Historical Perspectives On Holmes's Dissent In *Abrams*

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During his four decades as a judge before his dissent in *Abrams v. United States* in November 1919, Oliver Wendell Holmes, Jr., mostly shared the general hostility of American judges to free speech claims. His decisions for a unanimous Supreme Court in March 1919, which upheld convictions for antiwar speech during World War I, resembled his earlier opinions restricting free speech in many contexts. Between March and November 1919, Holmes joined the growing number of Americans who had become much more sympathetic to freedom of expression during and immediately after the war. Holmes revealed his transformed views in his *Abrams* dissent even while asserting that they had not changed, but elements of his previous restrictive approach lingered.

I. THE RESTRICTIVE JUDICIAL TRADITION

From the Civil War through World War I, the overwhelming majority of American judges rejected free speech claims.[1] Many decisions did not even address free speech issues raised by litigants. The pervasive judicial hostility toward free speech included all levels of the state and federal judiciary and all regions of the United States. It extended to all varieties of expression, whatever the topic and whoever

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[1] *See generally* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 129–76 (1997) (providing an overview of these cases in a chapter entitled "The Courts and Free Speech").

the speaker. Courts upheld convictions for libel, slander, and contempt of court. They upheld exclusions of material deemed obscene or immoral from the mail. They upheld restrictions on political campaigning and expenditures, prohibitions against speaking on public property, and injunctions against language used by unions. They denied protection to commercial advertising and movies. Even within this pervasive hostility, the United States Supreme Court stood out as particularly restrictive. It typically rejected free speech claims in unanimous opinions. The only significant dissent in a free speech case between Holmes's appointment to the Supreme Court in 1904 and his dissent in *Abrams* was by Justice Harlan, the sole dissenter from a majority opinion written by Holmes.

Legal decisions rejecting free speech claims rarely contained much analytical content. Many relied on Blackstone's treatment of free speech in his Commentaries on the English common law, published shortly before the American Revolution. Blackstone famously asserted that the English common law precludes prior restraints on expression but allows subsequent punishment for the "bad tendency" of speech to harm the public welfare. In addition to applying Blackstone's formulation to American common law, American judges concluded that the First Amendment and state constitutional provisions on free speech incorporated it into American constitutional law.

American judges overwhelmingly deferred to the "police power" of legislators and administrators to determine the "bad tendency" of speech. As many critics observed at the time, this deference to regulation of speech contrasted dramatically with decisions that invalidated economic and social legislation as infringing constitutional rights of property and "liberty of contract." When a law did not directly address speech, judges often punished language they believed had a bad tendency to cause an action the law prohibited.

Even more than the widespread rejection of free speech claims across a wide variety of subjects and speakers, judges revealed their hostility by often ignoring them entirely. Rejecting a claim at least gives it the minimal respect of attention. Ignoring a claim makes it invisible, suggesting it does not exist. In many cases, lawyers raised free speech issues that judges did not address. In similar cases, lawyers themselves did not raise speech issues, probably because they realized that judges might not address them and if they did, would almost certainly reject them.

Despite the overwhelming judicial hostility to free speech, a small minority of cases, mostly in state courts, occasionally protected it in circumstances that would normally have led to convictions. A few

protective decisions concluded that speech did not have a bad tendency to harm the public welfare. A very few refused to apply the bad tendency test at all, finding it inconsistent with the necessary role for free speech in a democracy.

These protective decisions underline the restrictiveness of the dominant judicial treatment of free speech during the decades before World War I. They demonstrate that judges were not confined by an established legal tradition that would have required an intellectual breakthrough to transform. Judges who rejected or ignored free speech claims knew there were alternative approaches and consciously rejected them. Before his dissent in *Abrams*, Holmes revealed in numerous decisions that he was in the mainstream of the repressive judicial tradition and not among the rare judges who protected free speech.

II. HOLMES'S DECISIONS BEFORE WORLD WAR I

During his long career as a judge, Holmes wrote opinions in many free speech cases. While serving on the Supreme Judicial Court of Massachusetts, he addressed the right of a police officer to solicit money for political purposes, the right of a minister to speak on the Boston Common, and the rights of labor picketers. After he joined the United States Supreme Court, he addressed the contempt conviction of a publisher who was also a United States Senator for criticizing justices on the Colorado Supreme Court, and the conviction of the editor of an anarchist newspaper for an article that urged a boycott of businesses responsible for the arrests of nude bathers.

Holmes's opinion for the majority of the Supreme Court in *Patterson v. Colorado*,[2] from which Justice Harlan dissented, is the most significant and revealing of his decisions about free speech before World War I. Thomas Patterson was a Democratic Senator from Colorado who owned and edited several newspapers in the state. His newspapers supported an amendment of the state constitution to provide home rule for Denver. When the majority of the Colorado Supreme Court subsequently invalidated the amendment on state constitutional grounds, Patterson's newspapers published editorials, cartoons, and letters portraying the judges as tools of the utility companies that controlled the state Republican Party. At the request of the Colorado Supreme Court, the state attorney general brought criminal contempt

[2] 205 U.S. 454 (1907).

proceedings against Patterson. The Colorado Supreme Court convicted and fined Patterson.[3]

Writing for eight justices, Holmes left "undecided" whether the First Amendment applies to the states through the Fourteenth Amendment,[4] an issue the Court did not resolve until 1925 when it held that it does.[5] He maintained that even if the First Amendment did apply against state action, it would not preclude Patterson's contempt conviction.[6]

Holmes's opinion exemplified the restrictive interpretation of free speech that pervaded the American judiciary in the decades before World War I. He assumed that Blackstone's formulation of the English common law had been incorporated into the provisions on free speech in the constitutions of the United States and the individual states. The "main purpose" of these provisions, Holmes wrote, was to prevent "*previous restraints*" on publications, not to prevent subsequent punishment of those "deemed contrary to the public welfare."[7] Rejecting Patterson's defense that he had a right to prove the truth of his publications, Holmes maintained that under the constitutional provisions, the "preliminary freedom" against previous restraints "extends as well to the false as to the true," but that "the subsequent punishment may extend as well to the true as to the false."[8] He ignored the assertion in Patterson's brief that the popular sovereignty underlying these constitutions required protection for truthful criticism of the official conduct of public officials. Only through public discussion, the brief maintained, "are the people who possess sovereign power informed of the merits or demerits of those who are chosen to rule over them."[9]

While observing that Blackstone's formulation of free speech was the law of criminal libel, Holmes maintained that it applies "yet more clearly to contempts," which "tend to obstruct the administration of justice," even if true.[10] He acknowledged that this tendency is greater for juries than for judges because judges "perhaps, are less apprehensive that publications impugning their own reasoning or

[3] People v. News-Times Publ'g Co., 84 P. 912, 956 (Colo. 1906); RABBAN, *supra* note 1, at 132–33.

[4] *Patterson*, 205 U.S. at 462.

[5] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[6] *Patterson*, 205 U.S. at 462.

[7] *Id.* at 465 (emphasis in original).

[8] *Patterson*, 205 U.S. at 462.

[9] RABBAN, *supra* note 1, at 133.

[10] *Patterson*, 205 U.S. at 462.

motives will interfere with their administration of the law."[11] But he concluded that contempts against judges may also be punished if judges find them "tending toward such an interference."[12] He added that after a case is decided, "courts are subject to the same criticism as other people."[13] Patterson's brief asserted that under Colorado law, a case remains pending indefinitely because a petition for rehearing could be filed at any time.[14] Even if so, Holmes responded, rules about rehearing are "questions which the local law can settle as it pleases without interference from the Constitution of the United States."[15]

Justice Harlan's dissent in *Patterson* highlighted the restrictiveness of Holmes's opinion and demonstrated that more protective interpretations of the First Amendment were not beyond the conceptual horizon of contemporary judges. In addition to maintaining that the Fourteenth Amendment applies the First Amendment to state action,[16] Harlan briefly but emphatically rejected Holmes's interpretation of the First Amendment. "I cannot assent to that view," Harlan wrote, "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," he added, "cannot override constitutional privileges."[17]

In *Fox v. Washington*,[18] a subsequent opinion written for a unanimous Supreme Court, Holmes, like many other judges during this period, rejected free speech claims without even referring to the First Amendment. In contrast to *Patterson*, the speech punished in *Fox* did not concern disputes over major political issues among important public figures. But *Fox* is very revealing in demonstrating the extent to which judges, including Holmes, were willing to strain to deny protection to speech.

Jay Fox was the editor of the newspaper published by an anarchist community. He published an article entitled "The Nude and the Prudes," which encouraged a "boycott" of local businesses whose owners had helped secure the arrests of nude bathers on charges of indecent exposure.[19] He was convicted under a Washington state statute that

11 *Id.* at 462–63.
12 *Id.* at 463.
13 *Id.*
14 *See* RABBAN, *supra* note 1, at 134.
15 *Patterson*, 205 U.S. at 460.
16 *Id*. at 464 (Harlan, J., dissenting).
17 *Id.* at 465 (Harlan, J., dissenting).
18 236 U.S. 273 (1915).
19 *Id.* at 276.

prohibited publishing material "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."[20] Although the article only encouraged a boycott, Holmes unconvincingly concluded that "by indirection but unmistakably," it "encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure."[21] He acknowledged that the article was directed to "a wider and less selected audience" than those who might violate the law, but he did not think that had any legal significance.[22]

Holmes allowed the punishment of speech for its indirect tendency without considering the First Amendment or analogous provisions in state constitutions. Yet the indirect tendency in the *Fox* case was even more attenuated from the possible commission of a crime than in most other cases using this restrictive approach. Holmes provided no support for his assumption that encouraging a boycott of businesses responsible for arresting nude bathers would have any tendency, however indirect, of inducing some fraction of its readers to engage in nude bathing themselves. And even though the law punished publications that "tend to encourage or advocate disrespect for law," Holmes asserted without any explanation that, "by implication at least," the state court had interpreted "disrespect" as "confined to encouraging an actual breach of law."[23] The extent to which Holmes obviously strained to preserve the legality of this conviction underlines his lack of sensitivity to interests in free speech.

In prior opinions as a judge on the Supreme Judicial Court of Massachusetts, Holmes produced some of his most famous dismissive epigrams while rejecting free speech claims. Upholding the firing of a policeman who violated a regulation by soliciting money for political purposes, Holmes wrote, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[24] The United States Supreme Court reached a similar result in upholding the constitutionality of a federal statute prohibiting employees of the United States from soliciting or receiving money for political purposes.[25] The Supreme Court did not even address the

[20] *Id.* at 275–76.
[21] *Id.* at 276–77.
[22] *Id.* at 277–78.
[23] *Id.* at 275, 277.
[24] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).
[25] *See Ex parte* Curtis, 106 U.S. 371 (1882).

petitioner's assertion that the statute violated the First Amendment.[26] Just as he denied protection to the speech of public employees, Holmes denied the right of citizens to speak on public property. When a minister challenged his arrest for speaking on the Boston Common without the permit required by a city ordinance, Holmes responded, "[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 member of the public than for the owner of a private house to forbid it in his house."[27] The United States Supreme Court quoted this sentence in affirming the minister's conviction.[28]

Though Holmes used memorable language, these decisions, like his later decisions as a Supreme Court justice, typified the rejection of free speech claims by the American judiciary. Yet a minority of judges reached more protective results in similar cases. The Supreme Court of Virginia, for example, invalidated a law that prohibited political activities by public officials.[29] It maintained that the state constitutional protection for free speech is "guaranteed to all the citizens of the state, not to any portion or any class of citizens."[30] The denial of this protection to public employees, it concluded, violated the state constitution.[31] During Reconstruction, the Supreme Court of North Carolina affirmed the right to conduct a noisy but peaceful celebration of the Emancipation Proclamation on public property. The court stressed that "in a popular government like ours, the laws allow great latitude to public demonstrations, whether political, social, or moral."[32] The supreme courts of Michigan and Wisconsin invalidated ordinances restricting parades on public streets. The Michigan court warned that unregulated official discretion to control parades "would enable a mayor or council to shut off processions of those whose notions did not suit their views or tastes, in politics or religion, or any other matter on which men differ."[33] The Wisconsin court similarly claimed that the ordinance allowed "petty tyranny" and was "entirely un-American, and in conflict with the principles of our institutions and all modern ideas of civil liberty."[34]

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[26] *See id.*

[27] Commonwealth v. Davis, 39 N.E. 113, 113 (1895).

[28] *See* Davis v. Massachusetts, 167 U.S. 43, 47 (1897).

[29] Louthan v. Commonwealth, 79 Va. 196, 206 (1884).

[30] *Id.* at 206.

[31] *Id.*

[32] State v. Hughes, 72 N.C. 25, 28 (1875) (per curiam).

[33] *In re* Frazee, 30 N.W. 72, 76 (Mich. 1886).

[34] *In re* Garrabad, 54 N.W. 1104, 1107 (Wis. 1893).

In at least one dissent as a state court judge, Holmes supported the right of free speech more than most of his judicial contemporaries. Whereas many courts issued injunctions against labor picketing, and sometimes declared all picketing to be illegal, Holmes maintained that peaceful picketing should be protected. He complained that a labor injunction prohibited "organized persuasion or argument, although free from any threat of violence either express or implied" and rejected the assumption, shared by many judges, that picketing "necessarily carries with it a threat of bodily harm."[35] Reflecting the more typical judicial view, a federal judge denied the possibility of peaceful picketing. "When men want to converse or persuade," he asserted, "they do not organize a picket line."[36]

III. HOLMES'S INITIAL DECISIONS IN ESPIONAGE ACT CASES

In March 1919, eight months before his dissent in *Abrams*, Holmes wrote for a unanimous Supreme Court in its initial decisions reviewing convictions for antiwar speech under the Espionage Act of 1917: *Schenck v. United States*,[37] *Frohwerk v. United States*,[38] and *Debs v. United States*.[39] Like the overwhelming majority of lower federal court judges who had decided similar cases, Holmes continued the prewar judicial tradition of relying on the bad tendency of speech to uphold the convictions.

Most prosecutions under the Espionage Act were brought under Title I, Section 3, which contained three prohibitions: (1) making false statements with intent to interfere with the war effort, (2) willfully causing or attempting to cause insubordination in the armed forces, and (3) willfully obstructing the recruitment and enlistment service.[40] The prosecutions often charged that antiwar speech constituted an attempt to cause insubordination and was itself an obstruction. As in free speech cases before the war, lower courts in Espionage Act cases emphasized the tendency of language to produce an illegal act, often maintaining that the tendency need not be direct.[41]

Debs was by far the most prominent of the defendants in the Espionage Act cases that reached the Supreme Court. His case received the most extensive legal arguments and amicus participation, as well as

35 Vegelahn v. Guntner, 44 N.E. 1077, 1080 (Mass. 1896).
36 Atchison, T & S. F. Ry. Co. v. Gee, 139 F. 582, 584 (C. C. S. D. Iowa 1905).
37 249 U.S. 47, 48 (1919).
38 249 U.S. 204, 205 (1919).
39 249 U.S. 211, 212 (1919).
40 The Espionage Act of June 15, 1917, Pub. L. No. 65-24, 40 Stat. 217, 219 (1917).
41 *See* RABBAN, *supra* note 1, at 257–58.

the most attention from the public. Yet Holmes discussed the First Amendment in *Schenck* and then relied on *Schenck* in *Frohwerk* and *Debs*. He probably did so because the defendants in *Schenck* mailed antiwar circulars to men who had been drafted or accepted for military service. They posed a more likely danger of insubordination and obstruction than the more general audiences for the antiwar speech in *Frohwerk* and *Debs*.

As described by Holmes, the circulars mailed by *Schenck* maintained that "a conscript is little better than a convict," asserted that conscription was "in the interests of Wall Street's chosen few," and urged "peaceful measures such as a petition for the repeal" of the Espionage Act.[42] Holmes concluded that "the documents 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."[43] Holmes then began his single paragraph about the First Amendment by characterizing the defendants as taking the position that even if this "was the tendency of this circular, it is protected by the First Amendment."[44] He apparently did not believe the document could have had its stated purpose of encouraging a petition for the repeal of the Espionage Act.

The government's brief in *Debs* conceded that the First Amendment might restrict the power of a legislature to regulate speech, providing more protection than Blackstone's prohibition against prior restraints.[45] Perhaps in response, Holmes in *Schenck* retreated from his position in *Patterson v. Colorado* equating the First Amendment with Blackstone's formulation of the English common law. "It well may be," Holmes wrote without indicating he had changed his views, "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*."[46] He acknowledged as well that "in many places and in ordinary times" the First Amendment would protect the circulars.[47] But, he added, "the character of every act depends on the circumstances in which it is done."[48] In a passage soon

[42] Schenck v. United States, 249 U.S. 47, 50–51 (1919).

[43] *Id.* at 51.

[44] *Id.*

[45] Brief for the United States at 81, Debs v. United States, 249 U.S. 211, 212 (1919) (No. 714).

[46] *Schenck*, 249 U.S. at 51–52.

[47] *Id.* at 52.

[48] *Id.*

made famous by Harvard Law professor, Zechariah Chafee, Jr., Holmes elaborated. "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."[49] The circumstances of war, Holmes added, allow restrictions on speech that would not be permissible during peacetime. Holmes returned to the tendency of speech at the end of this paragraph. "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done are the same," he concluded while indicating that in this case they were the same, "we perceive no ground for saying that success alone warrants making the act a crime."[50]

In *Frohwerk* and *Debs*, Holmes relied on his brief analysis of the First Amendment in *Schenck*. He did not repeat his reference to "clear and present danger" in either *Frohwerk* or *Debs*, but he frequently emphasized that antiwar speech can be punished under the Espionage Act for its tendency to cause insubordination or to obstruct recruitment. Although Holmes conceded that Frohwerk's antiwar articles were published "in a newspaper of small circulation" and that the evidence did not indicate "any special effort to reach men subject to the draft," Holmes upheld the conviction despite "the very severe penalty imposed" of ten years imprisonment.[51] Even while admitting weaknesses in the record, Holmes wrote that "we must take the case on the record as it is."[52] In a vivid formulation of the bad tendency approach, Holmes concluded that "it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[53]

Similarly relying on the bad tendency approach, Holmes maintained that if in the speech for which Debs was convicted "he used words tending to obstruct the recruiting service he meant that they should have that effect."[54] He observed that this "principle is too well established and too manifestly good sense to need citation of the books," but he could have easily cited his own prewar decisions and numerous others for support.[55] Holmes recognized that the "main theme" of Debs's

49 *Id.*

50 *Id.* (citing Goldman v. United States, 245 U.S. 474, 477 (1918)).

51 Frowherk v. United States, 249 U.S. 204, 208–09 (1919).

52 *Id.* at 209.

53 *Id.*

54 Debs v. United States, 249 U.S. 211, 216 (1919).

55 *Id.*

speech was the legal discussion of "socialism, its growth, and a prophecy of its ultimate success."[56] But he added that "if a part of the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech."[57]

Just as a small minority of prewar decisions protected speech that Holmes and the overwhelming majority of American judges punished, an even smaller minority protected speech prosecuted under the Espionage Act. In *Masses Publishing Company v. Patten*, one of the first cases decided under the Espionage Act, Judge Learned Hand refused to apply the bad tendency approach. In response to the government's argument that the antiwar speech at issue "tends to promote a mutinous and seditious temper among the troops," Hand maintained that "to interpret the word 'cause' so broadly would . . . 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."[58] This consequence, Hand asserted, "would contradict the normal assumptions of democratic government."[59] "If one stops short of urging upon others that it is their duty or their interest to resist the law," Hand concluded, "it seems to me one should not be held to have attempted to cause its violation."[60] In construing the obstruction clause, Hand acknowledged that statements praising people for conspiracy to resist the draft "have a tendency to arouse emulation in others."[61] But he required "some advocacy of such emulation,"[62] not just a tendency to arouse it, for language to constitute obstruction. The Second Circuit immediately reversed Hand, relying on "the natural and reasonable effect of the publication."[63]

A few other lower court judges, without rejecting the bad tendency approach, did not find sufficient proximity between antiwar speech and the prohibitions of the Espionage Act to justify convictions. In directing a verdict against the government, one judge observed that the speech was made informally in a remote village in Montana far from any

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56 *Id.* at 212.

57 *Id.* at 212–13.

58 Masses Publ'g Co. v. Patten, 244 F. 535, 539–40 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

59 *Id.* at 540.

60 *Id.*

61 *Id.* at 541.

62 *Id.* at 542.

63 Masses Publ'g Co. v. Patten, 246 F. 24, 39 (2d Cir. 1917).

military base.[64] Other judges similarly found that the circumstances of speech did not justify convictions or refused to convict unless the government specified the surrounding circumstances.[65] These Espionage Act decisions, like the decisions that recognized free speech claims during the decades before the war, highlighted the pervasive judicial hostility by demonstrating that protective alternatives were conceptually available and occasionally applied.

IV. HOLMES'S DISSENT IN *ABRAMS*

Holmes's dissent in *Abrams*, just eight months after his opinions for a unanimous Supreme Court in *Schenk*, *Frohwerk*, and *Debs*, was a major departure from his prior restrictive views about free speech during his four decades as a judge. The defendants in *Abrams* had been convicted under the Espionage Act as amended in 1918, when Congress added prohibitions against "unpatriotic or disloyal" language.[66] The Department of Justice sought this amendment after the summary judgment in the Montana case.[67] Though he recognized that most judges allowed juries to determine whether speech violated the Espionage Act, Attorney General Gregory maintained that this directed verdict demonstrated the "ineffectiveness" of the law "when applied by a judge not in accord with its purposes."[68]

The majority opinion in *Abrams* did not focus on the new prohibitions in the 1918 amendments, but closely resembled Holmes's opinions in *Schenck*, *Frohwerk*, and *Debs*. It cited *Schenck* and *Frohwerk* as having "definitely negatived" the defendants' assertion that the Espionage Act violated the First Amendment.[69] Just as Holmes had deferred to the jury's evaluation of the "natural tendency and reasonably probable effect" of Debs's speech,[70] the majority in *Abrams* limited its role to determining whether there was sufficient evidence before the jury "fairly tending to sustain the verdict."[71]

Although Holmes asserted that he had no doubts that *Schenck*, *Frohwerk*, and *Debs* had been correctly decided,[72] his dissent revealed the many respects in which he departed from his analysis in those cases.

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64 United States v. Hall, 248 F. 150, 152 (D. Mont. 1918).
65 *See* RABBAN, *supra* note 1, at 267–69.
66 Act of May 16, 1918, Pub. L. 65-150, 40 Stat. 553, 553–54 (1918).
67 *See supra* text accompanying note 64.
68 *See* RABBAN, *supra* note 1, at 267.
69 Abrams v. United States, 250 U.S. 616, 619 (1919).
70 Debs v. United States, 249 U.S. 211, 216 (1919).
71 *Abrams*, 250 U.S. at 619.
72 *Id.* at 627 (Holmes, J., dissenting).

In *Abrams*, he applied a much more rigorous conception of intent. He recognized in *Abrams* that "the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue." For purposes of civil and criminal liability, he added, an even lesser standard of intent suffices. But he maintained that "when words are used exactly" an act is not done "with intent to produce it unless the aim to produce it is the proximate motive of the specific act."[73] The Espionage Act, he asserted, "must be taken to use its words in a strict and accurate sense. They would be absurd in any other."[74]

Yet Holmes in *Schenck*, *Frohwerk*, and *Debs*, like most judges in Espionage Act decisions, had interpreted intent "as vaguely used in ordinary legal discussion" and did not construe the Espionage Act "in a strict and accurate sense."[75] He observed in *Schenck* that "the document would not have been sent unless it had been intended to have some effect."[76] He acknowledged in *Frohwerk* that the defendants did not make "any special effort to reach men . . . subject to the draft" and that the record was weak, but sustained the convictions because "it was impossible to say" that the articles did not have a tendency to cause a violation of the act.[77] And in *Debs*, he commented approvingly on the trial judge's instruction to the jury that evidence of specific intent could be based on the finding that "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service."[78]

In addition to requiring a much stricter interpretation of intent, Holmes rephrased the sentence using the term "clear and present danger" that he wrote in *Schenck* but did not include in either *Frohwerk* or *Debs*. He made clear in *Abrams*, as he had not in *Schenck*, that words must come very close to producing an illegal act to justify punishment without violating the First Amendment. In *Schenck*, he wrote that words can be punished when they "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[79] In *Abrams*, he wrote that "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

[73] *Id.*
[74] *Id.* at 626.
[75] *Id.* at 626–27.
[76] Schenck v. United States, 249 U.S. 47, 51 (1919).
[77] Frohwerk v. United States, 249 U.S. 204, 208–09 (1919).
[78] Debs v. United States, 249 U.S. 211, 216 (1919).
[79] *Schenck*, 249 U.S. at 52.

evils that the United States constitutionally may seek to prevent."[80] Adding the word "forthwith" indicates a closer relationship between speech and crime. Unlike in *Schenck*, moreover, Holmes used the word "immediate" throughout his dissent in *Abrams*. He wrote that "only the present danger of immediate evil" or the "immediate danger" that expression would hinder the war effort justifies punishment.[81] He maintained that "the expression of opinions that we loathe and believe to fraught with death" should be protected "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."[82] "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time," he concluded, "warrants making any exception to the sweeping command" of the First Amendment.[83]

Beyond his new emphasis on immediacy, Holmes's rephrasing of his language in *Schenck* reveals more protective views about free speech. Instead of "the substantive evils Congress has a right to prevent" in *Schenck*, he referred in *Abrams* to "certain substantive evils that the United States constitutionally may seek to prevent." In *Abrams*, only "certain" substantive evils may be prevented, the right to prevent becomes the right to "seek to prevent" within constitutional limits, and the legal standard applies to the United States, implying all branches of government, not just to Congress. In *Abrams*, moreover, Holmes rejected the government's argument that the First Amendment did not abolish the common law of seditious libel,[84] an argument debated in the briefs in *Debs*[85] but ignored by Holmes in his decision. Most memorably, Holmes included in *Abrams* a powerful defense of free speech that had no counterpart in his previous Espionage Act decisions and that remains famous a century later. In its core sentence, he wrote 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."[86]

V. EXPLANATIONS FOR HOLMES'S TRANSFORMATION IN *ABRAMS*

It is easier to identify than to determine the relative weight of the numerous possible explanations for Holmes's transformation in the

80 *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).
81 *Id.* at 628.
82 *Id.* at 630.
83 *Id.* at 630–31.
84 *Id.* at 630.
85 *See* RABBAN, *supra* note 1, at 274, 278.
86 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

eight months between his unanimous opinions in the initial Espionage Act cases and his dissent in *Abrams*. Factual differences in the *Abrams* case itself could have led Holmes to a different result and prompted him to treat free speech claims more sympathetically. Holmes characterized the "only object" of the leaflet at issue in *Abrams* that "affords even a foundation" for a charge under the Espionage Act "is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on" against Germany, which was the focus of the Espionage Act. Any impact of the leaflet on the war effort, he maintained, was "an indirect and probably undesired effect."[87] In *Schenck*, *Frohwerk*, and *Debs*, by contrast, the defendants opposed American participation in World War I. Underlining the persuasiveness of this difference, the lawyer who wrote the government's briefs in *Schenck* and *Debs* himself used it to explain in private correspondence his opposition to the prosecution in *Abrams*.[88]

The criticism of his earlier Espionage Act decisions by two respected law professors and Judge Learned Hand might have prompted Holmes to alter his views, though he never acknowledged their influence. Professor Ernst Freund wrote a devastating critique of Holmes's opinion in *Debs* in *The New Republic* magazine, a leading journal of progressive thought. Published in May 1919, the article criticized Holmes's analysis because "to be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency, and possible effect, makes the right of free speech a precarious gift." By insulating a jury's findings "of a conceivable psychological nexus between words and deeds," Freund suggested, the Espionage Act itself violated the First Amendment.[89]

Judge Learned Hand, who had rejected the bad tendency approach in the *Masses* case, made a similar point in a letter to Holmes immediately after *Schenck*, *Frohwerk*, and *Debs*. Hand disagreed with punishing speech under the Espionage Act when "the result is known as likely to follow." He stressed that juries "won't much regard the difference between the probable result of the words and the purposes of the utterer," citing the numerous convictions under the Espionage Act as examples. Beyond the actual convictions, Holmes's approach had allowed juries to "intimidate" and "scare" many people who might have

87 *Id.* at 629.

88 *See* RABBAN, *supra* note 1, at 350.

89 Ernst Freund, *The Debs Case and Freedom of Speech*, 19 NEW REPUBLIC, May 3, 1919, at 13–14, *reprinted in* Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 240–41 (1973).

"moderate[d] the storms of popular feeling" against antiwar speech. Reiterating the views he expressed in *Masses*, Hand stressed that words should be deemed illegal only when they are "directly an incitement."[90]

In "Freedom of Speech in War Time," published in the June 1919 issue of the Harvard Law Review, Professor Zechariah Chafee had a mixed reaction to Holmes's initial Espionage Act decisions. Chafee believed that the term "clear and present danger" in *Schenck* could effectively protect free speech, though he regretted that Holmes had "not more specifically defined" the "substantive evils" that Congress could prevent. Chafee hoped that Holmes used "substantive evils" to "mean overt acts of interference with the war," which would make "the punishment of words for their bad tendency impossible."[91] Chafee criticized Holmes in *Debs* for accepting "the verdict as proof that actual interference with the war was intended and was the proximate effect of the words used," which allowed Debs to be convicted "merely because the jury thought his speech had a tendency to bring about resistance to the draft." Chafee called Holmes's "clear and present danger" phrase in *Schenck* "the Supreme Court test" and maintained that if it "is to mean anything more than a passing observation," it must be applied to reverse jury convictions in cases such as *Debs*.[92]

When Harold Laski, an English friend of Holmes who had close connections to *The New Republic*, asked Holmes if he had been influenced by Freund's article, Holmes described it as "rather poor stuff."[93] He shared with Laski a letter he had drafted to Herbert Croly, the editor of *The New Republic*, but decided not to send. The letter observed that "Freund's objection to a jury 'guessing at motive, tendency and possible effect' is an objection to pretty much the whole body of law, which for thirty years I have made my brethren smile by insisting to be everywhere a matter of degree."[94] Holmes accurately portrayed his longstanding position to Laski, but his transformed treatment of intent in *Abrams* eliminated the loose construction and deference to the jury that Freund criticized in *Debs*.

Laski also sent Holmes a copy of Chafee's article and invited both of them to tea in July 1919. Chafee did not think that he had convinced

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[90] Letter from Learned Hand to Oliver Wendell Holmes, Jr. (late Mar. 1919), *reprinted in* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 758–59 (1975).

[91] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 967 (1919).

[92] *Id.* at 967–68.

[93] *See* RABBAN, *supra* note 1, at 297.

[94] Letter from Oliver Wendell Holmes, Jr., to Herbert Croly (May 12, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS, 159 n.2 (Mark Howe ed., 1953).

Holmes about the *Debs* case. He wrote a letter after the tea reporting his impression that Holmes continued to think the Supreme Court should have deferred to the jury verdict and congressional legislation about the war. Yet Chafee was certain that if Holmes had been on the jury, he would have voted to acquit Debs.[95] Whether or not ultimately influenced by his discussion with Chafee, in his *Abrams* dissent Holmes came much closer than in his initial Espionage Act opinions to the views expressed in Chafee's article. He refused to defer to the jury verdict. By repeatedly stressing that the danger of "substantive evils" must be immediate, he significantly limited the possibility of punishing speech merely for its bad tendency. Holmes had used the phrase "clear and present danger" in *Schenck* but not in *Frohwerk* and *Debs*, indicating that it might have been the "passing observation" Chafee hoped it was not. But in *Abrams*, Holmes, like Chafee in his article, treated "clear and present danger" as the Supreme Court test while strengthening its protections for speech.

It is harder to detect the influence of Hand on Holmes. His dissent in *Abrams* did not incorporate Hand's preference for a direct incitement test. But by limiting the bad tendency approach that Hand rejected in *Masses* and by emphasizing that the probable illegal results of speech must be immediate in order to justify punishment, Holmes mitigated the problems Hand had identified in the earlier Espionage Act decisions.

Laski himself might have had a significant role in Holmes's transformation of views. Between his first Espionage Act decisions and *Abrams*, Holmes read Laski's book, *Authority in the Modern State*, which Laski jointly dedicated to Holmes and Felix Frankfurter. While arguing for "absolute" freedom of thought, Laski wrote that it is "in the clash of ideas that we shall find the means of truth," a phrase very similar to Holmes's famous statement in *Abrams* that "the best test of truth is to the power of the thought to get itself accepted in the competition of the market." Indeed, a major biography of Laski published in 1993 concluded that Holmes's dissent in *Abrams* "was almost verbatim Laski's own amalgam of J.S. Mill and Charles Darwin."[96]

Beyond these possible intellectual influences, Holmes's eagerness for approval from the young intellectuals who wrote for *The New Republic* at a time he felt lonely and underappreciated may have made him receptive to their more protective views about free speech than he had previously expressed.[97] More generally, many Americans

[95] *See* RABBAN, *supra* note 1, at 353–54.

[96] ISAAC KRAMNICK & BARRY SHEERMAN, HAROLD LASKI: A LIFE ON THE LEFT 127 (1993).

[97] *See, e.g.*, G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 450 (1983); EDMUND WILSON, PATRIOTIC GORE 772 (1962); G. Edward White, *Justice Holmes*

developed a greater sensitivity to free speech during and immediately after World War I. It is plausible to interpret Holmes's transformation of views in *Abrams* as an important manifestation of this widespread phenomenon. The general transformation occurred at different times for different people from 1917 through 1919. Antiwar pacifists confronted with prosecutions under the Espionage Act were among the first. Roger Baldwin, who founded the American Civil Liberties Union (ACLU) in 1920, became exposed to free speech issues as a member of the American Union Against Militarism (AUAM), a pacifist organization opposed to American intervention in World War I. When the United States entered the war in April 1917, Baldwin became the executive of the Civil Liberties Bureau established by the AUAM to defend freedom of speech for conscientious objectors. The Civil Liberties Bureau separated from the AUAM as it began to defend the free speech rights of more radical opponents of the war, eventually becoming the ACLU.[98]

Americans who supported the war often took longer to become interested in free speech. John Dewey, the eminent philosopher and public intellectual, wrote a series of articles in *The New Republic* in the months after the American entry into the war urging pacifists to end their opposition to it. He challenged them instead to devote their energy to the more realistic effort of making sure that the war is fought to establish the international community sought by President Wilson.[99] Though he denounced the suppression of antiwar views, Dewey ridiculed radicals who defended themselves by invoking "all the early Victorian political platitudes," including "the sanctity of individual rights and constitutional guaranties."[100] Yet only two months later, Dewey wrote another article in *The New Republic* contritely entitled "In Explanation of Our Lapse." The article emphasized "the increase of intolerance to the point of religious bigotry" in the United States, which prompted him to find his prior articles "strangely remote and pallid." In contrast to his recent criticisms of pacifists for unrealistically failing to support the proper goals of the war and of those who invoked individual constitutional rights against the suppression of antiwar speech, Dewey now warned that the prowar "liberal who for expediency's sake would

and the Modernization of Free Speech Jurisprudence: The Human Dimension, 80 CAL. L. REV. 391, 410–11 (1992).

98 *See* RABBAN, *supra* note 1, at 300, 306–07.

99 *See* RABBAN, *supra* note 1, at 243–47. *See also id.* at 217–32 (analyzing Dewey's social thought before World War I in relation to his views about free speech).

100 JOHN DEWEY, *Conscription of Thought*, *in* 10 THE MIDDLE WORKS OF JOHN DEWEY, 1899–1924: ESSAYS ON PHILOSOPHY AND EDUCATION 278, 279 (Jo Ann Boydston ed., 1985).

passively tolerate invasions of free speech" may be "preparing the way for a later victory of domestic Toryism."[101]

Others became interested in free speech issues after the war ended. The perceived failure of the Versailles Peace Conference to achieve the American war goal "to make the world safe for democracy" led many Americans to reconsider their prior support for the war and made them more sympathetic to those who had been prosecuted and convicted for their antiwar speech. Many who did not reconsider their views about the war were shocked into recognition of the importance of free speech by the extensive violations of civil liberties during the "Red Scare" of 1919.[102] Referring to the Red Scare, Felix Frankfurter later maintained in his book about Holmes that this "period of hysteria undoubtedly focused the attention of Mr. Justice Holmes on the practical consequences of a relaxed attitude" toward free speech.[103]

In the most memorable paragraph of his *Abrams* dissent itself, Holmes may have been commenting on this transformation of views about free speech. "Persecution for the expression of opinions seems to me perfectly logical," he wrote at the beginning of a paragraph that ended with a strong endorsement of free speech. "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." Holmes had expressed similar views in 1918 while responding to a letter from Learned Hand, who advocated tolerance of dissent because "[o]pinions are at best provisional hypotheses, incompletely tested."[104] Although most would not "care enough" to suppress speech, Holmes replied, "if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong."[105] Holmes added that he "used to define the truth as the majority vote of that nation that can lick all others. So we may define the present war as an inquiry concerning truth."[106] Only later in the paragraph in *Abrams* did Holmes qualify his initial statements. "But when men have realized that time has upset many fighting faiths," he wrote, "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 . . . ." It

101 *Id.* at 292, 295.

102 *See* RABBAN, *supra* note 1, at 300–02, 351–52.

103 FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 79 (2d ed. 1961).

104 Letter from Learned Hand to Oliver Wendell Holmes, Jr. (June 22, 1918), *reprinted in* Gunther, *supra* note 90, at 755–76.

105 Letter from Oliver Wendell Holmes, Jr., to Learned Hand (June 24, 1918), *reprinted in* Gunther, *supra* note 90, at 757.

106 *Id.*

seems plausible that Holmes, perhaps unselfconsciously, was referring to the "fighting faith" in American participation in World War I that had been "upset" for many Americans, and perhaps for Holmes himself between March and November of 1919.

VI. TRACES IN *ABRAMS* OF HOLMES'S PREVIOUS VIEWS

Though Holmes's dissent in *Abrams* revealed major doctrinal and ideological transformations in his treatment of free speech, in two significant respects he did not alter his previous views. First, Holmes continued to focus on the temporal relationship between speech and crime even as he significantly weakened the traditional bad tendency approach by repeatedly emphasizing that a danger must be immediate before speech can be punished. He did not adopt the "direct incitement" standard that Learned Hand used in *Masses* and recommended to Holmes in personal correspondence. Writing Chafee in 1922, Hand continued to object to Holmes's underlying approach. Hand observed that even "their Ineffabilities, the Nine Elder Statesmen" on the Supreme Court "have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' today may seem very remote next year even though the circumstances surrounding the utterance be unchanged." He preferred "a qualitative formula, hard, conventional, difficult to evade."[107] Second, by asserting that the "best test of truth is the power of the thought to get itself accepted in the competition of the market," Holmes continued to reflect the Social Darwinism that characterized much of his prior scholarly and judicial writings.

These remnants of Holmes's prior views did not linger in the subsequent First Amendment opinions of Justice Brandeis in the 1920s. Culminating in his concurrence in *Whitney v. California* in 1927,[108] Brandeis emphasized the critical role of free speech in a democratic society. That opinion merits its own reassessment at 100 in 2027. Yet Holmes's dissent in *Abrams*, despite the traces of his prior views, remains the decisive break from the restrictive judicial tradition of the past and the foundation for subsequent interpretation of the First Amendment over the following century.

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[107] Letter from Learned Hand to Zechariah Chafee, Jr., (Jan. 2, 1921), *reprinted in* Gunther, *supra* note 90, at 770.

[108] *See* Whitney v. California, 274 U.S. 357, 372–76 (1927) (Brandeis, J., concurring).