"The Road I Can't Help Travelling": Holmes on Truth and Persuadability

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I. INTRODUCTION

The marketplace metaphor that Justice Holmes deployed in *Abrams v. United States* makes "truth" central to the system of free speech.[1] Judges, lawyers, and scholars have now spent a century unpacking the origins, viability, breadth, alternatives, and desirability of that metaphor.[2] Their inquiries have at least one important question in common: what did Holmes mean by the "truth" for which the competition of the marketplace is the best test?

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

[2] No string cite could possibly suffice, but would have to include ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 73 (1965) (arguing that establishing truth through a marketplace of ideas "is not merely the 'best' test. There is no other."); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1; William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) ("In Speech Clause jurisprudence, for example, the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.").

In his voluminous and often-illuminating private correspondence, Holmes answered that question with another metaphor: "All I mean by truth is the road I can't help travelling."[3] He went on: "What the worth of that *can't help* may be I have no means of knowing. Perhaps the universe, if there is one, has no truth outside of the finiteness of man."[4]

Holmes repeatedly returned to this notion of truth as a "can't help," suggesting that it constitutes a kind of intellectual bedrock (like some personal preferences) beyond the power of persuasion,[5] even while recognizing that society itself depends on others holding the same "can't helps":

> "*I* can't help" is the ultimate. If we are sensible men and not crazy on-*ists* of any sort, we recognize that if we are in a minority of one we are likely to get locked up and then find a test or qualifications by reference to some kind of majority vote actual or imagined. Of course the fact that mankind or that part of it that we take into account are subject to most of the same can't helps as ourselves makes society possible, but what interests me is that we start with an arbitrary limit which I know no reason for believing is a limit to the cosmos of which I am only a small part.[6]

One can hear strains of *Abrams* in the passage. After all, if "[p]ersecution for the expression of opinions seems to me perfectly logical,"[7] then it is indeed "sensible" to recognize that a minority of one "can't help" will be "locked up."

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[3] Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Oct. 27, 1901), *in* 1 HOLMES-POLLOCK LETTERS at 100 (Mark D. Howe ed., 1941); *Id.* at 139 ("[A]ll I mean by truth is what I can't help thinking.") (both cited in Blasi, *supra* note 2, at 11 n.36).

[4] *Id.*

[5] *See infra* text accompanying note 45 ("Deep-seated preferences cannot be argued about—you can not argue a man into liking a glass of beer . . . ."). Holmes's belief that discussion is eventually pointless and that the cosmos is ultimately unknowable (what Wittgenstein might call the "ineffable") do call to mind the famous final line of the *Tractatus Logico-Philosophicus*: "Whereof one cannot speak, thereof one must be silent." LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS § 7 (1961). The *Tractatus* was completed in the summer of 1918, as *Abrams* was making its way to the Court, though it would not be published until 1921, and then only in German. To my knowledge, Holmes's broad and deep reading never included Wittgenstein, but his taste for the mystical and ineffable—consider the final lines of *The Path of the Law*—is of a piece. OLIVER WENDELL HOLMES JR., THE PATH OF THE LAW 40–41 (American Classics Library ed. 2012) ("The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.").

[6] Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Oct. 26, 1929) *in* 2 HOLMES-POLLOCK LETTERS, at 255–56 (Mark D. Howe ed., 1941).

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

In other ways, though, Holmes's notion of truth seems to be in tension with his embrace of the marketplace metaphor in *Abrams*. What is the point of "competition" among things that one "can't help"? How can such a "market" ever lead to "acceptance" if none of the participants can change?

One possibility, of course, is that Holmes meant simply to valorize the fight and to suggest that we have no choice but to take up arms on behalf of our own "can't helps," even as others do the same for theirs (and perhaps, we must recognize, with equally good reason). Holmes was, after all, quite comfortable with martial imagery and the heroism of doomed, dutiful warriors.[8]

But the central metaphor in *Abrams* is the marketplace, not the battlefield—of "free trade" and "competition," rather than a bayonet charge. In that respect, Holmes's opinion seems to suggest a system of beliefs that can adapt and change, at the societal and even individual level. Scholars of *Abrams* have understandably devoted most of their attention to Holmes's remarkable argument for the logic of persecution and his even more powerful defense of free speech. And yet it is the pivot point between those themes that is most suggestive of the role of change in discourse: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . ."[9]

Men can *realize*; they can *come to believe*. How? What role is there for persuasion and change on matters of truth, if "I can't help is the ultimate"? Is it only happenstance that "mankind or that part of it that we take into account are subject to most of the same can't helps"? If we find ourselves or others traveling the wrong roads, how can we change course?

Others have written in great depth about the central role of the marketplace metaphor in First Amendment law and scholarship,[10] and

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[8] OLIVER WENDELL HOLMES, *The Soldier's Faith*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 486, 487 (Sheldon M. Novick ed., 1995) ("[T]here is one thing I do not doubt . . . and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.").

[9] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[10] *See supra* note 2. My own attempts to investigate the metaphor have mostly focused on how it interacts with the institutions and social practices needed to support the pursuit of truth. *See, e.g.*, Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439 (2019); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008).

what Holmes meant by truth.[11] The goal of this Essay is to bring those two inquiries together, not by mixing metaphors ("the best test of the road I can't help travelling is to get itself accepted in the competition of the market"), but by considering what the "can't help" vision of truth means for a system of free speech that presupposes—or at least prizes—the possibility of change.

In particular, the discussion here will focus on the constitutional relevance of *persuadability*—the willingness and ability to change one's mind—and how it might factor into the effectiveness of a marketplace of ideas or any "dynamic" theory of free speech in which the set of ideas changes.[12] Most analyses of free speech dynamism and the characteristics needed to support it have focused on the persuasiveness of speakers, or on the degree to which listeners can overcome cognitive limitations and biases. But persuadability is something different, or at least the ability to overcome a very specific kind of bias—that in favor of one's existing beliefs. It is also distinct from skepticism, which typically connotes a willingness to doubt premises and beliefs, rather than a willingness to hold but revise them.

The marketplace metaphor, in other words, seems premised on the notion that ideas can change, which in turn suggests that people can be persuaded. Such change and persuasion are easier to observe the farther one zooms out—groups and societies change their beliefs and ways of thinking in important and obvious ways that were perfectly congenial to Holmes.[13] He does not seem to have believed in collective "can't helps." The harder question is whether *individuals* are persuadable. Here, Holmes seems less optimistic. Perhaps change only comes intergenerationally, or as open-minded and uninformed people write beliefs on blank slates, or as certain "can't helps" are persecuted or silenced.[14]

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[11] *See, e.g.*, Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35 (2010); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1039, 1056–57 (2015).

[12] *See, e.g.*, GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT (2017) (describing a defending "dynamic diversity" as a central free speech value).

[13] *See infra* notes 41–44 and accompanying text.

[14] Blasi, *supra* note 2, at 26 (internal citation omitted) ("[T]he theory of evolution might help to explain why a robust freedom of speech can be extremely valuable even when most individuals remain stubbornly impervious to demonstrably valid refutations of their beliefs. . . . As the population changes with the infusion of new persons with different ideas, the pattern of beliefs within the community changes, even if no single individual ever embraces a new idea or discards an old one.").

And yet the *Abrams* dissent itself appears to be the result of just such an individual transformation—having spent most of his already-lengthy career on the bench rejecting free speech claims, Holmes pivoted into the role that made him a hero for generations of civil libertarians. Exploring *that* transformation, and how it came about, may help shed light on how the opinion is proof of its own concept. And yet one will not find much help from Holmes himself. As Thomas Healy notes in his magnificent book on *Abrams*, the title of which describes Holmes as having "changed his mind,"[15] the Justice seemed to go to great lengths to deny that such a transformation had taken place.[16] That, in turn, presents the question of whether it is important *openly* to acknowledge, and perhaps explain, one's change of mind.

The modest normative position of this Essay is that it does matter—that it is a free speech virtue to acknowledge when one has been persuaded, and that the particular discourse community of law offers a useful lens through which to consider that virtue. Not only is persuasion (and therefore, although it receives less attention, persuadability) central to the very practice of law (and perhaps even constitutive thereof)[17] but law has done more than most disciplines to self-consciously address changes of mind. This is evident, for example, in the doctrine of stare decisis, which provides a set of explicit criteria by which courts and even individual judges (tracking the group versus individual persuadability distinction) can, and sometimes do, change their minds.[18]

And that sets up the second Part of the Essay: a very brief and speculative foray into persuadability and the legal academy, where the distinction between individual and group persuasion appears particularly stark, especially if one is looking for explicit, individual acknowledgment of a changed position. Schools of thought regularly—and sometimes quickly—rise and fall, and yet it is difficult to identify

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

16 *See infra* notes 66–69.

17 James Boyd White, *Law As Rhetoric, Rhetoric As Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) ("Let us begin with the idea that the law is a branch of rhetoric. Who, you may ask, could ever have thought it was anything else?"). *See generally* JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985).

18 To be more precise, the doctrine of stare decisis provides a set of rules for when the *law* should change—disagreement with a prior decision (the change of mind) is necessary but not sufficient. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (articulating various factors to guide the practice of stare decisis). *See generally* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017) (developing a theory of continuity in constitutional doctrine).

many examples of individual scholars openly repudiating views they once held. (*Sub silentio* change is another matter, and harder to track.)

It is far beyond the scope of this Essay or the ability of its author to suggest any firm conclusions or broad takeaways in that regard; the goal is just to offer a tentative observation and situate it in the larger discussion of persuadability. And again, Holmes's private correspondence offers a distinction that might be useful in partially addressing it—the distinction between "Thingsters" and "Ideasts."[19] Thingsters are those who master bodies of facts and yearn for rules and testable hypotheses; Ideasts, of which Holmes counted himself, favor generalized principles and premises. Thingsters and Ideasts not only make different kinds of arguments but are persuadable in different ways as well.

II. THE CONSTITUTIONAL RELEVANCE OF PERSUADABILITY

In the century since Holmes launched the metaphor in *Abrams*, and with increasing vigor in recent decades, scholars have picked apart the assumptions that seem to animate the marketplace metaphor, including the very basic notion that competition is actually "the best test of truth." Much of that literature has focused on the basic cognitive limitations that make it hard for people to engage with new ideas—racism, sexism, and other forms of bias being only the most obvious of those limits.[20]

My focus here is on a particular element of that cognitive task—the willingness and ability to change one's mind, to revise or repudiate a belief one holds. I call this *persuadability* (and, appropriately enough, remain very open to revising or repudiating that label).

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[19] As far as I can tell, the distinction has only been noted once before in the legal literature. *See* Charles P. Curtis, 63 YALE L.J. 266, 271 (1953) (reviewing HOLMES-LASKI LETTERS, 1916–1935 (Mark Dewolfe Howe, ed., 1953)) (noting that Holmes, in his own words, "divided 'mankind around the two poles of emotion and thought—the poets at one end and the philosophers at the other.' 'I don't like Goethe. . . . Perhaps at bottom it is that he is on the side of the poets and I prefer the philosophers. Goethe could not explain and so he said theory was gray.' As Holmes said, he and Laski were both 'ideasts rather than thingsters.'"). Budiansky suggests that the distinction maps that between "internal men and external men"—a division proposed by a doctor in his Civil War regiment. STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 128 (2019).

[20] *See, e.g.*, Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 673–96 (2006); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385–86 (1991); Susan H. Williams, *Feminist Jurisprudence and Free Speech Theory*, 68 TUL. L. REV. 1563 (1993).

Although the line is not clear (nor is it all that essential for the argument), belief-revision is distinct from belief-formation; it is a specific kind of open-mindedness. It is one thing to be confronted with a new and disturbing fact—that, for example, the man you thought was your father has been beheaded by a malevolent boy-king.[21] Such information can be assimilated into one's mental framework without the need to displace anything that is already there (other than the belief that your father is alive). It is quite another thing—and, for most people, probably a harder one—to be informed that the man you thought was your father was actually your uncle, your lover is actually your aunt, and instead of being a bastard you are actually the rightful heir to the throne.[22] Accepting *that* information requires significant revision of existing beliefs ("ideas"), which generally presents a different cognitive task. It is one thing to learn; another to un-learn and re-learn. It might well be harder to discard an idea than to acquire one.

The willingness and ability to change one's existing views—to be persuaded—is also meaningfully distinct from (or at least combines distinct elements of) skepticism, curiosity, and other character traits that might make a person sensitive to the "competition" of ideas in the marketplace.[23] In his correspondence with Holmes, Learned Hand suggested that "incredulity" can provide a basis for protecting free speech: "Tolerance is the twin of Incredulity," because we must always acknowledge that our own presuppositions could be proven incorrect.[24] Holmes was unmoved: "If for any reason you did care enough [to stop a particular speech act] you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act."[25]

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[21] GAME OF THRONES: BAELOR (HBO television broadcast 2011) (death of Ned Stark).

[22] GAME OF THRONES: WINTERFELL (HBO television broadcast 2019) (Jon Snow learns his true parentage).

[23] Vince Blasi has argued persuasively that *Abrams* "contains the seeds of an understanding of the First Amendment that has more to do with checking, character, and culture than with the implausible vision of a self-correcting, knowledge-maximizing, judgment-optimizing, consent-generating and participation-enabling social mechanism." Blasi, *supra* note 2, at 2.

[24] Quoted in HEALY, *supra* note 15, at 23. For an insightful account of Hand's views, see James Weinstein, *The Story of* Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet*, *in* FIRST AMENDMENT STORIES 62 (R. Garnett & A. Koppelman, eds., Found. Press 2011).

[25] HEALY, *supra* note 15, at 24.

Skepticism comes the closest to persuadability and is a trait often associated with Holmes himself.[26] It has in common with persuadability a willingness to change and to subject existing beliefs to testing. But skepticism typically connotes doubt of the truth,[27] while a person can have confident beliefs, even fundamental ones, and still be persuadable. Skepticism can corrode beliefs; persuadability makes them malleable. In any event, it is not my intention to attempt a novel intervention in the epistemological debates. Nothing much turns on the labels, so if "skepticism" or "adaptability" or something else seems a better fit than "persuadability" then readers should feel free to make the substitution.

A. Abrams' *Theory of Persuasion*

With regard to persuadability, *Abrams* is more remarkable for what it shows than what it says; namely, that Holmes himself changed his mind about the First Amendment, though he was reluctant to admit or explain the change.[28] But even taken on its own terms, the opinion contains interesting—if indirect and perhaps underappreciated—language regarding persuadability.

As many have noted, what the concluding paragraphs of the opinion do for the protection of speech, the opening paragraphs do for its persecution:

> 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.[29]

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[26] Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) ("But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism"). I return to that passage below. *See infra* note 46. For a broader account, which includes Holmes, see Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988). *See also* John Inazu, *Holmes, Humility, and How Not to Kill Each Other*, 94 NOTRE DAME L. REV. 1631, 1632 (2019) (arguing that *Abrams* is best understood as expressing a kind of epistemic humility, not skepticism *per se*).

[27] *See generally* PETER KLEIN, SKEPTICISM (Stanford Encyclopedia of Philosophy, June 2, 2015), online at https://plato.stanford.edu/entries/skepticism/ (visited June 21, 2019).

[28] *See infra* notes 68–69 and accompanying text.

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

Holmes had hummed these opening bars before in private correspondence,[30] and it is logically consistent with the vision he sometimes described (and even seemed to celebrate) of a world in which the strong will ultimately prevail, but all must struggle. And yet, of course, logic has not been the life of the law; neither could it be the life of free speech.[31] The fact that persecution of disfavored opinions appears "perfectly logical" is thus not enough to embrace it. Just as "experience" trumps logic in the development of the law,[32] seeing "fighting faiths" upset should lead men to "come to believe" that the free trade of ideas must be protected.[33]

Before he reaches that conclusion, however, Holmes considers (in the final sentence of the passage above) three other possible justifications for permitting disfavored speech. The second and third are that the would-be speech persecutor does not care enough about his own view prevailing, or that he doubts his power or premises.[34] But the first feint is the most interesting: that failing to persecute an opinion with which one disagrees may be evidence that one thinks the opinion "impotent." If this premise is convincing, it would not be hard to transform it into an affirmative theory for the protection of speech—precisely because speech is harmless, the government has no business regulating it.

But it is evident that Holmes does not believe this to be true. That speech is, or can be, efficacious is precisely why governments sometimes seek to stifle it. Again, the pivot point in *Abrams* drives that message home, with the notion that "men have realized" and "come to believe" the basic premises of Holmes's own theory.

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[30] In a letter to Laski in July of 1918, he wrote:

> My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power—you will do what you believe efficient to bring about what you want—by legislation or otherwise.
>
> In most matters of belief we are not cocksure, we don't care very much, and we are not certain of our power. But in the opposite case we should deal with the act of speech as we deal with any other over act that we don't like.

Letter from Oliver Wendell Holmes, Jr. to Harold Laski, (July 7, 1918), *in* HOLMES-LASKI LETTERS at 160–61 (Mark D. Howe ed., 1953).

[31] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881); HEALY, *supra* note 15, at 195 (noting the parallel).

[32] HOLMES, *supra* note 31, at 3.

[33] *Abrams*, 250 U.S. at 630.

[34] In his letter to Laski, Holmes suggested that "most matters of belief" fall into this category. *See supra* note 30.

The boundaries of free speech can be drawn based in part on that very quality—the power of speech to persuade.[35] Although Holmes sometimes casts doubt on the power of speech to persuade, his own doctrinal solutions seem shaped in no small part by his own belief that it can. Effectively rejecting the common view that speech can be punished if it has a "bad tendency" (i.e., a chance, even if remote in odds and time, of generating bad results[36]) in *Schenck v. United States*, Holmes wrote that 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."[37]

Although Holmes found that test satisfied in *Schenck*—i.e., that the government could prohibit the speech at issue—his account helped provide a stronger basis for free speech going forward.[38] And, more importantly for present purposes, it rested in no small part on an apparent belief that speech can persuade; that people's minds can be changed. Consider the false-shout-of-fire-in-a-crowded-theater hypothetical.[39] One common explanation for why such speech—unlike other false speech—is punishable is that the circumstances give no room for counter-speech, for *persuasion* to run its course.[40] Again, it seems implicit that Holmes believed people could be persuaded, albeit not in a panicked crowd.

And yet *Abrams* does not necessarily provide many clues about how this conversion happens. How does an idea "get itself accepted in the competition of the market"? If truth is "the road I can't help travelling," can it ever be rerouted? Who or what can be persuaded to

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[35] To be clear, I do not mean to suggest that speech can be restricted because of its persuasiveness, only that the persuasiveness of speech factors into its constitutional treatment. *Cf.* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (arguing that speech cannot be restricted on account of its persuasiveness).

[36] MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 9–12 (2000).

[37] Schenck v. United States, 249 U.S. 47, 52 (1919).

[38] Zechariah Chafee, for one, suggested that the *Schenck* test could adequately protect speech, but that Holmes had effectively misapplied it. Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 968–69 (1919).

[39] *Schenck*, 249 U.S. at 52 ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."). Healy shows that Holmes lifted the example from federal prosecutor Edwin S. Wertz. HEALY, *supra* note 15, at 91.

[40] 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, 183–85 (2015).

accept new ideas, especially if doing so means changing pre-existing beliefs?

There are at least two broad possibilities: Groups and societies—the market as a whole—can adapt. The other, perhaps more challenging, possibility is that individuals can adapt. The mechanisms and possibilities for each of these options are quite different.

Descriptively, there is no denying that collectives are "persuadable" in the sense that prevailing beliefs can and do change. Recall that the pivot point in *Abrams*—the point where Holmes shifts from defending the logic of persecution to erecting a constitutional barrier against such persecution—refers to "when men have realized that time has upset many fighting faiths." Perhaps the use of the plural ("men," not "a man") is simply meant to suggest that a critical mass of realization is necessary for the marketplace metaphor to be embraced. But it might also be taken to suggest that society can change, even as individuals do not.

In a powerful and insightful article distinguishing Holmes's and John Stuart Mill's views of "truth,"[41] Irene Ten Cate shows that they had different views on how beliefs can change over time. As Ten Cate explains, "Mill's free speech theory is based on the idea that societal progress (indispensably fueled by a collective truth-seeking endeavor) is inextricably connected to *individual* development."[42] Holmes, by contrast, "is concerned with neither individual development nor the discovery of some external truth. Rather, he values speech for its role in a dynamic process in which shifting interest groups are vying for dominance in a continually changing world."[43]

Moreover, communities are often much more ready to acknowledge, and even emphasize, the degree to which their collective ideas have changed. Given the apparent reluctance of many individuals to acknowledge when they have been persuaded, it is notable that generations and groups sometimes go so far as to define themselves in opposition to what has come before. Perhaps that is because the repudiated ideas were never theirs to begin with. In any event, when and how that change happens will of course depend on the particular collective or discourse community at issue—political revolutions and

[41] In keeping with my theme, I should acknowledge Ten Cate's article as one that persuaded me. She correctly identifies me as one of the scholars guilty of having "grouped [Mill and Holmes] together as representatives of the 'marketplace of ideas' rationale for free speech," Ten Cate, *supra* note 11, at 38 n.13, when doing so "ignores significant differences between their free speech theories, and does not do justice to the complexity of either defense." *Id.* at 81. I can't help but agree.

[42] *Id.* at 39 (emphasis added).

[43] *Id*.

scientific revolutions need not follow the same rules of change. Nor will change always be easy, or even desirable. The point is simply that change happens, is acknowledged, and is sometimes even celebrated.

But this kind of change—significant as it may be—does not require anything of individuals. A thought might "get itself accepted in the competition of the market" without ever actually persuading a single person. After all, the *participants* in the marketplace change over time, and if an idea sticks around long enough it might gain acceptance in a new generation without ever shifting the battle lines in an old one.

Persuadability at an individual level presents a much more difficult problem. Scholars writing on cultural cognition and motivated reasoning have powerfully—heartbreakingly—argued that people are not moved by facts and "ideas" in the sense that most marketplace of ideas theorists probably conceptualize them.[44] I have no new empirics or conceptual frameworks to add to that literature. My more modest goal is simply to illustrate its stakes for a system of free speech in which persuadability seems significant to the pursuit of truth. And the most appropriate place to begin is with Holmes himself.

B. *Persuading Holmes*

Holmes consistently argued that some beliefs are not subject to reasoned debate and that some differences of opinion will ultimately be resolved by violence rather than the competition of ideas in the market. As he put it, "[d]eep-seated preferences cannot be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way."[45] But Holmes was also perfectly willing to concede that such dogmas are contingent on, rather than reflective of, any universal truth: "[T]hat is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours."[46]

While this leaves open the possibility that people can change their minds about trifles, it indicates that deep-seated preferences are rooted in personal experience, and are dogmatic but not universal:

> What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes,

[44] For one such article, focusing on persuasion as such, see Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1292 (2003). Many thanks to Fred Schauer for pointing me to earlier literature in other disciplines. *See, e.g.*, Rasyid Sanitioso & Ziva Kunda, *Ducking the Collection of Costly Evidence: Motivated Use of Statistical Heuristics*, 4 J. BEHAV. DECISION MAKING 161 (1991).

[45] Holmes, *supra* note 26, at 41.

[46] *Id.*

> no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else.[47]

Efforts to convince one of a different "truth" in such matters are likely to be perceived, and resisted, as attacks: "If I may quote myself again, property, friendship, and truth have a common root in time. One cannot be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one's life."[48]

None of this seems to leave much room for individual persuasion or persuadability, at least not about anything that matters. And yet, even in his own definition of "truth," Holmes seemed to acknowledge some development and change over time:

> I used to say, when I was young, that truth was the majority vote of that nation that could lick all others. Certainly we may expect that the received opinion about the present war will depend a good deal upon which side wins, (I hope with all my soul it will be mine), and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view. If . . . the truth may be defined as the system of my (intellectual) limitations, what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps*.[49]

Holmes refers to the truth-as-majority definition in the past tense. And while he defends its partial correctness, he also shifts to the "can't help" formulation. It is hard to avoid the conclusion that Holmes has found a way out of his own "rocky crevices"; he has changed his mind.

And that brings us back to *Abrams*. Less than a year before he wrote his great dissent, Holmes wrote three other opinions dismissing First Amendment claims in cases with facts quite similar to *Abrams*. In one, he upheld Eugene Debs' conviction for having illegally obstructed military recruiting.[50] In *Schenck,* he announced a seemingly speech-protective test but applied it in such a way that upheld the conviction of

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47 *Id.*

48 *Id.* at 40–41.

49 *Id.* at 40.

50 Debs v. United States, 249 U.S. 211, 216–17 (1919).

a person who had criticized the draft.[51] And in the third—applying *Schenck*—he upheld the conviction of a draft-criticizing newspaper.[52]

Whether *Abrams* can be technically squared with these and others of Holmes's opinions[53] is a matter of scholarly debate.[54] Certainly *something* changed in 1919. Having written an earlier opinion that essentially limited the free speech clause to a narrow, Blackstonian focus on prior restraints,[55] Holmes's opinion in *Schenck*—while hardly a civil liberties jeremiad—came very close to acknowledging a change of heart: "It may well 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*."[56]

In *Abrams*, the change is even more pronounced. As noted above, Holmes's opinion rejected the "bad tendency" approach, thereby providing a stronger basis for protecting free speech claims going forward. But at the jurisprudential level, the more subtle and potentially more significant change was that Holmes specifically embraced the clear and present danger test and, with the marketplace metaphor, gave it a theoretical justification.[57]

Indeed, the opinion *itself* seems to change its mind. As noted above, Holmes begins by laying out the "perfectly logical" case in favor of persecuting opinions with which one disagrees. Had he stopped there, he likely would have been writing a majority opinion, and tilting the trajectory of free speech in quite a different direction than the one we

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

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

53 *See, e.g.*, Fox v. Washington, 236 U.S. 273, 276–77 (1915) (upholding conviction for incitement of nude sunbathing); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (holding that First Amendment is focused exclusively on prior restraints, not ex post punishments for speech); McAuliffe v. City of New Bedford, 29 N.E. 517, 518 (Mass. 1892) (upholding termination of police officer on the basis of his political speech).

54 *See, e.g.*, David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 99 (1982) ("It is a thesis of this article that the different tone of the *Abrams* dissent is not evidence of a marked change in Holmes's view of free speech, but is rather the product of Holmes's frustration at what he considered the misreading by critics and the public of his position in *Schenck*.").

55 *Patterson*, 205 U.S. at 462.

56 *Schenck*, 249 U.S. at 51–52.

57 Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2356 (2000) (noting that Holmes "virtually invented both First Amendment theory and First Amendment doctrine. He advanced the theory of the marketplace of ideas, and he demonstrated how doctrine would have to evolve to correspond to this new theory."); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1278 n.97 (2005) [hereinafter Schauer, *Towards*] (noting the view that "the First Amendment started in 1919" with *Abrams*).

are discussing at this symposium.[58] But, having given censorship perhaps the most powerful defense it has ever received in a Supreme Court opinion, he then pivoted and did the same for freedom of speech. The fulcrum is persuadability: "when men have realized that time has upset many fighting faiths."

It was not time alone that upset Holmes's own fighting faith, but a sustained campaign of personal and intellectual change, driven by debates with trusted friends. Holmes seemed to regard those one-on-one discussions, rather than public discourse and debate, as the most powerful engine of persuasion. Writing to the diplomat Lewis Einstein, Holmes reiterated his logic-of-persecution argument with regard to "fundamental difference[s]" between "side[s]," but suggested that discussion might be more open and fruitful in "private life": "I agree that the logical result of a fundamental difference is for one side to kill the other, and that persecution has much to be said for it; but in private life we think it more comfortable for disagreement to end in discussion or silence."[59] The availability of "discussion" as a remedy to "disagreement" in "private life" was something which, like love of granite, had been instilled in Holmes from a young age—his father was, after all, the Autocrat of the Breakfast Table.[60] Throughout his long life, Holmes's home was marked by a constant flow of discussion and debate, and he was of course a common visitor at the "House of Truth."[61]

Healy's account of *Abrams* fills in the story of an "intense behind-the-scenes effort to change the mind of a legal icon" and of "intellectual exploration and emotional growth."[62] The protagonists in that story—the architects of Holmes's transformation—were friends and colleagues like Harold Laski, Learned Hand, and Felix Frankfurter, who won him over with the power of their personal relationships as well as the ideas they presented. Healy emphasizes that "[t]hrough the intervention of his friends and his own willingness to adapt, he had come to see free speech from a different, more personal perspective. And from that moment forward, he became the champion of the First Amendment we

[58] To my knowledge, there have been no symposia marking the centennials of *Debs*, *Frohwerk*, or *Schenck*. If we were here nine months ago, the tenor and substance of our discussions would be quite different.

[59] Letter from Oliver Wendell Holmes, Jr., J. to Lewis David Einstein (July 11, 1918), *reprinted in* THE HOLMES-EINSTEIN LETTERS, 168–69 (J.P. Peabody ed., 1964).

[60] OLIVER WENDELL HOLMES, SR., THE AUTOCRAT OF THE BREAKFAST-TABLE (Phillips, Sampson and Co. 1858).

[61] *See generally* Brad Snyder, *The House That Built Holmes*, 30 LAW & HIST. REV. 661 (2012) (describing Holmes's interactions with the House, as well as its role in building his legend).

[62] HEALY, *supra* note 15, at 8.

know him as today, writing passionate dissents on behalf of radicals and subversives throughout the rest of his career."[63]

Of course, personal interventions will not *always* persuade, nor will they always protect speech. After all, three of Holmes's colleagues visited him at home—even enlisting the support of his wife, Fanny—in an unsuccessful effort to persuade him not to issue the *Abrams* dissent.[64] Holmes saw this coming and wrote to Pollock: "I feel sure that the majority will very highly disapprove of my saying what I think, but as yet it seems to me my duty. No doubt I shall hear about it on Saturday at our conference and perhaps be persuaded to shut up, but I don't expect it."[65] Holmes thus signaled the possibility of persuasion ("perhaps be persuaded to shut up") even as he minimized its likelihood ("but I don't expect it"). This general discomfort with the practice of persuasion raises an important question: did Holmes *acknowledge* change, and does it matter if he did?

C. *Acknowledging Change*

It is hard to avoid the conclusion that Holmes changed his mind. But he was reluctant to acknowledge the change—to *show* persuasion at work, and not just to describe and defend it. He wrote in *Abrams*, "I never have seen any reason to doubt that the questions of law alone that were before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided."[66] And yet, as Healy notes, "Holmes purported to stand by his earlier opinions."[67]

That is not to say that Holmes totally denied the change, or that he refused to acknowledge the influence of Laski, Hand, Zechariah Chafee, and others who had worked so hard to bring it about. In a later letter to Chafee explaining his use of the phrase "clear and present danger," Holmes wrote, "I think it came without doubt after the later cases (and probably you—I do not remember exactly) had taught me that in the earlier Paterson [*sic*] case, if that was the name of it, I had taken Blackstone and Parker of Mass. as well founded, wrongly. I simply was ignorant."[68] As Healy notes (taking the phrase as a chapter title), "*I simply was ignorant*. It was the closest Holmes would ever come to

[63] *Id.* at 244.

[64] *Id.* at 1–5, ("Nowhere else in the annals of the Supreme Court has there been such a personal appeal to one justice by a group of his colleagues.").

[65] *Id.* at 213.

[66] *Abrams*, 250 U.S. at 21 (Holmes, J., dissenting).

[67] HEALY, *supra* note 15, at 201; *id.* at 3 (noting that "something had changed" in *Abrams*).

[68] *Id.* at 243 (internal citation omitted).

admitting that he had been wrong. Even in *Abrams*, he had continued to insist that *Debs* and the other cases were correctly decided."[69]

Of course, admitting prior ignorance has a different cast than admitting persuasion. The former is about the acquisition of knowledge, the latter about the changing of existing beliefs. Holmes seems to cast the latter as the former. Does acknowledging persuasion matter?

The modest normative claim of this Essay is that it does. It is important, and a free speech virtue, to acknowledge and explore the experience of being persuaded. Although it is impertinent even to suggest it, the *Abrams* dissent itself might have been an even more powerful opinion—or at least a more powerful act—if Holmes had made explicit that he had personally "come to believe" something new; that his own "fighting faith" had been upset.

That such moments of persuasion may be rare is all the more reason to call them out when they happen, both for the persuaded individual and the broader system of free speech. For the individual, recognizing a change of heart—and calling it what it is—can and should be a part of intellectual development. We learn not only by acquiring new facts and information but by revising our beliefs in accordance. And yet we tend to celebrate the former while downplaying the latter. The result can only be stifling to the marketplace of ideas.

Psychologists and rhetoricians have undoubtedly studied these issues in depth, and I make no claims to depth or originality with regard to human cognition. My more modest goal is to suggest that these issues matter for the pursuit-of-truth version of free speech. Normalizing changes of mind can help facilitate them. And that, in turn, would facilitate the marketplace of ideas, making it easier for "ideas" to get themselves "accepted" even by people who already have ideas of their own. After all, there is often no better way to get others to change their minds than to demonstrate a willingness and ability to change one's own.

The point is not that people should repudiate their existing beliefs in favor of a pointless and weak-minded credulity, nor that every idea is equally persuasive. It is important, especially in the context of a truth-based account of free speech, to build and maintain the mechanisms of justified true belief.[70] An uncritical and misbegotten persuadability could potentially contribute to radicalization, paralysis, or anomie: the "collapse of creeds" that Holmes referenced, decades before *Abrams*, in

[69] *Id.* at 243.

[70] *See generally* Blocher, *Free Speech and Justified True Belief*, *supra* note 10 (arguing that justified true belief, rather than truth alone, may provide a better lodestar for an epistemic theory of free speech).

his "Soldier's Faith" speech.[71] But one can regard persuadability as a free speech virtue without valorizing those who are taken in by Russian propaganda or the endless assault of disinformation from the Trump White House.

In fact, a failure to acknowledge and explore persuadability can have its own radicalizing effects. If changing one's mind is not seen as a normal—even desirable—outcome of a discussion, then the threshold for doing so will undoubtedly be higher. If a person who has changed her mind faces pressure to justify doing so, she will almost inevitably be pushed (even if only internally) either to refuse the change or to exaggerate both the weaknesses of her prior belief and the strengths of the new one. And if one can only adopt a new idea with the zeal of the converted, as opposed to the curiosity of the seeker, it is not hard to imagine how knowledge, discourse, and democracy will all be distorted.

This negative view is, admittedly, consistent with much of Holmes's own writing—he sometimes described persuasion as a kind of combat, in which to be persuaded was to be defeated. After all, even amid his own conversion into the Justice who would pen the *Abrams* dissent, he wrote to Hand that "man's destiny is to fight. Therefore take thy place on the one side or the other, if with the added grace of knowing that the enemy is as good a man as thou, so much the better, but kill him if thou canst."[72] He then professed agreement with Hand's latest letter to him—the one, cited above, which linked tolerance and incredulity.[73]

In the very next paragraph of that letter, Holmes returned to his "can't help" formulation of truth, echoing almost word-for-word the letter to Pollock cited above:

> When I say a thing is true I mean that I can't help believing it—and nothing more. But as I observe that the Cosmos is not always limited by my Cant Helps I don't bother about absolute truth or even inquire whether there is such a thing, but define the Truth as the system of my limitations. I may add that as other men are subject to a certain number, but not all, of my Cant Helps, intercourse is possible. When I was young I used to define the truth as the majority vote of the nation that can lick all others. So we may define the present war as an inquiry concerning truth.[74]

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[71] HOLMES, *supra* note 8, at 487.

[72] Letter from Oliver Wendell Holmes, Jr., J., Sup. Ct., to Learned Hand, J., U.S. Dist. Court, S.D.N.Y. (June 24, 1918) [hereinafter Holmes-Hand Letter] (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43097580$18i.

[73] *See* Weinstein, *supra* note 24, at 69.

[74] *See* Holmes-Hand Letter, *supra* note 72.

Others in Holmes's intellectual milieu employed similarly militaristic metaphors, perhaps most notably Milton in *Areopagitica*: "Let [truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?" [75]

In this frame, changes in belief represent defeat, rather than growth, and it should not be surprising if people are reluctant to own up to them. And yet, as Felix Frankfurter, one of Holmes's self-styled proteges, once put it: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[76] The question is how social practices and law itself can keep the door open for later-arriving wisdom, especially if admitting it would mean displacing existing beliefs.

In fact, law has probably done more than most disciplines to grapple with the practice of persuasion. But understanding what it takes to persuade is different from understanding what it takes to be persuaded. And that makes sense, at least for training lawyers, because mostly their job is to serve as advocates—to persuade a judge, for example—not to be persuaded by opposing counsel. But the result may be that we focus on rhetoric[77]—which no less authority than Aristotle defined as "an ability, in each [particular] case, to see the available means of persuasion"[78]—rather than the other side of the equation: what it means to *be* persuaded, to be a consumer rather than producer of rhetoric.

Within legal discourse, the more fruitful place to find the principle of persuadability at work is on the bench, not in the bar. Judges, after all, are not cast as advocates, but are expected to approach evidence and arguments with an open mind, and also (and more significantly for present purposes) to tailor or alter their beliefs accordingly. The law has devoted substantial energy to exploring and explaining the appropriate bases for such changes.

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[75] JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 45 (H.B. Cotterill ed., MacMillan & Co. 1959) (1644). *See also* Vincent Blasi, *A Readers Guide to John Milton's* Areopagitica*, the Foundational Essay of the First Amendment Tradition*, 2017 SUP. CT. REV. 273.

[76] Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[77] *See supra* note 17 and sources cited therein. Holmes attended law school at a time when rhetoric was still a standard part of the law school curriculum in many places, though it would soon be phased out as part of the Langdellian revolution. Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 111 (1993) (internal footnotes omitted).

[78] 1 ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 37 (George A. Kennedy, trans., 2007).

It is clear, of course, that courts as institutions "change their minds," and sometimes—as when they overturn a precedent—they do so explicitly and give reasons. But, more notably for present purposes, even specific *judges* sometimes have a change of heart, and vote to overturn a precedent that they helped write into law. Holmes's own opinion in *Abrams* is a signal example, as explained above. (Somewhat ironically, perhaps, Hand and Frankfurter themselves seemed to change their minds in the other direction, writing First Amendment opinions in *United States v. Dennis* that went a long way to eviscerating the principles Holmes laid out in *Abrams*.[79])

But other examples are not hard to find. Justice Thomas did so in *Apprendi v. New Jersey*,[80] noting that he regretted his vote for the majority conclusion in *Almendarez-Torres v. United States* just two years earlier.[81] Justice Marshall voted with the majority in *Terry v. Ohio*, but only four years later he concluded in dissent in *Adams v. Williams* that "the delicate balance that *Terry* struck was simply too delicate, too susceptible to the 'hydraulic pressures' of the day."[82] In the First Amendment context, Justice Brennan wrote the majority opinion in *Roth v. United States*[83] but wrote (in dissent) in *Paris Adult Theatre I v. Slaton* that he regretted it.[84] Some judges declare their changes of heart after having left the bench.[85]

Of course, it would be too much to say that such changes—or at least such candor—is the norm for judges, even if it might be desirable.[86] Perhaps scholars might consider looking closer to home.

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[79] Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring); United States v. Dennis, 183 F.2d 201, 213 (1950) (Hand, J.) (upholding convictions of Communist organizers on the basis that they presented a "clear and present" danger).

[80] 530 U.S. 466, 520–21 (2000) (Thomas, J., concurring).

[81] 523 U.S. 224 (1998).

[82] 407 U.S. 143, 162 (1972) (Marshall, J., dissenting).

[83] 354 U.S. 476 (1957).

[84] 413 U.S. 49, 73–74 (1973) (Brennan, J., dissenting).

[85] *See, e.g.*, MICHAEL GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 213 (2017) (noting reports that Justice Lewis Powell initially changed his mind in joining the *Bowers v. Hardwick* majority, and that four years later he said he "probably made a mistake in voting with the majority"); RICHARD A. POSNER, REFLECTIONS ON JUDGING 84–85 (2013) ("I plead guilty to having written the majority opinion upholding Indiana's requirement that prospective voters prove their identity with a photo ID—a type of law now widely regarded as a means of voter suppression rather than fraud prevention."); JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: MY FIRST NINETY FOUR YEARS (2019) (noting a "somewhat embarrassing to acknowledge" misreading of a line of cases in *Kelo v. City of New London*, 545 U.S. 469 (2005)).

[86] Jeffrey S. Sutton, Barnette*, Frankfurter, and Judicial Review*, 96 MARQ. L. REV. 133, 149 (2012) ("Judges are not known for admitting their mistakes, and perhaps that is a tradition that should change. In any given year, I sit on roughly ten to twenty cases that reverse decisions of district court judges. Is it not possible that appellate judges and

III. THINGSTERS, IDEASTS, AND PERSUADABILITY IN LEGAL SCHOLARSHIP

In 2019, Harvard Law School held an event called "Why I Changed My Mind."[87] In a panel discussion, four members of the law faculty described things about which they had changed their minds—matters like the private purposes interpretation of the Second Amendment (Laurence Tribe) and the complexity of William Jennings Bryan (Jill Lepore). The panel was well-attended, and there was some talk of making it an annual event. But how, one might ask, will they fill another panel?

The question is serious in two ways: it is genuine, in the sense that it is legitimately difficult to identify scholars who have openly repudiated views they once held, and it is potentially important, in the sense that it may shed some light on how scholars—or scholarly discourse—change over time in response to new ideas.

The connection to *Abrams* and the preceding discussion should hopefully be plain. If there is any area of discourse in which the "competition of ideas" is front and center, and "fighting faiths" regularly upset, one might expect it to be academia. But, again borrowing from *Abrams*, when do we "realize" that fact and when do we "come to believe" anything different than what we already do? Or was Holmes right to say (as he did when urging Frankfurter to steer clear of it) that "academic life is but half life—it is a withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister"?[88]

Unsurprisingly, Holmes's description strikes me, and presumably most of us who have chosen the half life, as a bit unfair. A scholarly symposium or debate-in-print is hardly Antietam (one of three Civil War battles in which Holmes was wounded[89]) or even a courtroom, for that matter—but there are stakes, and a "fight." It is, at its best, the ideal form of the "competition of the market" that *Abrams* celebrates. And, in

justices have similar rates of error?"). Not everyone agrees that such candor would be desirable. Charles Lane, *Judge Richard Posner's Mea Culpa Was Better Left Unsaid*, WASH. POST, Oct. 21, 2013 ("If it is realistic to be skeptical about judges' capacity for deciding cases objectively, why should we trust their subsequent claims of error?").

87 Laurence Tribe, Jill Lepore, Jeannie Suk Gersen & Kendra Albert, Professors, Harvard University, Panel Discussion at Harvard Law School: Why I Changed My Mind (Mar. 4, 2019) (recording available at HARV. L. TODAY, https://today.law.harvard.edu/why-i-changed-my-mind/)

88 Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (July 15, 1913), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934, at 12–13 (Robert M. Mennel & Christine L. Compston eds., 1996).

89 Holmes's father wrote a somewhat overwrought postscript, "My Hunt for the Captain," which was published in the *Atlantic Monthly* and for which his son never quite forgave him. BUDIANSKY, *supra* note 19, at 97–99.

keeping with the present theme, things *change* in the legal academy. Schools of thought rise and fall, often in direct opposition or repudiation of what preceded them.

How that change happens is far, far beyond the scope of this Essay or the abilities of its author to address. My goal is not to attempt any novel intervention into the literature on intellectual history or the life cycles of legal theory[90] but rather to locate in legal scholarship a principle that I have argued is important to free speech—persuadability. In particular, I hope to identify and explore incidents like the Harvard panel, wherein scholars do what Holmes stopped short of doing in *Abrams*—experience persuasion and acknowledge it.

I do not mean to suggest that law is a unique or uniquely problematic scholarly debate in this regard. One could ask similar questions all over campus. Sometimes philosophers renounce their frameworks,[91] or empiricists issue revisions or admit errors in their data. In fact, in recent years, there have been a few notable efforts to encourage social scientists to alter or reject their own prior conclusions when appropriate,[92] or to "[t]rack[] retractions as a window into the scientific process."[93] But even the former has been described as an effort to "create a radical new culture."[94]

What is true in other disciplines seems to be true in law as well: legal scholars rarely acknowledge when or why they have changed their minds. This is admittedly a hard claim to prove, and I make it with some hesitation. Although I have researched the question as best I can and relied on reference librarians, colleagues, research assistants, and patient friends to provide examples, I am quite conscious that I might be missing obvious ones, and that readers might at this very moment be

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90 For one recent and insightful account within the legal literature, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819 (2016). *See also*, of course, DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (1998).

91 Ludwig Wittgenstein, to take one obvious example, spent the second half of his career attempting to demolish what he had done in the first with the *Tractatus*. He described *Philosophical Investigations* as a rejoinder to "what logicians have said about the structure of language. (Including the author of the Tractatus Logico-Philosophicus.)" LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 23 (G.E.M. Anscombe trans., 3d ed. 1969) (1953).

92 Julia M. Rohrer, et al., *Putting the Self in Self-Correction: Findings from the Loss-of-Confidence Project*, PsyArXiv (Dec. 12, 2018), https://psyarxiv.com/exmb2/.

93 RETRACTION WATCH, https://retractionwatch.com/ (last visited June 21, 2019).

94 Brian Resnick, *Intellectual Humility: The Importance of Knowing You Might Be Wrong*, VOX (Jan. 4, 2019, 8:40 AM), https://www.vox.com/science-and-health/2019/1/4/17989224/intellectual-humility-explained-psychology-replication.

compiling lists. If so, and in keeping with the theme, I admit the error and invite the corrections.

But I should note that what I have in mind are not the many scholars whose corpus contains inconsistencies: who argued X at one point and later argued Y (or even not-X), without necessarily acknowledging the change. Many successful scholars with a large enough *oeuvre*, and who have defeated the hobgoblin,[95] will exhibit and even celebrate such inconsistencies.[96]

This Essay is concerned with a certain subset of those cases—those in which a scholar believed something, was later convinced otherwise, and (this is the hardest part to find) acknowledged the change.[97] Illustrations of these are hard to come by, though again the difficulty of constructing a search may be partially to blame. The ready examples tend to be those one has noticed in passing. In First Amendment scholarship, two examples come immediately to mind.

First, in a footnote of *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, then-Professor Elena Kagan noted that she had become un-persuaded by an argument she relied on just four years earlier.[98] Specifically, she noted the argument (citing Alexander Meiklejohn and her colleague Geoffrey Stone) that the purpose of the First Amendment's content-neutrality rule is to protect the "thinking processes of the community" from distortion.[99] She went on: "I used the argument with respect to *R.A.V.* in [Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v St. Paul*,* Rust v Sullivan*, and the Problem of Content-Based Underinclusion*, 1992 S. CT.

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[95] RALPH WALDO EMERSON, *Self-Reliance*, *in* ESSAYS AND ENGLISH TRAITS 63, 70 (C.W. Eliot ed., 1909) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."). Emerson, a friend of Holmes's father, was something of a mentor. BUDIANSKY, *supra* note 19, at 58–61, 152–53.

[96] *See, e.g.*, Frank Michelman, *Tushnet's Realism, Tushnet's Liberalism,* 90 GEO. L.J. 199, 208–13 (2001) (charting apparent changes in Mark Tushnet's scholarship); James M. Oleske, Jr., *The Born-Again Champion of Conscience*, 128 HARV. L. REV. F. 75, 78 (2015) ("[W]hile today [Robert] George waxes nostalgic about the widespread denunciation of [*Employment Division v.*] *Smith*, in 1998 he praised the decision as 'impeccably faithful to the original meaning of the 'Free Exercise Clause.'").

[97] *See, e.g.*, Robert S. Summers, *Summers's Primer on Fuller's Jurisprudence—A Wholly Disinterested Assessment of the Reviews by Professors Wueste and Lebel*, 71 CORNELL L. REV. 1231, 1234 (1986) ("Several years ago, when I reread Fuller prior to writing my book on his work, I had a change of mind. I now believe that Fuller's principles of legality do have a justified claim to being a morality.").

[98] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 418–19 n.15 (1996) (citing Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM & MARY L. REV. 189, 198 (1983)).

[99] *Id.*

REV. 29, 69–71]. As will become clear, I now find the argument unpersuasive, both in its application to *R.A.V.* and more broadly."[100] Much of the rest of the Article proceeded to clarify how she came to believe that "only the *purpose*-based model can explain the difference in the levels of review applicable to content-based and content-neutral laws."[101]

Tim Scanlon has been, if anything, even more exasperated by the prominence of his own prior view, and his inability now to denounce it:

> *A rant: Can we please stop talking about autonomy?* If we were to look for a single idea that captures the interests at stake in expression that merits First Amendment protection, the idea of autonomy would be a bad choice for this role. (As someone who once made a mistaken appeal to autonomy as the centerpiece of a theory of freedom of expression, my position in the Dantean Inferno of free speech debates seems to be repeatedly assailed with misuses of this notion, no matter how I criticize them.)[102]

A footnote obligingly provides sources for the Scanlon v. Scanlon debate: "*See generally* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 151, 204 (1972). I criticize the view presented in that article in T.M. Scanlon, *Content Regulation Reconsidered*, *in* T.M. SCANLON, THE DIFFICULTY OF TOLERANCE 151, 161–64 (2003)."[103]

Where should one hope to find other similar examples of scholars who have repudiated their own prior views? What *kinds* of change might we expect to see? Again, this Essay cannot hope to provide a comprehensive account, but only to sketch a few possible routes. And indeed, Holmes himself suggested a distinction that might help guide the search. He once posited a difference between "Ideasts" and "Thingsters"[104]—those who theorize, and those who master facts. He placed himself squarely in the former category;[105] Justice Brandeis would be exemplary of the latter.

The academy, too, has its Ideasts and Thingsters, and it seems plausible that they are persuadable in different ways. Thingsters are more likely to make claims about bodies of discernible facts and to rely

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100 *Id.*

101 *Id.* at 456 (emphasis added).

102 T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 546 (2011) (footnote omitted).

103 *Id.* at n.15.

104 HEALY, *supra* note 15, at 140.

105 *Id.* ("[A]lthough Holmes recognized the value of facts, he personally despised them. It was one of the biases he inherited from his father, who complained that facts choked his windpipe when he talked.").

on standard scientific hypotheses. Precisely because they tend to make scholarly claims that are more easily susceptible to proof, they are more likely to be confronted with evidence and arguments that could effectively force an acknowledgment of a changed view. This is true, for example, of historians who misunderstand[106] or misrepresent[107] their source material, or quantitative empiricists who do the same with data.[108]

One might think of this as simple error correction, a matter of "proof" rather than "persuasion," but it is not clear that the two can be easily separated.[109] For Thingsters with fact-dependent "can't helps," changed facts change truths—a completed mathematical proof, a newly discovered species, or a cured disease, for example. Such changes might not be immediate or simple, of course—the history and philosophy of science is its own discipline, after all—and existing paradigms might be able to absorb a great deal of apparently conflicting information before they are forced to shift.[110] But for a Thingster with an optimistic epistemological vision, such shifts can be acknowledged and celebrated as another step toward "true" understanding.

For Ideasts, the situation is a little bit different. The general theories that Holmes said are the Ideasts' focus probably tend to be less susceptible to proof and closer to the kinds of "deep-seated preferences" that Holmes suspected are not worth debating, at least if the goal is to change someone's mind.[111] Ideasts' debates tend to the normative, rather than descriptive, which complicates the possibility of persuasion. Convincing someone that their facts are wrong is one thing; convincing them to revise their vision of the good is another.

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106 As I write this, the latest kerfuffle involves Naomi Wolf's *Outrages* (2019), which—she acknowledged, when confronted with them during a live interview—contains significant mistakes stemming from her misunderstanding of the words "death recorded" in Victorian court records. Wolf's response: "It's such an important story and I welcome the chance to correct these two out of hundreds of citations and make it perfect." Parul Sehgal, *Naomi Wolf's Career of Blunders Continues in 'Outrages'*, N.Y. TIMES, (June 5, 2019), https://www.nytimes.com/2019/06/05/books/review-outrages-naomi-wolf.html.

107 *See, e.g.*, James Lindgren, *Fall from Grace:* Arming America *and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002).

108 *See* RETRACTION WATCH, *supra* note 93 (collecting examples of errors, misrepresentations, and fraud in scientific research).

109 Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1359 (2016) ("[I]t is important to recall that *pisteis*-the word Aristotle used to describe the rhetorical genus uniting the species of *logos*, *ethos*, and *pathos*— can also be translated as 'proof.' Using the same word to describe proof and persuasion hammers home the rhetorical perspective on discourse: proof is what persuades.").

110 *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996).

111 Holmes, *supra* note 26, at 41.

I do not mean to suggest that Thingsters are more persuadable than Ideasts, nor that seemingly fact-bound arguments are free from normative priors and motivated reasoning. The point is simply to highlight that persuadability may look different to Thingsters and Ideasts. And even then, the difference is one of degree rather than kind.

In choosing which facts to master, and what questions to pursue, Thingsters are guided by general theories. And Ideast propositions—even basic constitutional principles like the marketplace of ideas[112]—sometimes rest on Thingster-type suppositions. One of the original promises of originalism, to take one example, can be understood as an effort to transform a debate between Ideasts into one between Thingsters—a search for historical "facts," not normative visions of constitutional interpretation. Whether this promise has been or can be fulfilled is a debate for another day. For present purposes, what stands out are the general efforts to "empiricize" originalism, including recently through corpus linguistics, which can make it possible to evaluate originalist queries in a data-driven way.[113]

To be clear, I am not suggesting that constitutional law or constitutional scholarship can or should be reduced to a system of proofs. What Holmes said of people is true also of constitutional law: "[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man."[114] The point is simply that

112 *See* Frederick Schauer, *Discourse and Its Discontents*, 72 NOTRE DAME L. REV. 1309, 1333 (1997) ("A great deal of free speech theory and a great deal of discourse theory is marked by an admirable epistemological optimism, but whether that epistemological optimism is well-founded is in the final analysis an empirical question, as to which the resources of contemporary social science research might help to locate an answer."); Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1160 (2015) (noting that while there is "at best mixed evidence for the [marketplace] metaphor's veracity," and reporting empirical study of "buffer zones" at polling places or abortion clinics).

113 Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L. Q. 509 (2019); Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (Aug. 7, 2018), https://blog.harvardlaw review.org/corpus-linguistics-and-the-second-amendment/ (noting that the authors were "persuaded by" Justice Scalia's majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), but that "[a]pplying corpus linguistics to the Second Amendment leads to potentially uncomfortable criticisms for both the majority and dissenting opinions in *Heller*"); Neal Goldfarb, *Corpora and the Second Amendment: "bear"*, LAWNLINGUISTICS, (Dec. 16, 2018), https://lawnlinguistics.com/2018/12/16/corpora-and-the-second-amendment-bear/; Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, THE PANORAMA (Aug. 3, 2018), http://the panorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/.

114 Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

whether one is looking for normative persuasion or a demonstration of proof, legal scholarship seems to offer few open changes of mind. Assuming this is to be true—it is, again, a Thingster-type claim subject to disproof—it raises a question. Why do scholars write as if to persuade, and yet so rarely admit to being persuaded? Should scholars more openly acknowledge—and explain—the times when their minds have been changed?

For one thing, persuasion is not the only thing that a scholar (especially a young scholar) might want to maximize in her career. If one wants to *engage* with other scholars, and not necessarily to convert or conquer them, then it makes sense to pursue issues for which the battlefield is already well set. That might mean spending time in an intellectual trench, without dislodging anyone else from theirs, but scholars might still glean whatever is "divine" in academic battles.[115]

And persuasion is not the only way, perhaps not even the most effective way, to exert scholarly influence. An alternative, of course, is to speak to those who are not yet on the battlefield—to reach the minds that are not yet made up. The underlying premise of the second approach is that made-up minds are unlikely to change and that the key to scholarly change is to reach new audiences. Justice Scalia might not have won many converts to originalism among those with well-developed views on constitutional interpretation, but generations of law students—his primary audience, he often said[116]—have now been baptized in it.

An academic discourse in which scholars do not change positions is still one in which influence can be had, and certain ideas prevail over others. Students and scholars who have not yet developed their own positions might well be won over by one side or another in a scholarly debate about, say, originalism. But in doing so, they will not necessarily have received any guidance or incentive to grow any further—to open themselves up to subsequent change. Perhaps a discourse in which scholars themselves do not just describe but demonstrate the virtues of persuadability would encourage and teach others to do the same.

While many incentives are admittedly against it, I think there is much to like about a system in which scholars—Thingsters, Ideasts, and everyone in between—more commonly acknowledge and explain their

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115 OLIVER WENDELL HOLMES, *The Life Struggle*, *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 94, 95 (Richard A. Posner ed., 1992) ("Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole.").

116 *See, e.g.*, Adam J. White, *Antonin Scalia, Legal Educator*, 33 NAT'L AFFAIRS (2017) https://www.nationalaffairs.com/publications/detail/antonin-scalia-legal-educator.

changes of heart. Those reasons (suspicions might be a better word) track, in large part, those recounted above as to why open persuadability might be a virtue for a broader system of free speech.[117] For one thing, it might help create a scholarly discourse that is more self-consciously persuasive and persuadable. If (and this is of course an if) the goal of scholarly discourse is to provide the "best test" of truth, then presumably we should be the ones willing and able to "accept" it.

For this to happen, it is useful, though not essential, for scholars explicitly to change over time and to explain why. As Kagan and Scanlon do in the examples quoted above, explaining *why* one has changed one's mind is not only fair to the author/creator of the persuasive argument—it gives credit where credit is due—but also helps identify and teach the kinds of arguments that are successful in changing individual minds.

Moreover, to the degree that law professors describe and extol the value of open-mindedness and persuadability—celebrating the tendency of a legal education to open and stretch students' minds, and sometimes bemoaning students' perceived unwillingness to be confronted with distasteful ideas—we might as well model it ourselves. If the marketplace of ideas is to be modeled, not just described, then one would hope and expect to see scholars noting and explaining the points in the "competition" when they "came to realize" that their own "fighting faiths" could be displaced.

Why, then, does this occur so rarely in law reviews? Surely the answers vary from scholar to scholar, school to school, and field to field, but one can at least imagine a range of explanations.

The obvious one is that there is nothing to acknowledge: one doesn't read of scholars having changes of mind because their minds don't change. This is of course the explanation suggested by Part I above, and from my perspective it is discouraging—not so much for the development of legal scholarship as a whole (it can and will continue to change, for all the reasons described above), but for the scholars who entered the academy nominally seeking truth only to behave as if they arrived in full possession of it.

Another is that individual intellectual change comes gradually and incrementally, not all at once, such that it is difficult to pinpoint the moment at which one's mind "changed"—just as it might be hard to identify with precision the point on a spectrum at which red shades into blue. Relatedly, scholars might believe that their own internal intellectual development is simply not newsworthy, as it were—that their own voyages of intellectual self-discovery need not be explained to

117 *See supra* Section II.0

anyone else. But to the degree that scholars hold back on acknowledging their development, that seems to be a lost opportunity to provide a map to the roads they can't help traveling.

IV. CONCLUSION

Holmes's First Amendment opinions were handed down at a time of incredible national anxiety. Many of them—*Abrams* very much included—involved speech about wars, the draft, anarchy, and the very future of the United States. It is easy, at a century removed and with a new set of anxieties, to lose track of how significant those challenges must have seemed and how high the stakes: it was not the First Amendment at stake but the nation.

How far away, and yet how familiar. Our contemporary anxieties and challenges have different roots, but they are again imbricated with issues of free speech. Many feel that the nation is again under threat, both from within and without, and that the main threats include tribalism, closed-mindedness, and a loss of faith in the very nature of truth. *Abrams* is a major part of that discussion. But the part of the opinion that might be most relevant is not its concept of "truth," but its treatment of persuadability.

Appropriately enough, that theme can be summed up by an internet meme. In 2018, a conservative comedian and commentator Tweeted a picture of himself seated on a university campus, sipping a cup of coffee, behind a table with a sign on it reading: "Male Privilege is a Myth—Change My Mind."[118] In short order, hundreds of internet parodies popped up, Photoshopping in other absurd topics of persuasion.[119] It might not be the shout of fire in a crowded theater, but the image of a person defiantly challenging others to change his mind deserves a place in the First Amendment iconography as well.

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[118] Steven Crowder (@scrowder), TWITTER, (Feb. 16, 2018, 2:09 PM), https://twitter.com/scrowder/status/964577508447449088.

[119] Among the less profane examples: "Australians are Just British Texans"; "Pluto is a planet"; "I'm a bad person And deserve to die"; "Spring is Here." *Steven Crowder's "Change My Mind" Campus Sign Images*, KNOWYOURMEME, https://knowyourmeme.com/memes/steven-crowders-change-my-mind-campus-sign (last visited Jul 29, 2019).