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THE PURE-HEARTED ABRAMS CASE

Andres Yoder*

One hundred years ago, Justice Oliver Wendell Holmes changed his mind about the right to free speech and wound up splitting the history of free speech law into two. In his dissent in Abrams v. United States, he called for the end of the old order—in which courts often ignored or rejected free speech claims—and set the stage for the current order—in which the right to free speech is of central constitutional importance. However, a century on, scholars have been unable to identify a specific reason for Holmes’s Abrams transformation, and have instead pointed to more diffuse influences. By drawing on heretofore overlooked material, and by investigating the evolution of Holmes’s political thought, this Article identifies a specific reason for Holmes’s reversal that is both compelling and new.

Along the way, this Article makes the surprising revelation that Holmes never believed his influential marketplace-of-ideas concept—that is, his argument in Abrams that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” Instead, he only cared about what the intellectual elite thought. This Article also makes the surprising revelation that big-name journalist and wit H. L. Mencken pushed Holmes to adopt libertarian free speech rhetoric in the final stretch of his career. As a result, Mencken emerges as a new contributor to the rise of modern free speech law.

INTRODUCTION ................................................. 456
I. MENCKEN’S IDEA OF FREE SPEECH ............................... 464
II. THE SCHENCK AND ABRAMS CASES ............................... 473
III. THE DEMOCRATIC FEELING..................................... 488
CONCLUSION ................................................... 494

Taft . . . [invited us] to the White House to see moving pictures of a wolf hunt . . . I own as I grow older I dislike the cruelties of sport and in this case my sympathies were all with the wolf—when I saw a crowd of men, horses and dogs all after this poor little creature in his native home.

—Oliver Wendell Holmes in a letter to Ethel Scott

* Counsel for a federal agency that administers labor laws. G. Edward White, Allen Mendenhall, and Matthew Marro provided helpful comments.

1 SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 290 (1989) (quoting Letter from Oliver Wendell Holmes to Ethel Scott (Dec. 11, 1908)).

455
In early 1919, in what can only be described as a stunning letter, Justice Oliver Wendell Holmes—the fabled “great oracle” of American law—apologized to historian and politician Albert Beveridge, “I haven’t thought much on the subject [of judicial power] . . . .” Although Holmes had never doubted the Supreme Court’s authority to review the constitutionality of acts of Congress, he had always rejected the doctrine of judicial supremacy. That is, he did not believe the Court had the authority to “set its opinions about the correct meaning of the Constitution above those of Congress.” Instead, Holmes believed that when Congress passed a law, it had every right to embody its own constitutional vision in that law. The only question for the Court was whether it would carry it out. “I don’t think the court annuls an act [as unconstitutional],” Holmes explained to Beveridge. “It declines to enforce it—which for most purposes does annul it indirectly, but not I think in theory.”

Although Holmes did not believe he had thought extensively about judicial power at the time he wrote to Beveridge, he had by then compiled a decades-long record of thinking about legislative power. And his approach to legislative power was
unmistakably shaped by James Bradley Thayer,\textsuperscript{12} a law professor he knew both professionally and socially.\textsuperscript{13}

In his “classic”\textsuperscript{14} 1893 article \textit{The Origin and Scope of the American Doctrine of Constitutional Law}, Thayer asserted that when Congress passes a law, it has the “primary authority” to “put[,] an interpretation on the [C]onstitution.”\textsuperscript{15} That being so, he reasoned, the Court should not demand that Congress follow “one specific opinion” as to the meaning of broad constitutional language.\textsuperscript{16} The Constitution, after all, “often admits of different interpretations.”\textsuperscript{17} Instead, Thayer offered a proposition. The judiciary’s role, he argued, “is a secondary one.”\textsuperscript{18} It “is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which . . . legislative power . . . cannot [constitutionally] go.”\textsuperscript{19} And in order to ensure that the judiciary stuck to its role, Thayer offered a second proposition: a reasonableness test. “[The Court] can only disregard [an] Act,” Thayer maintained, “when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”\textsuperscript{20}

As it happened, Holmes’s Thayerian take on judicial review was on full display only months before he confided in Beveridge. In the 1918 case \textit{Hammer v. Dagenhart}, the Court considered the constitutionality of the Keating-Owen Child Labor Act of 1916,\textsuperscript{21} a federal law that banned the cross-border shipment of goods made by children.\textsuperscript{22} Although Justice William Day, writing for the majority, conceded that the

\textsuperscript{12} See Sanford Byron Gabin, \textit{Judicial Review, James Bradley Thayer, and the “Reasonable Doubt” Test}, 3 HASTINGS CONST. L.Q. 961, 961, 986, 988 (1976) (maintaining that Thayer’s views as to “the proper scope of judicial review” influenced Holmes); see also Yoder, \textit{supra} note 5, at 380–92 (discussing how Thayer influenced Holmes’s approach to constitutional questions).


\textsuperscript{16} Thayer, \textit{supra} note 15, at 144.

\textsuperscript{17} Id.

\textsuperscript{18} Id. at 148.

\textsuperscript{19} Id.

\textsuperscript{20} Id. at 144.


\textsuperscript{22} Specifically, the Child Labor Act prohibited the “shipment in interstate or foreign commerce” of “mine or quarry” products made by children under sixteen; and “mill, cannery, workshop, factory, or manufacturing” products made by children under fourteen or by children between fourteen and sixteen who worked “more than eight hours in any day, or more than six days in any week, or after [7:00 PM], or before [6:00 AM].” Child Labor Act at 675.
aim of the law was admirable, he nevertheless concluded that Congress lacked the power to enact it. The Child Labor Act, he wrote, both exceeded Congress’s power to regulate commerce, and indirectly invaded the states’ exclusive authority over “local trade and manufacture.”

Holmes, however, dissented. He began his opinion by identifying Congress’s general power, in accordance with Thayer’s first proposition. “Under the [Commerce Clause],” he maintained, “Congress . . . may carry out its views of public policy whatever indirect effect they may have upon the activities of the States.” He then applied Thayer’s second proposition by subjecting the law to a variation of Thayer’s reasonableness test. The reasonableness of a law could be established, Thayer taught, “where the court . . . finds [a challenged law] to be constitutional in its own opinion.” And in Holmes’s opinion, the Child Labor Act “was preeminently a case for upholding” Congress’s power. “[I]f there is any matter upon which civilized countries have agreed,” he reasoned, “it is the evil of premature and excessive child labor.” Having thus satisfied himself that Congress “kept within a reasonable interpretation of its power,” he concluded that the law was constitutional.

So in Hammer, Holmes was unafraid to place his comments on Congress’s authority front and center. Yet even so, he declined to mark the point at which the Supreme Court would push back. He never attempted, in other words, to identify where exactly he thought Congress’s Commerce Clause power came to an end. Holmes had always believed that the extent of a legislative power must be determined by “prick[ing] out [lines] by the gradual approach and contact of decisions on the opposing sides.” Such powers, he reasoned, implicated “conflicting interests[, the] balance [of which]”

23 Hammer, 247 U.S. at 275 (“That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit.”).
24 Id. at 277.
25 Id. at 269–76.
26 See id. at 277–81 (Holmes, J., dissenting).
27 See id. at 281.
28 Id.
29 Id. at 280.
30 Thayer, supra note 15, at 151.
31 Hammer, 247 U.S. at 280.
32 Id.
33 James B. Thayer, Constitutionality of Legislation: The Precise Question for a Court, Nation, Apr. 10, 1884, at 314.
34 Hammer, 247 U.S. at 281.
35 Noble State Bank v. Haskell, 219 U.S. 104, 112 (1911); see, e.g., Frost & Frost Trucking Co. v. R.R. Comm. of Cal., 271 U.S. 583, 601 (1926) (Holmes, J., dissenting) (“The power of the State is limited in its turn by the constitutional guaranties of private rights, and it often is a delicate matter to decide which interest preponderates . . . . The line cannot be drawn by generalities, but successive points in it must be fixed by weighing the particular facts.”).
cannot be determined by any general formula in advance.” So by the time Holmes wrote to Beveridge, he undoubtedly realized that *Hammer* was far from an isolated case. It was, in fact, emblematic of his entire approach to constitutional questions. As law professor Yosal Rogat observed in 1963, “[Holmes] habitually upheld government action by pointing to the most general powers that government had already exercised, giving little indication of how the Court might determine the limits of those powers, and sometimes leaving it unclear whether any such limits existed.”

Holmes was, in all likelihood, focused on judicial power at the time he wrote to Beveridge because he had some doubts about applying the Thayerian method to laws that restricted speech. He had just heard arguments in *Schenck v. United States*, a landmark case in which the Court considered a First Amendment challenge to the speech-restrictive Espionage Act of 1917. And only months earlier, in the summer of 1918, Judge Learned Hand debated him over the extent to which judges should use their power in free speech cases. Unlike most judges of the time, who agreed with the premises of judicial supremacy, Hand was a Thayerian who believed Congress should interpret the Constitution for itself. But during his debate with Holmes, he advocated for a modification of Thayer’s method. In reviewing a statute that criminalizes speech, he maintained, the question is not what a legislative majority could reasonably understand free speech to be, but rather what a person he...
considered to be enlightened and judicious could reasonably understand it to be.\(^4^4\)

It was, in effect, a countermajoritarian approach to freedom of expression.\(^4^5\)

So when Hand made his case to Holmes over the course of two letters, he argued
for a wide power of judicial review in free speech cases.\(^4^6\) In the first letter, Hand
argued that the majority of people cannot understand the value of opinions they dis-
agree with.\(^4^7\) Most people are such “poor . . . creature[s],” he maintained, they cannot
conceive of their “opinions” as being anything less than “absolutes.”\(^4^8\) Then in the sec-
ond letter, Hand offered a rationale as to why judges should push back on the popular
disregard for opposing views.\(^4^9\) Unless judges restrain the common bias against
dissent, he explained, speech-related prosecutions will tend to “intimidate,—throw a

\(^{4^4}\) In *Masses Publ’g Co. v. Patten*, 244 F. 535 (1917), Hand announced a direct-advocacy test
“[w]hen the question is of a statute constituting a crime.” *Id.* at 542. That is, “[c]ould any
reasonable man say . . . that the language directly advocated [the violation of law]?” *Id.* Later,
in a March 1919 letter, Hand told Holmes that judges should use his direct-advocacy test in
cases like *Debs v. United States*, 249 U.S. 211 (1919)—which involved statutory crimes and
speech—because juries are excitable and “clannish,” and because they “won’t much regard”
the subtleties of a more nuanced test. Letter from Learned Hand to Oliver Wendell Holmes
that jury members were not judges’ peers. “[A]re they societates perfectae?” he asked. *Id.* at 759.

\(^{4^5}\) Law professor Vincent Blasi has pointed out that in *Masses*, Hand treated free speech as
“a procedure essential to constituting a legitimate majority.” Vincent Blasi, *Learned Hand’s
Seven Other Ideas About the Freedom of Speech*, 50 ARIZ. ST. L.J. 717, 719 (2018) (emphasis
omitted). The effect of such a procedure, however, would be to place a limit on what the
majority can do. At any rate, there is no record of Hand making the procedural argument in
his subsequent debate with Holmes, even though Holmes told Hand he had read *Masses*. See
Letter from Oliver Wendell Holmes to Learned Hand (Feb. 25, 1919), in *GUNTHER*, *supra*
note 42, at 758, 758. Holmes may have rejected the procedural argument in an unrecorded
conversation as “strik[ing] at the sacred right to kill the other fellow when he disagrees.”
Letter from Learned Hand to Oliver Wendell Holmes (June 22, 1918), in *GUNTHER*, *supra*
note 42, at 755, 756. See generally Letter from Oliver Wendell Holmes to Harold Laski (Sept. 15,
1916), in 1 *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND
Hiss) [hereinafter 1 *HOLMES-LASKI LETTERS*] (“Law also as well as sovereignty is a fact. If
in fact Catholics or atheists are proscribed and the screws put on, it seems to me idle to say
that it [ought not be] because [it goes against] a theory that you and I happen to hold . . . .”).

\(^{4^6}\) As I argue in Part II, Part III, and in the Conclusion, Holmes announced that he had
changed his mind about free speech in November 1919 when he dissented in *Abrams v. United
States*, 250 U.S. 616, 628 (1919). Soon thereafter, Hand sent Holmes a third letter in which he
praised his *Abrams* dissent. See Letter from Learned Hand to Oliver Wendell Holmes
(Nov. 25, 1919), in *GUNTHER*, *supra* note 42, at 760, 760–61. In this Article, however, I
focus on the free speech ideas Hand presented to Holmes before his *Abrams* reversal.

\(^{4^7}\) Letter from Learned Hand to Oliver Wendell Holmes (Nov. 25, 1919), *supra* note 46,
at 760, 760–61.

\(^{4^8}\) Letter from Learned Hand to Oliver Wendell Holmes (June 22, 1918), *supra* note 45,
at 755–56.

\(^{4^9}\) Letter from Learned Hand to Oliver Wendell Holmes (late Mar. 1919), *supra* note 43,
at 758, 758–59.
scare into,—many a man who might moderate the storms of popular feeling.”

Hand’s basic message to Holmes, then, was that free speech in a Thayerian constitutional order presented a practical problem that lent itself to a practical solution.

Yet despite Hand’s best efforts, Holmes seemingly dismissed his perspective without a second thought. “[F]ree speech,” he bluntly told Hand, “stands no differently than freedom from vaccination.” In either case, he was convinced legislative majorities should have their way. To define free speech in a countermajoritarian fashion, Holmes argued a few years earlier, would be “logically indefensible.” As Hand would soon realize, Holmes’s instincts were set against making any changes to the Thayerian method in free speech cases. So it must have surprised Hand when, late the following year—in an Espionage Act case called Abrams v. United States—Holmes abandoned his Thayerian approach to free speech questions in order to endorse a countermajoritarian view. It was, in fact, a revolution in his understanding of judicial power that no one could have predicted, including perhaps even Holmes himself.

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50 Id. at 759. In his first letter, Hand offered an additional rationale for protecting dissent: future developments could always make dissenting views look better. See Letter from Learned Hand to Oliver Wendell Holmes (June 22, 1918), supra note 45, at 755–56. Hand, however, abandoned that argument by the time he wrote his second letter. See Letter from Learned Hand to Oliver Wendell Holmes (late Mar. 1919), supra note 43, at 758, 758–59 (declaring to repeat his rationale from June 1918).

51 Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), in GUNTHER, supra note 42, at 756, 757. In 1905, Holmes joined the Court’s decision in Jacobson v. Massachusetts, a case in which the Court upheld a Massachusetts measure requiring vaccinations against smallpox. See 197 U.S. 11, 25–30 (1905).

52 See supra Introduction (“Holmes believed that when Congress passed a law, it had every right to embody its own constitutional vision in that law.”); see also text accompanying notes 2–36.


54 Letter from Learned Hand to Oliver Wendell Holmes (late Mar. 1919), supra note 43, at 758 (prefacing his disagreement with Holmes’s approach to free speech law by saying it was “positively [his] last appearance in the role of liberator”).

55 250 U.S. 616 (1919).


57 Holmes never explained his Abrams transformation to anyone. See DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 355 (1997).
As Holmes admitted to British political theorist Harold Laski over a decade after his Abrams reversal, “I think the argument for free speech . . . is not entirely easy.”

Others, to be sure, have noticed that Abrams represents a transformation in Holmes’s understanding of judicial power. Why, recently asked the Cato Institute’s Ilya Shapiro and Michael Collins, did “Holmes put aside his majoritarian impulses to support a constitutional restriction on legislative action [in Abrams and related cases]? “That question,” law professor Thomas Healy wrote in 2014, “is one of the great legal and intellectual mysteries of the twentieth century.”

Previous investigations of Holmes’s Abrams transformation have sensibly considered whether and to what extent a number of his friends and acquaintances influenced him. After all, in the year and a half leading up to Abrams, Hand and a few others pressed Holmes on the need for a broad power of judicial review in free speech cases. But given that those investigations have had little success in identifying a specific reason for Holmes’s change of heart, I have taken a different approach.

In researching Holmes’s reversal on the issue of free speech, I paid particular attention to Holmes’s course of self-education in the months leading up to Abrams.

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59 See, e.g., Healy, supra note 53, at 73 (“Prior to [Abrams, Holmes] had been willing to accept governmental suppression of speech as simply another instance of the majority’s right to sacrifice the interests of the individual. From Abrams onward, however, he viewed speech . . . as a privileged activity that was protected from governmental regulation . . . .”).


61 Healy, supra note 53, at 36.


64 See, e.g., RABBAN, supra note 57, at 350 (“[S]o many factors . . . might have influenced [Holmes to change his mind in Abrams].”); ALSCHULER, supra note 62, at 77 (arguing that old age as well as “[s]everal voices may have contributed to” Holmes’s Abrams transformation); Feldman, supra note 56, at 229 (“No precise [reason] can be given [for Holmes’s Abrams reversal].”); Heyman, supra note 62, at 679 (“Although the causes of [Holmes’s Abrams] transformation have always been something of a mystery, several factors seem to have played a role.”); Healy, supra note 53, at 73 (arguing that Holmes’s “experience of debating the issue of free speech and watching his young friends attacked for their views . . . pushed” Holmes to change his approach to free speech in Abrams).
And what I found was a strong case that the decisive factor in his reversal was his reaction to a heretofore overlooked *New Republic* article entitled *Mr. Burleson, Espionagent*, which examined Postmaster General Albert Burleson’s censorship of the mail during World War I.

But before I explain why it makes sense to conclude that Holmes reacted to *Espionagent* by endorsing a countermajoritarian right to free speech, I begin, in Part I, with a discussion of Holmes’s free speech rhetoric after *Abrams*. I will demonstrate, for the first time, that Holmes’s free speech rhetoric during that period closely tracks that of H.L. Mencken—the ultralibertarian critic and newspaperman—in his 1919 book *Prejudices: First Series* ("Prejudices"). My purpose in doing so is to provide a sense of the free speech climate around the time of *Abrams*, and to show how Holmes thought of free speech in the wake of *Abrams*.

Then, in Part II, I present my first of two arguments that Holmes’s reaction to *Espionagent* explains his *Abrams* transformation. I will show that in *Schenck* Holmes was not concerned with keeping official versions of truth in check, whereas eight

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66 See generally Hard, supra note 65.

67 I am not aware of any scholar who has argued that Mencken’s free speech rhetoric influenced Holmes’s.

68 See, e.g., H.L. Mencken, *The Monthly Feuilleton*, SMART SET, Dec. 1922, at 140 ("I am, in brief, a libertarian of the most extreme variety . . . ."). In addition to libertarianism, Mencken also believed in ordered social hierarchies. See, e.g., H.L. Mencken, *The Mailed Fist and Its Prophet*, ATLANTIC MONTHLY, Nov. 1914, at 603 (praising Imperial Germany because there "prizes went, not to those men who had most skill at inflaming and deluding the rabble, but to those who could contribute most to the prosperity and security of the commonwealth").

In 1926, journalist and political commentator Walter Lippmann criticized Mencken for embracing both libertarianism and hierarchism: "The destruction of authority, of moral values, of cultural standards is the result of [widespread] liberty . . . I am amazed that [Mencken] does not see how fundamentally the spiritual disorder he fights against is the effect of that regime of liberty he fights for." Walter Lippmann, *H.L. Mencken*, SATURDAY REV. LITERATURE, Dec. 11, 1926, at 1, 414. Holmes would later express agreement with Lippmann’s criticism. See Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Sept. 18, 1927), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 205, 205 (Mark DeWolf Howe ed., 1942) [hereinafter 2 HOLMES-POLLOCK LETTERS].


70 H.L. MENCKEN, PREJUDICES: FIRST SERIES (CreateSpace Indep. Publ’g Platform 2016) (1919) [hereinafter PREJUDICES].
months later in Abrams he was. The reason Holmes suddenly became concerned with truth and authority, I will contend, is that Espionage made him worry that legislative majorities might someday clamp down on what the intellectual elite could read and say.

Finally, in Part III and in the Conclusion, I present my second of two arguments that Espionage sparked Holmes’s Abrams reversal. I will demonstrate, for the first time, that Holmes considered an empathetic impulse he called the democratic feeling to be an important precondition for liberty.71 But after he read Espionage, he became convinced that the country had temporarily lost sight of that impulse. So when he considered the Abrams case, he proceeded as though the legislative coalition behind the Espionage Act had actually wanted to protect a countermajoritarian right to free speech all along. In effect, Holmes bet on the idea that Americans were fundamentally decent and generous.

Given that Holmes’s Abrams dissent now defines the beginning of modern free speech law,72 I conclude that there is good reason to think that history has vindicated Holmes’s faith in the American people.

I. MENCKEN’S IDEA OF FREE SPEECH

Although Holmes never admitted to being influenced by Mencken’s Prejudices, in this Part, I will identify a number of factors that make that influence all but certain. Most importantly, Holmes made arguments in multiple opinions that fit neatly with the free speech commentary within the book’s pages. And even though Holmes’s Abrams conversion came just before his encounter with Prejudices, it pretty clearly influenced his thinking moving forward.

In the dead of January 1920, Holmes spent his evenings listening to his wife, Fanny Dixwell Holmes, read while he played solitaire.73 It was, by all accounts, a time-honored pastime in the Holmes household.74 On this occasion, Fanny read Mencken’s breakout book Prejudices—a collection of highbrow essays into which he had “insert[ed] some rat-poison.”76 Although Holmes would qualify his estimation

71 I am not aware of any scholar who has specifically connected Holmes’s notion of the democratic feeling—as I describe it in Part III and in the Conclusion—with his notion of liberty. 72 See, e.g., David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. CHI. L. REV. 1205, 1303 (1983). 73 Letter from Oliver Wendell Holmes to Harold Laski (Jan. 28, 1920), in 1 HOLMES-LASKI LETTERS, supra note 45, at 181, 181. 74 WHITE, supra note 13, at 108. 75 Letter from Oliver Wendell Holmes to Harold Laski (Jan. 28, 1920), supra note 73, at 181; see MARION E. RODGERS, MENCKEN: THE AMERICAN ICONOCLAST 197 (“Within weeks, Prejudices became a sensation on both sides of the Atlantic.”); TERRY TEACHOUT, THE SKEPTIC: A LIFE OF H.L. MENCKEN 161 (2002) (saying that Prejudices raised Mencken’s profile considerably). 76 RODGERS, supra note 75, at 196 (quoting Letter from H.L. Mencken to Ernest Boyd (June 6, 1919)).
of Mencken in the coming years, his response to Prejudices was positively effusive. “I took malevolent pleasure in . . . Prejudices,” he told Laski soon after he and Fanny finished the book. “[Mencken] I suspect would prove more or less a Philistine at bottom, but Lord with what malevolent joy do I see him smash round in the china shop . . . .” He wiped off poet Amy Lowell in a way that seemed to me deserved; and he takes writer George Ade seriously which again I like. “With various foibles,” Holmes concluded after processing the book for a few weeks, “he has a sense of reality and most of his prejudices I share.”

When Holmes encountered Mencken in early 1920, he had for some time been dealing with the fallout from the 1919 Espionage Act cases—a series of cases, including Abrams, in which the Court rejected First Amendment challenges to the Act. One of those cases in particular, Debs v. United States, must have weighed heavily on his mind. The Debs case centered on a speech given by powerful labor leader and Socialist Party activist, Eugene V. Debs, as the First World War raged on. The government argued that Debs’s speech violated two clauses of the Espionage Act which addressed causing insubordination and obstructing the recruiting services of the armed forces. In his appeal to the Supreme Court, Debs argued that


78 Letter from Oliver Wendell Holmes to Harold Laski (Jan. 28, 1920), supra note 73, at 181.

79 Letter from Oliver Wendell Holmes to Harold Laski (Feb. 10, 1920), in 1 HOLMES-LASKI LETTERS, supra note 45, at 183, 184.

80 Letter from Oliver Wendell Holmes to Harold Laski (Feb. 10, 1920), supra note 78, at 184.

81 Id. When Mencken’s diary was unsealed and published decades after his death, it became clear that he had a long history of using racial and ethnic slurs. See, e.g., Charles A. Fecher, Firestorm: The Publication of HLM’s Diary, 113 MENCKENIANA 1, 1–7 (1990); Vincent Fitzpatrick, After Such Knowledge, What Forgiveness?, 66 VA. Q. REV. 514, 516–18 (1990). However, there is no evidence that Holmes knew about that side of Mencken.


83 249 U.S. 211.

84 Three years after writing his Debs opinion, Holmes told Laski: “I . . . was glad at the release of Debs [from prison] . . . .” Letter from Oliver Wendell Holmes to Harold Laski (Jan. 15, 1922), in 1 HOLMES-LASKI LETTERS, supra note 45, at 305, 305–06.


86 Debs, 249 U.S. at 212.
those clauses violated the First Amendment. Holmes, however, writing for a unanimous Court, rejected Debs’s argument. “If a man thinks that in time of war the right of free speech carries the right to try to impede by discourse the raising of armies,” Holmes later explained to law professor John Henry Wigmore, “I am content to . . . say you . . . had better not monkey with the buzz saw.”

The Debs case was, according to law professor G. Edward White, “the cause célèbre of the Espionage Act cases.” It was, in the words of historian Robert Murray, nothing short of “spectacular.” A hero to both organized labor and socialists, Debs received “almost one million votes” in the 1920 presidential election, despite running his campaign from prison. Although most of the country both opposed Debs and approved of Holmes’s Debs opinion, Holmes soon began to complain of receiving “stupid letters of protest” from Debs’s supporters. “The Debs case,” Holmes told Wigmore, “seems to have let loose every damned fool in the country.” But Holmes’s critics did not stop there. Just before May Day in 1919, followers of anarchist Luigi Galleani attempted to mail bombs to Holmes and thirty-five of their other perceived enemies. Although six bombs were delivered, the one intended for Holmes was not. “I suppose it was the Debs incident,” Holmes wrote to Laski, “that secured me the honor of being among those destined to receive an explosive machine, stopped in the Post Office as you may [have] seen. It shows a want of intelligence in the senders.”

87 Id. at 212, 215.
88 Id. at 216–17.
90 WHITE, supra note 13, at 419.
92 See, e.g., FREEBERG, supra note 85, at 7–23 (describing Debs’s work as a union leader and socialist activist).
95 Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 5, 1919), in 2 HOLMES-POLLOCK LETTERS, supra note 68, at 7, 7; see also Letter from Oliver Wendell Holmes to Lewis Einstein (Apr. 5, 1919), in THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903–35, at 184, 184 (James Bishop Peabody ed., 1964) [hereinafter THE HOLMES-EINSTEIN LETTERS] (“I am receiving some singularly ignorant protests against a decision that I wrote sustaining a conviction of Debs, a labor agitator, for obstructing the recruiting service.”).
96 Letter from Oliver Wendell Holmes to John Henry Wigmore, supra note 89.
98 See id. at 36–37.
99 Letter from Oliver Wendell Holmes to Harold Laski (May 1, 1919), in 1 HOLMES-LASKI LETTERS, supra note 45, at 149, 149.
Given Holmes’s engagement with free speech issues just before Fanny read *Prejudices*, it is no wonder that he seemed to pay particular attention to the book’s scattered polemics against the free speech climate of the time—an era, of course, that was defined by the First World War and the First Red Scare, when the country was ruled by fear.100

Those attacks on the prevailing idea of free speech, for instance, played a significant role in *The Genealogy of Etiquette*, an essay about the work of psychologist Elsie Clews Parsons.101 There, Mencken highlighted Parsons’s thesis that “[t]he safety of human society lies in the assumption that every individual composing it, in a given situation, will act in a manner hitherto approved as seemly.”102 When someone instead acts in a “novel manner,” Mencken reported Parsons to have argued, “he . . . forces [those around him] to meet the new situation he has created by the exercise of independent thought. Such independent thought, to a good many men, is quite impossible, and . . . extremely painful.”103

After presenting Parsons’s doctrine, Mencken immediately used it to launch an attack on democratic habits of thought and behavior.104 “[P]eople in the mass,” Mencken protested, “cannot understand innovations that are genuinely novel and they don’t want to understand them; their one desire is to put them down.”105 “[T]he revolutionist in custom,” Mencken went on,

is opposed by a horde so vast that it is a practical impossibility for him, without complex and expensive machinery, to reach and convince all of its members, and even if he could reach them he would find most of them quite incapable of rising out of their accustomed grooves.106

“[I]t is the distinguishing mark of democratic societies,” Mencken decided in the end, “that they exalt the powers of the majority almost infinitely, and tend to deny the minority any rights whatever.”107

Holmes, for his part, registered his agreement only a year later, in the 1921 case *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*.108

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100 See generally ANN HAGEDORN, SAVAGE PEACE: HOPE AND FEAR IN AMERICA, 1919 (2007); MURRAY, supra note 91.


102 MENCKEN, supra note 101, at 85.

103 Id. at 86.

104 Id. at 86–87.

105 Id. at 87.

106 Id.

107 Id.

In *Burleson*, a socialist daily called the *Milwaukee Leader* sued Postmaster General Burleson because he ordered the revocation of its second-class mail privileges, which were defined in the Act of March 3, 1879. Burleson’s reason for issuing the order was that, in the past, the newspaper had run articles that were “nonmailable” within the meaning of the Espionage Act. The *Milwaukee Leader* challenged Burleson’s order, in part, by arguing that it violated its First Amendment right to free speech. Nevertheless, a majority of the Court ruled that Burleson’s order was “amply justified.”

Holmes, however, could not agree. In making his case, Holmes’s reasoning ran parallel with Mencken’s Parsons article. Holmes first echoed Mencken’s point that a dissenter is effectively silenced without access to an expansive communications system. “[T]he use of the mails,” Holmes asserted, “is almost as much a part of free speech as the right to use our tongues.” Then, mirroring Mencken’s condemnation of democratic societies on the grounds that they are poor guardians of counter-majoritarian rights, Holmes criticized the idea that the Espionage Act authorized Burleson’s action. Because “the power claimed by the Postmaster could [easily] be used to interfere with very sacred rights,” he explained, “it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man.” As a result, Holmes concluded that Burleson’s “refusal to allow” the newspaper to receive “the rate to which it was entitled . . . was unjustified by statute and was a serious attack upon [fundamental] liberties.”

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111 *Burleson*, 255 U.S. at 409. The *Milwaukee Leader*’s other arguments against Burleson’s order were that “it [did] not afford [the newspaper’s owner] a trial in a court of competent jurisdiction[,] . . . [it] is destructive of the rights of a free press, and deprives [the newspaper’s owner] of [their] property without due process of law.” *Id.*
112 *Id.* at 415.
113 See *id.* at 436–38 (Holmes, J., dissenting).
114 See *id.* at 437–38.
115 *Id.* at 437. Holmes, however, had expressed concern about “the enormous powers exercised by the post office” as early as 1914. Letter from Oliver Wendell Holmes to Edward Ross (May 20, 1914) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43026634/5 [https://perma.cc/C85Y-MMSZ]; see also sources cited *infra* note 119 (addressing Holmes’s attitude toward Post Office fraud orders).
116 *Burleson*, 255 U.S. at 437.
117 *Id.* at 438.
118 *Id.* at 437.
119 *Id.* at 438. Similarly, in the 1922 case *Leach v. Carlile*, Holmes thought two mail fraud laws violated the First Amendment in large part because the Post Office was “the principal means of speech with those who are not before our face.” 258 U.S. 138, 140–41 (1922) (Holmes, J., dissenting). Privately, Holmes thought the mail fraud laws had “been an instrument of more or less tyranny.” Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 26, 1922), in 2 HOMES-POLLOCK LETTERS, supra note 68, at 89, 90. “[The] post office
A few years later, in another free speech case, Holmes again took a Menckenian turn. In the Parsons essay, soon after discussing the barriers to being a cultural innovator in America, Mencken maintained—rather flamboyantly—that Americans hate new ideas.120 "The whole political history of United States is the history of . . . three ideas," each of which is "unsound," he wrote.121 To wit, "there is the fundamental idea" that the “exercise” of political power “by superior men is intrinsically immoral[,] . . . there is the primary doctrine that the possession of great wealth is a crime . . . [and] there is the ineradicable peasant suspicion of the man who is having a better time in the world."122 Because Americans find genuine innovations to be “incomprehensible [and] alarming,” Mencken added, they continuously back political movements that place “extra-gaudy label[s]” on their old sacred cows.123 Those worn-out notions, Mencken charged, are behind “the whole gasconade of ‘reform’ politics,” from “trust-busting” to racist demagoguery, as well as “the glittering pearls of the uplift, from Abolition to Prohibition.”124

After attacking Americans’ inability to get beyond their “circle of . . . elemental convictions,”125 Mencken went on to make a heated case against the American approach to free speech. Vladimir Lenin’s Bolsheviks, Mencken wrote—at a time when they were, without a doubt, public enemy number one126—actually agreed with the American idea of free speech.127 In fact, he continued, the Bolsheviks understood the American idea of free speech more clearly than Americans did.128 “Once they were in the saddle,” Mencken said, they “put the [American] principle into plain words.”129

[T]hey decreed the abolition of the old imperial censorship and announced that speech would be free henceforth—but only so long as it kept within the bounds of the Bolshevist revelation! In other words, any citizen was free to think and speak whatever he pleased—but only so long as it did not violate certain fundamental ideas. This is precisely the sort of freedom that has prevailed in the United States since the first days. It is the only sort of freedom comprehensible to the average man. It accurately reveals

fraud orders,” he told Laski in 1922, “[have] been on my conscience for years.” Letter from Oliver Wendell Holmes to Harold Laski (Mar. 11, 1922), in 1 HOLMES-LASKI LETTERS, supra note 45, at 313, 314.

120 MENCKEN, supra note 101, at 87.
121 Id. at 88.
122 Id.
123 Id. at 87–88.
124 Id. at 88.
125 Id.
126 See, e.g., HAGEDORN, supra note 100, at 345; MURRAY, supra note 91, at 166.
127 MENCKEN, supra note 101, at 89.
128 Id.
129 Id.
his constitutional inability to shake himself free from the illogical and often quite unintelligible prejudices, instincts and mental vices that condition ninety per cent. of all his thinking . . . .

In the 1925 case Gitlow v. New York, Holmes similarly described Americans as being narrow-minded and incapable of understanding freedom of expression.131 The Supreme Court in Gitlow considered an appeal from Benjamin Gitlow, a radical member of the Socialist Party,132 who had been convicted of “criminal anarchy” under New York’s Criminal Anarchy Law of 1902 for publishing a document called The Left Wing Manifesto.133 In the document, Gitlow “advocated . . . mass industrial revolts[,] . . . mass political strikes[,] and ‘revolutionary mass action’, for the purpose of . . . destroying the parliamentary state and establishing in its place . . . a ‘revolutionary dictatorship of the proletariat.’”134 Although the Court majority voted to uphold Gitlow’s conviction,135 Holmes refused to lend them his support.136

Holmes began his dissent by attacking the majority’s belief that Gitlow’s manifesto used “the language of direct incitement” rather than the language of mere “philosophical abstraction” or cold-headed prognostication.137 “Every idea is an incitement,” Holmes objected.138 The real issue before the Court, Holmes continued, was whether there was a genuine likelihood that Gitlow’s document would be “acted on.”139 Then, without providing any reasons, Holmes definitively shut down the possibility that Gitlow’s manifesto posed such a threat.140 “[W]hatever may be thought of the redundant discourse before us,” Holmes announced, “it had no chance of starting a present conflagration.”141 Apparently, Holmes thought it was obvious that the great majority of Americans had zero interest in Gitlow’s exotic message. The country, he believed, was deeply set against what he had to say.142 So in its basic logic, Holmes’s assumption recalled Mencken’s description of Americans as being reliably hidebound and reactionary.

130 Id.
131 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
132 See id. at 655 (majority opinion).
133 Id. at 654–55.
134 Id. at 657–58 (quoting The Left Wing Manifesto, REVOLUTIONARY AGE, July 5, 1919).
135 Id. at 672.
136 Id. (Holmes, J., dissenting).
137 Id. at 665 (majority opinion).
138 Id. at 673 (Holmes, J., dissenting).
139 Id.
140 See id.
141 Id.
142 See also Letter from Oliver Wendell Holmes to Lewis Einstein (Feb. 10, 1918), in THE HOLMES-EINSTEIN LETTERS, supra note 95, at 160, 161 (“I hardly think [the] chaos [of the Russian Revolution] is to be apprehended here.”); Letter from Oliver Wendell Holmes to Harold Laski (Sept. 17, 1920), in 1 HOLMES-LASKI LETTERS, supra note 45, at 222, 222 (“I cannot believe . . . this country will repeat [the Russian Revolution].”).
Then, in a final rhetorical flourish, Holmes presented a formulation of free speech that directly responded to Mencken’s complaint that even Lenin could endorse the American idea of free speech. “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community,” Holmes announced, “the only meaning of free speech is that they should be given their chance and have their way.” Holmes’s understanding of free speech, then, was the clear inverse of Mencken’s accounting of the American concept. Whereas Mencken believed that Congress and the courts had effectively confined free speech to a narrow range of sanctioned principles, Holmes thought the right to free speech should protect those who defied the conventional wisdom. As Holmes later explained his Gitlow opinion to diplomat Lewis Einstein, “[T]he usual notion is that you are free to say what you like if you don’t shock me. Of course the value of the constitutional right is only when you do shock people.”

In Prejudices, after winding down his attack on the American idea of free speech in the Parsons essay, Mencken picked it back up in An Unheeded Law-Giver, an essay in which he lamented Ralph Waldo Emerson’s relative lack of influence on American culture. “One discerns, in all right-thinking American criticism,” Mencken began, cautiously enough, “the doctrine that . . . Emerson was a great man.” Emerson, he acknowledged, has always been hailed as the “spokesman . . . of bold and forthright thinking, [and] of the unafraid statement of ideas.” But lurking just below the surface of all the high-minded praise, Mencken continued, lay a troubling problem. “What one notices about him chiefly is his lack of influence upon the main stream of American thought, such as it is. He had admirers and worshippers, but no apprentices.” None of Emerson’s stateside followers, Mencken regretted to say,

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143 Gitlow, 268 U.S. at 673. In 1992, Grey noted that in Gitlow, “[p]rotection of free discussion, even against the short-term majority, . . . became an aspect of a long-term commitment to majority rule itself.” Grey, supra note 56, at 533. But, he continued, “Holmes offered no argument to justify the presumption in favor of a potential long-term majority over the actual short-term one that had decreed the restriction of speech in question.” Id. That problem dissolves away, however, when you consider that, in Gitlow, Holmes was not making a point about majoritarianism, but was instead echoing Mencken’s rhetoric.

144 Letter from Oliver Wendell Holmes to Lewis Einstein (July 11, 1925), in The Holmes-Einstein Letters, supra note 95, at 243, 244.

145 Mencken, An Unheeded Law-Giver, in Prejudices, supra note 70, at 102, 102–04. The essay was first published as H.L. Mencken & George Jean Nathan, The Puritan Plato, Smart Set, July 1919, at 66.

146 Mencken, supra note 145, at 102. Aside from discussing the pressing topic of free speech, Mencken’s An Unheeded Law-Giver would have caught Holmes’s attention because it dealt with Emerson, who was Holmes’s only lifelong hero. See Letter from Oliver Wendell Holmes to Frederick Pollock (May 20, 1930), in 2 Holmes-Pollock Letters, supra note 68, at 264, 264.

147 Mencken, supra note 145, at 102.

148 Id.

149 Id.
has ever executed [his] command to “defer never to the popular cry.” On the contrary, it is precisely within the circle of Emersonian adulation that one finds the greatest tendency to test all ideas by their respectability, [and] to combat free thought as something intrinsically vicious . . . . [T]he country of this prophet of Man Thinking is precisely the country in which every sort of dissent from the current pishposh is combated most ferociously, and in which there is the most vigorous existing tendency to suppress free speech altogether.150

“[I]t would surely be absurd to hold,” Mencken observed at last, “that [Emerson] has colored and conditioned the main stream of American thought . . . .”151

Holmes, for his part, expressed similar sentiments in the 1929 case United States v. Schwimmer.152 There, the Supreme Court considered a petition for naturalization filed by a Hungarian national named Rosika Schwimmer.153 Under the Naturalization Act of 1906, Schwimmer was required to take an “oath . . . [to] support and defend the Constitution and laws of the United States against all enemies.”154 A district court, however, rejected her petition155 because, as an avowed pacifist, she was unwilling to “take up arms in defense of [the] country.”156 A majority of the Court agreed with the district court’s denial.157 According to the majority, “a fundamental principle of the Constitution” is that citizens have a duty, when necessary, “by force of arms to defend our government.”158

Holmes, however, saw the Constitution differently. He argued that if the Constitution stood for anything, it stood for the principle Mencken admired in Emerson—that is, the idea that people should be free to think for themselves.159 Although Schwimmer’s beliefs may “excite popular prejudice,”160 Holmes wrote in his dissent, the “foundation of the Constitution”161 rests beyond the reach of popular opinion. “[I]f there is any principle of the Constitution that more imperatively calls for

150 Id. at 103.
151 Id. at 104.
152 279 U.S. 644 (1929).
153 Id. at 646.
154 Id. (quoting the Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, 598).
155 Id. at 646.
156 Id. at 647.
157 Id. at 650.
158 Id.
159 Id. at 654–55 (Holmes, J., dissenting).
160 Id. at 654. In a letter to Laski, Holmes suggested that his observation about Schwimmer’s unpopular views included, at least in part, “her somewhat flamboyant declaration that she was an atheist.” Letter from Oliver Wendell Holmes to Harold Laski (June 15, 1929), in 2 HOLMES-LASKI LETTERS, supra note 58, at 270, 271.
161 Letter from Oliver Wendell Holmes to Harold Laski (Apr. 13, 1929), in 2 HOLMES-LASKI LETTERS, supra note 58, at 263, 263.
attachment than any other[,] it is the principle of free thought,” Holmes argued.162 “[N]ot free thought for those who agree with us[,] but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.”163

So by 1929, it seems, Holmes had completely fallen in line behind the free speech rhetoric Mencken had advanced in Prejudices. Like Mencken, Holmes argued that dissenters should have access to effective communications systems. Like Mencken, Holmes argued that free speech protections should extend to genuinely novel ideas. And like Mencken, Holmes argued that attacks on free thought should be put down. On free speech matters, Thayer’s venerable disciple had echoed the polemics of an ultra-libertarian editorial writer. It was a development that was, by any measure, unimaginable as late as November 9, 1919, the day before Holmes issued his Abrams dissent.164

II. THE SCHENCK AND ABRAMS CASES

“In his post-Abrams free speech opinions,” White observed in 1993, “Holmes regularly adopted speech-protective positions and thereby cemented his reputation among commentators as a libertarian on free speech issues.”165 Yet before Abrams, Holmes’s understanding of free speech was very different. As Schenck shows, he did not think of free speech as a right that was meant to “hobble . . . the majority,” as Mencken would have had it.166 Instead, he thought of free speech as a set of activities that happened to exist beyond the reach of legislative power.167 In this Part, I will track Holmes’s transformation after Schenck by doing two things. First, I will outline Holmes’s Thayerian understanding of free speech in Schenck.168 Then, I will describe how Holmes understood free speech in Abrams, the first opinion in which he endorsed a countermajoritarian right to free speech.169 In Abrams, I will show Holmes was influenced by Hand’s basic idea of modifying Thayer’s method on pragmatic grounds.

162 Schwimmer, 279 U.S. at 654–55.
163 Id. at 655.
165 WHITE, supra note 13, at 436–37.
166 H.L. Mencken, Mr. Justice Holmes, AM. MERCURY, May 1930, at 122–23. See generally RABBAN, supra note 57, at 131 (explaining “[t]hroughout the period from the Civil War to World War I, the overwhelming majority of decisions in all jurisdictions rejected free speech claims, often by ignoring their existence. . . . No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case”).
167 As political science professor H.L. Pohlman explained in 1991, “[Holmes] defined free speech negatively, not positively . . . . What constituted free speech was what was left over.” H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION 10 (1991). Pohlman, however, does not think Holmes changed his mind about free speech in Abrams. See id. at 255.
168 See generally Collins, supra note 56, at 95–219 (discussing Holmes’s free speech jurisprudence before Schenck).
169 See Grey, supra note 56, at 533.
In *Schenck*, the Justice Department accused two Socialist Party officials—Charles Schenck and Elizabeth Baer\(^{170}\)—of printing and distributing circulars to a number of men who had been drafted under the Selective Service Act of 1917.\(^{171}\) Those circulars, the Justice Department charged, were “calculated to cause . . . insubordination and obstruction” in the armed forces.\(^{172}\) A jury eventually convicted Schenck and Baer of conspiring to violate Title I, Section 3 of the Espionage Act,\(^{173}\) which made it illegal, “when the United States is at war,” to “willfully cause or attempt to cause insubordination . . . in the military or naval forces of the United States, or [to] willfully obstruct the recruiting or enlistment service of the United States.”\(^{174}\) Schenck’s and Baer’s appeals to the Supreme Court relied, in part, on the First Amendment.\(^{175}\)

In his opinion for the Court, Holmes reduced the case to two issues, both of which fit comfortably into his habit of thinking about legislative authority. The first issue was whether Congress had the power to prohibit conspiracies to obstruct the recruiting service.\(^{176}\) Holmes resolved the issue by relying on two decisions he had joined the previous year.\(^{177}\) In *Arver v. United States* (Selective Draft Law Cases)—a decision which addressed a handful of similar cases—Chief Justice Edward Douglass White ruled that the Selective Draft Act was within Congress’s power under Article I, Section 8 of the Constitution, which includes its power to declare war and to raise and support armies.\(^{178}\) And in *Goldman v. United States*, White ruled that a crime could result from an unsuccessful conspiracy to “induce persons” to “fail[] to register” for the draft when the Selective Draft Act required them to do so.\(^{179}\) Taken together, the

\(^{170}\) Schenck v. United States, 249 U.S. 47, 49 (1919); see Collins, supra note 56, at 219–20 (discussing the defendants in *Schenck*).

\(^{171}\) Schenck, 249 U.S. at 49–51. See generally Selective Service Act of 1917, ch. 15, 40 Stat. 76 (1917).

\(^{172}\) Schenck, 249 U.S. at 49. See id. at 48–49.

\(^{173}\) Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (1917). The jury also convicted Schenck and Baer of “conspiring to . . . use the mails” to distribute those circulars, which they deemed to be “nonmailable” under Title 12, Section 2 of the Act, and of “unlawful use of the mails.” *Schenck*, 249 U.S. at 49; see also Espionage Act of 1917 at 230–31.

\(^{174}\) Schenck, 249 U.S. at 49. Schenck and Baer also argued that there was insufficient evidence that they conspired to distribute the circulars. *Id.* Holmes rejected that argument. *Id.* at 49–50. In addition, Schenck and Baer “objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears.” *Id.* at 50. Holmes rejected that argument as well. *Id.*

\(^{175}\) See id. at 52–53.

\(^{176}\) In *Schenck*, Holmes specifically relied on White’s 1918 opinion in *Goldman v. United States*. See id. at 52 (citing Goldman v. United States, 245 U.S. 474 (1918)). In *Goldman*, in turn, White relied in part on his own earlier 1918 opinion in *Arver v. United States*. See *Goldman*, 249 U.S. at 476 (citing Arver v. United States (Selective Draft Law Cases), 245 U.S. 366 (1918)).

\(^{177}\) Selective Draft Law Cases, 245 U.S. at 377 (citing U.S. CONST. art. I, § 8).

\(^{178}\) Goldman, 245 U.S. at 475, 477 (citing United States v. Rabinowich, 238 U.S. 78, 85–86 (1915)).
Selective Draft Law Cases and Goldman stood for the idea that Congress had the power to prohibit conspiracies to obstruct the draft, even if those conspiracies were not ultimately successful.

So when Holmes considered the first issue in Schenck—whether Congress had the power to prohibit conspiracies to obstruct the recruiting service—he thought the answer was obvious: Congress had such power.  

It did not matter that the Selective Draft Act addressed obstructions of the draft while the Espionage Act addressed obstructions of the recruiting service. “[R]ecruiting[,]” Holmes reasoned, “is gaining fresh supplies for the forces, as well by draft as otherwise.”

Then, after determining that Schenck’s and Baer’s activities amounted to a conspiracy to obstruct the recruiting service, Holmes went on to address the second issue: whether their particular conspiracy was protected by the First Amendment. Notably, when Holmes tackled the second issue, his analysis did not begin with the right to free speech. He did not, in other words, identify the extent to which the First Amendment protected opposition to the recruiting service. Instead, in keeping with his longstanding Thayerianism, he focused on Congress’s authority. For Holmes, resolving the free speech issue meant deciding whether Schenck’s and Baer’s activities fell inside or outside Congress’s power to prohibit conspiracies to obstruct the recruiting service.

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180 See Schenck, 249 U.S. at 52–53.
181 See id.
182 Id. at 53. Privately, Holmes justified the Title I, Section 3 clauses at issue in Thayerian terms. As he shared with Laski in May 1919:

I think the clauses under consideration [in Schenck and Debs] not only were constitutional but were proper enough while the war was on. When people are putting out all their energies in battle I don’t think it unreasonable to say we won’t have obstacles intentionally put in the way of raising troops—by persuasion any more than by force.


183 In Schenck, Holmes reduced the Goldman holding (that a crime could result from an unsuccessful conspiracy to induce persons to fail to register for the draft) to a compressed formula: “If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.” Schenck, 249 U.S. at 52. And after looking at the facts in Schenck, Holmes thought that formula applied: “[T]he document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.” Id. at 51.

184 See id. at 51–52.
185 See id.
186 See id. at 52.
187 See id.
As in *Hammer*—in which Holmes ruled on whether a law fell within Congress’s Commerce Clause power without identifying the limits of that power—Holmes’s approach to the question of whether Congress had the power to punish Schenck’s and Baer’s conspiracy demonstrated a disinclination to create broad legal distinctions. “[Holmes] does not think it is possible,” law professor Zechariah Chafee reported in the fall of 1919, not long after chatting with him about the law of free speech, “to draw any limit to the First Amendment but simply to indicate cases on the one side or the other of the line.” Holmes resolved the constitutional question before him in *Schenck*, then, as if it were a single data point that would inevitably be joined by many more.

“We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights,” Holmes began.

But the character of every act depends upon the circumstances in which it is done. . . . When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

In just a few broad strokes, then, Holmes had placed the circulars within Congress’s power to prohibit conspiracies to obstruct the recruiting service, and outside the protection of the First Amendment. Schenck’s and Baer’s free speech argument, he believed, had to fail.

Despite the similarities between *Hammer* and *Schenck*, however, they differed in a big way. In *Hammer*, Holmes understandably had nothing to add after resolving the dispute before him. But in *Schenck*, he tacked on an ambitious second act; incredibly, he set out to alter the judiciary’s entire approach to mediating between legislative power and the right to free speech. In the half-century before *Schenck*, law professor David Rabban has explained:

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189 See HEALY, supra note 63, at 154–59 (describing the events leading to and the events of the day of a July 1919 meeting between Chafee and Holmes at the summer residence of Harold Laski).

190 Letter from Zechariah Chafee, Jr. to Judge Charles F. Amidon (Sept. 30, 1919), supra note 188.

191 *Schenck*, 249 U.S. at 52.

192 Id.

193 See HEALY, supra note 63, at 243 (quoting Letter from Oliver Wendell Holmes to Zechariah Chafee, Jr. (June 12, 1922)) (saying that he “thought . . . out” the free speech framework he laid out in *Schenck* “unhelped”).
The most pervasive and fundamental judicial approach to free speech issues . . . used the bad tendency test derived from Sir William Blackstone’s Commentaries on the English common law in the eighteenth century. Many decisions . . . followed Blackstone’s conclusion that the legal right of free speech precludes prior restraints, but permits the punishment of publications for their tendency to harm the public welfare.\footnote{RABBAN, supra note 57, at 132.}

And so the targets of Holmes’s second act were Blackstone’s prior restraints doctrine and bad-tendency test—both of which were ubiquitous, and both of which Holmes had previously “taken . . . as well founded.”\footnote{Letter from Oliver Wendell Holmes to Zechariah Chafee (June 12, 1922), supra note 193, at 243; see also Patterson v. Colorado, 205 U.S. 454, 465 (1907) (“[T]he main purpose of [the rights of free speech and a free press] was to prevent . . . ‘previous restraints’ upon publications . . . but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”) (emphasis omitted).} Although by 1922 Holmes could not remember who had “taught” him Blackstone was mistaken, he recalled being convinced nonetheless.\footnote{See Letter from Oliver Wendell Holmes to Zechariah Chafee, Jr., supra note 193, at 243.}

In upending Blackstone, Holmes began by casually brushing aside the doctrine of prior restraints. “It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . .”\footnote{See Schenck, 249 U.S. at 51–52.} Then, with a simple decree, he replaced Blackstone’s deferential bad tendency test\footnote{See, e.g., WHITE, supra note 13, at 350 (describing the bad tendency test as a “standard of judicial review [that] was minimal”).} with a more demanding guideline, his famous clear-and-present-danger framework.\footnote{See Thomas Healy, Anxiety and Influence: Learned Hand and the Making of a Free Speech Dissent, 50 ARIZ. STATE L.J. 803, 804 (2018) (“[I]n the months immediately following World War I, [Holmes] mov[ed] from the conservative Blackstonian position . . . to the then-radical position that speech is protected unless it poses a clear and present danger.”). Some commentators, however, do not believe that Holmes’s clear-and-present-danger test significantly altered the bad tendency test. For a discussion of the debate, see Collins, supra note 56, at 229, 260.} “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,” Holmes began.\footnote{Schenck, 249 U.S. at 52.}

It does not even protect a man from [a labor] injunction [on the theory that his] words . . . may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a
clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.201

Unsurprisingly, Holmes’s newly established framework did little to curtail legislative power. “When [Holmes] chose the uncertain metric of ‘clear and present danger,’” Rogat once observed, “his deference to dominant social forces prevailed.”202 Rather than establishing a sharp line that Congress could not cross, Holmes’s framework merely set up hazy guideposts for deciding, in future cases, whether particular words in particular cases ran afoul of Congress’s rightful authority. Any application of the clear-and-present-danger framework, Holmes explained in Schenck, “is a question of proximity and degree.”203

A week after deciding Schenck, on March 10, 1919, Holmes handed down opinions for the Court in two more Espionage Act cases, Frohwerk v. United States204 and Debs v. United States.205 In both cases, Holmes upheld convictions under Title I, Section 3,206 just as he had done in Schenck. And in both cases, Holmes rejected free speech objections by relying on his free speech analysis in Schenck.207 That being so, it would be reasonable to assume that Holmes would continue to rely on Schenck moving forward—especially in a case like Abrams, which he considered only eight months later, and which involved another free speech challenge to Title I, Section 3.208 But in Abrams, of course, he rethought his entire approach to free speech law.

Perhaps the most conspicuous feature of Abrams—in part because it is entirely missing from Schenck—is Holmes’s focus on the benefits of free speech.209 After

201 Id. (citation omitted).
202 Yosal Rogat & James M. O’Fallon, Justice Holmes: A Dissenting Opinion—The Speech Cases, 36 STAN. L. REV. 1349, 1382 (1984) (describing the significance of Holmes’s clear-and-present-danger framework before Abrams); see also Gunther, supra note 40, at 736 (“Holmes, at the time of Schenck . . . , is revealed as . . . blind[] to any justification for curtailing majority suppression of dissent.”).
203 Schenck, 249 U.S. at 52.
204 249 U.S. 204 (1919).
205 249 U.S. 211 (1919).
206 Frohwerk, 249 U.S. at 205, 206–10; Debs, 249 U.S. at 212, 215–17. In Frohwerk, a newspaper editor named Jacob Frohwerk was convicted of violating Title I, Section 3 on twelve separate occasions, and of conspiring to violate it. See Frohwerk, 249 U.S. at 205. In Debs, Debs was also convicted of violating Title I, Section 3. See Debs, 249 U.S. at 212.
207 Frohwerk, 249 U.S. at 206–09; Debs, 249 U.S. at 215; see also Letter from Oliver Wendell Holmes to Herbert Croly (May 12, 1919), supra note 182, at 152, 153 (“The constitutionality of the [Espionage Act] so far as the clauses concerning obstructing the recruiting service are involved was passed upon in Schenck v. U.S. and so all that was needed in the Debs case was to refer to that decision . . . .”).
arguing that “truth” amounts to whatever propositions have at least some popular support, Holmes maintained that that notion of truth “is the only ground upon which [our] wishes safely can be carried out.” According to law professor Vincent Blasi, with that comment, Holmes revealed that he was worried “about the risk of desires being thwarted by wielders of power who” rely on “some [alternative] notion of truth.” Holmes’s interest in truth and authority is all the more remarkable because it did not seem to stem from the Abrams case at all. Far from having any authority, the Abrams defendants were struggling young activists who promoted the cause of Bolshevism. They were, in other words, marginal people who hawked a widely despised philosophy.

Holmes’s newfound concern with truth and authority was most likely sparked by the New Republic’s May 10, 1919, article Espionage. In the article, journalist William Hard examined the phenomenon of Burleson exercising his power under the Espionage Act, as amended by the Sedition Act of 1918, to censor the mail “when the United States is at war.” Burleson, Hard was unhappy to report, had not shirked his duties. When particular facts clashed with the government’s version of reality, he did not hesitate to wipe them out. Not even George Washington was safe from his eraser. But in carrying out his duties, Hard explained, Burleson’s actions fell entirely “within our spirit and within our law.” Not only did the courts “approve[] Mr. Burleson,” Hard pointed out, but the country “applauded [him]. For one letter coming to Washington resenting suppressions of speech, there were ten

Schenck, Holmes identified “just the costs of free speech,” while in Abrams he “can be seen sketching in the other side of the cost-benefit algorithm”).
urging more suppressions." If anything, Hard concluded, Burleson’s behavior simply uncovered a bug in the administration of any program designed to control thought. While “[c]ensorship may start as the creature of popular impulse,” Hard argued, it inevitably “finishes by making thought. . . . We end by being all of us outwitted by the officeholders.”

Soon after reading the article, Holmes admitted to Laski, “Few can sympathize more than I do with Mr. Hard’s general way of thinking on the subject.” The story of Burleson must have caught Holmes’s attention because he had always prized intellectualism above all else. There were certain “ideas that make life worth living,” he told British jurist Frederick Pollock in 1929, and “[i]t is proper that a gentleman should have read certain books before he dies.”

In the years leading up to Hard’s article, however, Holmes felt “a vague apprehension” that those ideas would be “dimmed and diminished” by the political movements he saw bubbling up all around him. “[O]h how little I care for the . . . trend . . . to make other people better,” Holmes told Laski in late 1916, “with teetotalism and white slave laws that make felons of young men . . . for crossing a state line with a girl.” “[W]e are learning,” he told his friend Clara Sherwood Stevens months earlier, “that most great things are done by . . . the despotism of a dominant generally accepted ideal that does not tolerate difference and laughs at free speech—The Catholic Church—The Puritans—Islam—these did things.” Holmes’s fear was so

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223 Id.
224 See id. at 44–45.
225 Id. at 44.
226 Id. at 45.
227 Letter from Oliver Wendell Holmes to Herbert Croly (May 12, 1919), supra note 182, at 152.
229 Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 5, 1929), in 2 HOLMES–POLLOCK LETTERS, supra note 68, at 238, 239.
230 Letter from Oliver Wendell Holmes to Lewis Einstein (Feb. 10, 1908), in THE HOLMES–EINSTEIN LETTERS, supra note 95, at 33, 33; see also MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841–1870, at 71 (1957) (quoting Letter from Oliver Wendell Holmes to Albert Beveridge (Feb. 8, 1927) and Letter from Oliver Wendell Holmes to Albert Beveridge (Nov. 17, 1926)) (saying the South’s elite during the Civil War “knew nothing of the ideas that make the life of the few thousands that may be called civilized” and calling Southerners “usually half-educated”).
231 Letter from Oliver Wendell Holmes to Lewis Einstein (Feb. 10, 1918), supra note 142, at 160, 161.
present to his mind that in 1928, when he reviewed a labor group’s report on the Soviet Union, his instinct was to see in it the lesson that the ideas he lived for could be made officially infamous in short order:

Perhaps it comes down to the question . . . of what kind of world you want. Personally I do not prefer a world with a hundred million bores in it to one with ten. The fewer the people who do not contribute beauty or thought, the better to my fancy. I perfectly realize that the other fellers feel otherwise and very likely would prefer to get rid of me and all my kind. Perhaps they will . . . as I suppose they did in Russia.234

Heading into Abrams, then, it made sense that Holmes would have truth and authority on his mind. Hard’s article confirmed what he had already been feeling. Legislative majorities, whether by design or by unintentional overreach, might someday find a way to suffocate his life and the lives of those he most respected.

 Abrams involved five young radicals—Jacob Abrams, Hyman Lachowsky, Samuel Lipman, Hyman Rosansky, and Mollie Steimer—all of whom had emigrated from Russia.235 The record in the case showed that in the summer of 1918, they had “united to print and distribute” two circulars, one in English and one in Yiddish.236 The English circular criticized President Woodrow Wilson’s silence about America’s role in the international military intervention in the ongoing Russian Revolution, and advanced the idea that capitalism and German militarism were the common enemies of both “workers” and the Bolsheviks.237 The Yiddish circular, meanwhile, warned “[w]orkers” and Russian immigrants that it harmed the Bolshevik cause when they bought war bonds or worked in armament factories, and called for a general strike in response to the Russian intervention.238

After investigating the group’s activities, the Justice Department charged each of the five with four counts of violating Title I, Section 3 of the Espionage Act, as amended by the Sedition Act of 1918,239 and a jury convicted them on all counts.240 However, both Justice John Hessin Clarke, writing for the majority, and Holmes, writing in dissent, focused their attention on the third and fourth counts, which they

234 Letter from Oliver Wendell Holmes to Harold Laski (July 8, 1928), in 2 HOLMES-LASKI LETTERS, supra note 58, at 219, 220.
235 See Abrams v. United States, 250 U.S. 616, 617 (1919); POLENBERG, supra note 214, at 145–46. A sixth defendant—Jacob Schwartz—died the night before the trial began, and a seventh defendant—Gabriel Prober—was acquitted at trial. See id. at 88, 138.
236 Abrams, 250 U.S. at 618; see id. at 619–22 (discussing the circulars at issue).
237 See id. at 619–20.
238 See id. at 620–22.
240 See Abrams, 250 U.S. at 616–17.
agreed were the strongest.241 The third count alleged a conspiracy “to encourage resistance to the United States” in the war with Germany, and “to attempt to effectuate the purpose by publishing” both circulars.242 And the fourth count alleged a “conspiracy to incite curtailment of production of things necessary to the prosecution of the war” with Germany, and “to attempt to accomplish it by publishing” the Yiddish circular.243

In their appeal to the Court, the defendants’ “chief[]” argument was that “there [was] no substantial evidence in the record to support” their convictions, and that, as a result, the trial judge “erroneously denied” their motion for a directed verdict.244 In response, Holmes considered the narrow issue of whether there was evidence that the group’s activities fell within the prohibitions of the Title I, Section 3 clauses on which the third and fourth counts were based.245 Although the majority ruled that there was “much persuasive evidence . . . before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment,” Holmes disagreed. Given the record, he did not think it was possible for anyone to convict the five radicals on either count.246

Holmes began his analysis by noting that the two Title I, Section 3 clauses at issue required an intent to interfere with the war against Germany.247 And as a matter of statutory interpretation, Holmes believed the term intent had to be understood “in a strict and accurate sense.”248 The intent required by the statute, Holmes argued, is an “intent to produce a consequence . . . [that] is the aim of the deed.”249 So when Holmes considered whether any evidence supported convictions under the third and fourth counts, he looked for proof that the defendants’ “proximate motive” was to interfere with the war against Germany.250 But he found none.251 As he explained his

241 Id. at 623–24; id. at 626 (Holmes, J., dissenting). The first count alleged “a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States.” Id. at 624. The second count alleged “a conspiracy pending the war to publish language intended to bring the form of government into contempt.” Id.
242 Id. (Holmes, J., dissenting).
243 Id. at 624–25.
244 Id. at 619 (majority opinion).
245 See id. at 626–29 (Holmes, J., dissenting).
246 Id. at 624 (majority opinion).
247 See id. at 626–29 (Holmes, J., dissenting).
249 Abrams, 250 U.S. at 627 (Holmes, J., dissenting).
250 Id.
251 Id. at 627–629.
reasoning to Pollock shortly after writing his dissent, “[A]n actual intent to hinder the U.S. in its war with Germany must be proved. . . . [I]t seems to me plain that the only object of the leaflets was to hinder our interference with Russia.”  

After answering the defendants’ evidentiary argument, Holmes could have easily put his pen down. Once he decided the Espionage Act did not address their conduct, after all, their convictions could not stand. Nevertheless, Holmes went on to address a second argument the five had only “somewhat faintly” put forward. Specifically, they had argued that the “acts charged . . . were not unlawful because” they were protected by the First Amendment. Whereas Clarke promptly dismissed the argument as having been “definitely negatived” by Schenck and Frohwerk, Holmes used it as an occasion to announce how he would apply, from then on, the clear-and-present-danger framework he had created. The framework, he contended, should be applied in a way that advanced the rationality of a civilized person. On the issue of free speech, the old Thayerian amazingly went to war for the enlightened few.

Holmes’s argument for taking the clear-and-present-danger framework from the hands of legislative majorities was, at its core, an exercise in dissimulation. Holmes began with his usual defense of the majority’s right to define free speech. “Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power[,] and want a certain result with all your heart[,] you naturally express your wishes in law[,] and sweep away all opposition.” But then he immediately responded to his settled view with a counterview.

evidence the defendants encouraged such resistance. Id. Meanwhile, the fourth count depended, in part, on whether the defendants attempted to “incite curtailment of production of things necessary” for the war effort. Id. at 625. Holmes argued that “[a]n actual intent . . . is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime.” Id. at 628 (citing Swift & Co. v. United States, 196 U.S. 375, 396 (1905)). However, he did not think there was any evidence the defendants acted with such intent. Id.  
253 Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 14, 1919), in 2 HOMES-POLLOCK LETTERS, supra note 68, at 32, 32; see Letter from Oliver Wendell Holmes to Harold Laski (Dec. 27, 1919), in 1 HOMES-LASKI LETTERS, supra note 45, at 175, 175 (“It was . . . necessary that the overt act laid should be proved to be done with intent to forward a conspiracy to interfere with the war with Germany—and I thought it plain on the face of the document that it was written [with another view].”).  
254 Abrams, 250 U.S. at 618 (majority opinion).  
255 Id. The five also argued that “the entire Espionage Act [was] unconstitutional.” Id. at 619. Clarke rejected that argument, id., while Holmes never addressed it.  
256 Id.  
257 See id. at 627–28 (Holmes, J., dissenting).  
258 See id. at 630.  
259 See id.  
260 Id.; see, e.g., Letter from Oliver Wendell Holmes to Harold Laski (July 7, 1918), in 1 HOMES-LASKI LETTERS, supra note 45, at 116, 116 (repeating the argument); Letter from Oliver Wendell Holmes to Harold Laski (Oct. 26, 1919), in 1 HOMES-LASKI LETTERS, supra note 45, at 165, 165 (making the same argument).
In kicking off what has become one of “the most frequently quoted” passages in free speech law, Holmes described how hypothetical people could come to value tolerance more than democratic power:

[When men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .]

Because Holmes’s argument for tolerance echoed the ideas of British philosopher John Stuart Mill—and because Holmes reread Mill only months before Abrams scholars have naturally assumed that he had finally moved toward Mill’s way of thinking. His letters, however, prove otherwise. The famous justification for tolerance Holmes advanced in Abrams was a mere stand-in for his own.


262 Abrams, 250 U.S. at 630. Some commentators have taken issue with Holmes’s marketplace metaphor because the market does not always produce truth. See, e.g., STEVEN H. SHIFFRIN, DISSERTATION, INJUSTICE, AND THE MEANINGS OF AMERICA 6 (1999); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 26 (1993). Holmes, however, simply wanted to combat official versions of truth by pushing for versions of truth that had been “accepted in the competition of the market.” Abrams, 250 U.S. at 630. As Blasi put it: [A]lthough an open marketplace of ideas might not lead to truth, any governmental intervention in the market is likely to exacerbate rather than ameliorate the preexisting distortions. . . . [A] fully implemented policy of selective suppression permits some orthodoxies to be perpetuated in the face of the most irrefutable evidence of their falsity.


263 See Irene M. Ten Cate, Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses, 22 YALE J. & HUMANS. 35, 38 (2010) (noting the “similarities” between Mill’s justification for free speech in his book, ON LIBERTY, and Holmes’s justification in Abrams). See generally JOHN STUART MILL, ON LIBERTY 43 (2d ed. 1863) (“The beliefs which we have [the] most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded.”).

264 Letter from Oliver Wendell Holmes to Harold Laski (Feb. 28, 1919), in 1 HOLMES-LASKI LETTERS, supra note 45, at 138, 139.

Both before and after Abrams, Holmes subjected proposed truths to two related tests, neither of which appears in his dissent. The first test was straightforward; it merely asked what, at any moment, could he not help but believe. That test, in turn, verified his personal “can’t helps.” By contrast, Holmes’s second test of truth required a more delicate social calculation. As he explained to philosopher M. C. Otto in 1929, “When I go beyond my [personal] can’t help[s] in saying a thing is true, I mean that I believe that in the long run those who are as civilized and intelligent as I am will believe it.” And those beliefs, he told Einstein in 1913, are “the can’t helps that are common to what we consider the better part of the human race.”

Given that Holmes’s real social test of truth used elite opinion as a reference point (rather than a general competition of the market), his argument for preferring tolerance to democratic power takes on a whole new significance. “[N]otice how large a part of the fighting faiths of men depend on men having been shaped by them for a considerable time,” he explained to Einstein in 1913, “before [they] ever heard [them] questioned.” “[F]allacies that one would think . . . [were] smashed a century ago,” he told his friend Nina Gray a year later, “are the breath of the nostrils for politicians.” Although Holmes realized that elite opinion did not

266 See supra note 253 and accompanying text. In a 1929 letter to philosophy professor M.C. Otto, Holmes plainly outlined his two tests of truth. Notes and News, 38 J. PHL. 389, 391–92 (1941) (citing Letter from Oliver Wendell Holmes to M.C. Otto (Sept. 26, 1929)). However, I am not aware of any scholar who has noted that Holmes’s discussion of truth in the letter clashes with the competition-of-the-market test of truth he set out in Abrams.

267 See Letter from Oliver Wendell Holmes to Lewis Einstein (June 17, 1908), in THE HOLMES-EINSTEIN LETTERS, supra note 95, at 34, 36; Letter from Oliver Wendell Holmes to M.C. Otto (Sept. 26, 1929), supra note 266, at 391.

268 Letter from Oliver Wendell Holmes to Lewis Einstein (June 17, 1908), supra note 267, at 36; see Letter from Oliver Wendell Holmes to M.C. Otto (Sept. 26, 1929), supra note 266, at 391.

269 Letter from Oliver Wendell Holmes to M.C. Otto (Sept. 26, 1929), supra note 266, at 392.

270 Letter from Oliver Wendell Holmes to Lewis Einstein (Nov. 9, 1913), in THE HOLMES-EINSTEIN LETTERS, supra note 95, at 81, 82 (italics removed).

271 Id.

272 Letter from Oliver Wendell Holmes to Alice S. Green (Nov. 9, 1913), in THE ESSENTIAL HOLMES, supra note 4, at 22, 23. An unpublished interpretation of Holmes’s handwritten November 9, 1913 letter to Einstein uses similar language: “[N]otice how large a part of the fighting faiths of men depend on men having been shaped by them for a considerable time before they ever heard [them] question[ed].” Letter from Oliver Wendell Holmes to Lewis Einstein (Nov. 9, 1913), supra note 270.

always win the day, he thought it exerted a positive influence on popular opinion. In [W]ith effervescing opinions, as with the not yet forgotten champagnes,” he told the Harvard Liberal Club in 1920, “the quickest way to let them get flat is to let them get exposed to the air.” In Abrams, then, Holmes must have advocated for tolerance in order to protect the intellectual elite.

Once Holmes had set up tolerance as more important than democratic power, he injected that value system into the First Amendment’s guarantee of free speech. Taking a page from Chafee’s law review article Free Speech in Wartime—which he had come across only months before—Holmes insisted that the First Amendment “is a declaration of a national policy in favor of the public discussion of all public questions:

Congress certainly cannot forbid all effort to change the mind of the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.”

Having thus set the stage for a wide power of judicial review in free speech cases, Holmes reaffirmed his clear-and-present-danger framework before announcing

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274 In a 1912 letter to Charles Owen, Holmes wrote, “The test of truth, I used to say, is the majority vote of that nation that can lick all others. But it is the majority vote in the long run—and as to that we have to rely for consolation upon a few, at times.” Letter from Oliver Wendell Holmes to Charles Owen (Feb. 5, 1912) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43026615/6 [https://perma.cc/2AQQ-M98V]. In his 1918 article Natural Law, however, Holmes watered down the same point:

I used to say, when I was young, that truth was the majority vote of that nation that could lick all others. . . . I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view.

Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40, 40 (1918).

275 OLIVER WENDELL HOLMES, Harvard Liberal Club, in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 137 (1936) [hereinafter JUSTICE OLIVER WENDELL HOLMES]; see Letter from Oliver Wendell Holmes to Herbert Croly (May 12, 1919), supra note 182, at 153 (“[I]n the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat.”).

276 For further discussion as to how Holmes justified arguing that the Constitution enacted a policy of tolerance, see infra Part III and the Conclusion.

277 See HEALY, supra note 63, at 157–58.


280 See id. at 627 (Holmes, J., dissenting) (“I do not doubt for a moment that . . . the United States constitutionally may punish speech that produces or is intended to produce a
how he thought it should be applied in the case before him. And his approach, it turns out, conforms to his long-held view that civilized people are those who “transcend[ their] own dogmas” as a matter of course:

I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

So even though Holmes continued to stand by his clear-and-present-danger framework, including the case-by-case methodology it entailed, he had planted his own flag firmly on the side of tolerance. While other judges may do what they may, Holmes would demand that challenged legislation conform to the rationality of a civilized person.

In applying his newly minted civilized-person standard to the case before him, Holmes wasted no time in gutting the count he considered to have the most merit—the fourth count—which alleged a conspiracy and attempt “to incite curtailment of production of things necessary to the prosecution of the war” with Germany. Under the civilized-person standard, Holmes reasoned, the circular on which the count was based—the Yiddish circular—was protected by the First Amendment.
“Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.” As a result, Holmes concluded that “the defendants were deprived of their rights under the Constitution of the United States.”

By responding to the problem of truth and authority in a Thayerian constitutional order with a countermajoritarian right to free speech, Holmes made it clear that he had finally accepted Hand’s basic idea of modifying Thayer’s method on pragmatic grounds. In free speech cases, he decided at last, judges must use their power to push back against laws that restricted speech. Otherwise, the country’s best minds would find no shelter from the unpredictable and piercing winds of democratic politics.

III. THE DEMOCRATIC FEELING

Although Holmes’s Abrams reversal makes sense as a practical reaction to the threat that speech-restrictive laws posed to the intellectual elite, there remains in his opinion a second argument for a countermajoritarian right to free speech that leans on his understanding of freedom itself. As I will show, Holmes considered an empathetic impulse he called the democratic feeling to be an important precondition for liberty. But after reading Espionagent, Holmes concluded that the country had temporarily set that impulse to the side. As a result, in Abrams, Holmes acted on his intuition that voters would yield to a countermajoritarian right to free speech if the judiciary pushed them to do so. In this Part, I examine the democratic feeling, and in the Conclusion, I explain how Holmes used the democratic feeling to support his argument for a countermajoritarian right to free speech.

things necessary to the prosecution of the war and to attempt to accomplish it by publishing the [Yiddish] leaflet . . . .”

288 Id. at 628.
289 Id. at 631.
290 After Abrams, however, Hand was not satisfied with Holmes’s civilized-person standard because it continued to rely on a case-by-case methodology. As he told Chafee in 1921, “I am not wholly in love with Holmesey’s test, . . . [for] [o]nce you admit that the matter is one of degree . . . you give to Tomdickandharry, D.J., so much latitude . . . that the jig is at once up. . . . I own I should prefer a qualitative formula, hard, conventional, difficult to evade.” Letter from Learned Hand to Zechariah Chafee (Jan. 2, 1921), in GUNther, supra note 42, at 769, 770.
291 See Abrams, 250 U.S. at 630–31 (Holmes, J., dissenting).
292 Holmes understood that democracies did not necessarily confine themselves to policies he thought were acceptable. In December 1916, for instance, Holmes agreed with Laski’s opinion that the “hideous . . . truth” is that democracy is not always “good.” Letter from Harold Laski to Oliver Wendell Holmes (Dec. 8, 1916), in 1 HOLMES-LASKI LETTERS, supra note 45, at 40, 41; see Letter from Oliver Wendell Holmes to Harold Laski (Dec. 13, 1916), supra note 232, at 30.
In the summer of 1924, as Holmes enjoyed a break from the Court, jurist and philosopher Morris Cohen thoughtfully sent him William Mackintire Salter’s *Nietzsche the Thinker: A Study*—a detailed restatement of Friedrich Nietzsche’s thought—which Holmes quickly promised to read “with a reasonably docile mind.” Although Holmes had read Nietzsche years earlier, Salter’s study paid particular attention to Nietzsche’s politics, a theme Holmes had never before shown attention to. And the Nietzsche Salter knew, Holmes soon discovered, was a truculent antidemocrat.

Today “the idea of the individual’s importance and of equality [and] equal rights,” Salter reported, “has taken political form in democracy.” But for Nietzsche, suffrage was far from a sparkling achievement. It was instead “a form of decline . . . . [I]t represents a form of unbelief—unbelief in great men and a select society.” Nietzsche thought the rise of democratic governments in the nineteenth century meant “[a] more common kind of men are getting the upper hand . . . . They have their place . . . in society, but they are a lower type of men, and when they wish to order everything for their own benefit, their selfishness is . . . revolting . . . .”

Whereas Salter’s reaction to Nietzsche’s imperiousness “had been . . . shock after shock,” Holmes did not so much as wince. Soon after receiving Salter’s study, Holmes confided to Laski, “[Nietzsche] moves some sympathy in me. Before I knew him[,] if not before him[,] I used to say that equality between individuals, as a moral formula, was too rudimentary.”

As Holmes explained decades earlier in his *The Use of Law Schools* address, he regretted to see that the country’s “passion for equality ha[d] passed far beyond the

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293 WILLIAM MACKINTIRE SALTER, NIETZSCHE THE THINKER: A STUDY (1917); see Felix Cohen, The Holmes-Cohen Correspondence, 9 J.HIST.IDEAS 3, 40 (1948) (citing Letter from Morris Cohen to Oliver Wendell Holmes (Aug. 18, 1924)).

294 Letter from Morris Cohen to Oliver Wendell Holmes (Aug. 18, 1924), supra note 293, at 41.

295 In 1902 Holmes read two compilations of Nietzsche’s work, “including his *Case of Wagner*, his *Anti-Christ*, his *Genealogy of Morals*, and his *Poems.*” 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 101 n.3 (Mark DeWolfe Howe ed., 1942).


297 See SALTER, supra note 293, at 425 (describing Nietzsche’s theory as the “extreme antithesis of the democratic theory”).

298 Id. at 309.

299 Id. at 418 (quoting his personal translation of 8 FRIEDRICH NIETZSCHE, Götzen-Dämmerung, in NIETZSCHE’S WERKE 151 (1899)).

300 Id. (quoting his personal translation of 11 FRIEDRICH NIETZSCHE, Nachgelassene Werke, in NIETZSCHE’S WERKE 374 (1901)).

301 Id. at 1.

302 Letter from Oliver Wendell Holmes to Harold Laski (Aug. 31, 1924), in 1 HOLMES-LASKI LETTERS, supra note 45, at 443, 444.
political or even the social sphere.” Not only are we “unwilling to admit that any class or society is better than that in which we move,” he added, “but our customary attitude towards every one in authority of any kind is that he is only the lucky recipient of honor or salary above the average.”

Although he acknowledged that “the democratic feeling which will submit neither to arrogance nor to servility” is an important “virtue[] of freemen,” he also believed it was equally important for Americans to be “[m]odest[]” about their capacities and “reveren[t]” of those who were superior to them. Democracy and social hierarchy, he thought, had to live side by side:

[W]hen the passion for equality is not content with founding social intercourse upon universal human sympathy, and a community of interests in which all may share, but attacks the lines of Nature which establishes orders and degrees among the souls of men—they are not only wrong, but ignobly wrong.

Although Holmes consistently viewed people as falling along a hierarchy, he was always capable of allowing himself to feel kind and sentimental towards others, without regard to his opinion of their merits. Take, for example, Holmes’s view of the South’s old ruling class. In 1927, when Holmes reviewed Beveridge’s draft biography of Abraham Lincoln, he bristled at Beveridge’s suggestion that the South’s elite were equals to the North’s elite. “I hope that time will explode the humbug of the
Recalling his experiences with the Confederate side when he fought for the Union, Holmes explained that “southern gentlemen generally were an arrogant crew who knew nothing of the ideas that make the life of the few thousands that may be called civilized.” The Southerners he had encountered, he complained a few months earlier, were “provincially arrogant, and . . . usually half-educated.”

But when Holmes considered the personal qualities of the Southerners he had come across during the Civil War, his distaste for their social traits and intellectual culture quickly gave way to an admiring respect. “I have heard more than one of those who had been gallant and distinguished officers on the Confederate side,” Holmes said in an 1884 speech:

[S]ay that they [felt no personal hostility toward the Union side]. I know that I and those whom I knew best had not. . . . The experience of battle soon taught its lesson even to those who came into the field more bitterly disposed. . . . You could not stand up day after day in those indecisive contests where overwhelming victory was impossible . . . without getting at least something of the same brotherhood for the enemy that the north pole of a magnet has for the south—each working in an opposite sense to the other, but each unable to get along without the other.

“The greatest qualities, after all,” Holmes concluded in another speech a month later, “are those of a man, not those of a gentleman, and neither North nor South needed colleges to learn them.”

Holmes’s views of ordinary men and women likewise depended on the lens through which he perceived them. On the one hand, he had a long history of viewing everyday people as beneath him. Having decided in his youth that they were “thick-fingered clowns,” by his mid-80s he hung onto the idea that they were of

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310 Howe, supra note 230, at 70 (quoting Letter from Oliver Wendell Holmes to Albert Beveridge (Feb. 8, 1927)).
311 Id. at 71.
312 Howe, supra note 230, at 71 (quoting Letter from Oliver Wendell Holmes to Albert Beveridge (Nov. 17, 1926)).
313 Oliver Wendell Holmes, Memorial Day, in The Occasional Speeches of Justice Oliver Wendell Holmes, supra note 303, at 4, 4–5.
314 Oliver Wendell Holmes, Harvard College in the War, in The Occasional Speeches of Justice Oliver Wendell Holmes, supra note 303, at 17.
315 As Grey noted in 1992, Holmes often referred to ordinary people as the crowd, a phrase which is “closer in connotation to ‘the mob’ than to ‘the people.’” Grey, supra note 56, at 526.
316 Letter from Oliver Wendell Holmes to Amelia Holmes (Nov. 16, 1862), in Touched with Fire: Civil War Letters and Diary of Oliver Wendell Holmes, Jr., 1861–64 at 70, 71 (Mark DeWolfe Howe ed., 1946).
“limited intellectual means.” The great majority of Americans, he told Laski in 1929, “live an essentially animal life . . . —and I know no *a priori* reason or necessity for their not doing so.”

Yet despite his low opinion of ordinary people, there were occasions on which Holmes could be genuinely moved by their struggles and vulnerabilities. In 1906, for example, after reading Jane Addams’s book *Democracy and Social Ethics*, Holmes told economist Richard T. Ely, “Addams . . . gives me more insights into the point of view of the working man and the poor than I had before. How excellent her discrimination between doing good to them and doing good with them. I believe with her that we need more democratic feeling . . . .” And a dozen years later, Holmes recalled the democratic feeling he took from Addams’s book when he considered 17th century Dutch artist Adriaen van Ostade’s depictions of “the poor.” Holmes found one of Ostade’s etchings in particular, *Saying Grace*, to be particularly moving. The etching, he told Laski, depicts “a peasant saying grace over his bowl of porridge—his little boy to his right—wife and baby in the rear.” The image, he continued, is “so simple, so unconscious, so immediately sympathetic. I mean you don’t feel that Ostade was seeing himself sympathize.” The line of devotion in the little boy’s back,” he told Einstein a few months earlier, is so “tenderly given . . . , and the whole thing makes me want to cry.”

It is perhaps no coincidence, then, that on the day Holmes circulated a draft of his *Abrams* dissent to the other justices, he bought a picture that reminded him of *Saying Grace*. All the available evidence, after all, suggests that while Holmes

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317 Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 1, 1925), in 2 HOLMES-POLLOCK LETTERS, supra note 68, at 172, 173.
318 Letter from Oliver Wendell Holmes to Harold Laski (Dec. 18, 1929), in 2 HOLMES-LASKI LETTERS, supra note 58, at 297, 298.
319 Letter from Oliver Wendell Holmes to Richard T. Ely (June 18, 1906), in Rader & Rader, supra note 308, at 137.
320 Letter from Oliver Wendell Holmes to Lewis Einstein (Apr. 26, 1918), in THE HOLMES-EINSTEIN LETTERS, supra note 95, at 163, 164–65 (“[Ostade], in Jane Addams’ phrase, is good with the poor not to them.”).
321 Compare id. at 164 (identifying the etching as appearing “in Hind’s Short History of Engraving and Etching, page 189”), with ARTHUR M. HIND, A SHORT HISTORY OF ENGRAVING & ETCHING 189 (2d ed. 1911) (showing an image of an Ostade etching entitled *Saying Grace*).
322 Letter from Oliver Wendell Holmes to Lewis Einstein (Apr. 26, 1918), supra note 320, at 165; see Letter from Oliver Wendell Holmes to Frederick Pollock (Jan. 24, 1919), in 2 HOLMES-POLLOCK LETTERS, supra note 68, at 3, 4 (“[Ostade’s *Saying Grace*] makes me want to cry . . . .”)
323 Id.
324 Letter from Oliver Wendell Holmes to Lewis Einstein (Apr. 26, 1918), supra note 320, at 165; see Letter from Oliver Wendell Holmes to Frederick Pollock (Jan. 24, 1919), in 2 HOLMES-POLLOCK LETTERS, supra note 68, at 3, 4 (“[Ostade’s *Saying Grace*] makes me want to cry . . . .”)
325 Holmes sent his dissent out to the other justices on November 6, 1919. See HEALY, supra note 63, at 213. On that same day, he told Gray that he bought an etching that reminded
would have normally considered the Abrams defendants to be beneath him, when he wrote his dissent, he saw them through the lens of the democratic feeling.

Nowhere in the Abrams case was Holmes the terrible, who, during oral arguments in the Selective Draft Law Cases, “whisper[ed] to [his] neighbor on the bench” that the draft’s anarchist opponents were “pig headed adherents of an inadequate idea.”326 Nowhere was Holmes the hardhearted, who, in a letter to Laski, attacked Debs as a fraud,327 even after agreeing that his prison sentence was “both cruel and blind.”328 And nowhere was Holmes the pitiless, who, after seeing Gitlow carted off to prison, regarded his defense of him “as simply upholding the right of a donkey to drool.”329 All we get in Abrams is Holmes the crestfallen. Although he considered the radicals’ political message to be “ignoran[t] and immatur[e],”330 he never took the next step, in his opinion or anywhere else, of belittling them for it. Instead, he only saw the tragedy of their fate.

In his dissent, Holmes powerfully condemned the court system’s treatment of the radicals. “[N]o one has a right even to consider [the defendants’ creeds] in dealing with the charges before the Court,” Holmes wrote, yet they were “made the subject of examination at the trial.”331 And following the tarnished trial, he continued, they received decades-long prison sentences for making and distributing a couple of circulars with the aim of changing the country’s foreign policy—an endeavor Holmes could only believe was hopeless.333 The entire affair, from prosecution to sentencing, Holmes charged, had been senselessly cruel. “Even if . . . enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper,” he protested, “the most nominal punishment seems to me all that possibly could be inflicted.”334 And because of that, he reasoned, the radicals simply could

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327 See Letter from Oliver Wendell Holmes to Harold Laski (Jan. 15, 1922), supra note 84, at 305–06 (“I hardly can believe [Debs] honest . . . .”).
328 Editorial Note, New Republic, Apr. 19, 1919, at 362; see Letter from Oliver Wendell Holmes to Harold Laski (Apr. 20, 1919), in 1 Holmes-Laski Letters, supra note 45, at 197, 197 (expressing his agreement with the New Republic’s April 19, 1919 editorial note about Debs’s sentence).
329 Letter from Oliver Wendell Holmes to Lewis Einstein (July 11, 1925), supra note 144, at 244.
331 Id.
332 Id. at 629.
333 Id. at 629 (arguing that the circulars could not have affected American foreign policy).
334 Id. at 629.
not have been punished for “what the indictment alleges.” They were instead, unfortunately, being “made to suffer . . . for the creed that they avow.” The image of the United States breaking the lives of five powerless young people, merely for being different, was too much for Holmes to pass silently over.

So after Holmes had determined that the Yiddish circular was protected by the First Amendment, he closed his opinion with a humble confession: “I regret that I cannot put into more impressive words my belief that[,] in their conviction upon this indictment[,] the defendants were deprived of their rights under the Constitution of the United States.” It was an apology that emphasized the tolerance he thought the United States owed to the five defendants, but callously denied to them. And it was an apology that expressed his genuine sorrow at that fact.

With the strand of his dissent that led to his confession, then, Holmes removed all doubt about how he perceived the Abrams case. He took an interest in who the defendants were, despite disagreeing with their ideas. He thought of them as significant, even though they were rejected by mainstream society. And he approached them “on a simply human basis, without” any thought as to whether they measured up to his high standards. By modestly focusing on the defendants’ humanity, and by unselfconsciously sympathizing with them, Holmes succeeded in replicating the impulse he regarded as admirable in Democracy and Social Ethics, and that nearly moved him to tears in Saying Grace. For Holmes, the Abrams case involved much more than “simply a problem to be solved.” As he knew all too well, it involved real people who really suffered.

CONCLUSION

On May 29, 1929, the New York Times, in an unattributed editorial, heaped praise on Holmes for his then-recent dissent in Schwimmer. By insisting that the Constitution embodied a national policy of tolerance, the Times writer extravagantly boasted, Holmes revealed once again that he owned “one of the deepest, subtlest, most massive and courageous of judicial intellects.” “We know from the experiences of the late war that any dissemination of [Schwimmer’s] views at the wrong

335 Id.
336 Id.
337 Id. at 631.
338 Letter from Oliver Wendell Holmes to Lewis Einstein (May 7, 1930), in THE HOLMES-EINSTEIN LETTERS, supra note 95, at 308, 309.
339 See Letter from Oliver Wendell Holmes to Richard T. Ely (June 18, 1906), supra note 319, at 137.
340 WHITE, supra note 13, at 448 (quoting Letter from Oliver Wendell Holmes to Rosika Schwimmer (Jan. 30, 1930)) (explaining that he typically viewed cases as problem-solving exercises).
341 See A Dissenting Opinion, N.Y. TIMES, May 29, 1929, at 28.
342 Id.
time would get her into jail,” the Times writer observed. And in that respect, the Schwimmer case brings to mind

[the] whole question of American intolerance . . . . Here is a brave thinker who follows his thought and would allow the largest liberty of opinion. There have been few judges as learned. His generous spirit strives always for freedom in all directions. . . . [He] may be said to be the defender[ ] of minorities, of not only theoretic but applied freedom.344

In portraying the old Thayerian judge as at once brilliant, brave, and eminently concerned with individual liberty, the Times writer was well within the mainstream of public opinion of the time.345 Towards the end of his career, G. Edward White observed in 1971, “Holmes stood on the threshold of deification. He stepped from . . . [the] shadow” of his father346—the well-known author of The Autocrat of the Breakfast Table347—“by transcending his privileged background through tolerance and sympathy for thoughts and life styles foreign to his own.”348

In a pair of early 1930s American Mercury articles,349 however, Mencken hit back at the widespread image of Holmes as a “liberal and lovable philosopher.”350 In the earlier article, entitled Mr. Justice Holmes351—a review of a compilation of Holmes’s dissents352—Mencken pointed out that Holmes always remained, first and foremost, a thoroughgoing majoritarian.353 Despite having received “so much attention . . . from hopeful Liberals,”354 Mencken informed his readers, it was hard

343 Id.
344 Id.
347 Holmes’s father—Oliver Wendell Holmes, Sr.—of course, wrote a well-known series of essays for The Atlantic Monthly called The Autocrat of the Breakfast Table. See generally William C. Dowling, Oliver Wendell Holmes in Paris: Medicine, Theology, and The Autocrat of the Breakfast Table (2006) (discussing the life and work of Holmes, Sr.).
348 White, supra note 346, at 61.
350 Holmes, 90, Quits the Supreme Court, N.Y. TIMES, Jan. 13, 1932, at 1.
351 See generally Mencken, supra note 166, at 122–23.
352 In Mr. Justice Holmes, Mencken reviewed a compilation of Holmes’s dissents entitled The Dissenting Opinions of Mr. Justice Holmes. See id. at 122.
353 See id. at 122–24.
354 Id. at 122.
to see how the great majority of his opinions could have possibly advanced the cause of individual liberty.355 “[I]f I do not misread his plain words,” Mencken continued, Holmes was decidedly not

a sworn advocate of the rights of man. . . . [H]e was actually no more than an advocate of the rights of law-makers. There, indeed, is the clue to his whole jurisprudence. He believes that the law-making bodies should be free to experiment almost ad libitum, [and] that the courts should not call a halt upon them until they clearly pass the uttermost bounds of reason . . . .

. . . . Bear this doctrine in mind, and you will have an adequate explanation, on the one hand, of those forward-looking opinions which console the Liberals—for example, . . . the child labor case[], . . . —and on the other hand, of the reactionary opinions which they so politely overlook—for example, . . . the Debs case . . . .356

Even so, in the later article—a review of two books about Holmes entitled The Great Holmes Mystery357—Mencken noticed that something was amiss with Holmes’s Abrams opinion and few others like it. Although Mencken guessed that Holmes was, by default, contemptuous of ordinary people, as well as “precise, pedantic, unimaginative, even harsh,” he theorized that every once in a while, on an occasional off-day, “a strange amiability overcame him.”358 As best as Mencken could tell, that impulse simply overwhelmed him, without much in the way of explanation, as if it had momentarily seized him from the outside.359 Yet it was precisely that impulse that allowed him to set aside his usual defense of the rights of legislatures, and to instead set forth “the case for the widest freedom . . . of the individual citizen . . . with a magnificent clarity.”360

Although Mencken could not have possibly known it, Holmes would have easily recognized the amiable impulse he described in The Great Holmes Mystery. That impulse was none other than the democratic feeling Holmes mentioned in his The
Use of Law Schools speech, and that he described over the years in letters to friends. Holmes, in fact, had by then already incorporated the democratic feeling into his political thought on at least two occasions.

Holmes first did so in The Puritan, an 1886 speech he delivered at the First Church in Cambridge in Harvard Square. In his address, Holmes hailed the democratic feeling as both the flower of New England’s Puritan culture and its most powerful legacy. “Two hundred and fifty years ago a few devout men founded . . . [this] congregational church, from which grew a democratic state,” he explained to his audience. “Whether they knew it or not,” he continued,

[t]hese men and their fellows . . . planted something mightier even than institutions. . . . [T]hey planted the democratic spirit in the heart of man. It is to them we owe . . . that instinct, that spark that makes the American unable to meet his fellow man otherwise than simply as a man, eye to eye, hand to hand, and foot to foot, wrestling naked on the sand.

Despite speaking favorably of the spread of the idea of “democratic freedom,” however, Holmes believed “the somewhat isolated thread of our intellectual and spiritual life is rejoining the main stream.” The future, he maintained, did not belong to the Puritans or even to 17th century free speech advocate John Milton. Rather, it belonged to the likes of Thomas Hobbes, the hard-nosed political theorist who taught, centuries earlier, that “the law-making power” was necessarily superior to the law.

361 See THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES, supra note 303, at 36–37.
363 Id. at 25.
364 Id.
365 Id. at 26.
367 HOLMES, supra note 362, at 26.
Nearly 20 years later—in a 1904 eulogy in memory of Boston-area artist and women’s education advocate Sarah W. Whitman—Holmes again incorporated the democratic feeling into his political thought. The highest goal that any reformer can aspire to, Holmes mentioned midway through his address, is to help “keep society together and alive.” And assuming that premise, Holmes continued, Whitman’s activism was wholly invaluable. “It seems to me . . . that those who let their democratic feeling grow cold . . . do more than any others to shake the present order of things,” Holmes shared. “If I am right, a woman who meets her kind with Mrs. Whitman’s sympathy, with Mrs. Whitman’s democracy of soul, is, on the other hand, a pillar and a bond to uphold and to unite the Commonwealth.” “I called her friend and neighbour,” Holmes recalled at last, with a fond sadness, “I think . . . [others] have noticed the same thing[.] . . . [S]he was our neighbour as the Samaritan was [a] neighbour in the parable.”

In 1908, however, after being presented with the case of Harriman v. Interstate Commerce Commission, Holmes began to get the sense that the democratic feeling was on the retreat. The Harriman case began when the Interstate Commerce Commission (“ICC”) decided to investigate certain railroads in part to simply be “fully informed” about them. In the course of the inquiry, however, railroad executive E. H. Harriman and financier Otto Kahn declined to answer certain of the ICC’s questions, and the ICC responded by asking the courts to compel their testimony. In making its case, the ICC asserted that it had the power, under the Interstate Commerce Act of 1887, to “make any investigation that it deem[ed] proper” and that it could require testimony pursuant to those investigations. But Holmes, writing for the Court, flatly rejected the ICC’s argument. As a matter of statutory interpretation, he reasoned, the ICC could only require testimony that pertained to “a specific breach of law.” “We could not believe[,] on the strength

369 See Oliver Wendell Holmes, Address of Mr. Justice Holmes, in SARAH WHITMAN 25, 25 (1904).
370 Id. at 27.
371 Id.
372 Id. at 26–27.
373 Id. at 27.
374 Id. at 26; see Luke 10:30–37 (recounting the parable of the good Samaritan).
375 See 211 U.S. 407 (1908).
376 Id. at 414. The ICC also investigated the railroads in order to determine whether they had violated the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887), or defeated its purposes. See id.
377 Id. at 414–17.
378 See id. at 416.
379 Id. at 417.
381 Id. at 419–20 (majority opinion).
of other than explicit and unmistakable words,” he added, that Congress intended to give the ICC the “autocratic power” it asserted.382

The lesson Holmes took from Harriman was that the country had fallen into a “soft period of culture”383 in which the overriding tendency was to forget that “personal liberty [is] worth fighting for.”384 The Harriman case “made my blood . . . boil,” he admitted to Laski in 1916, and “it made my heart sick to think that [it] excited no general revolt.”385 “I have noticed the composure with which we listen to claims of right to examine anybody on anything . . . , e.g. [.] Harriman,” Holmes told sociologist Edward Ross a few years earlier, “[and] I do sometimes wonder whether by long taking freedom for granted we have not forgotten that its price was eternal vigilance.”386

In May 1919, after reading Espionage, Holmes similarly got the sense that the democratic feeling was on the retreat.387 “[T]he general aspects of the article . . . stirred my sympathies,” Holmes shared with Laski soon after reading it.388 “As long ago as . . . Harriman,” he continued, “it seemed to me that we so long had enjoyed the advantages protected by bills of rights that we had forgotten . . . that they . . . could not be kept unless we were willing to fight for them.”389 Holmes’s comparison of Espionage to Harriman, it turns out, was perfect; the very notion of censorship outraged him as much as the ICC’s behavior had. As then-law professor Felix Frankfurter390 would recall in 1932, Holmes “flared up . . . with heat” when the issue of censorship came up.391 “I never could understand by what right that’s done,” he

382 Id. at 421. In dicta, Holmes also suggested he thought the ICC’s assertion of power was unconstitutional: “If we felt more hesitation than we do” about our interpretation of the Interstate Commerce Act of 1887, Holmes added, “we still should feel bound to construe [it] not merely so as to sustain its constitutionality[,] but so as to avoid a succession of constitutional doubts.” Id. at 422.
383 Letter from Oliver Wendell Holmes to Harold Laski (Sept. 15, 1916), supra note 45, at 19.
384 ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 63 (2001) (quoting Letter from Oliver Wendell Holmes to Alice S. Green (Dec. 18, 1914)).
385 Letter from Oliver Wendell Holmes to Harold Laski (Sept. 15, 1916), supra note 45, at 19.
386 Letter from Oliver Wendell Holmes to Edward Ross (May 20, 1914), supra note 115 (emphasis added).
387 Letter from Oliver Wendell Holmes to Herbert Croly (May 12, 1919), supra note 182, at 202–03.
388 Id. at 203–04.
389 Id. at 203.
390 Frankfurter also served as a Supreme Court justice, among other roles. See, e.g., Jerome A. Cohen, Mr. Justice Frankfurter, 50 CALIF. L. REV. 591, 591–97 (1962) (discussing Frankfurter’s career).
remembered Holmes saying.\textsuperscript{392} “I should think constitutional rights are here clearly involved and to be protected.”\textsuperscript{393}

The problem that \textit{Espionage} and \textit{Harriman} presented to Holmes, then, was the onset of the dark future he predicted decades earlier in \textit{The Puritan}, and that he did not realize was at his doorstep years earlier when he eulogized Whitman. Liberty, Holmes had always believed, depended to a great extent on the tolerance the stronger groups in a society were willing to extend to the weaker ones,\textsuperscript{394} and he was now seeing the glow of that tolerance fade away. But rather than paving the way for the country to slide further into the Hobbesian night, on the occasion of \textit{Abrams}, he fought back with everything he had.\textsuperscript{395}

Holmes plainly acknowledged in his dissent that liberty of speech was ultimately in the hands of the strong.\textsuperscript{396} “To allow opposition by speech,” he wrote, “seems to indicate that you think the speech impotent, . . . or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.”\textsuperscript{397} But he also recognized that dominant factions did not always remember their deepest convictions, even if they reliably returned to them over the long haul. The Sedition Act of 1798\textsuperscript{398}—enacted during the “crisis atmosphere” of the Quasi-War with France\textsuperscript{399}—had taught him that his countrymen were not invulnerable to the hydraulic pressure of fear. “I had conceived that the United States[,] through many years[,] had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.”\textsuperscript{400} In the context of his opinion, it was equally an indictment of the fear-driven America of the First World War and First Red Scare that had broken the \textit{Abrams} defendants.\textsuperscript{401}

\textsuperscript{392} Id.
\textsuperscript{393} Id.
\textsuperscript{394} See Letter from Oliver Wendell Holmes to Harold Laski (Mar. 31, 1917), in 1 HOLMES-LASKI LETTERS, supra note 45, at 74, 74 (“It is a question of policy and power how far the strongest will stand the others.”); Letter from Oliver Wendell Holmes to Frederick Pollock (Oct. 26, 1919), in 2 HOLMES-POLLOCK LETTERS, supra note 68, at 27, 28 (“[T]he territorial club (i.e., the nation), while it lasts, must have the army. While it has the army the extent to which it will allow other clubs depends upon its will . . . .”).
\textsuperscript{395} See HEALY, supra note 63, at 203 (noting that Holmes described writing his \textit{Abrams} dissent “as if possessed”).
\textsuperscript{396} Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).
\textsuperscript{397} Id.
\textsuperscript{398} Sedition Act of 1798, 1 Stat. 596.
\textsuperscript{400} \textit{Abrams}, 250 U.S. at 630 (Holmes, J., dissenting).
\textsuperscript{401} See also Letter from Oliver Wendell Holmes to Lewis Einstein (Feb. 10, 1918), supra note 142, at 161 (“I don’t worry much about possible coordinated public changes, and I hardly think [the] chaos [of the Russian Revolution] is to be apprehended here.”); Letter from
Armed with the conviction that legislative majorities sometimes lose sight of who they are, Holmes repudiated, at long last, the political ideas he set out in *The Puritan*.\(^{402}\) No longer did he think of the United States as a provincial outflowing of the democratic feeling that was destined to rejoin “the great [Hobbesian] currents of the world’s life.”\(^{403}\) Instead, the country became a “city . . . on a hill”—shining for the world to see, proudly brimming with an empathetic spirit—come what may. The Constitution, he wrote in *Abrams*, “is an experiment, as all life is an experiment. Every year[,] if not every day[,] we have to wager our salvation upon some prophecy based upon imperfect knowledge.”\(^{404}\) The founding charter, he decided in the end, did far more than set a government into motion. It embodied, in an eminently public and consequential way, “the deepest cause we have to love our country”\(^{405}\)—that is, the democratic feeling which has burned in the Republic’s heart since before the framing generation gave it life.\(^{406}\)

In the judgment of history, Holmes’s extraordinary bet on the fundamental openness and kindness of the American people has paid off handsomely. Although Holmes’s influence on the sprawling field of free speech law has been far from even or universal, it has nevertheless proven to be wide-ranging, enduring, and even paradigm-forming.\(^{407}\) After all, as Healy observed in 2013, “the First Amendment . . . was still largely an unfulfilled promise” at the time of *Abrams*.\(^{408}\)

Oliver Wendell Holmes to Frederick Pollock (Oct. 26, 1919), *supra* note 394, at 28–29 (“Some of our subordinate Judges seem to me to have been hysterical during the war.”); Letter from Oliver Wendell Holmes to Harold Laski (Sept. 17, 1920), *supra* note 141, at 222 (“I cannot believe . . . this country will repeat [the Russian Revolution].”).

\(^{402}\) See also RABBAN, *supra* note 72, at 1310 (noting that Holmes’s *Abrams* dissent “reflected a . . . readjustment in his personal ideology”).


\(^{404}\) *Matthew* 5:14 (King James).

\(^{405}\) *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

\(^{406}\) HOLMES, *supra* note 362, at 25.

\(^{407}\) In 1962, Rogat discussed how Holmes’s view of sovereignty affected his treatment of aliens. See Yosel Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN L. REV. 3, 13–44 (1962). Aside from a section that examined three opinions which Holmes joined but did not write, see *id.* at 37–39, and which “turned on statutory construction” rather than on any theory of sovereignty, *id.* at 37, Rogat’s discussion considered cases that predated *Abrams*. See *id.* at 10–44.

G. Edward White later relied on Rogat’s discussion when he argued that Holmes’s “language [in *Schwimmer*] suggests [his] abandonment, in free speech cases, of a positivist view of sovereignty.” WHITE, *supra* note 13, at 448. White, however, did not see the connection between Holmes’s understanding of sovereignty and his *Abrams* dissent. Rather than representing “a considered reexamination of his general views on the proper stance of the judiciary in constitutional cases,” White argued, Holmes’s *Abrams* opinion and those that followed it instead represented “something of a rhetorical spree.” *Id.* at 413.

\(^{408}\) See generally Collins, *supra* note 56, at 349–78 (discussing Holmes’s influence on free speech law); RABBAN, *supra* note 57, at 371–76 (examining Holmes’s impact on the law of free speech).

\(^{409}\) HEALY, *supra* note 63, at 3.
The Supreme Court itself had never ruled in favor of a free speech claim, and lower courts had approved all manner of free speech restrictions, including the censorship of books and films, the prohibition of street corner speeches, and assorted bans on labor protests, profanity, and commercial advertising. Even criticism of government officials could be punished . . . if it threatened public order and morality.410

Yet, “[i]n his Abrams opinion and the opinions following it,” free speech scholar Ronald K. L. Collins observed a few years earlier, “[Holmes] ushered in an entire new way of thinking about free speech.”411 Due in large part to his vision, Collins wrote, the First Amendment came, in time, to enjoy a centrality that it had not previously experienced. In the process, probability became more doubtful; harm became more tolerable; experimentation became more desirable; truth became less categorical; and free speech freedom became more durable. . . . It is undeniable: free speech in America was never the same after [Abrams].412

In his Abrams dissent, then, far from merely offering technical insights into what the First Amendment means, Holmes provided the lens through which the generations that followed him interpreted the founding charter itself. And in that respect, Holmes rose well above the rank of an able judge; remarkably, he took a seat alongside our Constitution-makers.413 In Abrams and in the related opinions that followed it, Holmes reminded the nation, in the most dramatic of ways, what it always had been, and what it was destined to become once again. What Holmes had always known—and what the country seems to have always known as well—is that there is nothing more American than bowing one’s head in reverent silence at the brave and awe-inspiring lesson of the beautiful Nazarene, who taught the world nearly two millennia ago, “Blessed are the merciful: for they shall obtain mercy. [And again, b]lessed are the pure in heart: for they shall see God.”414

410 Id.
411 Collins, supra note 56, at 376–77.
412 Id. at 377.
414 Matthew 5:7–8 (King James).