UNC SCHOOL OF LAW

FIRST AMENDMENT LAW REVIEW

Volume 6 | Issue 2 Article 2

3-1-2008

Free Speech, World War I, and Republican Democracy: The Internal and External Holmes

Stephen M. Feldman

FREE SPEECH, WORLD WAR I, AND REPUBLICAN DEMOCRACY: THE INTERNAL AND EXTERNAL HOLMES

STEPHEN M. FELDMAN*

INTRODUCTION

The Supreme Court did not explicitly decide a First Amendment free-expression case until the World War I era. The Court then issued a flurry of decisions under the Espionage Act of 1917 and its 1918 amendments.[1] Justice Oliver Wendell Holmes, Jr., wrote opinions for unanimous courts in three of the first four cases, affirming convictions and repeatedly concluding that the First Amendment did not protect the various defendants' words (in the fourth case, a unanimous Court "[d]ismissed for want of jurisdiction").[2] But in the next case, *Abrams v. United States*,[3] Holmes dissented, arguing that the defendants' writings should be constitutionally protected.[4] Years later, a majority of justices vindicated Holmes's minority position, and free expression became a constitutional "lodestar."[5]

---

* Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming. This article is derived in part from a forthcoming book: Free Expression and Democracy in America: A History (University of Chicago Press, forthcoming 2008).

1. Espionage Act of 1917, Pub. L. No. 110-180, 40 Stat. 217.

2. Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919). Louis D. Brandeis wrote the opinion in the dismissed case, *Sugarman v. United States*. 249 U.S. 182 (1919) (alteration added).

3. 250 U.S. 616 (1919).

4. *Id.* at 624-28 (Holmes, J., dissenting).

5. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech In Twentieth-Century America*, 95 MICH. L. REV. 299, 301 (1996) [hereinafter White, *Comes of Age*]. Other helpful sources on free expression, in general, include the following: MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA (Oxford Univ. Press 1992);

Did Holmes's *Abrams* dissent manifest a change in his free-speech jurisprudence? Scholars have fallen into two camps. One argues that Holmes consistently followed a single principle of free expression; he voted differently in *Abrams* because of its distinctive facts. The second camp argues that Holmes altered his concept of free speech, moving from a narrow to a broad definition in *Abrams*. Thus, one scholar concludes that "the evidence shows without much doubt that

---

MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE:" STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (Duke Univ. Press 2000) [hereinafter CURTIS, FREE SPEECH]; MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (Univ. Cal. Press 1991); WILLIAM E. LEUCHTENBURG, THE PERILS OF PROSPERITY, 1914-32 (Univ. Chi. Press 1958); PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (W.W. Norton & Co. 1979); RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (Viking Penguin 1987); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (Cambridge Univ. Press 1997) [hereinafter RABBAN, FORGOTTEN]; GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (W.W. Norton 2004); PATRICK S. WASHBURN, A QUESTION OF SEDITION: THE FEDERAL GOVERNMENT'S INVESTIGATION OF THE BLACK PRESS DURING WORLD WAR II (Oxford Univ. Press 1986); Thomas A. Lawrence, *Eclipse of Liberty: Civil Liberties in the United States During the First World War*, 21 WAYNE L. REV. 33 (1974); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207 (1983) [hereinafter Rabban, *Emergence*]; David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951 (1996) [hereinafter Rabban, *Progressive*]; Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003) [hereinafter Stone, *Espionage*]; Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411 [hereinafter Stone, *Origins*]; Christina E. Wells, *Discussing the First Amendment*, 101 MICH. L. REV. 1566 (2003); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391 (1992) [hereinafter White, *Justice Holmes*]; DOCUMENTS OF AMERICAN HISTORY (Henry Steele Commager ed., 9th ed. Prentice-Hall, Inc. 1973) [hereinafter COMMAGER]; LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS]; THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (Ben Perley Poore ed., 2d ed. Gov't Printing Office 1878) [hereinafter POORE].

Holmes's views did not change,"[6] while another scholar insists that Holmes changed "dramatically."[7]

Both of these opposed outlooks are too simplistic; they tell only part of the story. They must be synthesized to illuminate Holmes and his contributions to free expression. Such a synthesis requires an appreciation of two viewpoints: an external and an internal. From an external vantage, Holmes transformed. His votes and opinions in the first cases cannot be reasonably reconciled with his *Abrams* dissent. Yet, from an internal standpoint, Holmes himself never believed he had

---

6. Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 304 (1991).

7. Rabban, *Emergence*, *supra* note 5, at 1311. *Compare* David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 99 (1982) (arguing that Holmes changed before *Schenck*, but not between *Schenck* and *Abrams*), *and* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2358 (2000) (arguing that Holmes recognized a fundamental difference between *Schenck* and *Abrams* that justified his contrasting votes), *with* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 75-76 (Univ. Chi. Press 2000) (arguing that Holmes changed), *and* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS (Basic Books 2004) (arguing that Holmes's *Abrams* opinion was "a reversal of his earlier position"), *and* Stone, *Origins*, *supra* note 5, at 607 n.314 (arguing that Holmes "substantially changed his position in *Abrams*"), *and* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 726 (1975) (arguing that Holmes changed), *and* Douglas Laycock, *The Clear and Present Danger Test*, 25 J. SUP. CT. HIST. 161, 171-74 (2000) (arguing that Holmes changed), *and* White, *Justice Holmes*, *supra* note 5, at 409-28 (arguing that Holmes changed).

In addition to sources already cited concerning Holmes, I will cite to the following: I HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI (Mark DeWolfe Howe, ed., Harvard Univ. Press 1953) [hereinafter HOLMES-LASKI]; II HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 (Mark DeWolfe Howe, ed., Harvard Univ. Press 1941) [hereinafter HOLMES-POLLOCK]; Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2004); Gerald Caplan, *Searching for Holmes Among the Biographers*, 70 GEO. WASH. L. REV. 769 (2002) (book review); 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); Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984).

changed. He insisted that he had always been firmly committed to free speech and a free press. This Article explains how and why Holmes transformed decisively, yet how and why he sincerely denied doing so. By resolving this Holmesian puzzle, this Article throws light onto the all-important Free Speech and Free Press cases from the First World War. Why did a majority of justices consistently find expression unprotected? And why did Holmes, together with Justice Louis D. Brandeis, start to interpret the First Amendment more broadly?

Many scholars have misunderstood Holmes and the World War I free-expression cases because they failed to grasp the connection between democracy and free expression. This assertion might be surprising. After all, after World War II, it became commonplace to insist that free expression is a prerequisite for democracy.[8] But the concept of democracy itself changed between the two world wars. When late twentieth-century scholars emphasize that democracy does not exist without free expression, they conceive of democracy in pluralist terms: democratic processes, including free speech and writing structure supposedly fair and open political battles in which citizens and societal groups compete to satisfy their preexisting interests and values.[9] But from the outset of nationhood through the 1920s, American governments were understood to be republican rather than pluralist democracies.[10]

---

8. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 26-27 (Harper & Brothers 1948); Frederick Schauer, *Free Speech and the Argument from Democracy*, *in* LIBERAL DEMOCRACY: NOMOS XXV 241, 241-42 (J. Roland Pennock & John W. Chapman eds., N.Y. Univ. Press 1983).

9. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (Yale Univ. Press 1989) (discussing ways to prevent control of democratic institutions by political elites); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (Univ. Chi. Press 1956) (discussing Madison's concerns about protecting the political minority from the majority); STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 117-18, 133, 149-50 (Oxford Univ. Press 2000) (discussing the emergence of pluralist political theory and its impact on judicial interpretation).

10. N.C. CONST. (1776), *reprinted in* 2 Poore, *supra* note 5, at 1409; PA. CONST. (1776), *reprinted in* 2 Poore, *supra* note 5, at 1540. For more complete discussions of the differences between republican democracy and pluralist democracy, see also Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 50-62 (2006); Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme*

Citizens and governmental officials were to be imbued with civic virtue, which theoretically led them to pursue the common good rather than "private and partial interests."[11] As would be true with pluralist democracy, republican democracy was entwined with free expression, but republican democracy had different implications.

In the republican democratic regime, individual liberties generally were of the utmost importance and were protected from undue governmental interference, but such liberties were always subordinate to the government's power to act for the common good.[12] Any individual right or liberty could be sacrificed for the benefit of the community.[13] These republican democratic principles informed the legal doctrine of free expression. Like other liberties, free expression was protected, but courts developed a legal standard, the "bad tendency" test, that accounted for the governmental power to pursue the common good. Numerous state and federal courts held that, while the government could not impose prior restraints on expression, it could impose criminal penalties for speech or writing that had bad tendencies or likely harmful consequences.[14] The criminal punishment of expression with bad tendencies would, in theory, further the common good. Many courts added that a criminal defendant, to be convicted for spoken or written words, must also have intended harmful consequences. Even so, under the doctrine of constructive intent, the courts typically reasoned that a

---

Court Favor Free Expression Over Religious Freedom?, 8 U. PA. J. CONST. L. 431, 433-43 (2006).

11. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 59 (Univ. N.C. Press 1969). The 1780 Massachusetts Constitution, for example, stated: "Government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class of men." Mass. Const. (1780), *reprinted in* 1 Poore, *supra* note 5, at 956, 958.

12. James Kent explained that "private interests must be made subservient to the general interests of the community." James Kent, 2 COMMENTARIES ON AMERICAN LAW 276 (1827; Legal Classics Library Reprint 1986).

13. *See generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (Univ. N.C. Press 1996) (describing how government regulated in the antebellum nineteenth century).

14. *See, e.g.*, Knowles v. United States, 170 F. 409 (8th Cir. 1909); Castle v. Houston, 19 Kan. 417 (1877); Perkins v. Mitchell, 31 Barb. 461 (N.Y. Sup. Ct. 1860); Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824); Commonwealth v. Morris, 3 Va. 176 (1811).

defendant was presumed to have intended the natural and probable consequences of his or her statements. If a defendant's expression was found to have bad tendencies, then the defendant's criminal intent would be inferred.[15]

Part I of this Article describes the Supreme Court's doctrinal approach in its pre-World War I free-expression cases. Part II discusses the government's suppression of dissident expression during the war. Part III examines the first set of Espionage Act cases to reach the Court, while Part IV focuses on the emergence of a civil libertarian movement. Part V explores Holmes' change, as revealed in *Abrams*. Part VI, the Conclusion, uses a final set of World War I cases to compare Holmes' and Brandeis' respective stances on free expression. Ultimately, Brandeis' strong commitment to protecting civil liberties highlights Holmes' ambivalence toward free expression and its constitutional protection.

I. EARLY SUPREME COURT FREE-EXPRESSION CASES

The Supreme Court of the late-nineteenth and early-twentieth centuries was no more protective of free expression than were other courts. Before World War I, the Supreme Court did not find any speech or writing to be constitutionally protected from criminal punishment.[16] Numerous times, the Court effaced potential free-expression problems. As was true with other jurists, the justices often subsumed free-expression issues within a due-process or economic-liberty analysis. For example, early in the twentieth century, attempts to regulate the new technology of motion pictures raised novel free-expression questions. The state of Ohio, in one instance, required that a censorship board pre-approve any movies before they could be shown to the public. In a case decided in 1915, Mutual Film Corporation argued, among other things,

---

15. *See generally* Margaret A. Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to* Gitlow, *in* THE FIRST AMENDMENT RECONSIDERED 14 (Bill F. Chamberlin & Charlene J. Brown eds., Longman, Inc. 1982).

16. *See, e.g.*, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911) (dicta refutes free-expression challenge to injunction of labor boycott); Turner v. Williams, 194 U.S. 279, 292 (1904) (holding that illegal aliens lack free speech rights); Robertson v. Baldwin, 165 U.S. 275, 281 (1897) (dicta interprets First Amendment and other Bill of Rights provisions narrowly).

that this licensing requirement amounted to a prior restraint contravening the U.S. and state constitutions.[17] The Court rejected this claim, reasoning "that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit."[18] As such, the censorship statute constituted a reasonable regulation on personal liberty—that is, economic liberty—because it was "in the interest of the public morals and welfare."[19] While many films might be "useful and entertaining," some might be used for "evil," insidiously corrupting adults and children.[20]

Even when the justices acknowledged a free-expression question, they tended to treat the issue as an aspect of due-process liberty. In *Halter v. Nebraska*,[21] the Court upheld the conviction under a state flag-desecration statute of defendants who sold bottled beer affixed with labels bearing the flag. As noted in Justice John Marshall Harlan's majority opinion, over one dissenter, many states had similar statutes protective of the flag.[22] Harlan discussed free expression at length but as an aspect of due-process liberty rather than as a First Amendment right per se. He began by explicating the powers of a republican democratic government: "a state possesses all legislative power consistent with a republican form of government; therefore each state . . . may, by legislation, provide not only for the health, morals, and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."[23] Thus, as Harlan explained, "[i]t is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good."[24] More

17. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 231 (1915).

18. *Id.* at 244.

19. *Id.* at 242.

20. *Id.*; *see also* Graber, *supra* note 5, at 34-36 (discussing judicial acceptance of position that liberty encompassed free expression); RABBAN, FORGOTTEN, *supra* note 5, at 173-75 (discussing Supreme Court cases where justices effectively ignored Free Speech issues); White, *Justice Holmes*, *supra* note 5, at 405-06 (explaining how Court subsumed free-expression issues within economic liberty).

21. 205 U.S. 34 (1907).

22. *Id.* at 39-40.

23. *Id.* at 40-41.

24. *Id.* at 42 (alteration added).

specifically, then, free expression, as an aspect of personal liberty, was subordinate to any state actions promoting the community's welfare. In this particular case, the protection of the flag from desecration, including its use "for purposes of trade and traffic," would further the common good.[25] Indeed, Harlan concluded that a state would "be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it."[26]

Another 1907 decision, *Patterson v. Colorado*,[27] warrants special attention because Holmes wrote the majority opinion, his first in a free-expression case at the Supreme Court. *Patterson* involved a contempt of court arising from the publication of a cartoon and articles that allegedly could embarrass the Colorado Supreme Court and interfere with its "impartial administration of justice" in pending cases.[28] Holmes assumed, without deciding, that the Fourteenth Amendment proscribed state governments from infringing free expression. While unclear, Holmes seemed to discuss free expression as an aspect of liberty, as had the *Halter* Court, rather than suggesting that the Fourteenth Amendment applied or incorporated the First Amendment per se against the states.[29] At the same time, Holmes seemed to equate Fourteenth Amendment free speech liberty with First Amendment free expression. Either way, then, Holmes interpreted free expression, whether primarily a Fourteenth- or First Amendment liberty, harmoniously with the *Halter* Court's understanding. Holmes wrote that "the main purpose of such constitutional provisions [protecting free speech and a free press] is 'to prevent all such *previous restraints* upon publications as had been

25. *Id.*

26. *Id.*

27. 205 U.S. 454 (1907).

28. *Id.* at 458-59.

29. In other words, Holmes did not treat the case as raising a First Amendment issue, which would require him to interpret the First Amendment directly. Rather, he appeared to treat the case as raising a Fourteenth Amendment issue, which required him to interpret the Fourteenth Amendment. "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach." *Id.* at 462.

practiced by other governments.'"[30] Yet, consistent with republican democratic principles, constitutional protections of free expression "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[31] Thus, while the proscription of prior restraints protects even false statements, the government's power to impose criminal punishment on expression to further the common good extends "as well to the true as to the false."[32] In short, Holmes's understanding of free expression corresponded with the standard nineteenth and early twentieth-century renditions of the legal doctrine. Prior restraints were prohibited, but the government could punish speech with bad tendencies because doing so would promote the common good—even if the expression asserted the truth.[33]

Holmes wrote his second free-expression opinion in *Fox v. Washington*,[34] decided in 1915. The state convicted Jay Fox for publishing an article, *The Nude and the Prudes*, which violated a criminal libel statute proscribing expression that tended "to encourage or advocate disrespect for law."[35] Holmes's unanimous opinion discussed free expression but, as in *Patterson*, Holmes never clarified whether he was focused on the First Amendment per se or on Fourteenth Amendment liberty.[36] Regardless, Holmes partially sidestepped the constitutional challenges by interpreting the statute consistently with the bad-tendency standard. That is, by construing the statute harmoniously with constitutional standards, as Holmes understood them at the time, Holmes obviated any need to discuss further whether the statute as applied violated free expression protections.[37]

---

30. *Id.* (quoting Commonwealth v. Blanding, 3 Pick. 304, 313-14 (Mass. 1825) (alteration added) (italics in original)).

31. *Id.*

32. *Id.*

33. White, *Justice Holmes*, *supra* note 5, at 399 (explaining that the "precise constitutional basis" of the *Patterson* appeal was "unclear").

34. 236 U.S. 273 (1915).

35. *Id.* at 275.

36. *See* RABBAN, FORGOTTEN, *supra* note 5, at 139-40 (describing how Gilbert Roe framed his arguments to the Court as focusing on the Fourteenth Amendment rather than the first amendment).

37. 236 U.S. at 277; *see also* White, *Justice Holmes*, *supra* note 5, at 402 (emphasizing that in *Fox* Holmes broadly interpreted the concept of a bad tendency).

II. WORLD WAR I AND SUPPRESSION

On April 2, 1917, President Woodrow Wilson asked Congress to declare war on Germany to make "[t]he world . . . safe for democracy."[38] Four days later, Congress issued its declaration of war. Wilson immediately sought congressional action to suppress opposition to the war. In his own words, "censorship . . . is absolutely necessary to the public safety."[39] "[I]n every country there are some persons in a position to do mischief . . . and whose interests or desires . . . [would be] highly dangerous to the Nation in the midst of a war."[40] From the Department of Justice, Assistant Attorney General Charles Warren drafted a bill "for suppressing or punishing disloyal and hostile acts and utterances."[41] Before long, Congress opened debate on this espionage bill. While some proposed provisions generated extensive congressional discussions, Title I, Section III, provoked little, even though the government would indict the "overwhelming majority" of Espionage Act defendants under this section.[42] Section III allowed the government to punish anyone obstructing the draft ("the recruiting or enlistment service of the United States") or causing or attempting to cause insubordination or disloyalty within the military.[43] On May 16, 1918, less than a year after the enactment of the original Espionage Act, Congress overwhelmingly passed an amended Section III, which came to be called the Sedition Act of 1918. With this legislative proscription of "any disloyal, profane, scurrilous, or abusive" expression concerning the nation's government,

---

38. Wilson's Speech for Declaration of War Against Germany (April 2, 1917), *reprinted in* 2 Commager, *supra* note 5, at 128, 131 (alteration added).

39. 55 CONG. REC. 3144 (May 31, 1917) (quoting letter from Wilson to Representative Edwin Y. Webb, May 22, 1917).

40. *Id.* (alterations added); *see also* Blanchard, *supra* note 5, at 76 (explaining how Wilson, when he asked for a declaration of war, already was worried about spies); Murphy, *supra* note 5, at 52-58 (discussing Wilson's desire for suppression).

41. Rabban, *Emergence*, *supra* note 5, at 1217-18 (quoting 1918 ATT'Y GEN. ANN. REP. 41).

42. *Id.* at 1223-24; *see, e.g.*, 55 CONG. REC. 1823-34 (May 4, 1917).

43. David Rabban and Christina Wells agree that a congressional majority believed the original Espionage Act, Pub. L. No. 110-180, 40 Stat. 217, authorized the restriction of expression, while Geoffrey Stone argues otherwise. Rabban, *Emergence*, *supra* note 5, at 1218-27; Stone, *Espionage*, *supra* note 5, 345-55; Wells, *supra* note 5, at 1582.

Constitution, military, or flag, Congress erased any lingering doubts regarding its willingness to foster suppression.[44]

Attorney General Thomas W. Gregory epitomized the Wilson administration's attitude toward draft- and war-protesters when he warned: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."[45] The Justice Department initiated more than 2,000 prosecutions and secured convictions in more than 1,000 cases under the Espionage and Sedition Acts.[46] In most of these cases, the judges interpreted the statutory language broadly and allowed juries to determine guilt. The courts usually did not consider the constitutionality of the convictions under the First Amendment.[47] Sentences could be severe, with twenty-four individuals receiving twenty-year prison terms, six receiving fifteen-year terms, and eleven receiving ten-year terms.[48] Individuals were convicted for arguing that the government should fund the war effort through heavier taxation rather than with bonds, that conscription violated the Constitution, that Christian teachings proscribed fighting in a war, and

---

44. An Act to Amend Section Three, Title One of the Espionage Act (May 16, 1918), 40 Stat. 553 (the Sedition Act). The House approved the bill 293 to one, while the Senate approved it forty-eight to twenty-six, with twenty-four of the nays coming from Republicans. 56 CONG. REC. 6057 (May 4, 1918) (Senate vote); *id.* at 6186-87 (May 7, 1918) (House vote); POLENBERG, *supra* note 5, at 33 (legislative history).

45. Stone, *Origins*, *supra* note 5, at 413 (quoting N.Y. TIMES 3 (Nov. 21, 1917)).

46. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 387-94 (Harcourt, Brace & Howe 1920) (Index of Reported Cases Under the Espionage Acts of 1917 and 1918) [hereinafter CHAFEE, FREEDOM OF SPEECH]. Chafee's other key writings on free expression during World War I include the following: Zechariah Chafee, Jr., *A Contemporary State Trial—The United States Versus Jacob Abrams Et Al.*, 33 HARV. L. REV. 747 (1920) [hereinafter Chafee, *Abrams*]; Zechariah Chafee, Jr., *Freedom of Speech*, NEW REPUBLIC, Nov. 16, 1918, at 66 [hereinafter Chafee, *Free Speech*]; Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919) [hereinafter Chafee, *War Time*]; Zechariah Chafee, Jr., *Legislation Against Anarchy*, NEW REPUBLIC, July 23, 1919, at 379 [hereinafter Chafee, *Legislation*].

47. Rabban, *Emergence*, *supra* note 5, at 1234-35. For a typical case, see Shaffer v. United States, 255 F. 886 (9th Cir. 1919).

48. Washburn, *supra* note 5, at 13; Wells, *supra* note 5, at 1582-83 (listing indictments).

that the war was being fought for profiteers.[49] One person was sentenced to eighteen months in prison for mailing a chain letter that requested "immediate peace."[50] Another person was sentenced to ten years for producing a movie about the Revolutionary War that depicted British soldiers killing Americans.[51] Yet another person was sentenced to twenty years because, arguing that the war benefited capitalists, he prodded Iowans not to reelect a congressman who supported conscription.[52]

Fueled by nativism and xenophobia, public opinion strongly supported governmental suppression. The Head of the War Emergency Division of the Department of Justice, John Lord O'Brian, later admitted that "immense pressure" had been "brought to bear" during the war for "wholesale repression and restraint of public opinion."[53] Suppression manifested a sustained drive toward conformity with mainstream views, values, and interests.[54] Any Wobbly (a member of the radical labor union, the Industrial Workers of the World, or the IWW), Socialist, pacifist, or other outsider who criticized the administration or its war-related policies was open to prosecution and conviction. The Socialist party, for instance, had several hundred thousand members in 1916, and grew even stronger in 1917, precisely because it was the only political party to oppose entry into the war. But during the war, the government used the Espionage Act to deny mail service to Socialist publications and to prosecute most of the party's antiwar leaders.[55] Meanwhile, the government arrested, indicted, and convicted hundreds upon hundreds of Wobblies. In a single trial in Chicago, 101 IWW leaders were prosecuted and convicted; the jury returned more than 400 guilty verdicts

49. CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 57-59, 61-62.

50. *Id.* at 60.

51. *Id.* at 60-61.

52. *Id.* at 62-63.

53. Stone, *Espionage*, *supra* note 5, at 337; *see also* MURPHY, *supra* note 5, at 16 (quoting O'Brien, *Civil Liberty in War Time*, 42 REP. N.Y. ST. BAR ASS'N 275, 305 (1919)); STONE, PERILOUS TIMES, *supra* note 5, at 212-20 (discussing the ambivalences of O'Brian and Alfred Bettman in the Justice Department).

54. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 219-20, 247-49 (1992 ed.); Murphy, *supra* note 5, at 271.

55. Murphy, *supra* note 5, at 141-43; HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 355-59 (Harper & Row 1980). In the 1912 presidential election, the Socialist candidate, Eugene Debs, received 900,000 votes. *Id.* at 333.

in less than an hour. The presiding judge, Kenesaw Mountain Landis, brushed aside any potential free-expression issues: "When the country is at peace it is the legal right of free speech to oppose going to war and to oppose even preparation for war. But when once war [sic] is declared this right ceases."[56] By the end of the war, the IWW was ravaged, with nearly all executive-board members in prison.[57]

While support for suppression was widespread, there were opponents, both official and unofficial. A handful of lower court judges attempted to protect expression by interpreting the Espionage Act narrowly. Barely a month after Congress passed the 1917 Act, Judge Learned Hand of the Southern District of New York decided *Masses Publishing Company v. Patten.*[58] Masses Publishing had sought a preliminary injunction to prevent the postmaster from refusing the revolutionary journal, *The Masses*, access to the mails. In granting the injunction, Hand explicitly stated that the case neither raised the issue of congressional power to restrict the mails during wartime nor the issue of freedom of the press.[59] Rather, to Hand, the question was solely a matter of statutory construction and application. Did Congress intend to proscribe the mailing of publications, like *The Masses*, that criticized the war and the draft? Despite so limiting the case, Hand implicitly discussed the constitutional parameters of a free press by interpreting the relevant sections of the Act, Section III and a nonmailability provision, in accordance with his understanding of protected expression.[60] Most importantly, Hand suggested that a bad-tendency standard did not sufficiently protect freedom. The postmaster, therefore, was not authorized to deny Masses Publishing access to the mails merely because the "general tenor and animus of the paper as a whole were subversive to authority and seditious in effect."[61] Instead, Hand suggested that an overt-acts or direct-incitement test embodied the appropriate standard—

---

56. Blanchard, *supra* note 5, at 88 (quoting Judge Landis).

57. *Id.* at 87-88; PAUL LE BLANC, A SHORT HISTORY OF THE U.S. WORKING CLASS: FROM COLONIAL TIMES TO THE TWENTY-FIRST CENTURY 69 (Humanity Books 1999); WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933, at 118-41 (Univ. Ill 1994).

58. 244 F. 535 (S.D.N.Y. 1917), *reversed*, 246 F. 24 (2d Cir. 1917).

59. *Id.* at 29.

60. *Id.* at 38-39.

61. *Id.* at 542-43.

and hence the one that Congress must be assumed to have followed unless expressly stating otherwise. According to Hand, "[i]f one stops short of urging upon others that it is their duty or their interest to resist the law, . . . one should not be held to have attempted to cause its violation."[62] Political agitation, which *The Masses* aimed to foment, did not equate with "direct incitement to violent resistance."[63] In short, as interpreted by Hand, the Espionage Act proscribed only direct advocacy or incitement of an overt act of unlawful conduct. Regardless, the Second Circuit overruled Hand's decision and repudiated his infusion of the Espionage Act with a direct-incitement standard. Instead, like most other courts, the Second Circuit interpreted the Act in accordance with the bad-tendency approach.[64]

At the outset of the war, many Progressive intellectuals, including John Dewey and the editors of the *New Republic*, supported suppression of dissenters.[65] They believed the national government reasonably pursued the common good by punishing expression that might weaken the war effort. After witnessing the degree of wartime suppression, however, some of these intellectuals withdrew their support. The *New Republic* editors, for example, invited a young Harvard law professor, Zechariah Chafee, Jr., to write an article advocating for the protection of speech and writing. In *Freedom of Speech*, published in the November 16, 1918, issue, Chafee inquired: "Where shall we draw the line [between punishable offenses and constitutionally protected speech and writing]?"[66] Writing in the shadow of the numerous Espionage Act

---

62. *Id.* at 540 (alteration added).

63. *Id.*; *see also* RABBAN, FORGOTTEN, *supra* note 5, at 261-65 (discussing *Masses*).

64. Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917). For another atypical lower court decision, see *United States v. Hall*, 248 F. 150 (D. Mont. 1918).

65. Editors, *Public Opinion in War Time*, NEW REPUBLIC, Sept. 22, 1917, at 204; John Dewey, *The Future of Pacificism*, NEW REPUBLIC, July 28, 1917, at 358.

66. Chafee, *Free Speech*, *supra* note 46, at 67 (alteration added). For an explanation of how Chafee was asked to write this essay, see DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 16-17 (Harvard Univ. Press 1986); Rabban, *Progressive*, *supra* note 5, at 1017-18; Ragan, *supra* note 7, at 37. For other helpful sources on Chafee and the emergence of a civil libertarian movement, see DONALD JOHNSON, THE CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION (Univ. Ky.

convictions, Chafee articulated a philosophical foundation that he thought justified an expansive concept of free expression under the First Amendment. "The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . . ."[67] Thus, Chafee reiterated John Milton's rationale for broadly protecting speech and writing: the free and open exchange of ideas helps society arrive at truth. Chafee acknowledged, though, that the recognition of the social interest in the search for truth did not, by itself, determinatively resolve free-expression issues. "[T]here are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale."[68] In other words, the social interest in free expression—the search for truth—must sometimes be balanced against other social interests, such as safety and order. But in this balance, courts should give special weight to free expression. "The First Amendment gives binding force to this principle of political wisdom," Chafee insisted.[69] He concluded by quoting from Hand's *Masses* opinion and by articulating a direct-incitement or overt-acts test. "In war-time, therefore, speech should be free, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war."[70]

Press 1963); SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (Oxford Univ. Press 1990).

67. Chafee, *Free Speech*, *supra* note 46, at 67.

68. *Id.* (alteration added).

69. *Id.*

70. *Id.* at 67-68; *see also* John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England,* 55 CONG. REC. 1825-34 (May 4, 1917); John Dewey, *In Explanation of Our Lapse*, NEW REPUBLIC, Nov. 3, 1917, at 17 (admitting that wartime suppression was wrong). In some ways, Chafee's essay resembled an essay by Herbert L. Stewart, published in *The Nation* more than a year earlier. Like Stewart, Chafee formulated a Miltonian argument to suggest that free expression served a social interest or value because it could lead to an open exchange of ideas and the pursuit of truth. Moreover, both Chafee and Stewart believed that this social value of free expression must be balanced against other social interests or values. Yet, Chafee and Stewart ultimately reached different

III. THE FIRST ESPIONAGE ACT CASES

The first four Espionage Act cases to reach the Supreme Court were not argued until January 1919, after hostilities had ended. The first two were *Schenck v. United States*[71] and *Sugarman v. United States*.[72] In *Schenck*, Charles T. Schenck and Elizabeth Baer were indicted under both Section III and the nonmailability provision of the 1917 Espionage Act. Schenck was the general secretary of the Socialist party, while Baer served on its Executive Board. They printed fifteen- to sixteen-thousand copies of a leaflet that they mailed to men eligible for the draft. The leaflet advocated for the repeal of the draft law and argued that conscription violated the Thirteenth Amendment's proscription of slavery. "If you do not assert and support your rights," the leaflet added, "you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."[73] Given the nativist anti-radicalism rampant at the time, a jury predictably convicted both defendants.

Holmes wrote a unanimous opinion upholding the convictions. When he addressed the defendants' argument that the First Amendment protected their expression (the leaflet), Holmes's opinion turned obscure. "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*."[74] Did Holmes mean that First Amendment protections extended beyond the common law proscription of prior restraints? Holmes, of course, had written the majority opinion in *Patterson*. In that ambiguous case, he had seemingly discussed free expression as an aspect

---

conclusions: Stewart argued for the restriction of expression during wartime, while Chafee argued for broad protections. Their disagreement lay largely in the weight they accorded to free expression in the balance against other national interests during wartime. Unlike Stewart, Chafee argued that the First Amendment mandated that free expression be given an especially heavy weight. Herbert L. Stewart, *Freedom of Speech in War Time*, 105 THE NATION, Aug. 30, 1917, at 219.

71. 249 U.S. 47 (1919).

72. 249 U.S. 182 (1919).

73. *Schenck*, 249 U.S. at 49-51.

74. *Id.* at 51-52. Holmes's puzzling phrases in his free-expression cases are not atypical. White, *Justice Holmes*, *supra* note 5, at 412.

of Fourteenth Amendment liberty, though he had also connoted that Fourteenth Amendment free-expression-liberty equated with First Amendment free expression. Holmes's *Schenck* opinion, consequently, might clarify *Patterson*, given that *Schenck* explicitly addressed free expression as a First Amendment issue. *Schenck* suggests that Holmes's discussion of free expression in *Patterson* should be understood as an exegesis on the First Amendment per se. But in *Patterson*, Holmes had emphasized that the "main purpose" of the constitutional protection of expression was to proscribe prior restraints and that the government was otherwise empowered to punish expression.[75] Thus, in *Schenck*, Holmes probably intended to reiterate his *Patterson* position, though he did so with inverted language. He wrote that the First Amendment did more than proscribe prior restraints, though that proscription was the First Amendment's "main purpose."[76] What, then, did the First Amendment proscribe beyond prior restraints? *Patterson* had already answered that question. The First Amendment imposed in the realm of expression (speech and writing) the standard republican democratic restriction that governmental actions promote the common good; only expression with bad tendencies could therefore be punished. Hence, Holmes in *Schenck* proffered, in his view, a prototypical example of unprotected expression: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[77] Why so? Because shouting fire in a crowded theater would likely cause harm to other people; the expression would have bad tendencies.

Continuing in the same paragraph, Holmes articulated a doctrinal standard delineating the scope of free expression under the First Amendment. "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."[78] Apparently, in light of Holmes's invocation of *Patterson*, followed by his example of falsely shouting fire, Holmes did not intend this "clear and present danger" language to delineate a new standard for free expression. Rather, he meant merely to

75. Patterson v. Colorado, 205 U.S. 454, 462 (1907).
76. *Schenck*, 249 U.S. at 51-52.
77. *Id.* at 52.
78. *Id.*

reiterate the customary bad-tendency test, adhered to by the Court in the past and by most other courts for over 100 years. If so, one might still wonder why Holmes did not state the bad-tendency doctrine in its more typical language? Most likely, Holmes drew on his understanding of the law of criminal attempts to inform his construal of bad tendency. In *Schenck*, immediately after Holmes articulated the clear and present danger test, he clarified its application in the particular circumstances of wartime.

> It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[79]

In any particular case, he seemed to say, the discernment of a clear and present danger—or a bad tendency—depended on the circumstances, as guided by legal concepts central to criminal attempts, proximity and degree. When discussing criminal attempts in his book, *The Common Law*, Holmes wrote: "Acts should be judged by their tendency under the known circumstances, not by the actual intent which accompanies them."[80] As was his wont, Holmes emphasized his preference for a supposedly objective standard, one that did not turn in its application on the subjective motivations or desires of the actor. "[A]n act is punishable as an attempt, if, supposing it to have produced its natural and probable effect, it would have amounted to a substantive crime."[81] Indeed, Holmes explained that, in a close or difficult case, a judge should consider "the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."[82] From this passage in *The Common Law*, Holmes might well have derived his reiteration of the

---

79. *Id.* When Holmes sat on the highest Massachusetts court, he decided a criminal attempts case where the defendant, after preparing a building for arson, solicited another person to start the fire. Commonwealth v. Peaslee, 59 N.E. 55 (Mass. 1901); *see* Rabban, *Emergence*, *supra* note 5, at 1274-75, 1277-78 (discussing *Peaslee*).

80. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 66 (Dover ed., Publisher 1991) (1881).

81. *Id.* (alteration added).

82. *Id.* at 68.

bad-tendency standard as a clear and present danger test. Indeed, years later, Holmes was asked by letter about the source of his clear and present danger language. Holmes's "hurried answer" did not clearly respond, but he nonetheless noted: "I did think hard on the matter of attempts in my *Common Law* and [in a couple of cases]."[83]

The same day the Court decided *Schenck*, March 3, 1919, it also handed down the decision in *Sugarman v. United States*.[84] Justice Louis D. Brandeis, this time, wrote the unanimous opinion for the Court.

---

83. Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922), *responding to* Letter from Zechariah Chafee, Jr. to Oliver Wendell Holmes, Jr. (June 9, 1922), *both quoted in* Bogen, *supra* note 7, at 99-100 (alterations added); *see* Ragan, *supra* note 7, at 34-36 (stressing Holmes's reliance on common law concept of criminal attempts in free speech context); White, *Justice Holmes*, *supra* note 5, at 414-15, 418-19 (discussing Holmes's understanding of criminal attempts and how it shaped his clear and present danger test). *Compare* GRABER, *supra* note 5, at 110 (asserting strongly that Holmes derived clear and present danger language from *The Common Law*), *with* Rabban, *Emergence*, *supra* note 5, at 1271-73, 1276-78 (arguing that this connection was probable but not definite). Stone contends that the Department of Justice, in its briefs to the Supreme Court, maintained that the government needed to prove specific intent and bad tendency "as separate and distinct requirements" under the 1917 Espionage Act, and that Holmes likewise did not adopt an "extreme version of the bad tendency/constructive intent standard." Stone, *Origins*, *supra* note 5, at 446-47. To me, the briefs do not adequately support Stone's contention. For instance, Stone quotes from a brief to demonstrate that Justice attorneys "insisted that in order to convict under section 3 the government had to prove both that the defendant had a 'specific, willful, criminal intent' and that he used language having 'a natural and reasonably probable tendency to cause the results which have been forbidden by these provisions of the espionage law.'" *Id.* at 445. Yet, these passages in the brief actually were derived from a long quotation of the trial judge's jury instructions. Brief for the United States at 75-77, Debs v. United States, 249 U.S. 211 (1919), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 601, 680-82. The Justice Department attorneys repeated the trial judge's charge so they could argue that it was adequate. Moreover, in these briefs, the Justice Department attorneys always argued, naturally enough, that the evidence was sufficient to support the convictions; they did not argue that the evidence was insufficient to prove specific intent. *See e.g.*, *id.* at 77-79, *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 682-84; Brief for the United States, at 23-31, Schenck v. United States, 249 U.S. 47 (1919), *reprinted in* 18 LANDMARK BRIEFS, *supra* note 5, at 1021, 1048-56. Finally, Stone's interpretation of Holmes seems to disregard Holmes's explicit preference for, in his writings on criminal attempts, an objective standard revolving around the natural consequences of a defendant's actions.

84. 249 U.S. 182 (1919).

Abraham L. Sugarman had been convicted for violating the 1917 Espionage Act, Section III, for his speech at a Socialist meeting attended by many draft registrants.[85] Sugarman had condemned the war as a "capitalist conspiracy."[86] His appeal to the Court arose from the trial judge's refusal to give, in the precise words requested, two jury instructions related to the First Amendment and free expression. The first requested jury instruction accentuated that First Amendment protections remain in force during wartime. The second was a precise and straightforward statement of the bad tendency standard. The judge combined these two requests into one jury charge, and in so doing, actually articulated a standard more favorable to the defendant than bad tendency.[87] The judge instructed the jury, in part, as follows: "A man has a right to honestly discuss a measure or a law, and to honestly criticize it. But no man may advise another to disobey the law, or to obstruct its execution, without making himself liable to be called to account therefor."[88] This charge to the jury nearly required direct incitement of unlawful conduct. Regardless, the Court found this instruction permissible. In his brief opinion, Brandeis reasoned that the judge's "charge clearly embodied the substance of the two requests made by the defendant."[89] Thus, Brandeis either did not acknowledge or did not recognize the difference between the bad-tendency test and the judge's charge.[90] Sugarman, meanwhile, had bypassed the Circuit Court of Appeals and had instead invoked a jurisdictional statute that allowed a direct appeal to the Supreme Court for constitutional claims. Therefore, the Court, having concluded that the jury instruction did not raise a "substantial constitutional question," dismissed the case "for want of jurisdiction."[91]

---

85. *Id.* at 183.

86. White, *Justice Holmes*, *supra* note 5, at 413 n.123.

87. While this charge was favorable to the defendant, he nonetheless appealed because he was convicted. *Sugarman*, 249 U.S. at 185.

88. *Id.*

89. *Id.*

90. At this stage, then, Brandeis had not yet fully developed his ideas regarding free expression.

91. *Sugarman*, 249 U.S. at 185.

One week later, March 10, 1919, the Court handed down decisions in *Frohwerk v. United States*[92] and *Debs v. United States*,[93] both with unanimous opinions written by Holmes. Jacob Frohwerk, a copy editor for a German-language newspaper, was convicted and sentenced to ten years imprisonment under the Espionage Act, Section III, based on his participation in publishing several articles. As described in the Department of Justice brief,

> [t]he main tenor of the whole series of articles is that Germany committed no wrong against the United States; that this country entered into the war for the benefit of England and the rich men; that the official reasons for our entrance into the war, such as the benefit of democracy and wrongs committed against us by Germany, are mere pretenses.[94]

Yet, as Holmes acknowledged, "[i]t does not appear that there was any special effort to reach men who were subject to the draft."[95] In this regard, then, the case factually diverged from *Schenck*, where the leaflet was mailed to draft-eligible men. Nonetheless, in upholding Frohwerk's conviction, Holmes reasoned that *Schenck* controlled. "[W]e think it necessary to add to what has been said in *Schenck v. United States*, *only* that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language."[96] In other words, the First Amendment did not provide absolute protection for speech and writing; not a novel proposition, of course, after *Schenck* and the previous Supreme Court cases. Thus, even though no evidence in the record showed that the newspaper had influenced anybody to oppose the

---

92. 249 U.S. 204 (1919).

93. 249 U.S. 211 (1919).

94. Brief for the United States at 3, Frohwerk v. United States, 249 U.S. 204 (1919), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 467, 472 (alteration added).

95. *Frohwerk*, 249 U.S. at 208 (alteration added).

96. *Id.* at 206 (emphasis added) (alteration added). The Court added that "so far as the language of the article goes there is not much to choose between expressions to be found in them and those before us in *Schenck v. United States*." *Id.* at 207.

war, Holmes 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."[97] Holmes's use of this language—"a little breath would be enough to kindle a flame"—strongly reinforced the conclusion that he had not intended his "clear and present danger" phrase in *Schenck* to articulate a new and more protective standard for free expression. To the contrary, Holmes's subsequent *Frohwerk* language not only disregarded his "clear and present danger" phrasing, but it also resonated closely with the bad-tendency test. Given the facts of the case and the Court's ready willingness to find the writings unprotected, the "kindle a flame" language appeared to be just another way to say bad tendency.[98]

The Court's first decision under the amended Espionage Act (the 1918 Sedition Act) was *Debs v. United States*.[99] Eugene Debs, national

---

97. *Id.* at 209.

98. RABBAN, FORGOTTEN, *supra* note 5, at 282-83; White, *Justice Holmes*, *supra* note 5, at 416-19.

99. 249 U.S. 211 (1919). One remarkable oddity related to *Debs* is the scholarly assumption that Debs was indicted under the 1917 Espionage Act. *See e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPAL AND POLICIES 957 (2d ed. 2002) (categorizing *Debs* as a conviction under the 1917 Act); Laycock, *supra* note 7, at 168 (the subsequently decided *Abrams v. United States*, 250 U.S. 616 (1919), differed from earlier decisions, including *Debs*, because it was under the 1918 amendments); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 Cal. L. Rev. 2353, 2357 n.12 (2000) ("In *Debs*, the Court unanimously sustained the conviction of prominent socialist politician Eugene Debs for violating the Espionage Act of 1917"). In truth, Debs was indicted under the amended Act (that is, under the 1918 Sedition Act). *Debs*, 249 U.S. at 212. The brief for Debs expressly stated that all counts of the indictment were "under Section 3, Title I, of an Act of Constitution of June 15, 1917, as amended by Act of May 16, 1918." Brief for Plaintiff-in-Error, at 1, Debs v. United States, 249 U.S. 211 (1919), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 511, 514. The brief for the United States described the indictment in similar terms, then added in a footnote "the full text" of the amended Espionage Act, Section Three (the 1918 Sedition Act). Brief for the United States, at 12 & n.1, Debs v. United States, 249 U.S. 211 (1919), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 601, 617 & n.1. One possible explanation for the scholarly confusion is that Gilbert Roe's amicus brief actually focused on the original 1917 Espionage Act rather than on the amended version. Brief of Gilbert E. Roe, as amicus curiae, at 3-22, 50-51, Debs v. United States, 249 U.S. 211 (1919), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 697, 704-23,

leader of the Socialist party, was convicted because of the content of a public speech given at a party convention.[100] His eloquent statement to the district court judge apparently did not help Debs's cause. Just before sentencing, Debs declared that "while there is a lower class, I am in it; and while there is a criminal element, I am of it; and while there is a soul in prison, I am not free."[101] The judge sentenced Debs to ten years imprisonment. As described by the Supreme Court, Debs's earlier speech at the party convention had been mostly about Socialism, though he had also confided to the audience "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 . . ."[102] He had glorified minorities, according to the Court, and predicted "the success of the international Socialist crusade, with the interjection that 'you need to know that you are fit for something better than slavery and cannon fodder.'"[103] Holmes's opinion, affirming the conviction, explicitly approved a jury instruction that presented the bad-tendency test in conventional terms. The jurors, as charged, "could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in

---

751-52. Why would Roe have focused on the 1917 Act when Debs had been indicted pursuant to the 1918 amendments? The answer is unclear, but one possibility is that Roe chose to file an amicus brief raising constitutional challenges in only one of the first four Supreme Court cases—that one being *Debs*, of course. Roe sought to raise constitutional challenges to the Espionage Act, and he apparently thought that the differences in the indictments among the four cases were not overly significant. *See* RABBAN, FORGOTTEN, *supra* note 5, at 272-79 (discussing the briefs in *Debs*). Chafee, too, mistakenly categorized *Debs* as arising from an indictment under the 1917 Act. This mischaracterization benefited Chafee's analysis. Given his desire to expand First Amendment protections, he was able to note briefly that the 1918 amendments must have been unconstitutional, regardless of what the Court had previously held. Chafee, *War Time*, *supra* note 46, at 969.

100. *See* Brief for Plaintiff-in-Error, at 2-31, Debs v. United States, 249 U.S. 211 (1919), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at, 515-44 (Debs's entire speech); Brief for the United States, at 2, Debs v. United States, 249 U.S. 211 (1919), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 601, 607 (describing context of public speech).

101. WALKER, *supra* note 66, at 41.

102. *Debs*, 249 U.S. at 213.

103. *Id.* at 214.

his mind."[104] Moreover, Holmes recognized that the jury could find constructive intent. Evidence that Debs "used words tending to obstruct the recruiting service" constituted evidence that "he meant that [his speech] should have that effect."[105] The jury could infer the defendant's intent to obstruct the draft from the bad tendencies or likely harmful effects of his words. Any further potential First Amendment issues, Holmes noted, had been "disposed of in *Schenck v. United States*".[106]

At this stage, after the Supreme Court's first four Espionage Act cases of the World War I era, Holmes had left a distinct impression: he considered the free-expression claims to be relatively unimportant. Not thinking the claims too significant, he appeared to write his opinions as expeditiously as possible, without as much thought or analysis as he might have accorded to some other cases (though Holmes tended to write many opinions quickly). To Holmes, the four cases were little more than "routine" criminal appeals.[107] In other contexts, Holmes crafted analogies that revealed his underlying attitude: free expression did not merit special protection. In *McAuliffe v. New Bedford*,[108] decided when Holmes still sat on Massachusetts's highest court, he analogized "constitutional rights of free speech" to "idleness."[109] In a letter to Learned Hand, Holmes insisted that "free speech stands no differently than freedom from vaccination."[110] Thus, in *Schenck*, Holmes finished his discussion of free expression by referring to a recent case that had upheld convictions under the Selective Draft Law, which instituted

104. *Id.* at 216.

105. *Id.* (alteration added).

106. *Id.* at 215.

107. The "evidence strongly suggests that what Professor Kalven said of *Debs* was true of all these cases—'It was for Holmes a routine criminal appeal.'" Rogat & O'Fallon, *supra* note 7, at 1378 (quoting Harry Kalven, Jr., *Professor Ernst Freund and* Debs v. United States, 40 U. CHI. L. REV. 235, 238 (1973)). With regard to Holmes's propensity for producing opinions quickly, Brandeis said of his colleague: "Holmes shoots down so quickly and is disturbed if you hold him up." Rabban, *Emergence*, *supra* note 5, at 1330.

108. 29 N.E. 517 (Mass. 1892).

109. *Id.* at 518.

110. Letter from Oliver Wendell Holmes, Jr., to Learned Hand, June 24, 1918, *reprinted in* Gunther, *supra* note 7, app. at 756-57.

conscription.[111] "Indeed that case might be said to dispose of the present contention," Holmes explained, "[b]ut as the right to free speech was not referred to specially, we have thought fit to add a few words."[112] This passage is most telling. The Court, in *Schenck*, for the first time explicitly discussed and decided a free-expression claim under the First Amendment, yet Holmes "thought fit" merely "to add a few words" to a prior case unrelated to the First Amendment. Certainly, an important issue would merit more than a few words.

To Holmes, the law of free expression seemed unambiguous. Less than a week after *Frohwerk* and *Debs* were decided, Holmes wrote to his friend, Harold Laski, a young British political scientist then teaching at Harvard, that "on the only questions before us I could not doubt about the law."[113] Not entertaining doubts about the legal doctrine, Holmes cavalierly used or accepted (in jury charges) different phrases to articulate the ostensibly plain boundary between protected and punishable expression. No substantial difference existed, it seemed, between standards that required proof of a clear and present danger (*Schenck*), proof that in the circumstances a little breath would kindle a flame (*Frohwerk*), or proof that the punished expression would generate bad tendencies (*Debs*). If one accounts as well for Brandeis' unanimous *Sugarman* opinion, then the justices, including Holmes, also seemed to disregard any potential differences between a bad tendency and a direct incitement standard. In fact, Learned Hand, after having read *Debs* and *Frohwerk*, wrote to Holmes to accentuate the differences between his direct incitement approach from *Masses Publishing* and Holmes's clear and present danger test. The defendant's "responsibility," Hand explained, should only begin "when the words were directly an incitement."[114] To Hand, a direct-incitement test was far more protective

---

111. Selective Draft Law, ch. 15, 40 Stat. 76 (1917). Goldman v. United States, 245 U.S. 474 (1918); *see* Rabban, *Emergence*, *supra* note 5, at 1244-46 (discussing Selective Draft Law cases).

112. Schenck v. United States, 249 U.S. 47, 52 (1919) (alteration added).

113. Letter from Holmes to Laski, March 16, 1919, HOLMES-LASKI, *supra* note 7, at 189-190.

114. Letter from Learned Hand to Oliver Wendell Holmes, Jr., late March, 1919, *reprinted in* Appendix, Gunther, *supra* note 7, at 758.

of expression than was a clear and present danger test.[115] Holmes responded by writing that "I don't quite get your point."[116] "[Y]ou say 'the responsibility only began when the words were directly an incitement'— . . . but I don't see how you differ from the test as stated by me [in *Schenck*]."[117] Therefore, Holmes concluded: "So I don't know what the matter is, or how we differ so far as your letter goes."[118] In sum, to the Supreme Court Justices, the varieties of phrasing in the sundry cases were all the same. Despite the different phrasings, Holmes and the other justices accepted the bad-tendency approach, which they had, after all, previously followed (recall, Holmes himself had written two of the prior opinions, in *Patterson* and *Fox*). Given that the Court still operated within a republican democratic regime, with its emphasis on the common good, this approach was thoroughly predictable. Moreover, Holmes apparently did not think the amended Act (the 1918 Sedition Act) raised any novel First Amendment issues; otherwise, in *Debs*, he would not have invoked *Schenck* to deflect potential First Amendment issues.

Baltzer v. United States,[119] an Espionage Act prosecution of German-American Socialists that reached the Court even before *Schenck*, does not suggest any other conclusions. Although the Justices initially reached a tentative outcome, they ultimately did not decide the case on its merits. Instead, they reversed and remanded on motion of the Solicitor General.[120] Of note, while the majority had planned to uphold the conviction, Holmes prepared a dissent, which Brandeis intended to join. This unpublished dissent did not explicitly discuss the scope of protection under the First Amendment, but rather focused on statutory construction. The defendants had petitioned the Governor of South

115. The Department of Justice attorneys carefully underscored that Hand's direct incitement test was not a proper statement of legal doctrine. Brief for the United States, at 71-75, Debs v. United States, 249 U.S. 211 (1919), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 601, 676-80; Stone, *Origins*, *supra* note 5, at 444-45.

116. Letter from Oliver Wendell Holmes, Jr., to Learned Hand, April 3, 1919, *reprinted in* Gunther, *supra* note 7, app. at 759.

117. *Id.* at 759-60 (alteration added).

118. *Id.* at 760.

119. Baltzer v. United States, 248 U.S. 593.

120. *Id.*; *see also* Novick, *supra* note 6, at 331-33 (discussing *Baltzer*).

Dakota to ask that he change the implementation of the Draft Law. Holmes emphasized that the petition was "not circulated publicly"[121] and thus could not constitute an obstruction of the draft under the Espionage Act, § III. To the contrary, the petition was "an appeal for political action through legal channels."[122] While Holmes believed the case turned on statutory construction, he nonetheless twice alluded to the scope of free expression. Both times, however, he appeared to do no more than express his approval of the bad-tendency test, albeit in a somewhat convoluted fashion (as was typical for Holmes). First, he reaffirmed the Court's earlier decisions, which had embraced the bad-tendency standard. "I agree that freedom of speech is not abridged unconstitutionally in those cases of subsequent punishment with which this court has had to deal from time to time."[123] Second, he wrote: "I think that our intention to put out all our powers in aid of success in war should not hurry us into intolerance of opinions and speech that could not be imagined to do harm."[124] At first blush, this language might be viewed as expressing a disdain for suppression during wartime, but a closer look reveals an implicit endorsement of the bad-tendency approach rather than the articulation of a more speech-protective stance. Expression is unprotected, Holmes seemed to say, if it can "be imagined to do harm."[125] Indeed, this language might be deemed to be yet another Holmesian reiteration of the bad tendency standard.

In conclusion, the first set of World War I free-expression cases, including *Baltzer*, reveal that Holmes, as well as the other Justices, viewed free expression as an individual liberty like any other individual liberty under republican democracy. It was important and should be protected, but it was also subordinate to any governmental actions furthering the common good. The government, therefore, could punish any speech or writing that impeded the national effort during wartime because such expression would be deemed harmful or with bad tendencies, and thus would be found to contravene the common good. The crux of these cases, then, was the Justices' understanding of the

121. Baltzer v. U.S., 248 U.S. 593 (1919), *reprinted in* Novick, *supra* note 6, app. at 388.

122. *Id.* at 390.

123. *Id.* at 389-90.

124. *Id.* at 389.

125. *Id.* at 389.

common good, just as in contemporary liberty of contract cases. During this period, the Court often concluded that asserted governmental justifications for limiting economic liberties did not constitute the common good but were instead pretexts for furthering private or partial interests, such as the interests of laborers.[126] At the same time, the Court consistently found that governmental justifications for limiting free expression—such as "administering a draft, putting an end to interferences with the war effort, preventing violence"—fit within traditional conceptions of the common good.[127] Holmes, it should be added, tended to defer consistently to legislative and executive determinations of the common good, whether vis-à-vis free expression or liberty of contract. "I am so skeptical as to our knowledge about the goodness or badness of laws," Holmes once wrote to Pollock, "that I have no practical criticism except what the crowd wants."[128]

IV. A CIVIL LIBERTARIAN MOVEMENT

The Espionage Act authorized the national government to prosecute its critics only during wartime. Hostilities ceased on November 11, 1918, but Congress did not ratify a peace treaty until 1921.[129] Thus, the government's power under the Act remained ambiguous, and whether authorized or not, the government continued to arrest and harass Socialists, union activists, and the like. A brief wartime golden era for moderate labor unions, like the American Federation of

126. *See e.g.*, Adams v. Tanner, 244 U.S. 590, 591 (1917) (invalidating state law that proscribed employment agents from charging workers "for furnishing [the worker] with employment or with information leading thereto" (alteration added)); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating state law proscribing yellow dog contracts); Lochner v. New York, 198 U.S. 45 (1905) (invalidating state law limiting hours for bakery employees).

127. Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 640 (1994).

128. Letter from Holmes to Pollock, April 23, 1910, *in* I HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 163 (Mark DeWolfe Howe, ed., Harvard Univ. Press 1941); *Lochner*, 198 U.S. at 74-76 (Holmes, J., dissenting).

129. Treaty of Peace between the United States and Germany, 42 Stat. 1939 (1921).

Labor, ended abruptly, and the nation immediately succumbed to a wave of violent strikes. In 1919, the cost-of-living index shot upward—by 1920, it was nearly twice the 1916 average—forcing workers to press for higher wages.[130] Starting in early 1919, nationwide strikes disrupted the steel and coal industries. Seattle was hit by a shipyard workers' strike that spread into a general strike, which immobilized the city for five days. The Boston police went on strike, and looting broke out. Racial tensions led to riots in several cities, including Chicago and Omaha, where federal troops were summoned to restore order. On May 1, 1919, newspapers reported an assassination plot aimed against several cabinet members, plus Justice Holmes, John D. Rockefeller, and J.P. Morgan. On June 2, 1919, a bomb exploded at the Washington home of A. Mitchell Palmer, who had become Attorney General three months earlier. When the Communist Third International formed, "to encourage worldwide proletarian revolutions," American fears intensified that Bolshevism was spreading and underlay the societal disruptions.[131] With nativism and xenophobia flaring up, the first Red Scare burst into a conflagration.[132] The American Legion emerged to push forward a 100-percent-Americanism movement; with the war over, a need for unity no longer tempered the drive to conformity. The Ku Klux Klan resurrected itself and flourished. During the war, five states had passed laws proscribing criminal syndicalism; fourteen more states followed suit in 1919. Then, in the summer of 1919, Palmer, with J. Edgar Hoover's assistance, started a campaign to rid the nation of radicals. Russian immigrants, labor leaders, Jews, blacks, and other outsiders, considered inherently suspect, were deported or prosecuted. Universities such as Harvard and Columbia restricted the admission of Jews, while in 1919, Henry Ford explained that "[i]nternational Jewish bankers arrange [wars] so they can make money out of them."[133] The black press had existed for decades, but now, in response to growing urban audiences, it increasingly reported the details of racial discrimination. The

130. THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 127 (1965) (Table: Cost-of-Living Indexes).

131. Rabban, *Emergence*, *supra* note 5, at 1313.

132. For discussions of the Red Scare, *see* HIGHAM, *supra* note 54, at 222-32, 277-78, 286-99; LEUCHTENBURG, *supra*, note 5, at 66-88; WASHBURN, *supra* note 5, at 14-23.

133. HIGHAM, *supra* note 54, at 284 (quoting Ford) (alteration added).

government reacted by targeting black writers and editors for investigations as Bolshevik revolutionaries.[134] As early as February 8, 1919, *The Nation* recognized that that the wartime suppression of civil liberties would not soon end. "The process of turning the thoughtful working people of the country into dangerous radicals and extreme direct actionists goes merrily on."[135] Even though wartime apologists for suppression had refused to admit as much, "[it] required no prophet . . . to foretell that the hatred and intolerance born of war would in due time be turned against unpopular minorities."[136]

This burst of postwar suppression ignited indignation among some Americans. In particular, the aftermath of the war had left pro-war Progressives sorely disappointed in two interrelated ways. First, Progressives believed the United States had fought the war to make the world "safe for democracy."[137] But when Congress swung Republican in the 1918 elections, Wilson's political strength ebbed. On November 19, 1919, after a summer-long national debate, Congress defeated the proposed Versailles Treaty and, with it, Wilson's Covenant for a League of Nations. Many Progressives were forced to wonder why America had gone to war in the first place.[138] Second, before the war, Progressives had believed centralized governmental power was needed to combat the economic inequities inherent to an industrialized society. The exercise of governmental power, in other words, would further the common good. Consequently, early in the war, most Progressives believed suppression of draft and war protesters would benefit the common good, but as the war progressed, some Progressives renounced suppression (leading, for instance, to Chafee's *New Republic* essay).[139] Then, as suppression of

134. WASHBURN, *supra* note 5, at 14-23.

135. Editorial, *Danger Ahead,* 108 THE NATION 186, 186 (1919).

136. *Id.*; *see* Frederic Almy, *The Land of the Free*, 108 THE NATION, 345, 352 (1919) (arguing for free expression) (alteration added).

137. President Wilson, Speech for Declaration of War Against Germany (April 2, 1917), *reprinted in* 2 COMMAGER, *supra* note 5, at 128, 131.

138. LEUCHTENBURG, *supra* note 5, at 50-65; Rabban, *Emergence*, *supra* note 5, at 1216, 1313. The Treaty was reconsidered and again defeated in subsequent votes. The Defeat of the League of Nations, *reprinted in* 2 COMMAGER, *supra* note 5, at 160.

139. For examples of essays either supporting or indifferent to suppression, see John Dewey, *The Future of Pacificism*, NEW REPUBLIC, July 28, 1917, at 358-360; John Dewey, *What America Will Fight For*, NEW REPUBLIC, Aug. 18, 1917, at 68-

radical outsiders and others continued after the war, even more Progressives acknowledged the potential dangers of centralized governmental power. The national government, they saw, did not necessarily act as an agent for positive social change, for the common good. Too often, nativist and xenophobic biases as well as partisan political interests motivated governmental actors. If the nation had gone to war to spread democracy, was this widespread irrational suppression of outsiders to be America's gift to the world? To counter these problems, some of these disheartened Progressives joined those intellectuals who had earlier opposed suppression during the war to form an incipient civil libertarian movement.[140] Criticizing Holmes's opinion in *Debs*, Ernst Freund argued that since "the war is virtually over," it was time to hear "the voice of reason."[141] Holmes, however, had taken "the very essentials of the entire problem for granted."[142] Holmes's metaphorical analogy between, on the one hand, political agitation, including resistance to the war, and on the other hand, shouting fire in a crowded theater was "manifestly inappropriate."[143] Free speech became "a precarious gift" if limited in accordance with the bad-tendency standard, which allowed "a jury's guessing at motive, tendency and possible effect."[144] Chafee, too, wrote again to oppose suppression. He lamented how both the state and national governments continued to suppress Socialists and suspected Bolsheviks even though the war had ended. The nation had grown accustomed to "the pleasure of being able to silence" radicals and other outsiders.[145]

The new cadre of civil libertarians faced a difficult intellectual and political conundrum. Many of them had for years supported

---

69; John Dewey, *Conscription of Thought*, THE NEW REPUBLIC, Sept. 1, 1917, at 128-130. Dewey changed his position in John Dewey, *In Explanation of Our Lapse*, NEW REPUBLIC, Nov. 3, 1917, at 17-18.

140. GRABER, *supra* note 5, at 87-121; Rabban, *Progressive*, *supra* note 5, at 954-56; *e.g.*, Randolph S. Bourne, *Twilight of Idols*, SEVEN ARTS, Oct. 1917, *reprinted in* THE RADICAL WILL 336 (1977).

141. Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13, 15.

142. *Id.* at 14.

143. *Id.*

144. *Id.*

145. Zechariah Chafee, Jr., *Legislation Against Anarchy*, NEW REPUBLIC, July 23, 1919, at 379, 384.

Progressive legislation that opponents claimed violated economic liberties. Courts ought to defer to the legislatures, the new libertarians had previously argued. For the most part, these civil libertarians retained these views of economic regulations, though they now questioned legislative actions that, from their vantage, violated the liberties of speech and writing. Courts, they suggested, should protect free expression rather than deferring to legislative and executive actions. Thus, the challenge for the new civil libertarians: how could they justify governmental regulations in the economic realm but oppose them in the expressive realm?[146] Some prewar constitutional theorists such as John Burgess and Thomas Cooley, influenced by libertarian concepts, had linked economic and expressive liberties. These earlier and more conservative libertarians had argued that, whether in the economic or expressive realm, government should minimize regulations and thus maximize individual liberty.[147] How, then, could the new libertarians differentiate between economic and expressive liberties? Why should courts be less concerned with protecting liberty of contract while more concerned with protecting liberty of expression?[148]

Chafee attempted to respond to this dilemma, first in an article published in the June 1919 issue of the *Harvard Law Review* and then in a book published the following year. The article, *Freedom of Speech in War Time*, restated and elaborated the argument from his first *New Republic* essay, while the book, *Freedom of Speech*, in turn elaborated and extended the argument from his article. In the *Harvard* article, Chafee quickly arrived at the question that animated his earlier essay: "to determine where the line runs between utterance which is protected by the Constitution from governmental control and that which is not."[149] Chafee then reviewed the history of suppression and free expression to show one way *not* to draw the line: through the application of a bad-tendency standard. The "lesson" of history, Chafee wrote, was that "the most essential element of free speech is the rejection of bad tendency as the test of a criminal utterance . . ."[150] Instead, and again like in the *New*

146. *See generally* GRABER, *supra* note 5, at 75-121.

147. *See, e.g.*, JOHN W. BURGESS, THE RECONCILIATION OF GOVERNMENT WITH LIBERTY 358-83 (1915).

148. *See* GRABER, *supra* note 5, at 75-121.

149. Chafee, *War Time*, *supra* note 46, at 938.

150. *Id.* at 953.

Republic essay, Chafee located the line by emphasizing the value of free and open expression in a societal search for truth. "The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . . ."[151] Chafee did not argue, though, that this social interest rendered free expression an absolute right. "[T]here are other purposes of government, such as order, the training of the young, protection against external aggression."[152] Given that "[u]nlimited discussion sometimes interferes with these purposes . . ." they sometimes "must then be balanced against freedom of speech . . ."[153] In the context of wartime and the Espionage Act,

> [t]he true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired . . . .[154]

But, as Chafee underscored, one must be careful not to underestimate the social value of free expression in the search for truth. "[F]reedom of

---

151. Chafee, *War Time*, *supra* note 46, at 956; CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 34. Chafee added:

> The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. This social interest is especially important in war time.

Chafee, *War Time*, *supra* note 46, at 958; CHAFEE, *supra* note 46, at 36.

152. Chafee, *War Time*, *supra* note 46, at 956-957; CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 34 (alterations added).

153. *Id.* at 957; CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 34 (alterations added).

154. *Id.* at 959-60; CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 38 (alteration added).

speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom."[155]

In light of the gravity accorded to free expression by the First Amendment, what test or standard might usefully identify the border between protected and unprotected expression in any particular case? Chafee reiterated his conclusion based on history: we "can with certitude declare that the First Amendment forbids the punishment of words merely for their injurious tendencies."[156] So, if the bad-tendency standard does not distinguish between protected and unprotected expression, then what does? Here, Chafee drew upon the *Schenck* case, decided subsequently to the publication of Chafee's *New Republic* essay but before the *Harvard* article. In particular, Chafee quoted (and italicized) Holmes's clear and present danger language: "*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.*"[157] As Chafee rephrased the test in the context of wartime, "speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of war."[158]

To Chafee, that is, the clear and present danger test marked the line between protected and unprotected expression. Yet, recall, Holmes had apparently intended his clear and present danger language in *Schenck*

---

155. Chafee, *War Time*, *supra* note 46, at 957 (alteration added). In a subsequent article as well as in his book, Chafee underscored that the First Amendment protected more than political expression. Put in different words, the search-for-truth rationale was broader than what would eventually be called the self-governance rationale. "The policy behind it [the First Amendment] is the attainment and spread of truth, not merely as an abstraction, but as the basis of political and social progress. 'Freedom of speech and of the press' is to be unabridged because it is the only means of testing out the truth. The Constitution does not pare down this freedom to political affairs only or to the opinions which are held by a majority of the people in opposition to the government." CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 156; Chafee, *Abrams*, *supra* note 46, at 771 (alteration added).

156. Chafee, *War Time*, *supra* note 46, at 60; CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 39.

157. Chafee, *War Time*, *supra* note 46, at 967 (emphasis in original).

158. *Id.* at 960; CHAFEE, *supra* note 46, at 38.

to reiterate the bad-tendency standard. Chafee clearly meant otherwise, as he unequivocally repudiated bad tendency. In appropriating Holmes's clear and present danger phrasing, Chafee intended to imbue it with greater vitality. Indeed, Chafee construed the clear and present danger standard as if it "substantially agrees" with Learned Hand's direct incitement standard from *Masses Publishing*.[159] Chafee, however, did not equate the two tests. While a direct incitement approach, according to Chafee, focused on the spoken or written words in the abstract, the clear and present danger test required an assessment of their likely effects in the circumstances of the case. Thus, for instance, Mark Antony's funeral oration, which "counselled violence while it expressly discountenanced it," would be protected expression under a direct incitement approach but would be punishable under Chafee's iteration of the clear and present danger test.[160] To Chafee, then, "our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts."[161] By shaping the clear and present danger test to subsume a direct incitement approach, Chafee transformed clear and present danger from a bad tendency test to a near-overt acts test. If Holmes's *Schenck* language were to be meaningful, Chafee concluded, then it must protect any speech or writing that falls short of creating "'a clear and present danger' of overt acts."[162] Consequently, as Chafee added in his book, the government can "meet violence with violence, since there is no other method."[163] But when an individual utters words that merely offend us, however seriously, the solution is counter-speech rather than suppression. "[A]gainst opinions, agitation, [and] bombastic threats, [the government] has another weapon,—language. Words as such should be fought with their own kind, and force called in against them only to head off violence when that

159. Chafee, *War Time*, *supra* note 46, at 967.

160. *Id.* at 964.

161. *Id.* at 960; CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 38.

162. Chafee, *War Time*, *supra* note 46, at 968. Thus, "the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected." *Id.* at 960; CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 38; *see* White, *Justice Holmes*, *supra* note 5, at 429 (describing Chafee's interpretation of Holmes's clear and present danger language as "astonishing").

163. CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 158.

is sure to follow the utterances before there is a chance for counter-argument."[164]

How, then, did Chafee differentiate the emerging civil libertarian position from the earlier conservative libertarian view? How did Chafee justify the broad protection of liberty of expression without analogously justifying the broad protection of liberty of contract? He did so in two ways. First, Chafee consistently characterized free expression as a First Amendment rather than a due-process right. Expressive liberties were not akin to economic liberties. The First Amendment extended special protection to free speech and a free press. Second, Chafee stressed that free expression serves a substantial social interest, the search for truth. Thus, even when the government asserted that legislation was needed to pursue some other interest, such as public safety, the government would not then necessarily have free reign to suppress speech and writing. Instead, the social interest in free expression (the search for truth) would need to be weighed against the social interest in public safety. Moreover, in striking this balance, a court should always remember that the First Amendment accorded free expression significant weight. In short, free expression would most often outweigh other social interests, according to Chafee.

Chafee's balancing approach to free expression was derived partly from the Progressive or sociological jurisprudence of his mentor, Roscoe Pound.[165] In two articles published in 1915, Pound distinguished among three types of interests: individual, public ("interests of the state as a juristic person"), and social ("interests of the community at large").[166] But, Pound added, "[s]trictly the concern of the law is with social interests."[167] In fact, Pound repeatedly demonstrated how social interests took priority over individual interests. The legal system, to Pound, evolved through a balance of various social interests; an individual interest would be legally protected only if there arose a social interest in securing it.[168] The problem, according to Pound, "ultimately is not to balance individual interests [or rights] and social interests, but to

164. *Id.* (alterations added).

165. SMITH, *supra* note 66, at 6, 86.

166. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 343-44 (1915).

167. *Id.* at 344 (alteration added).

168. *Id.* at 346-49.

balance this social interest [in individual rights] with other social interests and to weigh how far securing this or that individual interest is a suitable means of achieving the result which such a balancing demands."[169] In this regard, the individual interest "in free belief and opinion," or that is, in free expression, was not unique: the law would protect it when it furthered a social value or interest and when other social interests did not outweigh it.[170] Significantly, then, Pound and other Progressive jurisprudents did not repudiate republican democracy. To the contrary, they sought to determine the common good more accurately through the empirical evaluation of various social interests. Thus, when Pound advocated for ascertaining the balance among social interests and then pursuing that result, he was merely reiterating traditional republican democratic principles, albeit in more sociological terminology. Social interests were those interests or values that were relevant to ascertaining the communal or common good.

Likewise, Chafee articulated an argument for an expansive concept of free expression that remained harmonious with traditional republican democratic principles. He did not argue that individual rights or liberties, particularly free expression, took priority over the common good. He did not argue that an individual right to free expression was inviolate. Rather, in effect, he argued that in most circumstances the broad protection of free expression was itself for the common good. Chafee acknowledged that there are individual interests, including an individual interest in free expression. But it is the social interest in free expression—the search for truth—that is "especially important," particularly during wartime.[171] The "great trouble" with most Espionage Act decisions, Chafee explained, was that judges viewed free expression as solely an individual interest.[172] And of course, under republican democracy, any individual interest or right was subordinate to the common good, including public safety during wartime. Hence, Chafee's argument turned on his identification of free expression with a weighty

169. *Id.* at 349 (alterations added).

170. Roscoe Pound, *Interests in Personality (Part II)*, 28 HARV. L. REV. 445, 454-56 (1915). Pound did not conclude that a balance of social interests necessarily led to an expansive concept of free expression. Rabban, *Progressive*, *supra* note 5, at 998-1001.

171. Chafee, *War Time*, *supra* note 46, at 957-58.

172. *Id.* at 959.

social interest or value that needed to be accounted for when determining the common good.

V. HOLMES'S TRANSFORMATION

Four months would pass between the publication of Chafee's *Harvard* article and the argument of the next two Supreme Court Espionage Act cases, *Abrams v. United States*[173] and *Schaefer v. United States*.[174] During that time, Holmes went through a transformation, of a sort. Why? No precise answer can be given, but a number of factors seem relevant. By the time the World War I cases arose, Holmes was in his mid-seventies and had been sitting on the Court for more than fifteen years. He had been raised in a Boston Brahmin family, in the shadow of his father, a famous writer and doctor (in fact, his father had coined the term, Boston Brahmin). Thus, despite his many accomplishments, Holmes believed for many decades that he unjustly toiled in obscurity.[175] Sparked partly by his dissent in *Lochner v. New York*[176]—the Court had held that Progressive legislation limiting the hours of employees in bakeries violated due process liberty to contract—Holmes's seeming obscurity metamorphosed into celebrity during the early 1910s. Numerous luminaries in political journalism as well as in the legal profession, including many young Progressives, praised Holmes and sought his friendship. Herbert Croly, Felix Frankfurter, Learned Hand, Harold Laski, and Walter Lippmann were within his circle of admirers.[177] Holmes, quite reasonably, valued his stature among such a distinguished group of acolytes. He wrote to British diplomat Lewis Einstein: "Do you see the *New Republic*? It is rather solemn for my taste; but the young men who write in it are, some of them, friends of mine, which doesn't prevent an occasional, flattering reference to this old man, and I get great

---

173. 250 U.S. 616 (1919).

174. 251 U.S. 466, 479 (1920).

175. For discussions of Holmes's frustrations, see ALSCHULER, *supra* note 7, at 78-79, 181-84; Bogen, *supra* note 7, at 131-33; White, *Justice Holmes*, *supra* note 5, at 408-12.

176. 198 U.S. 45 (1905).

177. For discussions of Holmes's desire for recognition and the development of his cadre of admirers, see ALSCHULER, *supra* note 7, at 78-79, 181-84; Bogen, *supra* note 7, at 131-33; White, *Justice Holmes*, *supra* note 5, at 408-12.

pleasure from our occasional talks. They put me on to books that they think will be good for me, and please me by their latent or expressed enthusiasm, and their talent."[178] Holmes would not have wanted to risk his hard-earned and long-denied preeminence among the young intelligentsia. Indeed, one of Holmes's former clerks observed that he was "driven by an unusual longing for recognition."[179]

Most probably, Holmes was surprised when his first three World War I free-expression opinions provoked critical reactions from his friends. Less than two months after the Court had issued its *Debs* and *Frohwerk* decisions, for example, the *New Republic* had published Freund's essay reproaching Holmes's opinion in *Debs*.[180] Besides printed criticisms, Holmes's friends questioned his decisions in personal exchanges. On June 19, 1918, even before *Schenck* and *Sugarman* had been argued, Holmes and Hand accidentally met on a train going from New York City to Boston. They discussed suppression, tolerance, and Hands's *Masses Publishing* decision.[181] This chance meeting led to an exchange of letters. Hand not only pressed the superiority of his direct-incitement test but, after *Debs* and *Frohwerk*, he also criticized Holmes's approach in those cases. From Hand's perspective, Holmes allowed juries, "especially clannish groups," too much power to determine guilt or innocence, particularly during times of societal crisis.[182] Meanwhile, Laski often recommended books to Holmes, a voracious reader, and that summer and early fall Holmes read several volumes related to civil liberties, suppression, and the nature of truth.[183] More significant perhaps, Laski also sent Holmes a copy of Chafee's *Harvard* article. In

---

178. Letter from Holmes to Einstein (August 12, 1916), *reprinted in* THE HOLMES-EINSTEIN LETTERS 136 (J.P. Peabody ed. 1964), *quoted in* Bogen, *supra* note 7, at 132; Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

179. Rabban, *Emergence*, *supra* note 5, at 1280 n.459.

180. Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13; *see* Chafee, *War Time*, *supra* note 46, at 968 (criticizing Holmes).

181. POLENBERG, *supra* note 5, at 218-19; Gunther, *supra* note 7, at 732-33.

182. Letter from Learned Hand to Oliver Wendell Holmes, Jr. (June 22, 1918), *reprinted in* Appendix, Gunther, *supra* note 7, at 755, 755-56; Letter from Learned Hand to Oliver Wendell Holmes, Jr. (late March, 1919), *reprinted in* Appendix, Gunther, *supra* note 7, at 758, 758-59.

183. POLENBERG, *supra* note 5, at 223-27.

fact, the article had so impressed Laski that he invited Holmes to meet Chafee over tea in July 1919. Before the meeting, Laski wrote to Chafee: "we must fight on it. I've read it twice, and I'll go to the stake for every word."[184] So, for Laski and Chafee, the purpose of the tea was to persuade Holmes to adopt a more speech-protective stance. Apparently, though, Chafee thought his teatime chat failed, at least initially. In September, he wrote to Judge Charles Amidon: "I have talked with Justice Holmes about the article but find that he is inclined to allow a very wide latitude to Congressional discretion in the carrying on of the war."[185]

How did Holmes react to these criticisms? At first, he seemed defensive and even peevish. When Holmes began hearing criticisms shortly after the *Debs* decision, he wrote to Frederick Pollock that "[t]here was a lot of jaw about free speech, which I dealt with somewhat summarily in . . . *Schenck v. U.S.* [and] also *Frohwerk v. U.S.*"[186] Laski soon asked Holmes about Freund's *New Republic* article, which Holmes denounced as "poor stuff." Holmes explained in a letter to Croly, which Holmes never sent: "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."[187] Chafee, while believing he had not convinced Holmes to change, also believed that his criticisms had stung. In preparation for writing his book, Chafee had jotted annotations in the margins of a copy of his *Harvard* article, including one comment that "Holmes was a bit hurt at this accusation."[188]

At some point, though, Holmes's bruised ego recovered enough so that he could contemplate the substance of the various criticisms. Early on, Holmes said he wished the government had not prosecuted so many individuals under the Espionage and Sedition Acts.[189] On March

184. Ragan, *supra* note 7, at 43; White, *Justice Holmes*, *supra* note 5, at 428.

185. SMITH, *supra* note 66, at 30; *see also* White, *Justice Holmes*, *supra* note 5, at 430-31.

186. Letter from Holmes to Pollock (April 5, 1919), HOLMES-POLLOCK, *supra* note 7, at 7 (alteration added).

187. Letter from Holmes to Laski (May 13, 1919), HOLMES-LASKI, *supra* note 7, at 203.

188. SMITH, *supra* note 66, at 32.

189. White, *Justice Holmes*, *supra* note 5, at 420-21.

16, 1919, he wrote to Laski about his first three Espionage Act opinions: "I greatly regretted having to write them—and (between ourselves) that the Government pressed them to a hearing . . . . I should think the President when he gets through with his present amusements might do some pardoning."[190] Less than three weeks later, he wrote to Pollock about *Debs*: "I wondered that the Government should press the case to a hearing before us."[191] If true, then Holmes apparently did not believe these prosecutions too important. The government did not need to send Schenck, Frohwerk, or Debs to jail. "I could not see the wisdom of pressing the cases," he wrote to Laski, "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."[192] In a letter to Pollock, Holmes even claimed that "I should go farther probably than the majority in favor of [free speech]."[193]

Chafee's *Harvard* article, then, became crucial; it provided Holmes with a roadmap. First, recognize that free expression promoted an important social interest—a common good. The war effort and public safety were not the only social interests at stake in an Espionage Act case. Next, Holmes should follow his own clear and present danger test, as initially articulated in *Schenck* but now with a different gloss. Finally, find that the First Amendment protected the speech of a few defendants—insignificant defendants, from Holmes's perspective—whom the government did not need to prosecute in the first place. If Holmes followed this route, marked by Chafee, then Holmes would once again be in the good graces of his young admirers. Holmes may not have wanted to be one of the new civil libertarians, but he certainly hoped to continue being "a figure of authority and eminence" among them.[194]

The government indicted Jacob Abrams and six others for printing and distributing 5,000 leaflets in violation of the amended

---

190. Letter from Holmes to Laski (March 16, 1919), HOLMES-LASKI, *supra* note 7, at 189, 190.

191. Letter from Holmes to Pollock (April 5, 1919), HOLMES-POLLOCK, *supra* note 7, at 7.

192. Letter from Holmes to Laski (May 13, 1919), HOLMES-LASKI, *supra* note 7, at 203.

193. Letter from Holmes to Pollock (April 5, 1919), HOLMES-POLLOCK, *supra* note 7, at 7 (alteration added).

194. White, *Justice Holmes*, *supra* note 5, at 411.

Espionage Act, Section III. One leaflet was entitled, *The Hypocrisy of the United States and Her Allies*. It protested Wilson's decision to send American troops to Russia toward the end of the war: "'Our' President Wilson, with his beautiful phraseology, has hypnotized the people of America to such an extent that they do not see his hypocrisy . . . His shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington . . . ."[195] Abrams and his colleagues had attempted to distribute the leaflets by throwing them from the roofs of several Manhattan buildings.[196] From the time of the arrests, the result of the prosecutions seemed foreordained. During the post-arrest interviews, the police reportedly beat and humiliated the prisoners. Subsequent police denials of torture rang hollow given that one indicted defendant died in jail, apparently beaten to death.[197] Throughout the trial of the remaining six defendants, the judge, former United States Senator Henry Clayton, was hostile and biased. Before the defendants began presenting evidence, Clayton explained to the jury: "Now the charge in this case is, in its very nature, that these defendants, by what they have done, conspired to go and incite a revolt; in fact, one of the very papers is signed 'Revolutionists,' and it was for the purpose of . . . raising a state of public opinion in this country of hostility to the Government . . . . Now, they cannot do that. No man can do that, and that is the theory that I have of this case, and we might as well have it out in the beginning."[198] Clayton's attempt at humor during the trial revealed much: "I have tried to out-talk an Irishman, and I never can do it, and the Lord knows I can not out-talk a Jew."[199] The jury convicted Abrams and four other defendants, with one acquittal. Before sentencing, Clayton complained how he had listened to the defendants' attorney discuss "rot . . . ad nauseam."[200] Yet, Clayton claimed, he sat and listened "to it all because I did not wish by any act of mine to influence the jury."[201]

---

195. POLENBERG, *supra* note 5, at 49-50.
196. *Id.* at 43.
197. *Id.* at 66-68, 88-91.
198. CHAFEE, FREEDOM OF SPEECH, *supra* note 46, at 137.
199. POLENBERG, *supra* note 5, at 107, 120-25.
200. *Long Prison Terms for the Bolsheviki*, N.Y. TIMES, Oct. 26, 1918, at 18.
201. *Id.*

Clayton sentenced Abrams and two others to twenty years imprisonment; one defendant received fifteen years; and the last received three years.[202]

The Supreme Court affirmed the convictions, with Justice John H. Clarke writing the opinion for a seven-justice majority. While Clarke did not appear as biased as Clayton, Clarke's opinion nonetheless accentuated the foreignness and radicalness of the defendants.[203] In response to their argument that the First Amendment protected their writings, Clarke reasoned that *Schenck* and *Frohwerk* controlled.[204] Holmes and Brandeis dissented, with Brandeis joining Holmes's opinion. So, for the first time in a decided Supreme Court case, Holmes and Brandeis together voted to overturn an Espionage Act conviction.[205] After asserting the correctness of the Court's previous decisions in *Schenck*, *Frohwerk*, and *Debs*, Holmes reiterated his clear and present danger language from *Schenck*. "[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and

---

202. POLENBERG, *supra* note 5, at 72, 145.

203. Abrams v. United States, 250 U.S. 616, 617-18 (1919).

204. *Id.* at 618-19; Brief for Plaintiffs-in-Error at 42-51, Abrams v. United States, 250 U.S. 616 (1919) (No. 316), *reprinted in* 19 LANDMARK BRIEFS, *supra* note 5, at 775, 819-28.

205. In one previous decided case involving free expression, Holmes and Brandeis dissented together. Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918), *overruled by* Nye v. United States, 313 U.S. 33 (1941). In *Toledo Newspaper*, a federal district court judge issued a contempt order pursuant to a federal statute against the newspaper company and an editor because of articles criticizing the court. In upholding the contempt order, Chief Justice White's majority opinion emphasized "the sacred obligation of courts to preserve their right to discharge their duties free from unlawful and unworthy influences." 247 U.S. at 416.

Holmes wrote a dissent joined by Brandeis. Holmes argued that the newspaper's publications should not be punished by contempt. His argument was based, however, not on constitutional protections but on his interpretation of the applicable contempt statute. "The statute in force at the time of the alleged contempts confined the power of courts in cases of this sort to where there had been 'misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice.'" Holmes explained: "And when the words of the statute are read it seems to me that the limit is too plain to be construed away. To my mind they point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity—not to moving to vindicate its independence after enduring the newspaper's attacks for nearly six months as the Court did in this case." *Id.* at 422-23 (Holmes, J., dissenting).

imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."[206] While Holmes acknowledged that during wartime Congress must protect against unique dangers, he insisted that "the principle of the right to free speech is always the same."[207] Thus, Congress "cannot forbid all effort to change the mind of the country."[208] In applying the clear and present danger test to the facts of the case, Holmes stressed that the defendants were "poor and puny anonymities."[209] For Holmes, Abrams and his co-defendants were unimportant, their writings were insignificant, and the government should not have bothered to prosecute. "[N]obody can suppose," Holmes wrote, "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."[210] In short, the government had not proven clear and present danger because the defendants and their writings were so inconsequential. When it came to the twenty-year sentences, Holmes could find only one explanation: the defendants were "made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity."[211]

Holmes articulated a theory justifying an expansive concept of free expression under the first amendment.

> [W]hen 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. That at any rate is

206. *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting) (alteration added).
207. *Id.* at 627-28.
208. *Id.* at 628.
209. *Id.* at 629.
210. *Id.* at 628 (alteration added).
211. *Id.* at 629.

> the theory of our Constitution. It is an experiment, as all life is an experiment.[212]

Thus, like Chafee, Holmes reasoned that a societal search for truth justified the broad protection of speech and writing. Moreover, he then explicitly linked the search-for-truth rationale with the clear and present danger test. "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death," he warned, "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."[213] From the Holmesian standpoint, the government generally should allow speech and writing to flow into a marketplace of ideas. From this free exchange of ideas, the truth will emerge. Harmful ideas must be met with better ideas rather than with force or suppression. The only ideas (speech and writing) that should be restricted are those that would inhibit the further exchange of ideas. Which ideas would inhibit further exchange? Those that would engender a clear and present (or imminent) danger of unlawful or harmful conduct.

Holmes rarely acknowledged the influence of others, and in this instance, he followed to form. Without admitting as much, Holmes largely followed Chafee's roadmap.[214] As suggested by Chafee, Holmes claimed that society's search for truth required the broad protection of free expression. As suggested by Chafee, Holmes appropriated his own clear and present danger language from *Schenck*, now with a new gloss. Instead of equating clear and present danger with bad tendency, he reinterpreted it as highly protective of expression. And as suggested by Chafee, Holmes found that the First Amendment protected the speech of a few (insignificant) defendants.[215] Eventually, in a letter to Laski on

---

212. *Id.* at 630 (alteration added).

213. *Id.* (alteration added).

214. White, Justice Holmes, *supra* note 5, at 430-31.

215. Holmes might have been further following Chafee when he (Holmes) concluded that the First Amendment did not leave "the common law as to seditious libel in force." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Chafee, War Time, *supra* note 46, at 967.

December 17, 1920, Holmes called Chafee's *Harvard* article "first rate," though he still did not openly admit that it might have influenced him.[216]

Yet, Holmes did not follow Chafee's directions exactly. Holmes added a few of his own turns. Unlike Chafee, Holmes explicitly analogized the societal search for truth to the economic marketplace—"the best test of truth is the power of the thought to get itself accepted in the competition of the market."[217] Holmes here more than turned a clever phrase. Neither Holmes nor Chafee, it should be noted, invented this basic rationale for free expression, that a free exchange of ideas would lead to truth; it could be traced back to Milton and had been reiterated in 1859 by the British philosopher, John Stuart Mill (in fact, Holmes had recently reread Mill's *On Liberty*).[218] Regardless, while Chafee, in invoking this rationale, might have been more interested in separating free expression from economic liberties, Holmes seized upon the current, if controversial, passion for the economic marketplace to bolster his argument. Chafee talked of the value of "unlimited discussion," but Holmes suggested that ideas (speech and writing) operated like products in an economic marketplace.[219] Consumers should have the opportunity to choose, unburdened by governmental restrictions—whether choosing products or ideas. At the same time, Chafee's article might have implicitly suggested the marketplace metaphor to Holmes. When Chafee articulated his search-for-truth rationale, he mentioned the English journalist, Walter Bagehot,, who wrote extensively on economic issues. Thus, while Chafee did not expressly analogize the search for truth to an economic marketplace, he alluded to economics through his reference to Bagehot.[220] The erudite

---

216. Letter from Holmes to Laski (Dec. 17, 1920), HOLMES-LASKI, *supra* note 7, at 297.

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

218. Holmes wrote Laski a letter mere days before the Court handed down the *Schenck* decision (March 3, 1919), stating that he had "reread Mill on *Liberty*—fine old sportsman." Letter from Holmes to Laski (Feb. 28, 1919), HOLMES-LASKI, *supra* note 7, at 186-87. Holmes had visited Mill in 1867. ROBERT HARGREAVES, THE FIRST FREEDOM: A HISTORY OF FREE SPEECH 252 (Sutton 2002).

219. Chafee, War Time, *supra* note 46, at 956; JOHN STUART MILL, ON LIBERTY 21-27 (1859; Liberal Arts Press ed. 1956). Holmes did not use the precise phrase, "marketplace of ideas." *See* Blasi, *supra* note 7, at 13, n.41, 24, 80 (on the first uses of this phrase, more than fifteen years after Holmes's *Abrams* dissent).

220. Chafee, War Time, *supra* note 46, at 956.

Holmes, who occasionally mentioned Bagehot in letters, most likely understood Chafee's allusion and rendered it more striking and precise.[221] Even though Holmes had dissented in *Lochner v. New York*,[222] partly because he believed the majority had overemphasized the importance of an unregulated economic marketplace, Holmes apparently recognized in *Abrams* that a marketplace metaphor would vividly symbolize to his contemporaries a realm largely beyond governmental control.

Holmes departed from Chafee in additional ways. Holmes explicitly linked the search-for-truth rationale to the clear and present danger test. Intertwined together, both the rationale and the test seemed stronger. The search for truth no longer was a mere academic theory; now it appeared to have specific and concrete doctrinal implications.[223] And the clear and present danger test became more than a doctrinal framework that might help resolve cases. Shaped (or reshaped) by Holmes's hands, it became a solid doctrinal structure arising from a firm philosophical foundation. Finally, though unclear, Holmes's rendition of the clear and present danger test in *Abrams* may not have been as rigorous as Chafee would have wanted. In his *Harvard* article, Chafee sculpted clear and present danger to be a near-overt acts test. Holmes's dissent, to be sure, invigorated clear and present danger by grounding it on the search for truth, but Holmes may have been unwilling to push the clear and present danger test to the same extreme as Chafee had done.[224]

Regardless of the precise points at which Holmes either followed or departed from Chafee's analysis, Holmes undoubtedly had changed. Viewed from an external standpoint, Holmes's conception of free

---

221. *See e.g.*, Letter from Holmes to Laski (March 11, 1922), HOLMES-LASKI, *supra* note 7, at 409-10, 529; *cf.*, Blasi, *supra* note 7, at 4-13, 45 (criticizing the application of the marketplace metaphor to ideas and suggesting an alternative reading of Holmes's *Abrams* dissent).

222. 198 U.S. 45, 74 (1905).

223. From Holmes's pragmatic perspective, the move beyond theory to practice was significant. "Little as I believe in [free speech] as a theory I hope I would die for it and I go as far as anyone whom I regard as competent to form an opinion, in favor of it. Of course when I say I don't believe in it as a theory I don't mean that I do believe in the opposite as a theory." Letter from Holmes to Laski (Oct. 26, 1919), HOLMES-LASKI, *supra* note 7, at 217 (alteration added).

224. *See* White, Justice Holmes, *supra* note 5, at 439-40 (discussing differences between Holmes and Chafee).

expression transformed. Recall, in previous cases, Holmes had consistently voted to uphold the criminal punishment of speech and writing. And in a long list of those cases—*Debs*, *Frohwerk*, *Schenck*, *Fox*, and *Patterson*—he had written the majority opinion. Thus, Holmes's dissenting vote in *Abrams*, together with his rationale for dissenting, that the First Amendment protected the defendants' writings, demonstrated a significant change. True, Holmes's unpublished dissent in *Baltzer* had revealed a willingness to strike down an Espionage Act prosecution. Even so, his *Baltzer* dissent had focused on statutory construction, and where it had alluded to free expression, it had reiterated the bad-tendency standard (expression is unprotected if it can "be imagined to do harm").[225] Holmes's subsequent reiterations of the bad tendency approach in *Schenck*, *Frohwerk*, and *Debs* underscored that he had not intended to repudiate that standard in *Baltzer*. Thus, when Holmes applied the clear and present danger test rigorously in *Abrams* to argue that the convictions should be overturned, he was not applying the same test that he had applied in *Schenck*, where clear and present danger equated with bad tendency. The *Abrams* clear and present danger test was an innovative doctrinal standard for determining the scope of free expression, a standard far more protective than any before articulated by the Supreme Court. In sum, Holmes's vote to dissent in *Abrams* and his expressed rationale justifying his dissent appeared to suggest an unprecedented appreciation, on Holmes's part, for free expression and its contributions to society.

Yet, from an internal standpoint, Holmes never personally believed and therefore never publicly admitted that he had changed. At most, Holmes eventually acknowledged to Chafee in June 1922 that he had "wrongly" accepted the Blackstonian view of free expression (that only prior restraints are prohibited).[226] Otherwise, Holmes consistently maintained both that the Court's prior free-expression decisions were all correct *and* that he had always believed strongly in free expression, even though neither he nor the Court had ever previously found any specific

225. Holmes's dissent, joined by Brandeis, in the *Toledo Newspaper* case, arising from a contempt of court, further demonstrated Holmes's willingness to interpret a statute so as to disallow the punishment of expression. Toledo Newspaper Co. v. United States, 247 U.S. 402, 425 (1918).

226. Bogen, *supra* note 7, at 99-100 (quoting Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922)).

speech or writing constitutionally protected. At the outset of his *Abrams* dissent, when he turned to the First Amendment issue, he immediately reaffirmed the correctness of the Court's earlier decisions in *Schenck*, *Frohwerk*, and *Debs*.[227] Then, in a letter to Pollock written just over a month after *Abrams* was decided, Holmes again defended his earlier decisions, arguing that his votes in the first cases were justified on the facts.[228] Yet, in an October 26, 1919, letter to Laski, written after Holmes had decided to dissent in *Abrams* but before the decision was handed down, Holmes declared: "I hope I would die for [freedom of speech] and I go as far as anyone whom I regard as competent to form an opinion, in favor of it."[229] He repeated that sentiment, his willingness to "die" for free expression, in a letter written to Pollock on the same day.[230] As a general matter, Holmes rarely admitted that he had been wrong or had changed his mind on any issue, whether involving free expression or otherwise.[231] Thus, in his October 26 letter to Pollock, Holmes unsurprisingly added: "It is one of the ironies that I, who probably take the extremest view in favor of free speech, . . . have been selected for blowing up."[232] From Holmes's vantage, he did not deserve to be criticized; his friends' had been mistaken. In Holmes's next letter to Pollock, only days before *Abrams* was handed down, he explained that he was "stirred" about a dissent he had sent to the other justices. He then wrote: "I feel sure that the majority will very highly disapprove of *my saying what I think*, but as yet it seems to me my duty."[233] "Now!" with his *Abrams* dissent, he seemed to say to his friends, "I will show you how I really feel (or think) about free expression—in terms that you cannot misunderstand."

---

227. *Abrams*, 250 U.S. at 627.

228. Letter from Holmes to Pollock (Dec. 14, 1919), HOLMES-POLLOCK, *supra* note 7, at 32.

229. Letter from Holmes to Laski (Oct. 26, 1919), HOLMES-LASKI, *supra* note 7, at 217 (alteration added).

230. Letter from Holmes to Pollock (Oct. 26, 1919), HOLMES-POLLOCK, *supra* note 7, at 29.

231. Rabban, Emergence, *supra* note 5, at 1267.

232. Letter from Holmes to Pollock (Oct. 26, 1919), HOLMES-POLLOCK, *supra* note 7, at 29.

233. Letter from Holmes to Pollock (Nov. 6, 1919), HOLMES-POLLOCK, *supra* note 7, at 29 (emphasis added).

How could Holmes change his position on free expression so significantly without admitting as much to himself or to others? Chafee's roadmap helped. It provided Holmes with the precise terms that, when adopted by Holmes, would plainly show his friends his true commitment to free expression. Plus, since Chafee himself had appropriated Holmes's clear and present danger language from *Schenck*, Holmes could follow Chafee while still insisting that he was consistently following his own position, as previously established in *Schenck*. Through the traditional judicial mechanism of analogical reasoning—reasoning from one case to another—Holmes could maintain in *Abrams* that he was merely following the principle of an earlier case, *Schenck*—even if, in reality, the application of the clear and present danger test in *Abrams* resembled that in *Schenck* only in the most nominal fashion. Moreover, and of great importance, Holmes sincerely proclaimed that he had always believed in free expression—*but* it was the free expression that the majority of jurists and legal scholars believed in at the time. It was free expression as a liberty within a regime of republican democracy, a liberty subordinate to governmental actions for the common good. When Holmes followed Chafee's roadmap, his concept of free expression remained unchanged—a liberty subordinate to governmental actions for the common good. But following Chafee, Holmes for the first time gave free expression itself significant value when determining the common good, even if Holmes neither recognized nor acknowledged any novel appreciation, on his part, for speech and writing.

Finally, Holmes could readily flip-flop his position on these free-expression cases, whether he admitted it or not, exactly because he considered them relatively unimportant. To Holmes, even after *Abrams*, these cases were mundane criminal appeals. In the October 26 letter to Pollock, written after Holmes had prepared his *Abrams* dissent, Holmes expressed the "hope that we have heard the last, or nearly the last, of the Espionage Act cases."[234] Even after Holmes had written his *Abrams* dissent articulating a rigorous clear and present danger test, he still believed that free-expression cases were not worth much time or energy. In the entire series of Espionage Act cases, from Holmes's perspective,

234. Letter from Holmes to Pollock (Oct. 26, 1919), HOLMES-POLLOCK, *supra* note 7, at 28.

the government had acted no less silly than had the defendants. The defendants had spoken or written nonsense, Holmes believed, and the government had prosecuted them for it. Surely, the government should have attended to more important matters, especially during a war. As Holmes explained in a letter to Hand, people tended "to fight" about issues that they intensely cared about; on other issues, they would not be as passionate.[235] With regard to the issue of free expression, Holmes did not care enough to fight. In a July 7, 1918, letter to Laski, Holmes wrote: "My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power—you will do what you believe efficient to bring about what you want—by legislation or otherwise." But, Holmes added, "In most matters of belief we are not cocksure—we don't care very much—and we are not certain of our power."[236] Holmes himself just did not "care very much" about free expression.

Despite Holmes's indifference toward free expression, he succeeded wildly in regaining the good graces of his acolytes, who now showered him with fawning praise. Just two days after *Abrams* had been decided, Laski wrote to Holmes: "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*, as this dissent."[237] Felix Frankfurter expressed "the gratitude and . . . the pride I have in your dissent," and thanked Holmes for providing needed "education in the obvious."[238] Writing in the *Harvard Law Review*, Chafee extolled "Justice Holmes' magnificent exposition of the philosophic basis" of the First Amendment.[239] In a *New Republic* essay entitled *The Call to Toleration*, the editors focused on "the remarkable dissenting opinion of Mr. Justice Holmes," whom they described as "conspicuous at once for his learning, his grasp of juristic principles and

---

235. Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918) *reprinted in* Appendix, Gunther, *supra* note 7, at 757.

236. Letter from Holmes to Laski (July 7, 1918), HOLMES-LASKI, *supra* note 7, at 160-61.

237. Letter from Laski to Holmes (Nov. 12, 1919), HOLMES-LASKI, *supra* note 7, at 220.

238. White, Justice Holmes, *supra* note 5, at 441 (quoting a Letter from Felix Frankfurter to Oliver Wendell Holmes (Nov. 12, 1919).

239. Chafee, Abrams, *supra* note 46, at 769.

his political wisdom." In "memorable words," Holmes had "expressed with unusual breadth and vivacity the theory about the function of freedom of speech and assemblage in the American political system which all patriotic citizens used to share and to consider one of its great and peculiar merits."[240]

Schaefer v. United States was argued the same day as *Abrams* but decided more than three months later, on March 1, 1920.[241] Peter Schaefer and four other defendants were convicted under the Espionage Act for publishing a German-language newspaper that had allegedly denounced and falsely reported on the American war effort. Justice Joseph McKenna wrote the majority opinion affirming three convictions; two were reversed because insufficient evidence connected the defendants to the publications. McKenna, in explaining the affirmed convictions, emphasized that the Court would not allow anarchists and enemies of the United States to use the Constitution as a shield when they sought to destroy constitutional government.[242] Once again, the Court applied the Act consistently with the bad-tendency standard.[243]

Schaefer is noteworthy, however, because Brandeis wrote his first free-expression dissent, joined by Holmes. Arguing that the convictions of all defendants should have been reversed, Brandeis immediately focused on the issue of free expression and quoted Holmes's clear and present danger language from *Schenck*.[244] The bulk of Brandeis's opinion then reviewed the evidence and concluded that it was insufficient to prove a clear and present danger. Brandeis explicitly distinguished the bad tendency and clear and present danger approaches and, unlike Holmes, explicitly cited Chafee.

> It is not apparent on a reading of this article . . . how it could rationally be held to tend even remotely or indirectly to obstruct recruiting. But as this court has declared and as Professor Chafee has

240. Editors, *The Call to Toleration*, NEW REPUBLIC, Nov. 26, 1919, at 360, 360-61.

241. 251 U.S. 466 (1920).

242. *Id.* at 477-79.

243. "Their effect or the persons affected could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for offense . . . and to have required more would have made the law useless." *Id.* at 479.

244. *Id.* at 482 (Brandeis, J., dissenting).

> shown in his 'Freedom of Speech in War Time,' [in the *Harvard Law Review*] the test to be applied—as in the case of criminal attempts and incitements—is not the remote or possible effect. There must be the clear and present danger.[245]

In other words, even though Brandeis quoted the clear and present danger test from *Schenck*, he understood it as highly speech-protective, in accordance with Holmes's *Abrams* dissent and Chafee's article.

CONCLUSION

The Court upheld yet another group of Espionage Act convictions in *Pierce v. United States*,[246] with Brandeis again writing a dissent joined by Holmes. Like in *Schaefer*, Brandeis focused on showing that the evidence was insufficient to prove a clear and present danger.[247] And in a subsequent case, *Milwaukee Social Democratic Publishing Company v. Burleson*,[248] not decided until 1921, the Court again upheld an Espionage Act conviction. Brandeis dissented, again closely analyzing the facts and again citing Chafee.[249] Holmes wrote a separate dissent, saying little more than that he agreed "in substance" with Brandeis.[250] Between these two cases, though, the Court decided *Gilbert v. Minnesota*,[251] arising from a state prosecution. Joseph Gilbert was convicted for making a public speech that violated a state statute proscribing interference with or discouragement of "the enlistment of men in the military or naval forces of the United States or of the state of Minnesota."[252] Gilbert had stated:

> We are going over to Europe to make the world safe for democracy, but I tell you we had better make America safe for democracy first. You say,

245. *Id.* at 486 (alteration added).
246. 252 U.S. 239 (1920).
247. *Id.* at 267-73 (Brandeis, J., dissenting).
248. 255 U.S. 407 (1921).
249. *Id.* at 417-36 (Brandeis, J., dissenting).
250. *Id.* at 436 (Holmes, J., dissenting).
251. 254 U.S. 325 (1920).
252. *Id.* at 326.

> what is the matter with our democracy? I tell you what is the matter with it: Have you had anything to say as to who should be [P]resident? Have you had anything to say as to who should be Governor of this state? Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a good democracy, for Heaven's sake why should we not vote on conscription of men? We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours . . . .[253]

McKenna wrote the majority opinion upholding the conviction. Gilbert argued that the Constitution protected his speech, and in so doing, he implicitly raised the issue of whether First Amendment protections applied against state governments. The Court, however, bypassed this issue, assumed arguendo that the First Amendment applied, and decided the case on the merits. Concluding that the speech was unprotected, McKenna again, like in *Schaefer*, emphasized that the Court would not allow a defendant to invoke the Constitution as a shield for expression harmful to the nation's interests: "It would be a travesty on the constitutional privilege [that Gilbert] invokes to assign him its protection."[254]

Brandeis wrote a dissent that reached the issue of whether the constitutional protection of speech and writing applies against state governments. According to Brandeis, "[t]he right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a State was powerless to curtail."[255] Brandeis, in other words, located a right to free expression, enforceable against state governments, in the privileges and immunities clause of article four: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Thus,

253. *Id.* at 327.
254. *Id.* at 333 (alteration added).
255. *Id.* at 337 (Brandeis, J., dissenting) (alteration added).

unlike Holmes and Chafee, Brandeis more closely tied free expression to self-government, though he also alluded to the search-for-truth rationale.

> The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it.[256]

Because Congress had "the exclusive power to legislate concerning the Army and Navy," Brandeis reasoned, citizens had a right to discuss the propriety of any congressional actions related to the military, with one exception: "when those charged with the responsibility of Government, faced with clear and present danger, . . . conclude that suppression of divergent opinion is imperative."[257] Regardless, Brandeis did not resolve that Minnesota had violated Gilbert's right to free expression. Instead, Brandeis reasoned that Congress, by passing the Espionage Act, had preempted the field. Congress had left no room for states to pass laws regulating speech or writing related to the war, the draft, and the military. Finally, Brandeis concluded by comparing free expression with liberty of contract. He did not need to reach the issue of whether the Fourteenth Amendment protected free expression vis-à-vis state governments, he acknowledged. But so long as his Supreme Court colleagues continued to find liberty of contract protected, he could not understand how they could not find liberty of expression similarly protected.[258]

Gilbert is critical because Holmes neither joined Brandeis's dissent nor wrote his own. Instead, Holmes concurred in the judgment, though not in the majority's opinion.[259] Why would Holmes have voted to uphold the conviction? Unfortunately, because Holmes did not write an opinion, one is left to conjecture. Three different explanations are

---

256. *Id.* at 337-38.

257. *Id.* at 336, 338.

258. *Id.* at 343. Chief Justice White also dissented because of preemption. *Id.* at 334 (White, C.J., dissenting).

259. *Id.* at 334 (Holmes, J., concurring in judgment).

possible.[260] First, Holmes might have concurred in the majority's judgment because he believed the constitutional guarantee of free expression did not apply against state governments. State governments, according to this position, remained free to suppress expression as they saw fit, subject to other constitutional limitations. But then why would Holmes not write a concurring opinion expressing this important conclusion?

Second, Holmes might have agreed with the majority's conclusion because in applying the clear and present danger test, as Holmes then understood it, Gilbert's speech was unprotected. Indeed, Holmes wrote to Pollock in December 1919 admitting doubt even about his vote in *Abrams* because the record, after all, might have contained sufficient evidence to support convictions on one of the counts in the indictment.[261] And Holmes might have viewed the evidence in *Gilbert* as being far stronger than in *Abrams*, not because of the content of the respective messages but because of the identities of the respective communicators. Unlike in *Abrams*, where Holmes had described the defendants as "poor and puny anonymities," [262] Gilbert was a well-known Minnesota leader of the National Nonpartisan League, "one of the most successful third-party movements in United States history."[263] Gilbert thus might have wielded real influence. His speech might have successfully induced his audience to question whether the governmental decisions to go to war and to institute a draft were reached through fair democratic processes.[264] To Holmes, in other words, Gilbert's speech might have constituted a clear and present danger. Again, though, why would Holmes not write a concurring opinion clarifying his interpretation of the clear and present danger test? Perhaps, he did not

260. *See* Rogat & O'Fallon, *supra* note 7, at 1391-92 (discussing Holmes's concurrence).

261. Holmes wrote: "I think it possible that I was wrong in thinking that there was no evidence on the Fourth Count in consequence of my attention being absorbed by the two leaflets that were set forth." Nonetheless, he continued: "But I still am of opinion that I was right." Letter from Holmes to Pollock (Dec. 14, 1919), HOLMES-POLLOCK, *supra* note 7, at 32.

262. 250 U.S. at 629 (Holmes, J., dissenting).

263. Lawrence, *supra* note 5, at 103.

264. Graber, *supra* note 5, at 111-12.

want to risk losing his friends' praises, still flowing from his *Abrams* dissent.

Third, Holmes might have concurred in *Gilbert* because he simply had not thought much about the case. Free speech remained a relatively unimportant issue to him. Indeed, he might not have discerned the ramifications of his own *Abrams* dissent (or Brandeis's *Schaefer* dissent, for that matter), not because the issues were too complex for Holmes to grasp—this certainly was not true—but because he did not care. For Holmes, all the talk about free speech was, still, just talk, and not worth a whole lot of time or energy.[265] The world turned because of power. In a letter to Laski written during the war, Holmes explained that the "only limit that I can see to the power of the law-maker is the limit of power as a question of fact."[266] Legal doctrine and theory were inconsequential if not backed by the threat of force. Thus, Holmes added, "I understand by human rights what a given crowd will fight for (successfully)."[267] Finally, he concluded, "when men differ in taste as to the kind of world they want the only thing left to do is to go to work killing."[268] Likewise, he admitted in a letter to Hand that he defined "truth as the majority vote of that nation that can lick all others."[269] But if Holmes did not give the *Gilbert* case much thought—exactly because it was a free-expression case—why did he concur rather than join Brandeis's dissent (or dissent without opinion)? Perhaps because, while he willingly garnered praise for his ostensibly speech-protective *Abrams* dissent, Holmes genuinely believed he had never changed his position on free expression. And, to his mind, his unwavering position still closely resonated with his *Schenck*, *Frohwerk*, and *Debs* majority opinions, not with his *Abrams* dissent.

All three possible explanations of Holmes's concurrence in the judgment in *Gilbert* point to one overarching conclusion: even after *Abrams*, Holmes still did not intend to become a strong proponent of a

---

265. *See* Graber, *supra* note 5, at 109 (discussing Holmes's attitude).

266. Letter from Holmes to Laski (Dec. 3, 1917), HOLMES-LASKI, *supra* note 7, at 115.

267. *Id.*

268. *Id.* at 116; *see* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 *passim* (1897) (presenting Holmes's positivist theory of law).

269. Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918) *reprinted in* Appendix, Gunther, *supra* note 7, at 757.

highly speech-protective first amendment. He had followed Chafee's roadmap, but he had neither adopted Chafee's civil libertarian position as his own nor seriously contemplated the implications of an expansive concept of free expression. Thus, when Holmes read a draft of Brandeis's *Gilbert* dissent, Holmes told him, "I think you go too far."[270] In fact, Holmes admitted that he originally planned to vote to uphold the conviction in *Milwaukee Social Democratic Publishing Company v. Burleson*; Brandeis persuaded him to dissent.[271] If anything, *Gilbert* illustrated a persistent difference between Brandeis and Holmes: Brandeis largely agreed with the emerging civil libertarian position, while Holmes was, at most, indifferent. Even though Holmes and Brandeis managed to agree frequently on free-expression issues, they held fundamentally different views on the potential for individual liberty and societal progress.[272] Not many years earlier, Holmes had written a letter to John H. Wigmore, Dean of the Northwestern University School of Law, that starkly revealed a cynical disregard for human life and liberty. "[D]oesn't this squashy sentimentality of a big minority of our people about human life make you puke?" Holmes wrote.[273] He then specifically referred to people who condemn "the sensible doctor and parents who don't perform an operation to keep a deformed and nearly idiot baby alive—also of pacifists—of people who believe there is an upward and onward—who talk of uplift—who think that something particular has happened and that the universe is no longer predatory. Oh bring in a basin."[274]

Brandeis, as a general matter, expressed far more concern about civil liberties and social progress. He concluded his *Schaefer* dissent with a forewarning. "The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it

---

270. Rabban, Emergence, *supra* note 5, at 1319.

271. 255 U.S. at 436-37 (Holmes, J., dissenting); Rabban, Emergence, *supra* note 5, at 1319.

272. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 320-21 (1993) (comparing Holmes and Brandeis); *see id.* at 333-53 (discussing Holmes's ambivalence toward civil liberties and Progressivism).

273. Polenberg, *supra* note 5, at 211 (quoting letter from Holmes to John Wigmore, dean of Northwestern University Law School (Nov. 17, 1915)) (alteration added).

274. *Id.*

to be within their province to condemn men not merely for disloyal acts but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance," Brandeis explained.[275] "To prosecute men for such publications reminds of the days when men were hanged for constructive treason."[276] But Brandeis was more worried about the future. "Nor will this grave danger end with the passing of the war . . . . In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees."[277] One of Holmes's former clerks would observe that "Brandeis feels sympathy for the oppressed, Holmes contempt for the oppressor."[278] As such, Brandeis was more committed than Holmes to a broad concept of free expression and more thoughtful about the doctrine and theory. Unsurprisingly, then, unlike Holmes, Brandeis recognized and openly admitted that his understanding of free expression changed after the Court decided *Schenck*, *Sugarman*, *Frohwerk*, and *Debs*.[279]

Regardless, Holmes's contributions to the transformation of free expression should not be gainsaid. Through the World War I era and the 1920s, the majority of justices continued to resolve free-expression issues in accord with republican democratic principles, finding that the punishment of speech and writing with bad tendencies would promote the common good. Following Chafee, Holmes and then Brandeis imbued free expression with an enhanced social importance. All three continued to understand free expression within republican democratic parameters, but they argued that it deserved special gravity when

---

275. 251 U.S. at 493 (Brandeis, J., dissenting).

276. *Id.*

277. *Id.* at 494-95. For a discussion on Brandeis and civil liberties *see* PHILIPPA STRUM, LOUIS D. BRANDEIS 309-38 (1984).

278. Rabban, Emergence, *supra* note 5, at 1321; *see* Polenberg, *supra* note 5, at 265-66 (emphasizing intellectual and personality differences between Holmes and Brandeis); Rabban, Emergence, *supra* note 5, at 1322 (categorizing Brandeis as a "postwar civil libertarian").

279. Brandeis explained to Frankfurter: "I have never been quite happy about my concurrence in [the] Debs and Schenck cases. I had not then thought the issues of freedom of speech out—I thought at the subject, not through it. Not until I came to write the Pierce and Schaefer dissents did I understand it." Rabban, Emergence, *supra* note 5, at 1329 (quoting Brandeis, Aug. 1921) (alteration added).

determining the common good. In effect, the constitutional protection of speech and writing itself became the common good, even if the expression had bad tendencies. Most significantly, Holmes's *Abrams* dissent was the first Supreme Court opinion to afford free expression additional weight. The First Amendment should protect politically unpopular expression, Holmes insisted, even if most Americans (including the jurors) thought the expression harmful. Holmes's own failure to recognize or admit his transformation does not diminish his contribution to the eventual establishment of free expression as a constitutional lodestar.