

Holmes's Other Metaphor

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I. INTRODUCTION

For nearly seventy-five years, the “marketplace of ideas” has been regarded as the central metaphor of Justice Oliver Wendell Holmes’s dissent in *Abrams v. United States*¹ and of free speech theory in general. No other image has so captured the public imagination or generated such fierce academic argument.² Legal scholars, historians, and economists have filled countless pages debating what Holmes meant by “free trade in ideas,” how he defined “truth,” and whether the “competition of the market” is really “the best test” of that truth.³

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¹ 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

² See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 824–25 (2008) (“Never before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law.”).

³ See Thomas W. Joo, *The Worst Test of Truth: The ‘Marketplace of Ideas’ as Faulty Metaphor*, 89 TUL. L. REV. 383, 396 (2014); Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160 (2015); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1; Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 Legal Theory 1, 19–26 (1996); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); Albert Breton & Ronald Wintrobe, *Freedom of Speech vs. Efficient Regulation in Markets for Ideas*, 17 J. ECON. BEHAV. & ORG. 217 (1992); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6–24 (1989); Richard Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986); Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L.

These debates have proved illuminating and fruitful, but they have also had the effect of crowding out alternative ways of thinking about free speech—of monopolizing the market, so to speak. In my contribution to this symposium, I want to explore another metaphor from Holmes’s *Abrams* dissent, a metaphor that has been frequently overlooked but may offer a better framework for understanding his view of free speech. I am referring to the metaphor of the experiment.

Holmes uses the word “experiment” three times in the final paragraph of his *Abrams* dissent. After asserting that the conception of free speech he has articulated is “the theory of our Constitution,” he states, “It is an *experiment*, as all life is an *experiment*.”⁴ Two sentences later he returns to the image, writing, “While that *experiment* is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death”⁵ He also uses the word “test” (“the best test of truth”),⁶ which, depending upon the context, can be a synonym for “experiment.” Yet despite these repeated references, there has been almost no discussion of what Holmes meant by the experiment metaphor or what it might reveal about his thinking.⁷ To some extent, the fault may lie with Holmes. As Vincent Blasi has pointed out, Holmes’s *Abrams* dissent contains an “astonishingly rich set of allusions,” from his invocation of the market to his assertion that “time has upset many fighting faiths” to his claim that we must “wager our salvation upon some prophecy based upon imperfect knowledge.”⁸

REV. 669 (1986); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

⁴ *Abrams*, 250 U.S. at 630 (emphasis added).

⁵ *Id.* (emphasis added).

⁶ *Id.*

⁷ The most extensive discussions I am aware of can be found in Blasi *supra* note 3, at 4, 19, 46 (drawing connections between the market metaphor and Holmes’s allusion to experimentation) and Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2360 (2000) (arguing that Holmes’s use of the word “experiment” “strongly suggests that the *Abrams* dissent is best understood as an expression of American pragmatic epistemology”).

⁸ Blasi, *supra* note 3, at 4; see also LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 432 (2002) (stating that “[t]he marketplace is not the only metaphor in Holmes’s opinion”). In his correspondence, Holmes relied upon yet another metaphor for free speech. Writing to Zechariah Chafee a few months after his *Abrams* dissent, Holmes offered the “isolated reflection that with effervescing opinions, as with the not yet forgotten champagnes, the quickest way to let them get flat is to let them get exposed to air.” OLIVER WENDELL HOLMES ET AL., *JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS* 137 (Harry C. Shriver ed., 1936).

With so many “suggestive and loaded figurations,”⁹ perhaps it is no surprise that we have overlooked one.

But some of the blame, no doubt, lies with us. We have been so dazzled by the market metaphor—and the debates it has engendered—that we have given it undue attention, neglecting the other images and references Holmes sprinkled throughout his *Abrams* dissent.¹⁰ This has been a mistake.¹¹ And it has been compounded by the fact that, in many ways, the market metaphor is an unlikely image for Holmes to have relied on and for us to have prioritized over his other contributions.

II. AN UNLIKELY METAPHOR

For starters, Holmes was not much of an economist. Although he showed an interest in economics,¹² as he did with just about every subject of serious concern, those who knew him were unimpressed with his grasp of the topic. Francis Biddle, who spent a year as a secretary for Holmes and later served as United States Attorney General, wrote that “it is not far from the mark to conclude that his thinking in the field of economics stopped at twenty-five.”¹³ The philosopher Morris Cohen, a frequent correspondent, lamented the “backwardness of his fundamental economic views.”¹⁴

Furthermore, although Holmes, like nearly every other member of the New England establishment, embraced free-market capitalism, he never made a fetish of it like many of his peers.¹⁵ He had several friends, including Harold Laski, who were socialists, and he made a concerted

⁹ Blasi, *supra* note 3, at 4.

¹⁰ I include myself in the indictment. Until recently, I paid almost no attention to the metaphor of the experiment. See Thomas Healy, *Anxiety and Influence: Learned Hand and the Making of a Free Speech Dissent*, 50 ARIZ. ST. L.J. 803, 827–29 (2018).

¹¹ See Blasi, *supra* note 3, at 4 (“The challenge for one who would make sense of Holmes is to avoid being swept away by any one of his seductive formulations.”).

¹² See Blasi, *supra* note 3, at 5–6.

¹³ FRANCIS BIDDLE, MR. JUSTICE HOLMES 86–87 (New York: Charles Scribner’s Sons, 1942).

¹⁴ MORRIS R. COHEN, THE FAITH OF A LIBERAL: SELECTED ESSAYS 29 (1946).

¹⁵ It is true, as Louis Menand has pointed out, that Holmes “had a kind of schoolboy’s respect” for the “energy and willpower” of industrial titans such as John D. Rockefeller, J.P. Morgan, and James T. Hill. See MENAND, *supra* note 8, at 65. But unlike many of his peers, Holmes could imagine, with a certain degree of detachment and acceptance, a world in which capitalism was replaced by socialism. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (“If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”).

effort to understand their view.¹⁶ On one occasion, while serving on the Massachusetts Supreme Judicial Court, he even visited the home of a local labor leader to inquire what it was that workers wanted. And though he came away from the conversation unconvinced, he reported to a friend that he and the man had “discoursed several times with some little profit.”¹⁷

So it’s more than a little surprising that Holmes would ground his defense of free speech in a comparison to laissez-faire economics. And outside of his *Abrams* dissent, he never did. Not once before or after *Abrams* did Holmes ever discuss free speech in terms of economic theory or the competition of the market.¹⁸ Nowadays we automatically associate Holmes with the market metaphor. Yet Holmes never returned to that image in the handful of subsequent dissents he wrote on the topic of free speech.¹⁹ Nor did Justice Louis Brandeis in the many free speech opinions he wrote, several of which Holmes joined.²⁰ Nor, as far as I can tell, did any of the young acolytes who lavished praise on Holmes’s *Abrams* dissent. Not Laski or Learned Hand. Not Felix Frankfurter or Zechariah Chafee. Not Roscoe Pound, Walter Lippmann, or Herbert Croly.

Detractors also largely ignored the market metaphor. Most of the early academic criticism of Holmes’s dissent focused on his interpretation of the Sedition Act’s intent requirement.²¹ It was not until

¹⁶ See THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 30–35 (2013).

¹⁷ Letter from Oliver Wendell Holmes to Frederick Pollock (January 20, 1893), in 1 MARK DEWOLFE HOWE, *HOLMES-POLLOCK LETTERS* 44 (1942).

¹⁸ The closest he came was in *Vegeahn v. Guntner*, 167 Mass. 92, 107 (1896) (Holmes J., dissenting), in which he invoked “free competition” as a basis for opposing an injunction against a labor protest in front of a business. But the case was not framed as one involving free speech, and Holmes did not discuss it in those terms.

¹⁹ These dissents include *United States v. Schwimmer*, 279 U.S. 644 (1929) (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting); *United States ex rel. Milwaukee Social Democrat Pub. Co. v. Burlison*, 255 U.S. 407 (1921) (Holmes, J., dissenting).

²⁰ See Joo, *supra* note 3, at 386. Brandeis’s free speech opinions include *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring); *United States ex rel. Milwaukee Social Democrat Pub. Co. v. Burlison*, 255 U.S. 407 (1921) (Brandeis, J., dissenting); *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (Brandeis, J., dissenting); *Pierce v. United States*, 252 U.S. 239 (1920) (Brandeis, J., dissenting); and *Schaefer v. United States*, 251 U.S. 466 (1920) (Brandeis, J., dissenting).

²¹ See, e.g., Edwin S. Corwin, *Freedom of Speech and Press under the First Amendment: A Resumé*, 30 *YALE L.J.* 48 (1920); Day Kimball, *The Espionage Act and the Limits of Legal Toleration*, 33 *HARV. L. REV.* 442 (1920); C.W. German, *An Unfortunate Dissent*, 21 *U. MO. BULL. L. SER.* 65 (1920). The most vitriolic attack was written by Professor John Henry Wigmore, a long-time admirer of Holmes. He did briefly critique the market metaphor, arguing that the truth might not prevail quickly enough to avoid disaster. See John Henry

the Cold War era, when the United States was obsessed with the spread of communism, that the market metaphor emerged as a legal and cultural touchstone for thinking about free speech.²² And, as Thomas Joo has argued, that development likely had less to do with Holmes or with the metaphor's explanatory power than with a desire to connect America's expressive freedom with laissez-faire economics and thus to draw a contrast with the statism of the Soviet Union.²³

As for Holmes, he seems to have arrived at the market metaphor almost entirely by chance. The summer before he wrote his *Abrams* dissent, he read a biography of Adam Smith that had been given to him by Laski.²⁴ In addition to emphasizing the extent to which Smith believed in free speech and religious tolerance, the biography made repeated use of the phrase "free trade," including as a chapter title. That phrase, of course, became a central part of Holmes's market metaphor in *Abrams*. "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—that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]"²⁵

Thus, as often happened with Holmes, the market metaphor appears to be a clever and arresting formulation that he summoned into existence without fully thinking through its implications and without intending for it to serve as an overarching formula for resolving questions about the meaning or scope of the First Amendment.²⁶ This conclusion is supported by the fact that Holmes told Frankfurter he

Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539, 550–51 (1920). But Wigmore also mocked Holmes's comparison of the Constitution to an experiment, writing, "In the transcendental realms of philosophic and historical discussion by closet jurists, these expressions might pass. But when found publicly recorded in an opinion of the Supreme Guardians of the Constitution, licensing propaganda which in the next case before the court may be directed against that Constitution itself, this language is ominous indeed." *Id.* at 561.

²² According to Vincent Blasi, the phrase "market place of ideas" first appeared in a 1935 letter to the editor of the *New York Times* concerning the upcoming presidential election. See Blasi, *supra* note 3, at 13 n.41. But the phrase did not appear in a Supreme Court opinion until after World War II. See Joo, *supra* note 3, at 393–400; Ho & Schauer, *supra* note 3, at 1161 n.3.

²³ Joo, *supra* note 3, at 396.

²⁴ The book was *ADAM SMITH* by the British journalist Francis Hirst. See HEALY, *supra* note 16, at 206.

²⁵ *Abrams*, 250 U.S. 616, 630 (Holmes, J., dissenting) (emphasis added).

²⁶ Another example is Holmes's introduction of the clear and present danger test in *Schenck v. United States*, 249 U.S. 47, 52 (1919). See HEALY, *supra* note 16, at 100–04; DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 280–85 (1997).

wrote his *Abrams* dissent “quasi in furore”—a Latin phrase meaning “as if possessed.”²⁷ An opinion written “as if possessed” is not likely to represent a fully developed and systematic view of a subject as complex as free speech.

This is not to suggest that the market metaphor tells us nothing about the reasons behind Holmes’s support of free speech. He was attached enough to the image to include it in a dissent he knew would invite attention and controversy.²⁸ And, as Vincent Blasi has persuasively argued, there are many features of markets that appealed to Holmes and that give some coherence to his defense of free speech. Markets are premised on skepticism and competition, emphasize change and adaptation, reject fixed notions and orthodoxy.²⁹

But even if we accept that Holmes invoked the competition of the market because of these features, it is still a strange metaphor for him to have relied on for the very obvious reason that doing so conflicted so directly with his dissent in *Lochner v. New York*.³⁰ If the due process clause of the Fourteenth Amendment “does not enact Mr. Herbert Spencer’s Social Statics,”³¹ how, if you are Holmes, can you suggest that the First Amendment enacts Adam Smith’s principles of free trade? More to the point, how can you rely on an economic metaphor to overturn convictions obtained under a law approved and enforced by the democratically elected branches of government?

Holmes himself likely recognized this tension, as the key sentence in the final paragraph of his *Abrams* dissent suggests. In asserting that “the ultimate good desired is better reached by free trade in ideas” and “that the best test of truth is the power of the thought to get itself accepted in the competition of the market,” Holmes makes clear that these are things “[men] *may* come to believe even more than they believe the very foundations of their own conduct,”³² not that they are things men *must* believe. In other words, the propositions underlying the market metaphor are contestable.

²⁷ Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (November 1, 1919), in 74 HOLMES AND FRANKFURTER; THEIR CORRESPONDENCE, 1912–1934 (Robert M. Mennel et al., 1996).

²⁸ See Letter from Oliver Wendell Holmes Jr., to Frederick Pollock (November 6, 1919), in 2 MARK DEWOLFE HOWE, HOLMES-POLLOCK LETTERS 29 (“Today I am stirred about a case that I can’t mention yet to which I have sent round a dissent that was prepared to be ready as soon as the opinion was circulated—I feel sure that the majority will very highly disapprove of my saying what I think, but as yet it seems to me my duty.”).

²⁹ Blasi, *supra* note 3, at 24–33; see also MENAND, *supra* note 8, at xii.

³⁰ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

³¹ *Id.*

³² *Abrams*, 250 U.S. 616, 630 (Holmes, J., dissenting) (emphasis added).

And yet, despite that contestability, the very next sentence of his dissent reads, “That at any rate is the theory of our constitution.”³³ This is a bold assertion, and one would hope for some explanation or support—perhaps a reference to James Madison or Thomas Jefferson, a discussion of precedent, or some theoretical exegesis. Instead, Holmes writes the following:

It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.³⁴

I had long viewed Holmes’s reference to “an experiment” in this passage as an offhand observation, the kind of epigrammatic flourish for which he was well known and often criticized.³⁵ But I have come to believe that the metaphor of the experiment plays a more important role in Holmes’s defense of free speech than I once did and that it may help both to enhance our understanding of the marketplace of ideas and to serve as a corrective for our overreliance on that contested metaphor.

III. THE AMERICAN EXPERIMENT

To understand what Holmes means by the experiment metaphor, we must answer two questions. The first is what Holmes is referring to when he says, “It is an experiment.” The preceding sentence reads, “That at any rate is the theory of our Constitution,” so he could be referring either to the Constitution itself or to “the theory of our Constitution” he has just outlined—i.e., the theory that “the ultimate good desired is better reached by free trade in ideas.” The second question is what Holmes means by the word experiment since that word has multiple definitions, more than one of which might shed light on Holmes’s view of free speech.

I will begin with the first possibility—that Holmes is referring to the Constitution itself. If that is the case, it seems likely Holmes is using the word experiment not in its scientific sense, not as “an action or

³³ *Id.*

³⁴ *Id.*

³⁵ See, e.g., John M. Zane, *A Legal Heresy*, 53 AM. L. REV. 801, 811–14 n.23 (1919) (“He is a master of epigrammatic expression, of vivid and illuminating thought, but epigrams, unfortunately, are either half-truths or not truths at all.”); HEALY, *supra* note 16, at 10–11, 78–81.

operation undertaken in order to discover something unknown, to test a hypothesis, or establish or illustrate some known truth.”³⁶ Instead, he is likely using the word in its more general sense, as a “method, system of things, or course of action, adopted in uncertainty whether it will answer the purpose.”³⁷ The Constitution, under this definition, can thus be understood as an uncertain attempt to establish a system of popular government that might very well founder and fail.³⁸

This was a common understanding of American democracy during the nineteenth century, when monarchies and empires still ruled the world. It was an understanding reflected in the writing of Alexis de Tocqueville, who described as unprecedented the “adventure” in popular government that was taking place in the United States. “In that land the great experiment was to be made, by civilized man, of the attempt to construct society upon a new basis,” Tocqueville wrote in *Democracy in America*, in 1835. “[A]nd it was there, for the first time, that theories hitherto unknown, or deemed impracticable, were to exhibit a spectacle for which the world had not been prepared by the history of the past.”³⁹ The English historian and jurist James Bryce evinced a similar understanding in his 1887 book *The Predictions of Hamilton and de Tocqueville*. “The Constitution was an experiment, or rather a bundle of experiments, whose working there were few data for predicting,”⁴⁰ Bryce observed. He returned to the image a year later in *The American Commonwealth*, writing that “[t]he institutions of the United States represent an experiment in the rule of the multitude, tried on a scale unprecedentedly vast, and the results of which everyone is concerned to watch.”⁴¹

³⁶ *Experiment*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

³⁷ *Id.*

³⁸ One might question whether, used this way, the word “experiment” is a metaphor at all. In other words, one might think that Holmes is simply describing an attribute of the Constitution, much as if he wrote, “The Constitution is a document.” What leads me to believe Holmes is using the word “experiment” figuratively, as opposed to literally, is the second half of the sentence—“as all life is an experiment.” This phrase seems clearly metaphorical, and it would be odd to use the word “experiment” literally in the first half of the sentence and figuratively in the second half.

³⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 8 (Nova Science Publishers, Inc., 2019).

⁴⁰ JAMES BRYCE, *THE PREDICTIONS OF HAMILTON AND DE TOCQUEVILLE* 7–8 (Herbert B. Adams ed., 1887).

⁴¹ JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 1 (Liberty Fund, Inc. 1995) (1888).

Holmes read both Tocqueville and Bryce when he was younger.⁴² In fact he and Bryce were good friends. They had met in 1870 when Bryce made his first trip to America and kept up a steady correspondence until Bryce died in 1922.⁴³ Holmes had even advised Bryce on aspects of *The American Commonwealth* and had been thanked by the author in its preface.⁴⁴ So he was certainly familiar with the way both Tocqueville and Bryce had characterized American democracy.

But one didn't need familiarity with European writers to view the Constitution as an experiment. Writers closer to home had made the same comparison. In an oft-reproduced letter from 1804, Thomas Jefferson had written, "No experiment can be more interesting than that we are now trying, and which we trust will end in establishing the fact, that man may be governed by reason and truth."⁴⁵ Abraham Lincoln had also relied on the metaphor in a speech during his 1858 Senate race against Stephen Douglas. Referring to the American innovation of popular sovereignty, he observed, "We made the experiment; and the fruit is before us."⁴⁶ And when, in the Gettysburg Address, Lincoln declared that "now we are engaged in a great Civil War, *testing* whether that nation or any nation so conceived and dedicated, can long endure,"

⁴² According to the list of books compiled by Holmes's estate upon his death, he owned a copy of *DEMOCRACY IN AMERICA* that was given to him by his father on October 14, 1862, while Holmes was at home recuperating from an injury suffered in the battle of Antietam a month earlier. See *ESTATE OF JUSTICE HOLMES: THE LIBRARY*, 602, [https://iif.lib.harvard.edu/manifests/view/drs:42864702\\$33i](https://iif.lib.harvard.edu/manifests/view/drs:42864702$33i) (last visited July 31, 2020). This was before Holmes began keeping a list of the books he read each year, so there is no definitive proof he read it. But he almost certainly did. The book was inscribed by his father as a gift, and Holmes remained home for another month before returning to the war, so he had plenty of time on his hands. As for Bryce, Holmes included *THE PREDICTIONS OF HAMILTON AND DE TOCQUEVILLE* in his reading list for 1887. *THE AMERICAN COMMONWEALTH* does not appear in the reading list, but Holmes had a copy inscribed by the author. See *ESTATE OF JUSTICE HOLMES: THE LIBRARY*, 82, [https://iif.lib.harvard.edu/manifests/view/drs:42864690\\$73i](https://iif.lib.harvard.edu/manifests/view/drs:42864690$73i) (last visited July 31, 2020). And, as indicated, he advised Bryce on aspects of the book. See text accompanying *infra* note 44.

⁴³ See DUFFY GRAHAM, *THE CONSCIOUSNESS OF THE LITIGATOR*, 26 (The University of Michigan Press 2005). The correspondence between Holmes and Bryce can be viewed on Harvard Law School Library's OLIVER WENDELL HOLMES JR. DIGITAL SUITE, <http://library.law.harvard.edu/suites/owh/index.php/> (last visited July 31, 2020).

⁴⁴ BRYCE, *supra* note 41, at xxxiii.

⁴⁵ Letter from Thomas Jefferson to Judge John Tyler (June 28, 1804), in *LETTERS AND ADDRESSES OF THOMAS JEFFERSON*, 166 (William B. Parker & Jonas Viles eds., National Jefferson Society 1903).

⁴⁶ Abraham Lincoln, Speech during Senate race (1858) (transcript available in the Gilder Lehrman Collection at The Gilder Lehrman Institute of American History), <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/lincoln-speech-slavery-and-american-dream-1858>.

he was once again calling attention to the experimental nature of the American system.⁴⁷

As this last quote illustrates, the Constitution was viewed as an experiment not only because of its novelty but also because of its fragility. Whether it would succeed or fail was very much up in the air. And of course it almost did fail, as Holmes knew from personal experience, having served three years in the Union Army, having watched nearly all of his close friends killed, having been wounded three times, and having become convinced, at more than one point, that the experiment could not be salvaged.⁴⁸

So the idea that the Constitution was an experiment was not new to Holmes. It was deeply embedded in his personal history, his political philosophy, and his worldview. And it played a significant role in his approach to constitutional interpretation. Holmes's constitutional decisions are marked primarily by his commitment to majority rule and judicial restraint, but that was not because Holmes had a modest conception of the judicial role; he viewed judges as the primary shapers of the common law and urged them to decide cases explicitly on grounds of social policy.⁴⁹ Instead, his reluctance to exercise the power of judicial review was based on his understanding of the experimental nature of the American system. Like John Marshall, he viewed the Constitution not as a "legal code" designed to anticipate and answer all questions about the powers of government and the rights of individuals, but as a framework that could be adapted to meet changing circumstances so that it might, in Marshall's words, "endure for ages to come."⁵⁰

This view of the Constitution is evident in two of Holmes's most famous opinions: *Lochner* and *Missouri v. Holland*. In *Lochner*, Holmes objected to the majority's invalidation of New York's maximum hour law for bakers because he viewed it as favoring a particular economic theory. "But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the

⁴⁷ Abraham Lincoln, Gettysburg Address, Nov. 19, 1863 (emphasis added). Herbert Croly, the editor of the *New Republic* magazine, also referred to the "American experiment" in his 1909 book *The Promise of American Life*, which Holmes had read and admired. HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (Princeton University Press 2014) (1909).

⁴⁸ Holmes's war service is well-documented in all the major biographies of his life. See, e.g., STEPHEN BUDIANSKY, *OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS* (2019). His doubts about whether the experiment could be salvaged are conveyed in letters he wrote home during the war. See *TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARIES OF OLIVER WENDELL HOLMES JR., 1861-1864* (Mark de Wolfe Howe, ed. 1946) 73, 79-80.

⁴⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW*, 34 (The Belknap Press of Harvard University Press 2009) (1881).

⁵⁰ *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

citizen to the State or of *laissez faire*,” he responded in his dissent. “It is made for people of fundamentally differing views.”⁵¹ In *Missouri v. Holland*, he rejected the state’s argument that Congress could not enter into a treaty for the protection of migratory birds simply because it lacked the power to regulate such birds in the absence of a treaty. “It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could,” he wrote, “and it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.”⁵² Why was this not lightly to be assumed? Because, Holmes explained, “when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”⁵³

Many of Holmes’s lesser-known opinions also reflect this view of a living, adaptable Constitution. In his first opinion as a justice on the U.S. Supreme Court, he wrote that “[c]onsiderable latitude must be allowed for differences of view Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.”⁵⁴ He returned to the theme again and again throughout his career, writing that a constitution is “a frame of government for men of opposite opinions, and for the future;”⁵⁵ that its provisions “are not mathematical formulas having their essence in their form” but “are organic living institutions transplanted from English soil;”⁵⁶ that they must therefore “be administered with caution;”⁵⁷ that “[s]ome play must be allowed for the

⁵¹ *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

⁵² *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)).

⁵³ *Id.*

⁵⁴ *Otis v. Parker*, 187 U.S. 606, 608–09 (1903). The italicized phrase, translated from Latin, means roughly “always everywhere and by everyone.”

⁵⁵ *In re Mun. Suffrage to Women*, 36 N.E. 488, 491 (Mass. 1894) (Opinion of Holmes, J.).

⁵⁶ *Gompers v. U.S.*, 233 U.S. 604, 610 (1914).

⁵⁷ *Missouri, Kansas & Texas Ry. v. May*, 194 U.S. 267, 270 (1904).

joints of the machine;”⁵⁸ and that “we should . . . not hastily import into [the Constitution] our own views.”⁵⁹

In most contexts, Holmes’s conception of the Constitution as an experiment led him to adopt a presumption of judicial restraint, since doing so would provide space for the legislature to enact measures it thought necessary to move the experiment forward. In the context of free speech, however, he came to adopt a different presumption. Instead of judicial restraint serving the purpose of the experiment, it was *legislative* restraint that the Constitution called for—but for very similar reasons. Just as judicial censorship of the legislature would hinder the country’s ability to adapt to changing circumstances, so legislative censorship of the people and the ideas they proposed for meeting future challenges would imperil the experiment’s success. For experiments do not follow predictable paths. They are marked by risk and uncertainty and cannot be pursued with fixed notions and rigid mindsets. One embarking on an experiment cannot rule out strange ideas and unusual courses of action because one doesn’t know, ahead of time, what will be needed to meet the exigencies of the moment.

Viewed in this light, Holmes’s assertion in *Abrams* that the Constitution “is an experiment” is more than just a throwaway line. It is an observation about the nature of the document being interpreted, and, more importantly, about *how* that document should be interpreted. Precisely because the Constitution is an experiment, it cannot be interpreted to permit the silencing of views, since the views silenced might very well be essential to its success. Uncertainty is the key premise here. If we knew for sure which actions would guarantee the experiment’s success, free speech would be negotiable from a constitutional point of view. It would, as Holmes once believed, stand “no differently than freedom from vaccination”⁶⁰—a freedom that the legislature can curtail without significant scrutiny from the judiciary. But we don’t know anything for sure, as Holmes points out in the very next line of his *Abrams* dissent: “Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”⁶¹ And in the face of that uncertainty (“While that experiment is part of our system”) and given the high stakes involved (“our salvation”), Holmes reaches what he believes is the only logical

⁵⁸ *Id.*

⁵⁹ *In re Mun. Suffrage to Women*, 36 N.E. at 491.

⁶⁰ Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918) (on file with the Harvard Law School Library), <http://library.law.harvard.edu/suites/owh/index.php/item/43005319/8>.

⁶¹ *Abrams v. United States*, 250 U.S. 616, 630 (Holmes J., dissenting).

conclusion: “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”⁶²

Note that even in this last sentence, Holmes focuses on the survival of the country. One objection to the idea that free speech will further the constitutional experiment might be that free speech is itself disruptive and destabilizing. Especially in the context of war, we might view expressive freedom as a threat to the experiment's success, not as an essential ingredient. Holmes did not deny this possibility; he acknowledged that allowing people to speak their minds could lead to troubling, even disastrous, consequences. And if the dangers were great enough—if “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”—he was willing to set aside free speech because what mattered most, in his view, was the success of the constitutional experiment. But when the country's immediate survival was not in jeopardy, Holmes believed the best way to ensure that success was by protecting free speech.⁶³

This conception of free speech—as creating the conditions necessary to promote the constitutional experiment—is not in opposition to the market metaphor. The features of markets that Holmes was attracted to—change and adaptation, an aversion to stasis and rigidity—are also features that are necessary for successful experimentation. In that sense, we can regard the metaphor of the experiment as complimenting the market metaphor.⁶⁴

⁶² *Id.* I am not the first person to connect Holmes's view of the Constitution as an experiment to his defense of free speech. Louis Menand made a similar observation in his study of Holmes and other American pragmatists. See MENAND, *supra* note 8, at 442 (“The purpose of the experiment is to keep the experiment going. This is the point of Holmes's *Abrams* dissent . . .”).

⁶³ This is in contrast to Learned Hand, whose direct incitement test focused not on the danger posed by speech, but on the words used by the speaker. See *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917). Unlike Holmes, Hand was concerned not primarily with the Constitution's success, but with its legitimacy. In his view, the legitimacy of the government depended upon the freedom to engage in open debate and hostile criticism. But he did not think that freedom extended to direct incitement of unlawful activity because he viewed such speech as outside the scope of legitimate political discourse. See Healy, *supra* note 10, at 826. That is why his test permitted speech that threatened the survival of the country as long as it did not take the form of direct incitement and prohibited any speech, no matter how harmless, if it qualified as direct incitement.

⁶⁴ See Blasi, *supra* note 3, at 4.

But highlighting the experiment metaphor and downplaying the market metaphor may have certain advantages. For one, the experiment metaphor reconciles Holmes's understanding of free speech with his general approach to constitutional interpretation. It makes clear that Holmes supported free speech for the same reason he opposed freedom of contract—because he thought both positions enhanced the Constitution's prospects for success—and thus minimizes the tension between his *Abrams* and *Lochner* dissents.

The experiment metaphor also fits in nicely with other aspects of Holmes's legal philosophy, most notably his observation in *The Common Law* that “the life of the law has not been logic, it has been experience.”⁶⁵ There is a close connection between the idea of experience Holmes invokes in that sentence and the definition of experiment I have been considering. Holmes does not use the word “experience” in *The Common Law* the way we often use it today; he is not suggesting that the law has “skill” or “knowledge” or that it is “ancient” and “wise.” Experience, as Holmes uses the word, is “the action of putting to the test.”⁶⁶ Holmes is saying that the life of the common law has been “putting to the test” various policies and rules to determine which ones work—which ones meet the “felt necessities of the time.”⁶⁷ This mirrors his conception of the Constitution. In both cases, Holmes asserts that we cannot become tied to any particular policy or idea—even if we believe strongly in it—because the success of a legal system requires that it remain open to change and adaptation.⁶⁸ As Louis Menand has explained, “Holmes did not defend the interests of labor because he wished to see those interests prevail. He defended them because he believed that every social interest should have its chance. He believed in experiment. He knew what the alternative was.”⁶⁹

Finally, the experiment metaphor has the advantage of being less doctrinaire than the market metaphor. If there is one thing Holmes rebelled against with all his being it was orthodoxy, and laissez-faire economics is one of the most orthodoxical belief-systems we have. It has traditionally come with a set of fixed assumptions about human behavior and the operation of markets, and it prizes efficiency above all else. Those who apply market theory to free speech typically fall victim to the kind of rigid and formalistic thinking Holmes rejected. The experiment metaphor, by contrast, comes with no assumptions and

⁶⁵ HOLMES, *supra* note 49, at 1.

⁶⁶ Experience, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

⁶⁷ HOLMES, *supra* note 49, at 1.

⁶⁸ See MENAND, *supra* note 8, at 341–42.

⁶⁹ *Id.* at 67.

prescribes no solutions. It is a general framework for thinking about the nature of our constitutional system and the role of free speech in preserving that system. That is an approach Holmes would have embraced.

IV. FREE SPEECH AND SCIENTIFIC INQUIRY

So far, I have been considering what it would mean if Holmes were referring to the Constitution when he invokes the metaphor of the experiment. But there is another possibility. Holmes could instead (or also) be referring to the “theory of the Constitution” he has just outlined—the theory that “the ultimate good is best reached by free trade in ideas.” In other words, Holmes could be saying that free speech itself is an experiment. If this is what Holmes is referring to, then what is the meaning of experiment he has in mind? He could have in mind the same definition considered above—“a course of action, adopted in uncertainty whether it will answer the purpose.” But if Holmes is likening free speech to an experiment, we might consider another definition. As mentioned earlier, an experiment can also be “an action or operation undertaken in order to discover something unknown, to test a hypothesis, or establish or illustrate some known truth.”⁷⁰

This is the scientific meaning of experiment, and it is one that Holmes also would have appreciated. For if Holmes was interested in economics, he was shaped by science.⁷¹ His father was a medical doctor who served as dean of Harvard Medical School, published scientific papers, discovered the cause of puerperal fever, and invented a stereoscopic viewer.⁷² And Holmes, born in 1841, grew up in a world that was upended by scientific discovery, a world in which “science superseded theology as the dominant discourse in American intellectual life.”⁷³ Writing in the Harvard Magazine as a 17-year-old freshman, Holmes described his generation as “almost the first of young men who have been brought up in an atmosphere of investigation, instead of having every doubt answered.”⁷⁴ And sixty years later, when Morris Cohen asked Holmes whether his epistemic skepticism was influenced by the French philosopher Voltaire, Holmes’s response was revealing:

⁷⁰ See *supra* note 36 and accompanying text.

⁷¹ See CATHARINE WELLS, OLIVER WENDELL HOLMES: A WILLING SERVANT TO AN UNKNOWN GOD 29, 3, 111 (2020) (“Holmes believed in the scientific method, and had an enduring interest in applying it to the study of law”); Blasi, *supra* note 3, at 18 (“Holmes maintained an interest in science throughout his life”).

⁷² See BUDIANSKY, *supra* note 48, at 36; MENAND, *supra* note 8, at 6; WELLS, *supra* note 71, at 16–17.

⁷³ MENAND, *supra* note 8, at 81.

⁷⁴ *Id.* at 25.

Oh no—it was not Voltaire—it was the influence of the scientific way of looking at the world *The Origin of Species* I think came out while I was in college. H. Spencer announced his intention to put the universe into our pockets—I hadn't read either of them to be sure, but as I say it was in the air.⁷⁵

It was more than “in the air.” Scientific investigation and discovery was the basis for the philosophy of pragmatism that was ushered in by Holmes and the other members of the Metaphysical Club, including the psychologist William James, the philosopher Chauncey Wright, and the mathematician Charles Sanders Peirce. All of these men, but especially Peirce, incorporated an understanding of science and the scientific method into their view of the world and their thinking about the nature of truth.⁷⁶

That understanding differed from the one embraced by previous generations. In an earlier era, science had been dominated by a search for absolute truths and universal laws. Peirce and the other members of the Metaphysical Club rejected that approach, believing that scientists could never know anything with absolute certainty.⁷⁷ Instead, they could only “know with greater or lesser degrees of probability.”⁷⁸ In their view, “truth” was simply another name for the hypothesis that had the best chance of being correct. And the only way to make that determination was through repeated testing and experimentation. “The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth, and the object represented in this opinion is the real,” Peirce wrote.⁷⁹ The point is best illustrated by the example of an astronomer trying to determine the exact position of a star. No individual measurement the astronomer takes is likely to be precise. But if he takes numerous measurements over time, they will cluster around a point that represents the most likely position of the star. And if other astronomers also take numerous measurements, they will eventually cluster so closely around a particular point that one can say with confidence, but not absolute certainty, where the star is located.⁸⁰

⁷⁵ Letter from Oliver Wendell Holmes to Morris Cohen (Feb. 5, 1919), in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 110, 110 (Richard A. Posner, ed. 1992).

⁷⁶ See MENAND, *supra* note 8, at 59.

⁷⁷ *Id.* at 363 (stating that Peirce, like James and Dewey, “regarded a belief as a kind of bet in a probabilistic universe”).

⁷⁸ *Id.* at 182.

⁷⁹ *Id.* at 229.

⁸⁰ See *id.* at 177–80.

This approach to science had two defining features. The most important was that no hypothesis could be rejected out of hand, that every claim had to be tested before one could draw conclusions about it.⁸¹ And if a test showed something other than what was expected, its results could not be dismissed or ignored. Instead, scientists believed, aberrant measurements should be folded into the calculation, since one could never know for sure whether the outlier was right or wrong.⁸² According to Menand, “Peirce’s first rule as a philosopher of science was that the path of inquiry should never be blocked, not even by a hypothesis that has worked for us in the past.”⁸³

The second feature of this approach to science was that the process of experimentation—of gradually closing in on the truth—is social, not individual.⁸⁴ No individual could take enough measurements in one lifetime to approximate the truth. But if different scientists using different methods took different measurements, society would, over time, come near enough to the truth for any purpose it might conceivably desire to take.⁸⁵

Holmes believed deeply in this view of knowledge and the scientific method. Although in later years he denied having been influenced by Peirce, the two men shared a belief that we can never know the truth for certain; we can only make bets.⁸⁶ That is why Holmes described himself as a bettabilitarian. “I believe that we can bet on the behavior of the universe in its contract with us,” he wrote to his friend Sir Frederick Pollock, in 1929. “We bet we can know what it will be.”⁸⁷ Holmes also believed that no idea was ever immune from challenge. In a lecture given in 1886, he declared that “science like courage is never beyond the necessity of proof but must always be ready to prove itself against all challengers.”⁸⁸

So what does this have to do with free speech? If we view Holmes’s *Abrams* dissent as likening free speech to the methods of scientific experimentation, then the principles he understood as governing science should also govern free speech. That means first, there is no such thing as a false idea because every idea must be tested before we

⁸¹ See JONATHAN RAUCH, *KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT* 5–6 (Univ. of Chi. Press expanded ed., 2013).

⁸² *Id.* at 182–83.

⁸³ MENAND, *supra* note 8, at 276.

⁸⁴ *Id.* at 200.

⁸⁵ *Id.* at 229.

⁸⁶ MENAND, *supra* note 8, at 217.

⁸⁷ Letter from Oliver Wendell Holmes to Frederick Pollock (August 30, 1929), in 2 *HOLMES-POLLOCK LETTERS*, 251, 252 (Mark DeWolfe Howe ed., 1942).

⁸⁸ BUDIANSKY, *supra* note 48, at 138.

can evaluate its veracity. And second, it means that free speech, like science, is a social process. One person introduces an idea; another person expands on that idea; a third person refutes part of the idea; a fourth person rebuts the refutation. No single person possesses the truth, but through the process of debate and discussion we gradually move closer to the truth—close enough so that, in Holmes’s words, our “wishes safely can be carried out.”⁸⁹ Or as Menand puts it, “The purpose of all scientific investigation is therefore to push our collective opinions about the world closer and closer to agreement with each other, and thus closer and closer to the limit represented by reality itself.”⁹⁰

As should be clear, these are not just abstract principles for thinking about free speech; they closely track modern free speech doctrine. Perhaps the most important development of free speech law over the past half century has been the Supreme Court’s embrace of content neutrality—the idea that government cannot regulate speech based upon its content and, in particular, its viewpoint. That idea closely resembles the scientific precept that there is “no final say”—that inquiry can never be blocked because we think we already know the truth.⁹¹ Another key premise of modern free speech doctrine is that everyone’s ideas are equally valid as far as the First Amendment is concerned. “One man’s vulgarity is another’s lyric,” the Supreme Court asserted in *Cohen v. California*.⁹² This premise echoes Pierce’s claim that no one has personal authority because truth-seeking is a social process, not an individual endeavor.⁹³

As with the definition of experiment considered above, this conception of free speech—as resembling scientific inquiry—does not conflict with the market metaphor. In fact, the pragmatists viewed markets and scientific experimentation as deriving from the same concept of probabilistic thinking.⁹⁴ But once again, there may be advantages to highlighting the experiment metaphor at the expense of the market metaphor. Unlike the market metaphor, the metaphor of scientific experimentation doesn’t assume that the truth will necessarily prevail; instead, it posits that the only way to get close to the truth—close enough to safely act—is by hearing and investigating all views. In

⁸⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Jonathan Rauch refers to these two principles—which he calls, respectively, “no final say” and “no personal authority”—as the basis of “liberal science.” See RAUCH, *supra* note 81, at 46–49.

⁹⁰ MENAND, *supra* note 8, at 228.

⁹¹ See RAUCH, *supra* note 81, at 46.

⁹² 403 U.S. 15, 26 (1971).

⁹³ See RAUCH, *supra* note 81, at 46.

⁹⁴ Blasi, *supra* note 3, at 19–29; MENAND, *supra* note 8, at 431.

addition, the market metaphor implies a kind of indiscriminate and frivolous browsing. There is no sense of rigor or discipline, no sense of a purpose toward which the browsing is directed. To think about free speech and the exchange of ideas in terms of scientific experiment is to provide a more serious reference point. Where the market metaphor trivializes free speech, the metaphor of the experiment elevates it. Instead of consumers searching for an idea that suits us like a set of clothes, we become scientists probing the cosmos for a truth that will aid our survival.

V. CONCLUSION

There are, of course, limits to thinking about free speech in terms of scientific experimentation. Not everyone has access to the tools of science. And not every idea can be tested empirically (though, as Jonathan Rauch has pointed out, even moral claims can be investigated and challenged).⁹⁵ But analogizing free speech to the scientific method has benefits nonetheless. It helps to situate Holmes's dissent not as a product of the age of capitalism, but as a product of the age of Darwin. It shifts the focus from producers and consumers exchanging ideas in an indifferent marketplace to scientists and thinkers testing hypotheses in an effort to promote the "ultimate good."

In this shift, we can hear echoes of John Stuart Mill, who in *On Liberty* also invoked the idea of scientific experimentation as a justification for the protection of speech. "If even the Newtonian philosophy were not permitted to be questioned, mankind could not feel as complete assurance of its truth as they now do," Mill wrote. "The beliefs which we have most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded."⁹⁶

Mill published those words in 1859, sixty years before the *Abrams* case. At the time, it must have seemed unimaginable to him that Newtonian physics would ever be disproven. That is why he uses it as an example. It is meant to show that even the most unshakeable beliefs must be subjected to challenge. And yet, his words proved prescient. On November 10, 1919, the same day Holmes issued his dissent in *Abrams*, the *New York Times* published a front-page article reporting on the

⁹⁵ See RAUCH, *supra* note 81, at 172–73 (pointing out that even moral claims can be checked and challenged "through logical analysis, consistency with established facts, consistency with personal experience, facial plausibility, proponents' and opponents' credibility, ideas' aesthetic appeal (many physicists have regarded beauty as a sign of truth), and the residual X factor we call persuasiveness").

⁹⁶ JOHN STUART MILL, *ON LIBERTY*, 37 (2015) (ebook).

proceedings of the Royal Astronomical Society in London.⁹⁷ Five months earlier, during a solar eclipse, British scientists had tested a controversial new theory about the relationship between space and light. When they reported the results in London, Einstein's theory of relativity was validated, and Newton's classical mechanics was smashed. A truth that had once seemed unimpeachable was now displaced. And the mechanism for that displacement was not the marketplace of ideas. It was an experiment.

⁹⁷ *Lights All Askew in the Heavens*, *N.Y. TIMES*, Nov. 10, 1919, at 17.