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The Pure-Hearted Abrams Case

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THE PURE-HEARTED *ABRAMS* CASE

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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.

> 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[1]

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* 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)).

INTRODUCTION

In early 1919, in what can only be described as a stunning letter, Justice Oliver Wendell Holmes—the fabled "great oracle" of American law[2]—apologized to historian and politician Albert Beveridge, "I haven't thought much on the subject [of judicial power] . . . ."[3] Although Holmes had never doubted the Supreme Court's authority to review the constitutionality of acts of Congress,[4] he had always rejected the doctrine of judicial supremacy.[5] 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."[6] Instead, Holmes believed that when Congress passed a law, it had every right to embody its own constitutional vision in that law.[7] 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.[8] "It declines to enforce it—which for most purposes does annul it indirectly, but not I think in theory."[9]

Although Holmes did not believe he had thought extensively about judicial power at the time he wrote to Beveridge,[10] he had by then compiled a decades-long record of thinking about legislative power.[11] And his approach to legislative power was

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[2] Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 787 (1989).

[3] Letter from Oliver Wendell Holmes to Albert Beveridge (Jan. 19, 1919) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/42976633/44 [https://perma.cc/NB8Q-6U2L].

[4] *See, e.g.*, Commonwealth v. Perry, 28 N.E. 1126, 1127–28 (Mass. 1891) (Holmes, J., dissenting) (reviewing the constitutionality of a law); Letter from Oliver Wendell Holmes to Franklin Ford (Jan. 13, 1911), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., 180, 180 (Richard A. Posner ed., 1992) [hereinafter THE ESSENTIAL HOLMES] (acknowledging "the American plan of giving the judges the last word").

[5] *See* Andres Yoder, *The Americanism of Justice Holmes*, 39 CAMPBELL L. REV. 353, 380–86 (2017).

[6] KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 7 (2007).

[7] *See* Yoder, *supra* note 5.

[8] Letter from Oliver Wendell Holmes to Albert Beveridge (Jan. 19, 1919), *supra* note 3.

[9] *Id.*

[10] In the 1873 edition of James Kent's COMMENTARIES ON AMERICAN LAW, Holmes, in an editorial comment, endorsed the view that "the judicial power seems to be limited as against a co-ordinate branch of the government." 2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870–1882, at 33–34 (1963) (quoting JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW *296 n.1 (Oliver Wendell Holmes, Jr. ed., 12th ed. 1873)). To my knowledge, there is no record of Holmes explicitly developing that line of inquiry further.

[11] *See, e.g.*, David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 462 n.34 (1994) (quoting Letter from Oliver Wendell Holmes to James Bradley Thayer (Nov. 2, 1893)) (expressing agreement with law professor James Bradley Thayer's take on legislative power and his corollary understanding of judicial review).

unmistakably shaped by James Bradley Thayer,[12] a law professor he knew both professionally and socially.[13]

In his "classic"[14] 1893 article *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."[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.[16] The Constitution, after all, "often admits of different interpretations."[17] Instead, Thayer offered a proposition. The judiciary's role, he argued, "is a secondary one."[18] It "is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which . . . legislative power . . . cannot [constitutionally] go."[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."[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 *Hammer v. Dagenhart*, the Court considered the constitutionality of the Keating-Owen Child Labor Act of 1916,[21] a federal law that banned the cross-border shipment of goods made by children.[22] Although Justice William Day, writing for the majority, conceded that the

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[12] *See* Sanford Byron Gabin, *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, *supra* note 5, at 380–92 (discussing how Thayer influenced Holmes's approach to constitutional questions).

[13] *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 95, 197 (1993).

[14] Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 71 (1978).

[15] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893). For a discussion of Thayer's article and his rejection of judicial supremacy, see Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 628–29 (2012).

[16] Thayer, *supra* note 15, at 144.

[17] *Id.*

[18] *Id.* at 148.

[19] *Id.*

[20] *Id.* at 144.

[21] 247 U.S. 251, 268 (1918). To view the text of the Child Labor Act, see Keating-Owen Child Labor Act of 1916, ch. 432, 39 Stat. 675, *invalidated by id.*

[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,[23] he nevertheless concluded that Congress lacked the power to enact it.[24] 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."[25]

Holmes, however, dissented.[26] He began his opinion by identifying Congress's general power, in accordance with Thayer's first proposition.[27] "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."[28] He then applied Thayer's second proposition by subjecting the law to a variation of Thayer's reasonableness test.[29] The reasonableness of a law could be established, Thayer taught, "where the court . . . finds [a challenged law] to be constitutional in its own opinion."[30] And in Holmes's opinion, the Child Labor Act "was preeminently a case for upholding" Congress's power.[31] "[I]f there is any matter upon which civilized countries have agreed," he reasoned, "it is the evil of premature and excessive child labor."[32] Having thus satisfied himself that Congress "kept within a reasonable interpretation of its power,"[33] he concluded that the law was constitutional.[34]

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."[35] Such powers, he reasoned, implicated "conflicting interests[, the] balance [of which]

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[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."[36] 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."[37]

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.[38] 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.[39] 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.[40] Unlike most judges of the time, who agreed with the premises of judicial supremacy,[41] Hand was a Thayerian who believed Congress should interpret the Constitution for itself.[42] But during his debate with Holmes, he advocated for a modification of Thayer's method.[43] 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

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[36] Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

[37] Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 305–06 (1963).

[38] "It is noteworthy that in Thayer's day no significant free speech or press litigation had reached the Supreme Court," government professor Wallace Mendelson once observed. Mendelson, *supra* note 14, at 77. "Thus he had no empirical grounds for considering a judge's role in that context." *Id.*

[39] Schenck v. United States, 249 U.S. 47, 48–49 (1919).

[40] *See generally* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 722–45 (1975); Frederic R. Kellogg, *Learned Hand and the Great Train Ride*, 56 AM. SCHOLAR 471, 478–86 (1987).

[41] Keith E. Whittington, *Give "The People" What They Want?*, 81 CHI.-KENT L. REV. 911, 918–20 (2006) (saying that between Abraham Lincoln's and Franklin Roosevelt's respective presidencies, judicial supremacy was the dominant view); *see also* William F. Swindler, *Book Review of Judge Learned Hand and the Federal Judiciary*, 15 WM. & MARY L. REV. 755, 758 (1974) (noting that Hand was opposed to the judicial activism of the Warren Court).

[42] *See, e.g.*, GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 52 (1994) ("[T]here is no doubt that . . . [my views on constitutional law] are [Thayer's] get." (quoting Letter from Learned Hand to A. James Casner (Nov. 10, 1959))); *see also* Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 884–926 (1995) (reviewing GUNTHER, *supra* note 42 (discussing Thayer's influence on Hand's ideas about judicial review and noting differences)).

[43] *See* Letter from Learned Hand to Oliver Wendell Holmes (late Mar. 1919), *in* GUNTHER, *supra* note 42, at 758, 758–59.

considered to be enlightened and judicious could reasonably understand it to be.[44] It was, in effect, a countermajoritarian approach to freedom of expression.[45]

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.[46] In the first letter, Hand argued that the majority of people cannot understand the value of opinions they disagree with.[47] Most people are such "poor . . . creature[s]," he maintained, they cannot conceive of their "opinions" as being anything less than "absolutes."[48] Then in the second letter, Hand offered a rationale as to why judges should push back on the popular disregard for opposing views.[49] Unless judges restrain the common bias against dissent, he explained, speech-related prosecutions will tend to "intimidate,—throw a

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[44] 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 (late Mar. 1919), *supra* note 43, at 758–59. Then, in a parting shot, Hand reminded Holmes that jury members were not judges' peers. "[A]re they societates perfectae?" he asked. *Id.* at 759.

[45] 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 HAROLD J. LASKI, 1916–1935, at 18, 18–19 (Mark DeWolfe Howe ed., 1953) (abr. by Alger 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 . . . .").

[46] 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.

[47] Letter from Learned Hand to Oliver Wendell Holmes (Nov. 25, 1919), *supra* note 46, at 760, 760–61.

[48] Letter from Learned Hand to Oliver Wendell Holmes (June 22, 1918), *supra* note 45, at 755–56.

[49] 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."[50] 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."[51] In either case, he was convinced legislative majorities should have their way.[52] To define free speech in a countermajoritarian fashion, Holmes argued a few years earlier, would be "logically indefensible."[53] As Hand would soon realize, Holmes's instincts were set against making any changes to the Thayerian method in free speech cases.[54] So it must have surprised Hand when, late the following year—in an Espionage Act case called *Abrams v. United States*[55]—Holmes abandoned his Thayerian approach to free speech questions in order to endorse a countermajoritarian view.[56] It was, in fact, a revolution in his understanding of judicial power that no one could have predicted,[57] 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 (declining 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.

[53] Thomas Healy, *The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story Behind* Abrams v. United States, 39 J. SUP. CT. HIST. 35, 45 (2014) (quoting Chauncey Belknap, Unpublished Diary Entry (Oct. 21, 1915)).

[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).

[56] *See, e.g.*, Thomas C. Grey, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521, 533 (1992) (saying that in *Abrams*, Holmes first endorsed the countermajoritarian idea that judges should protect dissenters). However, in the past few decades, a minority of commentators have disagreed with the notion that *Abrams* represented a transformation in Holmes's thought. For a discussion of the debate, see Ronald K.L. Collins, *Supreme Court Opinions: Experimenting with Freedom*, *in* THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 262, 295–99 (Ronald K.L. Collins ed., 2010); Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192, 193–94 (2008).

[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."[58]

Others, to be sure, have noticed that *Abrams* represents a transformation in Holmes's understanding of judicial power.[59] 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]"?[60] "That question," law professor Thomas Healy wrote in 2014, "is one of the great legal and intellectual mysteries of the twentieth century."[61]

Previous investigations of Holmes's *Abrams* transformation have sensibly considered whether and to what extent a number of his friends and acquaintances influenced him.[62] 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.[63] But given that those investigations have had little success in identifying a specific reason for Holmes's change of heart,[64] 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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[58] Letter from Oliver Wendell Holmes to Harold Laski (May 18, 1930), *in* 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 320, 320 (Mark DeWolfe Howe ed., 1963) (abr. by Alger Hiss) [hereinafter 2 HOLMES-LASKI LETTERS].

[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 . . . .").

[60] Ilya Shapiro & Michael T. Collins, Opinion, *A Centenary for Free Speech*, WALL ST. J. (Nov. 7, 2019, 5:55 PM), https://www.wsj.com/articles/a-centenary-for-free-speech-11573167328 [https://perma.cc/WW9H-PMQ7].

[61] Healy, *supra* note 53, at 36.

[62] *See, e.g.*, RABBAN, *supra* note 57, at 350–55; ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 77–79 (2000); Feldman, *supra* note 56, at 229–31; Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 679–80 (2011); Healy, *supra* note 53, at 55–72.

[63] *See generally* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 1–197 (2013) (discussing events leading up to Holmes's *Abrams* reversal).

[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*,[65] which examined Postmaster General Albert Burleson's censorship of the mail during World War I.[66]

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[67]—the ultralibertarian[68] critic and newspaperman[69]—in his 1919 book *Prejudices: First Series* ("*Prejudices*").[70] 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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[65] William Hard, *Mr. Burleson, Espionagent*, NEW REPUBLIC, May 10, 1919, at 42. I am not aware of any scholar who has identified Holmes's reaction to *Espionagent* as being the decisive factor in his *Abrams* transformation. However, two scholars who have written about Holmes's *Abrams* opinion have discussed his reaction to *Espionagent*. *See* Anthony Gengarelly, *The Abrams Case: Social Aspects of a Judicial Controversy—Part II*, 25 BOS. BAR J., Apr. 1981, at 9, 11; David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 174–75 (1982).

[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 DeWolfe Howe ed., 1942) [hereinafter 2 HOLMES-POLLOCK LETTERS].

[69] *See generally* FRED HOBSON, MENCKEN: A LIFE (1994) (discussing Mencken's life and work).

[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 *Espionagent* 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 *Espionagent* 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 *Espionagent*, 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*[75]—a collection of highbrow essays into which he had "insert[ed] some rat-poison."[76] Although Holmes would qualify his estimation

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[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,[77] his response to *Prejudices* was positively effusive. "I took malevolent pleasure in . . . *Prejudices*," he told Laski soon after he and Fanny finished the book.[78] "[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 . . . ."[79] "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."[80] "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."[81]

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.[82] One of those cases in particular, *Debs v. United States*,[83] must have weighed heavily on his mind.[84] 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.[85] 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.[86] In his appeal to the Supreme Court, Debs argued that

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[77] Letter from Oliver Wendell Holmes to Harold Laski (Nov. 1, 1926), *in* 2 HOLMES-LASKI LETTERS, *supra* note 58, at 117, 117 ("I have read what I didn't care for in [Mencken] but I took much pleasure in a volume of *Prejudices*."); Letter from Oliver Wendell Holmes to Frederick Pollock (Sept. 18, 1927), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 68, at 205, 205 ("Walter Lippmann's . . . criticisms of . . . Mencken I thought A-1.").

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

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

[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.

[82] In this Article, I discuss four of the five 1919 Espionage Act cases. I discuss (1) Schenck v. United States, 249 U.S. 47 (1919), in Part II; (2) Frohwerk v. United States, 249 U.S. 204 (1919), in Part II; (3) Debs v. United States, 249 U.S. 211 (1919), in Part I and Part II; and (4) Abrams v. United States, 250 U.S. 616 (1919), in Part II, Part III, and the Conclusion. The Court dismissed a fifth 1919 Espionage Act case—*Sugarman v. United States*—for lack of jurisdiction. *See* 249 U.S. 182, 185 (1919).

[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.

[85] *See Debs*, 249 U.S. at 212–16; ERNEST FREEBERG, DEMOCRACY'S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT 7–23, 67–82 (2008) (discussing Debs's reputation and his Canton speech).

[86] *Debs*, 249 U.S. at 212.

those clauses violated the First Amendment.[87] Holmes, however, writing for a unanimous Court, rejected Debs's argument.[88] "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."[89]

The *Debs* case was, according to law professor G. Edward White, "the cause célèbre of the Espionage Act cases."[90] It was, in the words of historian Robert Murray, nothing short of "spectacular."[91] A hero to both organized labor and socialists,[92] Debs received "almost one million votes" in the 1920 presidential election, despite running his campaign from prison.[93] Although most of the country both opposed Debs and approved of Holmes's *Debs* opinion,[94] Holmes soon began to complain of receiving "stupid letters of protest" from Debs's supporters.[95] "The Debs case," Holmes told Wigmore, "seems to have let loose every damned fool in the country."[96] 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.[97] Although six bombs were delivered, the one intended for Holmes was not.[98] "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."[99]

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[87] *Id.* at 212, 215.

[88] *Id.* at 216–17.

[89] Letter from Oliver Wendell Holmes to John Henry Wigmore (June 7, 1919) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43024949/13 [https://perma.cc/H92F-YAGF].

[90] WHITE, *supra* note 13, at 419.

[91] ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920, at 23 (1955).

[92] *See, e.g.*, FREEBERG, *supra* note 85, at 7–23 (describing Debs's work as a union leader and socialist activist).

[93] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 198 n.* (2004).

[94] MURRAY, *supra* note 91, at 25–26.

[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.

[97] *See* CHARLES H. MCCORMICK, HOPELESS CASES: THE HUNT FOR THE RED SCARE TERRORIST BOMBERS 8, 36–37 (2005).

[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.

[101] MENCKEN, *The Genealogy of Etiquette*, *in* PREJUDICES, *supra* note 70, at 79, 79–89. The essay was first published as H.L. Mencken, *The Genealogy of Etiquette*, SMART SET, Sept. 1915, at 304.

[102] MENCKEN, *supra* note 101, at 85.

[103] *Id.* at 86.

[104] *Id.* at 86–87.

[105] *Id.* at 87.

[106] *Id.*

[107] *Id.*

[108] 255 U.S. 407, 436–38 (1921) (Holmes, J., dissenting).

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.[109] 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.[110] The *Milwaukee Leader* challenged Burleson's order, in part, by arguing that it violated its First Amendment right to free speech.[111] Nevertheless, a majority of the Court ruled that Burleson's order was "amply justified."[112]

Holmes, however, could not agree.[113] 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.[114] "[T]he use of the mails," Holmes asserted, "is almost as much a part of free speech as the right to use our tongues."[115] Then, mirroring Mencken's condemnation of democratic societies on the grounds that they are poor guardians of countermajoritarian rights, Holmes criticized the idea that the Espionage Act authorized Burleson's action.[116] Because "the power claimed by the Postmaster could [easily] be used to interfere with very sacred rights,"[117] 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."[118] 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."[119]

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[109] *See* Act of March 3, 1879, ch. 180, 20 Stat. 355, 358 (1879).

[110] *Burleson*, 255 U.S. at 408–09 (majority opinion); *see* Sedition Act of 1918, ch. 75, 40 Stat. 553, 554 (amending Espionage Act of 1917, ch. 30, tit. XII, 40 Stat. 217, 230).

[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 HOLMES-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 one[126]—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

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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 . . . .[130]

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.

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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."[143] 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."[144]

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*,[145] an essay in which he lamented Ralph Waldo Emerson's relative lack of influence on American culture.[146] "One discerns, in all right-thinking American criticism," Mencken began, cautiously enough, "the doctrine that . . . Emerson was a great man."[147] Emerson, he acknowledged, has always been hailed as the "spokesman . . . of bold and forthright thinking, [and] of the unafraid statement of ideas."[148] 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."[149] 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 petition[155] 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

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[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.

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[162] *Schwimmer*, 279 U.S. at 654–55.

[163] *Id.* at 655.

[164] *See* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

[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

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[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.

[173] *See id.* at 48–49.

[174] Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (1917). The jury also convicted Schenck and Baer of "conspir[ing] 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.

[175] *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.*

[176] *See id.* at 52–53.

[177] 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)).

[178] *Selective Draft Law Cases*, 245 U.S. at 377 (citing U.S. CONST. art. I, § 8).

[179] *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.[180] It did not matter that the Selective Draft Act addressed obstructions of the draft while the Espionage Act addressed obstructions of the recruiting service.[181] "[R]ecruiting[,]" Holmes reasoned, "is gaining fresh supplies for the forces, as well by draft as otherwise."[182]

Then, after determining that Schenck's and Baer's activities amounted to a conspiracy to obstruct the recruiting service,[183] Holmes went on to address the second issue: whether their particular conspiracy was protected by the First Amendment.[184] 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.[185] Instead, in keeping with his longstanding Thayerianism, he focused on Congress's authority.[186] 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.[187]

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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.

Letter from Oliver Wendell Holmes to Herbert Croly (May 12, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 45, at 152, 153 (emphasis omitted) (enclosed in a letter to Harold Laski, dated May 13, 1919).

[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,[188] not long after chatting with him about the law of free speech,[189] "to draw any limit to the First Amendment but simply to indicate cases on the one side or the other of the line."[190] 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.[191]

> 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.[192]

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.[193] In the half-century before *Schenck*, law professor David Rabban has explained:

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[188] DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 30 (1986) (quoting Letter from Zechariah Chafee, Jr. to Charles F. Amidon (Sept. 30, 1919)).

[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.[194]

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."[195] Although by 1922 Holmes could not remember who had "taught" him Blackstone was mistaken, he recalled being convinced nonetheless.[196]

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 . . . ."[197] Then, with a simple decree, he replaced Blackstone's deferential bad tendency test[198] with a more demanding guideline, his famous clear-and-present-danger framework.[199] "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.[200]

> 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

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[194] RABBAN, *supra* note 57, at 132.

[195] Letter from Oliver Wendell Holmes to Zechariah Chafee (June 12, 1922), *supra* note 193, at 243; s*ee 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).

[196] *See* Letter from Oliver Wendell Holmes to Zechariah Chafee, Jr., *supra* note 193, at 243.

[197] *See Schenck*, 249 U.S. at 51–52.

[198] *See, e.g.*, WHITE, *supra* note 13, at 350 (describing the bad tendency test as a "standard of judicial review [that] was minimal").

[199] *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.

[200] *Schenck*, 249 U.S. at 52.

> 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 States*[204] 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

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[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 . . . .").

[208] *See* Abrams v. United States, 250 U.S. 616, 616–17 (1919). The provisions at issue in *Abrams*, however, were added by an amendment to the Espionage Act called the Sedition Act of 1918. *See* Sedition Act of 1918, ch. 75, 40 Stat. 553 (amending Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219).

[209] *See* RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 66 (2001) (noting that in

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."[210] 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."[211] 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[212] were struggling young activists who promoted the cause of Bolshevism.[213] They were, in other words, marginal people who hawked a widely despised philosophy.[214]

Holmes's newfound concern with truth and authority was most likely sparked by the *New Republic*'s May 10, 1919, article *Espionagent*.[215] In the article,[216] journalist William Hard examined the phenomenon of Burleson exercising his power under the Espionage Act, as amended by the Sedition Act of 1918,[217] to censor the mail "[w]hen the United States is at war."[218] Burleson, Hard was unhappy to report, had not shirked his duties.[219] When particular facts clashed with the government's version of reality, he did not hesitate to wipe them out.[220] Not even George Washington was safe from his eraser.[221] But in carrying out his duties, Hard explained, Burleson's actions fell entirely "within our spirit and within our law."[222] 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

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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").

[210] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).

[211] Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1349 (1997).

[212] Although the *Abrams* defendants were technically "plaintiffs in error," both Clarke and Holmes settled on calling them "defendants." *Abrams*, 250 U.S. at 616 (majority opinion); *id.* at 628–29, 631 (Holmes, J., dissenting). I follow their lead.

[213] *See id.* at 618–22 (majority opinion); *id.* at 625–26 (Holmes, J., dissenting).

[214] *See* RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 4–27, 139–47, 154–96 (1987) (describing the defendants in *Abrams* at length).

[215] *See* Letter from Oliver Wendell Holmes to Herbert Croly (May 12, 1919), *supra* note 182, at 152 (discussing *Espionagent*).

[216] *See generally* Hard, *supra* note 65.

[217] *See* Sedition Act of 1918, ch. 75, 40 Stat. 553 (amending Espionage Act of 1917, ch. 30, 40 Stat. 217).

[218] *Id.* at 554.

[219] *See* Hard, *supra* note 65.

[220] *See id.* at 42–44 (listing and describing print media deemed non-mailable by Postmaster General Albert Burleson).

[221] *See id.* at 43.

[222] *See id.* at 42.

urging more suppressions."[223] If anything, Hard concluded, Burleson's behavior simply uncovered a bug in the administration of any program designed to control thought.[224] While "[c]ensorship may start as the creature of popular impulse,"[225] Hard argued, it inevitably "finishes by making thought. . . . We end by being all of us outwitted by the officeholders."[226]

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."[227] The story of Burleson must have caught Holmes's attention because he had always prized intellectualism above all else.[228] There were certain "ideas that make life worth living," he told British jurist Frederick Pollock in 1929,[229] and "[i]t is proper that a gentleman should have read certain books before he dies."[230]

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.[231] "[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."[232] "[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."[233] 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.

[228] *See* LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 14–16, 21–71 (1991) (describing Holmes's intellectual life).

[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.

[232] Letter from Oliver Wendell Holmes to Harold Laski (Dec. 13, 1916), *in* 1 HOLMES-LASKI LETTERS, *supra* note 45, at 30, 30.

[233] Letter from Oliver Wendell Holmes to Clara Sherwood Stevens (Feb. 9, 1916) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43026648/32 [https://perma.cc/37L9-CW2N].

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

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[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.

[239] *See id.* at 616–17. *See generally* Sedition Act of 1918, ch. 75, 40 Stat. 553 (amending Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219).

[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,"[246] Holmes disagreed. Given the record, he did not think it was possible for anyone to convict the five radicals on either count.[247]

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.[248] And as a matter of statutory interpretation, Holmes believed the term *intent* had to be understood "in a strict and accurate sense."[249] The intent required by the statute, Holmes argued, is an "intent to produce a consequence . . . [that] is the aim of the deed."[250] 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.[251] But he found none.[252] As he explained his

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[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).

[248] *See id.* at 626, 629. *See generally* Sedition Act of 1918, ch. 75, 40 Stat. 553 (amending Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219).

[249] *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

[250] *Id.*

[251] *Id.* at 627–629.

[252] *See id.* at 628–29. Holmes buttressed his reasoning with an additional argument addressing each of the third and fourth counts. The third count depended, in part, on whether the defendants "encourage[d] resistance" to the war effort. *Id.* at 624. The term *resistance*, in turn, appeared in the Espionage Act. *See* Sedition Act of 1918, ch. 75, 40 Stat. 553 (amending Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219). As a matter of statutory interpretation, Holmes thought the term *resistance* meant "some forcible act of opposition." *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting). However, he did not think there was any

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."[253]

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.[254] Specifically, they had argued that the "acts charged . . . were not unlawful because" they were protected by the First Amendment.[255] Whereas Clarke promptly dismissed the argument as having been "definitely negatived" by *Schenck* and *Frohwerk*,[256] Holmes used it as an occasion to announce how he would apply, from then on, the clear-and-present-danger framework he had created.[257] The framework, he contended, should be applied in a way that advanced the rationality of a civilized person.[258] 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.[259] "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."[260] But then he immediately responded to his settled view with a counterview.

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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 HOLMES-POLLOCK LETTERS, *supra* note 68, at 32, 32; *see* Letter from Oliver Wendell Holmes to Harold Laski (Dec. 27, 1919), *in* 1 HOLMES-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 HOLMES-LASKI LETTERS, *supra* note 45, at 116, 116 (repeating the argument); Letter from Oliver Wendell Holmes to Harold Laski (Oct. 26, 1919), *in* 1 HOLMES-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,[261] Holmes described how *hypothetical* people could come to value tolerance more than democratic power:

> [W]hen 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 . . . .[262]

Because Holmes's argument for tolerance echoed the ideas of British philosopher John Stuart Mill[263]—and because Holmes reread Mill only months before *Abrams*[264]—scholars have naturally assumed that he had finally moved toward Mill's way of thinking.[265] His letters, however, prove otherwise. The famous justification for tolerance Holmes advanced in *Abrams* was a mere stand-in for his own.

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[261] Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, 22 (1990). *See generally* Collins, *supra* note 56, at 373–75 (examining the influence of Holmes's marketplace-of-ideas concept on the law of free speech).

[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, DISSENT, 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.

Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 550 (1977).

[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.L. & 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.

[265] *See, e.g.*, Bogen, *supra* note 65, at 113 (saying that Mill's "views . . . bec[a]me important to Holmes'[s] view of free speech"); Michael F. Duggan, *The Municipal Ideal and the Unknown End: A Resolution of Oliver Wendell Holmes*, 83 N.D. L. REV. 463, 521 (2007) ("[Holmes] seems to have . . . [adopted] a version of Mill's marketplace of ideas."); Healy, *supra* note 199, at 823–25 (arguing that Mill influenced Holmes's justification for free speech).

Both before and after *Abrams*, Holmes subjected proposed truths to two related tests, neither of which appears in his dissent.[266] The first test was straightforward; it merely asked what, at any moment, could he not help but believe.[267] That test, in turn, verified his personal "can't helps."[268] 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."[269] 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."[270]

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,[271] "before [they] ever heard [them] questioned."[272] "[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."[273] Although Holmes realized that elite opinion did not

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[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. PHIL. 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.

[273] Letter from Oliver Wendell Holmes to Nina Gray (Sept. 22, 1914) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/42880820/13 [https://perma.cc/CD66-4SHB]; *see* Letter from Chauncey Belknap to Mark Howe (Apr. 12, 1963) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43123800/12 [https://perma.cc/UJP8-C834] (enclosing Belknap's transcription of his shorthand notes for his Justice Holmes's conversation) ("This country has been engaged in defying facts in every tack we take for the last twenty years.").

always win the day, he thought it exerted a positive influence on popular opinion.[274] "[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."[275] 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.[276] Taking a page from Chafee's law review article *Free Speech in Wartime*—which he had come across only months before[277]—Holmes insisted that the First Amendment "is a declaration of a national policy in favor of the public discussion of all public questions"[278]:

> 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."[279]

Having thus set the stage for a wide power of judicial review in free speech cases, Holmes reaffirmed his clear-and-present-danger framework,[280] 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.

[278] Zechariah Chafee, Jr., *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 934 (1919).

[279] Abrams v. United States, 250 U.S. 616, 628, 630–31 (1919) (Holmes, J., dissenting) (quoting U.S. CONST. amend I).

[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.[281] And his approach, it turns out, conformed to his long-held view that civilized people are those who "transcend[their] own dogmas" as a matter of course[282]:

> 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.[283]

So even though Holmes continued to stand by his clear-and-present-danger framework, including the case-by-case methodology it entailed,[284] 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[285]—which alleged a conspiracy and attempt "to incite curtailment of production of things necessary to the prosecution of the war" with Germany.[286] Under the civilized-person standard, Holmes reasoned, the circular on which the count was based—the Yiddish circular[287]—was protected by the First Amendment.

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clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.").

[281] Letter from Oliver Wendell Holmes to Albert Beveridge (Dec. 8, 1919) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/42976633/39 [https://perma.cc/4P3L-DGZE] ("I thought . . . it was my duty and my right to state what I thought the limits were to the [clear-and-present-danger] doctrine . . . ."); Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 14, 1919), *supra* note 253, at 32 ("I thought it proper to state what I thought the limits of the [clear-and-present-danger] doctrine.").

[282] Letter from Oliver Wendell Holmes to Ethel Scott (Nov. 28, 1908) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43026637/19 [https://perma.cc/FDA8-ZRM9]; *see* Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915) ("To have doubted one's own first principles is the mark of a civilized man.").

[283] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[284] *See id.* at 627 ("I never have seen any reason to doubt that the questions of law that alone were before this Court in the case[ ] of *Schenck* . . . were rightly decided."); *see also* Letter from Oliver Wendell Holmes to John C.H. Wu (Dec. 2, 1922), *in* JUSTICE OLIVER WENDELL HOLMES, *supra* note 275, at 154, 156 (saying, after *Abrams*, that "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree").

[285] Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 14, 1919), *supra* note 253, at 32 ("I think it possible that I was wrong in thinking that there was no evidence on the Fourth Count in consequence of my attention being absorbed by the two leaflets that were set forth.").

[286] *Abrams*, 250 U.S. at 624–25 (Holmes, J., dissenting).

[287] *See id.* ("The fourth count lays a conspiracy to incite curtailment of production of

"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."[288] As a result, Holmes concluded that "the defendants were deprived of their rights under the Constitution of the United States."[289]

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.[290] In free speech cases, he decided at last, judges must use their power to push back against laws that restricted speech.[291] Otherwise, the country's best minds would find no shelter from the unpredictable and piercing winds of democratic politics.[292]

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.

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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*[293]—a detailed restatement of Friedrich Nietzsche's thought—which Holmes quickly promised to read "with a reasonably docile mind."[294] Although Holmes had read Nietzsche years earlier,[295] Salter's study paid particular attention to Nietzsche's politics, a theme Holmes had never before shown attention to.[296] And the Nietzsche Salter knew, Holmes soon discovered, was a truculent antidemocrat.[297]

Today "the idea of the individual's importance and of equality [and] equal rights," Salter reported, "has taken political form in democracy."[298] 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."[299] 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 . . . ."[300]

Whereas Salter's reaction to Nietzsche's imperiousness "had been . . . shock after shock,"[301] 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."[302]

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).

[296] *See* Seth Vannatta & Allen Mendenhall, *The American Nietzsche? Fate and Power in the Pragmatism of Justice Holmes*, 85 UMKC L. REV. 187, 193–94 (2016) (discussing Holmes's engagement with Nietzsche prior to his reading of Salter's study).

[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."[303] 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."[304] 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.[305] Democracy and social hierarchy, he thought, had to live side by side[306]:

> [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.[307]

Although Holmes consistently viewed people as falling along a hierarchy,[308] 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.[309] "I hope that time will explode the humbug of the

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[303] OLIVER WENDELL HOLMES, *The Use of Law Schools*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 34, 36 (1962).

[304] *Id.*

[305] *Id.* at 37.

[306] *See id.* at 36–37.

[307] *Id.* at 37; *see also* Letter from Oliver Wendell Holmes to Harold Laski (May 12, 1927), *in* 2 HOLMES-LASKI LETTERS, *supra* note 58, at 149, 149 ("[T]he passion for equality . . . seems to me merely idealizing envy . . . ."); Letter from Oliver Wendell Holmes to Lewis Einstein (July 20, 1917), *in* THE HOLMES-EINSTEIN LETTERS, *supra* note 95, at 143, 143 ("[T]he so-called passion for equality really is a passion for superiority . . . .").

[308] *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 43–44 (1881) ("[T]he dogma of equality applied . . . to individuals only within the limits of ordinary dealings in the common run of affairs."); Benjamin G. Rader & Barbara K. Rader, *The Ely-Holmes Friendship, 1901–1914*, 10 AM. J. LEGAL HIST. 128, 132 (1966) (quoting Letter from Oliver Wendell Holmes to Richard T. Ely (Jan. 12, 1902)) ("[T]he equality of human individuals is only a politeness of conversation due to the necessities of talk."); Letter from Oliver Wendell Holmes to Margaret Bevan (Sept. 7, 1913) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43291246/9 [https://perma.cc/YS3Z-9G5N] ("[T]he fiction of conversation like that of morals is that all are equally important.").

[309] *See, e.g.*, Letter from Oliver Wendell Holmes to Albert Beveridge (Apr. 16, 1927) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/42976633/3 [https://perma.cc/E6YN-QBJA] (offering comments on Beveridge's ongoing "Life of Lincoln" project).

Southern Gentleman in your mind," he told Beveridge with an air of irritation.[310] 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."[311] The Southerners he had encountered, he complained a few months earlier, were "provincially arrogant, and . . . usually half-educated."[312]

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.[313]

"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."[314]

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.[315] Having decided in his youth that they were "thick-fingered clowns,"[316] 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."[317] 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."[318]

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 . . . ."[319] 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."[320] Holmes found one of Ostade's etchings in particular, *Saying Grace*, to be particularly moving.[321] 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."[322] The image, he continued, is "so simple, so unconscious, so immediately sympathetic. I mean you don't feel that Ostade was seeing himself sympathize."[323] "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."[324]

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*.[325] 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 Harold Laski (Jan. 25, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 45, at 132.

[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[332]—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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him of *Saying Grace*. *See* Letter from Oliver Wendell Holmes to Nina Gray (Nov. 6, 1919) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43097582/3 [https://perma.cc/WK38-HY2N].

[326] Letter from Oliver Wendell Holmes to Margaret Clifford (Dec. 18, 1917) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/42978025/4 [https://perma.cc/S2QS-DEP8].

[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.

[330] Abrams v. United States, 250 U.S. 616, 629–30 (1919) (Holmes, J., dissenting).

[331] *Id.*

[332] *Id.* at 629.

[333] *Id.* at 628 (arguing that the circulars could not have affected American foreign policy).

[334] *Id.* at 629.

not have been punished for "what the indictment alleges."[335] They were instead, unfortunately, being "made to suffer . . . for the creed that they avow."[336] 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."[337] 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.[338] 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*.[339] For Holmes, the *Abrams* case involved much more than "simply a problem to be solved."[340] 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*.[341] 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."[342] "We know from the experiences of the late war that any dissemination of [Schwimmer's] views at the wrong

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[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.[343] And in that respect, the *Schwimmer* case brings to mind

> [t]he 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 learning is the least of his gifts. 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 father[346]—the well-known author of *The Autocrat of the Breakfast Table*[347]—"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 Holmes*[351]—a review of a compilation of Holmes's dissents[352]—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

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[343] *Id.*

[344] *Id.*

[345] *See generally* I. Scott Messinger, *Legitimating Liberalism: The New Deal Image-makers and Oliver Wendell Holmes, Jr.*, 20 J. SUP. CT. HIST. 57 (1995) (providing an account of how liberal intellectuals championed Holmes); Brad Snyder, *The House that Built Holmes*, 30 L. & HIST. REV. 661 (2012) (discussing the role that liberal intellectuals played in canonizing Holmes).

[346] G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 61 (1971).

[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.

[349] *See* Mencken, *supra* note 166, at 122–24; H.L. Mencken, *The Great Holmes Mystery*, AM. MERCURY, May 1932, at 123–26.

[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 Mystery*[357]—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*

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[355] *See id.* at 122–24.

[356] *Id.* at 122–23.

[357] Mencken, *supra* note 349, at 123–25. The books Mencken reviewed in *The Great Holmes Mystery* were a Holmes biography by journalist Silas Bent entitled *Justice Oliver Wendell Holmes*; and a 1931 compilation of essays about Holmes entitled *Mr. Justice Holmes*. *See id.* at 123.

[358] Mencken, *supra* note 349, at 124.

[359] *Id.* at 123–24 ("[Holmes was] beset by occasional doubts, hesitations, flashes of humor, bursts of affability, moments of sneaking pity.").

[360] *Id.* at 124.

Use of Law Schools speech,[361] 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.[362] 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.[363] "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.[364]

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."[365] The future, he maintained, did not belong to the Puritans or even to 17th century free speech advocate John Milton.[366] Rather, it belonged to the likes of Thomas Hobbes,[367] the hard-nosed political theorist who taught, centuries earlier, that "the law-making power" was necessarily superior to the law.[368]

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[361] *See* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES, *supra* note 303, at 36–37.

[362] *See* OLIVER WENDELL HOLMES, *The Puritan*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES, *supra* note 303, at 24.

[363] *Id.* at 25.

[364] *Id.*

[365] *Id.* at 26.

[366] *See id.* According to law professor Ronald K.L. Collins, Holmes's marketplace metaphor in *Abrams* actually "trace[s] back" to the defense of free speech Milton put forward in his well-known *Areopagitica*. *See* Collins, *supra* note 56, at 282. *See generally* JOHN MILTON, AREOPAGITICA 35 (Cambridge at University Press 1918) (1644) ("Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"). Milton, of course, also wrote the famous epic poem *Paradise Lost*, among other works. *See generally* ANNA BEER, MILTON: POET, PAMPHLETEER, PATRIOT (2008) (discussing the life and work of Milton).

[367] HOLMES, *supra* note 362, at 26.

[368] *See* Letter from Oliver Wendell Holmes to Richard T. Ely (Nov. 24, 1912), *in* Rader & Rader, *supra* note 308, at 145. *See generally* JOHANN SOMMERVILLE, THOMAS HOBBES: POLITICAL IDEAS IN HISTORICAL CONTEXT (1992) (examining Hobbes's political writings).

Nearly 20 years later—in a 1904 eulogy in memory of Boston-area artist and women's education advocate Sarah W. Whitman[369]—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."[370] And assuming that premise, Holmes continued, Whitman's activism was wholly invaluable.[371] "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.[372] "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."[373] "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."[374]

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.[375] The *Harriman* case began when the Interstate Commerce Commission ("ICC") decided to investigate certain railroads in part to simply be "fully informed" about them.[376] 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,[377] and the ICC responded by asking the courts to compel their testimony.[378] 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.[379] But Holmes, writing for the Court,[380] 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."[381] "We could not believe[,] on the strength

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[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.

[380] Justice William Day dissented, and Justices John Marshall Harlan and Joseph McKenna concurred in his dissent. *See id.* at 423–29 (Day, J., dissenting). Justice William Henry Moody did not take part in the decision. *Id.* at 422.

[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 *Espionagent*, 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 *Espionagent* 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 Frankfurter[390] 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

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[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).

[391] Felix Frankfurter, Unpublished Anecdotes (Aug. 10, 1932) (on file with the Harvard Law School Library), http://library.law.harvard.edu/suites/owh/index.php/item/43123800/14 [https://perma.cc/8APE-9DAS].

remembered Holmes saying.[392] "I should think constitutional rights are here clearly involved and to be protected."[393]

The problem that *Espionagent* and *Harriman* presented to Holmes, then, was the onset of the dark future he predicted decades earlier in *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,[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 *Abrams*, he fought back with everything he had.[395]

Holmes plainly acknowledged in his dissent that liberty of speech was ultimately in the hands of the strong.[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."[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[398]—enacted during the "crisis atmosphere" of the Quasi-War with France[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."[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 *Abrams* defendants.[401]

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[392] *Id.*

[393] *Id.*

[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 . . . .").

[395] *See* HEALY, *supra* note 63, at 203 (noting that Holmes described writing his *Abrams* dissent "as if possessed").

[396] Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).

[397] *Id.*

[398] Sedition Act of 1798, 1 Stat. 596.

[399] WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT 253 (2016); *see* Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 941 (2009) ("Against the drumbeat of imminent war with [France], the Federalists enacted the Sedition Act of 1798.").

[400] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[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"[404]—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."[405] 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"[406]—that is, the democratic feeling which has burned in the Republic's heart since before the framing generation gave it life.[407]

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.[408] After all, as Healy observed in 2013, "the First Amendment . . . was still largely an unfulfilled promise" at the time of *Abrams*.[409]

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").

[403] HOLMES, *supra* note 362, at 26.

[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* Yosal 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]

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[410] *Id.*

[411] Collins, *supra* note 56, at 376–77.

[412] *Id.* at 377.

[413] *See generally* Richard A. Posner, *Introduction*, *in* THE ESSENTIAL HOLMES, *supra* note 4 (discussing Holmes's legacy).

[414] *Matthew* 5:7–8 (King James).