an organism that develops through natural selection: “The signal, if implicit, motive of Pragmatism is the realization of thinking as a life form, subject to the same processes of growth and change as all other life forms.”<sup>45</sup> Her diverse subjects signal the definitive mode of pragmatism for their respective eras: Jonathan Edwards, Emerson, William and Henry James, Wallace Stevens, and Gertrude Stein. Emerson, to her, is a visionary who retained a ministerial or spiritual philosophy but who repackaged it in less conventionally Christian terms than his Puritan, evangelical predecessors.<sup>46</sup> Richardson explains that Emerson imperfectly replicated the work of Old Testament prophets and New Testament apostles to make it apprehensible in the rapidly changing American context.<sup>47</sup>

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unmistakable relish. Darwinism is a theory of adaptation, not of improvement. Judicial rulings invalidating modern liberal legislation might be wise or foolish but in either case they would merely delay the inevitable. [...] So judges should get out of the way of the struggle between unions and employers, socialists and capitalists, no matter which side the judges wanted to prevail.” Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 527 (2012). Holmes’s notion of the common law was rooted in “historicism and Darwinian natural selection.” ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 87 (Univ. of Chicago Press 2000). Against what he considered to be natural law views, Holmes wrote that the “common law is not a brooding omnipotence in the sky.” *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, dissenting). In *The Common Law* he employed Darwinian terminology to describe how a “rule adapts itself to the new reasons which have been found for it, and enters on a new career” so that the “old form receives new content” and “in time [...] modifies itself to fit the meaning which it has received.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 4 (Am. Bar Ass’n 2009). He maintained that the law “is forever adopting new principles from life at one end” while “always retain[ing] old ones from history at the other, which have not yet been absorbed or sloughed off.” *Id.* at 25.

<sup>44</sup> JOAN RICHARDSON, *A NATURAL HISTORY OF PRAGMATISM: THE FACT OF FEELING FROM JONATHAN EDWARDS TO GERTRUDE STEIN* 1 (Cambridge Univ. Press 2006).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 62–65.

<sup>47</sup> *Id.* at 65–97.

Most recently and, for my purposes, most fruitfully, Albrecht has explored the term “individualism” and described its currency within a pragmatic tradition that runs from Emerson, William James, and Dewey to Kenneth Burke and Ralph Ellison. Unlike the aforementioned scholars of Emerson who “do not resolve the question of how far, and to what purpose, one can claim the ‘pragmatic’ character of Emerson’s thought,” Albrecht comes close to a practical answer that is made more insightful in light of Holmes’s judicial writings that appear in media (opinions and dissents) that control rather than merely influence social patterns.<sup>48</sup>

Albrecht strikes a balance between radical and conservative characterizations of pragmatism, “which gets accused of [...] contradictory sins: it optimistically overestimates the possibilities for reform, or it succumbs to a conservative gradualism; it is too committed to a mere, contentless method of inquiry that undermines the stability of traditional meanings, or its emphasis on existing means places too much weight on the need to accommodate existing customs, truths, and institutions.”<sup>49</sup> The same could be said of the common-law tradition that Holmes researched and about which he authored his only book, *The Common Law*, in 1881. Albrecht never mentions the common law, but there is a dual valence between his analysis of Emerson and Holmes’s notion of the common law as the gradual implementation and description of rules by courts that aggregate their decisions in cases that reflect changing social norms.<sup>50</sup> Nor does Albrecht mention Holmes, whose Emersonian contributions to pragmatism only affirm Albrecht’s contention that “there are important benefits to be gained not by calling Emerson a pragmatist, [...] but by reading Emerson pragmatically—by applying the fundamental methods and attitudes

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<sup>48</sup> ALBRECHT, *supra* note 14, at 30–31.

<sup>49</sup> *Id.* at 17 (emphasis in original).

<sup>50</sup> “Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to the syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.” HOLMES, *THE COMMON LAW*, *supra* note 43, at 24.

of pragmatism in order to highlight the ways in which similar attitudes are already present in, and central to, Emerson.”<sup>51</sup> One such benefit arises when Emerson is compared to Holmes and involves the sober realization that Holmes’s Emersonian pragmatism cannot be (or ought not be) distorted to mean an equivalence with contemporary and coordinate signifiers such as “Left” and “Right,” “Liberal” and “Conservative,” for there are as many self-proclaimed “Conservative pragmatists,” to borrow a term from Robert H. Bork,<sup>52</sup> as there are Cornel Wests: thinkers “concern[ed] with particularity—respect for difference, circumstance, tradition, history and the irreducible complexity of human beings and human societies—[which] does not qualify as a universal principle, but competes with and holds absurd the idea of a utopia achievable in this world.”<sup>53</sup>

Due to the long line of scholars celebrating and studying Emersonian pragmatism, Albrecht is able to remark, “The notion that Emerson is a seminal figure or precursor for American pragmatism is no longer new or controversial.”<sup>54</sup> He extends and affirms a scholarly tradition by depicting “an Emerson whose vision of the limited yet sufficient opportunities for human agency and power prefigures the philosophy of American pragmatism.”<sup>55</sup> More important than his being the latest link in a chain of Emerson scholars is the clarifying focus he provides for examining an Emersonian Holmes by attending to two aspects of Emerson’s philosophy that comport with Holmes’s common-law theory: first, that Emerson prefigured James by walking a line between monism and pluralism and emphasizing the contingency and complexity of natural phenomena; and second, that Emerson considered ideas as derived from past experience but open to creative revision in keeping with present circumstances.

Regarding the first, Albrecht seeks to undermine a prevailing assumption that Emerson was some kind of absolute idealist, as even William James suggested.<sup>56</sup> Albrecht’s argument is based on

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<sup>51</sup> ALBRECHT, *supra* note 14, at 30.

<sup>52</sup> ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 3* (American Enter. Inst. Press 2002).

<sup>53</sup> *Id.* at 4.

<sup>54</sup> ALBRECHT, *supra* note 14, at 18.

<sup>55</sup> *Id.* at 29.

<sup>56</sup> *Id.* at 32, 36–42, 47–48.

the position that Emerson rejected essentialisms and envisioned a cosmos consisting of competing forms and ideas that grow and evolve because of their competition. Regarding the second, Albrecht seeks to show that although Emerson imagined himself as breaking from past forms and ideas, he also regarded the past as indispensable to our understanding of the present and as necessary for generating and cultivating creative dynamism; put another way, the past is inescapable and must be utilized to shape the present.<sup>57</sup> “All attempts to project and establish a Cultus with new rites and forms, seem to me vain,” Emerson preached in his Divinity School address, adding that all “attempts to contrive a system are as cold as the new worship introduced by the French to the goddess of Reason[.] [...] Rather let the breath of new life be breathed by you through the forms already existing.”<sup>58</sup> The point here, as elsewhere in Emerson, is that creative minds from different generations can turn the burdens of the past into engines of expressive possibility. Emerson’s essay “Circles” suffices to show his general stance on the two positions—pluralism and the creative revision of antecedents—that resemble and set in motion the common-law theories of Holmes, namely, the evolutionary nature of rules and principles,<sup>59</sup> the revisionary relationship between past and present

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<sup>57</sup> Cf., the following lines from RALPH WALDO EMERSON, *Art*, in EMERSON: ESSAYS & POEMS 431 (Joel Porte & Harold Bloom & Paul Kane eds. Library of America, 1996): “But the artist must employ the symbols in use in his day and nation, to convey his enlarged sense to his fellow-men. Thus the new in art is always formed out of the old.”

<sup>58</sup> RALPH WALDO EMERSON, *Divinity School Address*, in THE WORKS OF RALPH WALDO EMERSON, VOL. 4 147 (Jefferson Press 1883). Compare these words by Holmes: “The law of fashion is a law of life. The crest of the wave of human interest is always moving, and it is enough to know that the depth was greatest in respect of a certain feature of style in literature or music or painting a hundred years ago to be sure that at that point it is no longer so profound. I should draw the conclusion that artists and poets, instead of troubling themselves about the eternal, had better be satisfied if they can stir the feelings of a generation, but that is not my theme. It is more to my point to mention that what I have said about art is true within the limits of the possible in matters of the intellect.” Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 443 (1899).

<sup>59</sup> “The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.” HOLMES, THE COMMON LAW, *supra* note 43, at 25. “Holmes’s description of the evolution of discrete legal generalizations such as contract resembles the process by which species form in nature. As organisms adapt to niches in the environment, separate species gradually develop.” Elliott, *supra* note 2, at 119. “Once variation produces two or more legal ideas

laws,<sup>60</sup> and the fluctuating content of the law according to shifting social conditions.<sup>61</sup>

## II. CIRCLES

The following three themes from “Circles” carry over into Holmes’s jurisprudence: the revisionary relationship between past and present thinkers, a description of which smacks of Darwinian agonism; the role of individual agency within the ongoing cultural enterprise, which by implication suggests that social and aesthetic natural selection cannot be reduced to environmental determinism or genetic causation but rather responsive to environment and sensitive to the imperatives of chance; and finally, the endlessness of growth and expansion.

### A. *The Revisionary Relationship Between Past and Present*

“Circles” begins with the proposition that “[t]he eye is the first circle; the horizon which it forms is the second; and through-

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that are arguably applicable, Holmes imagines them in a competition for survival, as Darwin saw life as a competition among animals and plants.” *Id.* at 123.

<sup>60</sup> “The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.” HOLMES, *THE COMMON LAW*, *supra* note 43, at 1. “However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past, which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is.” *Id.* at 25. Holmes’s *The Common Law* “attempts to tease out the various principles of the common law from their historical context and to evaluate them, based upon their character as valid and progressive (or the opposite). It is for this purpose that Holmes employs the doctrine of survivals,” or the Darwinian notion of survival of the fittest among legal rules handed down in cases. James W. Springer, *Natural Selection or Natural Law: A Reconsideration of the Jurisprudence of Oliver Wendell Holmes*, 3 *GEO. J.L. & PUB. POL’Y* 53, 68 (2005). “For Holmes, the basis of a judicial decision was the weight or intensity of competing interests, and the ability of one of those interests to overcome, defeat, or suppress its competitors in a Darwinian or Spencerian struggle.” *Id.* at 77.

<sup>61</sup> “The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.” HOLMES, *THE COMMON LAW*, *supra* note 43, at 1.

out nature this primary picture is repeated without end.”<sup>62</sup> The metaphor suggests that all experience is concentric in that it shares the same origin, which itself is not a point but a curved line having multiple points on it, to say nothing of the power to “see.” All circles of knowledge and existence derive from the first. The metaphor applies not just spatially but temporally: the circles of the present develop out of past circles and enable future circles.<sup>63</sup> Emerson is not clear about the exact constitution of each circle because “[t]here are no fixtures in nature,” and the “universe is fluid and volatile.”<sup>64</sup> He is, however, clear that the constitution of each circle has to do with “laws” and “culture,” the former being what regulates and explains the latter even as both change in synchronized stages.<sup>65</sup>

The development of culture over time, Emerson suggests, is manifestly evident in works of art and literature that paradoxically join the processes of accumulation and annihilation.<sup>66</sup> New orders of creativity arise from the destruction of old orders while ideational and aesthetic progress depends upon agonism.<sup>67</sup> Even moral

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<sup>62</sup> RALPH WALDO EMERSON, *Circles*, in *THE COMPLETE WORKS OF RALPH WALDO EMERSON*, VOL. II 301 (Edward Waldo Emerson ed., Houghton Mifflin Co. 1902).

<sup>63</sup> Cf., RALPH WALDO EMERSON, *The American Scholar*, in *EMERSON: ESSAYS & POEMS 55* (Library of America, 1996), in which Emerson states, “There is never a beginning, there is never an end, to the inexplicable continuity of this web of God, but always circular power returning into itself.”

<sup>64</sup> EMERSON, *Circles*, *supra* note 62, at 302.

<sup>65</sup> *Id.* at 302, 310.

<sup>66</sup> See EMERSON, *The American Scholar*, *supra* note 63, at 56–59 (discussing books as influences of the past and inspiration for the future).

<sup>67</sup> “Emerson glides from the material and technological forms of creative destruction, which few would deny, although many would spend their lives and energies opposing and delaying, to the destruction of arts and ideas by new arts and ideas, which still fewer would welcome and most would deny, to the encircling and surpassing of moral values, which almost all would regret and oppose.” PHILIP FISHER, *STILL THE NEW WORLD: AMERICAN LITERATURE IN A CULTURE OF CREATIVE DESTRUCTION* 19 (Harvard University Press 1999). In commemoration of creative destruction, Emerson celebrates the poet and the inventor as liberators from old orders of knowledge: “Every thought is also a prison; every heaven is also a prison. Therefore we love the poet, the inventor, who in any form, whether in an ode, or in an action, or in looks and behavior, has yielded us a new thought. He unlocks our chains, and admits us to a new scene.” RALPH WALDO EMERSON, *The Poet*, in *EMERSON: ESSAYS & POEMS* 463 (Library of America, 1996). Elsewhere, however, Emerson notes that “the inventor only knows how to borrow.” RALPH WALDO EMERSON, *Plato; or, The Philosopher*, in *EMERSON: ESSAYS & POEMS* 634 (Library of America, 1996). Regarding agon and progress, Harold Bloom indicates that Emerson’s “revisionary” relationship with past works embodies “the American religion of competitiveness” and that “the final pragmatists of agon have been and will be the Americans of

advances, he seems to say, depend upon value clashes and the voluntary individual capacity to challenge the opposition.<sup>68</sup> According to Albrecht the “moral character that Emerson ascribes to our world [...] is a morality based in the generative, agonistic interplay between power and limitation,”<sup>69</sup> an interplay that represents a “struggle against the resistances of our world.”<sup>70</sup>

Such a struggle is constructive in its destructiveness. We “rise into another idea,” Emerson declares, only to have it “disappear.”<sup>71</sup> What was once a new form of aestheticism, Greek sculpture, “is all melted away, as if it had been statues of ice,” and the “genius that created it creates now somewhat else.”<sup>72</sup> “The Greek letters,” he explains, “last a little longer, but are already passing under the same sentence and tumbling into the inevitable pit which the creation of new thought opens for all that is old.”<sup>73</sup> The lesson of history is that we ceaselessly seek to “destroy” in order to reconfigure and that contest and opposition are conditions for their own perpetuation.<sup>74</sup> This explains why the “new continents are built out of the ruins of an old planet,” why “the new races fed out of the decomposition of the foregoing,” why the “[n]ew arts destroy the old,” and why the “investment of capital” in various modes of invention results in novel forces of production.<sup>75</sup>

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Emerson’s tradition.” HAROLD BLOOM, *AGON: TOWARDS OF THEORY OF REVISIONISM* vii (Oxford University Press 1982).

<sup>68</sup> Not only “Circles” but also “Emerson’s journal entries of late 1842” represent “the locus classicus both for questions of antinomian continuities and for the tradition of American dissent.” Bercovitch, *Emerson, Individualism, and the Ambiguity of Dissent*, *supra* note 13, at 627. “‘America’ was for [Emerson] [...] a symbolic polarity which appeared sometimes as sheer antagonism, sometimes as probational conflict, and whose divergent meanings Emerson embodied in his consummate figure of dissent.” *Id.* at 637. The “transcendental champions of dissent” clashed with and sought to move beyond earlier intellectual periods and movements (even though their efforts sometimes led to “excesses” and “absurdities”). PERCIVAL CHUBB, *Introduction*, in *SELECTED WRITINGS OF RALPH WALDO EMERSON* xv (Walter Scott 1888).

<sup>69</sup> ALBRECHT, *supra* note 14, at 62.

<sup>70</sup> *Id.* at 63.

<sup>71</sup> EMERSON, *Circles*, *supra* note 62, at 302.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* See also RALPH WALDO EMERSON, *The Poet*, in *EMERSON: ESSAYS & POEMS* 450 (Library of America, 1996): “[T]he experience of each new age requires a new confession.”

No province of learning is secure from the creative forces of productive destruction: “There is not a piece of science but its flank may be turned tomorrow; there is not literary reputation, not the so-called eternal names of fame, that may not be revised and condemned.”<sup>76</sup> To sustain creativity, genius, and aesthetics, Emerson suggests, the products of creativity, genius, and aesthetics must be demolished, although complete demolition is never possible because all demolition requires tools retained from a prior order;<sup>77</sup> one must, in any case, seek to destroy that which one wishes to preserve, and preserve that which one wishes to destroy, but one can never totally succeed in either enterprise. It is not victory or triumph but the very struggle against resistance and limitation that enables creative productivity to flourish. “[I]t is only against the resistance and limitation of our material environment,” Albrecht summarizes Emerson on the score, “that we know, express, and develop our creative powers.”<sup>78</sup> An analogy might be found in Joseph Schumpeter’s theories of industrial mutation and the creative destruction attributable to capitalism;<sup>79</sup> these maintain that countervailing market forces unite to sweep away preexisting orders to make room for new and more productive orders.<sup>80</sup> For Emerson as for Schumpeter creative destruction is wholly natural and self-regulating without any specific intent or design except for those introduced by acting agents, whose competing ideas channel disparate purposes and aspirations towards needed social benefits.

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<sup>76</sup> EMERSON, *Circles*, *supra* note 62, at 308.

<sup>77</sup> See EMERSON, *The American Scholar*, *supra* note 63, at 58 (“But the genius looks forward: the eyes of man are set in his forehead, not in his hindhead: man hopes: genius creates. Whatever talents may be, if the man create not, the pure efflux of the Deity is not his;—cinders and smoke there may be, but not yet flame. There are creative manners, there are creative actions, and creative words; manners, actions, words, that is, indicative of no custom or authority, but springing spontaneous from the mind’s own sense of good and fair.”). *Id.* at 62 (“Herein he unfolds the sacred germ of his instinct, screened from influence. Not out of those, on whom systems of education have exhausted their culture, comes the helpful giant to destroy the old or to build the new, but out of unhand-selled savage nature, out of terrible Druids and Berserkirs, come at last Alfred and Shakespear.”).

<sup>78</sup> ALBRECHT, *supra* note 14, at 64.

<sup>79</sup> See JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942) (Routledge, 2013), in particular the chapter entitled “The Process of Creative Destruction.”

<sup>80</sup> *Id.*

“In nature,” Emerson says to this end, “every moment is new[,] [and] the past is always swallowed and forgotten.”<sup>81</sup> Not, then, by resisting creative change but by embracing it may people improve their social and aesthetic surroundings, which themselves compel creative change by influencing the way people think about their unsettled world. “People wish to be settled,” but “only as far as they are unsettled is there any hope for them.”<sup>82</sup> Therefore, people will grow content and productive if they accept that the only natural constant is “life, transition, and the energizing spirit.”<sup>83</sup> What is settled is that the phenomenal world is unsettled (although governed by unifying principles)<sup>84</sup> and that dissent and competition within that unsettled world generate industrious developments.<sup>85</sup>

### ***B. The Role of Individual Agency Within the Ongoing Cultural Enterprise***

One message of “Circles” is that the composition and objectives of an individual’s thought are necessarily conditioned by external surroundings; such conditioning is not the same as programming or determining for this paradigm in which free agency exists even if it is constrained by environmental limitations. One who seeks to destroy his or her thoughts may advance within the available parameters of acceptable belief and action at a given moment whereas one who complacently accepts his or her

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<sup>81</sup> EMERSON, *Circles*, *supra* note 62, at 319.

<sup>82</sup> *Id.* at 320.

<sup>83</sup> *Id.*

<sup>84</sup> “Human thought is torn between contemplating the unity of being, and describing and defining the articulation of being into heterogeneous particulars. According to Emerson, neither side is fully intelligible on its own. We do not fully understand the various parts of the natural world until we understand how they are parts of a unified whole. Likewise we cannot know the unifying principle of nature without knowing how this principle unifies heterogeneous parts. Each side of this duality seems to require, and to deny, the other. The perspective within which all things are one is the perspective of being, in Emerson’s usage, while the perspective that sees all things in their heterogeneity is that of ‘nature.’ Nature is composed of discrete parts whose connection to every other part is mostly unknown, whereas the whole that explains their ‘partness,’ and so resolves them into unity, is being. Complete wisdom would require capturing both sides.” G. BORDEN FLANAGAN, *Emerson’s Democratic Platonism in Representative Men*, in *A POLITICAL COMPANION TO RALPH WALDO EMERSON* 426–27 (Alan M. Levine and Daniel S. Malachuk, The University Press of Kentucky 2011).

<sup>85</sup> “In politics, for example, it is easy to see the progress of dissent.” RALPH WALDO EMERSON, *New England Reformers*, in *EMERSON: ESSAYS & POEMS* 593 (Library of America, 1996).

knowledge as final or total cannot advance.<sup>86</sup> “The key to every man is his thought,” Emerson remarks, adding that he “can only be reformed by showing him a new idea which commands his own.”<sup>87</sup> All thoughts may be improved once subjected to contest and experiment.<sup>88</sup> Because the “life of man is a self-evolving circle, which, from a ring imperceptibly small, rushes on all sides outwards to new and larger circles,” a person must exert the “inert effort of each thought.”<sup>89</sup> This of course requires will or agency that is shaped but not prescribed by external factors: “It would be wrong

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<sup>86</sup> Consider Emerson on those who complacently accept knowledge as complete: “God offers to every mind its choice between truth and repose. Take which you please,—you can never have both. Between these, as a pendulum, man oscillates. He in whom the love of repose predominates will accept the first creed, the first philosophy, the first political party he meets,—most likely his father’s. He gets rest, commodity, and reputation; but he shuts the door of truth. He in whom the love of truth predominates will keep himself aloof from all moorings, and afloat. He will abstain from dogmatism, and recognize all the opposite negations, between which, as walls, his being is swung. He submits to the inconvenience of suspense and imperfect opinion, but he is a candidate for truth, as the other is not, and respects the highest law of his being.” RALPH WALDO EMERSON, *Intellect*, in EMERSON: ESSAYS & POEMS 425–26 (Library of America, 1996). Regarding destruction of thought, consider RALPH WALDO EMERSON, *Art*, *supra* note 57, at 438: “A true announcement of the law of creation, if a man were found worthy to declare it, would carry art up into the kingdom of nature, and destroy its separate and contrasted existence.” In the context of Emerson’s circle metaphor, Poirier suggest that style itself is Emerson’s way of making sure that ideas go beyond stasis and repose to ensure advance: “We live among these [surfaces such as ideas and texts] as among so many ‘circles’ or discursive formations. ‘Art’ itself—meaning the performative acts out of which texts are produced—allows us a stylish, studied, graceful, and cool way of moving around these surfaces, with an always forward-looking superfluity of motion. Style represents a movement of mind as against the stasis achieved by former movements that have become textualized or intellectualized.” POIRIER, *POETRY AND PRAGMATISM*, *supra* note 34, at 65.

<sup>87</sup> EMERSON, *Circles*, *supra* note 62, at 303–304.

<sup>88</sup> “Let them compete,” Emerson says of Americans, who, he believes, have equal “opportunity” under a system of “free trade.” RALPH WALDO EMERSON, *The Fortune of the Republic*, 11 in THE WORKS OF RALPH WALDO EMERSON 422 (Houghton, Mifflin and Company 1883). “[S]uccess to the strongest, the wisest and the best,” Emerson adds. *Id.* Jonathan Levin describes Emerson’s view on the improvement of thought as expressed in “Circles” in terms of transition and transformation: “Emerson values processes but not necessarily their end products, which are in any event only instruments of further processes. So long as he keeps faith with these processes, at once cosmic and imaginative, Emerson can identify with the continuously emerging novelty of things. Emerson’s process-oriented perspective allows him to distinguish mere form from what he invariably figures as the authentic life that infuses all form. Form is limited and limiting, whereas life is expansive, a never-ending process of vital transitions and transformations.” JONATHAN LEVIN, *THE POETICS OF TRANSITION: EMERSON, PRAGMATISM, & AMERICAN LITERARY MODERNISM 2* (Duke University Press 1999).

<sup>89</sup> EMERSON, *Circles*, *supra* note 62, at 304.

[...] to suggest that Emerson portrays the self as wholly dependent on or determined by its environment. Individuality, as he portrays it, is instead a complex interaction between self and environment,<sup>90</sup> the type of “intense individualism that made the classical common-law tradition so out of accord with popular feeling in the first decade of the [twentieth century].”<sup>91</sup>

The limitations of environment are comparable to the limitations of aesthetic influence that must be conquered and surpassed to realize the powers of creative selfhood; the process operates and looks like the coordinate and derivative stages of human development down through the ages: “[H]istory and the state of the world [are] [...] directly dependent on the intellectual classification then existing in the minds of men. The things which are dear to men at this hour are so on account of the ideas which have emerged on their mental horizon, and which cause the present order of things, as a tree bears its apples. A new degree of culture would instantly revolutionize the entire system of human pursuits.”<sup>92</sup> So described, the processes of creative destruction are an “incessant movement and progression” in accord with a natural, physical, and cultural environment containing organized opposition that must be confronted and wrestled with.<sup>93</sup>

“The only sin is limitation,” Emerson declares,<sup>94</sup> suggesting that we not exhaust our potential to struggle against our social and aesthetic environment or consider our potential exhausted but rather that we follow our “instinct” to press “eagerly onward to the impersonal and illimitable.”<sup>95</sup> Albrecht takes Emerson to mean that “view[ing] limitations as occasions for struggle, power, and overcoming encourages us to take an activist attitude toward the resistant realities of our world.”<sup>96</sup> Exercising our volitional powers to transcend fixed limitations is, for Emerson, a moral imperative; it is indeed a “moral fact” that every success is met with an “inspirer and a condemner” whose antagonism pushes us forward, even if we never can reach “the Unattainable” or “the flying Per-

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<sup>90</sup> ALBRECHT, *supra* note 14, at 66.

<sup>91</sup> ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 15 (Marshall Jones Company, 1921).

<sup>92</sup> EMERSON, *Circles*, *supra* note 62, at 310.

<sup>93</sup> *Id.* at 318.

<sup>94</sup> *Id.* at 308.

<sup>95</sup> *Id.* at 313.

<sup>96</sup> ALBRECHT, *supra* note 14, at 65.

fect.”<sup>97</sup> According to Emerson, then, humanity may not attain a state of perfection, but it can improve and even divine absolute truths of existence.<sup>98</sup>

We must, Emerson urges, prefer truth to our past apprehension of truth,<sup>99</sup> which is to say that we must constantly challenge our perceptions and seek to improve upon inherited ideas and forms. To accomplish this is, in Emerson’s mind, to realize genius.<sup>100</sup> A genius, as it were, rises above the constraints of his or her time and place to become a “speaker” who “strikes a new light, emancipates us from the oppression of the last speaker to oppress us with the greatness and exclusiveness of his own thought, then yields us to another redeemer.”<sup>101</sup> The cycle goes on indefinitely as each generation’s geniuses realize “[h]ow to act in society without losing [their] individual integrity” as well as “how to use the resources for action that culture provides without becoming enervated by them.”<sup>102</sup>

### C. *The Endlessness of Growth and Expansion*

“Our life is an apprenticeship to the truth that around every circle,” Emerson remarks, “another can be drawn; that there is no end in nature, but every end is a beginning.”<sup>103</sup> From the original eye concentric circles spread centrifugally *ad infinitum* with each new one retaining elements of its antecedent despite what efforts have been made at destroying that antecedent. What seems merely an Emersonian metaphor is made more concrete when viewed alongside Holmes’s paradigm for the common law that instantiates Emerson’s theories about the circular content and evolution of hu-

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<sup>97</sup> EMERSON, *Circles*, *supra* note 62, at 301.

<sup>98</sup> *Id.* at 320.

<sup>99</sup> *Id.* at 309.

<sup>100</sup> “If Emerson had an obsession, it was with the question of American genius.” HAROLD BLOOM, *GENIUS* 338 (Warner Books 2002). The motif of genius is so prevalent in Emerson’s essays that it is impossible to describe it succinctly. Bloom frames Emerson’s “question of genius” as follows: “[C]an it transcend, and teach a creedless beyond, give some coherence and significance to its violent order?” *Id.* at 344.

<sup>101</sup> EMERSON, *Circles*, *supra* note 62, at 310.

<sup>102</sup> ALBRECHT, *supra* note 14, at 68.

<sup>103</sup> See EMERSON, *Circles*, *supra* note 62.

man intelligence,<sup>104</sup> not to mention Emerson's belief that "every law and usage was a man's expedient to meet a particular case."<sup>105</sup>

The "eternal generation of circles" that "proceeds" while the "eternal generator abides"<sup>106</sup> is tantamount to the processes undergirding and enabling the principles in Holmes's version of the common-law system to, like Emersonian circles, "create a life and thought as large and excellent as [themselves]; but in vain, for that which is made instructs how to make a better."<sup>107</sup> In Holmes's view, each new law or principle in the common-law system constitutes a revision of some previous law or principle and facilitates some new law or principle or at least some new way of applying an old law or principle.<sup>108</sup> The features that mark Emersonian circles also mark Holmes's common law: "no sleep, no pause, no preservation, but all things renew[ing], germinat[ing] and spring[ing]."<sup>109</sup> Emerson employs legal lexica ("facts," "law") to describe the circular processes of progress and generation: "Every ultimate fact is only the first of a new series. Every general law only a particular

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<sup>104</sup>"Holmes's jurisprudence reflected his philosophy. The common law was the deposit of an evolving society, moving toward self-awareness and conscious control of its own further evolution." Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L. REV. 703, 703-04 (1992). Novick claims that Emerson "inspired" Holmes with "vivid pictures of history as evolution, as the embodiment of advancing ideas." *Id.* at 707.

<sup>105</sup>RALPH WALDO EMERSON, *Politics*, in EMERSON: ESSAYS & POEMS 559 (Library of America, 1996). Cf. HOLMES, THE COMMON LAW, *supra* note 43, at 1: "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient."

<sup>106</sup>EMERSON, *Circles*, *supra* note 62, at 318.

<sup>107</sup>*Id.*

<sup>108</sup>Holmes once famously stated, "The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the newcomer puts on to make itself presentable according to conventional requirements." Oliver Wendell Holmes, Jr., *Book Notice*, 14 AM. L. REV. 233-34 (1880).

<sup>109</sup>EMERSON, *Circles*, *supra* note 62, at 319. "Holmes's focus on fallibilism indicates that the absolutism he rejected with such vehemence is that which places certain ideas and practices beyond the need for ongoing evaluation and modification in light of criticism, evidence, experience, changing conditions, and changing 'felt necessities.' Stasis and certitude bothered him more than conceptual overreach or metaphysical pretension. This aversion to intellectual rigidity, surely an attribute of all wise persons but peculiarly central to Holmes's thought, transcends differences over moral realism, relativism, and particularism." Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 21 (2004). For Holmes, "[c]onformity, deference to authority, stasis, [and] passivity in the realm of beliefs is not just unfortunate or unwise but *dangerous*." *Id.* at 29.

fact of some more general law presently to disclose itself. There is no outside, no inclosing wall, no circumference to us.”<sup>110</sup>

Like Emerson’s circles the common law in Holmes’s paradigm expands ever outward, advancing in stages, accumulating residual precedents and creatively destroying those which have lost their value or utility.<sup>111</sup> For Holmes laws are reflections of the cultural and intellectual climate of the time just as “history and the state of the world at any one time [are] directly depend[ent] on the intellectual classification then existing in the minds of men.”<sup>112</sup> “The new position of the advancing man,” including and especially a position of law, “has all the powers of the old, yet has them all new.”<sup>113</sup> Holmes’s theories about the common law seem to be restatements of Emerson’s proposition that this “new position [...] carries in its bosom all the energies of the past, yet is itself an exaltation of the morning.”<sup>114</sup> Anyone familiar with Holmes’s jurisprudence might well mistake the following line by Emerson as an axiom scribbled by Holmes’s pen: “Each new step we take in thought reconciles twenty seemingly discordant facts, as expressions of one law.”<sup>115</sup> This line refers to the agonistic contest be-

<sup>110</sup> EMERSON, *Circles*, *supra* note 62, at 304.

<sup>111</sup> “Precedent [...] had been reinterpreted in Holmes’ early articles as a consensus growing out of the gradual sifting of case-specific decisions.” Frederic R. Kellogg, *Holmes, Common Law Theory, and Judicial Restraint*, 36 J. MARSHALL L. REV. 457, 501 (2003). “For Holmes too, the growth of legal rules began with doubt relevant to an emergent problem and progressed over time in separate case-specific proceedings, connected by engagement with common forms of dispute-engendering conduct, though each instance might display slightly different circumstances.” *Id.* “[F]or Holmes, the structure of the common law was neither timeless nor inevitable. It was instead the result of an historically contingent set of decision making practices—judges who routinely struggled with conflicting legal claims would develop a repetitive structure for dealing with these claims. And, as the surrounding context of litigation might change, so too the logical structure. This was why the self-conscious study of legal history was so important to sound judicial decision making—it was only by examining the context of received doctrine that a sound judgment could be made as to its continuing viability in ever changing circumstances.” Catharine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L. J. 329, 333 (1993).

<sup>112</sup> EMERSON, *Circles*, *supra* note 62, at 310.

<sup>113</sup> *Id.* at 320.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 308. Compare these words by Emerson with the following words by Holmes: “The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). One commentator has explained,

tween Aristotle and Plato that, centuries after it transpired, allegedly revealed a single truth; these supposedly rival philosophers “are reconciled by being seen to be two extremes of one principle.”<sup>116</sup>

The example of Aristotle and Plato is instructive because it reveals how agonism is not about total or actual destruction but about competition and the way in which a concerted effort to overcome and outdo generates not violence or annihilation but consistency, regularity, and even uniformity. Agonism in theory neutralizes conflict and allows good ideas to be filtered from bad ideas by pitting intellectual forces against one another in a discursive or rhetorical manner. Carried over into the common-law context, Emerson might have said that disagreement among judges and the registering of dissenting opinions are necessary to achieve a more general harmony in the aggregate.<sup>117</sup>

### III. EMERSON’S INFLUENCE ON HOLMES

Before it may be believed that Emerson’s agonistics or theories of creative destruction pertain to Holmes’s theories of the common law, it must be shown that Holmes was familiar with Emerson’s writings and teachings. The historical evidence is vast; nearly every biography of Holmes has considered his relationship to Emerson, and it has not escaped remark that Emerson was a close relation to Holmes’s father and a giant within Holmes’s immediate community. It has been claimed that “[a]ll his youth

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“In Holmes’s thinking, [...] the role of the Emersonian Oversoul, awareness of which infuses life with meaning, was played by the universal laws governing us.” David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L. J. 449, 467–68 (1994).

<sup>116</sup> EMERSON, *Circles*, *supra* note 62, at 308.

<sup>117</sup> Vincent Blasi makes this point in his summary of Holmes’s freedom of speech positions as exemplified by his marketplace metaphor in the *Abrams v. United States* 616 (1919), dissent: “An unregulated marketplace of ideas encourages free thought not so much by determining the equilibrium of the moment as by keeping low the barriers to entry, barriers that take the form not only of coercive sanctions but also social and intellectual peer pressures toward conformity. The sheer proliferation of ideas in a free market complicates perceptions in a manner that helps to weaken such barriers. In addition, the market metaphor makes a statement about the dynamic and chronically incomplete character of understanding and the value of intellectual contest and innovation. Such a statement by the constitutional regime can help to legitimate dissent and discredit demands for orthodoxy, and in that way lend much needed support to newcomers whose heretical notions will almost always engender strong resistance laced with accusations of illegitimacy if not disloyalty.” Blasi, *Holmes and the Marketplace of Ideas*, *supra* note 109, at 27.

[Holmes] looked up to Emerson as the wisest man he knew”;<sup>118</sup> that Holmes grew up calling Emerson “Uncle Waldo”;<sup>119</sup> and that “Holmes drew considerable inspiration from Ralph Waldo Emerson.”<sup>120</sup> The young Holmes allegedly solicited Emerson’s autograph before rejoining his Massachusetts regiment in 1862.<sup>121</sup> On Holmes’s seventeenth birthday, his parents presented him with Emerson’s *Poems*, *English Traits*, and *Representative Man*, as well as with two volumes of Emerson’s essays.<sup>122</sup> One popular legend maintains that upon running into Emerson in the street, a fourteen year old Holmes remarked, “If I ever do anything, I shall owe a great deal to you.”<sup>123</sup>

Emerson’s inspiration is as apparent in Holmes’s prose as it is in Holmes’s background. “[H]ow like Emerson Holmes could sound,” wrote one biographer shortly after Holmes’s death.<sup>124</sup> Although in his essays and judicial writings Holmes did not repeat Emerson’s explicit verbiage, he did employ similar diction in the context of similar themes. Silas Bent and Francis Biddle see in *The Common Law*, for instance, traces of Emerson’s “Self-Reliance.”<sup>125</sup> Liva Baker recognizes traces of “The American Scholar” not only in *The Common Law*,<sup>126</sup> but also in Holmes’s 1913 address to the Harvard Law School Association of New York.<sup>127</sup> She further mentions Holmes’s subtle and occasional mimicry of Emerson’s sayings: whereas Emerson remarked, “Wherever Macdonald sits, there is the head of the table,” Holmes

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<sup>118</sup> CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* 199 (Little, Brown & Co. 1944).

<sup>119</sup> GARY J. AICHELE, *OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE* 17 (Twayne Publishers 1989); DAVID H. BURTON, *OLIVER WENDELL HOLMES, JR.: WHAT MANNER OF LIBERAL?* 21 (Twayne Publishers 1980).

<sup>120</sup> G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 35 (Oxford Univ. Press 1993).

<sup>121</sup> LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 125 (1991).

<sup>122</sup> *Id.* at 85; MENAND, *supra* note 12, at 22; WHITE, *supra* note 120, at 35.

<sup>123</sup> Frederick C. Fiechter, Jr., *The Preparation of an American Aristocrat*, 6 *THE NEW ENGLAND QUARTERLY* 3, Mar. 1933, at 7–8, available at JSTOR; BURTON, *supra* note 119, at 15; BAKER, *supra* note 121, at 85; MENAND, *supra* note 12, at 25.

<sup>124</sup> FRANCIS BIDDLE, *MR. JUSTICE HOLMES* 25 (Charles Scribner’s Sons 1942).

<sup>125</sup> SILAS BENT, *JUSTICE OLIVER WENDELL HOLMES* 44 (Garden City Publ’g Co. 1932); BIDDLE, *supra* note 124, at 57.

<sup>126</sup> BAKER, *supra* note 121, at 254.

<sup>127</sup> *Id.* at 85.

remarked, "I once heard a man say, 'Where Vanderbilt sits, there is the head of the table.'"<sup>128</sup> If that were not enough, Sheldon M. Novick considers Holmes's 1884 Memorial Day address a "debut in a literary form invented by Emerson."<sup>129</sup> More generally Holmes's tendency to dissent memorably is a demonstration of Emersonian nonconformity.<sup>130</sup> After all, it was Emerson who symbolized the "adversarial American self"<sup>131</sup> and who inaugurated "the tradition of American dissent"<sup>132</sup> that celebrated transition against repose and that represented a "symbolic polarity," "sheer antagonism," or "probational conflict" that could propel society towards progress and innovation.<sup>133</sup>

Holmes's first notable publication, "Books," an essay that, in 1858, appeared anonymously in *The Harvard Magazine*, proclaimed that "we must study the present to know the past," adding, "Emerson, who probably takes about as large a view of man and events as any one we could point out now living in America, gains much of this breadth by the peculiar direction of his studies."<sup>134</sup> This essay is sprinkled with lines that recall Emerson's "Circles," published 17 years previously. For example, Holmes yields the following: "Regarding, then, what has been done already by mighty minds, and looking forward on the future we may reasonably suppose to be still remaining for this world, we see that the time is not inconceivably distant when a bookworm's life shall be spent in perusing a literature of Shakespeares and Prophets"; "every great book carries with it and implies ten thousand lesser ones"; "there are in each language one, or perhaps two or three geniuses, that have, as it were, originated the very literature of that state and period from which they sprung; that, like the loadstone mountain of the Arabian Nights, have drawn to their own mighty bulk the

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<sup>128</sup> *Id.* at 86.

<sup>129</sup> *Id.* at 176.

<sup>130</sup> "If, as Emerson dictates, misunderstanding is the essence of greatness, those in the legal profession should welcome dissenting views which are not consistent with contemporary maxims." Jay W. Stein, *The Hobgoblin Doctrine: Identifying "Foolish" Consistency in the Law*, 29 TEX. TECH. L. REV. 1017, 1024 (1998).

<sup>131</sup> Bercovitch, *Emerson, Individualism, and the Ambiguities of Dissent*, *supra* note 13, at 637.

<sup>132</sup> *Id.* at 627.

<sup>133</sup> *Id.* at 631.

<sup>134</sup> Oliver Wendell Holmes, Jr., *Books*, 4 THE HARVARD MAGAZINE 408, Dec. 1858, at 408, available at Harvard Law School Library Holmes Digital Suite.

nails and strength of the time”; “just as one man implies humanity, so the history of the struggles of one period implies eternity”; “[t]he great secret of all delight in literature is preserving this fineness of taste, and Emerson understands it, and not only reads the great works of our own tongue, but he studies all the great inspired books of all the great literatures”; “books are but little seeds after all, seeming insignificant enough before the merest weed of real life; but they lie soaking in our minds, and when we least expect it, they will spring up, not weeds, but supporters that will be our aid in the sorest struggles of our life.”<sup>135</sup>

Although the language of these passages speaks for itself, certain features of “Books” compel further comment because they corroborate my reading of “Books” as distinctly Emersonian—the references to geniuses and Shakespeare and prophets, the emphasis on the gradation of learning and knowledge, the application of metaphors about the natural world, and the explicit discussion of Emerson himself. It is little wonder that Louis Menand refers to this essay as “an Emersonian tribute to Emerson”<sup>136</sup> or that G. Edward White observes, “[The essay] was a virtual echo of one of Emerson’s essays, even bearing the same title.”<sup>137</sup> White adds that the essay “was simply a restatement of Emerson’s arguments.”<sup>138</sup> One of Holmes’s classmates, William A. Holbrook, critically reviewed the essay, lambasting Holmes for imitating Emerson and for adopting transcendentalism as his personal philosophy.<sup>139</sup> In the absence of argument to the contrary, it would appear that “Books” alone substantiates the proposition that Holmes had Emerson in mind when he wrote about the common law in the following decades and that it was the Emerson in him that caused Justice Felix Frankfurter to proclaim, “Mr. Justice Holmes was led by the divination of the philosopher and the imagination of the poet.”<sup>140</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> MENAND, *supra* note 12, at 23.

<sup>137</sup> WHITE, *supra* note 120, at 35.

<sup>138</sup> *Id.* at 36.

<sup>139</sup> MARK DEWOLFE HOWE, *Holmes to Emerson*, in JUSTICE OLIVER WENDELL HOLMES, VOL. 1: THE SHAPING YEARS 59 (Belknap Press of Harvard Univ. 1957); BAKER, *supra* note 121, at 92.

<sup>140</sup> FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 25 (Harvard Univ. Press 1939).

Yet there is much more verification, including Holmes's own testimony. In 1876 he mailed a note to Emerson accompanied by a copy of his recent essay on the law. The note said, "It seems to me that I have learned, after a laborious and somewhat painful period of probation, that the law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die. Accept this little piece as written in the faith and as a slight mark of the gratitude and respect I feel for you who more than anyone else first started the philosophical ferment in my mind."<sup>141</sup> Roughly a year after Holmes penned "Books," Emerson recommended that Holmes, still an undergraduate at Harvard, read Plato.<sup>142</sup> Holmes did. Later, Holmes went on to write an essay about Plato for the *University Quarterly*.<sup>143</sup> In writing the essay "Holmes was again tracking Emerson,"<sup>144</sup> who is reported to have read it and, unimpressed, informed his young protégé that "I have read your piece" before admonishing, "When you strike at a king, you must *kill* him."<sup>145</sup> Other accounts hold that Emerson said, rather, "When you shoot at a king you must kill him."<sup>146</sup> In either case, it is clear that Holmes admired, mimicked, and took instruction from the Sage of Concord.<sup>147</sup>

The gushing praises showered on Holmes's writing might have something to do with his copying of Emerson. Saul Touster

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<sup>141</sup> HOWE, *Holmes to Emerson*, *supra* note 139, at 203; *see also* BAKER, *supra* note 121, at 251; MENAND, *supra* note 17, at 59; SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 149 (Little, Brown & Co. 1989).

<sup>142</sup> Emerson remarked that "Plato's fame does not stand on a syllogism, or on any masterpieces of the Socratic reasoning, or on any thesis." RALPH WALDO EMERSON, *Plato: New Readings*, in EMERSON: ESSAYS & POEMS 655 (Library of America, 1996). Compare this line with the opening of *The Common Law* where Holmes states, "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." HOLMES, *THE COMMON LAW*, *supra* note 43, at 1.

<sup>143</sup> HOWE, *Holmes to Emerson*, *supra* note 139, at 54.

<sup>144</sup> WHITE, *supra* note 120, at 39.

<sup>145</sup> HOWE, *Holmes to Emerson*, *supra* note 139, at 54; BURTON, *supra* note 119, at 27; NOVICK, *supra* note 104, at 28; WHITE, *supra* note 120, at 43; AICHELE, *supra* note 119, at 28.

<sup>146</sup> AICHELE, *supra* note 119, at 43.

<sup>147</sup> Several biographies tell the story of Holmes's meeting with Emerson just after the Civil War and before he entered law school. I have omitted discussion of the alleged encounter because no details are known about it and the versions of it seem, to me, clouded in speculation.

says, “It is the obligatory cliché—whether one is decrying the cavalier way he treats the facts of a case before him, or heralding him for bringing the clarity of unforgettable epigram to a babel of judges—that Holmes could write like the devil.”<sup>148</sup> Celebrations of Holmes’s rhetorical style seem to be endless: “It is arguable that his style was more alive, more enjoyable, and [more] immediately effective than that of any other common-law judge.”<sup>149</sup> “What Holmes did,” Touster explains, “was to set out a theory on the judicial process which recognized that judges in deciding cases played a creative role in laying down the rules by which we are governed.”<sup>150</sup> Holmes has long been accepted as a pragmatist; the fact that he also has been considered an Emersonian means that he was likely enacting and experimenting with Emerson’s philosophies of agonism, progress, transition, and superfluity in his legal analysis in general and in his judicial dissents in particular.

My answer to Cavell’s question about the use of calling Emerson a pragmatist is that the designation bears out in Holmes’s jurisprudence that continues to affect the manner in which lawyers argue and judges and justices reason and rule. Not only that, but Holmes enacted in the law Emerson’s belief in the meliorative nature of ideas by suggesting that case precedents in a common-law system evolve from generation to generation and struggle to become binding in the practical world of everyday human relations.<sup>151</sup> Holmes shows that Emerson’s philosophy is more than high-flying, sweet-sounding rhetoric with no useful purpose. The use of calling Emerson a pragmatist is in showing how *useful* his philosophical and aesthetic influence has been as an impetus for American constitutional law. Calling Emerson a pragmatist does not make him one, and Albrecht is right to be cautious about con-

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<sup>148</sup> Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 679 (1981), available at HeinOnline.

<sup>149</sup> Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 9 (1962).

<sup>150</sup> Touster, *supra* note 148, at 690.

<sup>151</sup> “[T]here was a sense in which Holmes’ unvarnished realism is nevertheless benign and meliorative. Law is the result of centuries of collective responses to social disputes and conflicts, imperfectly refined and rationalized by judges, legislators and scholars. It is the residue of the actual historical reasoning process of society, warts and all: vestiges, fictions, intellectualisms, and unresolved struggles in a somewhat camouflaged display. Despite emergent and changing patterns of conduct, struggles among competing interests, and flowed individual decision makers, the depiction leaves ample room for a gradual and revisable formation of consensus.” Kellogg, *supra* note 111, at 502.

ferring the label; yet even the attempt to read Emerson pragmatically seems inevitably to lead to a reasonable conclusion about his alleged status as the wellspring of American pragmatism.

The legal term “disputation” conveys the pitting of party against party, principle against principle, and argument against argument, so that the accumulated results of each legal pleading, each legal holding, and each established case precedent together constitute the common law according to Holmes.<sup>152</sup> Holmes carries out an Emersonian project by supplying unique and aesthetic forms of legal reasoning<sup>153</sup> and by facilitating agonism with his judicial dissents. His dissents generated variations in thought and principles to prevent his ideas from suffering destruction or extinction.<sup>154</sup> He drew attention to his judicial dissents with his Emersonian language and thereby afforded the legal system the agonistic conditions necessary to ensure that certain practices did not fall into disuse.<sup>155</sup> The memorable qualities of his writing that

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<sup>152</sup>“Holmes undoubtedly learned something from Maine’s use of history in attacking Benthamite, Austinian, and Rousseauist thought. However, in stark contrast to Maine’s orderly picture, Holmes argues that the history of common-law doctrine is one of mistake, linguistic confusions, and ‘survivals’ (Holmes’s Darwinian term for legal ideas that persist without serving any discernable current purpose).” Kunal Parker, *The History of Experience: On the Historical Imagination of Oliver Wendell Holmes, Jr.*, 26 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 60, 70 (2003).

<sup>153</sup>See generally Robert Danisch, *Aphorism, Enthymemes, and Oliver Wendell Holmes, Jr. on the First Amendment*, 27 RHETORIC REVIEW 219 (2008) (discussing how Holmes employed literary devices such as aphorism that reflected enthymematic reasoning as well as his belief that the law did not grow out of logic or syllogisms).

<sup>154</sup>Consider this commentary about Holmes’s notions of political dissent in light of Holmes’s tendency to dissent from the bench: “Holmes, the old soldier and proud Darwinist, thought that one of the valuable functions of dissenting speech, including speech that advocates violent revolution, is its capacity to generate some of the grievances, aspirations, and mobilizations that force political adaptation and transformation. Such energies are activated and sustained not only by respectful petition and rational persuasion but also by incitement, recruitment, and organization for collective action. Probably the most energizing contribution that the freedom of speech can make is simply to leave people free to follow their political thoughts wherever they might lead—free, that is, to think the unthinkable regarding political loyalty, consent, obedience, and violence. That no viable political community could possibly recognize a comparable freedom to act does not, in this view, render incoherent or dysfunctional a capacious freedom to disseminate heretical political ideas, including ideas about the appropriate means for bringing about change.” Blasi, *Holmes and the Marketplace of Ideas*, *supra* note 109, at 39.

<sup>155</sup>“The dissent is a rhetorical medium that ensures the malleability of laws and rules because it records an opposing scheme of laws and rules—that is to say, it registers alternative and sometimes rivaling viewpoints to make sure those viewpoints are not lost to the historical record. The historical record is essential to common law rulemaking, which depends upon the embeddedness of jurisprudence in text. By preserving one side of an

have led to his canonization<sup>156</sup> support the claim that “the only pragmatic test for the canonical” is what is “worthy of rereading.”<sup>157</sup> Holmes has secured for his writings a prominent place in the legal canon; perhaps only Brandeis and Cardozo rival him in terms of canonicity.<sup>158</sup> He remains the most read and studied of all American jurists. Holmes’s agonism is most evident in his dissents because of their inherent opposition to the majority position. If Holmes had not dissented in some of his most memorable writings, his argument would not have been preserved in the textual record and thus would not have been vindicated by later courts.<sup>159</sup> By dissenting with Emersonian superfluity, however, he ensured that his legal argument would be not only remembered but also discussed and taught.<sup>160</sup> Holmes used aesthetics to call attention to his legal arguments and to implement an Emersonian project devoted to growing the legal system through constructive competi-

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argument or an alternative vision of the law within an authoritative text—a text issued by one who has the power to command instructions to others, who, in turn, obey the instructions—a dissenting judge safeguards argument and guarantees that ideas will continue competing for their truth value.” Allen Mendenhall, *Dissent as a Site of Aesthetic Adaptation in the Work of Oliver Wendell Holmes Jr.*, 1 BR. J. AM. LEG. STUDIES 679, 549 (2012). See also Allen Mendenhall, *Pragmatism on the Shoulders of Emerson: Oliver Wendell Holmes Jr.’s Jurisprudence as a Synthesis of Emerson, Peirce, James, and Dewey*, forthcoming in THE SOUTH CAROLINA REV.

<sup>156</sup>“Holmes was the first to become a judicial and cultural icon. Although Holmes’s judicial reputation has fluctuated widely since his death, his canonical status is unquestioned.” Brad Snyder, *The House that Built Holmes*, 30 LAW & HIST. REV. 661, 661–62 (2012).

<sup>157</sup>HAROLD BLOOM, *THE WESTERN CANON* 484 (Riverhead Books 1994).

<sup>158</sup>See generally G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576 (1995).

<sup>159</sup>Consider the following remarks by Justice Brennan: “The time periods in which dissents ripen into majority opinions depend on societal developments and the foresight of individual justices, and thus vary. Most dissents never ‘ripen’ and do not deserve to. But it is not the hope of eventual adoption by a majority that alone justifies dissent. For simply by infusing different ideas and methods of analysis into judicial decision-making, dissents prevent that process from becoming rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to rethink the result.” Justice William Brennan, *In Defense of Dissents*, 37 HASTINGS L. J. 427, 436 (1985–86).

<sup>160</sup>Allen Mendenhall, *Dissent as a Site of Aesthetic Adaptation in the Work of Oliver Wendell Holmes Jr.*, *supra* note 155, at 544–549. Poirier’s conception of Emersonian superfluity is always about reaching future audiences with stylistic writing. “Emerson never asks us to reclaim some heritage of civic or rational virtues as these have been embedded, so it is assumed, in works of the past; he wants us instead to discover traces of productive energy that pass through a text or a composition or an author, pointing always beyond any one of them.” POIRIER, *POETRY AND PRAGMATISM*, *supra* note 34, at 37–38.

tion. His Emersonian views about the common-law system may not have been correct, but they have been effectual and have instantiated in fact what Holmes believed to be true in theory.