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The Lessons of 1919

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ONE hundred years ago, the Supreme Court embarked on its first serious consideration of the First Amendment's guarantee of freedom of speech. In 1919, the Court upheld four federal criminal convictions over First Amendment defenses. Three of the majority opinions were written by Justice Holmes. In the fourth, he offered a classic dissent. Two of the cases, *Frohwerk v. United States*[1] and *Debs v. United States*,[2] are of middling significance. The other two, *Schenck v. United States*[3] and *Abrams v. United States*,[4] are iconic. From these cases have sprung an expansive and complex jurisprudence of free speech. Most law school courses begin consideration of freedom of speech with discussion of the *Schenck* and *Abrams* opinions, deservedly so since they have much to teach us. Justice Holmes's majority opinion in *Schenck* as well as his dissent in *Abrams*, at least on the First Amendment issue, are written in classic Holmes style—short, cryptic, and ambiguous—resulting in 100 years of explication and debate. What lessons do these classic cases teach?

First, a little background is warranted. Schenck was convicted under the Espionage Act of 1917 for "causing and attempting to cause insubordination, &c, in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war."[5] Schenck's conduct, which seems quite harmless and easily protected by present day standards, consisted of printing and distributing pamphlets quoting the Thirteenth Amendment and proclaiming "Assert Your Rights" and "Do not submit to intimidation."[6] Schenck was convicted and the Supreme Court affirmed the conviction in one of its first significant First Amendment opinions.

Abrams was convicted under the Espionage Act of 1917, as amended in 1918.[7] Unlike the language of the Act under which Schenck was convicted, focusing exclusively on the impact of the conduct or speech, for

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1. 249 U.S. 204 (1919).
2. 249 U.S. 211 (1919).
3. 249 U.S. 47 (1919).
4. 250 U.S. 616 (1919). For two excellent and very useful books written about the *Abrams* case, see Richard Polenberg, Fighting Faiths (1987) and Thomas Healy, The Great Dissent (2013).
5. *Schenck*, 249 U.S. at 48–49.
6. *Id.* at 51.
7. *Abrams*, 250 U.S. at 616–17.

example, interference with the draft, the sections of the amended Act that tripped up the Abrams defendants focused particularly on the content of their speech. The defendants, who were committed anarchists, were convicted under a statute that made it a crime,

> [w]hen the United States was at war . . . , to unlawfully utter, print, write and publish . . . 'disloyal, scurrilous and abusive language about the form of government of the United States;' . . . language 'intended to bring the form of Government of the United States into contempt, scorn, contumely, and disrepute;' and . . . language 'intended to incite, provoke and encourage resistance to the United States in said war.'[8]

In addition, they were charged with conspiring "to urge, incite and advocate curtailment of production of . . . ordnance and ammunition, necessary and essential to the prosecution of the war."[9] The defendants engaged in these violations by distributing flyers, some in English and some in Yiddish, objecting to United States interference with the developing Russian revolution by sending troops to Russia. Among other things, the flyers urged "Workers of the World! Awake! Rise! Put down your enemy and mine!"; "Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom"; and "In order to save the Russian revolution, we must keep the armies of the allied countries busy at home."[10] There was more of the same but nothing that would lead to an indictment, much less a conviction, today. Still, the defendants were convicted, and the Supreme Court sustained the conviction over Justice Holmes's classic dissent. Most of the majority opinion as well as the Holmes dissent focused not on the free speech issue but rather on whether the government had established its case under the statute given that the defendants were primarily concerned with halting U.S. interference with the Russian revolution and only tangentially with the impact on the U.S. war effort against Germany. Near the end, Holmes wrote two short paragraphs addressing the First Amendment defense and explaining why freedom of speech was worth protecting even in challenging circumstances.[11]

So why are the *Schenck* and *Abrams* opinions so important and what do they tell us about the First Amendment?

Characteristic of a Holmes opinion, *Schenck* is brief yet memorable. Holmes recognized at the outset in *Schenck* that speech is capable of causing serious harm.[12] To the extent that speech is worthy of serious protection, it is in spite of the harm that it may inflict.[13] That insight has continued to resonate throughout free speech jurisprudence. Because of

8. *Id.* at 617.
9. *Id.*
10. *Id.* at 620–22 (italics omitted).
11. *Id.* at 629–31 (Holmes, J., dissenting).
12. Schenck v. United States, 249 U.S. 47, 52 (1919).
13. *Id.*

the harm that speech can cause, despite the text of the First Amendment, protection is not absolute. Rather, it is contextual. Holmes noted that whether speech is protected will depend on "the circumstances."[14] In *Schenck*, the fact that the nation was at war was crucial.[15] Without becoming doctrinaire, Holmes recognized that at least in some cases, the interest in free speech must be balanced against competing public interests.[16] The *Schenck* opinion is simply the Court's initial attempt at the creation of free speech jurisprudence.[17] Courts and scholars would spend the next 100 years debating as to how the balance between free speech and important public interest should be struck. Holmes recognized that there needed to be a balance.

At the outset, Holmes did attempt to resolve one significant doctrinal issue suggesting that, contrary to his own dicta in the prior case of *Patterson v. Colorado*,[18] the protection of the First Amendment might not be limited to a prohibition against prior restraints against publication. In his *Commentaries on the Laws of England*, William Blackstone had concluded that the common law merely prohibited prior restraints on speech and did not interfere with subsequent punishment.[19] Some had argued that the framers of the First Amendment had intended to incorporate this principle considering how influential Blackstone's treatise was with the framing generation.[20] As noted, Holmes had flirted with the Blackstonian approach in *Patterson* but somewhat cavalierly cast it aside in *Schenck*.[21] From that point onward, it would be accepted that the First Amendment applied to attempts to punish speech once it had seen the light of day. Had *Schenck* done nothing else, that would have been an important achievement although it occurred most casually and in a case rejecting the First Amendment claim.

Assuming that speech is important and is constitutionally protected but that the protection is not absolute and sometimes must yield to competing considerations, the question became how should the Court determine whether speech or the competing governmental interest should prevail? Up to that point, federal courts had generally applied the "bad tendency"

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14. *Id.*

15. *Id.*

16. *Id.*

17. The Court had dealt with free speech issues incidentally or tangentially in prior opinions but not to an extent that would create freedom of speech doctrine. See DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997), for a detailed study of the development of a free speech culture prior to 1919.

18. 205 U.S. 454, 462 (1907).

19. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 151 (Rees Welsh & Co. 1898) (1769).

20. *See* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 9 (1941) ("This Blackstonian theory dies hard but it ought to be knocked on its head once and for all."); RABBAN, *supra* note 17, at 131–34 (prior to the World War I cases, many courts adopted the Blackstonian approach but not all).

21. Chafee had argued against the Blackstonian approach. *See* Zechariah Chafee Jr., *Freedom of Speech*, 17 NEW REPUBLIC 66 (1918); *see also* Zechariah Chafee Jr., *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 939 (1919).

test adopted from English law.[22] That is, the government had the right to prohibit and punish speech which might have a tendency to cause conduct which the government had the right to prevent, such as interference with the war effort. In *Schenck*, Holmes seemed to deviate from that approach by declaring that the government may prohibit speech that poses a "clear and present danger" to interests that it has the right to protect.[23] Clear and present danger sounds significantly more demanding than "bad tendency." And yet it is far from clear that Holmes intended to substitute a more rigorous legal standard.[24] To begin with, Holmes did not like formalistic bright line rules, so it seems inconsistent with his jurisprudential approach to assume that he intended to create one. Second, it would seem unlikely that any other Justice on the Court, much less a majority, would agree with a such a significant change. Third, on turning to the case before the Court, Holmes seemed to fall back on the bad tendency approach. He wrote, "If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."[25] Fourth, if the Court was indeed substituting a more speech protective standard for the bad tendency test, then presumably Schenck would be entitled to a new trial under the proper standard, unless the Court also concluded that it was clear from the record that he would have been convicted under that standard as well.[26] Finally, in the other speech cases decided in 1919, in two of which Holmes wrote the majority opinion affirming the convictions, the Court appeared to apply the bad tendency approach. At least it made no mention of clear and present danger.

Whether or not intended as a legal test, clear and present danger seemed to resonate. This may be at least partially attributed to Zechariah Chafee's relentless efforts to portray clear and present danger as more speech protective than it was or had been intended by Holmes.[27] Eventually, it was applied by the Court as a standard for judging whether seditious speech could be criminally punished.[28] Given the iconic nature of the Holmes opinion, clear and present danger became known to the general public as well. The highly inaccurate perception was created among the general public that all free speech issues could be resolved by deter-

22. RABBAN, *supra* note 17, at 118–19, 134–35; GEOFFREY R. STONE, PERILOUS TIMES 171 (2004) ("[T]he 'bad tendency' approach was embraced by almost every federal court that interpreted and applied the Espionage Act during World War I.").

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

24. David Rabban argues that clear and present danger was no different for Holmes than bad tendency. RABBAN, *supra* note 17, at 248, 282, 285, 293; *see also* STONE, *supra* note 22, at 195.

25. *Schenck*, 249 U.S. at 52 (citing Goldman v. United States, 245 U.S. 474, 477 (1918)).

26. STONE, *supra* note 22, at 195.

27. See RABBAN, *supra* note 17, at 318, 323–325, 333–335, 342–55, for the argument that Chafee deliberately misinterpreted clear and present danger to provide a more speech protective approach than Holmes intended.

28. In *Dennis v. United States*, 341 U.S. 494 (1951), the Court applied a diluted version of the test to activities of the leadership of the American Communist Party. *Id.* at 507.

mining whether the speech in issue created a clear and present danger. Regardless of the precise legal status of clear and present danger, it certainly indicates that similar to bad tendency, the focus of inquiry should be on the potential impact of the speech as opposed to the precise language or the speaker's intent. As is well known, Holmes and his young friend Federal District Judge Learned Hand argued as to whether the Holmes impact-based approach was superior to the language-focused approach developed by Hand in *Masses Publishing Co. v. Patton*.[29] Fifty years in the future, the Supreme Court would combine the two into a highly protective standard for evaluating seditious speech in *Brandenburg v. Ohio*[30] considering both inciting language and the imminence of harm.

When Holmes wrote the phrase "clear and present danger" he unleashed a formulaic concept into the legal world which would have far greater impact than we may assume Holmes ever intended.[31] *Schenck*, through a concise and ambiguous opinion, provided an object lesson that judges need to be extraordinarily cautious as to what they write in opinions since lawyers and legal scholars will scour through them in search of any usable scrap of language.

Even more iconic than clear and present danger is Holmes's often repeated, and much criticized, analogy to "falsely shouting fire in a theater and causing a panic."[32] The line is often misquoted with the omission of "falsely" and the insertion of "crowded" before theater.[33] This example clearly resonated in the public imagination, however, like so much that Holmes wrote, it is less than clear what this colorful image established. Holmes presumably used this example to illustrate that (1) freedom of speech was not absolute, (2) speech could cause serious harm, and (3) context mattered. All of these are points that Holmes had made earlier in the opinion. As a matter of rhetoric, this example, perhaps inspired some-

29. 244 F. 535, 542 (S.D.N.Y. 1917). For a discussion of the Holmes/Hand discussions, see GERALD GUNTHER, LEARNED HAND 162–70 (1994) and Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975). Their conversations are also recounted in HEALY, *supra* note 4, at 15–27, and STONE, *supra* note 22, at 201–203.

30. 395 U.S. 444, 447 (1969) (per curiam).

31. See Justice Frankfurter's concurring opinion in *Dennis* objecting to formulaic reliance on clear and present and observing that "[i]t does an ill service to the author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma." *Dennis*, 341 U.S. at 543 (Frankfurter, J., concurring).

32. Schenck v. United States, 249 U.S. 47, 52 (1919). Holmes apparently came across the fire in a theater example in reviewing closing argument of the prosecution in the *Debs* trial. *See* HEALY, *supra* note 4, at 91, 97. See, for example, ALAN DERSHOWITZ, TAKING THE STAND (2015), for criticism of the statement noting that falsely shouting fire is akin to maliciously setting off a fire alarm in the absence of a fire. Ernst Freund was also highly critical of the fire in the theater image at the time in his critique of the Holmes opinion in "The Debs Case and Freedom of Speech." *See generally* Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13, *reprinted in* 40 U. CHI. L. REV. 239 (1973). See also HARRY KALVEN, A WORTHY TRADITION 133–34 (1988), for criticism of the fire in the theater analogy.

33. *See* Vincent Blasi, *Shouting Fire in a Theater and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535, 560 (2011).

what by recent events, illustrated these points in a manner quite accessible to the reader.[34] The example humanized the legal analysis but perhaps at the expense of suggesting that the example was a legal test, which it clearly was not intended to be. Perhaps the key to the statement is the word "falsely," which seems to assume malice on the part of the speaker, arguably a dangerous concept to inject into free speech analysis. As far as the example goes, shouting fire in a theater, when such a fire actually exists, would presumably be protected, although it might lead to a panic resulting in serious harm and even death. Perhaps not too much should be made of the comment since it may have been merely intended as a throwaway line as Holmes was thinking out loud, or rather, on paper. Because of the Holmes mystique, these two phrases have assumed a life of their own.

After his brief one paragraph discussion of the First Amendment, Holmes, writing for a unanimous Court, affirmed the conviction.[35] Holmes made no serious attempt to apply either the clear and present danger or bad tendency approach to the facts. He never explained why Schenck's speech would present a threat to military recruiting or the war effort. It was as if the discussion of freedom of speech was nothing more than window dressing. And though Holmes seemed to suggest that freedom of speech was important, he made no attempt to explain why. Based on *Schenck* alone, the Holmes foray into free speech might have been forgotten, although it did provoke some response and criticism from those who hoped for more and better from the iconic Justice.[36]

Before moving on to *Abrams*, a few words on *Frohwerk* and *Debs* are in order. Both opinions were published a week after *Schenck*. In *Frohwerk*, Holmes, writing for a unanimous Court, upheld a conviction under the Espionage Act of 1917 based on the publication of a series of articles denouncing the U.S. war effort, criticizing the draft, and sympathizing with Germany.[37] As with *Schenck*, Holmes acknowledged that all of the statements might have been protected during peacetime. But like *Schenck*, Holmes emphasized that First Amendment analysis was contextual not absolute. Like the fire/theater example in *Schenck*, Holmes noted in *Frohwerk* that no one including Hamilton or Madison would have "ever supposed that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech."[38] In view of the inadequate record before the Court, Holmes concluded that "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

34. *Id.* at 562. Blasi suggests that Holmes used this as an example of speech that would be unprotected "by virtue of its subject matter, intention, and function [having] nothing to do with the evolution of ideas." *Id.* at 567.

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

36. See HEALY, *supra* note 4, at 108–114, for a discussion of the contemporaneous criticism of *Schenck*, *Frohwerk*, and *Debs*.

37. Frohwerk v. United States, 249 U.S. 204, 252 (1919).

38. *Id.* at 206.

a flame . . . ."[39] Although Holmes cited *Schenck* with some frequency in the *Frohwerk* opinion, there was no mention of clear and present danger. *Frohwerk* suggests that clear and present danger in *Schenck* was nothing more than loose dicta and bad tendency was still the dominant approach. The deference that the Court showed to the government in a free speech case is jarring to modern sensibilities.

Debs is interesting given that it affirmed the conviction of a sometime presidential candidate also pursuant to the Espionage Act of 1917 for inciting insubordination with respect to military duty and for obstructing and intending to obstruct recruiting.[40] Both charges were based on a speech that Debs had delivered in Canton, Ohio. Again, Holmes wrote a brief opinion for a unanimous Court. After quoting at length from the speech, Holmes declared with virtually no legal analysis that the properly instructed jury could have found that Debs's speech constituted violations of the Act.[41] As with *Frohwerk*, there was no mention of clear and present danger. Indeed, there was nothing in the Holmes opinion to suggest that important constitutional rights were at stake.

That brings us to *Abrams v. United States*. *Abrams* is different from the other cases in several respects. First, as noted above, Abrams was indicted under the 1918 amendments to the 1917 Act which focused specifically on the language of the defendant rather than the effect. The law essentially punished seditious speech similar to the infamous Sedition Act of 1798 passed and enforced during the Adams Administration. Second, although *Abrams*, like the three previous cases, was decided in 1919, it was part of the 1919–1920 Court Term while the others were part of the 1918–1919 Term. Finally, and most importantly, Justice Holmes dissented in *Abrams* while writing the majority opinions in the other three cases. *Abrams* is a First Amendment classic but only for the final paragraph of the Holmes dissent, in which for the first time a Justice attempted to explain why the First Amendment mattered.

Most of the majority opinion as well as the Holmes dissent focused on whether the jury could have decided that the defendants had the proper intent to support a criminal conspiracy to violate the statute. The problem was that they were protesting the wrong war. The indictments were aimed at seditious speech that interfered with the American war effort with Germany. The defendants were protesting American interference in the Russian Revolution. The government's theory accepted by the majority was that attempting to curtail American interference in the Russian Revolution would necessarily undermine the war effort against Germany. As the Court put it, "Men must be held to have intended . . . the effects which their acts were likely to produce."[42] Holmes would have required specific intent to interfere with the war effort against Germany rather

39. *Id.* at 209.
40. Debs v. United States, 249 U.S. 211, 216 (1919).
41. *Id.*
42. Abrams v. United States, 250 U.S. 616, 621 (1919).

than the indirect intent that satisfied the majority. But if that was all there was to it, *Abrams* would be a forgotten case.

Turning to the First Amendment argument, Holmes noted that he had no doubt that the decisions in *Schenck*, *Frohwerk*, and *Debs* were correct.[43] He then announced that the appropriate standard under the First Amendment was "clear and imminent danger" or "an intent to bring it about."[44] He declared that there was no possibility that the defendant's conduct could satisfy that standard.[45]

Then, however, in one final paragraph Holmes attempted to explain theoretically why the protection of free speech was important. Most significantly, as justification for the protection of freedom of speech, Holmes introduced the marketplace of ideas/search for truth justification, which remains one of the primary theories for vigorous First Amendment protection. The often-quoted sentence in the opinion reads:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas–that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[46]

As with so many of Holmes's classic statements, this sentence is packed with ambiguity. Was Holmes suggesting that there was absolute truth which would eventually prevail in the competition of the market, or was he taking the far more relativistic position that whatever prevails at any given time by definition is truth?[47] The former seems more reassuring, however, given Holmes's skepticism, it isn't clear that is what he meant. Holmes did not create the search for truth justification from whole cloth. It may be traced at least back to John Milton's *Areopagitica* in 1644,[48] and the theory was expounded and popularized by John Stuart Mill in Chapter 2 of his book *On Liberty* published in 1859.[49] Though Holmes cited neither, as a very learned and well-read individual, it is certain that he

43. *Id.* at 627 (Holmes, J., dissenting).

44. *Id.* at 627–28. Rabban argues that Holmes adopted Chafee's misinterpretation of clear and present danger as being more speech protective than it was intended. RABBAN, *supra* note 17, at 343, 354.

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

46. *Id.* at 630.

47. Holmes biographer G. Edward White argues that Holmes, unlike Chafee and the progressives, accepted a majoritarian conception of truth. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 435 (1993). See also Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2004), for a sophisticated analysis of Justice Holmes and the marketplace of ideas.

48. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644).

49. JOHN STUART MILL, ON LIBERTY 22–68 (David Bromwich & George Kate eds., Yale University Press 2003) (1859). *See generally* Lackland H. Bloom Jr., *John Stuart Mill and Political Correctness*, 56 LOUISVILLE L. REV. 1 (2017).

was familiar with both.[50] Indeed, he had actually met Mill on a trip to England.[51] Like Mill, from whom he clearly borrowed, Holmes based the search for truth/marketplace theory on the fact of human fallibility; that is, we have learned from experience that our prior strongly held conclusions (our "fighting faiths") were sometimes incorrect and that free interchange of ideas has permitted us to correct our errors.

In all of these opinions, particularly *Abrams*, Holmes failed to cite readily available authority for his statements. In addition to failing to credit Milton or Mill for the development of the search for truth justification, Holmes declared that it "is the theory of our Constitution"[52] with no reference at all to text or original understanding. It was the "theory of our Constitution" only to the extent that Holmes dissenting so declared. The text of the First Amendment revealed nothing as to the underlying theory of free speech. There was no useful evidence of either original intent or understanding. Holmes did mention the repayment of the fines assessed under the Sedition Act of 1798 as evidence that the common law of seditious libel did not remain in effect.[53] Even so, that does not speak to the search for truth theory. There was no useful precedent. If there was need for a theoretical justification for vigorous protection of free speech, which there certainly was, Justice Holmes was on his own. In developing free speech jurisprudence, the Court must, at least cautiously, attempt to explain why speech matters. It is a mere rhetorical trope, however, to suggest that such a constitutional theory already existed waiting to be discovered. Holmes was quite obviously influenced by recent scholarship by Professors Ernst Freund and Zechariah Chafee, however he did not cite either.[54]

The Holmes dissent in *Abrams* was not the last word on free speech theory, rather it was closer to the first. The search for truth has become one of the three well recognized justifications for freedom of speech along with the self-government theory and the liberty/autonomy theory, neither of which Holmes mentioned in the *Abrams* dissent. Both were introduced by Justice Brandeis in his notable concurrence in *Whitney v. California*[55] nine years later, which Holmes joined. Holmes contributed one theory of free speech that has resonated ever since. The fact that he did not say everything that could be said on the topic is hardly a fair criticism. If a Justice or the Court constructs a theory of justification out of thin air, as Holmes did in *Abrams*, there will be a duty to persuade the future if the theory is to survive. Holmes succeeded with the search for

50. See Blasi, *supra* note 47, at 27–28 n.97, for a discussion of Mill's influence on Holmes.

51. HEALY, *supra* note 4, at 98.

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

53. *Id.*

54. *See* HEALEY, *supra* note 4, at 154–60 (noting Chafee's influence); *see also* RABBAN, *supra* note 17, at 296–97 (Holmes acknowledged that he had read Freund's critique of *Debs* but purported to be unaffected by it).

55. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

truth theory. It has its critics to be sure.[56] And no single theory can adequately explain all aspects of free speech that have been or should be protected. Still the marketplace of ideas/search for truth has earned a secure place in the First Amendment canon.

Another theme that Holmes hit in his *Abrams* dissent was the recognition that courts and everyone else often must proceed in the absence of clear empirical guidance. He wrote that the theory of our Constitution "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."[57] This is consistent with Holmes's general theories of life, law, and government. Earlier in his career, Holmes made the famous statement: "Great cases, like hard cases, make bad law."[58] Here he was essentially declaring that hard cases by definition have no easy answers and that to a large extent courts must proceed on faith.

As with the earlier cases, Holmes's dissent in *Abrams* recognized that speech has the capacity to cause harm, although the record in *Abrams*, as discussed by both the majority and dissent, suggests that the particular speech at issue had no impact at all. Holmes did start his discussion by conceding that the suppression of speech might be sensible if it was recognized as ineffective noise, as Holmes put it, "as when a man says he that has squared the circle."[59] He then noted that time has upset many "fighting faiths."[60] Presumably, speech played a role. It's unclear whether the upset of "many fighting faiths" is a good thing or a bad thing, but surely it could be destabilizing and, in some instances, harmful. On the other hand, Holmes seemed to suggest that this was the way by which society progressively got closer to finding the truth which would certainly be a positive. Holmes would permit suppression of speech only when it "so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[61] Holmes conceded that speech can cause harm, however, such harm must be tolerated in the absence of a dire emergency.

The brief Holmes dissent in *Abrams* is not heavy on doctrine, however, Holmes does appear to have moved beyond clear and present danger, which he never mentioned. His recognition that government interference with speech is only warranted when the danger is imminent foreshadowed both the Brandeis *Whitney* concurrence and at least part of the seditious speech test that ultimately prevailed in *Brandenburg v. Ohio*[62]

56. See FRED SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 19–30 (1982), for criticism of the search for truth rationale.

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

58. United States v. N. Secs. Co., 193 U.S. 197, 400 (1904).

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

60. *Id.*

61. *Id.*

62. 395 U.S. 444, 447 (1969) (per curiam). The Court finally resolved the question of when seditious speech may be criminally punished by declaring that "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*

fifty years later. Imminence seemed more demanding than clear and present danger, which in turn seemed more demanding than bad tendency. Holmes did not explain why imminence should be the threshold, however Brandeis did nine years later in *Whitney*.[63] For the past one hundred years, scholars have debated whether in fact Holmes changed his doctrinal approach as of *Abrams* or whether he simply clarified his *Schenck* approach.[64] Assuming that Holmes had become more speech sensitive in the nine month period between the first three cases and *Abrams*, did Holmes's thinking evolve on its own or was he influenced by his conversations with Hand, the sharp critique by Zechariah Chafee and others,[65] or the more disturbing focus of the 1918 amendment? Resolution is best left to the historians with the caution that no one can say for certain.[66] In any event, the *Abrams* dissent became the official starting point for a relatively libertarian approach to freedom of speech at least on the Supreme Court. However, it would take several decades for the Holmes approach to become entrenched in constitutional jurisprudence.

The Holmes dissent did attempt to resolve another doctrinal issue. There remained a question as to whether the English common law doctrine of seditious libel, that is criminalizing criticism of the government or government officials, was consistent with the First Amendment. Holmes argued that it had in fact been rejected when the government repaid the fines of those convicted under the Alien and Sedition Acts of 1798. Writing for a majority forty-five years later in *New York Times Co. v. Sullivan*,[67] Justice Brennan agreed, although he was simply picking up an argument first raised by Holmes in his *Abrams* dissent.

The *Abrams* dissent also tells us much about effective opinion writing. As with most Holmes classics, it is short, an approach that has grown out of fashion as Justices seem to feel the need to cite every case and discuss every doctrine and counter argument that might be applicable. One reason that the *Abrams* dissent is still read is due to its rhetorical strength.[68] Holmes made his case with images that capture the reader's imagination. He referred to the authoritarian who would "sweep away all opposition"

63. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). Brandeis argued that if the likelihood of lawless action was not yet imminent, then the proper response was more speech, not suppression.

64. Chafee argued that the Holmes approach in *Abrams* was a logical progression from *Schenck*. *See* CHAFEE, *supra* note 20, at 128–140. Rabban argues that Chafee deliberately misconstrued clear and present danger as being far more speech protective than it was intended to be. RABBAN, *supra* note 17, at 342–43, 346–55.

65. University of Chicago Law Professor Ernst Freund published a sharp attack on the Holmes opinion in *Debs* in the May 3, 1919 edition of the *New Republic* entitled "The Debs Case and Freedom of Speech." *See generally* Freund, *supra* note 32. Holmes actually drafted a letter to Herbert Croly, the editor of the *New Republic*, defending his *Debs* opinion but declined to send it. HEALY, *supra* note 4, at 136–37 (reprinting the letter).

66. See WHITE, *supra* note 47, at 427–28, for the argument that criticism of *Schenck*, *Frohwerk*, and especially the *Debs* opinions by people that Holmes respected had a profound influence on his thinking about freedom of speech.

67. 376 U.S. 254, 276 (1964).

68. G. Edward White notes that "Holmes the judge was often consumed by the sheer attraction of language itself." WHITE, *supra* note 47, at 444.

perhaps like the poor sport who might overturn the chessboard when in danger of checkmate.[69] Likewise the upsetting of "many fighting faiths," whatever those might be, catches the reader's attention. Finally, Holmes made his case with the marketplace metaphor, perhaps because he had recently read a biography of Adam Smith.[70] As with *Schenck*, where the fire in a theater example has been misquoted, Holmes's opinion in *Abrams* is often remembered for introducing the "marketplace of ideas," a phrase that Holmes implied but never actually wrote. Still the notion that truth is better resolved by competition in the market than by government fiat is easy to grasp. In the two sentences quoted above regarding the nature of the judicial process, Holmes borrows words from science ("experiment"), gambling ("wager"), and religion ("prophecy" and "salvation") to make his point.[71] He chose language that evokes familiar images in the reader's mind. The discussion of free speech is conversational if not provisional. It is not turgid or legalistic. It could readily be understood and appreciated by the general public. It was as if Holmes was thinking out loud. Holmes showed how to write a memorable opinion yet few follow his lead.

Another lesson of *Abrams* relates to the role of dissenting opinions. Holmes became known as the great dissenter in no small part on account of his dissent in *Abrams*, as well as *Lochner v. New York*[72] and *Northern Securities Co. v. United States*.[73] Although some might question the utility of dissent, *Abrams* is proof that it is sometimes effective.[74] Both in terms of doctrine as well as theory, the Holmes dissent eventually prevailed as the Court explicitly admitted,[75] however, it was not overnight. It took decades but, to a large extent due to the strength of his argument, the power of his rhetoric, the value of the Holmes reputation, and the persistence of his disciples, especially in academia, the Holmes approach to free speech prevailed and the majority's approach was discarded. Quite apart from the doctrinal tightening of the *Abrams* dissent, had Holmes done no more than introduce the search for truth theory to free speech jurisprudence, the dissent would have been memorable.

The *Abrams* dissent also provides insight as to what may or may not affect a Justice. It is known that Holmes did debate the proper approach to free speech with Learned Hand at the time and he was aware of the vigorous criticism of *Schenck*, *Frohwerk*, and *Debs* by Chafee who he respected.[76] Perhaps this influenced him. On the other hand, a personal

69. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
70. HEALY, *supra* note 4, at 205–06.
71. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
72. 198 U.S. 45, 74 (1906) (Holmes, J., dissenting).
73. 193 U.S. 197, 400 (1904) (Holmes, J. dissenting).
74. See MELVIN UROFSKY, DISSENT AND THE SUPREME COURT 169–71 (2015), for a table of cases in which the Court cited or relied on the *Abrams* dissent.
75. Dennis v. United States, 341 U.S. 494, 507 (1951) (acknowledging that Holmes and Brandeis were correct in the seditious speech cases of 1919 but then applying a diluted version of clear and present danger).
76. HEALY, *supra* note 4, at 154–59.

appeal by Justices in the majority fell on deaf ears. Several of the Justices in the majority called on Holmes at his house to ask him not to publish his dissent in *Abrams* in view of its controversial nature.[77] At the time, the Supreme Court did not have its own building nor did the Justices have offices. Holmes politely declined. It is always a mystery as to what may or may not influence a Justice, however, in *Abrams*, it is apparent that there was a tug of war over the Holmes opinion.

Nineteen nineteen was a momentous year for the First Amendment, perhaps the most momentous. It provides a microcosm of the Court, and especially one great Justice struggling to come to grips with the meaning of freedom of speech, a crucial though long ignored provision of the Bill of Rights. In these cases Justice Holmes wrestled with both doctrine and theory largely on a fresh slate with little guidance from the text, original understanding, doctrine, or precedent. In the process Justice Holmes seemed to make missteps and then attempted to correct his errors. Perhaps more than most opinions, those from *Schenck* through *Abrams* give us at least some insight into a great Justice's mental process as he appeared to think through the issues on paper. The cases of 1919, especially the *Abrams* dissent, count because they provide a relatively clear starting point for the judicial protection of freedom of speech, which blossomed over the next 100 years. The Holmes dissent and the criticism that influenced it also gave rise to significant legal and cultural change. The Espionage Act of 1918 was repealed by Congress in 1920. President Coolidge released all remaining prisoners convicted under the Acts in 1923 and President Franklin D. Roosevelt later granted amnesty to all those convicted under the Alien and Sedition Acts.[78] Moreover, in reaction to the prosecutions under the Alien and Sedition Acts of 1917 and 1918, the American Civil Liberties Union was founded with a primary dedication to the protection of freedom of speech.

So what are the lessons of 1919? One obvious lesson is that in confronting an important and novel legal issue, in those cases the meaning of freedom of speech, it is fortunate to have a great Justice at the helm writing the opinions. Sometimes, as with freedom of speech in 1919, there is little guidance in terms of text, original understanding, or precedent. The Justices are truly on their own to decide the cases and to develop both legal doctrine and supporting theory. That's where Justice Holmes found himself in 1919. In *Schenck*, he began to build free speech doctrine recognizing that the First Amendment protected against subsequent punishment as well as prior restraint. He also recognized that, since speech was quite capable of causing public harm, protection must be contextual rather than absolute and there must be a mechanism through which the courts could accommodate important governmental interests such as successfully prosecuting the war effort with freedom of speech. Justice Holmes's initial crack at developing such an accommodation was clear

77. *Id.* at 1–5, 213.
78. STONE, *supra* note 22, at 232.

and present danger, which may or may not have been a restatement of the bad tendency approach.

As of *Schenck*, *Frohwerk*, and *Debs*, there was no attempt to explain why freedom of speech mattered. That was provided by the iconic Holmes dissent in *Abrams*. The introduction of the search for truth/marketplace of ideas justification, apparently borrowed from Mill, made a lasting contribution to freedom of speech jurisprudence and remains one of, if not the central, explanation for the importance of freedom of speech. As explicated by Holmes ever so briefly, it is grounded in human fallibility and assumes progressive enlightenment over time.

But quite beyond the doctrine and theory of *Schenck* and *Abrams*, the 1919 decisions reveal much about effective judicial decision-making and opinion writing. Holmes was a great legal stylist. He was clearly writing for a non-legalistic audience and writing for the future. His opinions were short, accessible, conversational, and packed with understandable and persuasive rhetorical devices. The opinions seem casually written and yet it is obvious that a great deal of thought and effort went into them. The reader is able to see Holmes mature as a free speech thinker over the course of nine months in 1919. This is an exciting phenomenon to behold. *Abrams* is a sterling example of the power of dissent to eventually prevail. The Holmes dissent manages eventually, well after the Justice had passed away, to sweep aside the then predominant "fighting faith" of bad tendency. *Schenck* through *Abrams* illustrates the power of the intellectually engaged Justice. Rarely, if ever, has there been a Justice more intellectually engaged than Justice Holmes. He did not write in isolation. Instead, he debated the central issues before him with other great thinkers of the day, including Learned Hand, and was keenly aware of the critiques of his writing and thinking that were being published. Holmes was not locked in an ivory tower isolated from the thinking public. Rather, he was in the very heart of the storm, arguably a very difficult place for a judge to reside.