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OUR PROUDEST BOAST

Wyatt Kozinski*

It took eighty-eight years to return to an old but proud principle of free speech law, one that was first announced in a little remembered dissent by Justice Oliver Wendell Holmes. That principle recently found noteworthy expression in Justice Samuel Alito's opinion in Matal v. Tam (2017). *For it was in that case that the Court harkened back to Justice Holmes's dissent in* United States v. Schwimmer (1929). *This was Holmes's last free speech opinion. Notably, it was not a constitutional case, but rather a case involving an immigrant. Yet Holmes took the occasion to announce a broad new principle that would, in time, blossom into a major tenet of our free speech jurisprudence – the need to protect the speech we hate. According to Holmes, this principle is not limited to citizens but applies to all those living in the United States. Holmes managed to do all this in 634 scant words. There is evidence that Brandeis played a role in spurring Holmes to write this dissent. But the circumstances of Holmes's life—the loss of his wife, the realization that his long career and life were coming to an end—also helped shape an opinion that is the antithesis of the values Holmes championed as a Justice: judicial restraint, a value-neutral jurisprudence, and personal detachment from the facts of his cases and the people whose lives they affected.* Schwimmer *was the one case where Holmes showed a touch of humanity that was otherwise absent from his judicial work. The Supreme Court eventually adopted Holmes's* Schwimmer *dissent in* Girouard v. United States (1946). *But there is much more, namely, the evolution of an idea, magnificently expressed, that nine decades later is hailed by the Supreme Court as "the proudest boast of our free speech jurisprudence."*

INTRODUCTION

Near the end of the last Term, the Supreme Court rendered its opinion in what is destined to become a landmark case, *Matal v. Tam*.[1] In sustaining a First Amendment challenge to the disparagement clause of the Lanham Act, the majority, per Justice Samuel Alito, reaffirmed a core principle of First Amendment law:

> But no matter how the point is phrased, [the Petitioner's] unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First

* This Essay benefitted greatly from the advice of Professor G. Edward White of the University of Virginia Law School and Professor Ronald K. L. Collins of the University of Washington Law School.

1. 137 S. Ct. 1744 (2017).

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> Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but *the proudest boast of our free speech jurisprudence* is that we protect the freedom to express "*the thought that we hate*." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).[2]

What is especially noteworthy about this principle – protecting the thought that we hate – is that Holmes announced it in a dissent that was not among his more famous ones.[3] For that matter, it was not even a First Amendment case. Penned when he was eighty-eight and fading, Holmes had little reason to believe that his *Schwimmer* dissent would ever draw more than scant attention compared to his memorable First Amendment opinions. But in *Schwimmer*, as in those cases, Holmes knew how to capture an idea and then encase it in rhetoric that would stand the test of time. The principle undergirding that dissent would, to paraphrase Justice Alito, become our proudest boast.

Oliver Wendell Holmes is a towering figure in American law—deified by some,[4] reviled by others,[5] and the subject of a large body of scholarly work that is positive but not uncritical.[6] Despite such widespread exploration, Holmes's views on many subjects have remained opaque, due in large part to "[t]he capacity of his thought to contain diverse and self-opposing points of view, the elusiveness of his ideas, [and] the hints in his personal life that his temperament was layered and complicated . . . ."[7] In a field rich with scholarly thought, this Essay sets out to shed some light on Justice Holmes's last opinion dealing with free speech, namely his dissent in *United States v. Schwimmer*,[8] and how that

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2. *Id.* at 1764 (emphasis added).

3. Anthony Lewis did, however, title a book after it. *See* ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007).

4. Benjamin Cardozo, who succeeded Holmes as Supreme Court Justice, called him "the great overlord of the law and its philosophy." Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 691 (1931). According to Cardozo, Holmes "is today for all students . . . of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence . . . ." *Id.* at 684. Cardozo's successor, Felix Frankfurter, did him one better: "He is, indeed, philosopher become king." FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE CONSTITUTION 8 (1927). Eight years later, Frankfurter added that "For centuries . . . men who never heard of him will be moving to the measure of his thought." Felix Frankfurter, *Mr. Justice Holmes*, 48 HARV. L. REV. 1279, 1280 (1935). Two decades later, U.S. District Judge Charles Wyzanski rhapsodized Holmes as being "like the Winged Victory of Samothrace . . . the summit of hundreds of years of civilization . . . ." Charles E. Wyzanski, Jr., *The Democracy of Justice Oliver Wendell Holmes*, 7 VAND. L. REV. 311, 323 (1954). Four decades later still, Judge Posner described Holmes as "the most illustrious figure in the history of American Law." Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., at ix (Richard A. Posner ed.,1992). To be sure, much more could be added.

5. *See, e.g.*, ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000). Professor Alschuler lists a number of largely forgotten Holmes skeptics, such as Mortimer Adler, H. L. Mencken, Yosal Rogat, Saul Touster, and Edmund Wilson. *Id.* at 10 & nn.62–67.

6. *See, e.g.*, SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989); LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES (1991); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993) [hereinafter WHITE, LAW AND THE INNER SELF]. See also the large body of work listed by Professor Alschuler in LAW WITHOUT VALUES, *supra* note 5, at 200–02 & n.61.

7. WHITE, LAW AND THE INNER SELF, *supra* note 6, at 4. As Professor White observes, "the ubiquity of Holmes' language and his capacity to take on multiple symbolic roles . . . appear to ensure that his 'core' is unlikely to come to rest, as successive waves of observers reconfigure his image in accordance with their own presuppositions." *Id.*

8. 279 U.S. 644 (1929). Later, in *Near v. Minnesota*, 283 U.S. 697 (1931), Holmes joined the majority in

opinion, nearly nine decades later, shaped our modern free speech jurisprudence.

SCHWIMMER: A FREE SPEECH CASE THAT WAS NOT A FIRST AMENDMENT CASE

Schwimmer was not a First Amendment case, or a constitutional case of any sort. This is because Rosika Schwimmer was not a U.S. citizen; she was a Hungarian national. She had been living in the United States for some years and decided to abandon her Hungarian citizenship[9] and apply for U.S. citizenship. Her loyalty to the United States and its form of government was not in doubt. She was otherwise qualified for citizenship but for her refusal to answer in the affirmative the following question: "If necessary, are you willing to take up arms in defense of this country?"[10] To that question, she answered: "I would not take up arms personally."[11] A self-proclaimed "uncompromising pacifist,"[12] Schwimmer explained that she

> found the United States nearest her ideals of a democratic republic, and that she could whole-heartedly take the oath of allegiance. . . . For the fulfillment of the duty to support and defend the Constitution and laws, she had in mind other ways and means. She referred to her interest in civic life, to her wide reading and attendance at lectures and meetings, mentioned her knowledge of foreign languages, . . . and she would conceive it her duty to uphold [the American form of government against attacks in foreign-language publications].[13]

The district court denied Schwimmer's application but the Seventh Circuit reversed, reasoning quite sensibly that a fifty-year-old woman would never be called upon to serve in the armed forces, so her unwillingness to do so was immaterial to her suitability for citizenship.[14]

After Olive Rabe[15] argued on behalf of Rosika Schwimmer, the Supreme Court reversed the Seventh Circuit. Justice Pierce Butler authored the majority opinion, writing for himself and five other Justices. According to the majority, Schwimmer had failed to show

> that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair

upholding a First Amendment free speech claim.

9. Letter from Rosika Schwimmer to Oliver Wendell Holmes 2 (Jan. 28, 1930), *available at* https://iiif.lib.harvard.edu/manifests/view/drs:37509894$1i ("A person born into the wrong family—and choosing another wrong one when chance permits the selection of a new family—that seemed to be my foolish position."). Schwimmer is here using "family" as a synecdoche for "country" or "nation."

10. *Schwimmer*, 279 U.S. at 647 ("The Naturalization Act of June 29, 1906, requires: 'He (the applicant for naturalization) shall, before he is admitted to citizenship, declare on oath in open court . . . that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.'").

11. *Id.*

12. *Id.* at 648.

13. *Id.* at 647.

14. Schwimmer v. United States, 27 F.2d 742, 744 (7th Cir. 1928).

15. *See* Ronald K. L. Collins & David L. Hudson Jr., *Remembering Two Forgotten Women in Free Speech History*, First Amend. Ctr. (May 27, 2008), http://www.firstamendmentcenter.org/remembering-2-forgotten-women-in-free-speech-history; Jane Dall Wilson, *Looking Back . . . The Advocacy of Olive Rabe in* Schwimmer v. United States, CIRCUIT RIDER, April 2013, at 38.

the true faith and allegiance required by the act.[16]

That Schwimmer was too old and the wrong sex under the then-applicable conscription law was of no consequence to the majority because "the word [pacifism] is also used and understood to mean one who refuses [to take up arms] . . . and *who is disposed to encourage others in such refusal*."[17]

As the majority viewed it, "her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition."[18] In other words, the majority suggested that Schwimmer might encourage others to resist the draft, making a tacit allusion to *Schenck v. United States*,[19] in which Holmes, writing for the Court a decade earlier, affirmed the conviction of a World War I draft protester—an opinion that Holmes's *Schwimmer* dissent is at pains to distinguish. In essence, the majority was saying that American pacifists caused trouble by persuading conscripted soldiers not to report for duty during the Great War, so there was good reason to avoid swelling their numbers by granting citizenship—and its concomitant constitutional rights—to someone who might engage in similarly subversive activities in case of another war. Given that World War II would erupt a scant decade later, and interwar Europe was far from politically stable, the majority's concerns hardly seemed fanciful.

Holmes's answer to the majority begins weakly:

> Of course the fear is that if a war came the applicant would exert activities such as were dealt with in *Schenck v. United States* . . . . But that seems to me unfounded. Her position and motives are wholly different from those of [Charles] Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues.[20]

Phrased differently, Holmes rejects the district court's finding that Schwimmer posed the same risk as Schenck in case of war. Given Holmes's track record of giving great—almost blind—deference to the findings of the trier of fact,[21] this *ex cathedra* pronouncement about Schwimmer's motives and likely future conduct is a remarkable departure.

These statements are best read as a rhetorical springboard for Holmes's broader objection to the Government's effort to penalize Schwimmer for mere opinion unconnected to concrete action, and he does so in resounding terms that only he among the Justices could muster:

> Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with

16. *Schwimmer*, 279 U.S. at 653.

17. *Id.* at 652 (emphasis added).

18. *Id.*

19. 249 U.S. 47 (1919) (affirming defendant's conviction for distributing leaflets criticizing conscription during World War I and holding that the Espionage Act of 1917 did not violate the First Amendment).

20. *Schwimmer*, 279 U.S. at 654.

21. *See* discussion *infra* 531–32.

regard to admission into, as well as to life within this country.[22]

Here Holmes takes a giant leap by introducing three ground-breaking concepts. The first is that the Constitution has anything at all to say about the treatment of aliens—a view he had in the past rejected most vigorously.[23] Second is the assertion that the Constitution guarantees freedom of thought—a right nowhere mentioned. This, too, seems to contradict decades of Holmesian jurisprudence—slavishly deferential to majoritarian will[24] and highly suspicious of efforts to find rights not enumerated in the Constitution. Holmes may have thought of himself as what we might today call a strict constructionist, perhaps even an originalist—although he would surely have bristled at any such labels.[25] Finally, and perhaps most remarkable, Holmes announces what might best be described as a meta-constitutional rule—a rule "that more imperatively calls for attachment than any other"[26] in the Constitution. Was this just rhetorical flourish, or did Holmes mean to say that the Constitution embodies a hierarchy of values, some more important than others? For a Justice who had for decades derided the value of values,[27] this would be a major departure indeed.

The balance of this Essay will consider what may have prompted Holmes to write these brief but powerful sentences, and what he may have sought to accomplish with them. But in order to do so, it is necessary to have some understanding of Holmes's pre-*Schwimmer* jurisprudence. The next section gives an overview of this, with particular emphasis on his somewhat mixed record in First Amendment cases.

THE YANKEE FROM OLYMPUS[28]

During his long life, Holmes served half a century as a Justice—two decades on the

22. *Schwimmer*, 279 U.S. at 654–55.

23. Professor Collins notes that "[i]n the past Holmes had been remarkably deferential to the power of the United States to treat aliens as lacking constitutional rights." THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 340 (Ronald K. L. Collins ed., 2010) [hereinafter THE FUNDAMENTAL HOLMES]. Writing for the Court in *Tiaco v. Forbes*, 228 U.S. 549, 556–57 (1913), Holmes stated: "It is admitted that sovereign states have inherent power to deport aliens, and seemingly that Congress is not deprived of this power by the Constitution of the United States."

24. This attitude is perhaps best summarized in Holmes's own words: "[I]f my fellow citizens want to go to Hell I will help them. It's my job." Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 249 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES-LASKI LETTERS].

25. In a letter to Laski, commenting on Schwimmer's pacifism, Holmes commented, "All 'isms seem to me silly . . . ." Letter from Oliver Wendell Holmes to Harold J. Laski (Apr. 13, 1929), *in* 2 HOLMES-LASKI LETTERS, *supra* note 24, at 1146.

26. *Schwimmer*, 279 U.S. at 655.

27. Professor Alschuler wrote an entire book criticizing Holmes for his disdain for values. *See* ALSCHULER, *supra* note 5. Holmes seems to have had values when he was a young man, enlisting in the army during the Civil War because of his strong abolitionist beliefs. THE FUNDAMENTAL HOLMES, *supra* note 23, at 4–5. Seeing the ravages of war, and being wounded three times, appears to have cured Holmes of his idealism. *Id.* at 7. Eventually, he ceased to believe that anything was provable. According to Professor Rogat, "it is well known that he claimed to have difficulty even with the 'truth' of the sum of two and two." Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1372 (1984).

28. *See* CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY (1944). Bowen wrote "a flattering, fictionalized bestseller" based "on the personal reminiscences of relatives and law clerks," reportedly because she was refused access to the Holmes papers by Harvard Law School. ALSCHULER, *supra* note 5, at 32.

Supreme Judicial Court of Massachusetts and three decades more on the United States Supreme Court. During that time, he developed a judicial philosophy that called for courts to exercise great restraint in reversing the will of political majorities. As Professor White described it:

> To some extent courts were bound by the choices of their predecessors; it was not generally the province of judges to "undertake to renovate the law." Even on those occasions when precedents gave no guidelines, a series of institutional constraints derived from Holmes's notion of majoritarian sovereignty limited judicial freedom. The judiciary, not being elected representatives of the majority, was [not] to substitute its views for those of legislatures. The judiciary did not necessarily protect even constitutional rights against legislative infringement. All individual rights, for Holmes, were ultimately held at majority sufferance.[29]

Holmes's most famous articulation of this principle was his forceful dissent in *Lochner v. New York*, wherein he stated: "I think that the word 'liberty,' in the [Fourteenth] Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[30] Holmes's *Lochner* dissent was emblematic of his philosophy: "He has always been prone to sustain legislation where it was not clearly unconstitutional."[31]

Moreover, Holmes believed that a reviewing court was subject to an additional constraint, namely the findings of the trier of fact, and he exhibited such deference in a trilogy of First Amendment cases in the spring of 1919: *Schenck v. United States*,[32] *Frohwerk v. United States*,[33] and *Debs v. United States*.[34] These cases were brought by the Government under the Espionage Act of 1917 against individuals who spoke out against the participation of the United States in World War I. The Supreme Court unanimously affirmed convictions in all three cases. In *Schenck*, Holmes announced the "clear and present danger" test, which we have come to understand as a highly speech-protective doctrine, but "it is hard to see how a clear and present danger test of any substance was there applied."[35] Indeed, "much of the language in *Schenck* is simply inconsistent with any satisfactory protection of speech."[36] *Debs* was equally problematic; it embodied "the dead opposite of any significant clear and present danger doctrine."[37] *Frohwerk*, which relied on *Schenck*, involved the publication of a newspaper titled the *Missouri Staats Zeitung*. There was no indication that the paper's editorials were directed

29. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 134 (3d ed. 2007) [hereinafter WHITE, AMERICAN JUDICIAL TRADITION] (quoting Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899)).

30. 198 U.S. 45, 76 (1905).

31. WHITE, LAW AND THE INNER SELF, *supra* note 6, at 369 (quoting Charles E. Carpenter, *Oliver Wendell Holmes, Jurist*, 8 ORE. L. REV. 269, 270 (1929)).

32. 249 U.S. 47 (1919).

33. 249 U.S. 204 (1919).

34. 249 U.S. 211 (1919).

35. Rogat & O'Fallon, *supra* note 27, at 1371.

36. *Id.* at 1370.

37. *Id.* at 1375.

to individuals involved in the war effort or to those who had been conscripted for service in the military (as was the case in *Schenck*). Thus, the evidence that the editorials presented a danger at all, much less a clear and present one, was scant. Nevertheless, Holmes affirmed the conviction in a passage that demonstrates the extreme deference he was willing to accord jury verdicts:

> But we must take the case on the record as it is, and on that record 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.[38]

These three cases illustrate Holmes's early insensitivity to free speech. While Holmes is widely celebrated today as the father of the modern First Amendment,[39] he came to that view late in his career. Holmes treated the trilogy of speech cases decided in the spring of 1919 as nothing more than "routine criminal appeal[s]."[40] While *Schenck* announced the "clear and present danger" test, Professor White notes that "*Schenck*, *Frohwerk*, and *Debs*, taken together, suggest that Holmes' 'clear and present danger' test was simply a restatement of 'attempts' language found in his earlier opinions . . . [and] did not significantly modify his earlier free speech jurisprudence."[41] To much the same effect, Professor Thomas Healy has noted: "In short, Holmes was in many ways the justice least likely to stick his neck out for the right of free speech – and for the Court's role in enforcing that right."[42] Holmes had not yet begun to use the First Amendment as a tool for protecting those who spoke out against the government.

That evolution came in the following Term when he filed his justly celebrated dissent in *Abrams v. United States*.[43] In *Abrams*, the Government prosecuted war protesters, this time under the Sedition Act of 1918, for tossing from the roof of a hat factory some 5000 leaflets calling for a general strike to protest U.S. operations in Russia. The Government claimed—and a jury found—that this was intended to impair the U.S. war effort against Germany. The Supreme Court affirmed, employing much the same reasoning that Holmes had employed in *Schenck*, *Frohwerk*, and *Debs*.[44] Holmes dissented in sonorous language that set the terms for our modern interpretation of the First Amendment. And once he unlocked that door, Holmes stepped through it body and soul. As Professor White notes, "[i]n only one free speech case after *Abrams* did Holmes fail to

38. *Frohwerk*, 249 U.S. at 209.

39. *See, e.g.*, THE FUNDAMENTAL HOLMES, *supra* note 23, at xiii.

40. *See* Harry Kalven, *Professor Ernst and* Debs v. United States, 40 U. CHI. L. REV. 235, 238 (1973). Professor Kalven was there referring only to *Debs* but, as Professor Rogat points out, the same "was true of all these cases." Rogat & O'Fallon, *supra* note 27, at 1378.

41. WHITE, LAW AND THE INNER SELF, *supra* note 6, at 420. Holmes's insensitivity to free speech issues dates back to his days on the Supreme Judicial Court of Massachusetts where he famously said: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (1892). *See also* Commonwealth v. Davis, 39 N.E. 113 (1895) (upholding conviction for speaking on the Boston Commons on the theory that the state could limit speech at will in a public park it owns).

42. THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND – AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 6–7 (2013).

43. 250 U.S. 616 (1919). *See* HEALY, *supra* note 42, at 4–8.

44. *Id.* at 623 ("[T]he plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country.").

adopt a position in support of speech rights."[45]

Much has been written about Holmes's *Abrams* dissent and his subsequent pro-First Amendment jurisprudence.[46] It will not be rehearsed here, as it is far beyond the scope of this Essay. What I do wish to consider are some of the reasons Holmes might have had for changing positions, as those reasons might bear directly on why Holmes chose to write as he did in *Schwimmer*.[47] In his personal correspondence, Holmes repeatedly complains about letters protesting his opinion in *Debs*: "Just now I am receiving some singularly ignorant protests against a decision that I wrote sustaining a conviction of Debs, a labor agitator . . . ."[48] And further, more testily: "I am beginning to get stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted . . . ."[49]

There was also considerable academic criticism. Professor Ernst Freund wrote a sharply critical article in *The New Republic*,[50] which Holmes took so seriously that he drafted (but never sent) a letter to Herbert Croly, editor of *The New Republic*, defending his opinion.[51] Moreover, Holmes was the object of private criticism and pressure on account of *Debs* in particular. According to Professor Rogat, "[Zechariah] Chafee, . . . at a tea arranged by Harold Laski, may have convinced Holmes of the need for more stringent protection of speech. It may also be that Holmes was moved by finding among the 'fools and knaves' who took issue with *Debs* many of the young men whose friendship and respect he greatly valued."[52]

Respect and admiration were precisely what Holmes craved his entire career and, despite the many outward signs that he achieved it, he remained insecure and dissatisfied.[53] In *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*,[54] Professor White refers to "Holmes's ambivalent reception of his

45. WHITE, LAW AND THE INNER SELF, *supra* note 6, at 445. The single subsequent case where Holmes did not come out on the side of free speech was *Gilbert v. Minnesota*, 254 U.S. 325 (1920), where he concurred in the result without explanation. His disagreement with Brandeis's free speech-protective dissent might thus have been procedural rather than substantive, namely, the application of the First Amendment to the states. See *id.* at 336 (Brandeis, J., dissenting).

46. *See, e.g.*, RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (1987); GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 203–11 (2004).

47. Most commentators agree that *Abrams* and subsequent Holmes opinions cannot be reconciled with his earlier speech cases. But it does not appear that Holmes himself ever recognized he had changed his position. In his *Abrams* dissent Holmes insisted, "I never have seen any reason to doubt that the questions of law that alone were before this Court in the Cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided." *Abrams*, 250 U.S. at 627 (citations omitted).

48. Letter from Oliver Wendell Holmes to Lewis Einstein (Apr. 5, 1919), *in* THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903–1935, at 184 (James Bishop Peabody ed., 1964).

49. Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 5, 1919), *in* HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 7–8 (Mark DeWolfe Howe ed., 1941).

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

51. We know about the letter to Croly because Holmes enclosed the draft in a letter to Harold Laski with the comment that he thought Freund's article "was poor stuff." Letter from Oliver Wendell Holmes to Harold J. Laski (May 13, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 24, at 202–04.

52. Rogat & O'Fallon, *supra* note 27, at 1378.

53. WHITE, LAW AND THE INNER SELF, *supra* note 6, at 369–71. *See also id.* at 476 ("Ambition also fostered Holmes' singular competitiveness, his extreme sensitivity to criticism, his thirst for recognition, . . . and his insatiable desire for an even higher level of accomplishment.").

54. 65 N.Y.U. L. REV. 1409 (1990) [hereinafter White, *Holmes's Life Plan*].

canonization."[55] This was based on Holmes's grave concern that, with advancing age and eventual retirement and death, his reputation and the influence of his legal thinking would be lost and he would slide into obscurity. His friendships with younger intellectuals like Felix Frankfurter, Laski, and their contemporaries "made possible the channeling of his passion . . . toward the goals of a resurgent professional ambition. These goals precipitated judicial contributions that, thanks to the approval of his new friends, eventually secured Holmes the level of recognition to which he had always aspired."[56]

Nevertheless, Holmes continued to feel "apprehension . . . about his friendships with the younger generation of scholars."[57] Thus, in "one letter to Frankfurter, . . . Holmes noted his 'rather fearful hope that I may never fall from the place you have given me,' and 'my expectation that always while I live . . . I shall have great cause to be proud of having counted for something in your life.'"[58] Holmes repeatedly expressed his ambition "to be admitted the greatest jurist in the world"[59] and "the greatest legal thinker in the world."[60] Given Holmes's insecurity and lofty ambitions, significant pushback on his spring 1919 speech opinions, from the very group of admirers that he was counting on to carry forward his legacy, might well have caused him to reconsider his position.[61]

Finally, one must not underestimate the influence of Justice Louis Brandeis, the other brilliant mind on what was otherwise a mediocre Supreme Court. It was not merely that Brandeis courted and, presumably, flattered Holmes;[62] the affinity of two superior intellects trapped in a small-group environment with arguably lesser intellects should not be understated. I find it significant that Brandeis joined Holmes's three spring 1919 speech opinions, but they both did an about-face that fall in *Abrams* and worked pretty much in lock-step in speech cases thereafter. Professor Chafee posited the hypothesis that in the spring of 1919, Holmes "was biding his time until the Court should have before it a conviction so clearly wrong as to let him speak out his deepest thoughts about the First Amendment."[63] I find it more plausible that it was Brandeis who was biding his time: going along with Holmes in *Schenck*, *Frohwerk*, and *Debs* so as to gain his confidence,

55. *Id.* at 1472.

56. *Id.*

57. *Id.*

58. *Id.* & n.336 (quoting Letter from Oliver Wendell Holmes to Felix Frankfurter (Mar. 9, 1915) (copy on file with Tulsa Law Review)).

59. Letter from Oliver Wendell Holmes to Canon Patrick Sheehan (Dec. 15, 1912), *in* HOLMES-SHEEHAN CORRESPONDENCE: LETTERS OF JUSTICE OLIVER WENDELL HOLMES, JR. AND CANON PATRICK AUGUSTINE SHEEHAN 78 (David H. Burton ed.,1976) [hereinafter HOLMES-SHEEHAN CORRESPONDENCE].

60. White, *Holmes's Life Plan*, *supra* note 54, at 1466 (quoting Letter from Oliver Wendell Holmes to Nina Gray (Dec. 2, 1910) (copy on file with Tulsa Law Review)).

61. *See* HEALY, *supra* note 42.

62. I have found no direct evidence that Brandeis flattered Holmes, but there is much flattery in Holmes's correspondence with his regular correspondents, such as Frankfurter. *See, e.g.*, Letter from Felix Frankfurter to Oliver Wendell Holmes (May 29, 1929), *available at* http://library.law.harvard.edu/suites/owh/index.php/item/42879160/10. In this letter, Frankfurter congratulates Holmes on his *Schwimmer* dissent in extravagant terms: "I had assumed that you exhausted my capacity for being thrilled by magistral utterance on behalf of sanity in your *Abrams* opinion. But you have done it again and anew." Biographer Liva Baker describes Laski's side of the correspondence with Holmes as "a flattering and reverential one, every letter a genuflection." BAKER, *supra* note 6, at 488. One would surmise that Brandeis, like Frankfurter and Laski, detected Holmes's affinity for such homage and played on it from time to time.

63. ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 86 (1941).

then leveraging that trust to help turn the old warhorse around. There is little doubt that Brandeis eventually came to influence Holmes: Chief Justice Taft sourly complained that "Holmes was 'so completely under the control' of Brandeis that it gave Brandeis two votes instead of one."[64] Even if Taft was exaggerating, it is not difficult to imagine that a symbiotic affinity developed between these two great men so that they influenced each other to forge a bold new path in First Amendment law.

Indeed, that affinity was on display in 1925, when Brandeis signed onto Holmes's famous dissent in *Gitlow v. New York*.[65] The *Gitlow* majority upheld a "criminal anarchy" conviction for publishing *The Left Wing Manifesto* in a radical newspaper named *The Revolutionary Age*. Holmes dissented, adopting a view of "incitement" that still resonates today:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[66]

Holmes had rounded another jurisprudential corner in defense of free speech. He had again invited danger; he had again flirted with the idea of free speech experiments; and he had again asked us to place an almost blind faith in his free speech enterprise. In the process, he became bolder. But just how far would that boldness go? Did *Gitlow* mark the end of the experiment or was there something more that needed to be added to the jurisprudential mix?

SCHWIMMER REDUX

Holmes's *Abrams* dissent brought him an avalanche of accolades from the intellectuals he admired, who then set in motion the process of canonization.[67] In the acerbic words of a Holmes critic, "[h]is very name became laden, through processes not completely secular, with connotations of concern for liberty; only with the greatest difficulty could he from that time on be seen as merely a man."[68] His collaboration with Brandeis also continued and strengthened, and the two Justices broke new ground—often

64. WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 29, at 135 (quoting 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 969 (1939)). "Taft was determined to keep any prospective candidate who might join Holmes and Brandeis and side with that 'dangerous twosome' from being nominated." PETER G. RENSTROM, THE TAFT COURT: JUSTICES, RULINGS, AND LEGACY 31 (2003).

65. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

66. *Id.* at 673 (Holmes, J., dissenting) (citations omitted).

67. As Professor White notes, "Holmes' 'greatness' was . . . the conscious product of a systematic campaign of publicity, a campaign in which Holmes participated." WHITE, LAW AND THE INNER SELF, *supra* note 6, at 355–56.

68. Rogat & O'Fallon, *supra* note 27, at 1389.

in dissents or concurrences—in a series of First Amendment cases.

According to biographer Sheldon Novick, Brandeis urged Holmes to write dissents in a number of these cases, appealing to Holmes's "sense of duty. . . . With each dissent he became more celebrated . . . ."[69] One can speculate on the "accidents of history" that brought together these two men of different "temperaments . . . [and] philosophies."[70] Brandeis, in full vigor of youth, was brilliant and methodical, yet lacked Holmes's rhetorical power and reputation. While Holmes was near the end of his career, he could still turn a memorable phrase and come up with sweeping concepts that fired the imagination. It is not difficult to accept Novick's claim that "Brandeis urged Holmes to write dissents, and Holmes did publish dissenting opinions more often than he would have . . . ."[71]

There appears to be little doubt that Holmes wrote his *Schwimmer* dissent at Brandeis's urging:

> [Mrs.] Holmes died on April 3, 1929, a few weeks after the oral arguments in *Schwimmer*. To help the grieving Holmes, then eighty-eight years old, Justice Brandeis spoke to his colleague about the *Schwimmer* case and about freedom of conscience. Talk of the case and the principle in it were therapeutic for the grieving jurist, or so Brandeis hoped. Thanks in part to Brandeis, Holmes rallied his energy and wrote a dissent.[72]

As previously noted, writing the dissent posed some obstacles for Holmes because Schwimmer was an alien, and thus had no First Amendment rights, and because Holmes had to make findings on appeal, contradicting those of the district court. But these complications were beside the point because Holmes used his dissent to elucidate not so much a constitutional principle as a theory about the proper relationship between individuals and their government in a free society. With classic Holmesian terseness, he cut to the heart of the matter: "Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be."[73] In other words, proposing changes in the way we govern ourselves is constructive and necessary, and any government that prohibits expressing such ideas is courting disaster by stifling the process that enables society to adapt to changing circumstances over time.

Holmes takes pains to distance himself from Schwimmer's ideas by stating that he does not share them.[74] This is no doubt true, and it eliminates one possibility for his changed opinion—that he was simply favoring his own point of view. Holmes also points to groups like the Quakers who hold ideas similar to Schwimmer's and "have done their share to make the country what it is" and states that he "had not supposed hitherto that we regretted our inability to expel them because they believed more than some of us do in the

69. THE FUNDAMENTAL HOLMES, *supra* note 23, at 320 (citing NOVICK, *supra* note 6, at 353).

70. WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 29, at 161.

71. THE FUNDAMENTAL HOLMES, *supra* note 23, at 320 (citing NOVICK, *supra* note 6, at 476 n.36).

72. *Id.* at 338 (citing LEWIS J. PAPER, BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES 326 (1980)).

73. United States v. Schwimmer, 279 U.S. 644, 654 (1929) (Holmes, J., dissenting).

74. *Id.* (Holmes, J., dissenting).

teachings of the Sermon on the Mount."[75] This rhetorical flare reminds readers that Schwimmer's ideas are consistent with some understandings of the Christian faith, countering the notion that Schwimmer's views are the product of her atheism.

But Holmes then goes a step further and proclaims that there is one "principle of the Constitution that more imperatively calls for attachment than any other": "the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[76] With this last idea, Holmes announces that there are limits on the power of government that transcend *even those expressly imposed by the Constitution*. He, who so memorably sneered at the idea of substantive due process in *Lochner*, foreshadowed the idea of unenumerated rights that the Supreme Court would recognize in a later era. And indeed, in *Girouard v. United States*,[77] the Court overruled *Schwimmer*, citing Holmes's dissent and using language that endorses his view: "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience *there is a moral power higher than the State*."[78] The pre-*Abrams* Holmes might have cringed at this idea, but the Holmes of the *Schwimmer* dissent would surely have nodded agreement and perhaps even smiled.

Holmes's *Schwimmer* dissent has rightfully been criticized for being "devoid of any formal statutory analysis" (this was, after all, a case interpreting an immigration statute, not the Constitution) and for "substitut[ing] [Holmes's] views about the respondent and her ideas about the war for any sustained examination for what power Congress had actually delegated to the Naturalization Board."[79] But such criticisms miss the point: Holmes was using Schwimmer's case as a vehicle for explicating the concept he first posited in his *Abrams* dissent: "the ultimate good desired is better reached by free trade in ideas, . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground upon which their wishes safely can be carried out."[80] And, by applying it in a case where the speaker herself had no constitutional rights, Holmes may well have anticipated another important concept: The marketplace of ideas involves both speakers and listeners and denying Schwimmer her right to speak impaired the rights of others who might hear her ideas and benefit from them. The Supreme Court eventually recognized that principle in *Kleindienst v. Mandel*[81] when it allowed U.S. citizens to challenge the refusal of a visa to a speaker whose message they wanted to hear.[82]

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75. *Id.* (Holmes, J., dissenting). In June 1929, in response to a letter from Laski praising his dissent, Holmes wrote, "I couldn't help suspecting that [the majority opinion] was made easier by [Schwimmer's] somewhat flamboyant declaration that she was an atheist." THE FUNDAMENTAL HOLMES, *supra* note 23, at 337.

76. *Schwimmer*, 279 U.S. at 654–55 (Holmes, J., dissenting).

77. 328 U.S. 61 (1946).

78. *Id.* at 68 (emphasis added).

79. THE FUNDAMENTAL HOLMES, *supra* note 23, at 339.

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

81. 408 U.S. 753 (1972).

82. Although the Court ruled in favor of the government on the substantive claim, it considered the issue on the merits while recognizing that Mandel, the proposed speaker, "had no constitutional right of entry to this country as a nonimmigrant or otherwise." *Id.* at 762. It thus decided the case on the basis of the right of the American petitioners to hear Mandel speak. *Id.* at 762; *Id.* at 775–76 (Marshall, J., dissenting) ("I am convinced that Americans cannot be denied the opportunity to hear Dr. Mandel's views in person because their Government disapproves of his ideas.").

More importantly, there is the story of Holmes's ability to give birth to an idea, namely, that we should protect the very speech we abhor – speech that offends us, speech that aims to uproot the very principles we hold dear. Back then, the idea was bold, so much so that it was seen more as a rhetorical flourish than as a jurisprudential maxim. But, like so many other Holmesian ideas, in time it took root. Today, in case after case, it finds expression in our First Amendment literature, culminating in Justice Alito's opinion in *Matal v. Tam*, which elevates it to "the proudest boast of our free speech jurisprudence."[83] Offensive speech, hate speech, even lies have long received First Amendment protection.[84] But with the *Matal* ruling, the toleration principle became our "proudest boast."

Think of it: In less than 700 words, in his waning years as a Supreme Court Justice, at an age where most men were long retired, writing in dissent, Holmes managed to give birth to an idea that the Court eventually parades as an accepted principle—one to boast about. And perhaps this was his purpose. As Professor White has noted, "Holmes believed that when he left the Court he would surrender not only the power to work but the power of place; that he would then be subject to the vicissitudes of fame or obscurity; that *others* would determine his fate."[85] Or, as Holmes himself put it in a radio address on the occasion of his ninetieth birthday:

> The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear the kind voice of friends and to say to one's self: The work is done. But just as one says that, the answer comes: The race is over, but the work is never done while the power to work remains. The canter that brings you to a stand still need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living.[86]

Holmes's *Schwimmer* dissent may have been his way of overcoming his wife's death by, himself, continuing to strive, to create, to live.[87]

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83. 137 S. Ct. 1744, 1764 (2017).

84. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 365 (1937); R.A.V. v. City of St. Paul, 505 U.S. 377, 403 (1992) (White, J., concurring in judgment); United States v. Alvarez, 567 U.S. 709, 711 (2012).

85. White, *Holmes's Life Plan*, *supra* note 54, at 1474 (emphasis added).

86. Oliver Wendell Holmes, Radio Address to the Nation (Mar. 8, 1931), *reproduced in* THE FUNDAMENTAL HOLMES, *supra* note 23, at 342–43.

87. Fanny Holmes's death no doubt reminded Holmes of his own mortality. He said as much in his May 30, 1929 letter to Laski: "My wife's death seems like the beginning of my own." 2 HOLMES-LASKI LETTERS, *supra* note 24, at 1152. Holmes's drive to "work . . . while the power to work remains" seems to have remained steady, if not increase, after her death. The day his wife died, in fact, Holmes wrote an opinion and sent it to Chief Justice Taft. *See* G. EDWARD WHITE, OLIVER WENDELL HOLMES, JR. 124 (2006). In the aforementioned letter to Laski, one month after her death, Holmes said, "My wife's death . . . hasn't prevented my writing. . . . I have just turned off a dissent about the refusal to admit a pacifist to citizenship that Brandeis liked and joined in. There seems to be a distinct compartment in one's mind that works away no matter what is going on with the rest of the machinery." 2 HOLMES-LASKI LETTERS, *supra* note 24, at 1152. Holmes's secretary, Chapman Rose, said of October Term 1931: "[His] attention span had gone without depriving him of the drive that he always had to finish any unfinished business. So it was getting more difficult to prevent him from really exhausting himself." WHITE, *supra*, at 125. Knowing that, to Holmes, living means functioning, it is unsurprising (and perhaps even characteristic) that Holmes would not only function—write the dissent—but that he would function grandly—write a dissent that is impactful decades later and that becomes our proudest boast.

EPILOGUE

Justice Holmes received a good dollop of praise for his *Schwimmer* dissent.[88] In a letter to Laski in August 1929, Holmes reports: "I still get letters from lonely enthusiasts who shout over my dissent in the case of a dame who was not allowed to become a citizen because she was a pacifist."[89] In a typically curmudgeonly fashion, Holmes adds: "I told one of them that it was moral sympathy not legal judgment that led to his encomiums."[90] Despite his protestations, Holmes no doubt enjoyed his fan mail immensely. One can imagine no worse fate for Holmes than descending into obscurity.

Among his letter writers was Rosika Schwimmer herself. On January 28, 1930, she sent a two-page handwritten letter thanking Holmes for giving her hope, despite the unhappy outcome in her case. She stated that she had been advised, "You don't thank judges," but felt she had to write because she "carried [her] unexpressed gratitude as a moral debt."[91] Holmes responded in a letter dated just two days later. He first chastises her for writing to thank him and explains that "[a] case is simply a problem to be solved, although the considerations are more complex than those of mathematics."[92] However, he finishes on a warm note: "After which protestation, I must add that of course I am gratified by your more than kind expression, and that I thank you."[93] There ensued a correspondence between them that lasted, as best the record reflects, until 1934, the year before Holmes's death.

Because only two letters from Holmes and three letters and a telegram from Schwimmer appear to have survived,[94] it is difficult to tell the nature of their correspondence. Schwimmer seems to have written Holmes on various occasions, such as his birthday and retirement from the Court, but there are no known responses from Holmes. He did write a second letter to Schwimmer, acknowledging a gift of books and expressing delight:

> I become a child again on reading them and sentimental tears drop from my eyes as I follow the boy chasing the rainbow or the youth of the other boys who followed the rainbow music. The law also is a rainbow, but to older eyes, and you have made

88. For example, noted New York lawyer (and later Congressman) Frederic R. Coudert wrote to Holmes: "The result in such cases as that of Madam Schwimmer inclines one to pessimism . . . , but utterances such as your dissent in that case may save liberalism from becoming completely obsolete, and ultra-nationalism and other forms of fanatical conformity from becoming wholly dominant." Letter from Frederic R. Coudert to Oliver Wendell Holmes (June 20, 1929), *available at* https://iiif.lib.harvard.edu/manifests/view/drs:36699707$56.i.

89. Letter from Oliver Wendell Holmes to Harold J. Laski (Aug. 23, 1929), *in* 2 HOLMES-LASKI LETTERS, *supra* note 24, at 1177.

90. *Id.*

91. Letter from Rosika Schwimmer to Oliver Wendell Holmes 2 (Jan. 28, 1930), *available at* https://iiif.lib.harvard.edu/manifests/view/drs:37509894$7i.

92. Letter from Oliver Wendell Holmes to Rosika Schwimmer (Jan. 30, 1930), *available at* https://iiif.lib.harvard.edu/manifests/view/drs:43026636$2i.

93. *Id.*

94. *See, e.g.*, Letter from Mark DeWolfe Howe to Edith Wynner (Oct. 3, 1955), *available at* http://library.law.harvard.edu/suites/owh/index.php/item/43026636/8 (explaining that "Holmes made it his general practice to destroy his incoming mail" and therefore the only letters available were the two from Holmes and the three from Schwimmer, plus a telegram). *See also* Letter from Mark DeWolfe Howe to Edith Wynner (Oct. 11, 1955), *available at* http://library.law.harvard.edu/suites/owh/index.php/item/43026636/6 (refusing Wynner access to search for further letters). I have, myself, been able to locate no others.

me forget it.[95]

Many of Holmes's commentators and biographers have alluded to his detached, almost cold, personality. In Professor White's words: "[H]e gave so little of himself to the persons around him."[96] And, as Holmes explained in his letter to Schwimmer, he viewed cases as problems to be solved, without regard to the litigants whose lives would be dramatically impacted by his decision. But did this detached attitude hold true in Schwimmer's case? As noted, Mrs. Holmes died after the case was argued and while Holmes was contemplating whether to dissent. There is little doubt that the loss of his wife hit Holmes hard; she was the one remaining person in his life to whom he showed warmth and devotion. In a 1910 letter to Canon Patrick Sheehan he waxed lyrical: "[M]y wife has made my whole life a path of beauty. She . . . has devoted all her powers to surrounding me with enchantments."[97] After her death, Holmes made regular visits to her grave at Arlington National Cemetery, "[u]sually a single flower, a rose, a spray of honeysuckle or perhaps a glowing poppy . . . in his hand."[98]

Did Holmes's grief over the loss of his wife—a personal loss and a pointed reminder of his own mortality—soften him? Perhaps. But as his *Abrams* and *Gitlow* dissents reveal, he had already begun his tilt toward a free-speech-friendly mindset, one that found its final expression in his *Schwimmer* dissent.

One wonders whether among his reasons for writing the *Schwimmer* dissent might have been to send a ray of hope and solace to the immigrant he knew would be devastated when she learned that she was rejected by her chosen country. There are hints in Holmes's dissent that this may have been the case. He refers to her as "a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States."[99] He called her an "optimist" and "sincere" and referred to her testimony as making "a better argument for her admission than any that I can offer."[100] Perhaps he was sending Rosika Schwimmer a message: "Don't despair, Madam. I, the greatest legal thinker in the world, consider you worthy of being my fellow citizen!"

Again, perhaps. If so, then Justice Holmes had, indeed, traveled very far from the detached cynic that he prided himself on being for most of his long judicial career. It could be that, for a brief moment, he descended from Olympus.

95. Letter from Oliver Wendell Holmes to Rosika Schwimmer (Feb. 5, 1939), *available at* https://iiif.lib.harvard.edu/manifests/view/drs:43026636$4i.

96. WHITE, LAW AND THE INNER SELF, *supra* note 6, at 411. *See also* ALSCHULER, *supra* note 5, at 31–37 (gathering sources).

97. Letter from Oliver Wendell Holmes to Canon Patrick Sheehan (Aug. 14, 1910), *in* HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 59, at 32.

98. THE FUNDAMENTAL HOLMES, *supra* note 23, at 345 (quoting *The Poe Sisters*, WASH. POST, Jan. 27, 1935, at A12).

99. United States v. Schwimmer, 279 U.S. 644, 653 (Holmes, J., dissenting).

100. *Id.* at 654 (Holmes, J., dissenting).