

Writing the Dissent in *Abrams*

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Much has been written about how Oliver Wendell Holmes, in November 1919, came to write his pathbreaking dissent in *Abrams v. United States*,¹ which virtually invents First Amendment doctrine. The most complete account may be found in Thomas Healy's superb book, *The Great Dissent*.²

Holmes's accomplishment in *Abrams* is all the more astonishing because eight months previously, in March 1919, Holmes had authored decisions sustaining criminal convictions for those who had dared to speak out against World War I. Holmes's friends and supporters were appalled by these opinions, most especially by *Debs v. United States*,³ in which Holmes upheld the conviction under the Espionage Act of 1917⁴ of a prominent socialist leader for what amounted to a political speech opposing American participation in the war.⁵ In *Debs*, Holmes deemed First Amendment protections irrelevant if political speech had its "natural tendency and reasonably probable effect to obstruct the recruiting service" of the United States.⁶ Virtually all anti-war speeches, and certainly all successful anti-war speeches, have this tendency and effect.

Throughout the spring and summer of 1919, Holmes "was both defensive and defiant" about his opinion in *Debs*.⁷ He went so far as to draft (but not send) a letter of protest to Herbert Croly, editor of *The New Republic*, a magazine normally appreciative of Holmes. But even

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¹ 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

² THOMAS HEALY, *THE GREAT DISSSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (1st ed. 2013).

³ 249 U.S. 211 (1919).

⁴ Espionage Act of June 15, 1917, ch. 30, tit. 1, § 3, 40 Stat. 219 (repealed 1921).

⁵ See Ernst Freund, *The Debs Case and Freedom of Speech*, *THE NEW REPUBLIC*, May 3, 1919, at 13. See generally Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 *HARV. L. REV.* 932, 944, 967–68 (1919).

⁶ 249 U.S. at 216.

⁷ HEALY, *supra* note 2, at 137.

The New Republic had published an article sharply critical of *Debs*. Holmes wanted to say to Croly:

I hated to have to write the *Debs* case . . . and I think it quite possible that if I had been on the jury I should have been for acquittal but I cannot doubt that there was evidence warranting a conviction on the disputed issues of fact. Moreover, I think the *clauses under consideration* not only were constitutional but were proper enough while the war was on. When people are putting out all their energies in battle I don't think it unreasonable to say we won't have obstacles intentionally put in the way of raising troops—*by persuasion any more than by force*. But in the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat.⁸

Holmes's close friend Learned Hand wrote the Justice, specifically criticizing *Debs*.⁹ In an effort to change Holmes's mind, his dear friend Harold Laski even went so far as to arrange a summer tea with the young Zechariah Chafee, whose brilliant article in the *Harvard Law Review* criticizing *Debs* would foreshadow Holmes's eventual dissent in *Abrams*.¹⁰

These external influences are no doubt important for understanding Holmes's eventual *volte face* in *Abrams*. But anyone who has closely encountered Holmes's mind knows that in technical legal matters he was a sublimely self-confident and self-directed thinker who regarded his vocation as "preparing small diamonds for people of limited intellectual means."¹¹ Holmes was not easily influenced by the views of others, even those of his friends and admirers. This is well illustrated in his 1918 correspondence with Learned Hand about freedom of speech; throughout, Holmes remained blithely oblivious to Hand's prescient and forceful arguments in favor of broadly interpreting the First Amendment.¹²

In this brief essay, therefore, I shall put aside explanations of Holmes's remarkable change of heart that stress external pressure and disapproval. Instead, I shall offer an internal account that sketches the

⁸ HEALY, *supra* note 2, at 136–37 (alteration in original) (emphasis added).

⁹ HEALY, *supra* note 2, at 112–13.

¹⁰ HEALY, *supra* note 2, at 154–59; *see also* Chafee, *supra* note 5.

¹¹ Oliver Wendell Holmes to Frederick Pollock (December 1, 1925), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932 173 (Mark DeWolfe Howe, ed., 1942).

¹² *See* HEALY, *supra* note 2, at 221–27; Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 733–34 (1975).

factors that Holmes himself might have considered relevant in justifying his altered understanding of the First Amendment. My hope is to reconstruct how Holmes might have reasoned his own way from *Debs* to *Abrams*.

Paradoxically, given Holmes's penchant for pungent Emersonian sentences, Holmes's legal approach to decision-making was intensely architectural. He confronted cases theoretically, seeking first principles on which to ground his approach. "Cases are like the other problems of life," wrote Holmes, "At first they loom vast, black immeasurable, but presently they shrink to infinitesimal luminous points."¹³ For all that Holmes stressed experience rather than logic, for all that his language was condensed and poetic, his decisions as a judge were highly axiomatic. He always sought the exact point on which to rest his explanation of a case. My hope in this essay is to trace the legal pathway by which Holmes's axioms regarding freedom of speech evolved to reach their powerful and climactic expression in November 1919.

To do that, we need a starting point, which we may take as Holmes's 1907 opinion in *Patterson v. Colorado*,¹⁴ a case in which a newspaper was charged with contempt of court for publishing articles and a cartoon that "reflected upon the motives and conduct of the supreme court of Colorado in cases still pending, and were intended to embarrass the court in the impartial administration of justice."¹⁵ The newspaper raised what we would now characterize as a First Amendment defense, to which Holmes, citing an 1825 precedent by his predecessor as Chief Justice of the Massachusetts Supreme Judicial Court, replied:

But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the states, still we should be far from the conclusion that the plaintiff in error would have us reach. . . . [T] he main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practised by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all.¹⁶

¹³ OWH to Baroness Moncheur (June 18, 1927) (Holmes papers).

¹⁴ 205 U.S. 454 (1907).

¹⁵ *Id.* at 459.

¹⁶ *Id.* at 462 (emphasis in original) (citations to *Commonwealth v. Blanding*, 20 Mass. 304 (1825) omitted).

It is fair to say, then, that Holmes began the second decade of the Twentieth Century with a minimal account of the First Amendment, which he did not believe extended to subsequent punishments such as those that were at issue in *Debs* and *Abrams*. This is roughly in line with the way elite lawyers typically regarded the First Amendment in the years before World War I.¹⁷ So for example, when in 1915 Harlan Fiske Stone, then Dean of Columbia Law School, published his one and only book, *Law and Its Administration*,¹⁸ the future author of footnote 4 of *Carolene Products*¹⁹ summarized the Bill of Rights in this way:

The more important of these were freedom of religious worship, the right peaceably to assemble, the right to bear arms, the right to be free from unreasonable searches and seizures, the right to a speedy trial by jury, the right not to be compelled to testify against oneself in a criminal trial, the right not to be deprived of life, liberty, or property without due process of law, and the like.²⁰

Freedom of speech did not even bear mentioning.²¹

Public attitudes toward freedom of speech changed after America entered World War I, when the Wilson administration launched a vicious program of state censorship and propaganda.²² One of the first repressive measures was enacted on June 15, 1917. Known as the Espionage Act of 1917, it provided that

whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.²³

¹⁷ See DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 2 (1997).

¹⁸ HARLAN F. STONE, *LAW AND ITS ADMINISTRATION* (1st ed. 1915).

¹⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁰ STONE, *supra* note 18, at 140.

²¹ *Id.* But see the first two paragraphs of Footnote 4 of *Carolene Products*, which in contrast concentrate on cases involving freedom of speech. 304 U.S. at 152 n.4.

²² See CHRISTOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN* 144–73 (2008); DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 75–92 (1980); ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 38–41 (2014); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

²³ Espionage Act of 1917, Pub. L. No. 65-24, § 3, 40 Stat. 217, 219 (June 15, 1917).

The Wilson administration took a broad view of obstructing the recruitment and enlistment services. It chose to prosecute persons who discouraged men from enlisting in the military and naval forces. One of the first cases to reach the Court involving this policy was *Baltzer v. United States*, which was argued on November 6–7, 1918.²⁴ The federal government successfully charged the defendants in *Baltzer* with “wilfully obstructing the recruiting and enlistment service of the United States” because they sent a petition to the Governor of South Dakota complaining that certain counties had been improperly exempted from the draft and that “the Governor should stand for a referendum on the draft.”²⁵ The Court was apparently ready to affirm the defendants’ convictions. We know this because in Holmes’s papers there is a draft dissent that he circulated to his brethren.²⁶

Holmes realized that the defendants’ speech could not be charged as the crime of obstructing the draft, which is all that the 1917 Espionage Act forbade.²⁷ The defendants’ speech was instead merely “the foolish exercise of a right.”²⁸ “I cannot see how asking a change in the mode of administering the draft so as to make it accord with what is supposed to be required by law can be said to obstruct it. . . . From beginning to end the changes advocated are changes by law, not in resistance to it”²⁹ The defendants’ petitions were simply efforts to persuade a state official to take official state action.

The hysteria of the war years evidently shook Holmes’s belief that the First Amendment was categorically inapplicable to subsequent punishments. He wrote in his *Baltzer* dissent:

Real obstructions of the law, giving real aid and comfort to the enemy, I should have been glad to see punished more summarily and more severely than they sometimes were. But I think that our intention to put out all our powers in aid of success in war should not hurry us into intolerance of opinions and speech that could not be imagined to do harm, although opposed to our own. It is better for those who have unquestioned and almost unlimited power in their hands to err on the side of freedom. We have enjoyed so much freedom

²⁴ JOURNAL OF THE SUPREME COURT OF THE UNITED STATES, 1918 TERM, 11, 45.

²⁵ *Baltzer v. United States*, 248 U.S. 593 (1918) (unpublished Holmes dissent) (Holmes papers).

²⁶ *Id.* The case is discussed in G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 414 (1993).

²⁷ See *Baltzer*, (unpublished Holmes dissent) (Holmes papers); Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 332. Brandeis wrote to Holmes that he would “gladly join” the dissent.

²⁸ *Baltzer*, (unpublished Holmes dissent) (Holmes papers).

²⁹ *Id.*

for so long that perhaps we are in danger of forgetting that the bill of rights which cost so much blood to establish still is worth fighting for, and that no tittle of it should be abridged. I agree that freedom of speech is not abridged unconstitutionally in those cases of subsequent punishment with which this court has had to deal from time to time. But the emergency would have to be very great before I could be persuaded that an appeal for political action through legal channels, addressed to those supposed to have power to take such action was an act that the Constitution did not protect as well after as before.³⁰

The passage strikes notes that, within the year, Holmes would radically rework in his *Abrams* dissent. It defends the importance of tolerance and freedom of discussion. It even intimates that the First Amendment might apply to some subsequent punishments (presumably the kind at issue in *Baltzer*). Yet it seems to propose that First Amendment protection be extended only in circumstances where speech is so innocuous that it could not be “imagined to cause harm,” and even in such circumstances it acknowledges that constitutional immunity might be overcome in the context of a “very great” “emergency.”

Baltzer illustrates Holmes’s striking technical mastery. Holmes plainly grasped the underlying flaw in the government’s case,³¹ which is that the defendants’ actions could not count as “obstruction.” Holmes was vindicated in the end because on December 16, 1918, the defendants’ convictions were reversed “upon confession of error” by the government,³² which is why Holmes’s dissent never saw the light of day.

Three weeks later, on January 9–10, 1919, the well-known and pivotal case of *Schenck v. United States*³³ was argued. The defendant in *Schenck* was charged with violating the 1917 Espionage Act by “causing and attempting to cause insubordination” in the military when the United States was at war. Schenck had “printed and circulated to men who had been called and accepted for military service” a leaflet that

³⁰ *Baltzer*, (unpublished Holmes dissent) (Holmes papers).

³¹ See Novick, *supra* note 27, at 332. In what counts as a perfect irony, Mahlon Pitney wrote on his return to Holmes’s draft dissent: “I submit, with great respect, that this reads as if it proceeded from the heart rather than the head.” Pitney added a P.S.: “A good fault perhaps but still a fault.”

³² *Baltzer*, 248 U.S. 593; JOURNAL OF THE SUPREME COURT OF THE UNITED STATES, 1918 TERM, at 83. Alex C. King of Georgia had become the new Solicitor General on December 9, 1918, and he immediately asked that *Baltzer* be restored to the docket. *Id.* at 74. King confessed error on December 16. King would later become the founding partner of King & Spaulding.

³³ 249 U.S. 47 (1919).

invoked the 13th Amendment to argue “that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few.”³⁴ Schenck argued that the circulation of his leaflet was protected by the First Amendment.

Given his earlier dissent in *Baltzer*, it is striking that Holmes was assigned the opinion for a unanimous Court upholding Schenck’s conviction. Holmes repeated the hypothetical point he had made earlier in *Baltzer*: “It well may be,” he wrote, “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*.”³⁵ Yet Holmes acknowledged this point only the more firmly to emphasize that the First Amendment offered no protection at all to Schenck.

“The question in every case,” Holmes explained, “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.”³⁶ Because causing insubordination among troops could legitimately be charged as a crime, so too could the attempt to cause insubordination as long as the acts constituting the attempt were taken with the intent to cause the crime.³⁷ Thus even if Schenck’s pamphlet had not caused a single soldier to rebel, Schenck could nevertheless be guilty of the attempt to cause insubordination. Holmes summarized, “*If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.*”³⁸

In 1881, Holmes had written of the crime of attempt, “[i]f an act is done of which the natural and probable effect under the circumstances is the accomplishment of a substantive crime, the criminal law, while it may properly enough moderate the severity of punishment if the act has not that effect in the particular case, can hardly abstain altogether from punishing it.”³⁹ In *Schenck*, Holmes reasoned that speech, even speech

³⁴ *Id.* at 49–51.

³⁵ *Id.* at 51–52.

³⁶ *Id.* at 52.

³⁷ “It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.” *Id.*

³⁸ *Id.* (emphasis added).

³⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 54 (Mark DeWolfe Howe, ed., 1963) (1881).

that seeks to persuade, is an “act”⁴⁰ whose “tendency” and “intent” can satisfy the elements of the crime of attempt. The implicit but undefended premise is that the First Amendment poses no bar to the prosecution of crimes.

Holmes turned his opinion in *Schenck* entirely on the construction of the criminal law of attempt. His initial tentative acknowledgment that the First Amendment may, in some circumstances, apply to subsequent punishment is purely hypothetical, as it was not perhaps in *Baltzer*. Holmes’s use of the phrase “clear and present danger” appears to refer to the relationship that an act must have to criminal conduct in order to constitute the distinct crime of attempt. But Holmes’s deployment of the phrase is loose and misleading. Not only is it immediately modified by the concept of “tendency,” but one week later in *Debs* Holmes offered a definitive explication of the kind of relationship to a crime that words must have in order to warrant prosecution as an attempt to commit the crime.

Like Charles Schenck, Eugene Debs was also prosecuted for violating the Espionage Act of 1917 by attempting “to cause and incite insubordination” in the military.⁴¹ The government charged that, with intent to cause such insubordination, Eugene Debs “delivered, to an assembly of people, a public speech” whose “main theme” was “to encourage those present to obstruct the recruiting service.”⁴² Debs’s speech was a standard political barnburner that opposed World War I. It was not delivered to draftees but to a convention of the Socialist Party. “We brand the declaration of war by our Governments as a crime against the people of the United States and against the nations of the world,” Debs declared, “In all modern history there has been no war more unjustifiable than the war in which we are about to engage.”⁴³

Holmes conceptualized the legal issues in *Debs* exactly as he had conceptualized them in *Schenck*. Everyone agreed that causing insubordination among soldiers could be made a crime. This crime could be committed by words as well as by deeds. Advocating the accomplishment of the crime could be punished as an attempt to commit the crime, so long as “the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service” and so

⁴⁰ *Schenck*, 249 U.S. at 52. As one commentator said about *Debs*, “The fact of the matter is that words are deeds.” Letter to the Editor, *The Debs Case*, THE NEW REPUBLIC, May 31, 1919, at 151.

⁴¹ *Debs v. United States*, 249 U.S. 211, 212 (1919).

⁴² *Id.* at 212–13.

⁴³ *Id.* at 216.

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long as “the defendant had the specific intent to do so in his mind.”⁴⁴ The logic of *Debs* makes crystal clear that the phrase “clear and present danger” in *Schenck* had been nothing more than a rhetorical flourish. *Debs* holds that an “act, (speaking, or circulating a paper,)” can constitutionally be punished as an attempt to commit a crime if with the appropriate intent it has the “tendency” to produce that crime. This is what is now called the “bad tendency” test, which Holmes developed in *Schenck* to express the substantive criminal law of attempt, not the independent requirements of the First Amendment.

Debs rightly provoked concern among those who believed in the importance of freedom of speech. Despite the fact that the case concerned an ordinary political speech made to an ordinary political audience, the First Amendment played no role at all in the decision’s logic. *Debs* held that speech could be punished as an attempt to commit a crime so long as the speech had the “natural tendency and reasonably probable effect” to cause the commission of the crime and so long as the speaker had the specific intent to commit the crime.

If we were to diagram the logic of *Schenck* and *Debs*, it might look something like this:

Speech —————→ **Insubordination in the Military**
 Natural tendency and reasonably probable effect

The legal axiom at the basis of Holmes’s decisions in both *Schenck* and *Debs* is that the First Amendment does not prohibit subsequent punishment for crimes. Each case turns on establishing that the defendant has committed the substantive crime of attempt. The First Amendment contributes nothing to the logic of the decisions. Constitutional concerns simply recede into the margins once it is determined that a defendant’s speech satisfies the legal elements of an attempt to commit what the state can legitimately punish as a crime.

In May 1918, Congress amended Section 3 of the 1917 Espionage Act. It passed the notorious Espionage Act of 1918, which was so draconian that it soon became known as the Sedition Act. It provided:

[W]hoever, when the United States is at war, shall willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United

⁴⁴ *Id.* at 216.

States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag or any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment of not more than twenty years, or both.⁴⁵

Abrams v. United States,⁴⁶ which was argued at the Court in October 1919, differed from *Schenck* and *Debs* because Jacob Abrams and his co-defendants were charged with four counts of violating the 1918 Espionage Act, not the 1917 Espionage Act. The indictment charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write, and publish, in the first count, “disloyal, scurrilous and abusive language about the form of government of the United States;” in the second count, language “intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute;” and in the third count, language “intended to incite, provoke and encourage resistance to the United States in said war.” The charge in the fourth count was that the defendants conspired “when the United States was at war with the

⁴⁵ Espionage Act of 1918, Pub. L. No. 65-150, 40 Stat. 553.

⁴⁶ *Abrams v. United States*, 250 U.S. 616 (1919).

Imperial German Government, . . . unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war.” The offenses were charged in the language of the act of Congress.⁴⁷

The *Abrams* indictment presented entirely different legal issues than had the indictments in *Schenck* and *Debs*. Holmes, always the master legal technician, was surely alert to these differences. To appreciate the enormous distinction between *Abrams* and *Debs*, we must concentrate on Counts 1 and 2 of the *Abrams* indictment:

Count 1: publishing “disloyal, scurrilous and abusive language about the form of government of the United States.”

Count 2: publishing “language ‘intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute.’”⁴⁸

The principle that Holmes had fashioned to decide both *Schenck* and *Debs* was that speech might constitutionally be punished as an attempt to commit an underlying crime. In Counts 1 and 2 of *Abrams*, however, there is no underlying crime with respect to which Abrams’s speech might be punished as an attempt. Abrams would still be guilty of Counts 1 and 2 even if his speech did not have the “natural tendency and reasonably probable effect” of producing any crime whatsoever. The government sought to punish Abrams’s speech *simpliciter*.

Holmes thus could not conceptualize the first two counts of *Abrams* through the same lens that he had used the previous March to decide *Schenck* and *Debs*. John H. Clarke’s opinion for the majority blissfully ignored this difference. It rejected the defendants’ First Amendment claims for the reason that “[t]his contention is sufficiently discussed and is definitely negated in *Schenck v. United States*.”⁴⁹ But Holmes was far too acute to miss the fact that the logic of the first two counts of *Abrams* were essentially incompatible with the logic deployed in *Schenck* and *Debs*. The first two counts of *Abrams* did not charge any “attempt” to commit any underlying crime.

In fact the first two counts of *Abrams* revived the age-old crime of seditious libel, which Blackstone defined as any speech “that may tend to lessen [the King] in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people.”⁵⁰

⁴⁷ *Id.* at 617.

⁴⁸ *Id.*

⁴⁹ *Id.* at 619.

⁵⁰ 44 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 123 (Wilfrid Prest ed., Oxford Univ. Press 2016) (1765). See W.B. ODGERS, A DIGEST OF THE LAW OF LIBEL AND

Seditious libel was designed to protect the “special veneration . . . due” to those who rule.⁵¹ In American jurisprudence, it was said that “[a] publication is a seditious libel if its object and effect are to disturb the peace of society or the existence of government.”⁵²

SLANDER 479–98 (4th ed. 1905). In 1724, Sergeant William Hawkins summarized the law of defamation as reaching its apex in the crime of seditious libel:

Nor can there be any Doubt, but that a Writing which defames private Persons only, is as much a Libel as that which defames Persons intrusted with a Publick Capacity, inasmuch as it manifestly tends to create ill Blood, and to cause a Disturbance of the Publick Peace; However, it is certain, That it is a very high Aggravation of a Libel that it tends to scandalize the Government, by reflecting on those who are intrusted with the Administration of Publick Affairs, which doth not only endanger the Publick Peace, as all other Libels do, by stirring up the Parties immediately concerned in it to do Acts of Revenge, but also has a direct Tendency to breed in the People a Dislike of their Governors, and incline them to Faction and Sedition.

WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN, OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT: DIGESTED UNDER THEIR PROPER HEADS* 194 (2d ed. 1724).

⁵¹ FRANCIS LUDLOW HOLT, *THE LAW OF LIBEL: IN WHICH IS CONTAINED A GENERAL HISTORY OF THIS LAW IN THE ANCIENT CODES* 90 (1816). As Holmes’s English friend Sir James Fitzjames Stephen analyzed the crime:

Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.

If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition.

2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 299–300 (London, MacMillan & Co. 1883).

⁵² SAMUEL MERRILL, *NEWSPAPER LIBEL: A HANDBOOK FOR THE PRESS* 74 (Boston Ticnor and Co. ed.) (1888). In 1875, an American author observed:

Such a thing as a prosecution for seditious libel, at least so far as our knowledge goes, is, and always appears to have been, utterly unknown. The right of the government, however, to restrain or punish utterances calculated to diminish its power or weaken its authority, cannot be supposed, from the fact of its never having been asserted . . . not to exist. Not only does such right inhere in the government by virtue of the common law, but an act of congress of

In *Baltzer*, Holmes had delicately hinted at a slight qualification of *Patterson*, to the extent of asserting “that freedom of speech is not abridged unconstitutionally *in those cases of subsequent punishment with which this court has had to deal from time to time.*”⁵³ But in December 1918, Holmes had been willing to accept constitutional protection only for speech “that could not be imagined to do harm.” For centuries seditious libel had been punished by the common law on the assumption that it seriously injured the state. *Abrams* brought Holmes face to face with the question of whether the First Amendment prohibited subsequent punishment for the crime of seditious libel, which the Espionage Act of 1918 had reasserted with a vengeance.

This was for Holmes a question of first impression. It was neither raised nor decided in either *Schenck* or *Debs*. Perhaps it was the criticism that he received in the months after *Debs*; perhaps it was the reading and thinking he had done on the subject of freedom of expression since the previous March;⁵⁴ but whatever the cause, Holmes put at the center of his *Abrams* dissent a sentence that marks the exact origin of contemporary First Amendment doctrine: “I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force.”⁵⁵ This was an entirely new axiom in the jurisprudence of Holmes or of the nation.

It is an axiom that is inconsistent with Holmes’s own unpublished *Baltzer* dissent. No one sensitive to the history of the common law could plausibly contend that seditious libel “could not be imagined to do harm.” If the First Amendment were to be construed as prohibiting subsequent punishment for seditious libel, it could not be because seditious libel was harmless. It must rather be because a proper understanding of the First Amendment would preclude government from categorizing the consequences of seditious libel *as* injuries. Why might this be so?

An exemplary contribution of the *Abrams* dissent is to offer an account of the purpose of the First Amendment that might justify this conclusion.⁵⁶ Holmes explained:

July 14, 1798, makes it an indictable offense to libel the government, congress, or president of the United States.

1 JAMES APPELTON MORGAN, *THE LAW OF LITERATURE* 76 (New York, James Cockcroft & Co.1875).

⁵³ *Baltzer v. United States* (unpublished Holmes dissent) (Holmes papers) (emphasis added).

⁵⁴ HEALY, *supra* note 2, at 154–63.

⁵⁵ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

⁵⁶ *Id.* At one point Holmes offered a half-hearted historical reason for his startling conclusion: “I had conceived that the United States through many years had shown its

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 whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.⁵⁷

Much has been written about the nature and origins of Holmes's theory of freedom of expression.⁵⁸ In the context of this symposium, I wish only to emphasize that Holmes was provoked to articulate his novel theory of why the First Amendment prohibited subsequent punishments for seditious libel in *Abrams* rather than in *Schenck*. This was because in *Abrams* he was confronting, for the first time, the vast overreach of the Espionage Act of 1918, which had not been an issue in either *Schenck* or *Debs*.

Having adopted his theory of the marketplace of ideas, however, Holmes still had to confront counts 3 and 4 of the *Abrams* indictment:

Count 3: Publishing “language ‘intended to incite, provoke and encourage resistance to the United States in said war.’”

Count 4: Conspiring “‘when the United States was at war with the Imperial German Government, . . . unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war.’”⁵⁹

repentance for the Sedition Act of 1798, Act of July 14, 1798, c. 73, 1 Stat. 596., by repaying fines that it imposed.” But this observation could scarcely begin to explain why the state could not treat the harms of seditious libel as harms equivalent to the injuries prohibited by the Espionage Act of 1917.

⁵⁷ *Id.*

⁵⁸ See, e.g., Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1.

⁵⁹ *Abrams*, 250 U.S. at 617. All four counts, Justice Clarke observed, “were charged in the language of the act of Congress.” *Id.*

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WRITING THE DISSENT IN ABRAMS

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Counts 3 and 4 posed a serious challenge to Holmes's newly minted theory of the First Amendment.

In *Schenck* and *Debs*, Holmes had held that the First Amendment permitted speech that had the "natural tendency and reasonably probable effect" of producing a crime to be punished as an attempt to commit that crime. The defendants had been charged with violating the Espionage Act of 1917, which prohibited causing insubordination among the troops. It was the job of the jury to determine whether the defendants' speech was sufficiently connected to the crime of causing insubordination to be punished as an attempt to commit that crime.

The Espionage Act of 1918 did not punish conduct, as did the Espionage Act of 1917. The Espionage Act of 1918 instead punished speech itself. In the provisions reproduced in Counts 3 and 4, the Act punished speech intended to incite actions. These counts thus posed a deep question: if a jury could determine whether a defendant's speech could be punished as an attempt to commit an underlying crime, why could not Congress also determine whether particular kinds of speech were so intrinsically connected to underlying crimes that they could also be punished as tantamount to attempts to commit those crimes? If the speech could be so punished, then *Schenck* and *Debs* would seem to hold that the speech was without constitutional protection.

Resisting the wartime effort of the United States could be made a crime. Why could Congress not conclude that speech "intended to incite, provoke and encourage resistance to the United States in war" had the "natural tendency and reasonably probable effect" of causing that crime? If the "curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of war" could have been made a crime, why could Congress not have concluded that speech inciting such curtailment had the "natural tendency and reasonably probable effect" of causing such curtailment?

The theory of *Schenck* and *Debs*, in other words, could easily be formulated in a way that would justify punishment under Counts 3 and 4 of the *Abrams* indictment. The only necessary additional assumption would be that Congress could apply the bad tendency test to a class of speech acts in the same way that a court of law could apply it to a particular speech act.⁶⁰

⁶⁰ This line of reasoning was basically the premise of Sanford's highly perceptive opinion six years later in *Gitlow v. New York*, 268 U.S. 652 (1925). Sanford upheld a New York statute that prohibited advocating, advising, or teaching "the duty, necessity or propriety of overthrowing or overturning organized government by force or violence." *Id.* at 654. Stressing the need to defer to legislative judgments, Sanford wrote that "by enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and

Avoiding this conclusion required Holmes to think hard about the implications of his new theory of the First Amendment. He realized that if Congress could punish all speech that might have the simple tendency of causing illegal action, it could effectively shut down the marketplace of ideas, whose protection Holmes was proposing as the essential purpose of the First Amendment. The fundamental premise of Holmes's new theory of the First Amendment was that "Congress certainly cannot forbid all effort to change the mind of the country."⁶¹ But the bad tendency test was so baggy and encompassing that it could easily produce exactly this result, whether applied by courts or by Congress.

The problem, then, lay with the "bad tendency" test of *Schenck and Debs*. That test was derived from the substantive criminal law of attempt. But in *Abrams* Holmes came to realize that the distinctive purpose of the First Amendment required a different test. Holmes therefore used his *Abrams* dissent to fashion innovative First Amendment doctrine designed to protect the marketplace of ideas by overriding the substantive criminal law of attempt:

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . . It is only the present danger of immediate evil or an intent to bring it about

unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute." *Id.* at 668. In his subsequent brilliant concurrence in *Whitney v. California*, 274 U.S. 357 (1927), Brandeis precisely denied the assumption that Congress and courts were equally competent to assess the threats of harm caused by speech:

The Legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain condition exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The powers of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

Id. at 374 (Brandeis, J., concurring).

⁶¹ *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

The novel theories propounded by Holmes in *Abrams* implied that eight months previously Holmes had himself sanctioned the unconstitutional conviction of Eugene Debs. Holmes was, however, a proud man. "I should like to be admitted to be the greatest jurist in the world," he once wrote to a close friend.⁶⁵ The admission of gross constitutional error was not easy for Holmes.

Fortunately the young Zechariah Chafee offered Holmes a way out of this potential embarrassment. We know that Holmes met with Chafee in the summer of 1919 and that Holmes then had on his desk Chafee's brilliant article on *Freedom of Speech in War Time*.⁶⁶ Chafee took the innovative (if "disingenuous")⁶⁷ tack of focusing on this sentence from Holmes's language in *Schenck*: "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."⁶⁸ Although Holmes had not intended in *Schenck* for this loose language to displace or supersede the bad tendency test, Chafee nevertheless seized upon it to argue that it propounded constitutional doctrine that "clearly makes the punishment of words for their bad tendency impossible."⁶⁹

Chafee's interpretation of *Schenck* was largely fanciful. As he acknowledged, it could not be reconciled with Holmes's nearly simultaneous opinion in *Debs*.⁷⁰ But Chafee had serendipitously hit upon a fig leaf that could save Holmes from the charge of inconsistency. In his *Abrams* dissent, Holmes would actually propose a constitutional test to which the phrase "clear and present danger" might aptly apply.

Beginning in 1920, Holmes (and Brandeis) would insist on the fiction that in *Schenck* Holmes had spoken for a unanimous Court to hold that subsequent punishments of speech were constitutionally

⁶⁵ Letter from Oliver Wendell Holmes to Canon Patrick Augustine Sheehan (January 31, 1913), in *HOLMES-SHEEHAN CORRESPONDENCE: THE LETTERS OF JUSTICE OLIVER WENDELL HOLMES AND CANON PATRICK AUGUSTINE SHEEHAN* 58 (David H. Burton, ed., 1976).

⁶⁶ Chafee, *supra* note 5; HEALY, *supra* note 2, at 154-59.

⁶⁷ HEALY, *supra* note 2, at 157.

⁶⁸ *Schenck*, 249 U.S. at 52; Chafee, *supra* note 5, at 967.

⁶⁹ Chafee, *supra* note 5, at 967.

⁷⁰ *Id.* at 967-68 ("If the Supreme Court had applied this same standard of 'clear and present danger' to the utterances of Eugene V. Debs, . . . it is hard to see how he could have been held guilty.").

restrained by the “clear and present danger” test.⁷¹ Six years later in *Gitlow v. New York*,⁷² for example, Holmes announced in dissent:

The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right then I think that the criterion sanctioned by the full Court in *Schenck v. United States*, 249 U.S. 47, 52, applies:

“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 [the State] has a right to prevent.”⁷³

Nothing could be further from the truth. Holmes in *Schenck* had not written an opinion about the First Amendment. He had instead defined the substantive criminal law of attempt. The fiction invented by Chafee, and embraced by both Holmes and Brandeis, was that *Schenck* foreshadowed the *Abrams* dissent. But it did not. Chafee’s fiction may have been face-saving, but it also effaced the profound change that had overtaken Holmes in the period between March and November of 1919. In reconstructing that change, the sharp legal differences between the Espionage Act of 1917 and the Espionage Act of 1918 must be emphasized and understood. Only in that way can we begin to appreciate the true magnitude of Holmes’s achievement.

⁷¹ See *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting, joined by Holmes J.) (“The extent to which Congress may, under the Constitution, interfere with free speech, was in *Schenck v. United States*, 249 U.S. 47, 52 declared by a unanimous court to be this: ‘The question in every case is whether the words . . . 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.’”); *Pierce v. United States*, 252 U.S. 239, 255, 271–72 (1920) (separate opinion of Brandeis, J., joined by Holmes, J.); *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring, joined by Holmes, J.) (“That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. See *Schenck v. United States*, 249 U.S. 47, 52.”).

⁷² 268 U.S. 652 (1925).

⁷³ *Id.* at 672–73 (Holmes, J., dissenting).