Common Law and Aesthetic Dissent: Oliver Wendell Holmes, Jr., Pragmatism, and the Jurisprudence of Agon

Abstract
This dissertation investigates Oliver Wendell Holmes Jr.’s dissents that instantiate his evolutionary view of the common-law system. The style and rhetoric of his dissents drew attention to his legal propositions that undermined the law as established by the majority; in so doing, Holmes ensured that the oppositional legal proposition was retained in the legal canon so that it would be available for future judges and justices to consider and possibly vindicate. Holmes thereby guaranteed that the legal system had, in his own words, some “play in the joints” and remained flexible in order to adapt to changes in culture and technology. I examine some of Holmes's dissents for their aesthetic and rhetorical properties to show that those properties contributed to the canonization of his writings and the vindication of his arguments. I use Richard Poirier's notion of superfluity and linguistic skepticism, which he attributes to Holmes's mentor Ralph Waldo Emerson, and Jonathan Levin's notion of the poetics of transition to the genre of dissent. These theories of Poirier and Levin are about overcoming stasis and ensuring creative progress—something that is central to Holmes’s view of an evolutionary common law in which rules must change and adapt. I consider how Holmes's canonical dissents, especially those regarding freedom of speech and expression, suggest that his model for the common law is also a pragmatic model for the way in which society can adjust effectively to change and to divided opinions among the populace.

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Roman law started from the blood feud, and all the authorities agree that the German law begun in that way. This book argues that Oliver Wendell Holmes Jr., helps us see the law through an Emersonian lens by the way in which he wrote his judicial dissents. Holmes's literary style mimics and enacts two characteristics of Ralph Waldo Emerson's thought: superfluity and the poetics of transition, concepts ascribed to Emerson and developed by literary critic Richard Poirier. Using this aesthetic style borrowed from Emerson and carried out by later pragmatists, Holmes only made it more likely that his dissents would remain alive for future judges or justices (because how they were written was A frequent collaborator with the Mises Institute, Allen Mendenhall is associate dean and executive director of the Blackstone & Burke Center for Law and Liberty at Faulkner University and is the author of Literature and Liberty: Essays in Libertarian Literary Criticism (2014) and Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon: Aesthetic Dissent and the Common Law (2016). Allen Mendenhall: I'm an associate dean in the law school at Faulkner and the executive director of a new center there called the Blackstone & Burke Center for Law & Liberty. The center promotes the common-law tradition and coordinates educational programs and research initiatives on liberty and private ordering.