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Learned Hand and the Self-Government Theory of the First Amendment: *Masses Publishing Co. v. Patten*

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LEARNED HAND AND THE SELF-GOVERNMENT THEORY OF THE FIRST AMENDMENT: *MASSES PUBLISHING CO. V. PATTEN*

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I. INTRODUCTION

Sitting as a federal district judge in the case of *Masses Publishing Co. v. Patten*,[1] Learned Hand was called upon to interpret the Espionage Act of 1917[2] just six weeks after its passage. The Act was potentially the most speech-restrictive piece of federal legislation since the Alien and Sedition Acts of 1798. Judge Hand recognized this and ruled that the terms of the Act must be construed in light of the first amendment. He defined the limits of legally protected war criticism, and presumably of political advocacy generally, according to a test that makes the crucial consideration the content of the speaker's message. He ruled that speech is not a sufficient basis for legal sanctions so long as "one stops short of urging upon others that it is their duty or their interest to resist the law. . . ."[3] It is clear from his correspondence that Hand took pride in this test and in the reasoning that lay behind it, and hoped his approach would serve as a benchmark for interpretation of the first amendment.[4]

* Corliss Lamont Professor of Civil Liberties, Columbia Law School. This essay derives from the Coen Lecture, delivered by the author on March 16, 1989, at the University of Colorado School of Law. It is part of a larger work in progress on the landmark opinions of the first amendment tradition. The author would like to thank Gerald Gunther, whose scholarship made this essay possible.

1. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

2. Espionage Act, ch. 30, 40 Stat. 217 (1917) (codified in scattered sections of 18, 22 and 50 U.S.C.).

3. 244 F. at 540.

4. The Hand correspondence relating to the *Masses* case is reprinted and discussed in Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27

He was sorely disappointed. His judgment in the *Masses* case, holding that war criticism that stopped short of explicit counseling of law violation could not be banished from the mails, was quickly overruled by the Second Circuit.[5] His eloquent and carefully reasoned opinion in *Masses* did not elicit much attention or admiration from academic commentators.[6] Especially disconcerting to Hand was his failure to persuade Justice Oliver Wendell Holmes, the judge he probably admired most.[7]

In March of 1919, almost two years after Hand wrote his opinion in *Masses*, the Supreme Court decided three cases testing the power of the federal government to prosecute war protestors under the Espionage Act of 1917.[8] By then Holmes had read the *Masses* opinion and Hand had pressed his view of the first amendment on Holmes in personal conversation and private correspondence.[9] But Holmes did not adopt the test proposed by Hand for defining the limits of protected advocacy. Instead, Holmes developed his famous clear-and-present-danger test, which makes constitutional protection turn on the predicted consequences of the speech rather than the meaning of the speaker's words.

Holmes applied the test permissively at first, writing the majority opinions that upheld convictions of various socialists for antiwar essays and speeches that did not counsel specific illegal acts but did express contempt for war proponents and profiteers and admiration for war critics and draft resisters.[10] Eight months later, in *Abrams v. United States*,[11] Holmes applied the clear-and-present-danger test more strictly—too strictly for the majority of his brethren. He dissented from a ruling that the first amendment permitted the conviction of five obscure radicals, four anarchists and a socialist, for urging

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STAN. L. REV. 719 (1975). Speaking of his *Masses* decision, Hand confided to New York lawyer Charles Burlingham: "I never was better satisfied with any piece of work I did in my life." *Id.* at 731.

5. 246 F. 24 (2d Cir. 1917).

6. In 1920 Hand remarked to Professor Zechariah Chafee that the *Masses* opinion "seemed to meet with practically no professional approval whatever." Gunther, *supra* note 4, at 768. Among the major articles of the period that approved severe restrictions on the speech of war protestors are Carroll, *Freedom of Speech and of the Press in Wartime: The Espionage Act*, 17 MICH. L. REV. 621, 652 (1919); Hall, *Free Speech in Wartime*, 21 COLUM. L. REV. 526, 529 (1921); and Vance, *Freedom of Speech and of the Press*, 2 MINN. L. REV. 239 (1918). Carroll and Hall mentioned Judge Hand's *Masses* decision in passing, but clearly disagreed with it and made no effort to refute its reasoning. Vance ignored the decision completely. A notable exception to the scholarly disregard for Hand's view of free speech is Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 960-64 (1919).

7. *See* Gunther, *supra* note 4, at 733, 736.

8. Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

9. *See* Gunther, *supra* note 4, at 732-35, 755-58.

10. *See* cases cited *supra* note 8.

11. 250 U.S. 616 (1919).

munitions workers to strike in protest of the intervention of the United States in the Russian Civil War.

The *Abrams* opinion surely represented a shift in Holmes's understanding of the first amendment, his disclaimers notwithstanding.[12] But it was not a shift in the direction of the test Judge Hand had proposed in *Masses*. For even in *Abrams*, Holmes's focus was on the predicted consequences of the speech, not its content. The telling consideration in the case for him was the probable ineffectuality of the defendants' speech due to their lack of stature, lack of eloquence, and almost pathetic means of communication—throwing leaflets from rooftops.[13] His reasoning left open the possibility that a charismatic speaker who did not tell her listeners it was their duty or in their interest to violate the law might still be subject to punishment because of the imminent danger created by her speech.

In the years following *Abrams*, Hand continued to advocate a content-based test in private correspondence with both Holmes and Zechariah Chafee, the foremost academic proponent of the clear-and-present-danger test.[14] Chafee conceded the advantages of the *Masses* test and reported that the renowned constitutional scholar Thomas Reed Powell preferred Hand's approach. But Chafee defended his embrace of the clear-and-present-danger standard on pragmatic grounds: the Supreme Court had adopted a test based on consequences, and Holmes had shown that such a test, tightly construed, could yield speech-protective results. Chafee appeared to counsel Hand against too much internecine disputation among the defenders of free speech: "We ought to take the best test we can find even though it will sometimes break down. . . ."[15] Chafee's position gained added support in 1927 when Justice Brandeis defended and refined the clear-and-present-danger test in his memorable opinion in *Whitney v. California*.[16] Hand's distinctive understanding of the freedom of speech seemed destined for oblivion.

By one measure, that prognosis has proved correct. Since 1919

12. In his *Abrams* dissent Holmes stated: "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." On the question whether Holmes altered his understanding of the first amendment during the eight-month interval between *Debs* and *Abrams* see Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97 (1982); Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1311-17 (1983); Rogat & O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1383-89 (1984).

13. Holmes described the speech at issue as "the surreptitious publishing of a silly leaflet by an unknown man. . . ." 250 U.S. at 628.

14. *See* Gunther, *supra* note 4, at 743-50, 760-73.

15. *Id.* at 773.

16. 274 U.S. 357, 373 (1927).

Judge Hand's *Masses* opinion has been cited in judicial opinions only a handful of times.[17] No court has ever adopted his test. The Supreme Court's prevailing doctrine regarding subversive advocacy, formulated in *Brandenburg v. Ohio* in 1969, retains the traditional emphasis on predicted consequences combined with an additional requirement that apparently turns on the intent of the speaker:

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[18]

Academicians continue to study the *Masses* opinion and continue to debate the merits of its direct-advocacy test,[19] but courts have shown no inclination to accept Judge Hand's view that political advocacy can be regulated only on the basis of the meaning conveyed by the speaker's words, not the risks generated or the intentions revealed by those words.[20]

While it may be fruitful to inquire whether a content-based test is superior to one based on consequences, I believe the lasting significance of Judge Hand's opinion in *Masses* does not lie in the particular test he proposed for demarcating the limits of political advocacy. The

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17. On only three occasions has a Supreme Court Justice cited the *Masses* decision. *See* Whitney v. California, 274 U.S. 357, 376 n.3 (1927) (Brandeis, J., concurring); Musser v. Utah, 333 U.S. 95, 102 n.6 (1948) (Rutledge, J., dissenting); Dennis v. United States, 341 U.S. 494, 571 (1951) (Jackson, J., concurring). Only four lower court judges have cited Judge Hand's opinion. *See* United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978); United States v. Jeffries, 45 F.R.D. 110, 116 (D.D.C. 1968); Jones v. City of Key West, 679 F. Supp. 1547, 1557 (S.D. Fla. 1988); United States v. May, 555 F. Supp. 1008, 1010 n.10 (E.D. Mich. 1983).

18. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

19. *See, e.g.*, E. BARRETT, W. COHEN & J. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1211-12 (8th ed. 1989); K. GREENAWALT, SPEECH, CRIME & THE USES OF LANGUAGE 193-94 (1989); G. GUNTHER, CONSTITUTIONAL LAW 1000-01 (11th ed. 1985); H. KALVEN, A WORTHY TRADITION 125-30 (1988); G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, CONSTITUTIONAL LAW 945-46 (1986).

20. It has been argued that the test adopted in Brandenburg v. Ohio, 395 U.S. 444 (1969) (see *supra* text accompanying note 18), "combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage." Gunther, *supra* note 4, at 754. *See also* H. KALVEN, *supra* note 19, at 231-35. This argument depends on the claim that *Brandenburg*'s requirement that speech be "directed to inciting or producing imminent lawless action" should be interpreted to mean that the speaker must use words that are understood by her listeners to convey the message that it is in their interest or is their duty to violate the law. It seems more natural to read the term "directed to" as a requirement that the speaker have some level of intent to cause lawless action. Kent Greenawalt agrees that the *Brandenburg* formulation embodies an intent requirement but suggests a possible reading that would in addition make the speaker's choice of language significant: "To say that someone's words are directed toward producing a result implies that the purpose of the speaker is to produce that result and, perhaps more, that this purpose is evident in the words he uses." K. GREENAWALT, *supra* note 19, at 207. Even this much consideration of the content of the speech falls short of Judge Hand's direct advocacy standard.

opinion's most important contribution lies instead in the structure of reasoning Judge Hand employed to justify his direct-advocacy-of-crime test. Hand was the first judge to place heavy reliance on democratic theory in seeking to understand the meaning of the first amendment, the first judge to hold that speech integral to the democratic process must be protected even when it may cause substantial harm.[21] The premises Hand invoked and the reasoning process he employed to draw out implications from those premises have become the basic, though often unacknowledged, features of modern first amendment analysis. This structure of reasoning informs such landmark precedents of the first amendment tradition as *Near v. Minnesota*,[22] *Bridges v. California*,[23] *West Virginia State Board of Education v. Barnette*,[24] *Terminiello v. City of Chicago*,[25] *New York Times v. Sullivan*,[26] and *Cohen v. California*.[27] The great Holmes and Brandeis opinions that turned the clear-and-present-danger test into a meaningful constraint on the power to punish dissent likewise employed a logic very similar to, and almost surely derived from, that introduced by Judge Hand in his *Masses* opinion.[28] In this respect, the impact of Hand's approach to first amendment interpretation has been far more pervasive, and far more profound, than even his admirers have recognized.

II. THE *MASSES* OPINION

Masses Publishing Co. v. Patten[29] presented the question whether the Espionage Act of 1917 authorized the Postmaster of the City of New York to exclude from the mails the August issue of the revolutionary journal *The Masses*. Under the Act, postal authorities were granted the power to exclude false statements made with intent to interfere with military success and writings willfully causing insubordi-

21. Prior to Judge Hand's opinion in *Masses*, a few state judges had invoked principles of public accountability or fair competition in the electoral process in finding legislation violative of state constitutional provisions guaranteeing freedom of speech. *See*, State v. Pierce, 163 Wis. 615, 158 N.W. 696 (1916); State v. Scott, 86 N.J.L. 133, 90 A. 235 (1914); Frazee's Case, 63 Mich. 396, 30 N.W. 72 (1886). Hand's emphasis on democratic theory was an innovation so far as judicial reasoning is concerned but several important scholars of the pre-war period had argued that the freedom of speech should be viewed as an outgrowth of the freedom of democracy. T. COOLEY, CONSTITUTIONAL LIMITATIONS 596, 604 (7th ed. 1903); E. FREUND, THE POLICE POWER 509-13, 521 (1904); Schofield, *Freedom of the Press in the United States*, 9 AM. SOC. SOC'Y PAPERS AND PROCEEDINGS 67 (1914), *reprinted in* H. SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 510 (1921).

22. 283 U.S. 697 (1931).

23. 314 U.S. 252 (1941).

24. 319 U.S. 624 (1943).

25. 337 U.S. 1 (1949).

26. 376 U.S. 254 (1964).

27. 403 U.S. 15 (1971).

28. *See infra* text accompanying notes 79-106.

29. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

nation in the military or willfully obstructing the recruiting service.[30] The Postmaster found that four cartoons and four articles in the August issue of *The Masses* met this standard and declared the issue nonmailable. The editors of the magazine sued to enjoin enforcement of this decision. They denied that the cartoons and articles in question were designed to interfere with military success, cause insubordination or obstruct recruiting. They also claimed that if the Espionage Act were construed to prohibit such writings it would violate the first amendment.

The cartoons were described as follows by Judge Hand:

> The four cartoons are entitled respectively, "Liberty Bell," "Conscription," "Making the World Safe for Capitalism," "Congress and Big Business." The first is a picture of the Liberty Bell broken in fragments. The obvious implication, taking the cartoon in its context with the number as a whole, is that the origin, purposes, and conduct of the war have already destroyed the liberties of the country. It is a fair inference that the draft law is an especial instance of the violation of the liberty and fundamental rights of any free people.
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> The second cartoon shows a cannon to the mouth of which is bound a naked figure of a youth, to the wheel that of a woman, marked "Democracy," and upon the carriage that of a man, marked "Labor." On the ground kneels a draped woman marked "Motherhood" in a posture of desperation, while her infant lies on the ground. The import of this cartoon is obviously that conscription is the destruction of youth, democracy, and labor, and the desolation of the family. No one can dispute that it was intended to rouse detestation for the draft law.
>
> The third cartoon represents a Russian workman symbolizing the Workmen's and Soldiers' Council, seated at a table, studying a paper entitled, "Plan for a Genuine Democracy." At one side Senator Root furtively approaches the figure with a noose marked "Advice," apparently prepared to throw it over the head of the workman, while behind him stands Mr. Charles E. Russell, the Socialist member of the Russian Commission, in a posture of assent. On the other side a minatory figure of Japan appears through a door carrying a raised sword, marked "Threat," while behind him follows a conventional John Bull, stirring him up to action. The import again is unambiguous and undisputed. The Russian is being ensnared and bullied by the United States and its Allies into a continuance of the war for purposes prejudicial to true democracy.

30. The pertinent provisions of the Act are quoted in Judge Hand's opinion, Masses Publishing Co. v. Patten, 244 F. at 536.

> The fourth and last cartoon presents a collection of pursy magnates standing about a table on which lies a map, entitled "War Plans." At the door enters an apologetic person, hat in hand, diffidently standing at the threshold, while one of the magnates warns him to keep off. The legend at the bottom runs as follows: "Congress: 'Excuse me, gentlemen, where do I come in?' Big Business: 'Run along, now! We got through with you when you declared war for us.' " It is not necessary to expatiate upon the import of this cartoon.[31]

Two of the disputed magazine articles consisted of tributes, one in the form of a poem, to the anarchists Emma Goldman and Alexander Berkman, who had recently been convicted and imprisoned for conspiracy to obstruct the draft. Goldman and Berkman had advocated in their magazine *Mother Earth* that persons conscientiously opposed to the war should refuse to register. "Whatever you may think of the practicability of such a protest," said the article in *The Masses*, "you must, with their friends, pay tribute of admiration for their courage and devotion."[32]

The other articles that formed the basis for the exclusion order also focused on the issue of conscription. One criticized the press for its unfair treatment of draft resisters:

> How many of the American population are in accord with the American press when it speaks of the arrests of these men of genuine courage as a "round-up of slackers"? Are there none to whom this picture of the American republic adopting towards its citizens the attitude of a rider toward cattle is appalling? . . . Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of contempt in the daily press, and induce the American government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world.[33]

The fourth article urged American opponents of the draft to study the treatment accorded religious conscientious objectors in England, "so that they may be prepared for what is at least rather likely to happen to them."[34] As Judge Hand recounted, "the article continues, showing the hardships and maltreatment of a number of English conscientious objectors, partly from excerpts out of their letters, partly from reports of what they endured. These statements show much bru-

31. *Id.* at 536-37.
32. *Id.* at 544.
33. *Id.* at 543-44.
34. *Id.* at 544.

tality in the treatment of these persons."[35] The article expressed admiration for the English conscientious objectors and analogized their plight to that of Americans who objected to the war and the draft.

In addition to the objectionable cartoons and articles from the August issue, the government attached to its pleadings copies of the June and July issues of *The Masses*, which had already been circulated via the mails. These issues contained, in Hand's characterization, "inflammatory articles upon the war and conscription in revolutionary vein, some of which go to the extent of counseling those subject to conscription to resist."[36]

Hand made short shrift of the government's claim that the cartoons and articles could be characterized as false statements made with intent to interfere with military success. He ruled that that section of the Espionage Act was violated only by "a statement of fact which the utterer knows to be false."[37] The disputed cartoons and articles, in contrast, "are all within the range of opinion and of criticism; they are all certainly believed to be true by the utterer."[38] Judge Hand concluded that statements of opinion such as these, honestly put forward, were not simply outside the literal terms of the Espionage Act but also enjoy a special status in a democratic system of government. He observed that the writings in question "fall within the scope of that right to criticise either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority."[39]

Next, he held that the cartoons and articles did not violate the statutory provision prohibiting willfully causing insubordination in the military. In so concluding, Hand felt constrained once again by the need to preserve the "right to criticise." He accepted the contention of the government that the cartoons and articles in the August issue of *The Masses* might well arouse discontent and disaffection among people with the prosecution of the war and with the draft. He conceded that such disaffection could lead to "a mutinous and insubordinate temper among the troops."[40] He spelled out the government's scenario of harm: "[M]en who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by a tyrannous disregard for the will of those who must

35. *Id.* at 537.
36. *Id.*
37. *Id.* at 539.
38. *Id.*
39. *Id.*
40. *Id.*

suffer and die, will be more prone to insubordination than those who have faith in the cause and acquiesce in the means."[41] Yet he concluded that the statutory prohibition on willfully causing insubordination should not be read to encompass that scenario of harm:

> [T]o interpret the word "cause" so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument. It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper.[42]

Having derived from democratic theory a rationale for protecting "hostile criticism" of the war effort, Hand next proceeded to derive from democratic theory a limit on the right of free expression:

> [T]here has always been a recognized limit to such expressions, incident indeed to the existence of any compulsive power of the state itself. One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.[43]

He then elaborated his limiting test, again drawing on his understanding of democratic theory:

> To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart, the definition is exhaustive, I think, and I shall use it. . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal.[44]

Hand fully recognized that the test he had devised would protect some instances of political advocacy that might very well lead to violence. He considered that consequence a price that had to be paid if democratic principles were to be realized:

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41. *Id.*
42. *Id.* at 539-40.
43. *Id.* at 540.
44. *Id.*

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom. . . .[45]

He ruled that the various criticisms of the war and the draft contained in the August issue of *The Masses* did not amount to direct incitement to insubordination in the armed forces and thus could not be suppressed because of their feared impact on troop morale and discipline.

The third statutory ground for excluding the August issue of *The Masses* from the mails was based on the government's claim that the offending cartoons and articles constituted a willful obstruction of the recruiting and enlistment service. Hand rejected the magazine's contention that words alone could never amount to an obstruction within the meaning of the Act. But he held that in light of the principle of freedom of speech the statute should be construed to prohibit only "the direct advocacy of resistance."[46]

Applying this standard, Hand concluded that none of the cartoons violated the Act:

> Certainly the nearest is that entitled "Conscription," and the most that can be said of that is that it may breed such animosity to the draft as will promote resistance and strengthen the determination of those disposed to be recalcitrant. There is no intimation that, however hateful the draft may be, one is in duty bound to resist it, certainly none that such resistance is to one's interest.[47]

Similarly, he ruled that the articles in praise of Emma Goldman, Alexander Berkman, and draft resisters generally did not cross the forbidden line:

> That such comments have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain. Literally at least they do not, and while, as I have said, the words are to be taken, not literally, but according to their full import, the literal meaning is the starting point for interpretation. One may admire and approve the course of a hero without feeling any duty to follow him. There is not the least im-

45. *Id.*
46. *Id.* at 541.
47. *Id.*

> plied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval. Now, there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation, I cannot see how the passages can be said to fall within the law.[48]

The government's final line of defense was its contention that the cartoons and articles in the August issue should be read to make covert reference to earlier issues of the magazine that contained more explicit counseling of draft resistance. Hand acknowledged that under his test the contents of earlier issues might be relevant to an assessment of what message actually was communicated to readers of the August issue. But he was not persuaded that even a reader aware of the earlier instances of direct advocacy of draft resistance would read the cartoons and articles of the August issue to contain such advocacy:

> [T]he plaintiff is still entitled to ask, whatever the results of its past utterance may be, that some words be pointed out which by some reference fairly inferable from the words themselves relate back to earlier and more explicit statements. I think there are no words in the four passages which admit of such an interpretation.[49]

Finding no instances of direct advocacy of law violation, Hand granted *The Masses* the injunction it sought prohibiting the government from excluding the August issue from the mails. In form, his decision was strictly an exercise in statutory construction. He stated that "no question arises touching the war powers of Congress."[50] There can be no doubt, however, that Hand believed that the test he had developed and the rationale he had produced captured the meaning of the first amendment.[51]

III. THE SELF-GOVERNMENT THEORY OF THE FIRST AMENDMENT

When Judge Hand wrote his opinion in the *Masses* case, the predominant, indeed virtually exclusive, practice among judges was to view the freedom of speech as a constitutional principle of individual liberty. The claim to speak was seen as comparable to other claims of individuals to order their lives and pursue their private desires. Judges recognized that the Constitution protects such liberties to a degree. But the proposition that dominated judicial reasoning was that indi-

48. *Id.* at 541-42.

49. *Id.* at 543.

50. *Id.* at 538.

51. Hand's correspondence with Professor Chafee makes this clear. *See* Gunther, *supra* note 4, at 765, 770.

vidual liberty must be limited by the legitimate claims of collective society. To deny this proposition is to embrace the philosophy of anarchism. It seems self-evident that the United States Constitution was not meant to establish anarchy in any of its forms. Thus, judges experienced little difficulty restricting speech in circumstances in which the speaker's words could plausibly be thought to lead to harm, either to other individuals or to the society as a whole. The measure of what harms could be considered in this calculus and how seriously they must be threatened in order to limit individual liberty was the same measure applied to disputes that pitted other liberties against other claims of individual or collective well-being. Speech was not thought to be special. Neither the value or social function of the liberty nor the nature of the harms it threatened were thought to call for special analysis.[52] The legal standard that embodied this perspective was known as the "bad tendency" test. Speech could be restricted when it might lead to bad consequences in the form of individual or social harms. The likelihood of such consequences need not be high. The time frame within which the speech might produce the consequences need not be short.[53]

The Hand opinion in *Masses* departed from this perspective. Hand did not view the freedom of speech as an individual liberty comparable to the liberty to enjoy privacy in one's home, the liberty to practice one's religion, or the liberty to make and enforce contracts. In fact, Hand did not view the freedom of speech as a personal liberty at all. Instead, he described the freedom of speech as a source of "hostile criticism" of government.[54] Hand derived his understanding of the freedom of speech not from a theory of individual rights or a tradition of respect for minorities. Rather, he derived his understanding from what he took to be the significance of free speech in providing the authority on which rests the government's very claim to power. In this respect, Judge Hand anticipated by some thirty-two years the theory of the first amendment developed by Alexander Meiklejohn.[55]

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52. *See, e.g.*, Fox v. Washington, 236 U.S. 273 (1915); Gompers v. Buck Stove & Range, 221 U.S. 418 (1911); Patterson v. Colorado, 205 U.S. 454 (1907); Turner v. Williams, 194 U.S. 279 (1904); Davis v. Beason, 133 U.S. 333 (1890); State v. Quinlen, 87 N.J.L. 333, 93 A. 1086 (1915); Commonwealth v. Karvonen, 219 Mass. 30, 106 N.E. 556 (1913); People v. Burman, 154 Mich. 150, 117 N.W. 589 (1908); People v. Most, 171 N.Y. 423, 64 N.E. 175 (1902); and People v. Most, 128 N.Y. 108, 27 N.E. 970 (1891).

53. For an informative discussion of the application of the bad tendency test prior to and during World War I see Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 533-49 (1981).

54. 244 F. at 540.

55. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1949), *reprinted in* A. MEIKLEJOHN, POLITICAL FREEDOM (1961).

One of the major implications of viewing the freedom of speech not as an individual right but as a source of governmental legitimacy is that the harm principle that limits individual liberties may not be applicable to disputes over the regulation of speech. Certain consequences that flow from some instances of speech simply must be endured by the society lest the claim of democratic legitimacy be forfeited. There is, in other words, some speech we must have even at what would normally be considered an exorbitant cost. Perhaps more important, the decision to view speech as a source of governmental legitimacy suggests that certain consequences we might otherwise regard as harms cannot be so regarded. One example alluded to by Hand in his *Masses* opinion is the creation of "a seditious temper."[56] No doubt it retards, even undermines, certain government projects when large segments of the populace come to view the incumbent administration with contempt or severe distrust. In many political societies this consequence can be considered a serious harm worthy of redress by the coercive power of the state. But if "hostile criticism" is an essential component of the process that legitimates government power, the creation of a seditious temper cannot be considered in itself a harm. The essential point here is that the political function of free speech informs the definition of harm, and may preclude defining harm simply in terms of what causes other individuals some measure of pain or unhappiness, either directly or by frustrating social projects that contribute to their well-being.

When speech is viewed not as an individual liberty but as a source of government authority, and when conventional measures of harm are no longer considered adequate to determine the limits of government regulatory power, first amendment analysis takes on a distinctive quality. New questions are asked. New answers are given. The reasoning process differs substantially from that which generated the bad tendency test. No longer is the central question whether the state has a rational basis for limiting the freedom of the individual. Nor is the question whether the state has a highly rational, or indeed even compelling, reason to regulate the individual. Instead, the question really becomes, who is "the state?"

Judges do not, of course, think in such abstract, conceptual terms. That is true even of judges so philosophically inclined as Learned Hand. Whatever terminology is used, however, the fact remains that the Hand opinion in *Masses Publishing Co. v. Patten* was based on the proposition that the first amendment must be interpreted in the light of the American nation's commitment to the ideal of self-

56. 244 F. at 540.

government. In this view, the limits of government authority to regulate speech derive from a theory of sovereignty that treats government officials, and even basic government institutions such as legislatures, as subordinate to the citizenry. As Mr. Meiklejohn put it, the first amendment is not about rights but powers, the powers that citizens need in order to govern themselves.[57] While self-government in its modern form depends on the use of agents—elected and appointed government officials—the ultimate authority remains in the true seat of government, the citizenry. Some powers that are essential to effective self-government cannot be delegated to agents. One such nondelegable power is the authority to decide what criticism of government practices and policies will be tolerated. Citizens must retain that power, not because it is a natural right or an essential attribute of individual liberty, but because the delegation of that power would so alter the relationship between the citizenry and its agents that the effective locus of sovereignty would be affected. No longer would the political community be self-governed in a meaningful sense.

In his classic essay, "Free Speech and Its Relation to Self-Government," Professor Meiklejohn emphasized the conceptual differences between his view of the first amendment and what he regarded as the traditional tendency to treat the freedom of speech as an individual right.[58] But Meiklejohn did not notice that Judge Hand's *Masses* opinion was based on the self-government theory.[59] Nor did Meiklejohn appreciate the extent to which variations of the self-government theory have been employed by judges at critical junctures in the development of modern first amendment doctrine. In particular, Meiklejohn did not realize how much the later first amendment opinions of Justice Holmes, whom he singled out for especially harsh criticism,[60] derived from the premise of self-government.

The self-government theory is based on a concept of sovereignty, not a particular vision of political justice. That is why such different first amendment doctrines as those developed by Hand, Holmes, and Meiklejohn can all be considered embodiments of the self-government theory. Judge Hand's opinion in *Masses* may have introduced the self-government theory, but the opinion does not represent either the most influential or the most satisfying application of the theory. One can accept the view that freedom of speech is an integral feature of demo-

57. A. MEILKEJOHN, *supra* note 55, at xv.

58. *Id.* at 36-38.

59. Meiklejohn acknowledged no debt to the *Masses* opinion but at the outset of his book he echoed Hand in describing the speech that is the principal concern of the first amendment as "hostile criticism." *Id.* at 10.

60. *Id.* at 39-48.

cratic legitimacy and still reject Hand's conclusion regarding how to define the category of speech that is "a part of that public opinion which is the final source of government in a democratic state."[61] Hand did not really explain why he believed that direct advocacy of law violation is under all circumstances not the kind of challenge that helps to legitimate government based on consent. Why, for example, is not the explicit advocacy of civil disobedience an example of speech that serves the legitimizing function? Why are the assertions of the lynch mob leader who stops short of telling his audience directly to violate the law within the category of speech that must be protected to preserve democratic legitimacy? Why indeed must the self-government theory yield a test that turns on the content of the speech rather than its consequences? In seeking to determine what speech is a constitutive element of democratic rule, the *Masses* opinion asked the right question. It may not have produced the correct answer.

Similarly, exponents of the self-government theory may reach rather different conclusions regarding what harms can serve as a justification for limiting the freedom of speech. It seems clear that the premise of self-government precludes one from counting as a harm any increased likelihood that incumbents will be rejected at the polls. Beyond that simple proposition, there is room for much debate concerning what consequences in a democratic society can serve as a justification for limiting speech. For example, how tangible must the harms be? Must the harms be felt by identifiable persons in some distinctive way? Must the harms be "serious?" What does the premise of self-government imply about the significance in first amendment adjudication of harms that relate to the quality of the public debate?[62] Acceptance of the self-government theory leads a judge to think about the question of harm in a special way. But a doctrine of harm informed by the commitment to self-government is likely to be no more determinate—indeed quite the reverse—than a doctrine of harm informed by utilitarian ethics or alternative methods of measuring social welfare or individual entitlements. Again, what is important about the *Masses* opinion is the question it asked, not the answer it gave.

Thus, Judge Hand's direct advocacy test is not one of the essential features of the self-government theory of the first amendment. There are, I believe, three such features, and they constitute the lasting legacy of the *Masses* opinion. First, in *Masses* Judge Hand treated the

61. 244 F. at 540.

62. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Mills v. Alabama, 384 U.S. 214 (1966); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); Buckley v. Valeo, 424 U.S. 1 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

freedom of speech as important because of its political function. Second, he concluded that certain categories of speech must not be regulated if the government is to retain its claim to legitimacy based on the consent of the governed. Third, he concluded that the commitment to democratic governance limits the kinds of consequences that can be considered harms capable of justifying the restriction of speech. One of these consequences that cannot be considered is the creation of a seditious temper among the populace.[63]

Since the *Masses* opinion was written no court has adopted Judge Hand's direct advocacy test. But almost every landmark Supreme Court opinion expanding the freedom of political advocacy has employed the self-government theory introduced by Judge Hand in his *Masses* opinion. The emergence of the self-government theory in Supreme Court opinions began with the legendary contributions of Justices Oliver Wendell Holmes and Louis Brandeis.

IV. HOLMES AND BRANDEIS

The free speech opinions of Justices Holmes and Brandeis have traditionally been compared to the Hand opinion in *Masses* to demonstrate a contrast rather than a connection.[64] And it is true that the operational standard urged by Holmes and Brandeis, the clear-and-present-danger test, requires a different kind of judgment, taking into account different facts, from the inquiry that is called for under the Hand direct advocacy test. Nevertheless, I believe the version of the clear-and-present-danger test employed by Justices Holmes and Brandeis in their later free speech opinions derives from the premise of self-government introduced by Judge Hand in the *Masses* opinion.

The clear-and-present-danger test began as a conventional standard designed to facilitate the application of the traditional harm principle as a limit on the individual right of free speech. The test was transformed by Justice Holmes in his majestic opinion in *Abrams v. United States*.[65] The transformation was accomplished by the abandonment of the conventional harm principle in favor of a method of reasoning informed by the premises of democratic government. In adopting the self-government theory, Justice Holmes produced a richer theory of democratic legitimacy than had Judge Hand in his *Masses* opinion. Justice Brandeis advanced the analysis further still when he employed the self-government theory in his opinion in

63. 244 F. at 540.

64. *See, e.g.*, the authorities cited *supra* note 19. *See also* Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).

65. 250 U.S. 616 (1919).

Whitney v. California.[66] In this regard, the connections between Judge Hand's view of the freedom of speech and that developed by Justices Brandeis and Holmes are more interesting and more important than the differences.

In *Schenck v. United States*,[67] *Frohwerk v. United States*,[68] and *Debs v. United States*,[69] the Supreme Court unanimously upheld criminal convictions of war protesters who did not advocate law violation in explicit terms. In none of the cases did the prosecution produce evidence that any material consequences followed from the writings or speeches of the defendants. Nor does it seem surprising, given the nature of the speeches and writings and the circumstances of their dissemination, that they had no apparent immediate effect. Writings and speeches of the sort involved in the three cases could be expected to have material consequences only by creating a general sense of disaffection with the war effort that might in time lead some persons to resist the war or the draft. In this scenario, the consequences would be speculative, delayed, and not readily traceable to the incremental impact of any particular statement.

Consequences of that sort were held by the Supreme Court to be sufficient to justify criminal sanctions against the speakers. Justice Holmes wrote the opinion of the Court in each of the three cases. In *Schenck* he introduced the phrase "clear and present danger," but gave no indication that he meant the phrase to embody a harm principle fundamentally different from that which informed the traditional "bad tendency" test. Holmes made no reference in *Schenck* to the value of free expression. He cited no examples of criticism that simply must be protected. To the contrary, all of his examples in *Schenck* were of instances of speech that demand regulation. His example of the man "falsely shouting fire in a theatre and causing a panic" was offered in this spirit.[70] In describing the harms that can support the regulation of speech, Holmes was deliberately and revealingly vague: "substantive evils that Congress has a right to prevent."[71]

To Holmes the important point in *Schenck* was that the danger presented by speech must be assessed on a case-by-case basis. "[T]he character of every act depends upon the circumstances in which it is done." "The question in every case is whether the words used are used in such circumstances and are of such a nature. . . ." "It is a

66. 274 U.S. 357 (1927).
67. 249 U.S. 47 (1919).
68. 249 U.S. 204 (1919).
69. 249 U.S. 211 (1919).
70. 249 U.S. at 52.
71. *Id.*

question of proximity and degree."[72] In fact, Holmes's emphasis on the particularistic nature of the assessment of danger confirms the claim that in *Schenck* he was defending a traditional rather than innovative conception of the harm principle. The government's contention in *Schenck* was that the war power serves as a restriction on the freedom of speech such that criticism of the war effort can be regulated on the basis of sovereign prerogative rather than nexus to particular harm. Holmes's answer was that harm must always be assessed case-by-case, but harm is to be measured according to circumstances, including the circumstance that the nation is at war. That he should employ a formulation borrowed from the law of inchoate crimes, and should cite in support of his conclusion the conspiracy case of *Goldman v. United States*,[73] only reinforces the view that the clear-and-present-danger test at its inception was based on a conventional harm principle.

In *Frohwerk v. United States* and *Debs v. United States* Holmes wrote majority opinions upholding the convictions of war protesters without even referring to the phrase "clear and present danger." Again, his emphasis was on the possible connection in the particular circumstances between the words of the speaker and the harm of resistance to the war or the draft. Again, the law of inchoate crimes served as the model for his analysis. In both cases he emphasized the intent that could be imputed to the speaker.[74] In *Debs* Holmes approved a test for measuring subversive advocacy that makes no reference to the imminence of the harm: he stated that the speaker could be convicted if "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service," so long as "the defendant had the specific intent to do so in his mind."[75] Similarly, in *Frohwerk* Holmes's formulation of the governing standard was consistent with a traditional view of the harm principle: he justified the conviction by noting that on the record of the case "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."[76]

The clear-and-present-danger test has come to be associated with a specialized, strict harm principle that protects speech by virtue of the demanding requirement that harmful consequences invoked to justify

72. *Id.*
73. 245 U.S. 474 (1918).
74. 249 U.S. at 209, 214-16.
75. *Id.* at 216.
76. *Id.* at 209.

the regulation of speech must be specific, tangible, and imminent. It is important to realize that in its original formulation the clear-and-present-danger test was not based on such a specialized harm principle but rather derived from Justice Holmes's effort to reaffirm the traditional harm principle in the face of the war power.

If speculative, delayed harms could serve as a justification for regulating speech under the clear-and-present-danger test, the Court's application of the standard eight months later in *Abrams v. United States*[77] cannot be considered either surprising or strained. The speakers in that case denounced the hypocrisy of the United States government in trumpeting the principle of national self-determination and then sending troops to oppose the Russian Revolution. The leaflets distributed by the defendants called explicitly for a general strike. Immigrant workers in munitions factories were urged to withhold their labor in order to frustrate the Russian intervention. The majority of the Supreme Court ruled that this speech bore a sufficient causal nexus to the predicted harm of a strike to justify the conclusion that the speech in question was not protected by the first amendment. Although the speakers in *Abrams* were not as well known as the speakers in *Schenck* and *Debs*—in fact, the pamphlets were distributed anonymously—the message at issue in *Abrams* was both more impassioned and more specific. The audience in *Abrams* was no less sympathetic to the speakers' point of view than were the audiences in *Schenck*, *Frohwerk*, and *Debs*. The majority's conclusion in *Abrams* that the speech was subject to regulation cannot be considered a weakening of the harm principle applied in the earlier cases.

Justice Holmes did not agree with the majority's application of the principles he had articulated in the earlier cases. He dissented from the majority's decision and used the occasion to propound the philosophy of freedom of speech for which he is so well known. This philosophy is different in a fundamental way from the philosophy that informed the earlier cases. *Schenck*, *Frohwerk*, and *Debs* did not treat speech as a special kind of liberty in a democracy. Those decisions did not rest on the assumption that the authority of the government is premised on the opportunity of its citizens to express "hostile criticism" of the government's actions and undertakings. Holmes's *Abrams* opinion, in contrast, was indeed based on the proposition that speech is special in the sense that only certain kinds of harms can justify its regulation. In these respects, the Holmes opinion in *Abrams* was based on the self-government theory of the first amendment.

The parallels between the theory employed by Judge Hand in his

77. 250 U.S. 616 (1919).

Masses opinion and that employed by Justice Holmes in *Abrams* are most apparent in that part of the *Abrams* opinion in which Holmes considered whether the defendants violated the statute under which they were prosecuted. That statute, the Espionage Act of 1918,[78] prohibited, among other things, the advocacy of curtailment of production "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." The majority found this intent requirement satisfied but Justice Holmes disagreed. He conceded that "the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue."[79] He admitted that under the normal meaning of intent, even as used to determine criminal liability, the defendants could be deemed to have intended to hinder the prosecution of the war with Germany even if their concern was not with that war but rather with the intervention of the United States in the Russian Civil War. But Holmes believed that a stricter definition of intent ought to be read into the Espionage Act of 1918: "[A] deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."[80] His reasons for preferring the stricter definition of intent echo the reasons offered by Judge Hand in *Masses* for construing the Espionage Act of 1917 to prohibit only explicit and direct advocacy of crime. Holmes stated:

> It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.[81]

In other words, an interpretation of the Act according to conventional principles of statutory interpretation would permit the punishment of speech that must be left free in a self-governing democracy.

In the next paragraph Holmes addressed the question whether the defendants, assuming they had violated the statute, were protected under the first amendment. He reaffirmed his belief that *Schenck*, *Frohwerk*, and *Debs* "were rightly decided."[82] But he stated the governing principle of first amendment interpretation somewhat differ-

78. 40 Stat. 533 (amending § 3 of the Espionage Act of 1917).
79. 250 U.S. at 626.
80. *Id.* at 627.
81. *Id.*
82. *Id.*

ently than he had stated it in those cases: "The United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."[83] In adding the words "imminent" and "forthwith" Holmes severely restricted the justifications available to the government for regulating speech. His choice of those terms cannot be considered casual. One paragraph later, he restated his proposed test as follows: "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[84] He then justified his requirement of a "present danger of immediate evil" with a characteristically terse yet powerful explanation: "Congress certainly cannot forbid all effort to change the mind of the country."[85] Just as the statutory definition of intent must be read narrowly in order to preserve the right to criticize government, so too the type of harm sufficient to justify the regulation of speech must be defined narrowly in order to preserve the right to criticize. Holmes continued to accept the claim that speech can be regulated when it bears a certain nexus to harm, but he defined that nexus strictly in the light of the needs of a democratic society.

In *Schenck*, *Frohwerk*, and *Debs* Holmes had drawn upon the law of inchoate crimes to justify the regulation of the speech at issue.[86] In *Abrams* he continued to invoke that analogy by specifying that an intent to bring about the present danger of immediate evil would justify the regulation of speech even in circumstances in which the speech, viewed objectively, would not be considered to present that danger.[87] His willingness to permit a speaker's intent to constitute a sufficient basis for regulating speech may seem to be a restrictive interpretation of the first amendment, arguably inconsistent with the commitment to self-government. The point is troubling, but it is important to notice that in *Abrams* Holmes asserted that the only kind of intent that would satisfy his constitutional principle was the narrow kind of intent—"the proximate motive of the specific act"—that he had read into the statutory intent requirement at issue in the case. Thus, only a speaker whose very aim in speaking was to produce an immediate evil would be subject to regulation under the intent prong of his newly

83. *Id.*

84. *Id.* at 628.

85. *Id.*

86. *See* Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1271-73 (1983).

87. 250 U.S. at 627-28.

formulated clear-and-present-danger test. The principle that the speaker's specific intent alone can justify the regulation of his speech may not be the most libertarian interpretation of the first amendment, but such a principle is not inconsistent with the proposition that a large measure of hostile criticism must be preserved in a democracy without regard to the harms that might flow from that criticism.

The Holmes opinion in *Abrams* is best known not for its tightening of the clear-and-present-danger test but rather for the philosophy of free speech it sketched. In what is probably the most frequently quoted paragraph in the entire corpus of judicial interpretation of the first amendment, Justice Holmes introduced his famous metaphor of the market:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is 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.[88]

Not only the imminence requirement but also Holmes's underlying marketplace rationale for the freedom of speech can be traced to the premise of self-government. This is not the conventional interpretation. The tendency has been to treat Holmes's statement, "the best test of truth is the power of thought to get itself accepted in the competition of the market," as an all-embracing epistemological proposition, not a claim grounded in democratic theory.[89] It is possible to find in the *Abrams* dissent an affirmation of the world view of neoclassical economic theory, and it is true that Holmes was an admirer of Adam Smith.[90] It is also possible to read the opinion as an effort to

88. *Id.* at 630.

89. *See* L. BOLLINGER, THE TOLERANT SOCIETY 160-63 (1986); A. MEIKLEJOHN, POLITICAL FREEDOM 73-74 (1961); Smith, *Scepticism, Tolerance and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 661, 665-69 (1987).

90. 1 HOLMES-LASKI LETTERS 409, 474 (M. Howe ed. 1953) (letters dated March 11, 1922, and Jan. 13, 1923).

interpret the first amendment in light of the Darwinian struggle for existence, and it is true that the theory of evolution was one of the formative intellectual influences on the young Oliver Wendell Holmes.[91] Still another body of thought that contributed to Holmes's understanding of the freedom of speech was the view of truth developed by the pragmatist philosophers, most notably Charles Sanders Peirce, and the philosophy of science that derives from that view of truth.[92] Holmes's emphasis on the tentative nature of all propositions and the evolutionary process by which beliefs are tested, modified, and eventually discarded almost certainly was a product of his lifelong interest in the scientific method.[93] But, in addition to the intellectual traditions associated with such thinkers as Smith, Darwin, and Peirce, the *Abrams* opinion builds, I would argue, upon a distinctly political theory that is much indebted to the work of another writer who had a major impact on Holmes, John Stuart Mill.[94]

Notice that Holmes's precise claim in *Abrams* was that the market "test of truth" and the proposition "that truth is the only ground upon which [the people's] wishes safely can be carried out" is "the theory of our Constitution."[95] The careful way in which he phrased the argument, combined with his observation that "time has upset many fighting faiths," suggests that Holmes saw the importance of free speech to lie in its capacity to prevent political stultification. In this view, government cannot be given the authority to regulate in the name of truth. Truth must be constructed by a decentralized process that is capable of responding to a changing world. Even the United States Constitution, widely viewed in Holmes's day much more than our own as an embodiment of enduring political wisdom, he described as "an experiment, as all life is an experiment."[96] Unlike his sometime mentor Mill, Holmes was no idealist, no visionary, no believer in progress. But like Mill, Holmes viewed the inability to adapt as one of the cardinal sins of a political society. Like Mill, Holmes considered the

91. *See* M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870, at 156, 238-39 (1957); M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882, at 44 (1963); P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 172-189 (1972); Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343 (1984); Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113 (1984).

92. *See* Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

93. *See* Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283 (1988).

94. *See* M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870, at 212-29 (1957).

95. 250 U.S. at 630.

96. *Id.*

freedom of speech a fundamental principle in a democratic society because of its contribution to the process of political evolution.

The extent to which Holmes based his justification for free speech on his acceptance of political change can be seen from his dissent six years after the *Abrams* decision in the case of *Gitlow v. New York*.[97] The defendant was convicted under a state statute that made it a crime to advocate revolution. The majority ruled that when a state makes a category of speech unlawful *per se*, and when the state's judgment regarding the dangerous tendency of that category of speech is reasonable, individual prosecutions for violation of the statute need not be measured on a case-by-case basis against a constitutional test of danger. Holmes dissented. He took issue especially with the majority's claim that revolutionary advocacy can be regulated because of its tendency over time to produce socially destructive consequences. So strong was Holmes's commitment to the process of political evolution that he was unwilling to concede that the government is entitled to regulate speech in order to preserve the electoral process itself: "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."[98] For Holmes, even the procedural "truth" of the electoral method of measuring political consent could only be considered an experiment subject to displacement.

The *Gitlow* dissent made clear what the *Abrams* dissent suggested: Holmes's requirement that speech threaten harm imminently in order to be subject to regulation was not based on the view that speech seldom has important long-term consequences. Rather, the imminence requirement derived from Holmes's belief that a government based on the consent of the governed must be open in the long run to change, even change of the most fundamental sort.

In this regard, Holmes's opinions in *Abrams* and *Gitlow* represent applications of the self-government theory of the first amendment. Holmes's understanding of democracy and the principle of consent was very different from Judge Hand's, but the two judges were united in the view that the freedom of speech cannot be defined with reference to conventional notions of individual liberty and harm. Despite their differences, both judges believed that the value of speech and the harms that can justify its regulation can only be determined by reference to democratic theory.

Justice Louis Brandeis joined the Holmes dissents in *Abrams* and

97. 268 U.S. 652 (1925).

98. *Id.* at 673.

Gitlow. In his concurring opinion in *Whitney v. California*[99] in 1927, Brandeis refined the clear-and-present-danger standard and offered a more detailed justification for the imminence requirement than had Holmes in any of his free speech opinions. In addition, in *Whitney* Brandeis presented a philosophical justification for the freedom of speech that has proved to be especially influential. Brandeis's understanding of the first amendment differed in some important respects from the views of both Hand and Holmes, but the *Whitney* opinion resembles the *Masses* and *Abrams* opinions in its reliance on democratic theory. In fact, the Brandeis concurrence in *Whitney* may well be the quintessential example of a judicial opinion based on the theory of self-government.

Anita Whitney was convicted of knowingly being a member of an organization that advocated criminal syndicalism. The majority of the Supreme Court upheld her conviction on the authority of the decision two years earlier in *Gitlow v. New York*. The general danger posed by her membership was considered sufficient to justify the restriction on her political activity. Brandeis concurred in the result on procedural grounds,[100] but took sharp issue with the majority's conclusion that a person can be convicted for membership in a political organization in the absence of a showing that the membership creates an imminent threat of serious injury to the state.

The theme of Brandeis's opinion is the need for a democratic society not to be unduly fearful in the face of challenge and change.[101] He believed that the impulse to regulate revolutionary speech reflects a fearful mentality that can prove to be the undoing of a democratic political community. Brandeis viewed the first amendment as an embodiment of the character ideal of civic courage:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.[102]

He argued that the risks that may be entailed in tolerating associational activities such as Ms. Whitney's are risks that have to be taken if the political community is to retain its vitality and its capacity to adapt:

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99. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

100. For a discussion of why Brandeis concurred in the Court's affirmance of the conviction despite his sharp disagreement with the majority's interpretation of the first amendment see H. KALVEN, *supra* note 19, at 164-65.

101. For an elaboration of this interpretation of the *Whitney* opinion see Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

102. 274 U.S. at 377.

> [Those who won our independence] recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[103]

Brandeis considered the freedom of speech not simply an individual liberty to be respected but also a force that makes an important contribution to the functioning of a dynamic society. He believed that the fear of novel, challenging ideas, and more broadly the fear of change, poses a major threat to self-government by retarding adaptation and progress. He saw free speech as an antidote to this threat: "It is the function of speech to free men from the bondage of irrational fears."[104] Like Judge Hand before him, Brandeis based his interpretation of the first amendment not on the perception that speech seldom leads to harm but rather on the judgment that speech critical of existing institutions is vital to the success of democratic governance.

Brandeis's style of reasoning in *Whitney* bears such a resemblance to that employed by Judge Hand in his *Masses* opinion that the link between the two opinions would be evident even in the absence of explicit citation. In the *Whitney* opinion, however, Brandeis acknowledged his debt to Hand. Echoing and citing a similar passage in the *Masses* opinion, Brandeis enumerated the various ways in which speech that serves a positive function in a democracy might contribute to the violation of law:

> Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.[105]

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103. *Id.* at 375.
104. *Id.* at 376.
105. *Id.*

This is not an argument that speech must be tolerated because it seldom leads to conventional harms. This is an argument based on the proposition that in a democracy political advocacy can be regulated only when it threatens to cause harm immediately. Moreover, that limitation on the conventional harm principle did not exhaust for Brandeis the implications of the commitment to self-government. Even with regard to imminent consequences, he added, "[t]he fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State."[106]

Like Holmes, Brandeis derived from the premises of democracy a legal standard—the refined, tightened clear-and-present-danger test—that differs significantly from the direct advocacy test championed by Judge Hand. That Holmes and Brandeis opted for the clear-and-present-danger test over Hand's preferred legal standard does not mean that Hand's effort to interpret the freedom of speech in the light of democratic theory had no impact on their thinking. The transformation of the danger test into a highly speech-protective doctrine occurred only after Holmes and Brandeis belatedly adopted the self-government theory of the first amendment in *Abrams*, *Gitlow*, and *Whitney*. The contribution of Hand's *Masses* opinion to the emergence of the modern liberal understanding of the freedom of speech was indirect but important.

V. THE SELF-GOVERNMENT THEORY IN THE MODERN ERA

During the 1930s, the approach to first amendment interpretation employed by Judge Hand and Justices Holmes and Brandeis won acceptance by a majority on the Supreme Court. Under the able leadership of Chief Justice Charles Evans Hughes, the Court ruled in favor of several speakers who had engaged in harsh criticism of government officials or had advocated sweeping political change.[107] A strong doctrine prohibiting prior restraints was recognized,[108] as was the principle that public spaces such as streets and parks must be available for first amendment activities.[109] Beginning with this period, and continuing to the present day, the three essential features of the self-government theory of the first amendment have informed the Supreme Court's opinions. First, speech is considered important not only as an

106. *Id.* at 378.

107. *See* Stromberg v. California, 283 U.S. 359 (1931); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937).

108. *See* Near v. Minnesota, 283 U.S. 697 (1931).

109. *See* Hague v. C.I.O., 307 U.S. 496 (1939).

individual liberty but for its political function. Second, first amendment analysis regularly proceeds on the assumption that certain categories of speech must be protected if government is to retain its claim to derive authority from the consent of the governed. Third, some consequences that ordinarily would be considered harms justifying the exercise of regulatory authority are considered insufficient to justify restrictions on the freedom of speech.

Many cases could be cited to illustrate how the self-government theory has shaped the development of modern first amendment doctrine. I shall discuss four such cases: *Bridges v. California*,[110] *Terminiello v. City of Chicago*,[111] *New York Times v. Sullivan*,[112] and *Cohen v. California*.[113] These cases come from different time periods in the history of modern first amendment adjudication and they raise different issues. Together, the cases illustrate the variety of ways in which the self-government theory has influenced modern first amendment doctrine.

In *Bridges v. California* the state court found a daily metropolitan newspaper with a wide circulation and a powerful labor leader guilty of contempt of court for publishing statements that were deemed to have a potentially intimidating effect on judges with cases pending before them. The newspaper had published three editorials on different occasions calling for heavy sentences for persons who had been convicted of crimes and were awaiting sentencing. The labor leader had arranged for the publication in a newspaper of a telegram he had sent to the Secretary of Labor threatening to tie up the port of Los Angeles if a court decision recognizing a rival union were enforced. In an opinion by Justice Hugo Black, the Supreme Court held that each of the contempt citations violated the first amendment. Justice Frankfurter entered a heated dissent, in which he was joined by three other Justices.

Frankfurter argued that a state's interest in protecting the integrity of the adjudicative process is of a special order. He cited the long history of the contempt power and the constitutional status of the goal of assuring fair trials. He asserted that freedom of speech and freedom of the press "themselves depend upon an untrammeled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations."[114] He argued, in

110. 314 U.S. 252 (1941).
111. 337 U.S. 1 (1949).
112. 376 U.S. 254 (1964).
113. 403 U.S. 15 (1971).
114. 314 U.S. at 284.

effect, that critical commentary directed to the judicial process presents a special case under the first amendment:

> A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market."[115]

Frankfurter also argued that the publications at issue amounted to threats, and could be regulated on that account even in the absence of a showing of particularized, imminent harm.[116]

Justice Black rejected these arguments in an opinion that repeatedly invoked the ideal of self-government. He disputed the view that commentary on pending litigation is an aberrant and unfortunate phenomenon. A ban on speech pertaining to pending litigation, he stated,

> is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.
>
> No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.[117]

Unlike Justice Frankfurter, Justice Black viewed the speech at issue as an integral part of the democratic process.

The importance of preserving speech that forms a part of that process also determined how Justice Black appraised the harm that can be caused by publications such as those at issue in the *Bridges* case. The state had argued that the contempt power was necessary to preserve respect for the judiciary. Black responded that this rationale cannot be countenanced in a system of self-government:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.[118]

Black drew on democratic theory in a similar fashion to reject the

115. *Id.* at 283.

116. *Id.* at 291-92.

117. *Id.* at 268-69.

118. *Id.* at 270.

state's argument that the contempt power is needed to preserve judicial impartiality:

> [W]e cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases.[119]

The state argued that one of the newspaper editorials was particularly likely to distort the sentencing decision of a judge up for reelection in the near future. Black refused to accept such a behavioral supposition:

> To regard [the editorial], therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor—which we cannot accept as a major premise.[120]

But why is it an unacceptable major premise that an elected judge can be influenced by the pointed editorial of a powerful metropolitan daily newspaper? Justice Black's answer seemed not to derive from an objective assessment of human nature so much as from a view regarding the importance in a self-governing democracy of hostile criticism of all government institutions, the judiciary not excepted.

Like *Bridges v. California*, the case of *Terminiello v. City of Chicago*[121] involved a type of speech that not everyone would consider valuable. Father Terminiello, a Catholic priest under suspension by his bishop, was invited by the Christian Veterans of America to give a speech on the subject of the communist menace. The auditorium in which he spoke was filled to capacity with over eight hundred persons; others were turned away. An angry crowd, estimated at fifteen hundred persons, formed outside the auditorium to protest the speech. The crowd obstructed passage into the auditorium, hurled epithets at those who tried to enter, and even tore off the coat of one woman as she tried to get in to hear Father Terminiello speak. During this melee bottles, stinkbombs, and brickbats were thrown at the building. Twenty-eight windows were broken. At times the crowd drowned out the voices of speakers in the auditorium and attempted to break into the building through the back door. Police officers assisted members of the audience seeking to enter or leave the auditorium. Ice picks and rocks were hurled at the police. Several members of the protesting crowd were arrested.

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119. *Id.* at 271.
120. *Id.* at 273.
121. 337 U.S. 1 (1949).

Terminiello delivered an impassioned, provocative speech. He referred to the crowd outside as "scum." He described how in Russia "from eight to fifteen million people were murdered in cold blood by their own countrymen" and told his audience "[t]hat is what they want for you, that howling mob outside."[122] Terminiello quoted from communist literature that spoke of "blood-soaked reality."[123] He made several anti-Semitic remarks.[124] His speech elicited cries from the crowd to the effect that Jews must be killed.

Terminiello was convicted of breach of the peace for the speech he gave. The trial judge charged the jury that "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[125] The Supreme Court of Illinois upheld Terminiello's conviction on the ground that his remarks constituted "fighting words,"[126] a category of speech held by the Supreme Court to be unprotected under the first amendment but previously limited to personal epithets delivered face to face.[127]

In an opinion by Justice Douglas, the Supreme Court ruled that the first amendment does not permit a person to be punished for giving a speech that stirs people to anger, invites public dispute, or brings about a condition of unrest. "A conviction resting on any of those grounds may not stand."[128] The Court did not reach the question whether on the particular facts of the case the defendant could have been convicted under a narrower standard of guilt. But the majority indicated that it would be loath to permit the presence of a hostile audience to serve as a justification for limiting the right of free speech. With only one exception, the Supreme Court has declined ever since to ascribe legal significance to harms that flow from audience hostility.[129]

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122. *Id.* at 17.

123. *Id.* at 18.

124. *Id.* at 20, 22.

125. *Id.* at 3.

126. City of Chicago v. Terminiello, 396 Ill. 41, 71 N.E.2d 2 (1947), *aff'd*, 400 Ill. 23, 79 N.E.2d 39 (1948).

127. The fighting words doctrine was introduced in dictum in Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940), and established in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The doctrine has been restricted by the Supreme Court to the context of face-to-face epithets. *See* Gooding v. Wilson, 405 U.S. 518 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Cohen v. California, 403 U.S. 15 (1971). *See also* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

128. 337 U.S. at 5.

129. The exception is Feiner v. New York, 340 U.S. 315 (1951). Cases in which the Supreme Court refused to allow audience hostility to justify the regulation of speech include Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); and Gregory v. City of Chicago, 394 U.S. 111 (1969). *See also* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

Justice Jackson, fresh from a stint as chief prosecutor at the Nuremberg trials, submitted an eloquent dissent in *Terminiello*. He argued that provocative, extremist speech like Terminiello's causes harm not only by generating violence but also by polarizing political debate. In apocalyptic terms, Jackson warned of the consequences of disabling municipal authorities from heading off confrontations such as that presented in the case at hand:

> This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe. Increasingly, American cities have to cope with it. One faction organizes a mass meeting, the other organizes pickets to harass it; each organizes squads to counteract the other's pickets; parade is met with counter-parade. Each of these mass demonstrations has the potentiality, and more than a few the purpose, of disorder and violence. This technique appeals not to reason but to fears and mob spirit; each is a show of force designed to bully adversaries and to overawe the indifferent. We need not resort to speculation as to the purposes for which these tactics are calculated nor as to their consequences. Recent European history demonstrates both.[130]

Jackson believed that the scenario of polarization he had sketched could only be controlled by treating the ideological and ethnic slurs of Terminiello as comparable to face-to-face epithets and thus outside the ambit of first amendment protection.

Justice Douglas's majority opinion took sharp issue with Jackson's argument. Douglas viewed polarized political conflict, presumably even conflict so vituperative as that presented on the record before the Court, as an essentially democratic experience, not a step on the road to totalitarianism:

> [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.[131]

That speech is intemperate and provocative does not detract from its contribution to self-governance:

> [A] function of free speech under our system of government is to

130. 337 U.S. at 23.

131. *Id.* at 4.

> invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, and even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[132]

The majority in *Terminiello* did not attempt to refute the claim that the speech in question might cause serious harm. Instead, the Court concluded that harms that derive from audience hostility cannot be taken into account without jeopardizing some speech that is integral to democratic rule. As Justice Douglas put it, "the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."[133]

So far we have seen how the commitment to self-government has led the Court to protect speech that threatens judicial dignity and impartiality and poses risks of political polarization and confrontation. Another harm that has been treated differently under the self-government theory from how it is treated in conventional legal analysis is that of injury to official reputation by means of defamatory falsehood.

In *New York Times v. Sullivan*[134] the Court held that false statements that defame public officials cannot be actionable unless they are published with knowledge of their falsity or reckless disregard for the truth. Justice Brennan's majority opinion did not dispute the contention that non-reckless defamatory falsehood can cause serious injury. The logic of the majority opinion is that undeserved injury to official reputation is one of the prices a democratic society must pay in order to have "uninhibited, robust, and wide-open" criticism of the stewardship of public officials.[135] The *Sullivan* opinion is notable for its unwillingness to treat the falsity of defamatory speech as a controlling consideration in determining its contribution to democratic governance. In the Court's view, a vital self-governing democracy requires vigor and variety in public debate, and those qualities are likely to be lost if good-faith factual error can be a basis for legal sanctions. As with other opinions based on the self-government theory, in *Sullivan* speech was valued for its political function. Certain speech was deemed essential despite its harm-causing potential, and conventional measures of harm were superseded by measures that derive from democratic theory.

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132. *Id.*

133. *Id.* at 4-5.

134. 376 U.S. 254 (1964).

135. *Id.* at 270-73.

Justice Brennan's opinion relied heavily on the writings of James Madison and on the historical significance of the repeal and repudiation of the Sedition Act of 1798. According to Justice Brennan, the Madisonian vision of government accountability was vindicated during the controversy over the Sedition Act.[136] In a democracy based on the principle of government accountability, injury to official reputation, even when that injury is caused by false statements of fact, cannot be considered a harm sufficient to justify the imposition of sanctions on good faith criticism of government. Professor Kalven described the governing principle of *Sullivan* to be that the concept of seditious libel is an impossible notion in a democracy.[137] The traditional solicitude exhibited by the common law for individual reputation, including official reputation, provides a telling contrast. *Sullivan* demonstrates how decidedly democratic theory can alter the harm principle.

Another vivid example of this phenomenon is provided by the 1971 case of *Cohen v. California*.[138] The defendant was convicted of disturbing the peace by offensive conduct for appearing in a Los Angeles courthouse corridor with a jacket bearing the words "Fuck the Draft." The majority of the Court, speaking through Justice Harlan, ruled that the first amendment prohibits a state from banning the use of profane language in public. Given the generality of the prohibition at issue, the state was not able to defend its regulation as an effort to preserve decorum in a specialized setting or to protect the sensibilities of persons forced to confront speech as captive viewers. To the Court majority, the case presented the question whether speech such as Cohen's can be regulated on the ground that it debases the level of public discourse and gives offense to persons who need to confront the speech only momentarily. Those are harms that some persons consider trivial but many persons consider substantial.

In an opinion written by Justice John Marshall Harlan, the most conservative Justice of his era, the Court rejected the state's regulatory justification. Justice Harlan did not deny that offensive speech can cause real harm. His opinion made no claim that sensibilities are not assaulted or that norms of civility are not weakened when political protestors violate widely recognized language taboos.[139] According to

136. *Id.* at 273-75.

137. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (1964).

138. 403 U.S. 15 (1971).

139. For commentary on *Cohen* that stresses the significance of these types of harm see A. BICKEL, THE MORALITY OF CONSENT 72 (1975); W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 188-205 (1976).

the Harlan opinion, those are costs that simply have to be endured if the premises of self-government are to be respected. The alternative is to cede to the government the authority to dictate the vocabulary of public debate:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[140]

Notice that Justice Harlan did not assert that a civilized, respectful quality of public debate will eventuate if the state keeps its hands off the language. That would be a wildly implausible claim. In a diverse political society in which intense disagreements are allowed to be ventilated, there will always be disaffected, strident speakers who seek to call attention to themselves by flouting conventional standards of decency. The Court's decision in *Cohen* rested on the judgment that "a more capable citizenry," if not a more orderly society, will result from a regime in which "each of us" assumes the responsibility to decide what words are appropriate in which settings. The commitment to self-government makes the nurturing of a capable, self-reliant citizenry a value that takes priority over the protection of sensibilities or promotion of universal norms of propriety.

Some might contend that *Cohen* was a poor occasion for the Court to employ the self-government theory of the first amendment because the speech at issue was more an act of individual rebellion than an effort to participate in the process of democratic governance. The dissenters characterized Cohen's gesture as an "absurd and immature antic."[141] But Justice Harlan refused to view the dispute as presenting the issue of when essentially worthless speech ought to be tolerated on account of its limited capacity to do harm. Reasoning from the premise of self-government, Harlan found that Cohen's speech served a genuine political function.

> [Much] linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their

140. 403 U.S. at 24.

141. *Id.* at 27.

> cognitive force. . . . [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.[142]

Like the implied threats in *Bridges*, the provocative statements in *Terminiello*, and the factual errors in *Sullivan*, Cohen's violation of a language taboo was protected because of its contribution to the public debate. Only in a democracy—indeed only in a particular kind of democracy—would such instances of speech be seen to have value.

VI. CONCLUSION

In *Masses Publishing Co. v. Patten*,[143] Judge Learned Hand introduced the self-government theory of the first amendment. Unlike the other judges of his era, Hand did not begin his analysis with the proposition that speech can be prohibited or punished whenever it bears a plausible causal connection to the kinds of harms that traditionally serve as the basis for legal regulation. Instead, Hand adopted as his starting point the proposition that in a democracy many forms and instances of speech simply must be protected. He asserted that the opportunity for hostile criticism is what legitimates the exercise of government regulatory authority. Hand thought the first amendment singles out speech for special protection not because speech is generally harmless or inconsequential but because it is valuable. He derived a test for adjudicating disputes concerning the regulation of speech from what he took to be the first principles of democratic theory.

The method of analysis employed by Judge Hand in the *Masses* case, though not the particular test he proposed, has been employed by the Supreme Court in most of its landmark decisions interpreting the first amendment. How much this phenomenon traces to the work of Learned Hand is difficult to assess. Certainly the *Masses* opinion had an influence on the famous speech-protective opinions of Justices Holmes and Brandeis. Those opinions in turn have served as the standard reference points for modern first amendment analysis. Today it seems obvious that free speech is important not only as a personal liberty but also as an essential feature of the process by which the authority of the state is established. One can hardly imagine a tradition of reasoning about the meaning of the first amendment that did not depend heavily on postulates deriving from democratic theory. That may show how thoroughly Judge Hand's perspective has shaped the modern understanding of the freedom of speech, or it may suggest that had Hand not introduced the self-government theory of the first

142. *Id.* at 26.

143. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

amendment someone else would have. The same paradox haunts most ideas that have prevailed over time.

The self-government theory of the first amendment has generated a fairly speech-protective set of modern doctrines. It is difficult to conceive of how the current level of speech protection could have been achieved without some form of reliance on the premises of democratic theory, some form of claim that speech on occasion must be protected even when it may cause substantial harm. It is important to recognize, however, that one could embrace the self-government theory and still develop a rather restrictive understanding of the freedom of speech. Robert Bork did it.[144] So did Alexander Bickel.[145] So did Walter Berns.[146] So, intermittently, did Robert Jackson.[147] On the contemporary Supreme Court, Justice John Paul Stevens consistently invokes the principle of self-government and frequently upholds regulations of speech that many of his brethren find unconstitutional.[148] Conservatives as well as liberals treat speech as special and look to what they consider to be the premises of democratic theory to assess the special value of speech and the special harm it can cause.[149] One person's polis is another's leviathan.

Why then does it matter whether courts and critics think about free speech disputes from the perspective of the ideal of self government? The answer, I believe, is straightforward. The freedom of speech is important in large part because of its central place in the procedures and ideals of democratic governance. In debating the difficult issues of first amendment interpretation, we ought to be debating the meaning of democracy. That debate will never reach closure but it will be profoundly on point.

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144. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

145. *See* A. BICKEL, *supra* note 139, at 57-88.

146. *See* W. BERNS, *supra* note 139; W. BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT (1957).

147. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 561 (1951) (Jackson, J., concurring); Kunz v. New York, 340 U.S. 290, 295 (1951) (Jackson, J., dissenting); Terminiello v. City of Chicago, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting).

148. *See, e.g.*, Texas v. Johnson, 109 S. Ct. 2533, 2555 (1989) (Stevens, J., dissenting); FCC v. League of Women Voters, 468 U.S. 364 (1984) (Stevens, J., dissenting); FCC v. Pacifica Found., 438 U.S. 726 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

149. Indeed, one might well add Learned Hand himself to the list of conservative judges who have developed a restrictive view of the first amendment by reasoning from the premise of self-government. In Dennis v. United States, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), Hand upheld criminal convictions of leaders of the Communist Party of the United States for organizing a group to advocate overthrow of the government. His decision can be reconciled with the test proposed thirty-three years earlier in *Masses*, but the sentiment he expressed in *Dennis* regarding the political function of revolutionary advocacy, *see* 183 F.2d at 212-13, can only be described as conservative in the extreme—and strikingly different in spirit from his attitude toward dissent in *Masses*.