

Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension

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A central puzzle for scholarship on the life and career of Justice Oliver Wendell Holmes has been the tension between his generally deferential theory of judicial review, premised on his acquiescence to majoritarian legislative power, and his role as the founder of modern First Amendment jurisprudence, a source of significant limitation on legislative sovereignty. Professor White reexamines this puzzle in the light of the increased availability of Holmes' private papers, using techniques drawn from biography, intellectual history, and doctrinal analysis. His reexamination of Holmes' free speech decisions casts doubt on a major premise of recent Holmesian commentary—that "positivism," or any ideological encapsulation, is a helpful label for characterizing Holmes' perspective as a jurist. The shift in Holmes' First Amendment jurisprudence is best explained by his personal experiences and relationships, which made him receptive to the ideas of progressive intellectuals as he pursued his interest in disassociating free speech from the jurisprudential underpinnings of "liberty of contract." Holmes' free speech opinions do not conform to a single coherent theoretical pattern because they were not meant to serve as conventional doctrinal formulations that provide guidance for the consistent interpretation of constitutional provisions. Rather, they were meant to serve as vehicles for conveying Holmes' broader philosophical views to the world. In the history of his free speech opinions, he is seen as a resonant intellectual figure, a "lightning rod" for cultural and ideological messages in the first thirty years of the twentieth century. It is in his use of language to this end that the source of Holmes' eminence is to be found.

I INTRODUCTION

One of the central puzzles for recent scholarship on the life and career of Justice Oliver Wendell Holmes has been the relationship

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between the positivistic overtones of Holmes' jurisprudence and his identification with the origins of modern First Amendment theory. The puzzle centers on a conflict between Holmes' generally deferential theory of judicial review, which has been said to be premised on a fatalistic acquiescence to majoritarian legislative power,¹ and his identification as the modern founder of an approach toward freedom of expression that treats the First Amendment as a source of significant limitations on legislative sovereignty.²

For those scholars confronting the apparent tension between Holmes the positivist and Holmes the architect of a speech-protective interpretation of the First Amendment, a particularly significant episode has been a sequence of opinions that Holmes wrote in 1919. The sequence began with Holmes' opinion for the Court in *Schenck v. United States*,³ extended through his opinions for the Court in *Frohwerk v. United States*⁴ and *Debs v. United States*,⁵ and culminated with his dissent, delivered about eight months after his *Schenck* opinion, in *Abrams v. United States*.⁶ In those opinions Holmes first upheld a series of convictions for subversive advocacy under the Espionage Act of 1917⁷ and then dissented from a decision upholding another conviction under the Sedition Act of 1918⁸ for what appeared to be comparably subversive advocacy.⁹

Commentary on the episode can be divided into two groups. One group of commentators has focused directly on Holmes' opinions in the

1. For example, see Holmes' 1916 statement to Harold Laski: "Man certainly is a personality but the Sovereign kills him when it sees fit and can. . . . I see no meaning in the rights of man except what the crowd will fight for." Letter from Oliver Wendell Holmes to Harold J. Laski (July 28, 1916), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 8 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES-LASKI LETTERS].

2. Perhaps the clearest recent statement of the puzzle is made by H.L. Pohlman, who speaks of "a tension between Holmes's positivism and his defense of the individual right of free speech." H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION 2 (1991). Pohlman seeks to resolve that tension in his study, not successfully in my view, but he deserves credit for recognizing the centrality of the puzzle to an understanding of Holmes' jurisprudence.

3. 249 U.S. 47 (1919).

4. 249 U.S. 204 (1919).

5. 249 U.S. 211 (1919).

6. 250 U.S. 616, 624-31 (1919).

7. Ch. 30, 40 Stat. 217.

8. Ch. 75, 40 Stat. 553, repealed by Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359, 1360.

9. One might distinguish between the text of the two statutes and argue that the Sedition Act was more overtly concerned with speech, since it referred to the willful utterance of "disloyal, profane, scurrilous, or abusive language," *id.*, § 3, 40 Stat. at 553, while the Espionage Act singled out only the making of "false reports or false statements," tit. 1, § 3, 40 Stat. at 219, with the intent to interfere with the operation or success of United States military or naval forces. In all the cases from *Schenck* through *Abrams*, however, the defendants communicated opposition to United States participation in World War I through words as well as acts. See *infra* text accompanying notes 125-27, 142, 249-51.

sequence and on contemporary events allegedly affecting his posture in the cases from *Schenck* through *Abrams*.¹⁰ The commentators in this group sharply disagree about the consistency of Holmes' decisions from *Schenck* through *Abrams* and about Holmes' motivation in reaching the various results.¹¹

Another group of commentators has addressed the *Schenck-Abrams* sequence as part of a larger project, such as the history of late nineteenth- and early twentieth-century First Amendment doctrine or a biographical or analytical overview of Holmes' career.¹² This group of commentary, most of which has appeared more recently than the first group, has contributed some new information and offered some new perspectives on the sequence. In particular, these commentators have made use of the increased availability of Holmes' private papers¹³ and have underscored

10. See, e.g., David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97 (1982) (asserting that the "different tone of the *Abrams* dissent is not evidence of a marked change in Holmes' view of free speech, but is rather the product of Holmes' frustration at what he considered the misreading by critics and the public of his position in *Schenck*," *id.* at 99); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) (comparing Holmes' and Learned Hand's First Amendment jurisprudence); Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971) (examining Holmes' early 1919 free speech opinions); Yosai Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984) (analyzing Holmes' free speech opinions and concluding that Holmes was not uniquely protective of free speech). The last article is consistent with an interpretation of Holmes made much earlier by Rogat and as such is part of this earlier group of commentaries. See Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion* (pts. 1-2), 15 STAN. L. REV. 3 (1962) [hereinafter Rogat, *Dissenting Opinion* (pt. 1)], 254 (1963) [hereinafter Rogat, *Dissenting Opinion* (pt. 2)].

11. For example, compare Gunther, *supra* note 10, at 724-29 (arguing that Holmes adopted a more speech-protective posture in *Abrams* in part because of correspondence and conversations with Learned Hand) with Bogen, *supra* note 10, at 141-49 (contending that the metamorphosis in Holmes' position came with *Schenck* and that from that point on Holmes held a speech-protective position). Bogen believes that Holmes' change in position was due principally to his reading the briefs in the first round of the Espionage Act cases. See *id.* at 146-49.

12. See, e.g., LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 511-47, 586-89, 621-26 (1991) (account of Holmes' First Amendment opinions, using his private papers); MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 106-12 (1991) (examination of Holmes' free speech opinions and challenge of the view that Holmes was a civil libertarian); SHELDON NOVICK, *HONORABLE JUSTICE* 324-32, 353, 471-74 (1989) (part of biographical account setting forth Holmes' free speech opinions); POHLMAN, *supra* note 2 (overview of Holmes' free speech opinions as they relate to his constitutional jurisprudence); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983) [hereinafter Rabban, *Emergence*] ("Developments during the immediate postwar years, rather than spontaneously creating first amendment doctrine, rapidly transformed it," *id.* at 1208.); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981) [hereinafter Rabban, *First Amendment*] (doctrinal and intellectual history of First Amendment prior to World War I).

13. The Holmes Papers, long in the possession of Harvard Law School with access controlled by authorized biographers, were disseminated to scholars in 1985 in a microfilm edition. Oliver Wendell Holmes, Jr., *Papers: American Legal Manuscripts from the Harvard Law School Library* Microfilm edition, University Publications of America (1985) [hereinafter *Holmes Papers*]. Future

the importance of seeing Holmes' First Amendment decisions in the context of changing attitudes toward freedom of expression among late nineteenth- and early twentieth-century American intellectuals.¹⁴

The contributions of the second group of commentators and the availability of the Holmes Papers have made possible a reexamination of the *Schenck-Abrams* sequence in the course of a more general reexamination of Holmes' First Amendment jurisprudence. Such a reexamination, based on a combination of techniques drawn from biography, intellectual history, and doctrinal analysis, is the central purpose of this Article. In pursuing that reexamination, I offer some general conclusions about Holmes' stance as a judge.

One of the Article's conclusions is that Holmes' free speech jurisprudence, at one time consistent with positivistic premises, evolved into a posture that cannot easily be reconciled with positivism.¹⁵ A second is that the most fruitful explanations for the change in Holmes' views on free speech lie more in the realm of his personal life and in the intellectual culture of early twentieth-century America than in the realm of "official" doctrinal analysis. The Article suggests that a reexamination of Holmes' free speech decisions casts doubt on a major premise of recent Holmesian commentary: that "positivism," or any ideological encapsulation, is a helpful label for characterizing Holmes' perspective as a jurist.¹⁶

The structure of the Article is as follows. Part II surveys current scholarship on Holmes' free speech jurisprudence. Part III provides an overview of Holmes' early free speech opinions, detailing Holmes' initially orthodox views about free speech. That Part also examines the changes in commentary on free speech issues and in Holmes' personal life that resulted in his becoming receptive to revising his free speech jurisprudence. Part IV then documents and explains the transformation of Holmes' stance toward free speech issues. Section IV.A describes

references to the Holmes Papers are to the 1985 Microfilm Edition. In 1983, Harvard Law School, which holds the originals of the Holmes Papers, made them generally available to scholars. Baker and Novick liberally used the Holmes Papers in their biographies. See BAKER, *supra* note 12; NOVICK, *supra* note 12.

14. For evidence of changing attitudes as reflected in cases and commentary between the 1870s and the 1920s, see GRABER, *supra* note 12; Rabban, *Emergence*, *supra* note 12; Rabban, *First Amendment*, *supra* note 12.

15. On this issue, I openly disagree with Pohlman's conclusion that Holmes' free speech jurisprudence can be reconciled with positivism. See POHLMAN, *supra* note 2. My primary interest is not, however, to refute Pohlman, but to approach Holmes' free speech jurisprudence from a vantage point different from that of previous commentators.

16. For a recent influential description of Holmes as a positivist, see Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982). Gordon's analysis is not directed at Holmes' free speech opinions, or indeed at any of his opinions as a Supreme Court Justice, but his essay remains one of the more trenchant modern works on Holmes' jurisprudence.

Holmes' first effort to go beyond the orthodox view he had previously held: a conceptualization of free speech theory as a form of criminal-attempt analysis in the 1919 Espionage Act cases, in which the "clear and present danger" test played a deceptive role. Section IV.B sets forth the response of Holmes' younger, "progressive" friends to that effort and their subsequent dialogue with Holmes. Section IV.C discusses the impact of that dialogue, which resulted in the transformation of Holmes' posture in free speech cases from a primarily speech-restrictive to a primarily speech-protective approach. Section IV.D documents the completion of that transformation, which resulted in the evolution of Holmes' free speech jurisprudence from a posture consistent with positivist premises to a posture that cannot easily be reconciled with positivism. Part V concludes that Holmes' perspective on free speech can best be understood as essentially impressionistic, intuitive, only deceptively consistent, and not principally directed at the elaboration or clarification of legal doctrine.

II

THE CURRENT STATE OF SCHOLARSHIP ON HOLMES' FIRST AMENDMENT JURISPRUDENCE

As previously noted, the evolution of Holmes' theories of free speech has been subject to debate among scholars.¹⁷ Widespread agreement does exist, however, on several issues. The overwhelming majority of commentators agree that when Holmes began to treat free speech issues seriously after 1918, his approach emerged from his experience with the common-law view of criminal attempts.¹⁸ Moreover, the overwhelming majority of commentators find Holmes' later Supreme Court decisions more speech protective than his earlier ones, although there is disagreement as to whether the successive results he reached are consistent with one another or illustrate a change in Holmes' views.¹⁹

In addition, commentators have also uncovered a number of cul-

17. For significant works on Holmes' First Amendment opinions, see sources cited *supra* notes 10-12; see also Harry Kalven, Jr., *Professor Ernst Freund and Debs v. United States*, 40 U. CHI. L. REV. 235 (1973); Douglas H. Ginsburg, *Afterword* to Kalven, *supra*, at 243. Both Ginsburg and Kalven argue that Holmes changed his approach to free speech issues between his majority opinion in *Debs* and his dissent in *Abrams*.

18. See, e.g., POHLMAN, *supra* note 2, at 59-65 (stating that Holmes sometimes imposed liability on nonharmful acts when the speaker's intent was unlawful); Rabban, *Emergence*, *supra* note 12, at 1274-78 (stating that Holmes implicitly viewed speeches and articles in Espionage Act cases as attempts). The first commentator to note the relationship between Holmes' early Espionage Act decisions and his views on criminal attempts was Rogat. See Rogat, *Dissenting Opinion* (pts. 1-2), *supra* note 10.

19. Compare Gunther, *supra* note 10, at 735-43 (arguing that Holmes changed his opinion on free speech between his opinion in *Schenck* and his dissent in *Abrams*) and Rabban, *Emergence*, *supra* note 12, at 1305-17 (same) with POHLMAN, *supra* note 2, at 53-87 (finding Holmes' free speech opinions consistent) and Bogen, *supra* note 10 (same). Among the "life and times" biographies,

tural factors that combined to make the free speech decisions in the latter portion of Holmes' tenure more pressing and significant. First, in part because of the extant jurisprudential orthodoxy on free speech issues, the Supreme Court decided very few free speech cases prior to 1918, and those few were perceived as comparatively trivial in their impact, dealing with such matters as editorial criticism of public officials and articles on nudity. In contrast, the Supreme Court cases after 1918 arose during legislative efforts to restrict criticism of the conduct of World War I and to suppress collectivist political ideologies that were perceived, in the aftermath of that war, as subversive. The post-1918 cases led to the incarceration of prominent critics of established political orthodoxy and accordingly attracted widespread public attention.

Second, the issue of free speech itself, which prior to World War I had not been a conspicuous feature of reform politics, began to galvanize the attention of progressive intellectuals during and after the war, as progressive journals such as *The New Republic* took up the cause of free speech.²⁰ Earlier arguments conceptualizing speech as a constitutionally protected "liberty," which had previously been confined to specialist circles,²¹ widened in their reach and were reformulated. At the same time scholarship on the history and theory of the First Amendment began to surface more widely, most conspicuously in Zechariah Chafee's *Freedom of Speech*, a synthesis of earlier essays that was published in 1920.²²

Third, several individuals who were particularly interested in free speech issues communicated their views to Holmes in the years between 1918 and 1920. These individuals included Learned Hand, then a federal district judge, Zechariah Chafee, an assistant professor at Harvard Law School, and John Wigmore, the Dean of Northwestern University School of Law, who had been a longtime correspondent of Holmes'. Holmes

BAKER, *supra* note 12, is aligned with the Gunther/Rabban view, while NOVICK, *supra* note 12, is aligned with the Bogen/Pohlman point of view.

20. For the emergence of a consciousness about free speech issues in *The New Republic* in the years during and after World War I, see David W. Noble, *The New Republic and the Idea of Progress, 1914-1920*, 38 MISS. VALLEY HIST. REV. 387, 397, 400 (1951).

21. See, e.g., THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (Boston, Little, Brown 1868); ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 502-14 (1904) (part entitled "Freedom of Speech and Press"); THEODORE SCHROEDER, *FREE SPEECH FOR RADICALS* (enlarged ed. 1916); Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916); Henry Schofield, *Freedom of the Press in the United States*, 9 AM. SOC. SOC'Y: PAPERS & PROC. 67 (1914). For a discussion of this scholarship, see GRABER, *supra* note 12, at 17-49; Rabban, *First Amendment*, *supra* note 12, at 559-79.

22. ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920). Chafee's book cites his earlier articles, Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919) [hereinafter Chafee, *Speech in War Time*], and Zechariah Chafee, Jr., *Freedom of Speech*, NEW REPUBLIC, Nov. 16, 1918, at 66 [hereinafter Chafee, *Freedom of Speech*]. See CHAFEE, *supra*, at 51 n.21, 57 n.35, 160 n.68, 379, 380.

also began to discuss free speech issues with his regular correspondents, writing letters to Frederick Pollock and Harold Laski about First Amendment cases that had come before the Supreme Court.²³

While all of these factors contributed to Holmes' new perspective on free speech in the years immediately following World War I, the precise nature of their combination has hitherto eluded, or at least has not preoccupied, Holmes scholars. At the same time some highly oversimplified views of Holmes' First Amendment decisions persist in the literature.²⁴ My interest here is in building on the contributions of commentators and on archival sources to produce an account of the transformation of Holmes' First Amendment jurisprudence with a different perspective and emphasis. My account is based, in part, upon the sorts of information emphasized by the recent "life and times" biographies of Holmes, with particular emphasis on his correspondence in printed and archival sources. My account is also based on an analysis of the changing intellectual history of free speech jurisprudence and on a close reading of the language of Holmes' opinions, emphases that are not present in the recent biographies.

III

THE EARLY CASES: DOCTRINE, COMMENTARY, AND CONTEXT

A. *Holmes' Orthodox Free Speech Jurisprudence*

When Holmes left the position of Chief Justice of the Supreme Judicial Court of Massachusetts to sit as Associate Justice of the Supreme Court of the United States in 1902, he had given no indication of holding views on the interpretation of the First or Fourteenth Amendments that singled out speech for special protection against governmental restrictions. Nothing in Holmes' experience on the Supreme Judicial Court of Massachusetts had been consistent with the view that speech merited special protection. In two unanimous opinions for that Court he had summarily dismissed claims based on free speech, one involving the firing of a police officer for participating in a political campaign²⁵ and the other the punishment of a preacher for speaking on the Boston Common without a permit.²⁶ Holmes conceptualized both

23. See, e.g., *infra* text accompanying notes 171-74, 178 (providing excerpts from Holmes' letters to Laski).

24. See, e.g., GARY J. AICHELE, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE 150-51 (1989) (failing to address how "clear and present danger" test contributed to inconsistency of Holmes' opinions); NOVICK, *supra* note 12, at 474 n.87 (attempting to reconcile Holmes' conflicting free speech opinions by distinguishing speech as action from speech as opinion).

25. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892).

26. *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895), *aff'd sub nom. Davis v. Massachusetts*, 167 U.S. 43 (1897).

claims as not properly raising free speech issues. Both claims, he said in his opinion in the latter case, rested on "the same kind of fallacy," namely that the state constitution barred a municipality or a state legislature from rescinding the privileges of public employment or speaking in a public park.²⁷ For Holmes, there was no constitutional right to "talk politics" in one's capacity as a policeman²⁸ or to speak on public property.

Holmes' views on free speech at that time were not unique. The prevailing orthodoxy when Holmes became a Supreme Court Justice was that the First Amendment was simply a codification of English common law. In the 1897 case of *Robertson v. Baldwin*,²⁹ the Supreme Court noted that the First Amendment, like other provisions of the Bill of Rights, did not institute "any novel principles of government," but merely codified "certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions."³⁰ This meant that First Amendment protection did not extend to libelous, blasphemous, obscene, indecent, or "other publications injurious to public morals or private reputation."³¹ Consistent with that view, the Court had upheld the convictions of a Mormon³² and an anarchist³³ for belonging to groups whose views had a tendency to encourage socially injurious acts, such as polygamy or the overthrow of government, even though neither case presented a clear showing that the defendants had advocated the performance of those acts.

Since, according to this view, the First Amendment merely codified the common law, it prevented only prior restraints on speech, such as government censorship of the press, and not subsequent punishment for expressions that had a socially injurious tendency. This had been the position maintained by William Blackstone in his *Commentaries*, purporting to summarize English common law.³⁴ Blackstone had declared that "[t]he liberty of the press . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."³⁵

In his first free speech opinion as a Supreme Court Justice, Holmes adopted Blackstone's view, treating as irrelevant the fact that

27. *Id.* at 113.

28. *McAuliffe*, 29 N.E. at 517.

29. 165 U.S. 275 (1897).

30. *Id.* at 281.

31. *Id.*

32. *Davis v. Beason*, 133 U.S. 333 (1890), *overruled by Thomas v. Review Bd.*, 450 U.S. 707 (1981).

33. *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904).

34. 4 WILLIAM BLACKSTONE, COMMENTARIES.

35. 4 *Id.* at *151.

Blackstone's *Commentaries* did not take into account the text of the Constitution of the United States. The case was *Patterson v. Colorado ex rel. Attorney General*,³⁶ in which an editor had published articles and a cartoon which allegedly "reflected upon the motives and conduct of the [judges of] the Supreme Court of Colorado in cases still pending."³⁷ He was convicted of contempt and appealed his conviction on the basis that "[t]o fine or imprison an accused person in contempt proceedings for publishing the truth about a judge or court when the truth of the charge is pleaded in justification . . . is to deprive him of liberty or property without due process of law."³⁸

The precise constitutional basis of the editor's appeal in *Patterson* was unclear. He did not argue that the Fourteenth Amendment's Due Process Clause "incorporated" the First Amendment, but rather that the word "liberty" in the Fourteenth Amendment should be read as including freedom to speak and to write.³⁹ Nor did the State of Colorado address the incorporation issue, arguing only that if there was a liberty to publish true information it should give way to the state's interest in preserving the orderly administration of justice.⁴⁰ Justice Harlan, however, dissenting in *Patterson*, argued that the Bill of Rights did apply against the States, relying on the privileges and immunities clause of the Fourteenth Amendment.⁴¹ Holmes merely said that "it is easier to refer to the Constitution generally for the supposed right [claimed by Patterson] than to point to the clause from which it springs."⁴² He then left the incorporation issue open, concluding that "even if we were to assume that freedom of speech and freedom of the press were protected from abridgement on the part not only of the United States but also of the States, still we should be far from the conclusion that [Patterson] would have us reach."⁴³

We will subsequently explore, from another perspective, Holmes' intermingling of First Amendment "incorporation" arguments and Fourteenth Amendment "liberty of speech" arguments in *Patterson*. His

36. 205 U.S. 454 (1907).

37. *Id.* at 459.

38. *Id.* at 456.

39. *Id.*

40. *See id.* at 458.

41. *Id.* at 464 (Harlan, J., dissenting). It was not until 18 years later that a majority of the Court was to hold, without discussion, that the Fourteenth Amendment did incorporate the First Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).

In his dissenting opinion in *Gitlow*, *see infra* text accompanying notes 359-73, Holmes wrote that "[t]he general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used." *Gitlow*, 268 U.S. at 672. For a discussion of the implications of that language, *see infra* text accompanying notes 362-64.

42. *Patterson*, 205 U.S. at 461-62.

43. *Id.* at 462.

grouping together of those arguments, however, also signaled that he did not think either the First or Fourteenth Amendments had a significant effect on the power of the state to restrict speech. "In the first place," he argued, citing decisions following Blackstone, "the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."⁴⁴ Holmes thus reduced the constitutional issues in *Patterson* to whether Colorado's punishment of the editor was a reasonable exercise of its police powers. That question answered itself. The editor had criticized the motives of state judges in cases pending before them. The "propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation," Holmes declared, "hardly can be denied."⁴⁵ In the vocabulary of the time, *Patterson* was a simple "police power" case in which a "bad tendency" of a communication had been identified: the standard of judicial scrutiny was minimal.

But the editor in *Patterson* had not merely claimed a right to comment about public trials and the judges who decided them; he had claimed that his statements about the corrupt and partisan motives of Colorado judges were true, and he had offered to prove their truth.⁴⁶ That fact did not matter to Holmes. At common law, he noted, "[t]he preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all."⁴⁷ In other words, the State of Colorado could decide that it did not promote the public welfare even for persons to make true statements about the conduct or motives of judges: it could treat those statements as criminal libels. If the statements had a tendency to interfere with the administration of the law, they could be suppressed without regard to their truth or falsity.

The combination of the prior-restraints limitation on First Amendment claims with the bad-tendency test employed as an evaluative standard for police-power limitations on free speech made Holmes' *Patterson* opinion very restrictive. Under its reasoning a state could suppress even true speech if it concluded that the words had a tendency to promote socially injurious acts. If a newspaper said that a particular decision of the governor of the state, or one of its courts, was reactionary and contrary to the public welfare, then that comment could apparently,

44. *Id.*

45. *Id.* at 463.

46. *Id.* at 461.

47. *Id.* at 462.

after *Patterson*, be made the basis for a contempt conviction simply because it might tend to undermine respect for elected officials or tend to interfere with the administration of justice.

Eight years after *Patterson* Holmes again advanced a restrictive theory of freedom of speech in a Supreme Court case, once more sanctioning the use of "bad tendencies" as a justification for subsequent punishment of speech. The case was *Fox v. Washington*,⁴⁸ in which he spoke for a unanimous Court. The petitioner in *Fox* was an editor whose magazine had published an article, *The Nude and the Prudes*, discussing the infiltration of a group whose members occasionally practiced nude bathing.⁴⁹ The group was infiltrated by "a few prudes," who "proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom," and ultimately had four members of the group arrested for indecent exposure.⁵⁰ The article called for a boycott of the "prudes'" businesses, declaring that "[t]he boycott will be pushed until these invaders will come to see the brutal mistake of their action and so inform the people."⁵¹

The state of Washington prosecuted the editor of the article under a state statute making it a gross misdemeanor to willfully publish, edit, or circulate any written matter " 'which shall tend to encourage or advocate disrespect for law or for any court or courts of justice.' "⁵² A jury convicted the editor and, on appeal, the Washington Supreme Court held that his article was "not a criticism of the law, but was calculated to, and did, incite the violation of law."⁵³ It noted that the right of free speech did not mean "that persons may with impunity advocate disregard of law."⁵⁴ The editor attacked the statute primarily on the ground that its controlling standard, "disrespect for law," was too vague, since " 'who can say what language will produce that state of mind?' "⁵⁵ The editor also claimed that the statute deprived him of his liberty under the Fourteenth Amendment and that the Court in *Patterson* had left open the question whether the First Amendment could be applied to the states.⁵⁶

Holmes, in sustaining the conviction, said that "[w]e understand the state court by implication at least to have read the statute as confined to

48. 236 U.S. 273 (1915).

49. *Id.* at 276.

50. *Id.*

51. *Id.* at 276-77.

52. *Id.* at 275-76 (quoting WASH. REMINGTON & BALLINGER'S CODE § 2564).

53. *State v. Fox*, 127 P. 1111, 1112 (Wash. 1912), *aff'd sub nom. Fox v. Washington*, 236 U.S. 273 (1915).

54. *Id.* at 1112.

55. Rabban, *First Amendment*, *supra* note 12, at 535 (quoting Brief for Plaintiff-in-Error at 15, *Fox v. Washington*, 236 U.S. 273 (1915) (No. 134, 1914 Term)).

56. *Id.* at 535 n.91; *see also Fox*, 236 U.S. at 274.

encouraging an actual breach of law," and "[i]t does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general."⁵⁷ He asserted that in this case "the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act."⁵⁸

There was no evidence, however, that the Washington courts would construe the statute so as to limit its application to actual breaches. Indeed, the facts of *Fox* suggested that the Washington courts would reach out to apply the statute to publications that "tend[ed] to produce unfavorable opinions." The article in *Fox* was such a publication. In sentences such as the one referring to "the privilege to bathe in evening dress, or with merely the clothes nature gave them,"⁵⁹ the article tended to communicate the "unfavorable" opinion that nudity in public was an appropriate activity. It appeared that the "disrespect for law" shown in the article was not the advocacy of a boycott, but rather the championing of public nudity.

Holmes further stated that "by indirection but unmistakably the article encourage[d] and incite[d] a persistence in what we must assume would be a breach of the state laws against indecent exposure."⁶⁰ He thus interpreted "disrespect" in the Washington statute as "manifested disrespect, as active disregard [for the] law."⁶¹ As a result, the statute fell into a class of laws that proscribed "encouragements that, . . . if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor" at common law.⁶² "Laws of this description," Holmes concluded, "are not unfamiliar."⁶³

Fox thus illustrated another Supreme Court application of the bad-tendency test to speech-restrictive legislation, a test that permitted states to suppress speech that had a "tendency" to incite or encourage socially undesirable acts. In *Fox* the Court applied the test quite broadly, since the speaker had not encouraged others to engage in public nudity but rather to boycott the businesses of those who had taken a "prudish" stance toward it. This suggested that any negative characterizations of persons who criticized others for purportedly engaging in an activity that a state had forbidden—such as working on Sunday or dropping out of school at the age of twelve—had "bad tendencies" and could be made the basis of criminal prosecutions.

57. *Fox*, 236 U.S. at 277.

58. *Id.*

59. *Id.* at 276.

60. *Id.* at 277.

61. *Id.*

62. *Id.*

63. *Id.* at 278.

Taken together, *Patterson* and *Fox* apparently left very little room for the First or Fourteenth Amendments to serve as a restraint on state legislation restricting efforts to criticize public officials or to protest majoritarian views. The decisions were consistent with judicial orthodoxy in free speech cases prior to the United States' involvement in World War I. They were not consistent with a later characterization of Holmes as having "a solicitude for individual expression."⁶⁴

B. Commentary on Free Speech Issues in the Late Nineteenth and Early Twentieth Centuries

The orthodox positions Holmes adopted in his early free speech cases do not represent a complete picture of the state of pre-World War I free speech jurisprudence. Recent scholarship has brought to light a quite different tradition of attitudes towards free speech that surfaced from the 1870s through World War I.⁶⁵

This alternative free speech jurisprudence attracted commentators of sharply diverging ideological perspectives. Some were early twentieth-century political reformers who sought to expand the opportunities for critics of established governmental and societal practices to be heard.⁶⁶ A greater number of the commentators, however, were closer to Holmes in age, and can be identified with an established late nineteenth-century "liberal" ideology that emphasized the lack of legitimate power in the state to intrude into a private citizen's affairs.⁶⁷

The most significant feature of this alternative tradition of commentary, for present purposes, is its implications for free speech cases in the period during and after World War I. To understand those implications it is necessary to understand the philosophical premises upon which the commentary was based. A central premise driving the commentary in its nineteenth-century versions was that the concept of liberty subsumed a cluster of fundamental values, including individual autonomy in matters of tastes and preferences, freedom of exchange in the marketplace, and the fruits of property ownership. Liberty was thus a concept of great importance and potentially broad scope, whose promotion furnished one of the rationales for government itself. The assumed fundamental status of liberty in American culture was the base point from which arguments supporting the judicial doctrine of "liberty of contract" in late nine-

64. THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 289 (Max Lerner ed., 1943).

65. See GRABER, *supra* note 12, at 17-65; Rabban, *First Amendment*, *supra* note 12, at 559-79.

66. Examples were Theodore Schroeder, Ernst Freund, and Henry Schofield. See GRABER, *supra* note 12, at 54-65; Rabban, *First Amendment*, *supra* note 12, at 560-75.

67. Some of the commentators were Thomas M. Cooley, Christopher G. Tiedeman, John W. Burgess, and John B. Minor. See GRABER, *supra* note 12, at 17-44; Rabban, *First Amendment*, *supra* note 12, at 560, 563-64.

teenth- and early twentieth-century substantive due process cases were derived. Those same arguments were potentially applicable to cases raising Fourteenth Amendment objections to governmental restrictions on speech, and were advanced by several treatise writers and commentators in the late nineteenth century.⁶⁸ In summary, the arguments demanded that the same presumptions against governmental interference with individual liberty that ought to be invoked in cases involving governmental efforts to regulate economic relationships also be applied to governmental efforts to regulate speech.⁶⁹ Both sets of cases raised the specter of potential threats to liberty.

While "liberty of contract" was a commonly invoked judicial concept in late nineteenth- and early twentieth-century case law, an analogous treatment of "liberty of speech" rarely appeared. There were two principal reasons for the hidden status of the "liberty of speech" argument. First, as noted earlier, there were no federal and only a handful of state statutes that directly regulated speech during the time of the 1917 Espionage Act⁷⁰ and the 1918 Sedition Act,⁷¹ and thus very few Supreme Court cases involved the issue of governmental power to restrict speech.⁷²

Second, while the status of "liberty of speech" was theoretically independent of the status of other liberties, late nineteenth-century legal doctrine tended to subsume issues of "speech" in issues conceived as involving economic liberty. In two late nineteenth-century Supreme Court cases, for example, the "free speech" issues were treated by both sides as derivative of economic issues. In the first case, *In re Debs*,⁷³ a federal court order enjoining Eugene Debs and others from encouraging railroad workers to leave their jobs was treated as an alleged infringement of a constitutional right to engage in the labor practice of a strike.⁷⁴

68. See, e.g., JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* (1913 prtg.) (1890); COOLEY, *supra* note 21; CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* (St. Louis, F.H. Thomas 1886). See generally GRABER, *supra* note 12, at 18-21 (discussing the philosophical foundations of civil libertarianism).

69. See GRABER, *supra* note 12, at 18-24.

70. Espionage Act of 1917, ch. 30, 40 Stat. 217.

71. Sedition Act of 1918, ch. 75, 40 Stat. 553, *repealed by* Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359, 1360.

72. See PAUL L. MURPHY, *THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 16-17* (1972) [hereinafter MURPHY, *FREEDOM OF SPEECH*] (arguing that formal repression was unnecessary because communication between people of different economic and social-class status was infrequent); PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 51* (1979) (discussing reasons why government did not need to suppress free speech before World War I); Rabban, *First Amendment*, *supra* note 12, at 519 (noting that the period following World War I was characterized by a marked increase in First Amendment prosecutions, judicial discussions, and scholarly commentary).

73. 158 U.S. 564 (1895).

74. *Id.* at 574-75.

In the second case, *Davis v. Massachusetts*,⁷⁵ in which the Supreme Court affirmed the position taken below by Holmes in *Commonwealth v. Davis*,⁷⁶ the issue of a person's right to speak on the Boston Common was treated as derivative of the powers of municipal corporations to restrict activities of any kind on city property.⁷⁷

The existence of a jurisprudential tradition grounding free speech protection on a broad interpretation of the concept of liberty was thus largely confined to scholarly literature prior to World War I. Moreover, that tradition differed from the orthodox view of free speech only in some respects. Those who conceptualized free speech as a liberty under the Fourteenth Amendment did not believe that the constitutional provisions on free speech merely codified the common law and therefore confined free speech protection to freedom from prior restraints.⁷⁸ It did not follow, however, that those individuals believed that free speech was to be given absolute or even extensive protection. On the contrary, many assumed that the liberty to speak could be balanced against the power of a government to defend itself in war or against attacks that threatened its own existence.⁷⁹

It is not clear, then, that the *Patterson* or *Fox* cases would have been decided differently had the late nineteenth-century view of speech as a liberty challenged Holmes' early orthodox view.⁸⁰ What is clear, however, is that when political reformers began to devote greater attention to the question of expanding protections for political dissidents in the early twentieth century, an earlier tradition of commentary treating speech as a fundamental liberty was available to them. Along with that tradition, however, came part of its intellectual baggage: the identification of liberty with doctrines, such as "liberty of contract," that by the early twentieth century had troublesome political implications.⁸¹

75. 167 U.S. 43 (1897).

76. 39 N.E. 113 (Mass. 1895), *aff'd sub nom. Davis v. Massachusetts*, 167 U.S. 43 (1897).

77. *Davis*, 167 U.S. at 46-48; *see also* Rabban, *First Amendment*, *supra* note 12, at 529-30 (discussing Court's failure to address First Amendment claims in *Davis*).

78. Cooley and Tiedeman directly challenged that view. *See* COOLEY, *supra* note 21, at 421; TIEDEMAN, *supra* note 68, at 191-92.

79. *See* COOLEY, *supra* note 21, at 428; TIEDEMAN, *supra* note 68, at 192; *see also* THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 277-78 (Boston, Little, Brown 1880) (government could intervene to suppress speech threatening "the abolition of republican institutions").

80. The defendants in *Patterson* and *Fox* arguably threatened the existence of "republican institutions" by encouraging disrespect for the law or its officials. *See supra* text accompanying notes 36-63.

81. The "liberty of contract" doctrine was criticized during the first decade of the twentieth century for being unresponsive to changing social and economic conditions. *See, e.g.,* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909). *See generally* G. EDWARD WHITE, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, in PATTERNS OF AMERICAN LEGAL THOUGHT 99, 102-07 (1978) (discussing the displacement of "mechanical jurisprudence" by sociological jurisprudence).

The potential use of liberty arguments as a source of protection for the controversial expressions of political dissidents, such as anarchists, labor organizers, and advocates of unconventional and arguably "obscene" sexual practices, caused a dilemma for early twentieth-century reformers inclined to challenge orthodox free speech jurisprudence. While they were prepared to resist judicial efforts to confine protection for speech to prior restraints, to permit suppression of expressions that had "bad tendencies," or to ignore free speech issues altogether, to do so on the basis of a broad-ranging conception of liberty would implicitly require them to acknowledge the primacy of that conception in the arena of economic affairs. In short, the liberty premise of protection for free speech seemed to legitimate other protections—such as freedom of contract—to which early twentieth-century political reformers were distinctly unsympathetic.

Over the first two decades of the twentieth century, political reformers who were supporters of free speech exhibited two different responses to the potential ramifications of the argument premised on liberty. One response was to disassociate freedom of contract from the general realm of protected liberties, either on the ground that liberty involved material possessions, which were necessarily secondary to the more fundamental right of human existence,⁸² or on the ground that the liberty being protected was a fiction given the unequal bargaining status of many contracting employers and employees.⁸³

The other response had far greater ramifications for the development of modern First Amendment theory. It constituted a reorientation of the premises underlying a speech-protective interpretation of the constitutional provisions affecting freedom of expression. That reorientation took place in two discernible stages. In the first stage, a group of "progressive"⁸⁴ political reformers confronted the implications of the liberty premise for numerous proposed legislative reforms and concluded that when the values associated with social progress conflicted with those associated with individual liberty, the latter set of values should give way to the former.⁸⁵ In the second stage, in part as a response to the implications of this conclusion, the liberty premise of free speech protection was reframed as a democracy premise. Thus the locus of philosophical

82. See, e.g., SCHROEDER, *supra* note 21, at 13, 94.

83. See, e.g., FREUND, *supra* note 21, at 539.

84. The term "progressive" is placed in quotes to signify that it was a label these reformers attached to themselves. Many were identified with the progressive movement in American politics that emerged as an influential political force in the early years of the twentieth century. See WHITE, *supra* note 81, at 103-04.

85. See GRABER, *supra* note 12, at 75-86 (chapter entitled "Progressive Responses to Free Speech Conflict, 1915-1927"). Graber discusses the assertion of many progressives that "preserving social community under modern conditions required an individual conformity inconsistent with broad rights of political dissent." *Id.* at 76.

energy animating solicitude for free speech was shifted from the individual as an autonomous being to the individual as a participant in a democratic society. The sources of protection for free speech became identified not with the interest of the individual whose liberty government existed to further, but with the social interest in furthering democratic principles by encouraging independent public discussion and debate.⁸⁶

Holmes was to emerge as one of the founders of modern First Amendment theory at the same moment in time when this second stage in the reorientation of the premises of free speech jurisprudence was taking place. I will subsequently discuss the relationship between Holmes and progressive intellectuals who were engaged in the reorientation process. At this point, as a prelude to that discussion, I want to take up another element in the context of Holmes' early free speech cases: his perception of the way others were reacting to his work on the Court in the first decade of his tenure as a Justice.

C. *The Personal Context of Holmes' Early Decisions: A Quest for Recognition*

During the same time period that Holmes was adhering to his orthodox view of free speech and commentators were seeking to articulate alternative views, Holmes was undergoing a series of changes in his personal life. These changes, which centered on the nature and significance of his friendships, were to provide an additional catalyst for the transformation of his free speech jurisprudence.

Prior to becoming a Supreme Court Justice in 1902, at the age of 61, Holmes' social and intellectual life had a distinctive, and seemingly contradictory, tenor. Following a pattern he had initiated very early in his professional career, Holmes did not participate extensively in social affairs in Boston, where he had lived his entire life. He absorbed himself in his judicial work and in intellectual pursuits, such as extensive reading and frequent letter writing, during his leisure time; he and his wife rarely entertained or socialized.⁸⁷ At the same time, however, Holmes devel-

86. The idea of free speech being related to social interests had been mentioned by Roscoe Pound and Henry Schofield. See Roscoe Pound, *Interests of Personality* (pt. 2), 28 HARV. L. REV. 445, 453 (1915) (discussing social interest in individual free speech); Schofield, *supra* note 21, at 91-92 (asserting that the "common right of public and truthful discussion of public affairs exists as a right held in trust for the educational profit and benefit of the public," *id.* at 91). This relationship was to become central to the views of Zechariah Chafee, Jr., the most significant figure in the reorientation of modern free speech jurisprudence. See *infra* text accompanying note 211; see also GRABER, *supra* note 12, at 122-51 (noting that Chafee has been regarded as the most influential legal scholar in the area of civil liberties); Rabban, *First Amendment*, *supra* note 12, at 563-64, 587-89 (commenting that prewar scholars, including Chafee, provided the theoretical underpinnings for modern First Amendment doctrine).

87. On Holmes' social contacts in his years in Boston, see G. Edward White, *Holmes's "Life*

oped a series of "flirtatious"⁸⁸ relationships with women in Boston, and especially in England, to which he frequently traveled in the summers after 1887.⁸⁹

After he became a Supreme Court Justice, however, Holmes changed his patterns of socializing. He and his wife, Fanny Dixwell, briefly became active participants in Washington political society, entertaining and dining out frequently.⁹⁰ At the same time Holmes informed his female correspondents that he would no longer be playing the roles of courtier and "flirt" in Washington, partly because of the provincial gossip of that city and partly because of the absorbing nature of his new work.⁹¹ After restricting his informal social contacts, Holmes turned more and more to his role as a correspondent and to the friendships associated with that role.⁹² Eventually, by the onset of the First World War, he ceased traveling to England altogether.⁹³

During these early years of Holmes' tenure on the Supreme Court, a central theme in his life was the juxtaposition of his great interest in his work with his frustration with the lack of appreciation of his contributions. In his correspondence during the period from late 1902, when he first noted his reactions to his new position, to 1912, when his friendship

Plan": *Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1436-39 (1990) [hereinafter White, *Life Plan*]. On his reading and letter writing, see G. Edward White, *Holmes As Correspondent*, 43 VAND. L. REV. 1707, 1749-61 (1990) [hereinafter White, *Correspondent*].

88. The term "flirtatious" has been placed in quotes to emphasize that it was an adjective commonly applied to his extramarital friendships by contemporaries. See, e.g., Alice James, Journal entry (June 16, 1889), in ALICE JAMES: HER BROTHERS—HER JOURNAL 93 (Anna R. Burr ed., 1934) [hereinafter ALICE JAMES: HER JOURNAL] (describing Holmes as having "certainly broken loose and . . . flirting as desperately as ever"); Letter from Harold J. Laski to Oliver Wendell Holmes (July 29, 1924), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 640 (informing Holmes that a woman "remembered you most perfectly in the 'nineties as the most perfect flirt in London"). Alice James was the sister of William and Henry James, close acquaintances of Holmes in Boston in the 1860s. See ALICE JAMES: HER JOURNAL, *supra*, at 6; see also 1 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870, at 201 (1957).

89. See White, *Correspondent*, *supra* note 87, at 1714, 1727-31; White, *Life Plan*, *supra* note 87, at 1439-42. These relationships had culminated in an emotional attachment to Clare Castletown, the wife of Bernard Fitzpatrick Castletown, a titled Anglo-Irish member of Parliament. White, *Correspondent*, *supra* note 87, at 1732. Holmes first met Clare Castletown in London in 1889, sent her a copy of the first edition of his volume of extrajudicial address, *Speeches*, when it was published in 1891, and on returning to England in 1896 renewed acquaintances with her. *Id.* at 1733. Between 1896 and the 1920s (Clare died in 1927) he wrote her over 100 letters that have survived; only a few of hers to him have survived. *Id.* at 1735. The letters were first published by John S. Monagan as *The Love Letters of Justice Holmes*, BOSTON GLOBE MAG., Mar. 24, 1985, at 14. For more detail on the relationship between Holmes and Clare Castletown, see White, *Life Plan*, *supra* note 87, at 1442-57; White, *Correspondent*, *supra* note 87, at 1731-44.

90. See White, *Life Plan*, *supra* note 87, at 1461-66 and sources cited therein.

91. See *id.*

92. See White, *Correspondent*, *supra* note 87, at 1709-10; see also White, *Life Plan*, *supra* note 87, at 1463-64 and sources cited therein (especially noting his lack of personal contacts with women in Washington).

93. White, *Correspondent*, *supra* note 87, at 1709.

with Felix Frankfurter first began to blossom, there are numerous letters describing his delight with the work of a Justice, especially its national dimensions and its intellectual depth and variety.⁹⁴ There are also several letters confessing his exalted ambitions as a jurist, his feeling of being apart, in his concerns and his intellectual inclinations, from his colleagues on the Court, and especially his sense that his reputation, even among the cognoscenti, was not commensurate with his talents and contributions.⁹⁵ This last reaction of Holmes' cannot easily be dismissed as false modesty or evidence of an insatiable drive for success. While both of those characteristics can fairly be attributed to Holmes,⁹⁶ there is independent evidence that he was not particularly well known, let alone widely admired, during his first decade on the Court.⁹⁷

The changes in Holmes' life that were ushered in by the themes of his early years on the Court precipitated a change in the nature of his friendships. In place of his friendships with women, and also as a surrogate for the loss of some of his older male friends, such as Chief Justice Melville Fuller and John Chipman Gray,⁹⁸ Holmes substituted a new set of friendships with a group of young intellectuals who had come to notice and to appreciate his work as a scholar and a judge.⁹⁹ The central figure in this group of Holmes acolytes was Felix Frankfurter, who first befriended Holmes in 1912, when Frankfurter was 29 and Holmes 71.¹⁰⁰ Through Frankfurter, Holmes came into contact with a number of Frankfurter's contemporaries, such as Harold Laski, Walter Lippmann,

94. See White, *Life Plan*, *supra* note 87, at 1461-62 and sources cited therein.

95. See *id.* at 1462 and sources cited therein.

96. See Yosaf Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 227, 233-34, 253-54 (1964). On Holmes' drive for recognition and success, see 1 HOWE, *supra* note 88, at 281-84; 2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882 (1963); White, *Life Plan*, *supra* note 87, at 1457-60 and sources cited therein.

97. For example, Alexander Bickel and Benno Schmidt make the following analysis:

Nearly thirty years after publication of *The Common Law* and after his first judicial appointment, the public hardly knew [Holmes]. . . . In professional circles, to be sure, and among his colleagues, there was recognition, to a degree, of Holmes' stature. . . .

Yet in his seventieth year, even among his professional peers, the general acknowledgment of greatness was still to come for Holmes, and he himself felt its absence rather painfully. He was, then as now, often charged with obscurity and with a disinclination to take particular facts into account. . . .

9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21*, at 69-70 (1984). Bickel cites a 1912 exchange between William Howard Taft, then President of the United States, John Chipman Gray, Holmes' intimate friend who was then on the Harvard Law faculty, and Taft's son Robert Taft, a Harvard student who had been offered the position of secretary for Holmes for the 1913-14 Term. The parties acknowledged that, as Gray put it, "'Judge Holmes' opinions seem sometimes to lack lucidity.'" *Id.* at 70. President Taft ultimately concluded that his son would learn little from Holmes that he had not already learned at Harvard. *Id.*

98. Both had died by 1915.

99. White, *Life Plan*, *supra* note 87, at 1467-72 and sources cited therein.

100. On the origins of the Holmes-Frankfurter friendship, see BAKER, *supra* note 12, at 454-55; White, *Life Plan*, *supra* note 87, at 1467-69 and sources cited therein.

Herbert Croly, Learned Hand, Morris Cohen, and Zechariah Chafee.¹⁰¹ Outside of this circle, Holmes also made other friends who were roughly the same age as Frankfurter, such as the British diplomat Lewis Einstein.¹⁰²

Three distinguishing features of Frankfurter and his contemporaries intrigued Holmes. First, they were distinctly men of the twentieth century, "moderns," "progressives," religious skeptics, and relative enthusiasts for democracy, pluralism, and beneficent affirmative government. As such they seemed to Holmes to be men of the future. Second, they were enthusiastic, even fawning supporters of Holmes as a jurist, and thus gave Holmes the attention and praise he coveted.¹⁰³ Third, and perhaps most importantly, Frankfurter and his contemporaries provided Holmes with a rationale for doing something he very much wanted to do: to continue in active service as a Supreme Court Justice well past the point where he was eligible to retire on a full pension.¹⁰⁴

Before meeting Frankfurter and his circle, Holmes had written to friends that he was contemplating retirement when he became eligible to do so on a full pension; after coming to know his younger acquaintances and encountering their praise, he wrote that he saw no reason to leave the Court while he felt he could do the work.¹⁰⁵ Doing the work, however, now had a different dimension for him: it was not simply "[getting] to the bottom"¹⁰⁶ of cases, nor writing his opinions "with style,"¹⁰⁷ but communicating to a younger generation of admirers and potential disciples. By the onset of World War I the jurisprudential context of Holmes' First Amendment opinions was beginning to change, as was his conception of the audience for, and in that sense the "meaning" of, those opinions.

The transformation of Holmes' free speech jurisprudence, then, was

101. White, *Correspondent*, *supra* note 87, at 1709; White, *Life Plan*, *supra* note 87, at 1470.

102. Holmes first met Einstein through his friendship with Bernard and Clare Castletown. See Lewis Einstein, *Introduction* to THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903-1935, at xx (James B. Peabody ed., 1964).

103. See White, *Life Plan*, *supra* note 87, at 1471.

104. See *id.*

105. On Holmes' seeing no reason to leave the Court, see Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Dec. 15, 1912), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 204, 205 (Mark DeWolfe Howe ed., 1941) [hereinafter HOLMES-POLLOCK LETTERS]. For examples of praise from younger acquaintances, see Letter from Felix Frankfurter to Oliver Wendell Holmes (Mar. 7, 1912), in Holmes Papers, *supra* note 13; Letter from Felix Frankfurter to Oliver Wendell Holmes (Feb. 19, 1912), in Holmes Papers, *supra* note 13; Letter from Felix Frankfurter to Oliver Wendell Holmes (Feb. 10, 1912), in Holmes Papers, *supra* note 13.

106. Oliver Wendell Holmes, Speech to the Bar Association of Boston (Mar. 7, 1900), in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 122, 123 (Mark DeWolfe Howe ed., 1962).

107. Letter from Oliver Wendell Holmes to Canon Patrick A. Sheehan (Dec. 15, 1912), in HOLMES-SHEEHAN CORRESPONDENCE 55, 56 (David H. Burton ed., 1976).

part of a larger process by which he sought to embrace a new set of friends and constituents. The course of that transformation, however, was not linear nor easily discernible on the surface, for reasons that go to the essence of Holmes as a person and a jurist. First, part of the attraction Holmes felt for the new generation of intellectuals that Frankfurter's circle personified stemmed from their perception of him as a figure of authority and eminence, being a representative of an older generation, a judge, and a major figure in American legal scholarship. But while Holmes found the company of his new friends invigorating and reveled in their praise, he did not share very many of their progressive ideas and took pains to disassociate himself from their political goals.¹⁰⁸ His embrace of the values of a modern generation was thus elliptical, tentative, and qualified, despite the fact that his interest in preserving his role as an eminent but "youthful" figure was keen.

Second, Holmes was a judge, and his interest in gaining recognition was closely tied to how others assessed his judicial work. Given the very high value placed on jurisprudential consistency and integrity by his fellow judges and by the community of scholars who commented on judicial opinion, it was evident that Holmes, or any other judge interested in professional acclaim, would seek to convey an impression that any changes in his jurisprudential point of view could be seen as principled and internally consistent rather than idiosyncratic or ad hoc.

Finally, Holmes had a distinctive sensibility as a judge, one that was relatively rare among his professional peers. His greatest gratifications came from the philosophical and literary dimensions of judicial decision-making, as distinguished from its more orthodox "legal" dimensions. Holmes was extremely interested in "finding a form of words" to express a particular argument;¹⁰⁹ he was also extremely interested in discerning

108. Holmes wrote Pollock in 1919, after reading a book suggested to Holmes by Laski, that the author, who described the twentieth century as the century of hope, held "a rather deeper belief in the spiritual significance of man than I am able to entertain and a consequently greater faith on the upward and onward destiny of the race." Letter from Oliver Wendell Holmes to Sir Frederick Pollock (May 26, 1919), in 1 HOLMES-POLLOCK LETTERS, *supra* note 105, at 13; see also Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 23, 1910), in 1 HOLMES-POLLOCK LETTERS, *supra* note 105, at 163 ("I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence, and my disbelief that the Interstate Commerce Commission is a fit body to be entrusted with rate-making.").

109. In an August 4, 1924, conversation with Felix Frankfurter, Justice Louis Brandeis said the following of Holmes:

Truth of [the] matter is he takes joy in the trick of working out what he calls "a form of words" in which to express desired result. He occasionally says, "I think I can find a form of words" to which I reply, "of course you can, you can find a form of words for anything."

Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 334 (quoting Conversation between Louis D. Brandeis and Felix Frankfurter, in Chatham, Mass. (Aug. 4, 1924) (transcribed by Melvin I. Urofsky from notes contained in The Lewis Brandeis Papers (Harvard Law School))).

the jurisprudential roots and philosophical groundings of that argument. He was only irregularly interested in the consequences of the result his opinion sought to justify, and strikingly uninterested in the doctrinal implications of his opinions for future cases.¹¹⁰ He wrote opinions, in short, as if they were literary exercises or philosophical discourses, not as if they were doctrinal guides for others. These tendencies make his opinions arresting, memorable, and pithy, but often cryptic, elusive, and sometimes even deceptive as doctrinal formulations; they make it difficult to render in any straightforward fashion the evolution of his perspective on a particular legal issue.

The process by which Holmes participated in the transformation of free speech jurisprudence was in the end an idiosyncratic process, despite its larger doctrinal implications. By treating Holmes' free speech cases as if they were the formulations of an orthodox judicial-opinion writer, some scholars have been misled into emphasizing doctrinal continuity or contradiction,¹¹¹ when Holmes was not particularly interested, except on a surface level, in those dimensions of his opinions. Other scholars have been overly anxious to identify Holmes as the founder of a modern libertarian tradition of First Amendment analysis, suggesting that a libertarian posture reflected his "deepest thoughts" on free speech.¹¹² Neither view captures the complex set of variables and responses that resulted in Holmes participating in the modernization of free speech jurisprudence.

IV

THE TRANSFORMATION OF HOLMES' FIRST AMENDMENT JURISPRUDENCE

A. "*Clear and Present Danger*" and the *Espionage Act Trilogy*: *Restating the Orthodox View*

Three years after Holmes' decision in *Fox v. Washington*,¹¹³ he gave some inkling that he was beginning to reconsider his orthodox views on freedom of speech. In the 1918 case of *Toledo Newspaper Co. v. United States*¹¹⁴ a majority of the Court upheld a judge's contempt citation of a newspaper imposed for remarks critical of the judge's conduct of a trial. The statute involved in *Toledo Newspaper* had provided that contempt citations could be issued in response to the "misbehavior of any person in [the] presence [of judges], or so near thereto as to obstruct the admin-

110. See *infra* text accompanying notes 413-17.

111. See *supra* note 11 and accompanying text.

112. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 86 (1941) (replaced original 1920 edition, *id.* at xi).

113. 236 U.S. 273 (1915).

114. 247 U.S. 402 (1918), *overruled by* *Nye v. United States*, 313 U.S. 33 (1941).

istration of justice.’”¹¹⁵ A majority of the Court read “so near” as meaning “tending to,” stating that the test of whether such a statute could restrict First Amendment rights was “the character of the act done and its direct tendency to prevent and obstruct,”¹¹⁶ a restatement of the bad-tendency test. Holmes dissented, reading “‘so near as to obstruct’” as “so near as actually to obstruct—and not merely near enough to threaten a possible obstruction.”¹¹⁷ That language, and his vote to overturn the conviction, appeared inconsistent with his endorsement of the bad-tendency test in *Fox*. Moreover, his assumption that the case raised a First Amendment issue did not seem to square with his previously expressed view in *Patterson v. Colorado ex rel. Attorney General*¹¹⁸ that subsequent punishment for objectionable speech did not violate the First Amendment at all, since the Amendment was confined to prior restraints against publication.

While Holmes’ departure from *Patterson* in *Toledo Newspaper* foreshadowed his eventual abandonment of his orthodox views on free speech, his first postwar decisions in First Amendment cases were hardly speech protective. In 1919 the Supreme Court considered four cases under the Espionage Act of 1917, a statute that sought to prevent persons from causing insubordination in the armed forces or obstructing the recruitment or enlistment of soldiers.¹¹⁹ In three of the cases, *Schenck v. United States*,¹²⁰ *Frohwerk v. United States*,¹²¹ and *Debs v. United States*,¹²² the Court reached the merits of convictions obtained under the Act and concluded that the convictions did not violate the First Amendment.¹²³ Holmes wrote unanimous opinions for the Court in each of the

115. *Toledo*, 247 U.S. at 418.

116. *Id.* at 419.

117. *Id.* at 423.

118. 205 U.S. 454 (1907).

119. Espionage Act of 1917, ch. 30, 40 Stat. 217. The overwhelming number of prosecutions under the Espionage Act were brought under title I, section 3 of that Act, which provided that:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

Id. tit. 1, § 3, 40 Stat. at 217.

120. 249 U.S. 47 (1919).

121. 249 U.S. 204 (1919).

122. 249 U.S. 211 (1919).

123. The Court dismissed *Sugarman v. United States*, 249 U.S. 182 (1919), for want of jurisdiction. In a unanimous opinion by Brandeis, the Court held that there had been no “substantial” constitutional issue properly raised in the case. *Id.* at 185. *Sugarman* dealt with a Socialist party member who had been convicted for describing World War I as a capitalist conspiracy in which workers should not participate. *Id.* at 183. The only basis for a constitutional

three cases.

The three cases featured, for the first time in the twentieth-century history of free speech, extensive discussion of the First Amendment issues raised by prosecution under the Espionage Act. In all the cases, the government conceded that the First Amendment did not merely apply to prior restraints,¹²⁴ but maintained that the test for finding a violation of the Espionage Act was whether the language complained of had a "bad tendency"—in these instances a tendency to prevent or obstruct the war effort. Holmes' opinion in *Schenck* provided the central basis for the Court's decisions in all the cases.

The defendants in *Schenck* had been Socialist Party officials who had distributed leaflets to men who had been drafted to serve in World War I.¹²⁵ The leaflets intimated "that a conscript [was] little better than a convict," and "that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few."¹²⁶ The leaflet headings, addressed to the soldiers, read: "'Do not submit to intimidation'" and "'Assert Your Rights.'"¹²⁷

Holmes treated the facts of *Schenck* as an attempt to violate the Espionage Act, analogous to an attempt at criminal law. Under the criminal-attempt rationale, speech was just another act whose legality was to be judged by the intentions of the actor and the act's tendency to bring about a legislatively prohibited evil.¹²⁸ In his *Schenck* opinion, Holmes emphasized both of those elements. "Of course," he concluded, "the 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."¹²⁹ Under orthodox analysis, then, "intent" and "bad tendency" both had been found.

Holmes then considered, however, whether the fact that the circular distributed by the defendants was "protected by the First Amendment to the Constitution"¹³⁰ made any difference. He conceded 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, as intimated in *Patterson v. Colorado*."¹³¹ He also conceded that "in many places and in ordinary times the defendants in saying all that was said in

issue in the case was purportedly erroneous instructions on the First Amendment. See *id.* at 185. On review, however, the Court found that the instructions were adequate.

124. See Rabban, *Emergence*, *supra* note 12, at 1255-56 (discussing *Debs*).

125. *Schenck*, 249 U.S. at 49-50.

126. *Id.* at 50-51.

127. *Id.* at 51.

128. *Id.* at 52.

129. *Id.* at 51.

130. *Id.*

131. *Id.* at 51-52.

the circular would have been within their constitutional rights.”¹³² He then continued:

But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. . . . 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.¹³³

This passage demonstrates how, at this stage of his career, Holmes’ view of First Amendment issues was still shaped by his common-law experience, in particular his experience with the law of criminal attempts. As a Massachusetts judge, Holmes had implemented a view of criminal-attempt law that focused on notions of intent and tendency, emphasizing that the requisite intent to bring about an evil that the state had a right to prevent and the tendency to produce that evil were to be determined from the circumstances of the case.¹³⁴ In two of his Massachusetts decisions, *Commonwealth v. Kennedy*¹³⁵ and *Commonwealth v. Peaslee*,¹³⁶ Holmes had addressed “intent” and “tendency” in terms of “proximity” and “degree.”¹³⁷ He had also used the same terms in an earlier Supreme Court decision, the criminal conspiracy case of *Swift & Co. v. United States*,¹³⁸ in which he stated that the distinction between “mere preparation” and an attempt was one of “proximity and degree.”¹³⁹

These previous opinions suggest that Holmes’ “clear and present danger” language in *Schenck* was merely another version of formulas involving “proximity and degree.” That speech was involved added nothing to the analysis. Spoken words urging resistance to the war were treated the same as an unsuccessful effort to poison a relative, as in *Kennedy*, or to burn down a building, as in *Peaslee*. Speech was, as Holmes told Harold Laski in July 1918, like “any other overt act that we don’t like.”¹⁴⁰ As in the case of prohibitions on overt acts in the com-

132. *Id.* at 52.

133. *Id.* (citation omitted).

134. This view had first been promulgated by Holmes in his book, *The Common Law*. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 65-66 (Boston, Little, Brown 1881).

135. 48 N.E. 770 (Mass. 1897).

136. 59 N.E. 55 (Mass. 1901).

137. See *Peaslee*, 59 N.E. at 56; *Kennedy*, 48 N.E. at 771-72.

138. 196 U.S. 375 (1905).

139. *Id.* at 402.

140. Letter from Oliver Wendell Holmes to Harold J. Laski (July 7, 1918), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 161.

mon law of attempts, prohibitions on speech did not need to be closely tied to the imminence of success of the attempt.

Schenck then became the basis for the Court's decision to uphold the convictions in *Frohwerk* and *Debs*. Both cases were potentially distinguishable from *Schenck* on their facts. The defendant in *Schenck* had distributed leaflets directly to men who had been drafted.¹⁴¹ The only question in that case was whether the language in those leaflets demonstrated a tendency to encourage draftees to resist their conscription. In *Frohwerk* and *Debs*, by contrast, the speakers had issued general criticisms of the war effort and had not made any real effort to direct them to draftees.¹⁴² In *Debs*, the speaker had specifically restrained from urging draftees not to enlist.¹⁴³

Holmes, however, did not treat these facts as making any difference. In *Frohwerk* he noted that "we have decided in [*Schenck*] that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion. . . . [S]o far as the language of the articles goes there is not much to choose between expressions to be found in them and those before us in *Schenck v. United States*."¹⁴⁴ He conceded that "[i]t does not appear that there was any special effort to reach men who were subject to the draft."¹⁴⁵ But on the record in *Frohwerk*, he concluded, "it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."¹⁴⁶

The *Frohwerk* case also included dicta suggesting that Holmes was treating it like an unsuccessful criminal attempt. He stated that "[w]e venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."¹⁴⁷ His comment seems unnecessary—no one at the time was suggesting that the First Amendment was an absolute—except to establish that an attempt to advise others to commit murder could be treated as an attempt to murder. Later in *Frohwerk*, Holmes noted that "[w]e do not lose our right to condemn either measures or men because the Country is at war."¹⁴⁸ Again, the comment seems unnecessary unless Holmes was seeking to

141. *Schenck*, 249 U.S. at 50.

142. See *Debs*, 249 U.S. at 214-15; *Frohwerk*, 249 U.S. at 208.

143. See *Debs*, 249 U.S. at 213; see also *infra* text accompanying note 153.

144. *Frohwerk*, 249 U.S. at 206-07.

145. *Id.* at 208.

146. *Id.* at 209.

147. *Id.* at 206.

148. *Id.* at 208.

underscore the fact that the criminality of such condemnations should be treated as a question of proximity and degree, as embodied in formulas such as the "clear and present danger" dictum. But Holmes did not repeat that dictum in *Frohwerk*, and it is very difficult to see, despite Holmes' "kindle a flame" metaphor,¹⁴⁹ how printing a circular intended for an audience of German-speaking socialists created a clear and present danger that the war effort would be obstructed.

The *Debs* case presented Holmes with another opportunity to apply his "attempts" analogy. This was the *cause célèbre* of the Espionage Act cases, in which Eugene Debs, the Socialist Party candidate for President in 1912, was convicted of obstructing the war effort on the basis of a speech he made at the Socialists' convention.¹⁵⁰ As Holmes conceded, Debs' "main theme" in the speech "was socialism, its growth, and a prophecy of its ultimate success."¹⁵¹ Several particulars of Debs' speech, however, were made the basis of a criminal prosecution under the Espionage Act. Debs had alluded in the speech to a visit that he had made to three "loyal comrades" who were serving time in a workhouse for "aiding and abetting another in failing to register for the draft."¹⁵² In discussing that visit, Holmes said in his opinion, Debs had "said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more."¹⁵³ Holmes also noted that, in taking up the case of another Socialist who had been convicted of obstructing the enlistment service, Debs had "praised her for her loyalty to socialism . . . and said that she was convicted on false testimony, under a ruling that would seem incredible to him if he had not had some experience with a Federal Court."¹⁵⁴ Finally, Holmes pointed out that Debs had said "I abhor war. I would oppose the war if I stood alone,"¹⁵⁵ and that the Socialist Party had adopted an "'Anti-war Proclamation and Program'" at its convention, which Debs had said that he "approved of . . . in spirit and in substance."¹⁵⁶

The logic of Holmes' approach to criminal attempts applied easily to Debs' acts. Holmes maintained that the acts raised the possibility that "one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to

149. See *supra* text accompanying note 146.

150. *Debs*, 249 U.S. at 212.

151. *Id.*

152. *Id.* at 213.

153. *Id.*

154. *Id.*

155. *Id.* at 214.

156. *Id.* at 215.

obstruct recruiting.”¹⁵⁷ He then concluded that “[i]f that was intended and if, in all the circumstances, that would be its probable effect, [Debs’ speech] would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.”¹⁵⁸ According to Holmes, Debs’ statement approving the Socialist Party’s antiwar platform was telling in this regard. “Evidence that the defendant accepted this view and this declaration of his duties at the time that he made that speech,” Holmes said, “is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect.”¹⁵⁹

Holmes’ analysis of the issues in *Debs* is very difficult to square with his “clear and present danger” dictum in *Schenck*. Holmes argued that since Debs had accepted the antiwar platform of the Socialist Party and used “obstructionist” language in his speech, Debs intended to obstruct the recruiting service. There was no evidence, however, that Debs had used “words tending to obstruct the recruiting service” unless opposition to war itself had that tendency. The most that could be said of Debs’ speech was that he had praised fellow socialists who had been convicted of obstructing the war effort and hinted that he would like to say more. Holmes’ argument therefore makes no sense if Debs did not use any language that could fairly be labeled obstructionist. In Holmes’ hands *Debs* thus established the principle that one could be convicted for opposing war generally.

Debs therefore was not a “clear and present danger” case unless Holmes was treating that formula as merely codifying the “tendency” element of criminal-attempt law.¹⁶⁰ While Debs’ speech might have had a tendency to obstruct the war effort—assuming that some of his audience, sharing his antiwar sentiments and encouraged by his praise for convicted obstructionists, might have decided to encourage draftees to resist—it surely had not created a “clear and present danger” that the war effort would be obstructed. *Schenck*, *Frohwerk*, and *Debs*, taken together, suggest that Holmes’ “clear and present danger” test was simply a restatement of “attempts” language found in his earlier opinions. An example of such language can be found in *Swift & Co. v. United States*, in which Holmes had said that “[w]here acts are not sufficient in themselves to produce a result . . . , an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.”¹⁶¹ If this conclusion is accurate, Holmes’ Espionage Act decisions did not

157. *Id.* at 214-15.

158. *Id.* at 215.

159. *Id.* at 216.

160. See *supra* text accompanying notes 133-38 (discussing influence of the law of criminal attempts on Holmes’ view of First Amendment issues).

161. 196 U.S. 375, 396 (1905).

significantly modify his earlier free speech jurisprudence. In the three cases, the only clear modification was Holmes' abandonment of the "prior restraints" interpretation of constitutional provisions affecting speech.

*B. Commentator Response to the Espionage Act Decisions: The Dialogue with Holmes*¹⁶²

After the three Espionage Act cases came down in the spring of 1919, a groundswell of criticism of the opinions from progressive intellectuals surfaced. While the precise causes for that groundswell cannot be determined with certainty, there are several possible factors. With the end of World War I one of the most obvious and settled rationales for suppressing speech, fostering the national interest in wartime, diminished in significance. At the same time a growing consciousness among Americans of the doctrines of collectivist European ideologies, such as socialism or syndicalism, had begun to emerge, sparked by the formation of the Communist Third International in March 1919, bombing of persons alleged to be political radicals in May or June of that year, and publicized strikes among police, steel workers, and coal workers in the fall of 1919.¹⁶³ The apparent emergence of this radical ideology as a moving force in American industrial life precipitated a "Red Scare," in which federal and state law enforcement authorities sought to expose the activities of radicals and to curb their influence by restricting their opportunities to speak. Those reacting to the Red Scare saw the suppression of radical doctrines allegedly designed to foster industrial unrest as comparable to the suppression of "enemy" actions in wartime.¹⁶⁴

The extension of repressive tactics toward controversial speech from the wartime to the Red Scare context alarmed a number of progressive intellectuals. During the year 1919, editorials in *The New Republic*, regarded by these progressives as their principal intellectual forum, increasingly described the tactics of those caught up in the Red Scare as excessive and hysterical, and called for a reaffirmance of the values of protecting free speech in a democratic society.¹⁶⁵

Holmes had become aware of *The New Republic* shortly after its

162. This section tracks material previously covered in Gunther, *supra* note 10, at 732-43, and Rabban, *Emergence*, *supra* note 12, at 1278-301. While its conclusions support those of Gunther and Rabban, its emphasis is primarily on Holmes, particularly his response to commentary and the relationship between that response and his altered perspective on free speech issues after his *Abrams* dissent.

163. See WILLIAM E. LEUCHTENBERG, *THE PERILS OF PROSPERITY 1914-32*, at 69, 73-76 (1958); ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HISTORY, 1919-1920*, at 92-94, 121-22 (1955).

164. See MURRAY, *supra* note 163, at 122-65.

165. See Noble, *supra* note 20, at 397, 400. On the role of *The New Republic* as an organ of progressive intellectuals, see CHARLES FORCEY, *THE CROSSROADS OF LIBERALISM* (1961) and

founding in 1914, and regularly discussed *The New Republic* articles and editorials in his correspondence with Felix Frankfurter and Herbert Laski.¹⁶⁶ In May of 1919, an article by Ernst Freund appeared in *The New Republic* that was conspicuously critical of Holmes' opinion in the *Debs* case. Freund claimed Holmes had taken "the very essentials of the entire problem for granted"¹⁶⁷ by permitting the jury "to find a tendency and an intent to obstruct recruiting" when there was "nothing to show actual obstruction or an attempt to interfere with any of the [recruitment] processes."¹⁶⁸ "[T]o be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect," Freund argued, "makes the right of free speech a precarious gift."¹⁶⁹ Freund thought Holmes' "fire in a crowded theatre" analogy unsuited to "political offenses" and suggested that Holmes' view of free speech was an "unsafe doctrine" if "it has to be made plausible by a parallel so manifestly inappropriate."¹⁷⁰

Holmes had already become aware of opposition to his *Debs* opinion before Freund's article had appeared and had responded to that opposition with a certain defensiveness. He wrote Frederick Pollock on April 5, 1919, that he was "beginning to get stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted of obstructing the recruiting service so far as the law was concerned."¹⁷¹ He went on:

I wondered that the Government should press the case to a hearing before us, as the inevitable result was that fools, knaves, and ignorant persons were bound to say he was convicted because he was a dangerous agitator and that obstructing the draft was a pretence. . . . There was a lot of jaw about free speech, which I dealt with somewhat summarily in an [earlier] case—*Schenck v. U.S.* . . . As it happens I should go farther probably than the majority in favor of it, and I daresay it was partly on that account that the C.J. assigned the case to me.¹⁷²

With this letter Holmes began a pattern of correspondence with several commentators in which he expressed regret about the Espionage Act

CHRISTOPHER LASCH, *THE NEW RADICALISM IN AMERICA* 181-224 (1965) (chapter entitled "*The New Republic* and the War: 'An Unanalyzable Feeling'").

166. See, e.g., Letter from Harold J. Laski to Oliver Wendell Holmes (July 19, 1918), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 5 ("Please don't fail to read Phil Littell in this week's *New Republic*"); Letter from Oliver Wendell Holmes to Felix Frankfurter (Jan. 28, 1916), in Holmes Papers, *supra* note 13 ("The *New Republic* is on my table but I am [behind and] hav[e] been frightfully busy. I note your recommendations.").

167. Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13, 14.

168. *Id.* at 13.

169. *Id.* at 14.

170. *Id.*

171. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 5, 1919), in 2 HOLMES-POLLOCK LETTERS, *supra* note 105, at 7.

172. *Id.* (footnotes omitted).

convictions and personal sympathy for Debs and the other defendants. At the same time, however, Holmes reaffirmed his view that the cases were rightly decided. Two weeks later, for example, he wrote Pollock:

Of course there were people who pitched into the Court for sending Debs to prison under the espionage act, but there was no doubt that the Jury was warranted in finding him guilty or that the act was Constitutional. Now I hope the President will pardon him and some other poor devils with whom I have more sympathy.¹⁷³

In the meantime Holmes sent Harold Laski his opinions in the Espionage Act cases. He felt compelled to add:

I greatly regretted having to write them—and (*between ourselves*) that the Government pressed them to a hearing. Of course I know that donkeys and knaves would represent us as concurring in the condemnation of Debs because he was a dangerous agitator. . . . But on the only questions before us I could not doubt about the law. The federal judges seem to me (again *between ourselves*) to have got hysterical about the war. I should think the President when he gets through with his present amusements might do some pardoning.¹⁷⁴

Laski's response was a lukewarm endorsement of Holmes' opinions. He called Holmes' cry-of-fire-in-a-theatre analogy "excellent" and conceded that "though I say it with deep regret [the decisions] are very convincing."¹⁷⁵ Laski added, however, that "I am not sure that I should not have liked the line to be drawn a little tighter about executive discretion."¹⁷⁶ Two weeks later, Holmes wrote again to Laski, informing him that the *New Republic* had written an editorial about *Debs*. The editorial stated that "[t]here is no doubt about the legality of his conviction. . . . [But] to let Debs serve his sentence would be both cruel and blind."¹⁷⁷ Holmes told Laski that he found the editorial "exactly right," but felt "it would not be proper . . . to say so publicly."¹⁷⁸

On May 11, at the end of a letter discussing poetry, English literature, and a controversy brewing at Harvard Law School over some alumni's reaction to Felix Frankfurter, Laski wrote, "I am eager to hear if you read Freund in the *New Republic* of May 3rd and if you were at all influenced by his analysis."¹⁷⁹ The first part of that question was an idle

173. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 27, 1919), in 2 HOLMES-POLLOCK LETTERS, *supra* note 105, at 11.

174. Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 16, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 190.

175. Letter from Harold J. Laski to Oliver Wendell Holmes (Mar. 18, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 191.

176. *Id.*

177. Editorial Note, NEW REPUBLIC, Apr. 19, 1919, at 362.

178. Letter from Oliver Wendell Holmes to Harold J. Laski (Apr. 20, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 197 (footnote omitted).

179. Letter from Harold J. Laski to Oliver Wendell Holmes (May 11, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 201-02.

one, for Holmes had already fired off a letter to Laski in which he had enclosed a letter he had prepared for Herbert Croly, editor of *The New Republic*, in response to the Freund article. Holmes wrote to Laski that he had "decided not to send" the letter to Croly "as some theimes may become burning."¹⁸⁰ The letter was consistent with the defensive stance Holmes had adopted in his previous discussions of the Espionage Act cases. It read in part as follows:

As long ago as 1908 when I wrote *Harriman v. I.C.C.* it seemed to me that we so long had enjoyed the advantages protected by bills of rights that we had forgotten—it used sometimes to seem to me that the *New Republic* had forgotten—that they had had to be fought for and could not be kept unless we were willing to fight for them. . . . As I spoke of [that theme] to my secretary . . . he called my attention to the article on the *Debs* case which I had not seen. You had a short paragraph in an earlier number that struck me as exactly right. This article appeared to me less so if I understood its implications. The constitutionality of the 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, and, given the finding of the jury, in my opinion it was impossible to have a rational doubt about the law. Freund's objection to a jury "guessing at motive, tendency, and possible effect" is an objection to pretty much the whole body of the law, which for thirty years I have made my brethren smile by insisting to be everywhere a matter of degree. . . . I hated to have to write the *Debs* case and still more those of the other poor devils before us the same day and the week before. I could not see the wisdom of pressing the cases, especially when the fighting was over and I think it quite possible that if I had been on the jury I should have been for acquittal but I cannot doubt that there was evidence warranting a conviction on the disputed issues of fact. Moreover I think the *clauses under consideration* not only were constitutional but were proper enough while the war was on. . . . But in the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat.¹⁸¹

The Croly letter is interesting in several respects. First, even though Holmes had previously informed Laski that he thought it improper to tell *The New Republic* editors that their editorial on the *Debs* case was "exactly right," Holmes had been initially inclined to send Croly a letter with that very language in it. Sending the letter to Laski, who knew Croly well, made it quite possible that Croly would learn of Holmes' views. Second, Holmes' statement that *Debs* was foreclosed by *Schenck* was only persuasive if both *Schenck* and *Debs* were bad-tendency cases,

180. Letter from Oliver Wendell Holmes to Harold J. Laski (May 13, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 202.

181. Letter from Oliver Wendell Holmes to Herbert Croly (May 12, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 203-04 (citation omitted) (footnote omitted).

because there was no evidence that Debs' speech had created a "clear and present danger" that the recruitment of troops would be obstructed. Holmes added that "it was impossible to have a rational doubt" about the constitutionality of the statute because the jury had found against Debs. But the jury's finding might have been based on a mistaken impression that persons could be convicted under the Espionage Act for voicing a general opposition to war.

Holmes next repeated his view that all legal questions were questions of degree, a statement which was unresponsive to Freund's argument about juries' "guessing" in Espionage Act cases. Freund's point was not that the application of any test or standard directed toward determining whether speech could be suppressed in a given case involved guesswork. It was that the bad-tendency test unduly permitted juries to guess whether "bad" inferences could be made from very general statements, and thus permitted the Act to serve as a means of restricting speech that was merely unpopular.¹⁸²

Along with emphasizing that his opinions in the Espionage Act cases were dictated by law, Holmes stressed that they were personally abhorrent. He confessed that he "hated" to "have to write" the *Debs* case; that he was sympathetic to Debs and even more so to the other defendants in Espionage Act cases; that if he had been on the jury in *Debs* he would have been for acquittal,¹⁸³ and that his general attitude toward speech was to allow "effervescing convictions" to be "aerated" so that they might "get flat" with public exposure. He even intimated that some of the Espionage Act might be unconstitutional by underlining "clauses under consideration" in his remarks on constitutionality, and stated that now that the war was over it made no sense to prosecute "obstructionist" speakers under the Act.

The defensiveness Holmes exhibited in responding to criticism of *Debs*, as illustrated by his letters to Laski and Croly, could have been taken by his young friends as a gesture of reassurance. The letters might have conveyed a message to Holmes' progressive supporters that he had not deserted them on free speech even though he had been constrained in the Espionage Act cases; that he bore a particular burden, having written the opinion in *Schenck*, but that he was not unsympathetic to free speech arguments. The gesture could even have been taken as an invitation to continue talking to him about the subject.

At the time that Holmes was corresponding with Laski and Croly

182. See Freund, *supra* note 167, at 15.

183. This view was not consistent with what he expressed to Pollock, see *supra* text accompanying note 173, and to Wigmore. He told Wigmore that the jury's finding in *Debs* was correct. See Letter from Oliver Wendell Holmes to John P. Wigmore (June 7, 1919), in Holmes Papers, *supra* note 13.

about free speech, he had already had discussions with yet another progressive intellectual, Learned Hand, on the same subject. In June 1918, Holmes had encountered Learned Hand on a train, and the two men had had a conversation about the First Amendment.¹⁸⁴ The discussion might have been prompted by the fact that Hand himself had previously issued an opinion in the case of *Masses Publishing Co. v. Patten*,¹⁸⁵ in which he had advanced a libertarian interpretation of the First Amendment. In *Masses* the Postmaster General sought to exclude *The Masses* magazine from the mails under the Espionage Act on the grounds that it was willfully critical of the war effort.¹⁸⁶ Hand granted an injunction against the Postmaster General.¹⁸⁷ In the process, he articulated a test for evaluating the constitutionality of First Amendment challenges to legislation that focused on "direct incitement to violent resistance."¹⁸⁸ In the Espionage Act cases, under Hand's test the question would not have been whether "the indirect result of the language might be to arouse a seditious disposition," but whether "the language directly advocated resistance to the draft."¹⁸⁹

Hand's direct-incitement test was rejected, on appeal, by the U.S. Court of Appeals for the Second Circuit, and was implicitly not regarded as a plausible approach to First Amendment issues during Holmes' tenure.¹⁹⁰ Hand, however, continued to believe in it and might have defended it in his train conversation with Holmes.

After the conversation the two men exchanged letters. Hand's letter began by referring to a comment in the conversation in which he and Holmes had discussed the role of tolerance for the opinions of others in free speech theory. He argued that Holmes' view that there was a "sacred right to kill the other fellow when he disagrees," which had "silenced" Hand when Holmes said it,¹⁹¹ needed to be limited. The right did not exist, Hand asserted, when "the victims insist upon saying things which look against Provisional Hypothesis Number Twenty-Six, the verification of which to date may be found in its proper place in the card catalogue," because if they are "spared, other cards may be added under

184. Gunther, *supra* note 10, at 732.

185. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

186. *Id.* at 538-39.

187. *Id.* at 543.

188. *Id.* at 540.

189. *Id.* at 542.

190. See *Masses Publishing Co. v. Patten*, 246 F. 24 (2d Cir. 1917). Hand himself intimated in correspondence to Holmes that no other court had endorsed his approach. See Letter from Learned Hand to Oliver Wendell Holmes (late Mar. 1919), in *Holmes Papers*, quoted in Gunther, *supra* note 10, at 758; Letter from Learned Hand to Oliver Wendell Holmes (Mar. 1919), in *Holmes Papers*, *supra* note 13.

191. Letter from Learned Hand to Oliver Wendell Holmes (June 22, 1918), in *Holmes Papers*, *supra* note 13.

that sub-title which will have, perhaps, an important modification.”¹⁹²

Holmes responded that “free speech stands no differently than freedom from vaccination.”¹⁹³ He felt that if the legislature believed strongly enough in the evil of certain acts to enact legislation prohibiting them, the possibility that the belief might be wrong would be wholly irrelevant. While “[t]he occasions would be rarer when you cared enough to stop it,” Holmes felt, “if for any reason you did care enough you wouldn’t care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act.”¹⁹⁴ He was not inclined to think that the possibility that speech might lead those in power to alter their policies in the future was a sufficient justification for invariably permitting it in the present.

The correspondence then lapsed until February 1919, when Holmes wrote Hand that he had read Hand’s *Masses* opinion and “will assume for present purposes that I should come to a different result.”¹⁹⁵ He added, however, that “few judges . . . could have put their view with such force or in such admirable form.”¹⁹⁶ The date of that letter suggests that Holmes might have been prompted to read *Masses* in connection with the Espionage Act cases, the first of which were handed down six days later. When the Espionage Act opinions were announced, Hand read them and wrote Holmes, prefacing his letter by saying that “this is positively my last appearance in the role of liberator.”¹⁹⁷ While stating that Debs “was guilty under any rule conceivably applicable,”¹⁹⁸ Hand criticized Holmes’ approach. He thought it dependent on an assumed causal relationship between words and their future impact. “In nature,” he argued, “the causal sequence is perfect, but responsibility does not go *pari passu*.”¹⁹⁹ Hand did “not understand that the rule of responsibility for speech” had ever been that “the result is known as likely to follow.”²⁰⁰ In his view “[t]he responsibility only began when the words were directly an incitement.”²⁰¹ He added that he thought “the test of motive” was a “dangerous test,” since “[j]uries won’t much regard the difference between the probable result of the words and the purposes of the

192. *Id.*

193. Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), in *Holmes Papers*, *supra* note 13.

194. *Id.*

195. Letter from Oliver Wendell Holmes to Learned Hand (Feb. 25, 1919), in *Holmes Papers*, *supra* note 13.

196. *Id.*

197. Letter from Learned Hand to Oliver Wendell Holmes (late Mar. 1919), in *Holmes Papers*, *supra* note 13.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

utterer.”²⁰² In short, Hand reiterated his *Masses* test as the touchstone for First Amendment cases.

Holmes responded in a letter that illustrates, in the words of Gerald Gunther, “the primitiveness of Holmes’s first amendment thinking at that time.”²⁰³ “I am afraid,” Holmes began, “that I don’t quite get your point.”²⁰⁴ He noted that he had “said nothing” in the *Debs* case “except to note that . . . the jury must be taken to have found that Debs’s speech was intended to obstruct and tended to obstruct.”²⁰⁵ He then claimed that Hand’s statement that “the responsibility only began when the words were directly an incitement” was the same as his “clear and present danger” formulation in *Schenck*. “I take it,” he said, “that you agree that words may constitute an obstruction within the statute, even without proof that the obstruction was successful to the point of preventing recruiting. . . . So I don’t know . . . how we differ so far as your letter goes.”²⁰⁶

The point of Hand’s letter, of course, was that any causal connections between a speaker’s words and the evils that the Espionage Act sought to prevent had to be predicated on the speaker’s directly advocating those evils. For Hand, whether the speaker “intended” the proscribed result or whether the speaker’s language “tended” to accomplish that result was irrelevant if the speaker had not directly advocated illegal activity. Holmes’ “clear and present danger” formulation was not responsive to that argument. Nor was Holmes’ statement that since Hand agreed that a speaker could be convicted even if his speech had been unsuccessful in obstructing recruiting, he and Hand did not disagree in their basic approaches. Hand would prosecute only for direct incitements of illegal activity, regardless of whether they were successful. Holmes would allow prosecution for speech that could be taken as “tending” to incite illegal activity even though the speaker stopped short of doing so directly. The approaches were sufficiently different that Hand had written Ernst Freund, four days after Freund’s critique of *Debs* had appeared, that “‘I was chagrined that Justice Holmes did not line up on our side.’”²⁰⁷ Hand added to Freund that “‘I have so far been unable to make [Holmes] see that he and we have any real differences.’”²⁰⁸

The exchange with Hand demonstrated that while Holmes thought

202. *Id.*

203. Gunther, *supra* note 10, at 741.

204. Letter from Oliver Wendell Holmes to Learned Hand (Apr. 3, 1919), in Holmes Papers, *supra* note 13.

205. *Id.*

206. *Id.*

207. Gunther, *supra* note 10, at 736 (quoting Letter from Learned Hand to Ernst Freund (May 7, 1919)).

208. *Id.*

his "clear and present danger" test to be controlling in free speech cases (even though he had not referred to it in the *Frohwerk* and *Debs* cases), he treated it as merely declarative of the state of the law governing both criminal attempts and criminal appeals in speech cases. "Clear and present danger" encapsulated the fact that the relevant inquiries in those cases focused on the speaker's (or actor's) words or acts, how closely they were connected to illegal activity, and whether, based on the closeness of that connection, the speaker could be presumed to have "intended" the illegal activity to take place. The test was not a limit on the scope of restrictions on free speech; it was a formula for describing how one analyzed "dangerous" speeches and other "attempts."

Thus as late as May 1919, when he wrote Croly defending his Espionage Act opinions, Holmes, however much he wanted to convey the impression that he was sympathetic to the position of the defendants in those cases, continued to treat unpopular speech as another "act you didn't like" and did not regard his "clear and present danger" dictum as a test emphasizing the limits on governmental suppression of speech. By November 1919, however, Holmes had issued his dissent in *Abrams v. United States*,²⁰⁹ and a month later, in a letter to Pollock discussing his dissent, Holmes said that "[a]s the *Debs* case and two others were assigned to me, in which the convictions were upheld, I thought it proper to state what I thought the limits of the doctrine."²¹⁰ From his *Abrams* dissent until the end of his career Holmes treated "clear and present danger" as a limiting test, an alternative to the bad-tendency test, and accordingly treated free speech problems as distinguishable from criminal attempts.

Abrams thus represented a major change in Holmes' posture in free speech cases, one that could not have been anticipated by his progressive friends on the basis of their correspondence with him in the few months after the Espionage Act trilogy. The correspondence with Laski and Hand, the editorials in *The New Republic*, and Ernst Freund's article had penetrated Holmes' consciousness, however, as his defensive response to criticism of the *Debs* case suggested. In addition, over the summer of 1919 his young friends continued to encourage him to rethink free speech issues, and eventually he encountered a formulation of the rationale for increased protection for speech that resonated. This was the formulation advanced by Zechariah Chafee, who combined an artful reconstruction of Holmes' treatment of speech in the Espionage Act cases with a refor-

209. 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

210. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Dec. 14, 1919), in 2 HOLMES-POLLOCK LETTERS, *supra* note 105, at 32 (footnote omitted). Holmes wrote similar letters to Nina Gray and Albert Beveridge at the same time. See Letter from Oliver Wendell Holmes to Nina Gray (Dec. 10, 1919), in Holmes Papers, *supra* note 13; Letter from Oliver Wendell Holmes to Albert Beveridge (Dec. 8, 1919), in Holmes Papers, *supra* note 13.

mulation of the philosophical basis for protecting speech rights. Chafee's reformulation deemphasized the argument that speech was one of many liberties held against the state and emphasized the "social interest" in protecting speech as a means of furthering "the discovery and spread of truth on subjects of general concern"²¹¹ in a democratic society.

In late July 1919, Laski invited Holmes, who was summering in Beverly Farms, Massachusetts, to tea in Cambridge to meet Zechariah Chafee, then an assistant professor at Harvard Law School.²¹² Prior to that meeting Laski had given Holmes a copy of Chafee's June, 1919, article.²¹³ Laski heartily approved of the article, which included, in addition to its discussion of the Espionage Act cases, an argument that the Court's pre-Espionage Act treatment of free speech cases had been speech protective.²¹⁴ The article included a plea for enhanced recognition of the limits the Amendment imposed on the power to suppress dissident speech,²¹⁵ and Laski wrote Chafee that "'we must fight on it'" with Holmes at the tea.²¹⁶ "'I've read it twice,'" Laski indicated, "'and I'll go to the stake for every word.'" ²¹⁷

Although Holmes' correspondence supplies no direct evidence that he had read Chafee's article, either before or after the tea, he had undoubtedly done so. The article was sent to him during a time, the early summer of 1919, when he had the leisure to read. It involved a subject about which Holmes was deeply interested and extensively discussed opinions he had written. Moreover, it had been critical of him and had been written by a person whose opinion he might presumptively have granted some weight, a young faculty member at Harvard Law School who had contributed to *The New Republic*.

Several statements in Chafee's article might have attracted Holmes' attention. First, Chafee said that all of the Espionage Act cases except *Debs* were "clear cases of incitement to resist the draft, so that no real question of free speech arose."²¹⁸ That statement was essentially inaccurate, but it conformed to Holmes' general view of the cases. Next, Chafee identified Holmes' "clear and present danger" dictum as the

211. Chafee made this argument, in identical language, in two articles. See Chafee, *Speech in War Time*, *supra* note 22, at 956-57; Chafee, *Freedom of Speech*, *supra* note 22, at 67.

212. See Ragan, *supra* note 10, at 43 (citing Letter from Harold J. Laski to Zechariah Chafee, Jr. (July 23, 1919), in Zechariah Chafee, Jr., Papers (Harvard Law School)).

213. *Id.* at 43. The article Laski gave to Holmes was Chafee, *Speech in War Time*, *supra* note 22.

214. Ragan, *supra* note 10, at 38-43; see also Chafee, *Speech in War Time*, *supra* note 22, at 955-59.

215. Chafee, *Speech in War Time*, *supra* note 22, at 934, 957, 973.

216. See Ragan, *supra* note 10, at 43 (quoting Letter from Harold J. Laski to Zechariah Chafee, Jr. (July 23, 1919), in Zechariah Chafee, Jr., Papers (Harvard Law Library)).

217. *Id.* (quoting Letter from Harold J. Laski to Zechariah Chafee, Jr. (July 23, 1919), in Zechariah Chafee, Jr., Papers (Harvard Law Library)).

218. Chafee, *Speech in War Time*, *supra* note 22, at 967 (footnote omitted).

"Supreme Court test"²¹⁹ for free speech cases. He then proceeded to construe it in a fashion that was remarkable, but sympathetic to Holmes. After arguing that earlier views of the First Amendment were incompatible with the bad-tendency test²²⁰ and consistent with Hand's direct-incitement test,²²¹ Chafee claimed that Holmes' dictum "substantially agree[d]" with the latter test and with "the history and political purpose of the First Amendment."²²² He said that Holmes, in his "clear and present danger" test, had "draw[n] the boundary line very close to the test of incitement at common law and clearly ma[de] the punishment of words for their bad tendency impossible."²²³

In light of *Frohwerk* and *Debs*, this last statement was astonishing. Chafee attempted to reconcile it with those cases by suggesting that the defendant in *Frohwerk* had clearly incited others to resist the draft,²²⁴ and that in *Debs* Holmes had unfortunately ignored the "clear and present danger" test.²²⁵ Both suggestions provide clues to Chafee's purpose in writing the article.

The statement about *Frohwerk* was incorrect: the defendant had only made general statements critical of existing governmental policy. *Frohwerk*, however, was a difficult case for Chafee's interpretation of Holmes' approach to the Espionage Act. In his *Frohwerk* opinion Holmes had openly indicated the possible tendency in the defendant's circulars to impede the war effort and had not mentioned the "clear and present danger" dictum.²²⁶ Thus, Chafee had nothing to gain from a detailed analysis of *Frohwerk*, which he did not undertake.

The statement about *Debs*, however, was very likely intended to touch a nerve in Holmes. *Debs* was the case for which Holmes had received the severest criticism, and the result in *Debs*, because of the defendant's deliberate effort to avoid making any explicit statement in support of resistance to the draft, was arguably the most vulnerable of the Espionage Act cases. Chafee devoted considerable attention to Holmes' opinion in *Debs*. If Holmes had applied the "clear and present danger" test in *Debs*, Chafee argued, it was "hard to see how [Debs] could have been held guilty."²²⁷ Holmes had permitted the jury to convict Debs "merely because [it] thought his speech had a tendency to bring about resistance to the draft".²²⁸ he had treated the verdict as

219. *Id.* at 968.

220. *Id.* at 949-53.

221. *Id.* at 960-64.

222. *Id.* at 967.

223. *Id.*

224. *See id.* at 967 & n.122.

225. *See id.* at 968.

226. *See Frohwerk v. United States*, 249 U.S. 204, 209 (1919).

227. Chafee, *Speech in War Time*, *supra* note 22, at 967-68.

228. *Id.* at 968.

"proof that actual interference with the war was intended and was the proximate effect of the words used."²²⁹ For the "clear and present danger" test to "mean anything more than a passing observation," Chafee maintained, "it must be used to upset convictions for words when the trial judge did not insist that they must create 'a clear and present danger' of overt acts."²³⁰ Only then would the test be functioning as it should: "to emphasize the social interest behind free speech, and show the need of balancing even in war time."²³¹ In *Debs*, Chafee concluded, Holmes "did nothing to emphasize the social interest behind free speech."²³² Holmes' "liberalism," Chafee concluded, seemed "held in abeyance" in the case.²³³

The option Chafee seemed to be implicitly posing for Holmes was that if Holmes wanted his clear and present danger dictum to emerge as the Court's test for First Amendment cases, he needed to apply it with some degree of rigor, not ignore it. Chafee even provided Holmes with a philosophical basis for treating the "clear and present danger" test as a test setting forth the limits on governmental suppression of speech: the assumption that "[o]ne of the most important purposes of society and government is the discovery and spread of truth."²³⁴ Those familiar with Holmes' *Abrams* dissent will recognize that Holmes implicitly accepted Chafee's offer. He restated the "clear and present danger" test in a more rigorous fashion, separated First Amendment analysis from the common law of attempts, and reached a result that was clearly incompatible with *Schenck* even though purportedly based on the same analytical criteria.

It is worth noting, however, that at the tea at which Holmes and Chafee met for the first time and "fought" about free speech doctrine, Chafee had no sense that he had brought Holmes over to his point of view. In September 1919, Chafee wrote Judge Charles Amidon that while Holmes had indicated at the tea that as a juror he would have voted to acquit Debs, as a judge he was "inclined to allow a very wide latitude to Congressional discretion in the carrying on of the war," and that he "could not have gone behind the jury verdict" in *Debs*.²³⁵ Chafee added that Holmes' "omission to state the principles" governing free speech cases was typical of federal judges at the time.²³⁶

Chafee's belief that Holmes remained unconvinced after their meet-

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 969.

234. *Id.* at 956.

235. Rabban, *Emergence*, *supra* note 12, at 1315 (quoting Letter from Zechariah Chafee, Jr., to Judge Charles Amidon (Sept. 30, 1919), in Zechariah Chafee, Jr., *Papers* (Harvard Law Library)).

236. *Id.*

ing should not be considered strong evidence that Chafee's analysis had not affected Holmes. Holmes was, as we have seen, defensive about criticism;²³⁷ in addition, he was disinclined to make public corrections²³⁸ and extremely sparing in his acknowledgment of the influence of others on his ideas.²³⁹ When confronted in a discussion with two younger men who were inclined to fight him on the *Debs* case, Holmes was not likely to confess error.

There is also reason to suspect that Holmes had incentives to accept Chafee's implicit invitation. Holmes had taken pains to communicate his personal belief that the Espionage Act prosecutions should not have been brought and his hope that the defendants would be pardoned. He also must have sensed, from the groundswell of criticism that *Debs* had stimulated and from *The New Republic's* adoption of a libertarian position on free speech issues, that free speech jurisprudence was at a pressure point in its history. Finally, he prided himself on not being "hysterical" with respect to unpopular speech in the same way that he was not "larmoyant" on issues that appealed to "sentiment."²⁴⁰ His early and prominent involvement with the Espionage Act cases had given him an opportunity to fashion Court doctrine in an area that promised to be of widespread public interest. Chafee's reconstruction of "clear and present danger" and reformulation of the philosophical basis of free speech had provided him with opportunities to rethink that doctrine: *Abrams* would give him an early chance to express his thoughts.

The above analysis of the *Schenck-Abrams* sequence rests on two assumptions: that when Holmes employed the phrase "clear and present" danger in *Schenck*, he had not moved very far from his previous orthodox response to free speech cases, and that it was the artful recharacterization of "clear and present" danger by Chafee, coming on the heels of other comments by young acquaintances of Holmes about free speech, that caused him to rethink his perspective. A letter Holmes wrote Chafee in 1922 provides indirect support for both of these assumptions.

In the letter Holmes gave an account of the origins of "clear and present danger" that suggested that he never intended the dictum to

237. See 1 HOWE, *supra* note 88, at 137, 230-31.

238. See 1 *id.* at 137.

239. See 2 HOWE, *supra* note 96, at 248.

240. The reference is to Holmes' opinion in *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922) (reversing a judgment concerning two child trespassers who died after swimming in a pool containing poisonous chemicals). A dissent by Justice John Clarke criticized the majority's position as "harsh." *Id.* at 280 (Clarke, J., dissenting). Holmes called the dissent "larmoyant" and based on "sentiment." Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Mar. 29, 1922), in 2 HOLMES-POLLOCK LETTERS, *supra* note 105, at 92.

mean anything more than an encapsulation of the law of attempts. He told Chafee that the expression "clear and present danger"

was not helped by any book that I know of. I think it came without doubt after the later cases (and probably you—I do not remember exactly) had taught me that in the earlier Pat[t]erson case, if that was the name of it, I had taken Blackstone and Parker of Mass. as unrefuted, wrongly. I simply was ignorant. But I did think hard on this matter of attempts in my *Common Law* and a Mass. case—later in the *Swift* case (U.S.)—and I thought it out unhelped.²⁴¹

The passage is revealing in several respects. First, while "the later cases" (by which Holmes may have meant the *Toledo Newspaper* case;²⁴² he could not have meant *Fox v. Washington*²⁴³) might have "taught" Holmes that the First Amendment was not confined to prior restraints, Chafee could surely not have taught him that, since Holmes was not acquainted with Chafee or his work at the time he wrote *Schenck*.²⁴⁴ Holmes remembered Chafee as having taught him something, however; possibly, Chafee had taught him that "clear and present danger" had significant doctrinal possibilities and that protection for free speech could be seen as based on "democracy" and "search for truth" as well as "liberty" premises.

Second, when Holmes discussed clear and present danger in the letter, his comments were exclusively about the law of attempts. He referred to *The Common Law*, where he had an extensive discussion of attempts; to "a Mass. case" (probably *Peaslee*,²⁴⁵ possibly *Kennedy*²⁴⁶ as well); and to *Swift*,²⁴⁷ all of which were attempt cases. The formulations of the law of attempts he had made in those cases, we have seen, were analogous to "clear and present danger": they emphasized "proximity and degree."²⁴⁸ The last sentence of the passage, with its reference to "it," brought the reader back to "this matter of attempts," as if Holmes still regarded the "clear and present danger" dictum in that context. In short, the letter suggests that Holmes' memory of the origins of the dic-

241. Rabban, *Emergence*, *supra* note 12, at 1265-66 (quoting Letter from Oliver Wendell Holmes to Zechariah Chafee, Jr. (June 12, 1922), in Zechariah Chafee, Jr., *Papers* (Harvard Law Library)). But see Ragan, *supra* note 10, at 26 & n.12 (reading the handwritten letter as saying "Patriotic" rather than "Pat[t]erson").

242. *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918), *overruled by* *Nye v. United States*, 313 U.S. 33 (1941).

243. 236 U.S. 273 (1915).

244. There is no indication in Holmes' correspondence that he had been exposed to Chafee's 1918 article on free speech in *The New Republic*, Chafee, *Freedom of Speech*, *supra* note 22, and in any event that article did not discuss the issue of whether the First Amendment was confined to prior restraints.

245. *Commonwealth v. Peaslee*, 59 N.E. 55 (Mass. 1901).

246. *Commonwealth v. Kennedy*, 48 N.E. 770 (Mass. 1897).

247. *Swift & Co. v. United States*, 196 U.S. 375 (1905).

248. See *supra* text accompanying notes 135-38.

tum—which for him was firmly set in the law of attempts—was quite distinct from his memory of his subsequent education about First Amendment issues. With respect to that latter memory, he identified Chafee as one of his teachers.

C. Holmes' Dissent in Abrams: Reformulating "Clear and Present Danger"

The foregoing analysis of the dialogue between Holmes and his younger contemporaries in the interval between *Schenck* and *Abrams* suggests that when Holmes considered *Abrams*, about a month after Chafee had described the results of their tea that July, he knew exactly what he was doing: he was seeking to reformulate the meaning of "clear and present danger." He used the facts of *Abrams* to aid him in that task.

In *Abrams* a group of Russian immigrants had published and distributed leaflets, both in English and in Yiddish, criticizing President Woodrow Wilson's decision to send troops into Russia in support of persons fighting against the Bolshevik government.²⁴⁹ The leaflets, apparently directed at factory workers in New York, also urged those workers to engage in a general strike, declaring that they were manufacturing weapons to use against their Russian comrades.²⁵⁰ The leaflets were distributed when the United States was still at war against Germany.²⁵¹

The case differed from the *Schenck* trilogy because the Espionage Act of 1917²⁵² had been amended by the Sedition Act of 1918.²⁵³ The Sedition Act made it a crime, when the United States was at war, to "willfully . . . urge, incite, or advocate any curtailment of production . . . with intent . . . to cripple . . . the United States in the prosecution of the war."²⁵⁴ Successful prosecution of the case required that the defendants had a specific intent to interfere with the war against Germany, as distinguished from the U.S. expedition to Russia.²⁵⁵ Moreover, because the indictments rested on the broader language of the 1918 Amendment rather than the original language of the 1917 Act, the Court was required to confront seditious libel on the face of the Sedition Act. *Abrams* was undeniably a case in which the government sought to restrict speech itself.

The defendants in *Abrams* argued both that they lacked the requisite

249. See *Abrams v. United States*, 250 U.S. 616, 617, 619-20 (1919).

250. *Id.* at 621.

251. See *id.* at 617.

252. Espionage Act of 1917, ch. 30, 40 Stat. 217.

253. Sedition Act of 1918, ch. 75, 40 Stat. 553, *repealed by* Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359, 1360.

254. *Id.* § 3, 40 Stat. at 553.

255. *Abrams*, 250 U.S. at 621.

intent to be convicted under the Espionage Act as amended by the Sedition Act and that the entire Act was unconstitutional under the First Amendment.²⁵⁶ The majority in *Abrams*, in an opinion by Justice John Clarke, found the *Schenck* trilogy dispositive of the First Amendment claim. "Th[e] [defendant's] contention," Clarke asserted, "is sufficiently discussed and is definitely negated in [*Schenck* and *Frohwerk*]."²⁵⁷

Clarke then turned to the question of statutory intent, resurrecting Holmes' language in *Debs*: a statement that was "part of a general program" of opposition to war could be the basis for finding a specific intent to obstruct a particular war "if, in all the circumstances, that would be its probable effect."²⁵⁸ "Men must be held to have intended, and to be accountable for," Clarke argued, "the effects which their acts were likely to produce."²⁵⁹ The "obvious effect" of the leaflets was "defeat of the war program of the United States."²⁶⁰ The defendants thus had the requisite intent for conviction.

The set of facts presented in *Abrams* made Holmes' dissent particularly interesting. Those facts arguably made the defendants' advocacy more of a "clear and present danger" to the war effort than any of the speeches delivered by previous Espionage Act violators. *Schenck* had delivered circulars to draftees, but the circulars had only spoken abstractly of the evils of conscription;²⁶¹ *Frohwerk* had not delivered circulars to anyone, and the pamphlets he printed were not directed specifically at draftees;²⁶² *Debs* had not said anything specific about draft resistance to World War I.²⁶³ The defendants in *Abrams* had printed leaflets and thrown them out the window of a factory, knowing they might be received by munitions workers, whose factory was in the vicinity. The leaflets urged a general strike, which if undertaken would certainly have hindered the war effort.²⁶⁴ Yet Holmes chose *Abrams* as an opportunity to argue that the First Amendment should be read as placing significant restrictions on the Espionage Act and comparable statutes.

A clue to Holmes' purposes in *Abrams* can be found in the way in which he described the leaflets that had been distributed. Clarke had set

256. *Id.* at 618-19, 621.

257. *Id.* at 619.

258. *Debs v. United States*, 249 U.S. 211, 215 (1919).

259. *Abrams*, 250 U.S. at 621.

260. *Id.*

261. *See Schenck v. United States*, 249 U.S. 47, 49-51 (1919).

262. *See Frohwerk v. United States*, 249 U.S. 204, 205 (1919).

263. *See Debs*, 249 U.S. at 213-14.

264. For a thorough account of the *Abrams* case, see RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (1987); see also Zechariah Chafee, Jr., *A Contemporary State Trial—The United States Versus Jacob Abrams Et AL.*, 33 HARV. L. REV. 747, 747-48 (1920). Chafee indicated that the circulars were thrown out of the window in the early morning when a crowd was loitering at a street corner directly below the window. *Id.* at 747. Many of the crowd were waiting to begin work in a nearby manufacturing building. *Id.*

forth the language of those leaflets in great detail: in much of his opinion, Clarke quoted the leaflets verbatim.²⁶⁵ Despite Clarke's thorough treatment, Holmes in his dissent chose to paraphrase the leaflets, and to paraphrase them in a strikingly informal way. After including some of the leaflets' vivid language, most of it without quotation,²⁶⁶ Holmes said that one of the leaflets "goes on,"²⁶⁷ that another "winds up,"²⁶⁸ and ends with "some usual tall talk."²⁶⁹ Juxtaposing paraphrased sentences from the leaflets with these informal side comments considerably reduced the incendiary quality of the leaflets: they now appeared as caricatures of early twentieth-century radical prose. This was not accidental, for Holmes subsequently characterized the leaflets as "silly,"²⁷⁰ as "poor and puny anonymities,"²⁷¹ and as products of a "creed of ignorance and immaturity."²⁷²

Holmes' distinctive recapitulation of the facts of *Abrams* had a larger purpose. His general effort in the *Abrams* dissent was to imbue the phrase "clear and present danger," previously a formula akin to that of causation in the law of torts or crimes, with a substantive meaning: to convert it to a standard of judicial review limiting governmental efforts to suppress speech. In *Abrams*, the act of throwing leaflets out the window to an audience that contained munitions workers had come far closer to the objective of bringing those leaflets into the consciousness of those engaged in the war effort than the act, as in *Frohwerk*, of printing circulars. But "clear and present danger," under Holmes' reformulation, was no longer just a function of how directly the act incited the proscribed objective; it was also a function of how likely the act would succeed at achieving its objective. Holmes was suggesting in *Abrams* that the danger of proscribed conduct was diminished by the "silly," "puny," and "immatur[e]" character of the leaflets' messages. Holmes' recapitulation of the *Abrams* facts, then, served his purpose of encouraging courts, in applying the "clear and present danger" formula, to consider the likely effectiveness of the speech sought to be suppressed.

Holmes' dissent served other purposes as well. Among those was a suggestion that where First Amendment rights were implicated, the standard for finding the requisite intent for an offense differed from the common-law standard. The majority had conceptualized *Abrams* as principally a case of statutory interpretation rather than constitutional

265. See *Abrams*, 250 U.S. at 619-23.

266. See *id.* at 625-26 (Holmes, J., dissenting).

267. *Id.* at 625.

268. *Id.* at 626.

269. *Id.*

270. *Id.* at 628.

271. *Id.* at 629.

272. *Id.*

law. Clarke had asserted that the First Amendment issue could be summarily disposed of, and therefore the principal issue was whether the defendants had the requisite intent to come under the Espionage Act as amended.²⁷³ In interpreting the Espionage Act, Holmes found the common-law analogy, which had previously informed his discussion of First Amendment cases, now inapposite. As he put it:

I am aware . . . that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not.²⁷⁴

This treatment of intent, Holmes argued in his dissent, should not govern in *Abrams*. "It seems to me," he said, "that this statute must be taken to use its words in a strict and accurate sense."²⁷⁵ Any other usage, in his view, "would be absurd."²⁷⁶ Under a strict definition of intent "a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."²⁷⁷ An actor "does not do the act with intent to produce [the consequence] unless the aim to produce it is the proximate motive of the specific act."²⁷⁸ Holmes concluded that "[t]o say that [speech] might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect."²⁷⁹

Holmes gave no reasons for his abandonment of the analogy to causation in the common law of attempts or for his conclusion that intent in the statute "must be taken" strictly. He had, however, made a distinction between "act[s]" in the common-law examples and "words" in his discussion of the construction of the statute. Because the First Amendment was implicated, Holmes seemed to be suggesting in this distinction, the statute needed to be interpreted strictly and the "indirect" test of causation abandoned.

The most significant purpose of Holmes' dissent in *Abrams*, however, was to advance a reconfiguration of First Amendment doctrine, allegedly based on his dictum in *Schenck* and anticipated by Chafee. To do so he turned to what he considered "a more important aspect of the

273. See *supra* text accompanying notes 256-60 (discussing the majority opinion in *Abrams*).

274. *Abrams*, 250 U.S. at 626-27 (Holmes, J., dissenting).

275. *Id.* at 627.

276. *Id.*

277. *Id.*

278. *Id.* Compare MODEL PENAL CODE § 2.02(2)(a) (1962) (definition of "purposely") with *id.* § 2.02(2)(b) (definition of "knowingly").

279. *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting).

case," the First Amendment issue.²⁸⁰ He first reasserted the primacy of the *Schenck* formula in evaluating First Amendment claims:

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . .

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country.²⁸¹

In this passage, some of Holmes' alterations of his *Schenck* dictum were bold; others were sufficiently subtle as to virtually escape notice. Holmes had invoked the *Schenck* trilogy and had referred to the murder example in an effort to maintain consistency and to remind his audience that anyone must concede that free speech must have some limits. But he qualified the constitutional ability of the government to punish speech with the "clear and present danger formula," which was also restated as "imminent danger." What had in *Schenck* been "substantive evils that Congress has a right to prevent"²⁸² became in the reformulation "certain substantive evils that the United States constitutionally may seek to prevent."²⁸³

These changes were not minor. Since Holmes had not referred to a "clear and present danger" in *Frohwerk* and *Debs*, and since he had employed the bad-tendency test in both those cases,²⁸⁴ the trilogy of 1919 cases could have been taken simply as attempt cases, with the "clear and present danger" dictum serving as one of Holmes' vivid aphorisms. In *Abrams*, however, "clear and present danger" moved to the center of First Amendment analysis: only speech that "produces or is intended to produce a clear and imminent danger" could constitutionally be punished.

The position of the government in speech cases had also been altered. Instead of having "a right to prevent" substantive evils, the government was "seek[ing]" to prevent those evils, and only "certain" evils

280. *Id.* at 627.

281. *Id.* at 627-28 (citations omitted).

282. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

283. *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

284. See *supra* text accompanying notes 144-61.

were appropriate—those that the government could “constitutionally prevent.” Moreover, the government was now referred to as “the United States,” not simply “Congress,” so the limitations on restricting speech extended to executive and judicial as well as legislative acts.

Holmes then confirmed in his dissent the substantive nature of his restated test by saying that “the principle of the right to free speech [was] always the same,” even in wartime, and restating the “clear and present danger” formula.²⁸⁵ He also introduced a qualification that might easily go unnoticed. Once the “clear and present danger” test had been satisfied, Congress could “set[] a limit to the expression of opinion [in cases] where private rights are not concerned.”²⁸⁶ This intimated that First Amendment cases involving public matters were different, perhaps even that the “clear and present danger” test did not apply where the subject of the speech was private. It suggested that First Amendment protection might be closely linked to the public nature of the speaker’s comments. In this observation Holmes was following Chafee, who had described the First Amendment as promoting “the public discussion of all public questions.”²⁸⁷

Having reconfigured the appropriate test in First Amendment cases, Holmes applied it to the *Abrams* facts. “Now nobody can suppose,” he maintained, “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 Moreover, once the “strict” definition of intent was employed, Holmes “[could] not see how anyone can find the intent required by the statute in any of the defendants’ words.”²⁸⁹ Further, Holmes stated that “there is no hint at resistance to the United States as I construe the phrase.”²⁹⁰ In short, “the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow,” a creed which “no one has a right even to consider in dealing with the charges before the Court.”²⁹¹

Holmes then addressed what he thought the *Abrams* case was all about: “[p]ersecution for the expression of opinions.”²⁹² He had written Laski in 1918 that “if you are cocksure, and . . . you have no doubt of your power—you will do what you believe efficient to bring about what you want,” but “[i]n most matters of belief we are not cocksure . . . we

285. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

286. *Id.*

287. Chafee, *Speech in War Time*, *supra* note 22, at 934.

288. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

289. *Id.*

290. *Id.* at 629.

291. *Id.* at 629-30.

292. *Id.* at 630.

are not certain of our power.”²⁹³ In his *Abrams* dissent he repeated those sentiments:

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. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, . . . or that you doubt either your power or your premises.²⁹⁴

While this passage seems at first blush to be articulating a rationale for suppressing speech, its actual purpose was to convey one of Holmes' central philosophical points in *Abrams*: that where matters of belief were concerned people rarely had “no doubt of [their] premises.” He made that point in the following manner:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.²⁹⁵

In this paragraph one can see the interaction of Holmes' cultural determinism, which had led him in *The Common Law* to speak of experience overwhelming logic in the law, so that legal theories and legal doctrines inevitably came to reflect “the felt necessities” of the times,²⁹⁶ with Chafee's conception of “[t]he true meaning of free speech” as “the discovery and spread of truth on subjects of general concern.”²⁹⁷ One could value “free trade in ideas” even more than one valued “the very foundations of [one's] own conduct” because “fighting faiths” were ephemeral and subject to change. Equating “truth” with “the power of the thought to get itself accepted in the competition of the market” captured the inevitable boundaries placed on ideas by current “felt necessities.”

Holmes' conception of the “search for truth” was thus quite a different one from that of Chafee and the other progressive theorists who sought to shift the premises of free speech theory in the early twentieth century. For Chafee and those who emphasized the social interest in free speech, the search for truth was part of a process in which public opinion could become more informed and enlightened. For Holmes, “truth” was

293. Letter from Oliver Wendell Holmes to Harold J. Laski (July 7, 1918), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 160-61.

294. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

295. *Id.*

296. HOLMES, *supra* note 134, at 1.

297. Chafee, *Speech in War Time*, *supra* note 22, at 956.

the equivalent of majoritarian prejudice at any point in time. He defined it to Laski as "the prevailing can't help of the majority,"²⁹⁸ and to Learned Hand as "the majority vote of that nation that can lick all others."²⁹⁹ The optimistic, democratic vision of Chafee and his progressive contemporaries had resonated with Holmes' skeptical resignation about the primacy of majoritarian sentiment. The "search for truth" metaphor, embodying both of those perspectives, had arrived in American free speech jurisprudence.

Holmes then emphasized the constitutional significance of the "search for truth" metaphor. Immediately after associating "the ultimate good" with a "free trade in ideas" designed to search for truth, he announced:

That at any rate is the theory of our Constitution. It 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. While that experiment is part of our system 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. . . . 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."³⁰⁰

In this passage Holmes explicitly linked the "clear and present danger" test to the idea that thoughts gained or lost acceptance in "the market" of ideas and were "corrected" with time, producing "truth," an idea now characterized as "the theory of our Constitution." Somehow the "experimental" character of the constitutional scheme of government was linked to the "experimental" process by which ideas were tested and discarded in the marketplace. And since "the ultimate good" was reached by allowing this experimental process to go on, only those ideas that directly threatened the existence of the nation should be removed from the process by being suppressed. The First Amendment had become a "sweeping command" that directed all ideas to the marketplace unless they immediately threatened the country.

Needless to say, after Holmes' reformulation in *Abrams*, his conception of the First Amendment generally, and of the "clear and present danger" test in particular, bore little resemblance to their counterparts in

298. Letter from Oliver Wendell Holmes to Harold J. Laski (Jan. 11, 1929), in 2 HOLMES-LASKI LETTERS, *supra* note 1, at 1124.

299. Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), in Holmes Papers, *supra* note 13 (referring to the view of truth he had when he was young).

300. *Abrams*, 250 U.S. at 630-31 (Holmes, J., dissenting).

the 1919 Espionage Act cases. In Holmes' original treatment of the First Amendment issues in those cases, notwithstanding the clear-and-present-danger dictum, the presence of a First Amendment claim added nothing to an analysis that conceptualized the cases as attempt cases.³⁰¹ Clarke's majority opinion in *Abrams*, in fact, had been faithful to the *Schenck* trilogy in its summary treatment of the defendants' First Amendment argument. It was Holmes who sought to change the rules.

Reaction to Holmes' dissent in *Abrams*, from the same sources that had initiated communication with him on First Amendment issues, was swift and, from Holmes' point of view, must have been eminently satisfactory. Laski wrote that "amongst the many opinions of yours I have read, none seems to me superior either in nobility or outlook, in dignity or phrasing, and in that quality the French call *justesse*."³⁰² Felix Frankfurter wrote of "the gratitude and . . . the pride I have in your dissent," adding that "[y]ou speak there as you have always spoken," but "this time we need education in the obvious."³⁰³ *The New Republic* wrote an editorial, *The Call to Toleration*, featuring Holmes' dissent,³⁰⁴ and commissioned an article highly critical of the majority opinion.³⁰⁵ And Chafee devoted a law-review article to the case in which he referred to "Justice Holmes's magnificent exposition of the philosophic basis" of the First Amendment.³⁰⁶ Chafee asserted that the effect of the majority decision "should be temporary in view of . . . the enduring qualities of the reasoning of Justice Holmes"³⁰⁷ and concluded that "[o]n the constitutional point, little can be added to the statement of Justice Holmes."³⁰⁸ Chafee believed that Holmes' dissent "must carry great weight as an interpretation of the First Amendment, because it is only an elaboration of the principle laid down by him with the backing of a unanimous court in *Schenck v. United States*."³⁰⁹ The "clear and present danger" test as reformulated, Chafee concluded, could now be taken as "marking the true limit of governmental interference with speech and writing under our constitutions."³¹⁰ The first stage in the modernization of free speech

301. See *supra* text accompanying notes 140-61.

302. Letter from Harold J. Laski to Oliver Wendell Holmes (Nov. 12, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 220.

303. Letter from Felix Frankfurter to Oliver Wendell Holmes (Nov. 12, 1919), in Holmes Papers, *supra* note 13.

304. *The Call to Toleration*, NEW REPUBLIC, Nov. 26, 1919, at 360 (editorial).

305. See Gerard C. Henderson, *What Is Left of Free Speech*, NEW REPUBLIC, Dec. 10, 1919, at 50.

306. Chafee, *supra* note 264, at 769.

307. *Id.* at 771.

308. *Id.* at 769.

309. *Id.*

310. *Id.* at 771. Of those who had participated in the conversations with Holmes about free speech only Learned Hand continued to express reservations, although Chafee privately concurred in some of Hand's concerns. Hand felt that the "clear and present danger" test gave too much

jurisprudence had been completed.

D. Holmes' Later Free Speech Opinions: Consciousness Overrides Consistency

Abrams, the case in which Holmes decisively abandoned earlier orthodoxy and embraced a conception of the First Amendment that encompassed substantive limitations on governmental power, has rightly been identified as "the constitutional divide" in the evolution of his views on free speech.³¹¹ In his post-*Abrams* free speech opinions Holmes regularly adopted speech-protective positions and thereby cemented his reputation among commentators as a libertarian on free speech issues. Surprisingly little attention, however, has been paid to the language of those opinions, which is not easily reconcilable with Holmes' language in *Abrams*.³¹²

There is no question that Holmes' later speech decisions reflected his expanded consciousness of the First and Fourteenth Amendments, which treated them as constitutional provisions with significant substantive bite, as distinguished from mere codifications of, or analogies to, the common law. The shape of Holmes' consciousness in the later free speech cases, however, was essentially idiosyncratic. While he continued to adhere, reflexively, to the "clear and present danger" test, he went well beyond it in some instances, apparently adopting an ultralibertarian posture. Further, while Holmes began to conceptualize some types of cases as raising free speech concerns when he had not previously done so, he simultaneously continued to resist any effort to treat speech as an essential liberty, akin to liberty of contract. As he neared the end of his tenure, Holmes seemed far more concerned with exhibiting his enhanced sensitivity to the free speech implication of cases than with maintaining doctrinal consistency with his earlier decisions. In his attempts to exhibit a sensitivity to free speech issues Holmes provided some clues about his essential orientation as a First Amendment theorist and as a judge.

In the first set of free speech cases decided after *Abrams*, Holmes continued to exhibit the enhanced consciousness he had demonstrated in that case. In the 1920 Term he joined two Brandeis dissents from majority opinions that applied the bad-tendency test and treated intent generally under the Espionage Act. In his dissenting opinions, Brandeis

leeway to juries to define the limits of protection for speech in an impressionistic fashion. See Gunther, *supra* note 10, at 749 (quoting Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), in Zechariah Chafee, Jr., *Papers* (Harvard Law Library)).

311. Rabban, *Emergence*, *supra* note 12, at 1317.

312. In 1941, Zechariah Chafee wrote of the *Schenck-Abrams* sequence: "Looking backward . . . we see that Justice Holmes was biding his time until the Court should have before it a conviction so clearly wrong as to let him speak out his deepest thoughts about the First Amendment." CHAFEE, *supra* note 112, at 86.

reiterated that the "clear and present danger" test should control judicial assessments of subversive speech³¹³ and that a specific intent to engage in prohibited activity should be required to sustain a conviction where speech rights were at stake.³¹⁴ In the 1921 Term, Holmes dissented separately from Brandeis in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*.³¹⁵

In *Burleson* the Postmaster General denied second-class mailing privileges to the *Milwaukee Leader* on the ground that the paper had printed articles critical of the war effort and was, therefore, a "non-mailable" publication within the meaning of the 1917 Espionage Act.³¹⁶ Although the Act did not address whether future issues of a "non-mailable" publication could be barred, the Postmaster General argued that because past violations had resulted in the newspaper's forfeiting its second-class mailing privileges, the government could decline to renew them.³¹⁷ The majority held that the articles clearly violated the Espionage Act and that the Postmaster General could presume that future publications would also violate the Act. Brandeis wrote an elaborate dissent, arguing that the Postmaster General had no discretionary authority to exclude publications from the mails based on a guess as to their future content.³¹⁸ Holmes dissented separately. He confessed that, until he had read Brandeis' dissent, he had been inclined to support the majority's position on the ground that "if a publisher should announce in terms that he proposed to print treason and should demand a second-class rate it must be that the Postmaster General would have authority to refuse it."³¹⁹ But Holmes had become convinced that "[t]he question of the rate has nothing to do with the question whether the matter is mailable," and that the Postmaster General could not determine nonmailability in advance.³²⁰ The only thing the Postmaster General was empowered to do under the statute, Holmes felt, was to deny second-class mail privileges, and after the publications were mailed "to refrain from forwarding the papers . . . and to return them to the senders."³²¹ He was not empowered to decide, on the basis of a publication's content, that it could not be carried in the mails.³²²

Holmes argued that the Postmaster General lacked authority to absolutely deny access to the mails in the future absent explicit language

313. *Schaefer v. United States*, 251 U.S. 466, 482-83 (1920) (Brandeis, J., dissenting).

314. *Pierce v. United States*, 252 U.S. 239, 271-72 (1920) (Brandeis, J., dissenting).

315. 255 U.S. 407, 436 (1921) (Holmes, J., dissenting).

316. 255 U.S. at 410-12.

317. *Id.* at 412.

318. *Id.* at 417 (Brandeis, J., dissenting).

319. *Id.* at 436-37 (Holmes, J., dissenting).

320. *Id.* at 437.

321. *Id.*

322. *Id.*

conveying that authority.³²³ So long as the United States maintained a Post Office, he suggested, "the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man."³²⁴ Otherwise, the power claimed for the Postmaster General "could be used to interfere with very sacred rights."³²⁵ According to Holmes, denial of second-class mailing privileges for the future was "a serious attack upon liberties."³²⁶

Holmes' response to the free speech implications of *Burleson* was in stark contrast to his treatment of arguably similar cases earlier in his career. Holmes had conceded that "[t]he United States may give up the Post Office when it sees fit."³²⁷ He did not accept the government's argument, however, that "a citizen uses the mail at second-class rates not as of right—but by virtue of a privilege or permission, the granting of which rests in the discretion of the Postmaster General."³²⁸ In fact, Holmes spoke in his opinion of "rights" and "liberties" in the use of the mails.³²⁹ Yet in his previously cited opinion in *McAuliffe v. Mayor of New Bedford*,³³⁰ the Massachusetts case involving a policeman who was fired for engaging in partisan political activity, he had summarily dismissed a First Amendment claim that the government could not condition access to its employment on conformity to its rules where those rules included a ban on the expression of political sentiments.³³¹ *Burleson* embodied an analogous claim—that the government could condition access to its mailing privileges, which it could withdraw at any point, on a user's not engaging in seditious speech. And yet Holmes, who had announced that there was no constitutional right to be a policeman, suggested in *Burleson* that there was a constitutional right to use the mails. His shift of position was consonant with the enhanced sensitivity to free speech issues that his *Abrams* dissent had demonstrated.³³²

After *Burleson*, in the 1922 Term, Holmes wrote opinions in two

323. See *id.*

324. *Id.*

325. *Id.* at 438.

326. *Id.*

327. *Id.* at 437.

328. *Id.* at 427 (Brandeis, J., dissenting).

329. See *id.* at 437-38 (Holmes, J., dissenting).

330. 29 N.E. 517 (Mass. 1892).

331. *Id.* at 517.

332. For another case demonstrating Holmes' enhanced sensitivity to free speech issues, see *Leach v. Carlile*, 258 U.S. 138, 140 (1922) (Holmes, J., dissenting). In *Leach*, Holmes found a First Amendment violation in the Postmaster General's refusal to deliver mail to a company that had advertised "Organo Tablets," which it manufactured as a general cure for illness, an advertisement that the Postmaster considered fraudulent. 258 U.S. at 139. "If the execution of this law does not abridge freedom of speech," Holmes wrote, "I do not quite see what could be said to do so." *Id.* at 141 (Holmes, J., dissenting).

cases that at first blush appear to bear no relationship to his free speech jurisprudence, but on closer analysis prove to complicate the nature of his newfound solicitude for speech rights. The two cases tested the constitutionality of efforts by three states to restrict the teaching of foreign languages in their public schools. The first case, *Meyer v. Nebraska*,³³³ involved a Nebraska statute forbidding the teaching of any language other than English before the eighth grade. The second case, *Bartels v. Iowa*,³³⁴ consolidated four challenges to similar statutes in Iowa, Ohio, and Nebraska that prohibited the teaching of all languages except English before the eighth grade or prohibited the teaching of German before the eighth grade. A majority of the Court conceptualized the cases as raising liberty issues under the Fourteenth Amendment's Due Process Clause and invalidated all the statutes. Justice McReynolds, writing for the Court, gave a list of the sorts of activities encompassed within the term "liberty":

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.³³⁵

McReynolds' conceptualization echoed the liberty arguments advanced by late nineteenth-century commentators, who had assumed that liberty in the Due Process Clause of the Fourteenth Amendment theoretically extended well beyond its familiar contract and property contexts. By the 1922 Term, however, no case had yet held that First Amendment protections were incorporated within the Fourteenth Amendment's Due Process Clause and thereby applicable against the states. Even McReynolds' cataloging of liberties to worship God or to acquire useful knowledge, while closely associated with the First Amendment's protection of speech or the free exercise of religion, did not rest on any incorporation arguments. McReynolds' list of protected liberties did suggest, however, that he viewed the logic of the Court's substantive due process decisions as had earlier commentators; namely, as leading to the eventual judicial designation of speech as a liberty within the meaning of the Fourteenth Amendment.

Having characterized the foreign languages cases as liberty cases, McReynolds proceeded through the familiar substantive due process analysis that had been employed by late nineteenth- and early twentieth-

333. 262 U.S. 390 (1923).

334. 262 U.S. 404 (1923).

335. *Meyer*, 262 U.S. at 399.

century courts in "liberty of contract" cases. That analysis was premised on the assumption that "liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."³³⁶ McReynolds concluded that the statutes restricting the teaching of foreign languages bore no reasonable relation to any end within the competency of the state.³³⁷ One stated end of the legislation, he noted, was fostering civic pride and a homogeneity of ideals.³³⁸ But given that ancient languages were exempt from the prohibition in Nebraska, and that the German language was singled out in Ohio, he concluded that the means adopted in furtherance of that end were too intrusive.³³⁹ McReynolds intimated that "[u]nfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries" may have precipitated the statutes.³⁴⁰ He dismissed out of hand the claim that the legislation was intended to "protect the child's health by limiting his mental activities," pointing out that proficiency in a foreign language was associated with early exposure to it and that no evidence had suggested such exposure had deleterious health effects.³⁴¹

Holmes dissented in all the cases except those in which the German language alone had been singled out for prohibition. His dissent was based on the proposition that "[w]e all agree . . . that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one."³⁴² The logic of that proposition is hard to follow. One might assume that a state has an interest in promoting the common language of the nation and offering that language, whether or not it offers other languages, in its public schools. But would that interest bear a reasonable and fair relationship to state requirements precluding its citizens from speaking other languages? The statutes at issue in *Meyer* and *Bartels* did not merely establish English as the common language of public education by ratifying the practice of not offering courses in other languages; they also prohibited the teaching of language courses that had previously been offered. Moreover, they prohibited only some languages, not including in their prohibitions ancient languages or, in the Ohio statute, all other languages except German. The states thus appeared less concerned with promoting a common tongue than in preventing their citizens from access to certain undesirable tongues.

336. *Id.* at 399-400.

337. *Id.* at 402.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 403.

342. *Bartels*, 262 U.S. at 412 (Holmes, J., dissenting).

Holmes' dissent, however, assumed that if the purpose of the statute was arguably reasonable, the means by which that purpose was implemented were also reasonable, except where one foreign language was singled out for prohibition. He asserted:

Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school.³⁴³

And if a statute prohibiting the teaching of all foreign languages was reasonable, Holmes argued,

it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."³⁴⁴

These comments were striking, especially in light of the time during which Holmes wrote them. *Meyer* and *Bartels* were decided three terms after his *Abrams* dissent, but Holmes did not treat the claim that the statutes restricted "the liberty either of teacher or scholar" as precipitating an inquiry comparable to that which would take place in speech cases. Instead he treated the inquiry as comparable to that in "liberty of contract" cases, in which he asked only that legislation purportedly infringing on economic liberties be rational as distinguished from arbitrary. The language cases did not elicit in Holmes the kind of enhanced scrutiny of legislative efforts that amounted to "[p]ersecution for the expression of opinions."³⁴⁵

There are two possible explanations for Holmes' failure to sweep the language cases under his new calculus on speech issues. First, he may not have seen them as primarily raising speech issues, in the same fashion that late nineteenth-century commentators had subsumed the right to advocate the tactic of striking in labor disputes in the economic right to strike. Teaching a foreign language, in this vein, could have been regarded as an occupation rather than as a form of expression. This explanation ignores, however, Holmes' belief that the liberty purportedly being restricted by the statutes was that of a "teacher or scholar." By "scholars" Holmes must have meant students in the public schools who sought access to information about the languages of other nations, allegedly to improve their ability to participate in world affairs. This interest in access to information would seem to be closely linked to the interest in

343. *Id.*

344. *Id.* (quoting *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 204 (1912)).

345. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

access to diverse views Holmes had identified as part of the "search for truth" in *Abrams*. It is unlikely, therefore, that Holmes failed to recognize the speech dimensions of the language cases, especially in light of his increased tendency to recognize these dimensions in other cases after *Abrams*.

A second, more likely, explanation is that the conceptual posture of the language cases made Holmes focus on protection for speech as premised on liberty, as distinguished from speech as premised on the social interest in searching for truth in a democracy. By interpreting the word "liberty" in the Fourteenth Amendment to include noneconomic as well as economic activities, McReynolds' opinion in the foreign language cases introduced, for Holmes, the jurisprudence of liberty of contract. Holmes reflexively responded by adopting his habitual posture in liberty of contract cases, in which he believed state "experiments" were being subjected to unjustifiable judicial attack on the basis of vague interpretations of the Due Process Clause.³⁴⁶ While it was not difficult to see the cases as involving the right of teachers to speak on subjects in which they were proficient, and the right of their students to listen to speech about these subjects, Holmes associated the "liberty . . . of teacher or scholar"³⁴⁷ with the "liberty of contract" context.

That "speech," despite his language in *Abrams*, had not fully broken free in Holmes' mind from "liberty of contract" analysis is suggested by a comment he made to Laski in April 1923, before the *Meyer* and *Bartels* cases were decided.³⁴⁸ In discussing his dissent in the case of *Adkins v. Children's Hospital*,³⁴⁹ in which the majority had adopted a "liberty of contract" analysis, Holmes added, "I am curious to see what the enthusiasts for liberty of contract will say with regard to liberty of speech under a State law punishing advocating the overthrow of government—by violence. The case was argued this week."³⁵⁰ The case was *Gitlow v. New York*,³⁵¹ which was to be reargued and not decided until 1925; it was to produce one of Holmes' major free speech opinions.

The implication of Holmes' comment to Laski was that "liberty of speech" would pose a dilemma for those who thought that "liberty of contract" should be broadly applied, since a comparable analysis might

346. Because the question of whether promoting "a common tongue" by prohibiting language instruction up to a certain age in the public schools was one "upon which men reasonably might differ," Holmes concluded he was "unable to say that the Constitution of the United States prevents the experiment [from] being tried." *Bartels*, 262 U.S. at 412 (Holmes, J., dissenting).

347. *Id.*

348. See Letter from Oliver Wendell Holmes to Harold J. Laski (Apr. 14, 1923), in HOLMES-LASKI LETTERS, *supra* note 1, at 495.

349. 261 U.S. 525 (1923), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

350. Letter from Oliver Wendell Holmes to Harold J. Laski (Apr. 14, 1923), in HOLMES-LASKI LETTERS, *supra* note 1, at 495.

351. 268 U.S. 652 (1925).

protect those who advocated subversive activity. The comment presupposed that "liberty of speech" remained a gloss on the Fourteenth Amendment's Due Process Clause, since the incorporation of First Amendment rights in that clause was still in an inchoate state in 1923. Incorporation was to take place in the *Gitlow* dissent, and Holmes' response to the incorporation argument was to be a revealing one.

Incorporation, however, was not the major issue that *Gitlow* raised for Holmes. By the time *Gitlow* was decided it had become apparent that he and other adherents of the "clear and present danger" test faced a dilemma. That test had been designed to deal with situations in which a legislature had identified a proscribed end, such as obstructing the war effort, and the question under the test was whether a particular expression was closely enough related to that end to come within the proscription. In *Gitlow*, however, the statute had criminalized the form of expression itself. A 1902 New York statute had provided criminal penalties for those who advocated "'that organized government should be overthrown by force, or violence or any unlawful means.'"³⁵² The statute, originally passed in response to the emergence of anarchism, was applied against the publisher of *The Left Wing Manifesto*, a document that paraphrased *The Communist Manifesto*, calling for class struggle and "'revolutionary mass action'" toward the "'annihilation of the parliamentary state.'"³⁵³ The only specific action the *Manifesto* urged, however, was a series of "mass political strikes."³⁵⁴ A majority of the Court in *Gitlow*, holding the statute constitutional, conceded that "[t]here was no evidence of any effect resulting from the publication and circulation of the Manifesto."³⁵⁵ That lack of evidence, however, was arguably immaterial because the New York Legislature, rather than proscribing action, had proscribed advocacy itself.

The majority held that given the language of the statute, the "clear and present danger" test was inapplicable, so the absence of any causal connection between the defendant's publication and any illegal activity did not matter. Justice Edward Sanford, writing for the majority, reasoned as follows:

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself . . . [In the latter cases the "clear and present danger" test of *Schenck* governs.] . . . [That test] was manifestly intended . . . to apply only in [the latter] cases, and has no application to those like the present, where the legislative body itself has previously determined the

352. *Id.* at 654-55 (quoting N.Y. PENAL LAW § 161 (Matthew Bender 1909)).

353. *Id.* at 658-59 (quoting THE LEFT WING MANIFESTO).

354. *Id.* at 659.

355. *Id.* at 656.

danger of substantive evil arising from utterances of a specified character.³⁵⁶

Sanford's analysis assumed that the only question for the Court was whether *The Left Wing Manifesto* had advocated the doctrine "that organized government should be overthrown by force, or violence or any unlawful means." He concluded, for the majority, that it had. He conceded that "[t]he statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action."³⁵⁷ He found, however, that *The Left Wing Manifesto* "advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government."³⁵⁸ It was immaterial to the majority that no effect had followed from the distribution of the *Manifesto* or that its authors had given no time frame for the "revolutionary mass overthrow" they urged.

Holmes, joined by Brandeis, dissented in *Gitlow*. He first took up the incorporation issue, which had been argued by both sides.³⁵⁹ The majority had summarily concluded that the First Amendment was incorporated against the states through the Fourteenth Amendment. Sanford stated that "[f]or present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States."³⁶⁰ Holmes, perhaps mindful that he had addressed and not resolved the incorporation issue in *Patterson v. Colorado ex rel. Attorney General*,³⁶¹ engaged in a fuller discussion of the issue in his *Gitlow* dissent, agreeing with the majority. "The general principle of free speech," he argued, "must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used."³⁶² This echoed the comment he had made to Laski in the 1923 letter, when *Gitlow* was first argued, equating liberty of speech and liberty of contract.³⁶³ Holmes' point was that the Court's own extensions of the liberty language in the Fourteenth Amendment to protect rights in the economic arena would make it anomalous not to make the same extension where free speech was involved.

356. *Id.* at 670-71.

357. *Id.* at 664.

358. *Id.* at 665.

359. *Id.* at 672 (Holmes, J., dissenting).

360. 268 U.S. at 666.

361. 205 U.S. 454 (1907); see *supra* text accompanying notes 36-45.

362. *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting).

363. See *supra* text accompanying notes 348-51.

Holmes, however, had protested against the extensions of economic liberties and, in the foreign language cases, had resisted treating liberty of speech as bearing any more constitutional weight than liberty of contract. He thus added a cryptic sentence to the discussion of incorporation in his dissent. "[P]erhaps," he said, the application of the First Amendment against the states "may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."³⁶⁴

Unraveling that sentence and the one following it reveals the idiosyncratic frame of reference that Holmes had come to adopt in free speech cases. In the first sentence, he expressed a reluctance, on the one hand, to endorse incorporation if it were premised on a substantive reading of liberty that might, in the guise of protection for speech, reinforce an expansive reading of economic liberties. Thus, according to Holmes, postincorporation jurisprudence ought to have "a somewhat larger latitude" to restrict speech rights in order to preserve a comparable latitude to restrict economic rights. On the other hand, he seemed eager to restate his new view of the First Amendment as "sweeping language" severely restricting Congress' powers, the view which he had articulated in *Abrams* and, as his "ought to govern" language indicated, had not been endorsed by the Court as a whole.

The next sentence, however, muddled things considerably. Holmes said, "If I am right, then I think that the criterion sanctioned by the full Court in *Schenck v. United States* applies" and quoted the "clear and present danger" dictum.³⁶⁵ The relationship between the sentences is hard to fathom. "If I am right" would seem to refer to Holmes' discussion of the incorporation of the First Amendment against the states, the only issue he had thus far discussed in his *Gitlow* dissent. It could conceivably have referred, more particularly, to his view that free speech restrictions on the states ought perhaps to be less severe than those on the federal government. But in either case the application of "clear and present danger" to *Gitlow* seemed to come out of the blue. If the states had more latitude to restrict speech than the federal government, judicial tests developed in cases in which Congress had restricted speech might not necessarily be applicable. On the other hand, if *Schenck* controlled, and the "clear and present danger" test was a rule of causation—evaluating the closeness of the connection between advocacy and illegal acts—causation would seem to have been satisfied in those instances in which a legislature had outlawed advocacy itself. It was only if "clear and present danger" in its reformulated version—the version that Holmes insisted

364. *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting).

365. *Id.* (citation omitted).

had been departed from in *Abrams* and *Schaefer*—was the correct test, as Holmes asserted, that the legislative action in *Gitlow* deserved searching scrutiny. But that would mean that in Holmes' view, incorporated speech cases involving actions by the states were to be treated the same as cases involving actions by Congress.

Nonetheless, Holmes proceeded as if the "clear and present danger" test applied, and concluded that "it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."³⁶⁶ If the publication of the *Manifesto* had been claimed to have been "an attempt to induce an uprising against government at once and not at some indefinite time in the future," Holmes argued, "it would have presented a different question."³⁶⁷ That would have been a situation "with which the law might deal," he surmised, "subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences."³⁶⁸

This argument was a familiar one after *Abrams*. Holmes had come to see the "clear and present danger" test as a substantive evaluation of the seriousness of any threat posed by the speech at issue, even though he couched that inquiry in the "remoteness" language of causation. A speech, under this view, could pose no "clear and present danger," even if it was quite specific in its aims, if its own ineptitude or other circumstances suggested that it would not be taken seriously. A six-year-old's exhortation to other children of the same age to "take up arms against the President right now!" might not qualify under that analysis as a "clear and present danger." "Eloquence may set fire to reason," Holmes said, "[b]ut whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration."³⁶⁹

Intertwined with this familiar language, however, was some that, if taken seriously, suggested that Holmes was embarking on yet another stage in his consideration of speech issues, one that might move him to adopt an ultralibertarian view of speech rights. The majority in *Gitlow*, after quoting passages from the *Manifesto*, had stated, "This is not the expression of philosophical abstraction . . . ; it is the language of direct incitement."³⁷⁰ Holmes responded:

It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of

366. *Id.* at 673.

367. *Id.*

368. *Id.*

369. *Id.*

370. 268 U.S. at 665.

energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.³⁷¹

Although this has been a regularly quoted passage, its implications for First Amendment analysis are somewhat obscure. Given Holmes' stated position that normative ideas become "incitements" or "opinions" if presented with "enthusiasm," and that the "ultimate good" is best served by "free trade in ideas," it would seem that "incitements" should be allowed to "offer [themselves] for belief" and be acted upon if accepted. Under this reasoning, statements urging others to overthrow the government at the conclusion of the speaker's remarks should be given their chance to come into the market. In breaking down distinctions between ideas, opinions, and incitements, Holmes appeared to adopt an ultralibertarian view of speech.

Such an interpretation of Holmes' "incitement" paragraph in *Gitlow* is supported by another famous sentence in his dissent. "If in the long run," he wrote, "the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."³⁷²

Although at first glance the sentence appears to be another version of Holmes' "free trade in ideas" approach, it contains some ambiguities. His language about "the dominant forces of the community" and his statement that "the only meaning of free speech" is that any stated belief should "be given [its] chance" suggest that he regarded any restrictions on free speech as ultimately fruitless. If the choices of the dominant forces of a community are the mechanism by which ideas become accepted, certain ideas will "have their way" regardless of their content. In choosing some of these ideas, however, the dominant forces are implicitly rejecting other ideas; indeed, those forces might even decide to bar some ideas from the marketplace altogether. Thus, in the passage Holmes seems on the one hand to be advancing a view of speech in which the marketplace of ideas determines which speech is favored and which is not, and on the other hand endorsing a positivist theory of the relationship between speech and the "dominant forces" of a community. It is not clear, from his language in *Gitlow*, whether the "only meaning of free speech" has become equated with the opportunity for all ideas to have a chance to "have their way" or has become equated with the prevailing attitudes of "the dominant forces of the community."

The dizzyingly contradictory implications of these several sentences in Holmes' dissent in *Gitlow* should suggest that one runs a risk in read-

371. *Id.* at 673 (Holmes, J., dissenting).

372. *Id.*

ing too considered an ideology into Holmesian language. Holmes was often driven in his opinions by his attraction for language itself. Such phrases as "every idea is an incitement" and "the only meaning of free speech" were characteristic of his style. Although the phrases are more arresting and memorable because of their unqualified language, they consequently collapse as analytical guidelines.

Moreover, Holmes could not have been expected to be governed by this unqualified language because he believed that all legal questions were questions of degree. He was very unlikely, despite having said that every idea is an incitement, to abandon the distinction between ideas that amounted to incitements and those that did not. Accordingly, Holmes was comfortable being governed by his "clear and present danger" dictum because that test was one of degree and because it invited him to make a distinction between incitements and other types of speech. Indeed, the phrase "every idea is an incitement" might have been his way of making it clear to Learned Hand and his other young friends that he was not about to jettison the "clear and present danger" test for Hand's incitement test in *Masses Publishing Co. v. Patten*.³⁷³ For the foregoing reasons, Holmes' *Gitlow* dissent is better characterized as an example of Holmes' distinctive consciousness as a judge than as an attempt to forge a new path in First Amendment jurisprudence after *Abrams*.

Even if *Gitlow* did not necessarily signify a more libertarian posture for Holmes in speech cases, there is abundant evidence revealing his commitment, in the last years of his career, to a point of view irreconcilable with the one he took in the Espionage Act cases. The best evidence of that commitment comes not from *Gitlow* but rather from Holmes' joining a series of cases, between 1925 and the end of his tenure, which protected free speech claims under a variety of theories, some of which were more protectionist than the "clear and present danger" test. These included Brandeis' concurrence in *Whitney v. California*,³⁷⁴ which attacked the *Gitlow* approach by arguing that the First Amendment did not permit deference to legislatures on the evil of language itself and by seeking to link prohibition of speech directly to incitements;³⁷⁵ the decision in *Stromberg v. California*,³⁷⁶ which declared a California statute comparable to the one sustained in *Gitlow* unconstitutional as applied to the display of a red flag at a political demonstration; and the decision in

373. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). In *Masses*, Hand stated, "If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation." *Id.* at 540.

374. 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring) (constitutional challenge to state criminal-syndicalism law), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

375. *Id.* at 373, 374, 376.

376. 283 U.S. 359 (1931).

Near v. Minnesota ex rel. Olson,³⁷⁷ which invalidated as a prior restraint a Minnesota statute that permitted the enjoining of "malicious, scandalous, or defamatory" publications. In only one free speech case after *Abrams* did Holmes fail to adopt a position in support of speech rights.³⁷⁸ In the place of his earlier comments about speech being simply "another act you don't like" came ones such as his 1925 remark to Laski that "I let out a page of slack on the right of an ass to drool about proletarian dictatorship Free speech means to most people, you may say anything that I don't think shocking."³⁷⁹

Perhaps the best evidence of Holmes' consciousness toward free speech issues in the last years of his tenure on the Court comes from his dissent in *United States v. Schwimmer*,³⁸⁰ written two months after his eighty-eighth birthday. The *Schwimmer* case concerned the application of a forty-nine-year-old woman of Hungarian citizenship to become a citizen of the United States. The woman, Rosika Schwimmer, was a prominent pacifist who, in 1915, when she was still living in Hungary, had persuaded Henry Ford to send a peace ship to Europe to, as she put it, "[bring] the boys out of the trenches by Christmas."³⁸¹ She had come to the United States in 1921 to visit and lecture, and had subsequently become a resident of Illinois.

In November, 1921, she declared her intention to become a United States citizen and in September, 1926, filed a petition for naturalization. As part of the naturalization process, she was given a "preliminary form" which required applicants to respond to various questions. Question 22 of the form asked whether an applicant for citizenship was "'willing to take up arms in defense of this country,'" and Schwimmer answered in the negative.³⁸²

When Schwimmer subsequently filed a petition for naturalization in the District Court of the Northern District of Illinois, her petition was denied on the grounds that she was "unable . . . to take the prescribed oath of allegiance" and was, therefore, "not attached to the principles of the Constitution of the United States" nor "well disposed to the good

377. 283 U.S. 697 (1931).

378. In *Gilbert v. Minnesota*, 254 U.S. 325 (1920), Holmes concurred in the result sustaining the conviction of an official of the Non-partisan League for giving a speech urging that the policy of conscripting soldiers in wartime be put to a popular vote. *Id.* at 333; *id.* at 334 (Holmes, J., concurring in the result). Holmes gave no reasons for his concurrence. It is possible that he thought that to do so would require the same substantive reading of liberty, in a preincorporation jurisprudence, that he had resisted in the foreign language cases. See text accompanying notes 343-47.

379. Letter from Oliver Wendell Holmes to Harold J. Laski (June 14, 1925), in 1 HOLMES-LASKI LETTERS, *supra* note 1, at 752 (footnote omitted).

380. 279 U.S. 644 (1929), overruled by *Girouard v. United States*, 328 U.S. 61 (1946).

381. See *Rosika Schwimmer Dead at Age of 70*, N.Y. TIMES, Aug. 4, 1948, at 21.

382. *Schwimmer*, 279 U.S. at 647.

order and happiness of the same."³⁸³ The Court of Appeals for the Sixth Circuit reversed, finding that since Schwimmer was a woman and not eligible for military service, her refusal to bear arms was not any direct threat to the security of the nation.³⁸⁴ The Supreme Court granted certiorari and heard the case in April 1929.³⁸⁵

A majority of the Court, through Justice Pierce Butler, reversed, concluding that "[w]hatever tends to lessen the willingness of citizens to discharge their duty to bear arms detracts from the strength and safety of the Government."³⁸⁶ Therefore, "opinions and beliefs" as well as "behavior" were appropriate subjects of inquiry for the naturalization authorities.³⁸⁷ Indeed, opinions and beliefs, in Butler's view, were "of vital importance, for if all or a large number of citizens oppose [the] defense [of the United States] the 'good order and happiness' of the United States can not long endure."³⁸⁸

Holmes dissented, joined by Brandeis, and converted the case from a routine naturalization case into a free speech case.³⁸⁹ A portion of his opinion is worth quoting at some length:

The views referred to are an extreme opinion in favor of pacifism and a statement that she would not bear arms to defend the Constitution. So far as the adequacy of her oath is concerned I hardly can see how it is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to. . . . Surely it

383. *Id.* at 646.

384. *Schwimmer v. United States*, 27 F.2d 742 (7th Cir. 1928), *rev'd*, 279 U.S. 644 (1929), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946).

385. *Schwimmer*, 279 U.S. at 644-45.

386. *Id.* at 650-51.

387. *Id.* at 651.

388. *Id.*

389. *Id.* at 653 (Holmes, J., dissenting). Technically *Schwimmer* was not conceptualized as a First Amendment case. Neither the majority nor Holmes mentioned the First Amendment. The majority pointed out that "aliens . . . have no natural right to become citizens, but only that which is by statute conferred upon them" and that the burden was on applicants "to show by satisfactory evidence that [they have] the specified qualifications" for citizenship. 279 U.S. at 649.

The question in *Schwimmer* was therefore whether she had met the burden of establishing "the requisite facts" to make out a case for admission. The majority held that she had not met the burden because of her testimony that she would not bear arms and that she was "an uncompromising pacifist with no sense of nationalism but only a cosmic sense of belonging to the human family." *Id.* at 651-52. "[O]pinions and beliefs as well as . . . behavior," Butler pointed out, "are subjects of inquiry under the statutory provisions governing naturalization." *Id.* at 651. The process thus contemplated that First Amendment issues would not be raised if the government denied an applicant citizenship solely on the ground of his or her beliefs. Even though the Naturalization Act of 1906, ch. 3592, 34 Stat. 596, which established the naturalization procedures used in *Schwimmer*, would in effect be an example of "Congress . . . abridg[ing] the freedom of speech," U.S. CONST. amend. I, the First Amendment did not apply to aliens.

Holmes, in his dissent, spoke of the "principle of free thought" and called that a "principle of the Constitution." *Schwimmer*, 279 U.S. at 654-55 (Holmes, J., dissenting). He also cited the *Schenck* case, as if *Schwimmer* were doctrinally comparable. *Id.* at 654. But he avoided mentioning the First Amendment.

cannot show lack of attachment to the principles of the Constitution that she thinks it can be improved. I suppose that most intelligent people think that it might be. . . . To touch a more burning question, only a judge mad with partisanship would exclude [an applicant for citizenship] because the applicant thought that the Eighteenth Amendment should be repealed.

Of course the fear is that if a war came the applicant would exert activities such as were dealt with in *Schenck v. United States*. But that seems to me unfounded. Her position and motives are wholly different from those of Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and . . . would welcome any practicable combination that would increase the power on the side of peace. . . . Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not 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.³⁹⁰

Before analyzing the free speech dimensions of Holmes' opinion, it is worth noting that the posture of the *Schwimmer* case arguably mooted any First Amendment arguments. Schwimmer had been asked a question about her willingness to take up arms in defense of the country and had given an answer that would have been grounds for a summary denial of citizenship had the relevance of the question to a forty-nine-year-old woman ineligible for military service not been at issue. The question in *Schwimmer* was not whether Congress was infringing on First Amendment rights by asking the question and acting summarily if an applicant gave the "wrong" answer. No one was seriously questioning Congress' power to condition American citizenship on the avowal of certain beliefs; aliens seeking to be naturalized did not possess First Amendment rights. Rather, the question was whether the United States could deny Schwimmer citizenship based solely on her disinclination to perform an act she would not likely ever be asked to perform.

Holmes, however, analyzed Schwimmer's views as if the case concerned the First Amendment. He stated that "[i]t is agreed that [Schwimmer] is qualified for citizenship except so far as the views" she had set forth,³⁹¹ and then he proceeded to analyze those views as if the case were an ordinary First Amendment case. He found it irrelevant that

390. *Id.* at 653-54 (citations omitted).

391. *Id.* at 653.

Schwimmer refused to bear arms because she was ineligible to do so anyway. He then trivialized her refusal to "defend the Constitution" as a mere belief that the Constitution can be improved—a belief that he suspected was shared by "most intelligent people."³⁹² Holmes further suggested that Schwimmer's views on the Constitution and war were akin to the view that Prohibition should be repealed, and "only a judge mad with partisanship" would exclude an applicant who expressed the latter views.³⁹³

Holmes thus considered Schwimmer's views mild and inconsequential, like the leaflets he had described as "poor and puny anonymities" in *Abrams v. United States*.³⁹⁴ Having started down the line of First Amendment jurisprudence, Holmes now increased his rhetorical intensity. *Schwimmer*, he argued, might be thought a similar case to *Schenck* in that if war broke out Schwimmer might commit acts like those Holmes had found punishable in *Schenck*. He concluded, however, that Schwimmer was in a different "position" and had different "motives" than *Schenck*.³⁹⁵ Schwimmer was a sincere pacifist; *Schenck*, by implication, a dangerous subversive. While Holmes himself did not share the optimism of pacifists,³⁹⁶ nor did he think that the idea of war was philosophically absurd, he, like "most people who have known" war, regarded it with "horror, as a last resort, . . . and would welcome any practical combination that would increase the power on the side of peace."³⁹⁷

After trivializing the dangerousness of Schwimmer's views, Holmes confronted the fact that some of her answers to questions about war and the obligations of citizenship "might excite popular prejudice."³⁹⁸ It was this very sort of answer, Holmes suggested, that was protected by the First Amendment. The "principle of free thought" was not only one "that more imperatively calls for attachment than any other" in the Constitution, it was designed to ensure "freedom for the thought that we hate."³⁹⁹ That principle should extend not only to "life within this country" but to proceedings where people sought admission into the United States.⁴⁰⁰

In light of Holmes' earlier decisions as a Supreme Court Justice, this

392. *Id.* at 653-54.

393. *Id.* at 654.

394. 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

395. *See Schwimmer*, 279 U.S. at 654 (Holmes, J., dissenting).

396. Indeed Holmes had written Laski on April 13, 1929, before the *Schwimmer* case had been decided, that "[a]ll 'isms [including pacifism] seem to me silly—but this hyperaethereal respect for human life seems perhaps the silliest of all." Letter from Oliver Wendell Holmes to Harold J. Laski (Apr. 13, 1929), in 2 HOLMES-LASKI LETTERS, *supra* note 1, at 1146.

397. *Schwimmer*, 279 U.S. at 654 (Holmes, J., dissenting).

398. *Id.*

399. *Id.* at 654-55.

400. *Id.* at 655.

language is rather extraordinary. First, it signified an apparent abandonment of the "clear and present danger" test. While Holmes continued to insist that *Schenck* was still good law and sought to distinguish it from *Schwimmer* on the basis of the defendant's "position and motives," he failed to use any "clear and present danger" language in *Schwimmer*. Instead, he suggested that the "principle of free thought," including "freedom for the thought that we hate," was now a more significant constitutional principle than any other. Moreover, the principle should apply to decisions affecting prospective citizens—aliens—as well as citizens; they should not be punished for expressing their views even if those views were "hateful" to most Americans.

Second, this language signified Holmes' abandonment of a positivist view of sovereignty. In the past, Holmes had been remarkably deferential to the power of the United States to treat aliens as devoid of constitutional rights. Indeed, he had been the principal early twentieth-century Supreme Court proponent of an ultrapositivist view of sovereignty and a starkly restrictionist view of the rights of those who sought to enter or to remain in the United States.⁴⁰¹ In contrast, Holmes' opinion in *Schwimmer* suggested that the constitutional principle of free thought applies to naturalization proceedings. In *Schwimmer* he was not only suggesting that a "principle of the Constitution" was implicated in a naturalization proceeding, he was suggesting that "the principle of free thought" was of greater constitutional significance than "any other."

Holmes' personal correspondence about the *Schwimmer* case further illustrates the extent to which Holmes' approach to free speech issues had become more libertarian. By the time of the *Schwimmer* decision, Holmes' life was centered around his work and his correspondence, and he was writing freely to intimates about his cases. In September 1928, he responded to a comment from Pollock criticizing "armchair pacifists"⁴⁰² with sentiments strikingly similar to those found in his *Schwimmer* dissent. "I agree with your condemnation of armchair pacifists," he wrote Pollock, "on the general ground that until the world has gotten farther along war not only is not absurd but is inevitable and rational." He added, however, that "I don't pass moral judgments."⁴⁰³ And in June 1929, in response to a letter from Laski declaring the majority opinion in *Schwimmer* to be "an iniquitous injustice,"⁴⁰⁴ Holmes said

401. See generally Rogat, *Dissenting Opinion* (pt. 1), *supra* note 10 (discussing Holmes' restrictive alien-rights jurisprudence).

402. Letter from Sir Frederick Pollock to Oliver Wendell Holmes (Sept. 9, 1928), in 2 HOLMES-POLLOCK LETTERS, *supra* note 105, at 229.

403. Letter from Oliver Wendell Holmes to Sir Frederick and Lady Pollock (Sept. 20, 1928), in 2 HOLMES-POLLOCK LETTERS, *supra* note 105, at 230.

404. Letter from Harold J. Laski to Oliver Wendell Holmes (June 4, 1929), in 2 HOLMES-LASKI LETTERS, *supra* note 1, at 1155.

that he thought the opinion was affected by "a recollection of the anti-draft talk during the late war" and was "made easier by [Schwimmer's] somewhat flamboyant declaration that she was an atheist," which he had "alluded to . . . discreetly without mentioning" in his dissent.⁴⁰⁵

In January 1930, Holmes received a letter from Rosika Schwimmer. She expressed her "deep-felt gratitude" for his dissent, even "[a]t the risk of violating legal etiquette."⁴⁰⁶ He responded, "You are too intelligent to need explanation of the saying that you must never thank a judge."⁴⁰⁷ Holmes described a case as "simply a problem to be solved" and stated that if a judge's decision "was of a kind to deserve thanks, he would not be doing his duty."⁴⁰⁸ Nonetheless he confessed that he was "gratified by [Schwimmer's] more than kind expression,"⁴⁰⁹ and began a correspondence with Schwimmer that lasted until 1934, a year before his death.

It is not altogether surprising that Holmes, after admonishing Rosika Schwimmer for writing him, would then write her back and begin a correspondence friendship. She was thirty-six years younger than he, about the same age as Frankfurter, Laski, Chafee, and Learned Hand. Holmes had noted in his dissent that Schwimmer "seem[ed] to be . . . of superior character and intelligence."⁴¹⁰ Though he thought her pacifism was naive, he did not hold the same view of her atheism.⁴¹¹ He could have seen her as part of the constituency of his old age: the progressive intelligentsia that had come to appreciate him and might pass on his contributions to posterity. In his correspondence friendships with this circle of people, Holmes grew comfortable expressing his instinctive affinity for the communicative arts, activities to which he had devoted his life. Just as he devoted an ever-increasing time in his later life to reading and writing letters, he devoted more time to taking seriously "the principle of freedom of thought." Holmes' correspondence with Schwimmer is further evidence both of the evolution in Holmes' thinking about speech issues and of his continued efforts to cultivate a constituency for his ideas.

405. Letter from Oliver Wendell Holmes to Harold J. Laski (June 15, 1929), in 2 HOLMES-LASKI LETTERS, *supra* note 1, at 1158. Schwimmer's atheism may have been what Holmes was "allud[ing] to" when he said that "[s]ome of her answers might excite popular prejudice." *United States v. Schwimmer*, 279 U.S. 644, 654 (1929) (Holmes, J., dissenting), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946).

406. Letter from Rosika Schwimmer to Oliver Wendell Holmes (Jan. 28, 1930), in Holmes Papers, *supra* note 13.

407. Letter from Oliver Wendell Holmes to Rosika Schwimmer (Jan. 30, 1930), in Holmes Papers, *supra* note 13.

408. *Id.*

409. *Id.*

410. *Schwimmer*, 279 U.S. at 653 (1929) (Holmes, J., dissenting).

411. Holmes had exhibited a skepticism about the existence of God by the age of 20. *See* 1 HOWE, *supra* note 88, at 109-10; MARK DEWOLFE HOWE, TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864, at 27-28 (1946).

Holmes' opinions from *Schenck* through *Schwimmer* demonstrate that while the transformation of his ideas on free speech is readily discernible, the expression of that transformation in the form of consistent legal doctrine is not. Although on the surface Holmes appeared to continue to endorse the "clear and present danger" test as the best means for protecting speech rights, he made very little use of the "clear and present danger" test in his later opinions. He employed the formula as an analytical device only once in his later speech cases, in his dissent in *Gitlow*, and in the course of that dissent also appeared to endorse a variety of other tests for free speech cases in addition to "clear and present danger."

In other opinions written after *Abrams* Holmes inexplicably failed to apply the "clear and present danger" test at all. In *Gilbert v. Minnesota*,⁴¹² for example, decided just before *Gitlow*, it was hard to see how the advocacy of putting conscription to a popular vote could have resulted in a "clear and present danger" to the state under Holmes' *Abrams* reformulation.⁴¹³ Under the "clear and present danger" test Gilbert's conviction for that advocacy seemed harder to justify than Gitlow's, since Gitlow had explicitly called for class action having as its objective "the conquest by the proletariat of the power of the state."⁴¹⁴ Holmes nonetheless permitted Gilbert's conviction to stand, while insisting that the "clear and present danger" test called for a reversal of Gitlow's conviction.

Even when Holmes went to great lengths to argue for the protection of speech rights, as he did in his *Schwimmer* dissent, he did not apply his "clear and present danger" test. In *Schwimmer*, Holmes stated that one of the grounds for denying Schwimmer citizenship was "the fear . . . that if a war came the applicant would exert activities such as were dealt with in *Schenck v. United States*."⁴¹⁵ But if by mentioning *Schenck* he meant to suggest that *Schwimmer* was a "clear and present danger" case, and that Rosa Schwimmer's refusal to bear arms in the defense of the United States at some indefinite time in the future could hardly constitute a "clear and present danger," he did not make that suggestion clear. He only said that Schwimmer's "position" and "motives" were "wholly different" from those of the defendant in *Schenck* and then went on to dis-

412. 254 U.S. 325 (1920).

413. The defendant in *Gilbert* also said that "[i]f they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours." *Id.* at 327.

414. *Gitlow v. New York*, 268 U.S. 652, 658 n.2 (1925). It is possible, of course, that Holmes declined to protect the speech in *Gilbert* because of the necessity of relying on a "liberty of speech" argument. See *supra* notes 64-86 and accompanying text. But on its facts, the *Gilbert* case hardly represented a "clear and present danger" as Holmes had come to define one after *Abrams*.

415. *United States v. Schwimmer*, 279 U.S. 644, 654 (1929) (Holmes, J., dissenting), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946).

cuss the "optimistic" and "sincere" quality of Schwimmer's pacifism.⁴¹⁶

It would, of course, have been hazardous for Holmes to state openly that the "clear and present danger" standard actually governed in *Schwimmer* or that the First Amendment was even relevant to the case. Holmes did say, however, that the "principle of free thought" should pertain to "admission into, as well as to life within this country."⁴¹⁷ In that context his citation of *Schenck*, and his effort to distinguish the defendants in *Schwimmer* and in *Schenck*, seems doctrinally curious. It is not clear whether he was suggesting that in the future the "clear and present danger" test he had outlined in *Abrams* should be applied to naturalization proceedings or simply that *Schenck*, *Abrams*, and *Schwimmer* were all cases in which the principle of "protection for the thought we hate" was implicated. In sum, all that one can conclude from a close analysis of Holmes' later free speech opinions is that he was regularly conscious of the free speech implications of cases and persistently solicitous of free speech claims. Even that conclusion needs to take into account *Gilbert* and the foreign language cases, in which he exhibited no solicitude for the free speech claim or no consciousness that there even was one. As for the "clear and present danger" test as a doctrinal formulation, Holmes might have wanted to give the impression that he continued to adhere to it, but he very rarely used it and in many instances did not even mention it.

V

CONCLUSION: HOLMES' SENSIBILITY AS A JUDGE

This exercise in exploring Holmes' free speech opinions has yielded several conclusions. First, Holmes' consciousness about the free speech dimensions of cases in 1929 was light-years away from that in the 1890s, when he decided the *McAuliffe* and *Davis* cases, or that in 1915, when he decided *Fox v. Washington*, or even that in the spring of 1919, when *Schenck* and the other Espionage Act cases were decided. By the time he was deciding the *Gitlow* and *Schwimmer* cases, Holmes' consciousness had shifted from that of a judge for whom speech issues seemed incidental, or trivial, or merely subsumed in other common-law issues, to one for whom speech issues were of central constitutional importance.

This Article has argued that the shift in Holmes' consciousness is best explained by Holmes' personal experiences and relationships. Events in his personal life and his own unfulfilled career expectations made him more receptive to the ideas of Laski, Frankfurter, Hand, and Chafee and the circle of commentators who wrote in *The New Republic* during and immediately after World War I. The interest of these intel-

416. *Id.*

417. *See id.*

lectuals in reframing free speech jurisprudence easily dovetailed with Holmes' interest in disassociating free speech from the jurisprudential underpinnings of "liberty of contract." When one undertakes a close comparison of Holmes' language in his *Schenck* and *Abrams* opinions, and places those opinions in the context of his intellectual friendships at the time, it is apparent that Holmes' exchange of views with younger intellectuals influenced him to abandon the analogy between the free speech cases and criminal-attempt cases and to reconfigure free speech jurisprudence as emanating from the premise of the social interest in free speech in a democracy. This reconfiguration led him, by the *Schwimmer* decision, to the affirmation of the principle of "freedom for the thought we hate."

While it might be tempting to conclude that early twentieth-century First Amendment doctrine mirrors this evolution in Holmes' thought and, therefore, that the reformulated "clear and present danger" test articulated in *Abrams* is the beginning of modern First Amendment analysis,⁴¹⁸ such a conclusion would be incorrect. First, Holmes' general free speech formulations in his opinions were not logically consistent. Holmes had attempted two general justifications for the protection of free speech: his statement in *Abrams* that the "theory of our Constitution" was that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"⁴¹⁹ and his statement in *Schwimmer* that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."⁴²⁰ He never clarified, however, how "the thought that we hate" could have any "power to get itself accepted in the competition of the market" and, therefore, how "the theory of our Constitution" could be squared with the constitutional principle of freedom for hated thoughts.

Second, although Holmes had said in *Schenck* that the "clear and present danger" test was to determine the limits of protection for speech "in every case,"⁴²¹ he failed to apply that test consistently after *Schenck*. In *Abrams* he had reformulated the test, and in some later cases, such as *Schwimmer*, he went beyond the test he had articulated in *Abrams*. In

418. See, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988) (discussing evolution of free speech doctrine in the United States); MURPHY, *FREEDOM OF SPEECH*, *supra* note 72 (focusing on the development and application of the First Amendment during the 1920s); MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH* (1984) (describing First Amendment doctrine in the twentieth century and exploring themes underlying the protection of speech).

419. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

420. *United States v. Schwimmer*, 279 U.S. 644, 654 (1929) (Holmes, J., dissenting), *overruled* by *Girouard v. United States*, 328 U.S. 61 (1946).

421. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

other cases, such as *Gilbert*, he failed to invoke the test or even to recognize the free speech issues at all. Holmes' failure to apply the "clear and present danger" test consistently is evidence that perhaps he did not intend it as a doctrinal guideline at all. His reformulation of the test in *Abrams* might simply have been an attempt to create an appearance of consistency between his dissent in *Abrams* and the earlier version of the test that he had formulated in *Schenck*.

One thus comes to see that Holmes' free speech opinions were not meant to serve as conventional doctrinal formulations, providing guidance for the consistent interpretation of constitutional provisions. They were meant to serve as vehicles for conveying Holmes' broader philosophical views to the world, vehicles by which Holmes implicitly sought to change the frame of reference within which free speech issues were viewed, to modernize First Amendment theory. In 1911 Holmes wrote a letter to Lewis Einstein in which he described the state of mind from which he approached his work as a judge:

The point that I have in view is continually to deepen and broaden the channels for the great forces that lie behind every detail. After a man has a working knowledge of his job it is less important to read the late decisions of other Courts, which generally are but the small change of thought, than to let in as much knowledge as one can of what ultimately determines those decisions; philosophy, sociology, economics, and the like. I am not an expert in those matters; but I open as many windows on them as I can, and fondly hope that in some way the habit of trying to see the particular in the light of the universal will tell in one's writing.⁴²²

The passage shows Holmes' implicit sense of priorities as he wrote opinions. Reading "the late decisions of other Courts," the "small change of thought," was afforded a low priority because those decisions typically did not reveal "the [philosophical, sociological, and economic] great forces" that "ultimately determined" the course of judicial decisionmaking. Holmes' method of revealing the existence of those "great forces" was to try "to see the particular in the light of the universal" and accordingly, to express particular details of cases in light of those "universal[s]" rather than in light of the "late decisions of other Courts." "The thing I have wanted to do" as a judge, Holmes wrote to Canon Patrick Sheehan in recognizing the tenth anniversary of his tenure on the Supreme Court, has been "to put as many new ideas into the law as I can, to show how particular solutions involve general theory, and to do it with style."⁴²³

Holmes expressed his consciousness in free speech cases in a way

422. Letter from Oliver Wendell Holmes to Lewis Einstein (June 24, 1911), in *HOLMES-EINSTEIN LETTERS* 59 (James B. Peabody ed., 1964).

423. Letter from Oliver Wendell Holmes to Canon Patrick A. Sheehan (Dec. 15, 1912), in *HOLMES-SHEEHAN CORRESPONDENCE*, *supra* note 107, at 56.

consistent with the priorities he expressed to Einstein and Sheehan. When he first became attracted to the "new idea" that speech meant more than protection from prior restraints, he sought to express the limits of that protection in his *Schenck* dictum, placing the facts of *Schenck* in the universal language of "clear and present danger"—language that seemed at that time to capture for him the close connection between subversive speech and crime. As he rethought speech issues after *Schenck* in response to criticism he had received from people whose opinions he valued, he sought to "open as many windows" as he could on the philosophical basis of protection for speech. One window that appeared promising was the reformulated basis of protection for speech as part of the "search for truth" in a democratic society that valued public discussion, and Holmes again sought to express that basis as a universal proposition embedded in the particular facts of *Abrams*.

The idea of the search for truth, however, did not fully justify the protection of speech rights. Though the search for truth was to take place in a competitive marketplace, that marketplace, in a democracy, was not completely free because it was controlled by majoritarian preferences. Thus, "getting accepted" meant, in some sense, "being popular"; if truth was to be equated with popularity a majority might choose to treat unpopular speech as untrue and suppress it. That was the problem in *Gitlow* and, in an abstract fashion, in *Schwimmer*. In both cases, representatives of a majority had deemed communism or pacifism unacceptable doctrines. Holmes responded by trying yet another universal formulation: the idea that the "only meaning of free speech" was that unacceptable doctrines be presumptively tolerated; that the Constitution embodied the principle of freedom for the thought that we hate.

This process of modernizing free speech theory reveals Holmes' distinctive sensibility as a judge and his ambivalence about the professional role he occupied. Though Holmes had little interest in the orthodox dimensions of his own profession's work product—the "small change of thought" manifested by "the late decisions of other Courts"—he wanted to be recognized, and celebrated, as a judge. Holmes often treated judging as a kind of game, an exercise in which he tried to find "a form of words" to justify a result, as he would try to find fresh and arresting language to express a thought in a letter. At the same time, however, the game was a serious one for Holmes, because he was also greatly interested in having his talents widely appreciated in the form of an exalted judicial reputation. In the sentence following his comment on doing his work with "style" in the 1912 letter to Sheehan, he had written, "I should like to be admitted to be the greatest jurist in the world."⁴²⁴

When one looks over the progression of Holmes' free speech juris-

424. *Id.*

prudence, one despairs of finding a coherent theoretical pattern or of squaring his stance with positivist premises or with conventional theories of judicial deference to the will of the majority. At times Holmes seemed to exhibit a minimalist conception of speech, as "another act" majorities may not "like"; at other times he seemed to inflate protection for speech to the most important and imperative of constitutional principles. His philosophical conception of speech evolved through stages that at first blush seem principally the products of his intuitive responses and his personal and professional goals. The implications of his stance toward First Amendment issues double back on many of his other jurisprudential positions. Liberty of contract, for example, was a dangerous illusion, an invitation to judicial overreaching, yet the protection for the principle of "freedom for the thought that we hate" was at the core of the Constitution. When one examines Holmes' free speech opinions from the perspectives of doctrine and theory, one finds inconsistencies and contradictions at every turn.

When one thinks, however, of those opinions as the products of a writer whose principal concern is to open "windows" on a philosophical issue, to see "the particular in the light of the universal," the opinions take on a different meaning. They appear less as doctrinal than as metaphorical statements. Their purpose is not to achieve logical consistency but to offer "form[s] of words" that convey the universal dimensions of free speech theory. Whatever the limitations of "clear and present danger," "the search for truth," and "freedom for the thought that we hate" as analytical guides, they are vivid encapsulations of concerns and values that recur in speech cases: reminders that Holmes the writer has glimpsed the universal in the particular. In his free speech opinions Holmes the writer arguably did precisely what he told Canon Sheehan he wanted to do: to put new ideas into the law, to show how particular "solutions" to legal issues involved general theory, and to communicate with style.

Holmes the writer, however, was also Holmes the judge. Holmes the judge made decisions that affected people's lives, sought to square his opinions with his previous judicial pronouncements, and operated within the confines of existing doctrine. In his free speech opinions, as in his judicial work as a whole, Holmes the writer was regularly in tension with Holmes the judge. That tension was sometimes acute for Holmes, because while he sought to achieve the goals of a philosopher-jurist for whom writing was the means of communicating his insights, he also sought esteem as a judge. Since he assumed that doctrinal consistency and theoretical integrity were prerequisites for esteem in a judge, he sought to use forms of words to create the appearance of consistency and integrity in his opinions. His own instinct for glimpsing the universal in

the particular betrayed him in that search. Having invented a doctrinal formula in one free speech case, he saw its limitations in another and sought one more all-encompassing.

The result was that Holmes became associated with the modernization of free speech theory in a fashion that was consistent with his goals as a jurist but inconsistent with the conventional professional expectations for a "contributing" judge. Holmes' intellectual journey through free speech cases introduced four conceptions of speech in early twentieth-century American history. The first was speech as "another act we don't like," personified by the "criminal attempts" analogy; the second, speech as "the search for truth," personified by the reconfigured "clear and present danger" test; the third, speech as the vehicle by which "the dominant forces of the community" exercised their power; the fourth, speech as "the principle of freedom for the thought that we hate." Each conception further complicated and refined the philosophical dilemma of protection for free speech in a modern constitutional democracy. Each conception carried with it a logically inadequate doctrinal formula for resolving speech issues. The cumulative inadequacy of the formulas served to demonstrate the complexity of the philosophical dilemma.

Holmes thus appears, in this history of his free speech opinions, as a resonant intellectual figure, a "lightning rod" for cultural and ideological messages in the first thirty years of the twentieth century. His resonance emerges from his roles as a jurist-philosopher, reflecting upon the intellectual conflicts of his time, and as a writer, communicating his reflections in vivid and memorable forms of words. It emerges less clearly, almost incidentally, in his role as a judge. With Holmes' free speech opinions, as with his judicial work as a whole, a purported exercise in doctrinal analysis becomes one in which the language of doctrine quickly disintegrates, revealing other language—language communicating the human, intellectual, and cultural dimensions of Holmes' opinions—beneath the surface. When one explores this language one comes to recognize the sources of Holmes' eminence.

