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"And the Truth Shall Make You Free": *Schenck, Abrams,* and a Hundred Years of History

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"AND THE TRUTH SHALL MAKE YOU FREE": *SCHENCK*, *ABRAMS*, AND A HUNDRED YEARS OF HISTORY

*Rodney A. Smolla**

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I. INTRODUCTION

"AND ye shall know the truth, and the truth shall make you free."[1] This biblical verse, from the Christian New Testament Gospel of John, is etched into the wall of the original main building of the Central Intelligence Agency, expressing a secular faith in the altruistic mission of intelligence agencies in a free society. Thus, the darkest and most secretive of all agencies in modern American government, the Central Intelligence Agency, draws missionary sustenance from a scriptural source.

In this 100th anniversary tribute by the *Southern Methodist University Law Review* to the famous opinions of Justice Oliver Wendell Holmes in *Schenck v. United States*[2] and *Abrams v. United States*,[3] I seek to explore

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1. *See John* 8:32.
2. 249 U.S. 47 (1919).
3. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

competing conceptions of what Americans might mean by the notion that the "truth shall make you free."

The "early Holmes" and the "later Holmes" represent two fundamentally different conceptions of freedom of speech. The astonishing transformation of Holmes occupies a place in the American sacred-secular space akin to the monumental reversals found in foundational scriptural texts of the world's great religions: a conversion as momentous as Jacob to Abraham or Saul becoming Paul on the road to Damascus. Yet as with most foundational texts, the opinions of Holmes in *Schenck* and *Abrams*, like the admonitions about truth, faith, and freedom to be found in any deeply resonant belief system, are filled with contradiction, ambiguity, and mystery.

Marc Antony came to bury Caesar, not to praise him.[4] In this essay I, at times, come perilously close to secular sacrilege, burying, not praising, the reputation of Justice Holmes, to the point of unseemly piling on. Yet unless we fully grasp the early Holmes, we will fail to appreciate the power of the contrast to the later Holmes. Let me use as an analogy the "early Nixon" and the "later Nixon." The early Holmes was as much a free-speech-hater as the early Richard Nixon was a red-baiter. Yet détente with China may have been achieved because President Richard Nixon, a fierce anti-communist, chose to go there and make peace. Perhaps Holmes is to modern First Amendment law what Richard Nixon was to American diplomacy with the communist Chinese. The free speech conversion experience of Holmes was as potent and improbable as the Chinese conversion experience of Nixon. And Holmes, like Nixon, approached the project with the zeal of a true convert.

The notion that *Abrams* represented a profound break with prior American precedent and with the internal psychology of Oliver Wendell Holmes has often been observed.[5] The orthodox narrative is that *Schenck* and the early Holmes were bad and that *Abrams*, and its ultimate triumph decades later, have been good.

In this narrative, I explore a more complicated narrative. The early Holmes, and the narrow view of free speech that dominated American law prior to *Abrams*, in fact has much to commend it. The early Holmes, the Holmes willing to allow the government to punish speech that we are certain is evil and can have only a bad tendency to advance that evil, appeals to "perfectly logical" calculations of the human mind. The logic of the early Holmes, in my judgment, is largely embraced by many on modern American university campuses. I use as an example the tragic confrontations at the University of Virginia and the City of Charlottesville in the summer of 2017 to punctuate this point. It is very difficult, logically, to see any persuasive reason why the law should tolerate the

4. WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.

5. *See, e.g.*, THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 3 (2013).

racist and anti-Semitic efforts of the alt-right groups that descended on Charlottesville to wreak hatred and violence on Charlottesville and the Virginia campus.

Yet for all that, while it took a long time coming, the "later Holmes" would eventually supplant the "early Holmes" in formal American First Amendment doctrine. The *Schenck* Holmes would continue to have the upper hand in American precedent well into the 1950s. Not until the 1960s would the libertarian views of the *Abrams* Holmes take hold as the dominant genes in the precedential gene pool.

I was personally part of the scholarly and advocacy movement pressing for that reversal. Yet on the 100th anniversary of this great American debate, I have personal difficulty pontificating as the cock-sure victor. The conflict I feel in my own mind and heart over what we mean by freedom of speech or the notion that the truth shall make us free feel as raw and ragged to me in 2019 as they must have felt to Holmes in 1919. Even the celebrated dissent by Holmes in *Abrams* reveals the split. One can almost sense Holmes struggling, arguing with himself.

The struggle continues at the heart of the larger American constitutional unconscious. The early Holmes appeals to our logic. The later Holmes appeals to our faith. The struggle remains a remarkably even fight.

II. CHARLOTTESVILLE 2017

Lest we think that one hundred years of history since *Schenck* and *Abrams* is a mere nostalgic tribute to a pivotal turning point in the intellectual history of the American free speech tradition, I begin this essay with a brief review of the current state of play in American discourse over the meaning of free speech.

Most revealing is the highly contested debate over the appropriate meaning of freedom of speech currently extant on American college campuses. Confrontations over the meaning of freedom of speech have been highly visible on many American campuses, public and private, large and small, in recent years. I focus here on just one confrontation, which began on the University of Virginia campus and then spread throughout the streets of Charlottesville, as a particularly virulent and deadly exemplar. I recall the bloody conflict in Charlottesville during the summer of 2017 to illustrate how the confrontations posed over the meaning of freedom of speech in *Schenck* and *Abrams* remain an ever-vexing conflict in the American constitutional unconscious. Or as William Faulkner, who taught as a writer in residence at the University of Virginia, once put it: "The past is never dead. It's not even past."[6]

I received a call on the Monday following Labor Day weekend in September 2017 from the Governor's Office in Richmond, Virginia. The call came from Shannon Dion, who was working in the Office of Virginia

6. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

Governor Terry McAuliffe. Shannon had been my law student at the University of Richmond School of Law, where I had served as the Dean of the Law School. She was phoning on behalf of the Governor and Virginia's Secretary of Public Safety, Brian Moran. Governor McAuliffe had created a Governor's Task Force to study the racial violence in Charlottesville, Virginia, during the summer of 2017. That violence had claimed the life of Heather Heyer, on August 12, 2017, when a white supremacist, James Alex Fields, slammed his speeding car pell-mell into a Charlottesville crowd of counter-protesters confronting a racist "Unite the Right" rally. Two Virginia State Troopers also died that day when their helicopter, positioned to monitor the violence in Charlottesville, crashed during their mission.

Earlier in the summer, I had been asked by the Virginia American Civil Liberties Union to serve as the First Amendment lawyer representing the alt-right groups when the City of Charlottesville sought to move their "Unite the Right" rally away from downtown Charlottesville. I had been an active litigator in emotionally charged confrontations involving speech and equality in Virginia, including acting as lead counsel in a famous Supreme Court decision challenging Virginia's anti-cross-burning law, a case called *Virginia v. Black*,[7] in which my client had been the Ku Klux Klan. I was co-counsel in a libel suit brought by a fraternity at the University of Virginia arising from *Rolling Stone*'s publication of an article alleging a gang-rape initiation ritual at a University of Virginia fraternity that turned out to be fabricated. Yet "seeing life from both sides now,"[8] I'd also been active as a university leader railing against hate speech and sexual assault on American campuses, having served as a President of Furman University and the dean of three law schools: Richmond, Washington and Lee, and Delaware. I ended up declining to represent the racial supremacists in Charlottesville. This left me free to participate in Governor McAuliffe's Task Force.

I had watched with horror the television images of racist violence in Charlottesville the month before. With so much of the nation, I had been shocked and traumatized by the gruesome video of Fields slamming his car into the crowd of innocent counter-protesters, murdering Heather Heyer. I also felt especially personal pangs of guilt, doubt, and remorse over the violence that engulfed Charlottesville and the death of Heather Heyer, for I had personally argued the Supreme Court case fighting for the rights of racist groups like the Ku Klux Klan and American neo-Nazis to spread their bile on the streets and parks of Virginia. What had my advocacy wrought? I felt vaguely complicit in the hate speech, violence, carnage, and death.

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7. 538 U.S. 343 (2003). I was lead appellate counsel in *Virginia v. Black*, responsible for writing the briefs and presenting oral argument in the Supreme Court. The contrasts between *Schenck* and *Abrams* were a driving force in how I attempted to frame the arguments in the case.

8. JONI MITCHELL, *Both Sides Now*, *on* CLOUDS (Reprise Records 1969).

It was in that spirit that I approached the work of the Charlottesville Task Force. It was in that spirit that I came to see that the events of Charlottesville in the super-heated hateful summer of 2017 had meaning and resonance far beyond that time and place.

Viewed as social history, there are time-tunnel linkages between the ferment that occupied the nation in the years prior to the 1919 decisions in *Schenck* and *Abrams* and the ferment that has occupied the nation between 2016 and 2019. *Schenck* and *Abrams* arose from prosecutions against protestors opposed to World War I and opposed more broadly to the state of American life after the industrial revolution. As the distinguished legal historian David Rabban has explained, in the period leading up to World War I "the consequences of industrialization led to substantial social unrest and radical activity."[9] Many in America responded with nativist fear to mass immigration, labor unrest, and anarchists.[10] "It is not surprising that this turbulent period tested the legal meaning of free speech."[11] One hundred years ago, those invoking the protection of freedom of speech were on the left, seeking to invoke the First Amendment in defense of their expression against capitalism, nativism, racism, and war.

In Charlottesville in 2017, those seeking to invoke the First Amendment in defense of their expression were on the right—or the newly coined "alt-right"—demanding the shelter of freedom of speech for messages of racism, anti-Semitism, and nativism.

The long, hot 2017 summer in Charlottesville was also the first summer of the presidency of Donald Trump and certainly not the winter of his opponent's discontent. Many of those who reacted with fear and loathing at the election of President Trump interpreted his election as a rearguard yearning for America's racist and xenophobic past; a yearning for an America in which "greater" is code for "whiter," conjuring images of ethno-state revivals of America in 1924 or Germany in 1933. Alt-right chants like "you will not replace us" or "blood and soil" were seen as surrogates for Trump's subliminal message.[12]

On June 17, 2015, Dylann Storm Roof, a white supremacist, brutally murdered nine African Americans at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. Roof's evil massacre of innocents would have ripple effects far beyond Charleston. His actions renewed debates over guns, the Second Amendment, and the right to bear arms. His actions also changed the dynamics of American debate over symbols of the Confederacy, including the Confederate battle flag and monuments to Confederate leaders such as Jefferson Davis, Stone-

9. David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 519 (1981).

10. *See id.*

11. *Id.*

12. Adam Goodheart, *Regime Change in Charlottesville*, POLITICO (Aug. 16, 2017), https://www.politico.com/magazine/story/2017/08/16/regime-change-in-charlottesville-215500 [https://perma.cc/66YN-Q96E].

wall Jackson, and Robert E. Lee. The ripple effects reached across the South, and the nation, and took on special intensity in Charlottesville.

Prior to committing the murders, Roof toured South Carolina historical sites with links to the Civil War and slavery posting photographs and selfies of his visits.[13] Four of the photographs on Roof's site showed him with the Confederate battle flag.

His online narrative, styled as his "manifesto," was the story of his racist radicalization. Roof's rambling manifesto was infested with attacks on African Americans, Hispanics, and Jews. "I have no choice," Roof asserted.[14] "I am not in the position to, alone, go into the ghetto and fight. I chose Charleston because it is most historic city in my state, and at one time had the highest ratio of blacks to Whites in the country."[15] Roof portrayed himself as one of the few with the courage to do what it takes. "We have no skinheads, no real KKK, no one doing anything but talking on the internet," he stated.[16] "Well someone has to have the bravery to take it to the real world, and I guess that has to be me."[17]

The Charleston Massacre led to the violence in Charlottesville. Like so many other cities in the United States in the aftermath of the Charleston Massacre, Charlottesville began to re-examine its own prominent symbols of the Confederacy, including two prominent statues of Robert E. Lee and Stonewall Jackson. The prospect that Charlottesville might have the statues removed provided the cover for rallies by alt-right leaders such as Richard Spencer.[18] While on the surface the rallies were over monuments to Lee and Jackson, on a deeper level the rallies were stalking horses for larger American debates over race, religion, and immigration. All of these debates again placed in raised relief the ongoing American debate over the meaning of freedom of speech. As the great legal philosopher and New York Yankee catcher Yogi Berra once said, "It was déjà vu all over again."

The American conflict symbolized by Charlottesville, just like the American conflict centered during World War I, forced confrontation over the meaning of free speech. The conflict pits two powerful yet opposing impulses. Many at the University of Virginia and the City of Charlottesville, and many of their allies on American campuses and communities across the United States, cannot imagine plausible policy or

13. Michael S. Schmidt, *Charleston Suspect Was in Contact with Supremacists, Officials Say*, N.Y. TIMES (July 3, 2015), https://www.nytimes.com/2015/07/04/us/dylann-roof-was-in-contact-with-supremacists-officials-say.html [https://perma.cc/FKQ6-AANJ].

14. Francis Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html [https://perma.cc/ZNP6-CYAW].

15. *Id.*

16. *Id.*

17. *Id.*

18. James Doubek, *Richard Spencer Leads Group Protesting Sale of Confederate Statute*, NPR (May 14, 2017, 2:25 PM), https://www.npr.org/sections/thetwo-way/2017/05/14/528363829/richard-spencer-leads-group-protesting-sale-of-confederate-statue [https://perma.cc/Z6WB-6CCD].

legal arguments supporting protection of the virulent racist, anti-Semitic, and nationalist messages of the contemporary alt-right. Many opposed to the radical labor, anti-capitalist, anti-war messages of the World War I insurgents held fast to identical views on the limits of speech. Yet there were contrarian voices, then and now, insisting that these feared messages be allowed the free vent of open expression in the marketplace, however convinced those in the mainstream might be that those messages are morally bankrupt and capable of nothing better than a tendency to promote discord, violence, and death. While the identities of many of the proponents and opponents of these views may have swapped places—many on the right have now traded places with many on the left on the meaning of free speech—the core debate has remained largely unchanged and largely, in the end, a relatively even fight.

III. EXPLORING THE INNER HOLMES

A. The Great Dissent

If we take a time machine back to 1919, we can see how these two opposing impulses raged at large not only in our national social and legal culture, but also inside the psyche of one of the most extraordinary influencers in the history of our national social and legal culture, Justice Oliver Wendell Holmes.

Holmes's opinion in *Abrams* remains, to this day, the most famous and celebrated opinion articulating this nation's radical commitment to robust protection for freedom of speech in our legal history. Holmes's opinion in *Abrams* was a dissent—a loser—but like a select few other prophetically haunting dissents, including Holmes's dissent in *Lochner v. New York*[19] or Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*,[20] the Holmes dissent in *Abrams* would come to be revered as an artifact of secular-sacred legal scripture, a prophetic cry from the wilderness that would emerge as the accepted truth that would set the nation free.

To say the least, however, Holmes did not start out this way.

B. Holmes and the Right-Privilege Distinction

The early Holmes, or the Holmes prior to *Abrams*, was no friend of civil liberties and no friend of freedom of speech. In *McAuliffe v. City of New Bedford*, dating back to his tenure on the Supreme Judicial Court of Massachusetts, Holmes summarily rejected a suit brought by a New Bedford police officer who had been dismissed by the mayor for violating a rule stating, "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever."[21] Officer McAuliffe argued that his dismissal invaded his "right to express

19. 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).
20. 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).
21. McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

his political opinions."[22] For Holmes, McAuliffe's claim was an utter nonstarter. In a famous epigram, Holmes wrote, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[23] For Holmes, the free speech rights of the public employee, McAuliffe, were waived through the terms of his contract of employment, in which he agreed to the conditions attached by the city, his employer. There are "few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract."[24] Just as any employee in the private sector, McAuliffe "takes the employment on the terms which are offered him."[25]

In another case decided by Holmes while he was still on the Supreme Judicial Court of Massachusetts, *Commonwealth v. Davis*, Holmes affirmed the conviction of a preacher for violating a Boston ordinance requiring advance permission from the city to engage in any public address on the Boston Common.[26] In rejecting the notion that the ordinance was unconstitutional, Holmes cited his prior opinion in *McAuliffe*, stating that "the argument to that effect involves the same kind of fallacy that was dealt with in *McAuliffe v. New Bedford*."[27] This "same kind of fallacy," as Holmes viewed it, revealed the complete blind spot for Holmes that conditions placed on entry to a public park, like conditions placed on acceptance of a public job, were different in kind from similar conditions placed on entry to land or acceptance of employment by private actors. "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[28] The United States Supreme Court granted review of the Holmes opinion and affirmed, quoting liberally from Holmes's opinion with enthusiastic approval.[29] The greater power to exclude anyone from the Boston Common, the Supreme Court reasoned, included the lesser power to require advance permission. "The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[30]

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22. *Id*.
23. *Id.*
24. *Id.* at 517–18.
25. *Id.* at 518.
26. Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895).
27. *Id.* (citing *McAuliffe*, 29 N.E. at 511).
28. *Id.*
29. Davis v. Massachusetts, 167 U.S. 43, 48 (1897).
30. *Id.*; *see also* Verlo v. Martinez, 820 F.3d 1113, 1144–45 (10th Cir. 2016) ("In *Davis*, the Court considered a First Amendment challenge to a Boston city ordinance forbidding 'any public address' on public property 'except in accordance with a permit from the mayor.' The Supreme Judicial Court of Massachusetts had affirmed a preacher's conviction for violating the ordinance by preaching on Boston Common without first obtaining a permit from the mayor, stating '[f]or the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a

Modern constitutional law doctrine has rejected decisions such as *McAuliffe* and *Davis.* At the highest level of generality, that rejection is reflected in the demise of the so-called "right-privilege distinction."[31] The mechanical notion that government has carte blanche to attach what conditions it pleases on entry to public property or the receipt of government benefits, such as public employment, public education, or public largess, has been abandoned.[32] The demise of the Holmes right-privilege distinction, however, has by no means been either clean or simple. An elaborate body of law involving "unconstitutional conditions" has emerged in its stead.[33]

The absolute power of the government to control the speech of government employees that Holmes embraced in *McAuliffe* has been replaced by a complex body of law providing some measure of First Amendment protection for government employees—though that protection is far from absolute. It is possible that a court today might even reach the same *result* as Holmes reached in *McAuliffe*, but the doctrinal path would involve far more intricate balancing than the simple one-liner that the petitioner "has no constitutional right to be a policeman."[34] The modern Supreme Court has thus recognized that "[t]he First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity."[35]

One line of government employment cases, curtailing the "spoils system" and regimes of political patronage, generally forbids conditioning government employment on political party affiliation,[36] though this gen-

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member of the public than for the owner of a private house to forbid it in his house.' The Supreme Court unanimously affirmed, concluding that '[t]he right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.'" (quoting *Davis*, 167 U.S. at 44, 47–48)).

31. *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

32. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."). Holmes would use very much the same patterns of thought when confronted with asserted constitutional rights to speak on public property.

33. *See generally* Van Alstyne, *supra* note 31, at 1445; Richard A. Epstein, *The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988); Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 85 (1982); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

34. *See* McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

35. Heffernan v. City of Paterson, 136 S. Ct. 1412, 1416 (2016).

36. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 79 (1990); Branti v. Finkel, 445 U.S. 507, 519 (1980); Elrod v. Burns, 427 U.S. 347, 372–73 (1976).

eral rule is subject to an exception for high-ranking policymaking positions.[37] The Supreme Court has upheld restrictions prohibiting certain federal employees from engaging in partisan political management and campaigning.[38] And in a series of cases, the Supreme Court has evolved a finely-tuned balancing test protecting the free speech rights of government employees when they speak out as citizens on matters of public concern, while providing no protection for the expressive activity of public employees on matters within the workplace deemed not to be matters of public concern.[39]

In the specific context of speech on public property, the absolute power of the government to exclude expression in public parks, streets, or sidewalks has been replaced by an elaborate body of modern "public forum law." A park such as the Boston Common would today be classified a "traditional public forum." Modern Supreme Court opinions describe spaces such as parks, streets, and sidewalks as places "which 'have *immemorially* been held in trust for the use of the public and, *time out of mind*, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[40] I place in emphasis the word "immemorially" and the phrase "time out of mind" because, as the *Davis* litigation makes clear, the designation of public parks as dedicated to free expression "immemorially" and "time out of mind" is a bit of a stretch. It was entirely out of Holmes's mind to imagine any general constitutional right to speak freely in public parks.

While modern public forum law has "overruled" Holmes with regard to speech in "traditional" and "designated" public forums,[41] some vestige of the Holmes view remains alive when it comes to "nonpublic forums," government property that is not by tradition or designation dedicated to free expression. Rejecting the view that the famous "baby doctor" and anti-war activist Dr. Benjamin Spock, who ran for President of the United States as a candidate for the People's Party, had a right to engage in expressive protest on a military base, for example, the Supreme Court stated that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is

37. *See Branti*, 445 U.S. at 518 (The public agency involved must "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved").

38. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 75 (1947) (rejecting a challenge to the Hatch Act, 18 U.S.C. § 9(a) (2012)); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 548 (1973) (affirming *Mitchell* and sustaining the Hatch Act).

39. *See* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); Connick v. Myers, 461 U.S. 138, 142 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

40. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (emphasis added) (quoting Hague v. Comm. Indus. Org., 307 U.S. 496, 515 (1939)).

41. "Designated" public forums are government facilities, properties, or programs that the government has of its own volition opened up to expressive activity, though it may not have been required to create the forum in the first instance. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267–68 (1981) (university meeting facilities); City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n, 429 U.S. 167, 174–75 (1976) (school board meeting); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 548 (1975) (municipal theater).

lawfully dedicated."[42] While this statement does seem to channel Holmes, it is limited by its terms only to government property that is not a traditional or designated public forum.[43]

Moreover, modern First Amendment principles would instantly identify the requirement that a speaker wishing to preach on the Boston Common obtain advance permission from the government, which was empowered to exercise unchecked and uncheckable discretion in granting or denying permission as a plainly unconstitutional prior restraint.[44]

The point here is not to criticize Holmes for failing to anticipate nuanced and relatively dense doctrinal evolutions in constitutional law that occurred decades after his views were stated. The point, to the contrary, is essentially the flip of that. As the nineteenth century moved into the twentieth, the sensibilities of jurists, including Holmes, had yet to evolve into anything *remotely* resembling our contemporary sensibilities about freedom of speech.[45]

C. *Patterson* and Contempt

In *Patterson v. Colorado ex rel. Attorney General*, Thomas M. Patterson, a former United States Senator and the principal owner of the *Denver Times* and the *Rocky Mountain News*, was held in contempt of court by the Supreme Court of Colorado for materials published in his newspapers critical of Colorado Supreme Court Justices.[46] The gist of Patterson's publications was that utility companies controlled the Denver political machine, which in turn exerted corrupt partisan influences on the rulings of the Colorado Supreme Court, including decisions of the Colorado court overturning certain election results to the benefit of Colorado Republicans and the detriment of Colorado Democrats. The publications deemed to be contemptuous were recounted at length in the opinion of the Colorado Supreme Court. One made the general charge that the Col-

42. Greer v. Spock, 424 U.S. 828, 836 (1976) (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)).

43. *See, e.g.*, United States v. Grace, 461 U.S. 171, 180 (1983) (striking down restrictions on expressive activity at the United States Supreme Court Building to the extent that the limitations extended to the public sidewalks around the Court grounds).

44. Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in 'the archetype of a traditional public forum,' is a prior restraint on speech. Although there is a 'heavy presumption' against the validity of a prior restraint, the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally. Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." (citations omitted) (first quoting Frisby v. Schultz, 487 U.S. 474, 480 (1988); and then quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 48, 70 (1963))); *see* Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 Fordham L. Rev. 263, 316–17 (1986).

45. Gibson, *supra* note 44, at 316–17.

46. Patterson v. Colorado ex rel. Att'y Gen., 205 U.S. 454, 461 (1907).

orado Supreme Court was illicitly controlled by the political machine and the utility corporations.[47] The second, a political cartoon in the *Rocky Mountain News*, graphically conveyed a similar message of political influence.[48] The third arguably went further, accusing the justices of the Colorado Supreme Court of deciding cases in order to advance "a business proposition that means millions upon millions" to their political benefactors.[49]

The contempt convictions against Patterson reached the United States Supreme Court. Holmes, now a United States Supreme Court Justice, rejected Patterson's argument that his conviction violated the First Amendment. Holmes noted that it was not at all clear that the First Amendment applied at all to the states, though he proceeded to reach the merits of the free speech claim on the assumption (without formally deciding) that the free speech guarantee of the First Amendment applied to the states

47. People v. News-Times Pub. Co., 84 P. 912, 914 (Colo. 1906) (quoting the publication and the Colorado Supreme Court's interpretation of it: "'What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered.' Meaning thereby that this court and the justices thereof are controlled by certain corporations and by partisan political influence, and were so controlled in rendering the decision in said causes.").

48. *Id.* ("The Attorney General further gives the court to understand and be informed that on the 25th day of June, A. D. 1905, there appeared on the first page of the Rocky Mountain News, one of said newspapers, so published as aforesaid, a certain cartoon and illustration, wherein are shown caricatures of five members of this court, namely, Chief Justice Gabbert, Mr. Justice Maxwell, Mr. Justice Bailey, Mr. Justice Campbell, and Mr. Justice Goddard, and wherein Chief Justice Gabbert is represented as the 'Lord High Executioner' in the act of beheading certain persons described therein (being the incumbents of certain county offices and the litigants mentioned in the foregoing causes, pending in this court), with display headlines in large letters over said cartoon and illustration, reading as follows, namely: 'IF THE REPUBLICAN PARTY HAS OVERLOOKED ANYTHING FROM THE SUPREME COURT IT WILL NOW PROCEED TO ASK FOR IT.' Also the following words appeared therein as describing this court, namely: 'The Great Judicial Slaughter-house and Mausoleum.' Thereby meaning and intending to convey the impression to the public that this court and the several members thereof, and especially Chief Justice Gabbert, Mr. Justice Maxwell, Mr. Justice Bailey, Mr. Justice Campbell, and Mr. Justice Goddard, were and are influenced by, and were and are under the control of, the Republican party, and were and are governed by political prejudice, and that this court is under the domination of a partisan political machine and of certain political bosses, and were, at the time of rendering said decisions, and are at the present time, so influenced, controlled, governed and dominated.").

49. *Id.* ("I know as common history the influence that created the majority of the court (meaning the Supreme Court of the state of Colorado) as it now is (meaning thereby that undue influences were brought to bear in appointing certain judges of said court), and I am old and experienced enough to judge of motives; and knowing the sponsors of the Chief Justice (meaning Chief Justice Gabbert) and his colleague Goddard (meaning Mr. Justice Goddard), and the interest they control, I am convinced that their intervention after the last election to overturn the senate as it stood, and to bowl out Governor Adams was not merely to prove themselves powerful bosses, or to advance themselves politically, but it was to carry out a business proposition that means millions upon millions to them, and especially to William G. Evans, the most consciousless boss that ever bestrode a suffering people (meaning that Chief Justice Gabbert and Mr. Justice Goddard were under the control, directly or indirectly, through third persons, of William G. Evans, for the purpose of carrying out certain business propositions which would bring millions upon millions of dollars to said third person, unnamed, and especially to William G. Evans).").

through incorporation under the Fourteenth Amendment.[50] (The free speech guarantee of the First Amendment would not be formally incorporated against state and local governments until 1925, in *Gitlow v. New York*.[51])

Holmes then proceeded to dispose of Patterson's claims through a series of quite stunning pronouncements.

The guarantee of free speech in the First Amendment, Holmes wrote, was intended only to prevent "previous restraints," and not to prevent subsequent punishments.[52] Because Patterson was sanctioned for contempt after his publications, the contempt was a "subsequent punishment" not covered by the free speech guarantee at all.

Patterson claimed that his attacks on the Colorado Supreme Court were *true*, and thus constitutionally immunized from any sanction.[53] Holmes rebuffed Patterson's assertion, refusing to accept the proposition that the truth should set him free. Holmes borrowed from the traditional common-law rule for criminal libel, under which truth was no defense.[54] Indeed, a true libel was deemed more dangerous and harmful than a false one. Holmes well knew the common-law maxim, "the greater the truth, the greater the libel."[55] He invoked that maxim in *Patterson*,[56] reasoning that the contempt of the Colorado Supreme Court justices would be "none the less a contempt that it was true."[57] A publication impugning the administration of justice that reached the eyes of a jury, Holmes explained, would be no less damaging if true.[58] Holmes maintained that

50. *Patterson*, 205 U.S. at 462 ("But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the states, still we should be far from the conclusion that the plaintiff in error would have us reach.").

51. 268 U.S. 652, 673 (1925).

52. *Patterson*, 205 U.S. at 462 ("In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." (quoting Commonwealth v. Blanding, 20 Mass. (3 Pick.). 304, 313–14 (Mass. 1825))).

53. *Id.* at 461 ("The defense upon which the plaintiff in error most relies is raised by the allegation that the articles complained of are true, and the claim of the right to prove the truth.").

54. Tollett v. United States, 485 F.2d 1087, 1098 n.27 (8th Cir. 1973) ("Whether libel was true or false was irrelevant under English common law. This was because breach of peace was regarded as the gist of the crime. As was said in the early English case, '[e]very libel . . . is made either against a private man, or against a magistrate or public person. If it be a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience . . . . " (alteration in original) (quoting de Libellis Famosis (1606) 77 Eng. Rep. 250, 251)).

55. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("If the state adopted for civil proceedings the saying of the old criminal law: the greater the truth, the greater the libel, the validity of the patent would not come in question at all.").

56. *Patterson*, 205 U.S. at 462 ("[T]he rule applied to criminal libels applies yet more clearly to contempts.").

57. *Id.*

58. *Id.* ("A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to

"[w]hat is true with reference to a jury is true also with reference to a court."[59]

There was an early free speech hero in *Patterson*, but it was not Holmes. The champion was Justice John Marshall Harlan. Harlan's dissenting opinion took sharp aim at Holmes's cavalier refusal to state whether the freedom of speech articulated in the First Amendment should be deemed incorporated in the protection of deprivations of liberty by states expressed in the Fourteenth Amendment. Harlan wrote eloquently that freedom of speech and press were essential parts of every man's liberty:

> I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the 14th Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press.[60]

Harlan also frontally assaulted the claim by Holmes that freedom of speech was limited to protection against previous restraints:

> It yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such "*previous restraints*" upon publications as had been practised by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any state, since the adoption of the 14th Amendment, can, by legislative enactments or by judicial action, impair or abridge them. In my judgment the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution.[61]

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obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.").

59. *Id.* at 462–63 ("Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it . . . .").

60. *Id.* at 465 (Harlan, J., dissenting).

61. *Id.*

Yet Harlan's incisive elegance left Holmes and the Court's majority unmoved. Patterson's contempt for daring to call out what he perceived as corruption in Colorado's highest court was upheld, in a manner astonishing when measured against modern First Amendment principles. As Justice Black, writing for the Court in *Bridges v. California* pronounced:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . An enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[62]

"Although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives '[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.'"[63] Modern First Amendment cases would use Holmes's own later invention, the "clear and present danger" test, to strike down attempts to invoke the contempt power in the service of protecting the reputation of judges and courts.[64]

D. Labor Unrest and Martial Law

The ferment that roiled the nation as Holmes ascended to the Supreme Court included violent industrial strife. Confrontations between labor and capital were often especially violent in the Rocky Mountain states, with the government typically siding against the unions. The Western Federation of Miners went on strike in Colorado in 1903, and Colorado Governor James H. Peabody responded by declaring a state of emergency, calling out the national guard, and imposing martial law.[65]

The Governor ordered one of the union leaders, Charles Moyer, arrested and incarcerated. Moyer was held in jail, allegedly without probable cause and with no judicial process of any kind, for approximately ten weeks. He sued, challenging his confinement as unconstitutional by claiming he was incarcerated without due process of law. In *Moyer v. Peabody*,[66] the Supreme Court, in an opinion by Justice Holmes, rejected

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62. Bridges v. California, 314 U.S. 252, 270–71 (1941).

63. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838–39 (1978) (quoting *Bridges*, 314 U.S. at 289 (Frankfurter, J., dissenting)).

64. *See* Wood v. Georgia, 370 U.S. 375, 388 (1962) ("Thus we have simply been told, as a matter of law without factual support, that if a State is unable to punish persons for expressing their views on matters of great public importance when those matters are being considered in an investigation by the grand jury, a clear and present danger to the administration of justice will be created. We find no such danger in the record before us. The type of 'danger' evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification.").

65. *Colorado Governor Sends Militia to Cripple Creek*, History, https://www.history.com/this-day-in-history/colorado-governor-sends-militia-to-cripple-creek [https://perma.cc/6AW3-SJPT] (last updated Dec. 13, 2018).

66. 212 U.S. 78 (1909).

Moyer's claim. Holmes stated that "what is due process of law depends on circumstances."[67] The essence of due process "varies with the subject-matter and the necessities of the situation."[68] Holmes wrote that there are times when "summary proceedings suffice for taxes, and *executive decisions for exclusion from the country*."[69]

The observation by Holmes that summary due process may be all that is required for "executive decisions for exclusion from the country" retains its relevancy and was tested most recently in *Trump v. Hawaii*.[70] The Court in *Trump v. Hawaii* upheld President Trump's travel ban, applying a highly deferential standard of review because the ban allegedly burdened not only foreign citizens seeking entry but the rights of American citizens, stating, "Although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen."[71]

Setting foreign travel bans aside, however, it is surely inconceivable that any American court would today countenance the summary jailing of a labor organizer leading a union strike without any due process of any kind on the mere declaration of a state governor or the President of the United States that a condition of emergency exists, at least in the absence of a formal congressional suspension of the writ of habeas corpus. Yet Holmes, apparently deaf to any of these civil liberties sensibilities, blithely endorsed the Colorado Governor's precipitous transition to a police state. No mind any checks and balances in times of civil disruption. "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment," Holmes wrote.[72] "Public danger warrants the substitution of executive process for judicial process."[73]

E. Nudes and Prudes

In *Fox v. Washington*,[74] Holmes again wrote for the Supreme Court in rejecting a free speech challenge. Jay Fox was the editor of an article published in Pierce County, Washington, in a small paper, the *Agitator*, entitled "The Nude and the Prudes."[75] The article arose from an incident in which Stella Thornhill, a member of an anarchist community on the Puget Sound known as the "Home Colony," was fined sixty-five dollars for indecent exposure for swimming in the nude.[76] Thornhill claimed that she

67. *Id.* at 84.
68. *Id.*
69. *Id.* (emphasis added).
70. 138 S. Ct. 2392 (2018).
71. *Id.* at 2402.
72. *Moyer*, 212 U.S. at 84.
73. *Id.*
74. 236 U.S. 273 (1915).
75. State v. Fox, 127 P. 1111, 1112 (Wash. 1912).
76. *See* Richard Polenberg, Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech 210 (1987).

liked to swim nude because it helped her rheumatism.[77] Thornhill's fine became a matter of some local controversy as it appears that, rheumatism or not, many locals were unfavorably disposed toward nude swimming. The article published in the *Agitator* took Thornhill's side of the dispute, praising Thornhill and the "Homeites" of the Home Colony for being a community of free spirits, and mocking the local prudes who sought to repress them.[78]

Fox was convicted and sentenced to two months in prison for violating a Washington law declaring,

> Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor.[79]

The Supreme Court of Washington held that Fox appeared to concede "that the article does tend to encourage disobedience and disrespect for law; for it clearly does so."[80] Fox nonetheless argued that his article was protected under the guarantees of freedom of speech and press.[81] The Supreme Court of Washington rejected the claim,[82] and Holmes, writing for a unanimous United States Supreme Court, rejected the claim as well.

Holmes recited the rule of construction that statues should be construed, when possible, to avoid "doubtful constitutional questions,"[83] and interpreted the Supreme Court of Washington's decision as construing the Washington statute "as confined to encouraging an actual breach of law."[84] Holmes thus avoided any need to decide whether a statute making the mere expression of opinion criticizing a law could stand: "It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions

77. *Id.*

78. *Fox*, 236 U.S. at 276 (The article declared: "Home is a community of free spirits, who came out into the woods to escape the polluted atmosphere of priest-ridden, conventional society;' that 'one of the liberties enjoyed by the Homeites was the privilege to bathe in evening dress, or with merely the clothes nature gave them, just as they chose;' but that 'eventually a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people's freedom,' and that they had four persons arrested on the charge of indecent exposure, followed in two cases, it seems, by sentences to imprisonment. 'And the perpetrators of this vile action wonder why they are being boycotted.' It goes on: 'The well-merited indignation of the people has been aroused. Their liberty has been attacked. The first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy.'").

79. *Id.* at 275–76 (quoting WASH. REM. & BAL. CODE § 2564 (1910)).

80. *Fox*, 127 P. at 1112.

81. *Id.*

82. *Id.*

83. *Fox*, 236 U.S. at 277.

84. *Id.*

of a particular statute or of law in general."[85] In the case before the Court, Fox had encouraged disregard of the law in a manner that Holmes described, consistent with the common law, as "manifested disrespect, as active disregard going beyond the line drawn by the law."[86] Like Pontius Pilate, Holmes washed his hands of all judgment on nude swimming, prosecution for nude swimming, or articles encouraging it.[87] "All that concerns us is that it cannot be said to infringe the Constitution of the United States."[88]

IV. THE TRILOGY OF ESPIONAGE ACT PROSECUTIONS

President Woodrow Wilson urged passage of what would become the Espionage Act of 1917, arguing that immigrants entering the United States included many who "poured the poison of disloyalty into the very arteries of our national life."[89] In his State of the Union Address on December 7, 1915, President Wilson declared:

> I am sorry to say that the gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our Government into contempt, to destroy our industries wherever they thought it effective for their vindictive purposes to strike at them, and to debase our politics to the uses of foreign intrigue.[90]

The United States declared war on Germany in April of 1917 and, two months later, the Espionage Act of 1917 was passed. Much of the Espionage Act dealt with classic spying. Section 3 of the Act, however, banned expression intending to interfere with the success of the military, promote the success of the nation's enemies, or obstruct recruitment and enlistment in the armed services. Section 3 read in its entirety:

> Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of

85. *Id.*
86. *Id.*
87. *Id.* at 278 ("Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act.").
88. *Id.*
89. President Woodrow Wilson, State of the Union Address (Dec. 7, 1915), https://www.infoplease.com/homework-help/us-documents/state-union-address-woodrow-wilson-december-7-1915 [https://perma.cc/XR7Z-6VPJ].
90. *Id.*

> the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.[91]

The sweep of § 3 was, to say the least, vague.[92] The law appeared to criminalize expression intended to cause insubordination, disloyalty, and obstruction of recruitment or enlistment, with no clear demarcation of the meaning of those terms.[93]

A trilogy of three cases challenging convictions under the Act reached the Supreme Court. All three were decided in March of 1919, while the country was still engaged in World War I. In each of them, the convictions were affirmed. In each of them, Holmes wrote the opinion for the Court.

A. *SCHENCK*

Schenck v. United States[94] was the first cased decided, arising from the prosecutions and convictions of Charles T. Schenck, the General Secretary of the Philadelphia Socialist Party, and Dr. Elizabeth Baer, a member of the Party's Executive Committee. In August 1917, Schenck and others mailed leaflets to men listed in newspapers as having passed their draft board examinations. Over 15,000 one-page leaflets, containing material on the front and back, were published. One side bore the title "LONG LIVE THE CONSTITUTION OF THE UNITED STATES," the other, "ASSERT YOUR RIGHTS!"[95] The leaflets quoted verbatim the first section of the Thirteenth Amendment, which declares: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[96] Holmes summarized the material in the leaflets in one paragraph:

> The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the

91. Espionage Act of 1917, Pub. L. No. 65-24, tit. 1, § 3, 40 Stat. 217, 219 (1917).
92. *See* THOMAS REED, AMERICA'S TWO CONSTITUTIONS: A STUDY IN THE TREATMENT OF DISSENTERS IN TIME OF WAR 113 (2017).
93. *Id.*
94. 249 U.S. 47, 48–49 (1919).
95. POLENBERG, *supra* note 76, at 212.
96. U.S. CONST. amend. XIII.

> solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country."[97]

The indictment, as described by Holmes, charged the defendants of:

> 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 with the German Empire, to-wit, that the defendant wilfully conspired to have printed and circulated to men who had been called and accepted for military service . . . , a document set forth and alleged to be calculated to cause such insubordination and obstruction.[98]

Schenck was convicted of violating the Espionage Act and sentenced to six months imprisonment. Dr. Baer was also convicted; she received a sentence of ninety days.[99]

The lawyers for Schenck and Baer, Henry J. Gibbons and Henry John Nelson, argued their free speech defense vigorously in their brief to the Supreme Court. "[H]ow can a speaker or writer be said to be free to discuss the actions of the Government if twenty years in prison stares him in the face if he makes a mistake and says too much?" they asserted.[100] "Severe punishment for sedition will stop political discussion as effectively as censorship."[101] The petitioners (then called "plaintiffs in error") noted that Thomas Jefferson had treated as unconstitutional the Sedition Act of 1798, which, they said, "wrecked the Federalist Party."[102] They argued that the Federalist giant Alexander Hamilton later defended a Federalist editor from prosecution.[103] The Brief resonated with themes of freedom to dissent against government and the importance of free discussion to the spread of truth:

> The spread of truth in matters of general concern is essential to the stability of a republic. How can truth survive if force is to be used, possibly on the wrong side? Absolutely unlimited discussion is the only means by which to make sure that "truth is mighty and will prevail."

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97. *Schenck*, 249 U.S. at 50–51.
98. *Id.* at 48–49.
99. POLENBERG, *supra* note 76, at 212–13.
100. Brief for Plaintiff in Error at *6, Schenck v. United States, 249 U.S. 47 (1919) (Nos. 1017, 1018), 1919 WL 20713, at *6.
101. *Id*.
102. *Id.* at *6, *8.
103. *Id.* at *6.

> This does not mean a man may with impunity violate the Draft Law by refusing to do military service when so required; but it does mean he can say the Draft Law is wrong and ought to be repealed. Some of our judges have made this distinction; while others virtually make all opposition to the war criminal.
>
> It can be even urged farther that the right of free speech, if it is allowed fully, gives the right to persuade another to violate a law, since, legally, it is only the one who actually violates the law who should be punished. It is no excuse for a thief to say John Jones persuaded him to steal; or, as the homely adage has it, "you don't have to put your hand into the fire because I tell you to do so."
>
> This is the distinction between words and acts.
>
> . . . .
>
> If all opponents of a war are suppressed and all advocates of a war are given free rein, is it not conceivable that a peace-loving president might be prevented from making an early, honorable peace, founded on justice! How can the citizens find out whether a war is just or unjust unless there is free and full discussion! If it is criminal to say the Draft Law is wrong, then it is criminal to say that any law is wrong, for the Constitution, we are told, is not suspended in time of war; but we dare not attack it or our form of government. It is conceivable, under such a rule, that a citizen might be a criminal who advocated the election of senators by popular vote, the adoption of the referendum, or what not; but probably such would only be the case in time of war when he might thereby give aid and comfort to the enemy.
>
> Must we return to conditions which prevailed under George III and be punished for criticizing our Government?[104]

The Brief recited the massive specter of prosecution under the Espionage Act, noting that the Department of Justice had announced a total of nearly 1,200 Espionage Act cases, with 125 convictions and 672 cases pending.[105]

The brief for the United States argued that the circulars distributed by the defendants went well beyond "legitimate political agitation for the repeal of the draft law," but rather "involved attempting to induce young men subject to the draft law to disobey the requirements of that law."[106] This was established, the government argued, by the "fact that they chose men already drafted and called as the persons to whom to address their arguments."[107] Holmes and a unanimous Supreme Court were unmoved by the free speech arguments advanced by Schenck, Baer, and their lawyers. Holmes's opinion in *Schenck* did backtrack a bit from *Patterson*, conceding the possibility that the First Amendment might reach subsequent punishments and was not confined merely to a ban on previous

104. *Id.* at *6–8.
105. *Id.* at *8.
106. Brief for Plaintiff in Error, *supra* note 100, at *12–13.
107. *Id.* at *13.

restraints.[108] But for Schenck and Baer, it went downhill from there.

The first dagger came with Holmes making the simple point that the document circulated would not have been sent unless it was intended to have "some effect." Justice Holmes wrote, "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."[109] The issue was punctuated with the emphasis that the defendants did not contest this point.[110]

The Holmes opinion then opined on the difference between speech published in times of war and speech published in times of peace. "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."[111] This was followed by the key passage in *Schenck*, for which the Holmes opinion is most famously remembered:

> But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[112]

The phrase in the middle of this passage, requiring a "clear and present danger," arguably held some promise for significant protection of freedom of speech. That promise proved illusory, however, in *Schenck* itself and through most of the next one hundred years. While "clear and present danger" stuck as a phrase that falls trippingly off the tongues of lawyers and judges, it was no friend to protection of free speech in *Schenck* and proved ambivalent at best as a formula for protecting free speech in the decades that followed. The phrase would ultimately be replaced by the three-part incitement test of *Brandenburg v. Ohio*,[113] in which the Court held that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of

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108. *Schenck*, 249 U.S. at 51–52 ("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*." (citation omitted)).

109. *Id.* at 51.

110. *Id.* ("The defendants do not deny that the jury might find against them on this point.").

111. *Id.* at 52.

112. *Id.* (citations omitted).

113. 395 U.S. 444 (1969) (per curiam).

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."[114]

Considered in its context, however, the Holmes formulation in *Schenck* is widely recognized as not very protective of free speech at all. There was, first, his famous line about "falsely shouting fire in a crowded theatre." This line, which would become one of the most oft-repeated clichés in American discourse, drew intense fire virtually from the beginning.[115] But more importantly, as already noted, the opinion openly reduced the protection given speech in times of war, substantially diluting the meaning of the words "clear" and "present," morphing them into little more than the "bad tendency" test Holmes had embraced in his prewar opinions. The tepid protection Holmes envisioned was captured in this pallid observation that the speech would not have been published unless it were intended to have "some effect." The phrase "some effect" did not require much. It was enough for Holmes that the leaflets were sent to "influence" persons to not subject themselves to the draft. This was essentially an act of common-law "attempt," and Holmes made it clear that success was not required to impose criminal liability. It was enough that the leaflets were sent with the requisite intent, coupled with their mere *tendency* for them to cause harm:

> It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 (Comp. St. 1918, § 10212d) punishes conspiracies to obstruct as well as actual obstruction. 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.[116]

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114. *Id.* at 447.

115. *See* Carlton F.W. Larson, *"Shouting 'Fire' in A Theater": The Life and Times of Constitutional Law's Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 183–84 (2015) ("The inaptness of the analogy was noted almost immediately. Writing a few months after Schenck was decided, Professor Ernst Freund of the University of Chicago Law School found the analogy 'manifestly inappropriate' in the context of 'implied provocation in connection with political offenses.' Professor Zechariah Chafee of Harvard Law School argued that a much closer analogy to Schenck was a 'man who gets up in a theater between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked.' Such perplexing cases 'cannot be solved by the multiplication of obvious examples, but only by the development of a rational principle to mark the limits of constitutional protection.' H. L. Mencken argued in 1926 that the theater example was unique because 'there is no opportunity for persons who know that there is no fire to state the fact calmly, and prove it.' One of Freund's successors at the University of Chicago, Professor Harry Kalven, would later describe the analogy as 'trivial and misleading,' noting that because it 'is so wholly apolitical, it lacks the requisite complexity for dealing with any serious speech problem likely to confront the legal system.'" (first quoting Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13, 14; then quoting Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 944 (1919); then quoting H.L. Mencken, *On Liberty*, CHI. DAILY TRIB., Mar. 21, 1926, at H1; and then quoting HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 133-34 (Jamie Kalven ed., 1988))).

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

This was no libertarian manifesto protecting freedom of speech. This was affirming the power of government to ban expression intended to and tending to cause harm—period. The "clear and present danger" language was misleading, nothing more than cosmetic window-dressing. It was not *Schenck*'s load-bearing substance.[117]

A week after *Schenck*, Holmes again affirmed two convictions under the Espionage Act, in *Frohwerk v. United States*[118] and *Debs v. United States*,[119] decided the same day. In neither case did Holmes even use the phrase "clear and present danger."

B. *Frohwerk*

Frohwerk arose from a series of articles critical of the war effort published by Jacob Frohwerk in *Staats-Zeitung*, a German language newspaper in Missouri with a minuscule circulation. Frohwerk's articles asserted that it was a monumental and inexcusable mistake to send American soldiers to France, and touted the "undiminished strength" and "unconquerable spirit" of the German people.[120] After describing the plight of the draftee, one article asked rhetorically who would pronounce the draftee guilty for following "the first impulse of nature: self-preservation."[121] Frohwerk was convicted under the Espionage Act of 1917 and sentenced to a fine and ten years imprisonment.

In affirming the conviction, Holmes observed that freedom of speech "cannot have been, and obviously was not, intended to give immunity for every possible use of language."[122] Moving away from his fire in a theater analogy, Holmes instead invoked counseling to commit murder: "We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[123]

Holmes seemed to harbor at least a modicum of sympathy for poor Frohwerk, whom Holmes described as a "poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation . . . ."[124] Moreo-

117. *See* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. Chi. L. Rev. 1205, 1261 (1983) ("Holmes in *Schenck* inferred intent from the probable consequences and surrounding circumstances of speech. This sequence, contrary to the subsequent assertions of Chafee and others, strongly suggests that Holmes did not consider 'clear and present danger' a libertarian replacement for the 'bad tendency' doctrine he himself had often invoked in prior decisions. It seems inconceivable that Holmes would use the word 'tendency,' stress the unimportance of a successful act, and rely on cases that did not demonstrate any sensitivity to free speech in order to elaborate a libertarian test designed as a constitutional bar to convictions based on predicting the tendency of speech.").

118. 249 U.S. 204 (1919).

119. 249 U.S. 211 (1919).

120. *Frohwerk*, 249 U.S. at 207.

121. *Id.* at 208.

122. *Id.* at 206.

123. *Id.*

124. *Id.* at 208.

ver, the record before the Court was scant, with little factual detail establishing Frohwerk's intent or the impact of his publications. Holmes noted that Frohwerk's articles actually had condemned violence, deploring draft riots in Oklahoma and elsewhere, though in the same breath Holmes suggested that the language Frohwerk used "might be taken to convey an innuendo of a different sort."[125]

A conspiracy to violate the Espionage Act, Holmes asserted, "could be accomplished or aided by persuasion as well as by false statements."[126] Returning to the theme in *Schenck* regarding expression in times of war and in times of peace, Holmes introduced a nuance that had not been addressed in *Schenck*. Much of what Frohwerk had written was plainly just opinion. Holmes noted that Frohwerk had argued that in entering the War, America was "ruled by England," and that the men who had led the nation into war were wrong and had given false and hypocritical reasons for the course.[127] Holmes admitted that opinions such as these "might be said or written even in time of war *in circumstances* that would not make it a crime."[128] Thus, even in times of war, Holmes seemed to admit Frohwerk had some right to express these opinions: "We do not lose our right to condemn either measures or men because the country is at war."[129]

Yet if this were true, what then *were* the "circumstances" that made Frohwerk's utterances of these views a crime punishable by ten years in prison? Holmes conceded that, unlike *Schenck*, the circumstances did not include targeted mailing to persons who had already been drafted, noting that "[i]t does not appear that there was any special effort to reach men who were subject to the draft."[130]

Well, then, what *was* there? The shocking answer was essentially *nothing*, save shear speculation. The record did not demonstrate that circumstances justifying Frohwerk's conviction existed. But the record also did not demonstrate that the circumstances did not exist. So Holmes effectively ruled that ties went to the government:

> But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.[131]

Frohwerk is in many ways the most shocking case of the trilogy. Frohwerk received a ruinous sentence of ten years in jail for expressing views that can only be fairly characterized as political opinion opposing a controversial war. No palpable evidence of illicit intent or harmful impact

125. *Id*. at 207.
126. *Id.* at 209.
127. *Id.* at 208.
128. *Id.* (emphasis added).
129. *Id.*
130. *Id.*
131. *Id.* at 209.

was presented to the Court. On the mere speculation that despite his condemnation of violence, Frohwerk intended to communicate "an innuendo of a different sort," or the mere speculation that his opinions could have been circulated in quarters "where a little breath would be enough to kindle a flame," his speech was rendered criminal.

C. *Debs*

The third case in the trilogy involved the most famous person to ever be prosecuted under the Espionage Act, Eugene Debs. Rising to national prominence as a labor leader in the 1890s, Debs led a successful strike for higher wages against the Great Northern Railroad in 1894. He became a hero of the union movement when he served a six-month jail term for his role in the infamous Chicago Pullman Strike. Debs was a charismatic and compassionate orator and leader. After campaigning for the populist William Jennings Bryan for president in 1896, Debs founded the Socialist Party of America and became a perineal candidate for president in his own right, running four times as the Socialist Party's candidate for president.[132]

On June 16, 1918, Debs was speaking in Canton, Ohio. The orator's principal themes were the future of American socialism and the immorality of the United States' involvement in World War I. Debs stated that he had just returned from a visit to three comrades who were in prison for aiding and abetting resistance to the draft: Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker.[133] The convictions of Ruthenberg, Wagenknecht, and Baker had been affirmed by the Supreme Court in January of 1918.[134] Debs thought they were paying the penalty for their devotion to the working class, remarking that "he was proud of them."[135] Debs stated that "the master class has always declared the war and the subject class has always fought the battles . . . the subject class has had nothing to gain and all to lose, including their lives," and "the working class, who furnish the corpses, have never yet had a voice in declaring war and have never yet had a voice in declaring peace."[136] "You need to know that you are fit for something better than slavery and cannon fodder," Debs proclaimed.[137]

Holmes recounted at length the substance of Debs's speech, noting particularly Debs's professed allegiance and admiration for other convicted draft obstructers, including Ruthenberg, Wagenknecht, Baker, Rose Pastor Stokes, and Kate Richards O'Hare. Holmes also described evidence introduced at Debs's trial that Debs had professed support for a manifesto entitled the "Anti-War Proclamation and Program," adopted

132. *See* Rodney A. Smolla, Suing the Press: Libel, the Media, and Power 46 (1986).
133. Debs v. United States, 249 U.S. 211, 212–13 (1919).
134. Ruthenberg v. United States, 245 U.S. 480, 483 (1918).
135. *Debs*, 249 U.S. at 213.
136. *Id.* at 213–14.
137. *Id.* at 214.

at St. Louis in April 1917, which declared: "We brand the declaration of war by our Governments as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage."[138]

At his trial, Debs elected to address the jury himself. He argued that his speech did not warrant conviction for violation of the Espionage Act. But in a courageous, if not foolhardy flourish, he also declared: "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone."[139] Holmes turned this statement by Debs against him, observing somewhat snidely that,

> The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting.[140]

The snarky opening to this sentence, stating that the statement "was not necessary" to the jury's finding, was Holmes engaging in the very wordplay for which Holmes had blasted Jacob Frohwerk, "an innuendo of a different sort."[141] Holmes's passive-aggressive innuendo was that Debs's statement to the jury, if "not necessary," was surely sufficient to uphold Debs's conviction. As Holmes said in the very next sentence, "If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."[142]

Holmes pointed out that the St. Louis "Anti-War Proclamation and Program" to which Debs subscribed promoted "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power."[143] For Holmes, this was the clincher. If Debs believed in this program, then Debs's speech in Canton could have been a manifestation of that belief, and on those grounds alone, enough to justify sending Debs to prison:

> Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c.,

138. *Id.* at 216.
139. *Id.* at 214.
140. *Id.* at 214–15.
141. Frohwerk v. United States, 249 U.S. 204, 207 (1919).
142. *Debs*, 249 U.S. at 215.
143. *Id.* at 216.

and unless the defendant had the specific intent to do so in his mind.[144]

V. THE *ABRAMS* TRANSFORMATION

Frank Abrams was one of five Russian immigrants who had printed 5,000 leaflets written in English and Yiddish, protesting the combination of "German militarism" and "allied capitalism" to "crush the Russian revolution."[145] When the Czarist regime in Russia was overthrown in the Bolshevik Revolution, Russia signed a peace treaty with Germany. In the summer of 1918, American marines were sent to Vladivostok and Murmansk. This intervention by the United States was perceived by Abrams and his comrades as antagonistic to the new Russian revolution.[146]

The majority opinion in *Abrams* was written by Justice John Hessin Clarke. The opinion provided a candid portrait of how the majority perceived the defendants: "They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization."[147] Justice Clarke's opinion went to unusual lengths to quote lavishly from the leaflets, reciting their attacks on President Wilson and America's intervention in Russia. The opinion summarized the leaflets as, on their surface, communicating resentment over the sending of American troops to Russia, but having as their deeper and intended meaning sedition, riots, revolution, and obstruction of the American war effort.[148] The defendants were convicted and sentenced to terms ranging from three to twenty years in prison, and the Supreme Court, following the roadmap in *Schenck*, *Frohwerk*, and *Debs*, affirmed.

The transformation in Oliver Wendell Holmes that was manifest in his dissenting opinion in *Abrams v. United States* is probably the most deeply explored flip in legal thinking in the history of American law. The law itself of course changes all the time. Major constitutional principles get overruled—as *Brown v. Board of Education*[149] overruled the "separate but equal" doctrine of *Plessy v. Ferguson*,[150] or *Williamson v. Lee Optical*[151] overruled the substantive economic due process principles of *Lochner v. New York*.[152] And individual Justices have been known to change

144. *Id.*
145. Abrams v. United States, 250 U.S. 616, 625 (1919) (Holmes, J., dissenting).
146. *See* POLENBERG, *supra* note 76, at 124.
147. *Abrams*, 250 U.S. at 617.
148. *Id.* at 623. ("These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe.").
149. 347 U.S. 483 (1954).
150. 163 U.S. 537 (1896).
151. 348 U.S. 483 (1955).
152. 198 U.S. 45 (1905).

their views on specific issues and on general approaches to constitutional interpretation as their jurisprudence evolves over the course of their tenure.[153] Justices appointed by presidents expecting to get safe conservative or liberal votes on the Court have, on more than one occasion, been unpleasantly surprised.[154]

So the law changes direction, and individual jurists change their minds. But for one powerful, intellectually dominant Supreme Court Justice, who had been the chief intellectual architect of one view of the law, to suddenly, within the course of months, become the prophet and champion of an opposite view, is rare. So rare, indeed, that it does not appear to have ever happened before Holmes's 1919 shift and does not appear to have happened since.

Many brilliant scholars have documented the dramatic shift in position of Holmes from *Schenck* to *Abrams* and explored in detail the mystery of *who* or *what* caused Holmes to change his mind. The shift in Holmes may be overdetermined, in that there are, as a fictional detective might protest, *too many* clues as to what precipitated the change.

David Rabban, the leading American legal historian of the period, points to a number of factors.[155] Holmes had been influenced by criticisms of *Schenck*, *Frohwerk*, and *Debs* by Harvard Law School's Professor Zechariah Chafee and Judge Learned Hand and the writings of Professor Ernst Freund of the University of Chicago Law School.[156] The excesses of post-World War I anticommunist hysteria alarmed many, including Holmes.[157] The Red Scare of 1919, and the national debate over the wisdom of the Treaty of Versailles, may have led Holmes to be more introspective about using law to enforce prevailing wisdom.[158]

The relationship between Holmes and Learned Hand is particularly intriguing. Hand had written a highly-publicized 1917 opinion in *Masses Publishing Co. v. Patten*.[159] In his opinion Hand issued an injunction prohibiting the Postmaster General from suppressing distribution of the magazine the *Masses*.[160] While technically the case was not a First Amendment decision, but an interpretation of the Espionage Act, it was widely perceived as the most pro-free speech judicial opinion of its time. Hand accepted that the magazine's agenda was to attack with the "utmost

153. Justice Harry Blackmun is probably the most famous example. *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 110–13 (2005).

154. *See* Ronald L. Feinman, *These 9 Justices Failed to Vote the Way Their Party Expected*, HIST. NEWS NETWORK (Oct. 14, 2018), https://historynewsnetwork.org/article/170179 [https://perma.cc/RP7T-DNB9] (listing Justices Felix Frankfurter, Byron White, Earl Warren, William Brennan, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, and David Souter).

155. Rabban, *supra* note 117, at 1311–15.

156. *Id.* at 1312–13.

157. *Id.* at 1313.

158. *Id.*

159. 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

160. *Id.* at 543.

violence the draft and the war."[161] Hand also conceded that these attacks tended to arouse emulation. What was not so plain, Hand insisted, was that the attacks actually counseled or caused law-breaking.[162] Much of Hand's language in *Masses* was, then and now, a powerful defense of free speech. At the heart of his opinion was a rejection of the notion that the mere "bad tendency" of the material to foment disregard of the law or the nation's war effort was enough to justify its suppression:

> The defendant's position is that to arouse discontent and disaffection among the people with the prosecution of the war and with the draft tends to promote a mutinous and insubordinate temper among the troops. This, too, is true; men 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 suffer and die, will be more prone to insubordination than those who have faith in the cause and acquiesce in the means. Yet to 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. Assuming that the power to repress such opinion may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the clearest expression of such a power justifies the conclusion that it was intended.[163]

Hand's opinion was reversed on appeal by the Second Circuit in an opinion that sharply reproved Hand's position:

> This court does not agree that such is the law. If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested. That one may willfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest, seems to us too plain for controversy. To obstruct the recruiting or enlistment service, within the meaning of the statute, it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting is sufficient.[164]

The Second Circuit's view would later be essentially the view adopted by Holmes in *Schenck*, *Frohwerk*, and *Debs*. Yet in *Abrams*, Holmes ap-

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161. *Id.* at 541.

162. *Id.* at 540–41 ("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.").

163. *Id.* at 539–540.

164. Masses Pub. Co. v. Patten, 246 F. 24, 38 (2d Cir. 1917).

peared to move more in the direction of Hand in *Masses*. Was Hand responsible for Holmes's change?

Estimable scholars have retraced the correspondence between Hand and Holmes during this period.[165] An indication of how far apart Hand and Holmes were in their basic instincts about freedom of speech, at least early in their correspondence, is a one-liner from one of the Holmes letters to Hand in which Holmes quipped, "Free speech stands no differently than freedom from vaccination."[166]

So too, many have speculated on a fateful train ride. By serendipity, Hand and Holmes shared a train ride on June 19, 1918, between New York and Boston, while Holmes was on his way from Washington to his home in Massachusetts following the end of the Supreme Court term, and Hand traveling to his summer home in New Hampshire. Their conflicting views of free speech were discussed on the train ride, though there is little record of who said exactly what.[167] What the record of interaction between Holmes and Hand does appear to reveal is that, at least in the early going, Hand's views had little impact on Holmes.[168]

I leave to better detectives the ongoing exploration of what caused Holmes to change.[169] My modest point in this essay is simply to suggest that it is too easy to adopt the simple narrative that the early Holmes was wrong, and he "just didn't get it," but then he saw the light and came around to the truth, which ultimately set him and the nation free. That narrative does not do justice to the internal struggle that the two contesting positions must have occupied within the mind of Holmes, or to the struggle of the two contesting positions within the larger American mind.

It is worth first remembering that Holmes himself claimed in *Abrams* to see no dissonance between his own prior opinions in *Schenck*, *Frohwerk*, and *Debs* and his dissent in *Abrams*. Holmes does not say in *Abrams*, "Hey, I was wrong in *Schenck*, *Frohwerk*, and *Debs*, and to be honest, also wrong in *McAuliffe*, *Davis*, *Patterson*, *Moyer*, and *Fox*. I once was lost, but now I'm found, was blind, but now I see."

To the contrary, Holmes in *Abrams* clung to the claim that *Schenck*, *Frohwerk*, and *Debs* were rightly decided:

> 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. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder,

165. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of Histor*y, 27 STAN. L. REV. 719, 722 (1975).

166. *Id.* at 756–57.

167. *See* HEALY, *supra* note 5, at 36.

168. Gunther, *supra* note 165, at 732 ("A year after *Masses*, months before *Schenck*, *Holmes* and *Hand* were indeed very far apart: Hand argued the case for protecting the dissenter; Holmes disagreed. That was a gap in values all the more remarkable because Hand and Holmes shared a common philosophical outlook in most respects."); s*ee also* Rabban, *supra* note 117, at 1281.

169. Professor Thomas Healy's fine scholarship on the question has been given book treatment. *See generally* HEALY, *supra*, note 5.

> 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. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.[170]

Can we spell "DENIAL"?

It was entirely disingenuous for Holmes to dismiss *Schenck*, *Frohwerk*, and *Debs* as presenting "questions of law alone" in some sense different from *Abrams*. All four of the cases presented the application of law to fact, and in *Schenck*, *Frohwerk*, and *Debs*, Holmes himself had gone into significant factual detail to explain why the facts in each case justified a conclusion that the expression could have been intended and could have had a tendency to produce an illegal outcome.

So too, neither the actual message contained in the pamphlets distributed in *Abrams* nor the intent of the defendants in *Abrams* can be distinguished, in any principled manner, from the expression in *Schenck*, *Frohwerk*, and *Debs*. The expression in all four cases (the trilogy cases and *Abrams*) was laced with diatribe against World War I and the draft and, in all four cases, was plainly intended to persuade others to engage in resistance. If *tendency* and *intent* were all the Constitution required, then all four cases would turn out the same way—which is exactly what the majority opinion for the Court reasoned.

Similarly, there is little traction to be gained in trying to draw some line between the potency of the speech in *Abrams* and the potency of the speech in *Schenck*, *Frohwerk*, and *Debs*. In one paragraph of his dissent in *Abrams*, Holmes does a magnificent job of presenting the case that the leaflets distributed by the defendants in *Abrams* could not plausibly have caused much real harm to the nation or the war effort, and certainly not enough to justify their punishing jail terms:

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow-a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here but which, although made the subject of examination at the trial, no one has a

170. Abrams v. United States, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting) (citations omitted); *see also* Rabban, *supra* note 117, at 1280 ("But as to the legal questions before the Supreme Court in *Schenck*, *Frohwerk*, and *Debs*, Holmes repeatedly emphasized that he had no doubts.").

> right even to consider in dealing with the charges before the Court.[171]

While not the most famous passage of his dissent in *Abrams*, the writing in the paragraph above is worth savoring for its sheer poetic beauty. The phrase in which Holmes rhetorically asks whether "enough can be squeezed from these *poor and puny anonymities* to *turn the color of legal litmus paper*" is one of the most creative uses of language in the history of American law. And when Holmes appeals to our conscience to demonstrate what, at least by our current sensibilities, we know was absolutely true—that the *Abrams* defendants were in fact punished for "the creed they avow"—Holmes was speaking heart to heart, in a manner reminiscent of Justice Harlan's famous dissent in *Plessy*.[172]

Even so, if the statements in *Abrams* were "poor and puny anonymities," then surely the leaflets in *Schenck* and the articles in *Frohwerk* were as well.

Holmes's dissent in *Abrams* was a break from the Court's past and his own past on multiple levels. First, in an important clarification, Holmes made it clear that the *formal test* for First Amendment protection does *not* change when the nation is at war. However, the fact that the nation is at war may be salient to its application, because the existence of the war may trigger governmental interests that would not exist in times of peace, as the "war opens up dangers that do not exist at other times," but the "principle of the right to free speech is always the same."[173]

VI. THE ONGOING DEBATE OVER WHETHER THE TRUTH SHALL MAKE US FREE

Let us now consider the most famous paragraph in the Holmes dissent in *Abrams*. It is also the most famous paragraph in the history of American free speech law. While it is one continuous paragraph, let us break it

171. *Abrams*, 250 U.S. at 629–30 (Holmes, J., dissenting).

172. In Justice Harlan's famous dissent in *Plessy*, he ultimately spoke to what, as he put it, "all will admit" was the true purpose of the Louisiana law. Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.").

173. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting) ("The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. 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. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.").

up into two parts. The first part, which comes before the fateful word "but," reflects the views of the early Holmes:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises.[174]

These opening lines sum up everything Holmes previously had believed and said both in his published opinions and in his private correspondence. Holmes clearly had believed that it was both *logical* and *permissible* to stamp out expressions of opinion that the government believed were bad for the country. The loose bad tendency test of *Schenck*, *Frohwerk*, and *Debs* fits perfectly within these early lines. But then everything changes:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[175]

Holmes tells us to tolerate speech we *loathe*, speech we are convinced is *fraught with death*. It is the marketplace, not law, which will decide the value of speech. The government may intervene through the force of law only if there is an *immediate* need to check the speech *to save the country*.

The first part of the famous *Abrams* Holmes dissent, reprising the early Holmes, is grounded in logic. The second part—everything that follows the word "but"—is grounded in faith. Our minds tell us to suppress bad speech, such as claims by modern alt-right and neo-Nazi members that Jews and Blacks should be banned from America, because in our minds we *absolutely* are convinced these views are evil and will *never* lead to truth. Yet Holmes exhorts us to resist what our minds insist, and instead place faith in an abstraction, the marketplace of ideas.

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174. *Id.* at 630.

175. *Id.*

The early Holmes, the bad tendency test, has always exerted a powerful hold on American thinking about free speech precisely because it *is* perfectly logical. If we are convinced that a message is evil, and if we have no doubt of our premises, then the bad tendency of the message strikes us as worthy of condemnation and strikes us even more as worthy of being banned by the law.

When I look at the forces on many public and private university campuses that seek to ban hate speech today, I see proponents of the early Holmes. Consider all who sought to prohibit the racial supremacist views of Nazis and alt-right members from marching on the University of Virginia campus or the streets of Charlottesville in the long, hot summer of 2017. The enemies of the alt-right, I am sure, have no doubt of their premises. And it is difficult to see why they should; the supremacist and anti-Semitic views of Adolph Hitler and the Third Reich caused millions to die in the Holocaust. The racism of the Ku Klux Klan fueled a reign of terror in America, a contagion of lynchings and bombings.

In my judgment, the logic of the early Holmes position was embraced and restated with elegance by Supreme Court Justice Frank Murphy in *Chaplinsky v. New Hampshire*, writing for a unanimous Court:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[176]

This passage from *Chaplinsky* captures the essence of the early Holmes.[177] If we are convinced that neo-Nazis who advocate a white ethno-state in America are an affront to order and morality and that their message offers no plausible purchase as a step to truth, then why shouldn't we adopt the "perfectly logical" step of banishing such speech from society?

The views of the early Holmes, as reinforced by decisions such as *Chaplinsky*, largely dominated American free speech law for decades, well into the 1950s. The Supreme Court's decision in *Beauharnais v. Illinois*[178] is the most resonant exemplar. Joseph Beauharnais was an Illinois racist, the leader of a Chicago racial supremacist group that called itself the White Circle League of America. Beauharnais distributed leaflets in Chicago bearing the headline: "PRESERVE AND PROTECT WHITE

176. Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942).

177. *See* Rabban, *supra* note 117, at 1277 ("Holmes's decisions in *Schenck*, *Frohwerk*, and *Debs* demonstrate his continued deference to majority will and to the external standards of liability that he believed necessary to enforce it.").

178. 343 U.S. 250 (1952).

NEIGHBORHOODS!"[179] The leaflets declared that white neighborhoods needed protection from "the constant and continuous invasion, harassment and encroachment by the negroes."[180] Beauharnais called for one million white people in the city of Chicago to oppose the national campaign by President Harry Truman's "Infamous Civil Rights Program."[181] Beauharnais warned, "If persuasion and the need to prevent the white race from becoming mongrelized by the Negroes will not unite us then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[182]

Beauharnais was convicted of violating an Illinois law prohibiting hate speech.[183] The law made it a crime to publish "any lithograph, moving picture, play, drama or sketch" which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" or which "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[184]

Justice Felix Frankfurter, who was Jewish, plainly had in mind Hitler's Holocaust and the use of group libel against Jews when he wrote the opinion affirming Beauharnais's conviction, referring to the "the tragic experience of the last three decades."[185] But "Illinois did not have to look beyond her own borders," Justice Frankfurter observed, "to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community."[186] Illinois had its own long history of racist violence. In 1837, Elijah Parish Lovejoy, an abolitionist Presbyterian minister, journalist, and newspaper editor, was brutally murdered by a pro-slavery mob in downstate Alton, Illinois, in an attack on a warehouse to destroy Lovejoy's printing press and abolitionist publications.[187] In 1951 there were riots in Cicero, Illinois, a suburb just west of Chicago.[188] (Cicero would again be the center of violent racial tensions when Martin Luther King Jr. marched there, bringing the civil rights movement to the North.)

Echoing the reasoning of Justice Murphy in *Chaplinsky*, Justice Frankfurter concluded,

> In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the

179. People v. Beauharnais, 97 N.E.2d 343, 345 (Ill. 1951).
180. *Id.*
181. *Id.*
182. *Id.* (alteration in original).
183. *Id.* at 344.
184. *Id.*
185. Beauharnais v. Illinois, 343 U.S. 250, 258 (1952).
186. *Id.* at 258–59.
187. *Elijah Parish Lovejoy*, ENCYCLOPEDIA BRITANNICA (Nov. 5, 2018), https://www.britannica.com/biography/Elijah-P-Lovejoy [https://perma.cc/NJQ8-AAYT].
188. *Race Riots*, ENCYCLOPEDIA OF CHICAGO, http://encyclopedia.chicagohistory.org/pages/1032.html [https://perma.cc/F7H6-6278] (last visited Feb. 28, 2019).

> Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.[189]

Social scientists might debate whether an individual's sense of dignity and self-worth is diminished by attacks on the individual's racial or religious group, Justice Frankfurter argued, but the Illinois legislature was entitled to adopt the view that it was. It would "be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State," he concluded, "for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[190]

I have personally invested a large part of my professional career as an advocate for the later Holmes, and against the views of the early Holmes and decisions such as *Chaplinsky* and *Beauharnais*. The briefs I wrote and my oral argument in the Supreme Court in *Virginia v. Black*[191] rested entirely on the shoulders of the Holmes dissent in *Abrams* and the later Supreme Court decisions that would ultimately embrace it.

But as Holmes himself admonished, "certitude is not the test of certainty."[192] I have not been willing to join the chorus of voices claiming that many in the current generation of college students "do not understand free speech." I put the matter more modestly. Many simply embrace a different conception of free speech—a conception more like the early Holmes, more like the views of Justice Murphy in *Chaplinsky* or Justice Frankfurter in *Beauharnais.*

In the end, both viewpoints may claim constancy with the biblical injunction that "ye shall know the truth and the truth shall make you free." One side, confident in its premises, is willing to fight evil with law, a proposition "perfectly logical."[193] The other side is equally confident in its faith "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."[194] The clash between the two views has long been part of the American democratic experiment—as Holmes would say, "as all life is an experiment."[195]

189. *Beauharnais*, 343 U.S. at 261.
190. *Id.* at 263.
191. 538 U.S. 343 (2003).
192. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).
193. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
194. *Id.*
195. *Id.*