All of Life an Experiment: A Synthetic Perspective on Oliver Wendell Holmes, Jr.'s Free Speech Opinions

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Abstract:

US Supreme Court Justice Oliver Wendell Holmes, Jr. reshaped American free speech law through his Supreme Court opinions during World War I and after. This paper explores the oft-debated questions of whether and how Holmes's free speech views changed between his legal education (during which he was taught that the common law's "bad tendency" test allowed governments to punish any speech after it was uttered) and World War I (during which he created and developed the more expansive "clear and present danger" test). This paper argues that Holmes developed the underlying principles of his later free speech ideas in his writings on American common law, but that he only expressed those ideas in Supreme Court opinions after several other legal thinkers prodded him to do so.

Introduction

A core principle of the American political system is the value of freedom of speech. As former Supreme Court Justice John Paul Stevens explained, "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."[1] However, freedom of speech was not always clearly defined and broadly protected in the United States. In the early 20th century, the meaning of the First Amendment's Free Speech Clause was unsettled, and World War I threatened to submerge free speech under the waves of extreme patriotism. In two Supreme Court opinions in 1919, though, Justice Oliver Wendell Holmes, Jr. developed the "clear and present danger" test (which prohibited the Federal Government from restricting anti-government speech unless that speech created a serious, imminent danger of civil disobedience) for free speech, and thus began a string of cases spanning several decades in which the Court interpreted the free speech clause to cover more and more types of speech. The evidence suggests that Holmes developed the basic principles of his free speech viewpoints in his writings on American common law, and also that his clear and present danger test and emphasis on the importance of free speech did not emerge until 1919, after several young legal thinkers had encouraged him to change his thinking.

Scholarly Literature

Scholars have suggested at least three significant viewpoints about how and when Holmes developed his revolutionary doctrine of free speech. Scholars such as Fred D. Ragan have argued that Holmes's primary change came in 1919 between his *Schenck* and *Abrams* opinions. According to Ragan,

[1] *Bose Corp. v. Consumers Union of US, Inc.*, 466 U.S. 485 (1984). Accessed from https://caselaw.findlaw.com/us-supreme-court/466/485.html.

Holmes originally used the clear and present danger test to prohibit seditious libel, a common law crime of criticizing the government in a way that supposedly decreased peace or respect for the government. By the time of *Abrams* in 1919, he had changed the test to be the libertarian test that most people think of it as.[2] A second view is that Holmes had changed his views before writing his *Schenck* opinion. One proponent of this perspective is David S. Bogen, who has argued that Holmes's dissenting opinion in *Abrams* was primarily a clarification of viewpoints he had already begun to express in *Schenck*.[3] A third view is that Holmes never changed at all, but developed his free speech viewpoints through his writings on common law liability before he was ever appointed to the US Supreme Court. A proponent of this interpretation is Sheldon M. Novick.[4] Each of these three perspectives contains part of the truth, but taken together they provide a more complete picture of how Holmes's free speech ideas changed. Holmes's judicial opinions show that he did change his opinion on free speech before *Schenck*, rejecting Blackstone's common law free speech doctrine in favor of the "clear and present danger" test. However, Holmes had developed the core elements of the clear and present danger test—imminent danger and subjective intent—in his common law writings decades before *Schenck*, so the core elements of his new speech ideas came from his thinking about the common law. Finally, Holmes became an outspoken supporter of broad free speech rights after *Abrams*. Thus, each of these three scholarly perspectives contains part of the truth about the development of Holmes's free speech thought.

Background: Oliver Wendell Holmes, Jr.

The most important advocate for free speech on the Supreme Court during the first few decades of the 20th century, Oliver Wendell Holmes, Jr. was a product of his experience in the Civil War. A lieutenant and captain in the Union Army, Holmes fought in the crucial Battle of Antietam and was wounded several times during the war, including a nearly fatal injury suffered at Ball's Bluff.[5] The war exposed Holmes to Confederates who held different ideals from his, but seemed to fight for them with the same conviction. Looking back on the war in a Memorial Day speech in 1884, Holmes reflected:

> We equally believed that those who stood against us held just as sacred convictions that were the opposite of ours…You could not stand up day after day in those indecisive contests… without getting at last something of the same brotherhood for the enemy that the north pole of a magnet has

[2] Fred D Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," *The Journal of American History* 58, no. 1 (1971): 25, https://doi.org/10.2307/1890079. For a more recent example of this view, see Leslie Kendrick, "On Clear and Present Danger," *Notre Dame Law Review* 94, no. 4 (April 2019): 1653-1670, https://heinonline.org/HOL/P?h=hein.journals/tndl94&i=1701.

[3] David Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," Hofstra Law Review 11, no. 1 (January 1, 1982): 97-189, https://scholarlycommons.law.hofstra.edu/hlr/vol11/iss1/3.

[4] Sheldon M. Novick, "The Unrevised Holmes and Freedom of Expression," *The Supreme Court Review* 1991 (1991): 303-390, https://heinonline.org/HOL/P?h=hein.journals/suprev1991&i=307

[5] Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas*, (First edition. New York: W. W. Norton & Company, 2019), 85-90.

> for the south—each working in an opposite sense to the other, but each unable to get along without the other.[6]

From his wartime experiences, Holmes concluded that dogmatic commitment to any belief was harmful and ultimately led believers to attempt to force their views on others.[7] At the same time, he felt that such conflict was inevitable and even appropriate. As one biographer explained, the war taught Holmes that, "Life is a struggle, and it is the struggle that gives it meaning. The only thing to do was to give one's all, and leave the consequences to fate."[8] This tension in Holmes's thinking between the uncertainty of truth and the right to fight over it would later shape his ideas on free speech. As a Supreme Court justice, Holmes wrote to fellow judge Learned Hand in response to Hand's suggestion (in a previous letter) that uncertainty about many of our opinions should lead us to tolerate others' views. Holmes wrote that he agreed, but added that "man's destiny is to fight" over which ideas are correct, and continued, "If for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong."[9] The Civil War convinced Holmes of the value of both skepticism about truth and conflict over whose beliefs were accurate, both of which ideas influenced his later thinking on freedom of speech.

A second important influence on Holmes's legal ideas was his training and expertise in American common law. Like any common law system, American common law was a body of legal principles that was always slowly growing as judges added greater nuance to it through their rulings and opinions.[10] The common law system that dominated US legal institutions in Holmes's day came from English jurist William Blackstone, whose *Commentaries on the Laws of England* (a summary of English common law) had shaped American legal education in both universities and apprenticeship programs since the late 18th century.[11] As a student at Harvard Law School, Holmes had read Blackstone's *Commentaries,* which argued for a prior-restraint-focused concept of free speech.[12] After law school, Holmes studied and applied the common law for about thirty-five years, first as an attorney, and later as a justice on the Massachusetts Supreme Court.[13] In 1884, Holmes published a book entitled *The Common Law*, in which

[6] Oliver Wendell Holmes Jr., "An address delivered for Memorial Day, May 30, 1884, at Keene, New Hampshire, before John Sedgwick, Post No. 4, Grand Army of the Republic," quoted in Ronald K. L. Collins, *The Fundamental Holmes: A Free Speech Chronicle and Reader,* (New York: Cambridge University Press, 2010), 20.
[7] Budiansky, *Oliver Wendell Holmes*, 130.
[8] Budiansky, *Oliver Wendell Holmes*, 129.
[9] Oliver Wendell Holmes Jr. to Learned Hand, June 24, 1918, quoted in Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*, (First Edition. New York: Metropolitan Books, Henry Holt and Company, 2013), 24-25.
[10] J. Lyn Entrikin, "The Death of Common Law," 42 *Harvard Journal of Law & Public Policy* 351, (Spring, 2019). https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5WC3-T400-00CW-H0M2-00000-00&context=1516831.
[11] Dennis R. Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," *New York University Law Review* 51, no. 5 (November 1976): 761, 767.
[12] Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," 107-109.
[13] Novick, "The Unrevised Holmes and Freedom of Expression," 305.

he summarized his own thoughts on the common law. This book laid out an important test of civil liability: whether an ordinary person would have foreseen harm from a given action.[14] In dealing with criminal attempts, in which a person attempts to commit a crime or comes close to committing it and then changes his mind, Holmes stated that the obvious tendency of an action (even if the action itself was not illegal) could make that conduct illegal if it was likely to cause a harmful result.[15] In 1894, he expanded upon his ideas from *The Common Law* in an article for the *Harvard Law Review* called "Privileges, Malice, and Intent," which explained two ways by which a person could escape liability for harming someone else: just cause and privilege. In both cases, Holmes argued that the actor's intent was the primary standard for determining whether the actor was in fact exempt from liability.[16] Holmes would later use his common law ideas about criminal attempts and the importance of intent to determine the constitutional limits of free speech for the Supreme Court.

The state of free speech law in the United States in the early 20th century provided a golden opportunity for the Supreme Court to reconsider the free speech clause of the First Amendment. The growth of government and its power in the late nineteenth century had begun to unintentionally foster the development of modern federal protections of free speech and other civil liberties.[17] This development occurred because modern nation-states like the United States Federal Government began to increase their power by directly engaging the individual. Through a sort of social contract, the Federal Government offered citizenship and civil liberties protection in exchange for the individual's support. This social contract made traditional political allegiances to non-governmental groups (such as churches and other civic-minded community groups) obsolete, as the individual was increasingly loyal to the Federal Government alone.[18] Additionally, before World War I the Supreme Court had made few rulings on the meaning of the Bill of Rights. Other than slavery, the 1798 Alien and Sedition Act, and a few matters from the Civil War, the Court had rarely addressed civil liberties issues, including free speech.[19] A key reason for this omission was that the Supreme Court had not yet conclusively declared the incorporation of the Bill of Rights against the states, meaning that states could pass speech laws at their own discretion without fear of federal intervention. Because no Supreme Court rulings clearly defined the constitutional limits of free speech, many courts relied upon the common law for guidance. The common law doctrine of free speech protection was based on prior re-

[14] Novick, "The Unrevised Holmes and Freedom of Expression," 306-307.
[15] Oliver Wendell Holmes Jr., G. Edward White, and Oliver Wendell Holmes , Sr., *The Common Law*, (Cambridge, United States: Harvard University Press, 2009), http://ebookcentral.proquest.com/lib/ku/detail.action?docID=3300809, 61-63.
[16] Oliver Wendell Holmes, "Privilege, Malice, and Intent," *Harvard Law Review* 8, no. 1 (1894): 5-12, https://doi.org/10.2307/1322381.
17 Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, (7th ed. New York: Norton, 1991), 509.
18 Christopher Joseph Nicodemus Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen*, (Oxford; New York: Oxford University Press, 2008),7-8; Kelly et. all, *The American Constitution*, 510.
[19] Kelly et. all, 510.

straint, the idea that the Federal Government must allow everyone to speak freely, but may punish speech after the fact.[20] William Blackstone, the English jurist who helped codify English common law, was a key proponent of this "bad tendency" test. In his *Commentaries on the Laws of England*, Blackstone stated that freedom of speech meant that governments must allow people to say whatever they desired. According to Blackstone, however, governments could also punish such speech at their discretion once a person uttered an offending statement.[21] Because of changing ideas of citizenship, a lack of civil liberties precedents, and the restrictiveness of the bad tendency test, the US Supreme Court found the opportunity to hand down groundbreaking free speech opinions in the early 20th century.

World War I, the immediate context for Holmes's landmark Supreme Court opinions, was a key reason for the emergence of the new rights-oriented idea of citizenship. Traditionally, Americans viewed citizenship primarily as an obligation to participate in various community- and nation-strengthening local organizations. This participation was not required but became a hallmark of true patriotism, leading to a form of peer pressure historian Christopher Capozzola has called "coercive voluntarism."[22] This culture of voluntary service for the national good pushed people to follow the Federal Government's dictates or face ostracism and even criminal charges. However, the war also helped create a new definition of American citizenship to rival this traditional view. During the war, the Federal Government attempted to control the personal lives of Americans at an unprecedented level, threatening the traditional function of local organizations.[23] Because the Federal Government emphasized obedience to national law during World War I, the war reshaped the American definition of obligation to country—from voluntarily contributing out of duty, to obeying the mandatory laws of an increasingly powerful federal government.[24]

The Selective Service Act of 1917, which instituted a draft of men aged twenty-one to thirty, sharpened the tensions between the old and new views of citizenship and further strengthened the new view.[25] On one hand, the Federal Government could appeal to the obligation-based old view to support the draft. Draft cards allowed the Federal Government to both gain information about its citizens and change the terms of faithful citizenship to include registering for the draft.[26] Because Americans now defined their citizenship largely in terms of the draft, the "slackers" who evaded the draft were considered unpatriotic, and the majority of Americans strongly condemned them.[27] Further, the Federal Government's newfound power and federal law's increased authority motivated dissidents to use federal institutions (such as the federal court system and Congress) to get their viewpoints heard. For example, the American Civil Liberties Union was formed in 1920 as the renamed version of the Civil Liberties Bureau, a civil liberties interest group that advocated for the free

[20] Kelly et. all, 511.
[21] Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," 101-102.
[22] Capozzola, *Uncle Sam Wants You,* 6-9.
[23] Capozzola, *Uncle Sam Wants You*, 7-8.
[24] Capozzola, *Uncle Sam Wants You*, 15.
[25] Capozzola, *Uncle Sam Wants You*, 21.
[26] Capozzola, *Uncle Sam Wants You*, 23
[27] Capozzola, *Uncle Sam Wants You*, 30.

speech rights of minorities who opposed the war.[28] Finally, in mid-1917, Congress passed the Espionage Act, which prohibited anyone from lying to impede the success of American war efforts, and enforced the prohibition with fines or imprisonment for offenders. The act also allowed the Postmaster General to remove from mail circulation any publication that advocated breaking a federal law.[29] The Sedition Act of 1918, passed on May 16, 1918, amended the Espionage Act to further restrict free speech by making felonies of inciting mutiny among soldiers, discouraging military recruiting, or opposing the United States or its soldiers.[30] These laws, along with the political climate in the United States at the time, proved to be the ideal circumstance for landmark free speech cases before the Supreme Court.

Although the Supreme Court generally, and Justice Oliver Wendell Holmes Jr. in particular, had no history of broad free speech rulings, two Espionage Act cases marked the beginning of a new chapter in free speech jurisprudence. The first case, *Schenck v. United States,* dealt with whether the Espionage Act's banning of a circular published by a group of American Socialists (including Charles Schenck, the General Secretary of the American Socialist Party) was constitutional under the 1st Amendment right to freedom of speech. Writing for a unanimous Court upholding the conviction of the Socialists, Holmes introduced the "clear and present danger" test for determining whether the government could restrict speech. In his own words, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." In applying this test in *Schenck*, Holmes recognized the rights of the defendants to say the things they said under other circumstances. However, whether a particular type of speech was protected depended on the circumstances surrounding it. During a war, the government had a right to restrict speech more than during peace time to prevent anyone from hindering the war effort. Since the clear intent—the only foreseeable effect—of the publication was to encourage people to obstruct the draft, Schenck and his colleagues had no right to publish the pamphlet.[31]

The second wartime case was *Abrams v. United States.* Jacob Abrams and other American Communists were arrested for publishing two leaflets attacking the United States government and its efforts in World War I. The United States charged Abrams and his colleagues with attempting to convince Americans to oppose US military efforts.[32] Using a variation of the bad tendency test, Justice John H. Clarke wrote for the majority that the purpose of the pamphlets was to incite sedition against the United States, and that prohibiting them was therefore constitutional.[33] This time, Holmes dissented from the majority opinion. To determine whether the Sedition Act was constitutional,

[28] Kelly et. all, *The American Constitution*, 515.
[29] Capozzola, *Uncle Sam Wants You*, 150-151.
[30] Kelly et. all, *The American Constitution*, 513.
[31] *Schenck v. United States*, 249 U.S. 47 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/249/47#writing-USSC_CR_0249_0047_ZO
[32] *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD
[33] Kelly et. all, *The American Constitution,* 514.

Holmes repeated his clear and present danger test from *Schenck* as a two-pronged test. Unless the government could show either imminent danger to harm the government's efforts or subjective intent to do so, the First Amendment prevented the government from restricting seditious speech. Holmes also included the following famous philosophical justification of free speech:

> 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.[34]

Though Holmes was in the minority in this case, his free speech ideas would soon become the official doctrine of the Supreme Court.

Continuity: How Holmes Initially Developed His Free Speech Ideas

Oliver Wendell Holmes Jr. began to develop the core elements of the clear and present danger test – imminent danger and subjective intent—in his common law writings. He began to develop "imminent danger" in his book *The Common Law*, published in 1884. In *The Common Law*, Holmes argued that intent to commit a crime (as shown by actions close to committing it) was adequate to convict someone of criminal conduct. When he discussed criminal attempts (how the law dealt with people who attempted to commit a crime and were not successful), Holmes explained that intent and attempt are two different things. An intent in the mind to commit a crime is not criminal by itself; on the other hand, "If an act is done of which the natural and probable effect under the circumstances is the accomplishment of a substantive crime," the actor is criminally liable.[35] In general, therefore, Holmes believed that the perpetrators of a failed crime were still guilty under the law if their actions were likely to accomplish that crime. At the same time, Holmes recognized another category of criminal attempts: actions which are closely connected with criminal activity but are not criminal themselves. In these cases, Holmes explained that subjective intent to commit a crime was the key, since criminal intent determined the likelihood that the actor would follow the legal conduct with other actions that were illegal.[36] But what otherwise legal conduct shows criminal intent so dangerous that the conduct becomes illegal? Holmes answered as follows:

> Public policy, that is to say, legislative considerations, are at the bottom of the matter; the considerations being, in this case, the nearness of the danger, the greatness of the harm,

[34] *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supreme-court/text/250/616#writing-USSC_CR_0250_0616_ZD

[35] Holmes, Jr., *The Common Law*, 61.
[36] Holmes, Jr., *The Common Law*, 64.

> and the degree of apprehension felt. When a man buys matches to fire a haystack, or starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match, or cocked and aimed the pistol, there is very little chance that he will not persist to the end, and the danger be comes so great that the law steps in.[37]

In summary, Holmes's book *The Common Law* explored when the law could punish criminal attempts and offered imminent danger as the answer. Holmes would later apply this standard to constitutional free speech in both his *Schenck* and *Abrams* opinions.

In several judicial opinions, Holmes further explained his ideas on criminal attempts. The first case was *Commonwealth v. Lincoln B. Peaslee*, a Massachusetts Supreme Court case in which a man set up explosives around a building with intent to burn down the building, destroy its goods, and injure its insurers.[38] After setting up the explosives, the man drove to within a quarter mile of the building to light them, but then changed his mind and left. Holmes explained that actions in furtherance of a planned crime were not generally crimes themselves if further actions were needed to complete the crime. However, "some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor." In this case, Holmes argued that the defendant was innocent because he did not come near enough to committing the arson. A punishable attempt required intent to complete the crime very soon, and at a time and place in which he could carry out his intentions. For Holmes, an example of a punishable attempt in this case would be if Lincoln Peaslee had been in the building lighting the match when he was caught by police.[39] In *Aikens v. Wisconsin*,[40] two newspaper publishers were convicted of willfully and maliciously attempting to harm someone's business by charging different interest rates to advertisers based on whether those advertisers bought advertisements in a third paper. Holmes applied his criminal attempts analysis from *The Common Law* by emphasizing the importance of the probable effect of an action when he said, "The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."[41]

In his Harvard Law Review article entitled "Privileges, Malice, and Intent,"[42] Holmes began to explore what would become the second element of his clear and present danger test: subjective intent. Holmes first laid out his theory of torts with an external test: If a person acts in a way that

[37] Holmes, Jr., *The Common Law*, 64.
[38] *Commonwealth v. Lincoln B. Peaslee*, 177 Mass. 267, https://law.justia.com/cases/massachusetts/supreme-court/volumes/177/177mass267.html.
[39] *Commonwealth v. Lincoln B. Peaslee*, 177 Mass. 267, https://law.justia.com/cases/massachusetts/supreme-court/volumes/177/177mass267.html.
[40] *Aikens v. Wisconsin*, 195 U.S. 194 (1904), https://caselaw.findlaw.com/us-supreme-court/195/194.html.
[41] *Aikens v. Wisconsin*, 195 U.S. 194 (1904), https://caselaw.findlaw.com/us-supreme-court/195/194.html.
[42] Holmes, "Privilege, Malice, and Intent," 1-14.

harms another person under circumstances the actor knew were likely to produce that effect, he is liable for that harm.[43] However, Holmes explained that in some cases, knowingly inflicting harm on another person is acceptable if just cause is present.[44] To determine whether the actor had just cause to harm someone else, the key factor was the actor's motives. As an example, Holmes imagined a person who counsels another person to refrain from hiring a certain doctor. If that counsel harmed the doctor's business, the person who provided that counsel might be liable if he gave the counsel solely to harm the doctor's business, as opposed to believing that the doctor was unqualified to practice medicine. Holmes then stated his thesis: "If the privilege is qualified, the policy in favor of the defendant's freedom generally will be found to be qualified only to the extent of forbidding him to use for the sake of doing harm what is allowed him for the sake of good."[45] In other words, a person's motives determined whether a defendant could be liable for a privileged action that harmed someone else. Later in the article, Holmes addressed another type of tort: When a person's lawful actions lead to the wrongdoing of another person. Holmes explained that people have a right to expect that others will act lawfully, even if that expectation is not likely to be true. For instance, if a person spreads a message he heard from someone else, he is not responsible if that message turns out to be slanderous.[46] However, if the conduct he attempted to induce in another person required tortious action (i.e. he intended to cause the tortious action), he is liable.[47] Holmes began to apply his ideas on intent from "Privileges, Malice, and Intent" in *Gandia v. Pettingill*, a US Supreme Court case in which Holmes decided that the authors of news articles claiming that the attorney general of Puerto Rico was operating a private law practice were not libelous, since they were not excessive or malicious, and they revealed issues of great interest to the public.[48] Holmes's emphasis on malice (similar to intent) reflected his analysis in "Privileges, Malice, and Intent" of liability for privileged conduct. Since intent is one of two elements Holmes emphasized in his clear and present danger test, and speech is both a privileged action and a potential cause of unlawful action, it appears that the principles in this article also influenced Holmes's thinking on free speech in *Schenck* and *Abrams*.

Holmes's academic writings and judicial opinions suggest that the two elements of his clear and present danger test originated long before his groundbreaking free speech opinions in 1919. Even more convincing, however, are two letters Holmes wrote to other legal thinkers in which he further described his thinking on these issues. Holmes wrote the first letter in response to a question from friend and Harvard law professor Zechariah Chafee, Jr. On June 9, 1922, Chaffe wrote to Holmes asking, "whether this definition of freedom of speech in the Schenck case was at all suggested to you by any writers on the subject or was the result entirely of

[43] Holmes, "Privilege, Malice, and Intent," 1.
[44] Holmes, "Privilege, Malice, and Intent," 3.
[45] Holmes, "Privilege, Malice, and Intent," 6-7.
[46] Holmes, "Privilege, Malice, and Intent," 10.
[47] Holmes, "Privilege, Malice, and Intent," 11.
[48] *Gandia v. Pettingill*, 222 U.S. 452 (1912). Accessed from https://scholar.google.com/scholar_case?case=10495946766850350745&hl=en&as_sdt=6&as_vis=1&oi=scholar

your reflections."[49] Holmes responded that he developed the clear and present danger test after several cases taught him that his commitment to Blackstone's prior restraint doctrine of free speech was incorrect. He then added, "But I did think hard on the matter of attempts in my Common Law and a Mass [Massachusetts] case [*Commonwealth v. Peaslee*], later in the Swift case (U.S.) [*Swift v. United States*]."[50] In other words, Holmes explicitly recognized that his criminal attempts writings found in *The Common Law, Commonwealth v. Peaselee,* and *Swift v. United States* led to his clear and present danger test in *Schenck v. United States*. Holmes sent the second letter to an English friend, the jurist Sir Fredrick Pollock. In this letter, while commenting on his own opinion in *Abrams v. United States*, he argued that to constitutionally restrict speech, "an actual intent to hinder the U.S. in its war with Germany must be proved." He continued, "even if there were evidence of a conspiracy to obstruct, etc., the overt act laid must be an act done to effect the object of the conspiracy and it seems to my plain that the only object of the leaflets was to hinder our interference with Russia. I ought to have developed this in the opinion."[51] These statements unmistakably suggest that Holmes applied his thoughts from "Privileges, Malice, and Intent"—that liability for privileged actions depended upon subjective intent – to constitutional freedom of speech in *Abrams*.

Change: How and Why Holmes Became a Champion of Free Speech

Though Holmes based his clear and present danger test on ideas from his common law writings, he did change his free speech viewpoints in important ways before his *Schenck* and *Abrams* opinions. One important change was his rejection of Blackstone's prior restraint idea of free speech. As discussed above, Blackstone's common law free speech doctrine allowed civil governments to punish speech after the fact. The key criterion was whether the speech showed proximate cause—a close connection between the speech and an illegal action—to show that the speaker had seditious intent. "In practice, however, more often than not the rule that obtained was the bad tendency test. Publication and speech were held to be punishable if they evinced a reasonable tendency, at some future point, to undermine the government."[52] This "bad tendency test" gave courts significant power to limit any kind of speech that potentially encouraged opposition to the government. In *Patterson v. United States*[53], in which a Colorado newspaper Holmes interpreted the constitution's freedom of speech and of the press provisions in the Blackstone tradition: "the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon

49 Letter from Zechariah Chafee, Jr. to Oliver Wendell Holmes, Jr. (June 9, 1922), quoted in Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," 101-102.

50 Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922), quoted in Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," 101-102.

51 Letter from Oliver Wendell Holmes, Jr. to Fredrick Pollock (December 14, 1919), in Mark De Wolfe Howe, ed. *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932*, (Cambridge, Massachusetts: Harvard University Press, 1942), 2:32-33. https://heinonline.org/HOL/P?h=hein.beal/holpol0002&i=1

52 Kelly et. all, *The American Constitution,* 511.

53 *Patterson v. Colorado*, 205 U.S. 454 (1907). Accessed from http://cdn.loc.gov/service/ll/usrep/usrep205/usrep205454/usrep205454.pdf.

publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[54] In an unpublished dissent for *Baltzer v. United States*, the first case the Supreme Court heard on the Espionage Cases, Holmes still left the bad tendency test intact, stating, "I agree that freedom of speech is not abridged unconstitutionally in those cases of subsequent punishment with which this court has from time to time."[55] As late as December 1918, Holmes still held to prior restraint (and the accompanying bad tendency test) to define constitutional freedom of speech.

Eventually, Holmes questioned and ultimately rejected the prior restraint doctrine, beginning in *Schenck v. United States*. In discussing *Schenck's* constitutional free speech claims, Holmes stated, "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado, 205 U.S. 454, 462."[56] Unlike in *Patterson,* Holmes mentioned the prior restraint doctrine of free speech, but seemed unsure about its legitimacy and willing to abandon it if needed. The clear and present danger test, which Holmes created in *Schenck,* was effectively a method for narrowing the scope of the bad tendency test to only those kinds of speech that threatened serious, immediate attacks on the Federal Government or its laws. In *Abrams v. United States* several months later, Holmes went even further, saying, "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force."[57] In other words, Holmes explicitly rejected the US government's argument that the free speech clause codified common law free speech doctrines. In 1922, Holmes openly rejected his previous adherence to the bad tendency test in a letter to Zechariah Chafee: "The later cases (and probably you-I do not remember exactly) had taught me that in the earlier Paterson [*sic*] case, if that was the name of it, I had taken Blackstone and Parker of Mass as well founded, wrongly. I surely was ignorant."[58] Holmes changed his views on free speech by rejecting Blackstone's bad tendency test and creating the clear and present danger test.

A second way in which Holmes's views of constitutional free speech changed was in his increased emphasis on freedom of speech in his court opinions and his willingness to lead vocal minorities in favor of free speech. This pattern did not emerge in *Schenck*, likely because Holmes was assigned the majority opinion and wanted to encourage as many of his colleagues as possible to join it. In a letter to Fredrick Pollock, Holmes reflected upon *Schenck* and concluded, "I

[54] *Patterson v. Colorado*, 205 U.S. 454 (1907). Accessed from http://cdn.loc.gov/service/ll/usrep/usrep205/usrep205454/usrep205454.pdf.

[55] *Baltzer v United States* (Holmes dissenting), memorandum distributed to the Justices on December 3, 1918, quoted in Novick, "The Unrevised Holmes and Freedom of Expression," 388–390. https://heinonline.org/HOL/P?h=hein.journals/suprev1991&i=307.

[56] *Schenck v. United States*, 249 U.S. 47 (1919). Accessed from https://www.law.cornell.edu/supreme-court/text/249/47#writing-USSC_CR_0249_0047_ZO

[57] *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supreme-court/text/250/616#writing-USSC_CR_0250_0616_ZD

[58] Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922), quoted in Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," 101-102.

should go farther probably than the majority in favor of [free speech], and I daresay it was partly on that account that the C. J. assigned the case to me."[59] In other words, Holmes recognized that the Chief Justice allowed him to write the majority opinion in *Schenck* to force Holmes to restrain his "extreme" speech viewpoints. After this obstacle was removed, Holmes began to support free speech (often through dissenting opinions) with greater emphasis than he had before. One tally of Holmes's votes on key Supreme Court free speech cases found that he voted to protect free speech in just 2 of 11 cases before *Schenck* and *Abrams*. By contrast, he voted for free speech protection in 12 of 14 cases after *Schenck* and *Abrams*.[60] Beginning in *Abrams*, Holmes also began to use his opinions to make sweeping defenses of his philosophical reasons for believing in freedom of speech. In *Abrams*, he declared:

> 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.[61]

In *Gitlow v. New York* in 1925, Holmes once again used a dissenting opinion as an opportunity to stand up for freedom of speech, saying, "It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement….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."[62] Beginning with *Abrams*, Holmes showed a new willingness to vote for freedom of speech and a new eagerness to explain its philosophical backing in his Supreme Court opinions.

Two legal thinkers influenced Holmes to change his free speech views: Learned Hand and Zechariah Chafee, Jr. Hand was a US District Court Judge with whom Holmes corresponded. In 1917, Hand handed down an influential free speech decision in *Masses Publishing Company v. Patten*.[63] In this case, Hand decided that the New York Postmaster General could not refuse to carry a magazine because it criticized US involvement in World War I. Hand reasoned that the Espionage Act only prohibited people from encouraging others to obstruct the draft, and therefore the magazine in question was

[59] Oliver Wendell Holmes, Jr., to Fredrick Pollock (April 5, 1919), in Howe, ed. *Holmes-Pollock Letters*, 1:7.
[60] Ronald K. L. Collins, *The Fundamental Holmes: A Free Speech Chronicle and Reader,* (New York: Cambridge University Press, 2010), 399.
[61] *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD
[62] *Gitlow v. New York*, 268 U.S. 652 (1925). Accessed from https://www.law.cornell.edu/supremecourt/text/268/652#writing-USSC_CR_0268_0652_ZD
[63] *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), reversed, 246 F. 24 (2d Cir. 1917).

legal.[64] Unlike the bad tendency test popular at the time, Hand introduced a new test based on "direct incitement," which suggesting that governments should fully protect nearly all speech, leaving only a few types unprotected.[65] Shortly after writing his *Masses* opinion, Hand discussed freedom of speech with Holmes during a train ride they happened to take together from [city] to [city] in [date]. In particular, Hand stated that our uncertainty about many of our opinions and the possibility that new insights may occur to us should lead us to tolerate others' views. Apparently, Hand was dissatisfied with his response on the train to Holmes's argument that humans have a "sacred right to kill the other fellow when he disagrees." Hand now argued, "Not at all, kill him for the love of Christ and in the name of God, but always realize that he may be the saint and you the devil."[66] Possibly Hand's arguments about uncertainty as the ground of tolerance convinced Holmes to argue that "time has upset many fighting faiths" in support of his dissent in *Abrams*.[67] After Holmes published his opinions for *Schenck* and two other Espionage Cases, Hand objected in a letter that his opinions focused too much on intent and the likelihood of harm.[68] Holmes's reply made clear that he saw Hand's "direct incitement" idea as identical to his clear and present danger test.[69] In summary, the evidence suggests that Judge Learned Hand may have influenced the free speech views of Oliver Wendell Holmes.

A second influence on Holmes's free speech developments was Zechariah Chafee, Jr., a law professor at Harvard University. Back in 1914, Holmes had subscribed to a new weekly magazine called *The New Republic*.[70] After Hand's *Masses* opinion in 1917, Chafee used the summer of 1918 to study the appropriate boundary between free speech and speech the federal government could restrict.[71] After Holmes's first Espionage Act opinions (including *Schenck*) were published, Chafee wrote an article for the *New Republic* in November 1919. In this article, Chafee attacked Holmes's decisions in the Espionage Cases for violating the First Amendment. Chafee argued that the First Amendment protected wartime opposition to the government as long as the opposition did not directly cause dangerous opposition to the war.[72] In a 1919 Harvard Law Review article entitled "Free Speech During War-

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[64] Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," 133-134.

[65] Douglas Laycock, "The Clear and Present Danger Test," *Journal of Supreme Court History* 25, no. 2 (2000), 163, 181. Accessed from http://supremecourthistory.org/assets/pub_journal_2000_vol_2.pdf

[66] Letter from Learned Hand to Oliver Wendell Holmes, Jr. (June 22, 1918), quoted in Healy, *The Great Dissent,* 22-23.

[67] *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD

[68] Learned Hand to Oliver Wendell Holmes, Jr. (late March, 1919), quoted in Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," Stanford Law Review 27, no. 3 (February 1975): 758-759. Accessed from https://heinonline.org/HOL/P?h=hein.journals/stflr27&i=737

[69] Oliver Wendell Holmes, Jr. to Learned Hand (April, 1919), quoted in Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine," 759-760.

[70] Oliver Wendell Holmes, Jr., to Fredrick Pollock (November 7, 1914), in Howe, ed. *Holmes-Pollock Letters*, 1:223-224.

[71] Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech," 37.

[72] Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech," 38.

time," Chafee argued that the purpose of the First Amendment was to allow all people to express their viewpoints, thereby furthering the search for truth. He argued that the government could only ban types of speech that came close enough to inciting illegal actions, and severely criticized Holmes by name.[73] In a 1922 letter, Holmes answered Chafee's question about how he developed the clear and present danger test by saying, "The expression that you refer to was not helped by any book that I know-I think it came without doubt after the later cases (and probably you-I do not remember exactly) had taught me…"[74] In other words, Holmes explicitly recognized that Chafee likely influenced him to reject the common law, prior restraint-based idea of free speech in favor of his clear and present danger test. Given Chafee's criticisms of Holmes and Holmes's own statements, it is likely that Chafee helped change Holmes's free speech ideas.

Clear and Present Danger After Holmes

In the 1930s and 1940s, a more civil liberties-conscious Supreme Court accepted Holmes's clear and present danger test and expanded its applicability beyond internal security issues. In *Whitney v. California*, Holmes's longtime Supreme Court colleague Louis Brandeis further developed the clear and present danger test that Holmes had created.[75] In his opinion, Brandeis explained that speech must threaten clear, imminent, and serious danger before the government could restrict it under the clear and present danger test.[76] The Court that would apply this version of the test was more committed to freedom of speech than previous Supreme Courts had been. President Franklin Roosevelt appointed several justices who supported expanded civil liberties (often including freedom of speech), including Benjamin Cardozo (1932), Hugo Black (1937), William O. Douglas (1939), Felix Frankfurter (1939), Frank Murphey (1940), and Wiley Rutledge (1943).[77] Combined with Brandeis and Harlan Fiske Stone, this gave civil liberties a majority on the Court by 1940.[78] This newly-composed Court began to apply the clear and present danger test to a wider scope of issues than the internal security issues Holmes had originally used the test for. For instance, Bridges v. California (decided in 1941) reversed the conviction of labor agitator Harry Bridges and the editors of the Los Angeles Times for contempt of court by publishing about pending state court cases. The Supreme Court found that the dangers the speech threatened were not serious, and therefore the state could not restrict that speech under the clear and present danger test.[79] *West Virginia State Board of Education v. Barnette* (decided in 1943) struck down a law that prohibited school children from refusing to salute the American flag. In his majority opinion, Justice Robert H. Jackson declared that refusing to salute the flag did

[73] Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech," 41-42.
[74] Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922), quoted in Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," 101-102.
[75] Collins, *The Fundamental Holmes*, 355.
[76] *Whitney v. California*, 274 U.S. 357 (1927). Accessed from https://www.law.cornell.edu/supreme-court/text/274/357#writing-USSC_CR_0274_0357_ZC
[77] Kelly et. all, *The American Constitution*, front matter.
[78] Kelly et. all, *The American Constitution*, 520.
[79] Kelly et. all, *The American Constitution,* 531.

not constitute a clear and present danger to the United States.[80] Through cases like these, the newly-configured Supreme Court of the 1930s and 1940s expanded the reach of the clear and present danger test.

In the 1950s, the Cold War encouraged a return to suppressing speech that criticized the government and brought about a landmark case that led to the death of the clear and present danger test. After the discovery of several Communist spies working to sabotage the United States, the free speech of American Communists became a hotly debated topic. Free speech libertarians used the spirit of Holmes's opinions—particularly his "marketplace of ideas" concept from *Abrams*—to argue for the Communists' right to speak. Conversely, free speech conservatives who opposed complete freedom of speech for Communists argued that the clear and present danger test could show when restricting Communist speech rights was appropriate.[81] The debate culminated in *Dennis v. United States*, a 1951 Supreme Court case addressing the convictions of twelve American Communist party leaders. To decide this case, the Court had to consider whether the Communist party itself taught ideas sufficiently dangerous to the United States to warrant restricting its leaders' free speech. While he invoked Holmes's clear and present danger test, Chief Justice Fred Vinson reinterpreted it to fit his argument to convict the Communist leaders. Specifically, Vinson argued that the Court must weigh the seriousness of the threat against the likelihood of the threat occurring. If the threat was serious enough, governments could constitutionally restrict it, even if it the illegal conduct the speech advocated was very unlikely to happen.[82] *Dennis* destroyed the usefulness of the clear and present danger test by turning several justices against the test and turning it into a "sliding scale" instead of imminent danger and subjective intent. At the same time, the Court could not overrule *Dennis* in an effort to reclaim the test because of popular support for *Dennis's* anti-Communist ruling. As a result, the Court had to abandon the clear and present danger test and find a new method of finding the limits of constitutional free speech.[83]

In the 1960s, the Supreme Court developed the "Imminent Lawlessness" test to replace the clear and present danger test. The liberal Supreme Court under Earl Warren in the 1960s finally brought about the triumph of libertarian views of free speech on internal security issues. This triumph happened largely because of the decline in anti-Communist fear in Americans in the late 1950s, and because new Supreme Court justices Arthur Goldberg and Abe Fortas (appointed in the early 1960s) gave the libertarians on the Court a majority.[84] In *Brandenburg v. Ohio* (1969), the Court struck down an Ohio statute under which the state convicted a member of the Ku Klux Klan [of what]. In this case, the Court overruled *Whitney v. California*, formally nullifying the clear and present danger test. The new imminent lawlessness test took the "present danger" element of the CPD test and combined it with "incitement" from Learned Hand's Masses opinion during World War I. The result was a test that al-

[80] Kelly et. all, *The American Constitution*, 530.
[81] Kelly et. all, *The American Constitution*, 560.
[82] Kelly et. all, *The American Constitution*, 571.
[83] Laycock, "The Clear and Present Danger Test," 179-181.
[84] Kelly et. all, *The American Constitution*, 574.

lowed the state to prohibit and punish a few types of speech while completely protecting most types of speech. This signified a clear break with the clear and present danger test, which attempted to balance individual rights and state interests.[85] Though *Brandenburg* rejected Holmes's test, it arguably vindicated his philosophy of free speech. As legal scholar Robert Bork has noted:

> The law of free speech we know today grows out of the Supreme Court decisions following World War I – Schenck v. United States, Abrams v. United States, Gitlow v. New York, Whitney v. California – not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justices Holmes and Brandeis….The great Smith Act cases of the 1950's, Dennis v. United States, as modified by Yates v. United States, and, more recently, in 1969, Brandenburg v. Ohio (voiding the Ohio criminal syndicalism statute), mark the triumph of Holmes and Brandeis.[86]

Though the 1960s Supreme Court rejected the test in *Brandenburg*, it built upon Holmes's first steps toward a broader view of free speech.

In summary, Oliver Wendell Holmes, Jr. changed the face of constitutional free speech in the United States while showing both change and continuity in his free speech views. Holmes's legal training caused him to accept the traditional bad tendency interpretation of the Constitution's free speech clause, but his Civil War experience encouraged a skeptical mindset that was willing to consider alternative approaches. On one hand, his common law writings on criminal attempts and liability for privileged conduct shaped his interpretation of the Free Speech Clause. On the other hand, only the Espionage Cases convinced Holmes to abandon the common law bad tendency test in favor of his own clear and present danger test. Not until even later, in *Abrams v. United States*, did Holmes begin to openly champion free speech and write dissents in favor of unpopular speakers. Holmes's clear and present danger test expanded beyond internal security to other areas of free speech before facing its downfall during the Cold War in *Dennis v. United States*. Though *Brandenburg v. Ohio* nullified the test in 1969, the new imminent lawlessness test retained Holmes's basic principle of protecting speech that was unpopular but not seriously dangerous. Though Holmes is known as one of the greatest legal thinkers in American history for his many contributions to American law, his contributions to free speech may be his most important accomplishment. His clear and present danger test changed the direction of American free speech jurisprudence and introduced the expansive free speech rights found in modern constitutional law.

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[85] Laycock, "The Clear and Present Danger Test," 179-181.

[86] Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47, no. 1 (Fall 1971): 23, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2720&context=ilj.

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