Notre Dame Law Review

Volume 72 | Issue 5 Article 2

6-1-1999

Reading Holmes through the Lens of Schauer: The Abrams Dissent

Vincent Blasi

READING HOLMES THROUGH THE LENS OF SCHAUER: THE *ABRAMS* DISSENT

*Vincent Blasi**

Even the best scholars rarely persuade. Mostly, they illuminate. They make us more discerning readers and interlocutors.

Here I want to illustrate how Frederick Schauer's work on the law of free speech can help us to read what may be the single most influential judicial opinion ever written on that subject, Justice Holmes's famous dissent in *Abrams v. United States*.[1] So far as I am aware, Schauer has not produced anything like a line-by-line parsing of the Holmes opinion. I claim nevertheless that a reader familiar with Schauer's ideas is far better prepared on that account to understand what Holmes is saying and suggesting. That is no small benefit, moreover, for the *Abrams* dissent has been given so many schematic, tendentious readings over the years[2] that its actual argument is at risk of being lost in the shuffle, despite Holmes's celebrity and the opinion's canonical status.

I

To demonstrate how Schauer can help us read Holmes, I must indulge in a time-honored ritual of First Amendment devotees and quote in full the stirring final paragraph of the *Abrams* dissent:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as

* Corliss Lamont Professor of Civil Liberties, Columbia Law School.

1 250 U.S. 616, 624 (1919).

2 *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 29–50 (1965); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 23–28 (1993); David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986); Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061, 1070–83 (1993); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

> when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.[3]

Once the eloquence has been savored (and the false modesty noted), the reader wonders whether Holmes can possibly mean what he seems to be saying about "the best test of truth." Is he really so cynical, or fatalistic? Is he asserting a Chicago-school level of faith in markets combined with a willingness both to commodify truth and to ignore the various sources of market failure that operate in the flesh-and-blood society he is supposedly discussing? And even if Holmes wishes to embrace such a mundane conception of truth, how then does truth become "the only ground"[4] of social organization and aspiration? Furthermore, how does the author of the quip "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social

3 *Abrams*, 250 U.S. at 630–31.

4 *Id.* at 630.

Statics"[5] justify the position that the First Amendment enacts an extreme version of epistemological skepticism and/or moral relativism?

One possible response is to read Holmes as neither a borderline cynic nor a model-building neoclassical economist but rather a pragmatist impressed by how free speech can foster a culture of productive adaptation.[6] In this view, the reference to "the market"[7]—observe that Holmes never employs the phrase "marketplace of ideas"—is not meant to evoke anything so elegant and implausible as a fair procedure for determining society's finely calibrated, self-correcting cognitive equilibrium. Rather, the claim is simply that the human understanding is eternally fluctuating and incomplete, and constantly in need of inquisitive energy much the way commercial prosperity depends on entrepreneurial energy. In addition, Holmes's allusion to Darwinian forces and his assertion that life is an experiment suggests his embrace of the scientific method, with the implication that the First Amendment represents a commitment by this society to test its truths continually and revise them regularly.

The skepticism and the economic logic can be tamed in this way, but the problem remains that the *Abrams* dissent reads too much like a personal philosophy of no conceivable constitutional pedigree. One searches for a reading of the opinion that is better grounded in the text, tradition, and philosophy of the Constitution. At this point, the work of Professor Schauer proves to be a most valuable resource.

In his fine book *Free Speech: A Philosophical Enquiry*, Schauer observes that we cannot justify a high level of protection for free speech simply by showing (if that can be done) that such a legal regime would significantly advance the search for truth (however defined). At least as crucial to the case for free speech is the proposition that the search for truth has an exceptionally high priority.[8] For any gain in knowledge might come at a cost to security, privacy, social harmony, personal dignity, and a host of other goods. Arguments for free speech that rely on claims about truth must be scrutinized as much, Schauer says, for what they say about this question of priority as for what they say about how speech improves understanding.[9]

---

5 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

6 What may well be the most important article ever written about Holmes's thought explores his complicated connections to the pragmatist philosophies of John Dewey, Charles Sanders Peirce, and William James, among others. *See* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

7 *Abrams*, 250 U.S. at 631.

8 *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 33 (1982).

9 *Id.* at 29.

By emphasizing the issue of priority, we can read the *Abrams* dissent in a new light. Notice that Holmes can be interpreted to be making a strong if cryptic claim about the priority of truth. After offering his "best test of truth," he asserts "that truth is the only ground upon which their wishes safely can be carried out," referring to the wishes of those who "have realized that time has upset many fighting faiths."[10] Truth (defined according to the test of the market) thus is a ground for carrying out wishes, and indeed the "only ground" upon which this can be done "safely."[11]

This sounds like an instrumental justification for the priority of truth: truth (or knowledge, or enhanced understanding, or a "preferable epistemic state" as Schauer puts it[12]) is not so much an end in itself as a means to some different end. Or at least the *priority* of truth, which may be considered both an end in itself and a means to something else, derives from its instrumental function. Earlier in the same sentence, moreover, Holmes specifies what end he thinks truth is instrumental to: "the ultimate good desired."[13] We might be tempted to think this noncommittal phrase says nothing at all, but the reference to desires, combined with Holmes's later invocation of "wishes,"[14] suggests that he views truth, and thus speech that aids the search for truth, as instrumental to the satisfaction of a wide variety of wants. That Holmes is characteristically capacious and non-judgmental about the "ultimate good"[15] that establishes the priority of truth is an important feature of his argument. For if the value of truth is that it helps us to satisfy our desires, as various and conflicting as they may be, truth is performing a function that is, in essence, political.

One might dispute this last step by ascribing to Holmes a much more individualistic frame of reference. Thus, truth discovered by means of unfettered discussion might be instrumental to the satisfaction of desires but only at the level of personal judgment, not that of societal construction of norms and understandings. Collective well-being is not what he is concerned with, in this view. Hence it is foolish to search the *Abrams* opinion for any kind of implicit *political* theory, at least not one that claims for free speech a distinctive political function.

Such an attempt to turn Holmes into a libertarian is not consistent with his lifelong fascination with social forces and his visceral hos-

10 *Abrams*, 250 U.S. at 630
11 *Id.*
12 SCHAUER, *supra* note 8, at 18.
13 *Abrams*, 250 U.S. at 630.
14 *Id.*
15 *Id.*

tility to assertions of individual right. Holmes was not at all averse to the claims of collective authority. That is one reason why he rejected the libertarian logic of the majority in *Lochner v. New York*[16] and other liberty-of-contract cases of that era.[17] Moreover, his terminology of "power" and "competition" and "market" suggests the notion of a collective struggle toward collective outcomes.[18] Holmes may have valued speech partly for its capacity to facilitate individual life-planning or identity formation (more likely, in his case, existential engagement),[19] but his argument in *Abrams* cannot properly be read to reflect an individualistic emphasis.

An alternative, equally mistaken reading would portray Holmes not as a libertarian but as a "liberal" more concerned with process than consequences. Stanley Fish has offered such an interpretation of the *Abrams* dissent.[20] A modicum of textual support for this view might even be squeezed from the statement "that truth is the only ground upon which their wishes safely can be carried out" were it to be read with the stress on the word "that" rather than "truth."[21] The significance of the shift of emphasis is that the procedure of the market becomes itself a truth, perhaps not exactly an end in itself but something at least as important as the contingent understandings it produces. This reading invites us to reify the market, protect it against distortions, perfect it, treat its purest form as an ideal, not to serve any particular political objective but out of a blind faith in the efficacy of the cognitive and normative outcomes it will generate.

Why should we read Holmes to exalt process so? Why should we assume he is indifferent to political consequences? He was no reformer, to be sure, but he shared with the pragmatists of his day the view that law is best understood in instrumentalist terms.[22] In what is

16 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

17 *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). For an excellent brief analysis of how Holmes's rejection of liberty-of-contract claims fits with his respect for social forces and skepticism about rights, see G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 324–30 (1993).

18 *Abrams*, 250 U.S. at 630.

19 The existential side of Holmes is best expressed in his succinct article, *Natural Law*, which he published one year before he wrote the *Abrams* dissent. *See* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918). This essay richly rewards close reading by anyone who would interpret what Holmes says in *Abrams*.

20 *See* Fish, *supra* note 2, at 1076–77.

21 *Abrams*, 250 U.S. at 630.

22 *See* Grey, *supra* note 6, at 806–07 (discussing this affinity between Holmes and John Dewey). Richard Posner has noted Holmes's "pragmatic preference for analyzing law in terms of consequences rather than morally charged abstractions such as

probably the most important statement of his legal philosophy, *The Path of the Law*,[23] Holmes says:

> I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious.[24]

Holmes was nothing like a neutrality-seeking, procedural liberal. The *Abrams* opinion, as I read it, is much more about the substantive effects of political criticism and challenge than it is about process as a measure of fairness or justice or wisdom. Despite his Olympian image, Holmes actually built his argument for free speech around a concern for political consequences.

This conclusion gains support from a little-noticed but significant structural feature of the *Abrams* opinion. In the earlier Espionage Act cases, Holmes, ever the common-law judge, had reached his repressive results by arguing from concrete analogies. Surely the First Amendment does not prevent the government from punishing the false shout of fire in a theater, at least when a panicky stampede ensues.[25] So too the government must be able to regulate "words that may have all the effect of force," as when a labor leader gives a signal to boycott.[26] So too persuasion to murder can be made a crime.[27] In other words, there is some speech we simply have to be able to regulate, and thus "[t]he question in every case"[28] is whether as a matter "of proximity and degree"[29] the speech at issue is analogous to those standard instances of unprotected speech. The *Abrams* dissent proceeds from concrete analogies too, but from the opposite direction. There is some speech, Holmes suggests, that we simply have to have under the First Amendment. He offers the example of the patriot who challenges the government's war production priorities, thereby in effect

---

'right' and 'duty.'" *See* Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES ix, ix (Richard A. Posner ed., 1992).

23 Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897), *reprinted in* THE ESSENTIAL HOLMES 160, (Richard A. Posner ed., 1992).

24 *Id.*, *reprinted in* THE ESSENTIAL HOLMES 160, 168 (Richard A. Posner ed., 1992).

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

26 *Id.*

27 *See* Frohwerk v. United States, 249 U.S. 204, 206 (1919) (asserting that Hamilton and Madison never would have believed that "the counselling of a murder" is an instance of constitutionally protected speech).

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

29 *Id.*

urging curtailment in some spheres.[30] More generally Holmes says: "Congress certainly cannot forbid all effort to change the mind of the country."[31] In fact, Holmes here sounds very much like his young admirer and correspondent on the subject of free speech, Judge Learned Hand, who argued in his famous *Masses* opinion that governing majorities gain their very authority from the fact that they are exposed to continuing "hostile criticism."[32] Hand developed his approach to free speech from the premise that such hostile criticism must be protected even when it may cause significant harm to the war effort.[33] Holmes, I suggest, borrowed from Hand on this point.

The claim that Holmes's argument from truth rests on a vision of the political function of free speech is reinforced by his choice of a term in the *Abrams* dissent that would otherwise seem out of place. He says: "truth is the only ground upon which their wishes *safely* can be carried out."[34] Why the concern for safety? To what risk does he refer? I believe he is worried about the risk of desires being thwarted by wielders of power who claim to control others in the name of values other than truth, or in the name of some notion of truth measured by means other than the open competition of ideas. His injunction three sentences later that we be "eternally vigilant against attempts to check the expression of opinions"[35] employs the Madisonian rhetoric of political distrust.[36] Holmes is worried, it seems, about the exercise of authority. The credential of the market, in this reading, is that it is the most viable alternative to authoritative decree. The claim is modest but no less important for that.

Here again, Professor Schauer's work on the First Amendment helps us to appreciate how the argument from truth flows into the

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

31 *Id.* at 628.

32 *See* Masses Publ'g Co. v. Patten, 244 F. 535, 539–40 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). The Hand-Holmes correspondence regarding free speech is reproduced and discussed in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

33 For a more detailed explanation of Hand's approach see Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1 (1990).

34 *Abrams*, 250 U.S. at 630 (emphasis added).

35 *Id.*

36 *See, e.g.*, JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, && 2, 3, 15 (1785), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 3, 10, 15–16 (Marvin Meyers ed., 1973); JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1799–1800), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 299, 330, 337–44 (Marvin Meyers ed., 1973).

argument from democracy. In his book he warns against the tendency to keep the standard rationales for free expression hermetically compartmentalized, and he demonstrates specifically how the arguments from truth and the arguments from democracy intersect.[37] Human fallibility, for example, is a major reason why the search for understanding ought to be decentralized, continual, and a high priority. In few spheres is human fallibility so evident, and also potentially so consequential, as in the domain of governance. An appreciation of Schauer's work in this respect helps us to read Holmes in *Abrams* as making a claim about the political function of the search for truth, and particularly about the political dangers of not giving that search a very high priority.

It is important that this reading of Holmes not be mistaken for an argument from democracy akin to those offered by Alexander Meiklejohn a half-century ago and by some prominent scholars today, Owen Fiss and Cass Sunstein among them.[38] That is, one cannot find in the *Abrams* dissent support for the claim that free speech deserves priority because it facilitates public deliberation about the common good, on the model of the New England town meeting. Holmes liked to view politics as a battle of forces, not a disinterested quest for collective wisdom.[39] Meiklejohn correctly perceived this and savaged Holmes for it.[40] Nor is the Holmesian rationale for free speech built upon the premise that in a democracy the distribution of political influence should satisfy some sort of equality norm, or that government founded on the principle of consent must accord each of its citizens equal concern and respect.[41]

---

37 *See* SCHAUER, *supra* note 8, at 34, 39, 45–46.

38 *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 18 (1996); MEIKLEJOHN, *supra* note 2, at 24–28; SUNSTEIN, *supra* note 2, at 241–52.

39 [I]n the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action. All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. But whatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.

The Gas-Stoker's Strike, 7 AM. L. REV. 582, 583 (1873), *reprinted in* THE ESSENTIAL HOLMES 120, 120–23 (Richard A. Posner ed., 1992).

40 MEIKLEJOHN, *supra* note 2, at 60–70.

41 Regarding Holmes's disdain for equality as a political norm see WHITE, *supra* note 17, at 343, 391–92. He once labeled equal protection claims "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927) (Holmes, J.).

Some persons might question whether any argument for free speech from democracy can remain aloof from these notions of public deliberation and equal civic status, and thus might conclude either that Holmes cannot be making a democratic process argument or that he is willy-nilly complicit in the utopian turn of contemporary free speech theory. Professor Schauer, however, has shown how the project of controlling the exercise of power need not collapse into a quest for the just society, and how the argument for free speech is strongest when it steers clear of strong claims relating to collective rationality and broad-based participation.[42] The article I consider his most probing on the subject of free speech, *The Role of the People in First Amendment Theory*,[43] is notable for its patient and perceptive elaboration of the many different roles, not all of them deliberative or highly participatory, that "the people" can play in a government that purports to derive its legitimacy from the phenomenon of consent.

I contend that the *Abrams* dissent builds on a sophisticated conception of the role of "the people" in the system of government enacted by the Constitution. In that regard, Holmes's argument aspires to a constitutional pedigree that would be conspicuously lacking were his interpretation of the First Amendment to rest on nothing more than his own skeptical epistemology. Holmes explicitly claims such a pedigree when he says of the view that market-determined truth is the only ground on which to base governance: "That at any rate is the theory of our Constitution."[44]

To support this conclusion Holmes invokes not philosophic logic but constitutional experience. He argues that the most dramatic instance of the government asserting the power to define political truth, the Sedition Act of 1798, was utterly repudiated: "I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed."[45] The Madisonian connection can scarcely be missed, particularly in light of the fact that earlier that year Holmes had read an amicus brief filed in the *Debs* case by the noted civil liberties attorney Gilbert Roe which built its argument around Madison's great Virginia Report challenging the constitutionality of the Sedition Act.[46]

---

42 SCHAUER, *supra* note 8, at 43–44.

43 Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761 (1986).

44 *Abrams*, 250 U.S. at 630.

45 *Id.*

46 Brief of Gilbert E. Roe, As Amicus Curiae, Debs v. United States, 249 U.S. 211 (1918) (No. 714).

The tendency to downplay the political distrust aspect of the *Abrams* opinion might trace to something Holmes says just after he states what is "the theory of our Constitution."[47] He says of the Constitution: "It is an experiment, as all life is an experiment."[48] Any proposition that derives from such a sweeping claim about the nature of "all life" hardly seems a promising building block for a positivistic argument of constitutional pedigree. However, when we consider the position (more precisely, the mentality) that Holmes is challenging in his dissent, the assertion that the Constitution is "an experiment" becomes more pointed, and more pertinent to an argument from democratic premises.

Unlike its counterpart of the year before, the Espionage Act of 1918 was really a sedition act. By its explicit terms the law made it a crime to publish "disloyal" language or language intended to cause "disrepute" as regards the form of government of the United States or the Constitution or the flag or the uniform of the Army or Navy.[49] Two of the four counts on which the *Abrams* defendants were convicted charged violations of this provision.[50] The Supreme Court affirmed the convictions on the basis of the two other counts, for publishing language intended to encourage resistance to the United States and urging the curtailment of the production of ordnance and ammunition.[51] Even on those counts, Holmes concluded in light of the paltry evidence of harm and the severity of the sentences (twenty years for three of the defendants, fifteen years for the other) that the defendants had been punished "for the creed they avow."[52] One plausible explanation for why Holmes failed to exhibit the least sympathy for free speech claimants until the *Abrams* case is that only then did he perceive the prosecution to be in essence an effort to punish ideas as such—to punish, that is, not for the "substantive evil"[53] of material interference with the war effort, but for sedition.

The rationale for punishing sedition goes beyond the claim that a sovereign state must be able to protect itself against material dangers to its existence or efficacious functioning. The fundamental claim is that a sovereign state must be able to protect its good name and must be able to control those who would weaken the attachment or trust of its citizens by besmirching that name. What is at stake is general be-

47 *Abrams*, 250 U.S. at 630.
48 *Id.*
49 Espionage Act of 1918, ch. 75, 40 Stat. 553 (1918).
50 *Abrams*, 250 U.S. at 617.
51 *Id.* at 624.
52 *Id.* at 629.
53 *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

liefs, even when the state's interest in its citizens' beliefs is driven largely by instrumental concerns. Central to Holmes's view of the First Amendment, I submit, is the proposition that false or dangerous general beliefs about government can never constitute "*substantive* evils that Congress has a right to prevent."[54]

One general belief that will always arouse the interest of officials relates to the acceptable methods for bringing about political change. The anarchists and revolutionary socialists of the *Abrams* era were despised and reviled by many good patriots for their refusal to abide by the principle of peaceful change by means of the ballot.[55] These radicals preached change by other, extra-constitutional, sometimes violent means. How then could they invoke the Constitution of the United States as a shield for their advocacy of its destruction?

In this view, the Constitution is the charter that establishes the rules of political change.[56] It does not preclude change but rather provides for it. The Constitution, so understood, is not a repository of permanent principles of governance—with the single exception that it represents a permanent commitment to the principle that its principles be changed only by peaceful, prescribed methods. Any political philosophy that denies this one procedural truth cannot be a part of the "freedom of speech" marked off by the Constitution for extraordinary protection, so the argument goes.

Holmes will have none of this. He refuses to view the Constitution as freezing in place a particular philosophy of political change. The Constitution, in his view, is not a repository even of this one fundamental principle. Rather, it is "an experiment, as all life is an experiment."[57] It is a "fighting faith,"[58] one he himself had been wounded three times fighting for, but one nevertheless in need of being tested continually by a variety of means, not excluding the critical scrutiny and revolutionary rhetoric of those who would practice sedition.

Constitution worship was in vogue when Holmes wrote the *Abrams* dissent,[59] and one can imagine his glee when it occurred to him to call this idol an "experiment,"[60] certain (he implies) eventually

54 *Id.* (emphasis added).

55 *See* RICHARD POLENBERG, FIGHTING FAITHS: THE *Abrams* Case, the Supreme Court, and Free Speech 29, 31–32, 100–102, 159 (1987).

56 For an account of this position, held by Woodrow Wilson among many others, see ELDON J. EISENACH, THE LOST PROMISE OF PROGRESSIVISM 126 (1994).

57 *Abrams*, 250 U.S. at 630.

58 *Id.*

59 *See* EISENACH, *supra* note 56.

60 *Abrams*, 250 U.S. at 630.

to be proved inefficacious and abandoned. Interestingly, a far more sober-minded, temperamentally less provocative constitutional theorist preceded Holmes in refusing to treat preservation of the existing constitution as the fundamental principle of sovereignty. In his Virginia Report, Madison points out that had it been exercised during the 1780s, the power to punish for sedition might have left the United States "languishing" under the "infirmities" of an inadequate constitutional regime, the Articles of Confederation.[61]

Placing at the center of the argument the reference to the historical repudiation of the Sedition Act helps to reconcile the *Abrams* dissent with Holmes's Darwinian respect for dominant forces, including legislative majorities.[62] What Alexander Bickel would later call the counter-majoritarian difficulty of judicial review[63] was surely a factor in Holmes's earlier refusal to invalidate convictions of prominent socialists under the Espionage Act of 1917 for routine expressions of war criticism.[64] Professor Schauer has demonstrated that the counter-majoritarian difficulty presents a serious challenge to anyone who would justify free speech in the name of democracy because the majoritarian preference may be to have less speech.[65] Anticipating an argument later developed suggestively by Schauer in response to this challenge,[66] Holmes finds a way in *Abrams* to invalidate the regulatory preference of the congressional majority that passed the 1918 sedition law. He does this so as to respect and empower a different and more fundamental "majority," the perpetually nascent forces of political displacement. Recognition that in the last analysis sovereignty resides with those forces "is the theory of our Constitution."[67]

II

The Schauer oeuvre can help us to understand not only the constitutional premises of the *Abrams* dissent but also the limits that Holmes articulates. In a passage too often ignored, Holmes specifies that "I am speaking only of expressions of opinion and exhortations, which were all that were uttered here."[68] Nothing he says in *Abrams*,

61 *See* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 333 (Marvin Meyers ed., 1973).

62 *See supra* note 39.

63 *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962).

64 *See* Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

65 *See* SCHAUER, *supra* note 8, at 40–41; Schauer, *supra* note 43, at 778–85.

66 *See* Schauer, *supra* note 43, at 785–87.

67 *Abrams*, 250 U.S. at 630.

68 *Id.* at 631.

by his own injunction, applies to regulations of speech predicated on misstatements of verifiable fact, such as the standard action for defamation. Likewise, disclosures of sensitive information remain outside the ambit of Holmes's argument for free speech, however much such disclosures might contribute to public debate or the checking of government power. The graphic depictions of pornographers, even the soft-core variety, also appear not to be the type of speech that Holmes insists must be tested in the competition of the market.

Schauer has observed that arguments for free speech from truth tend to be fatally overbroad. The value of truth, the priority it deserves, indeed the very meaning of the concept and the best procedure for ascertaining it, varies radically depending on whether we are considering propositions of morality, logic, political efficacy, theology, empirical fact, or beauty, to name only a few categories. The desirability of the market test for truth depends to a great extent, says Schauer, on the reliability of alternative means of verification and (perhaps even more important) falsification.[69] Schauer goes on to conclude that what he calls the "survival" or "consensus" theory of truth—by which he means the Holmesian claim that whatever is produced by the process of unregulated discussion (i.e., the competition of the market) is for that reason alone "true"—is defensible, if at all, only in the realm of political and moral opinion. Schauer disputes the validity of the market test of truth in other domains, including the empirical.[70] So too, it turns out, might Holmes.

The *Abrams* opinion not only seeks to protect a limited range of speech, but also seeks to protect that speech against only one type of regulation. Holmes states explicitly that the highly protective clear-and-imminent-danger standard he embraces should apply only "where private rights are not concerned."[71] Holmes in *Abrams* is erecting a bulwark against governmental suppression of speech in the name of public order, national security, political identity, and the like—concerns sounding in sedition, one might say. Wholly different, he implies, is the appropriate First Amendment standard when speech is regulated in order to protect or compensate specific persons.

We can read Holmes here as offering an embryonic version of an argument developed recently by Professor Schauer. The First Amendment analysis of private civil damage actions for harms caused by speech must be "uncoupled," Schauer contends, from the doctrinal tradition developed in disputes over criminal sanctions and civil disa-

69 *See* SCHAUER, *supra* note 8, at 24–25, 30–33.

70 *Id.* at 31–33.

71 *Abrams*, 250 U.S. at 628.

bilities designed to protect governmental interests.[72] The costs and benefits of speech and the risks of regulation are sufficiently distinct in these different categories of cases that wisdom does not lie in lumping them together.[73] Neither Schauer nor Holmes doubts the need for a highly protective constitutional standard limiting the power of government to regulate speech. Both, however, seek to confine the range of free speech disputes that is subject to such a demanding standard.

Schauer's "uncoupling" thesis derives from his comprehensive exploration of the nature of rules.[74] That exploration has yielded a perspective on the formulation of First Amendment doctrine that might go far to answer the hardest question one can ask about the *Abrams* dissent: How, if at all, does Holmes's philosophy of free speech as articulated in his memorable musings about truth, competition, the market, experimentation, and sedition justify the operational legal standard of clear and imminent danger? Specifically, why should Holmes care so much about the temporal dimension, the time frame within which a particular utterance causes harm? Why not the probability of harm, whatever the time frame? Or the magnitude of the harm? Or the balance between the harms and benefits generated by the speech in question?

According to Schauer, if we ask of a rule such as clear and imminent danger that it decide each case to which it is applied just the way the formulator of the rule would have preferred the case to be decided under an ad hoc procedure, we miss the whole point of a rule.[75] As a matter of ad hoc assessment, there is little to be said for tolerating speech that is highly likely to cause harm in the indefinite future. Consider a speaker today who tells a television audience that doctors who perform abortions are murderers and that killing such a doctor would be a morally justifiable act that would result in a net saving of lives. I take it that Holmes's emphasis on imminence would result in protecting such speech under the First Amendment, but is that the result that ought to follow from his general discussion in *Abrams* of the reasons for free speech?

Many students of Holmes would say "yes," on the ground that the anti-abortion moralist can be refuted in the marketplace of ideas if only there is time to do so before the speech leads to action. Indeed,

72 *See* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

73 *Id.*

74 *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE (1991).

75 *See* Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 9, 9–14 (1989).

Holmes can be read to support this interpretation when he urges toleration except in "the emergency that makes it immediately dangerous to leave the correction of evil counsels to time."[76]

The problem with this rationale for the imminence test is that it is based on a very crude generalization, and Holmes is best known as a legal thinker for his cautious and sophisticated approach to the technique of generalization.[77] The sufficiency of counter-speech "depends upon the circumstances,"[78] and those circumstances include many more variables than simply the time available for refutation. For example, those who would refute the televised assertion that the murder of an abortion doctor can be morally justified would have no idea to whom they ought to direct their counter-speech. Few opponents of abortion would be influenced by such an extreme argument, but which few? Even if we ignore, as Holmes never did, the great degree to which our beliefs are determined by our social positions, adventitious experiences, and psychological needs—even if we assume, as Holmes never did, listeners who respond only to rational arguments—the efficacy of refutation still turns on whether the counter-message comes to the attention of all the persons who were swayed by the original idea. The competitive market in ideas—remember Holmes never called it a market*place*—functions nothing like the New York Stock Exchange, and to appreciate why that is so one could hardly do better than to consult Holmes's many observations on the nature of belief formation.[79] Perhaps that is why he says we should leave the correc-

76 *Abrams*, 250 U.S. at 630.

77 "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). For a nuanced discussion of Holmes on formalism, generalization, and pragmatism see Grey, *supra* note 6, at 816–26.

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

79 Representative is his paragraph on the subject in the essay *Natural Law*:

> Certitude is not the test of certainty. We have been cock-sure of many things that were not so. If I may quote myself again, property, friendship, and truth have a common root in time. One can not be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one's life. What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism. Not that one's belief or love does not remain. Not that we would not fight and die for it if important—we all, whether we know it or not, are fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief. Deep-

tion of evil counsels not to "counter-argument" or "refutation" but to "time."[80]

A justification for the imminence test that is more persuasive than the time-for-refutation rationale is suggested by Professor Schauer's theory of the "Second-Best First Amendment."[81] To enjoy the various benefits of a rule we must settle for a pattern of outcomes that is less satisfying, in terms of our purest and most fundamental notions of value (including the value of free speech), than we would get if an ideal decision maker decided each case individually in terms of those values. The imminence test is a rule that produces such a less than satisfying pattern of outcomes. So, what are the benefits of the regime of rules in this particular area of law? Rules can foster predictability but Schauer questions whether disputes over free speech are such that predictability should count for a great deal.[82] Few putative speakers, it seems, depend on a high level of foresight concerning case outcomes in order to plan their endeavors. Schauer observes, however, that "rules serve other purposes as well, and one of those, the disabling of certain classes of decision makers from making certain kinds of decisions, does appear especially pertinent to thinking about freedom of speech as a rule."[83]

I suggest that the best reason to require a clear probability of imminent harm before a person can be convicted for expressing an

---

> seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as it appears, his grounds are just as good as ours.

Holmes, *supra* note 19, at 40–41.

See also Holmes's letter to Harold Laski of Jan. 11, 1929, *reproduced in* THE ESSENTIAL HOLMES 107 (Richard A. Posner ed., 1992).

> [W]hen I say that a thing is true I only mean that I can't help believing it—but I have no grounds for assuming that my can't helps are cosmic can't helps and some reasons for thinking otherwise. I therefore define the truth as the system of my intellectual limitations—there being a tacit reference to what I bet is or will be the prevailing can't help of the majority of that part of the world that I count. The ultimate, even humanly speaking, is a mystery.

Id.

80 *Abrams*, 250 U.S. at 630.

81 *See* Schauer, *supra* note 75. Before he undertook his ambitious study of the concept of rules, Schauer embraced the time-for-refutation rationale for the clear-and-imminent danger test. *See* SCHAUER, *supra* note 8, at 30. He may still hold to that view, but I think his recent work can help us to find a better explanation for the imminence requirement.

82 Schauer, *supra* note 75, at 14.

83 *Id.*

opinion is to disable regulators from using their authority to punish ideas as such, to persecute defendants for "the creed they avow."[84] As a matter of logic, of course, a regulatory rationale based on a prediction of non-imminent material harm need not entail any kind of hostility to the speaker's ideas as such, only to the anticipated consequences of those ideas. But, "[t]he life of the law has not been logic: it has been experience."[85] And experience tells us that the power to punish speech will be abused, as Holmes certainly believed it had been in *Abrams*, if all the prosecution must show is a plausible scenario of eventual harm. Absent a demanding causation rule such as an imminence test, a rule so demanding that it permits a reviewing court to declare an asserted causal connection downright implausible, de facto convictions for sedition are too likely to occur. That, I believe, is the relationship Holmes perceived between his artificially narrow danger test—strategically tightened on the occasion of *Abrams*—and his theoretical remarks tying the market test of truth to the historical rejection of the Sedition Act. Clear and imminent danger is a rule designed to function exactly the way Professor Schauer thinks a rule in the realm of the First Amendment ought to work.

III

The "marketplace of ideas" has come to stand for either a simplistic and complacent optimism about the pattern of beliefs that will result from a regime of non-regulation of speech, or a process ideal with which to condemn unequal patterns of communicative opportunity and ideological influence. Neither version of the metaphor captures much of what the First Amendment is about, and certainly not what Holmes was about. If only we could free ourselves from the spell of this overblown metaphor we would discover a Holmes whose views regarding free speech mesh rather well with the Madisonian underpinnings of the First Amendment. We would discover a Holmes who could second Schauer when he says: "Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense."[86]

---

84 Abrams v. United States, 250 U.S. 616, 629 (1919).

85 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (1963).

86 SCHAUER, *supra* note 8, at 86. With characteristic (indeed Holmesian) aversion to intellectual stasis, in his more recent work Schauer has explored whether we ought

Holmes and Schauer have much in common but that does not mean that Professor Schauer will find persuasive the interpretation of the *Abrams* dissent that I have developed with the help of his ideas. My guess is he will not; his passing references to Holmes's arguments regarding free speech are largely distancing.[87] To see one's work put to unauthorized use is, however, the lot of the best scholars. Good ideas take on lives of their own. No genuinely inquisitive person, and certainly not Fred Schauer, would want it any other way.

to distrust the way we use the concept of distrust. *See* Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653 (1991).

87 *See, e.g.*, SCHAUER, *supra* note 8, at 20; Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 705 (1991).