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The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence

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THE DARK SIDE OF THE FORCE: THE LEGACY OF JUSTICE HOLMES FOR FIRST AMENDMENT JURISPRUDENCE

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ABSTRACT

Modern First Amendment jurisprudence is deeply paradoxical. On one hand, freedom of speech is said to promote fundamental values such as individual self-fulfillment, democratic deliberation, and the search for truth. At the same time, however, many leading decisions protect speech that appears to undermine these values by attacking the dignity and personality of others or their status as full and equal members of the community. In this Article, I explore where this Jekyll-and-Hyde quality of First Amendment jurisprudence comes from. I argue that the American free speech tradition consists of two very different strands: a liberal humanist view that emphasizes the positive values promoted by free speech, and a darker vision that is rooted in the jurisprudence of Justice Oliver Wendell Holmes. Holmes understands free speech as part of a struggle for power between different social groups—a struggle that ultimately can be resolved only by force. After sketching the liberal humanist view, I trace the development of Holmes's position, which is grounded in his Darwinian understanding of human life and in his deeper view that all phenomena in the universe are governed by force. Next, I evaluate the Holmesian approach and discuss its implications for a wide range of contemporary issues, from hate speech and pornography to the *Citizens United* decision on electoral advertising by corporations. I conclude that Holmes's view does not provide an adequate rationale for free speech, and that it undermines the liberal humanist principles that should be regarded as central to the First Amendment.

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> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.
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> —Justice John Marshall Harlan[1]

[1] Cohen v. California, 403 U.S. 15, 24 (1971).

> 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.
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> —Justice Oliver Wendell Holmes[2]

INTRODUCTION

The right to free expression is central to our constitutional order.[3] Yet there is something deeply paradoxical about modern First Amendment jurisprudence. On one hand, freedom of speech is said to promote fundamental values such as individual self-fulfillment, democratic deliberation, and the search for truth. These values are vindicated in leading decisions like *West Virginia State Board of Education v. Barnette*[4] and *New York Times Co. v. Sullivan*.[5] At the same time, however, many important cases extend constitutional protection to expression that appears to undermine those values, such as racist hate speech,[6] violent and degrading pornography,[7] and gross invasions of privacy.[8] In this way, our free speech jurisprudence seems highly conflicted: in some cases, courts interpret the First Amendment to promote its core values, while in others they insist that speech is entitled to protection despite the harm that it may cause to those values.

In response, some people would say that this paradox is illusory. Some scholars who take a deontological approach to the First Amendment assert that the state must respect an individual's right to speak even when it causes serious harm.[9] Similarly, some of those who take a more interest-oriented approach argue that the values that

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[2] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[3] The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[4] 319 U.S. 624 (1943) (holding that individuals cannot be compelled to salute the American flag).

[5] 376 U.S. 254 (1964) (holding that the First Amendment protects all good-faith criticism of the official conduct of public officials).

[6] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down an ordinance banning cross-burning); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (holding that a neo-Nazi group had a First Amendment right to march in a Jewish neighborhood), *cert. denied*, 439 U.S. 916 (1978).

[7] *See, e.g.*, Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (striking down an ordinance that restricted pornography on the grounds that it violated women's civil rights), *aff'd mem.*, 475 U.S. 1001 (1986).

[8] *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989) (holding that a newspaper had a First Amendment right to publish the name of a rape victim).

[9] *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 55 (1989) [hereinafter BAKER, HUMAN LIBERTY]; C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 989–92 (1997) [hereinafter Baker, *Harm*].

are promoted by free speech categorically outweigh those on the other side.[10] On both of these views, the harm that flows from particular forms of expression is simply the price that we pay for a free society. In my judgment, however, the paradox of First Amendment jurisprudence cannot be dismissed so easily. When speech invades the dignity or privacy of other people or attacks their status as human beings and citizens, it injures interests "of the highest order."[11] Indeed, as I shall show, these interests derive from the same principles that justify freedom of speech itself, such as individual self-realization and democratic community.[12] For these reasons, it is not clear that the First Amendment should always be interpreted to protect speech that causes serious injury to others.

In short, First Amendment jurisprudence has a certain Jekyll-and-Hyde quality. The purpose of this Article is to explore where this quality comes from. I shall argue that the American free speech tradition actually consists of two very different strands. One is a liberal humanist view that emphasizes the positive values that are promoted by freedom of speech.[13] The other is a darker vision that is rooted in the jurisprudence of Justice Holmes. Holmes rejects the values of human freedom and dignity on which the liberal humanist view rests. Instead, he holds that free speech is best understood as part of the struggle for power between different social groups—a struggle that ultimately can be resolved only by force.[14]

In Part I of this Article, I provide an overview of the liberal humanist approach to the First Amendment—an approach that I have described and defended in depth elsewhere.[15] The next two parts contrast this view with that of Holmes. In Part II, I discuss his early, restrictive approach to free speech in cases like *Schenck v. United States*,[16] in which he took the position that speech could be restricted whenever it

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[10] *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) ("The First Amendment . . . reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."); Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("[T]he First Amendment's unequivocal command . . . shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 57 (1960) (The First Amendment expresses the view "that freedom is always expedient.").

[11] *Florida Star*, 491 U.S. at 537 (acknowledging that ensuring the privacy of rape victims is an "interest of the highest order") (internal quotation marks and citation omitted).

[12] *See infra* Part IV.C.

[13] In this Article, I use the term "liberal" to refer not to a current political orientation, but rather to the American tradition of individual liberty and democratic self-government that runs from the colonial era to the present—a tradition that embraces contemporary progressives, conservatives, and libertarians as well as liberals.

[14] While in some areas this view would protect more speech than the liberal humanist view, in others it would protect less speech. *See infra* Part V.B–C.

[15] *See* STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY (2008) [hereinafter HEYMAN, FREE SPEECH].

[16] 249 U.S. 47 (1919).

endangered other social interests.[17] In Part III, I explore his later approach in *Abrams v. United States*[18] and *Gitlow v. New York*.[19] In those cases, Holmes contended that free speech was necessary so that society could arrive at the truth—a truth that he equated with the ideas that would emerge from "the competition of the market,"[20] and ultimately with the beliefs that would be "accepted by the dominant forces of the community."[21] Finally, in Parts IV and V, I evaluate the Holmesian view and discuss its implications for a wide range of current First Amendment problems, including pornography, invasion of privacy, hate speech, corporate electoral advertising, private and artistic expression, and speech by public employees. I conclude that Holmes's view does not provide an adequate rationale for free speech and that it undermines the liberal humanist values that provide a much stronger justification. For these reasons, I argue that First Amendment jurisprudence should move away from the Holmesian view and more fully embrace the liberal humanist position.

I. THE LIBERAL HUMANIST APPROACH TO FREE EXPRESSION

A. Liberal Humanism and the Natural Rights Tradition

The origins of the liberal humanist strand of First Amendment jurisprudence may be found in the theory of natural rights and the social contract that was widely accepted in eighteenth-century England and America.[22] This view provided the theoretical basis for the Declaration of Independence, the first state constitutions, the federal Constitution, and the Bill of Rights, as well as the intellectual framework for leading legal texts such as Sir William Blackstone's *Commentaries on the Laws of England* and Chancellor James Kent's *Commentaries on American Law*.[23] A brief review of natural rights theory will provide valuable background not only for understanding the modern liberal humanist approach to the First Amendment, but also for understanding Holmes's legal philosophy, which was defined in opposition to traditional conceptions of natural rights.

Natural rights theory is based on the idea of self-determination.[24] In contrast to inanimate objects, whose motions are determined by the laws of physics, human beings

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[17] *Id.* at 52.

[18] 250 U.S. 616 (1919).

[19] 268 U.S. 652 (1925).

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

[21] *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

[22] A more comprehensive account of this history may be found in HEYMAN, FREE SPEECH, *supra* note 15, at 7–22.

[23] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (St. George Tucker ed., Phila., Birch & Small 1803); JAMES KENT, COMMENTARIES ON AMERICAN LAW.

[24] *See* RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY (5th ed. 1776), *reprinted in* POLITICAL WRITINGS 20, 22 (D.O. Thomas ed., 1991).

are capable of thinking for themselves and of determining their actions in accord with reason.[25] This capacity is the foundation of the natural liberty of mankind, which consists in the power to control one's own person, to direct one's own actions, and to acquire, possess, and dispose of external things.[26] These are the classic natural rights of life, liberty, and property.[27]

Reason not only provides the basis for natural liberty but also prescribes its limits. Because all individuals are equally free, the law of nature and reason teaches that no one should deprive another of his rights.[28] In a state of nature, however, individual rights would be radically insecure because there would be no effective means of defending them against aggressors who had superior force.[29]

For the natural rights tradition, the solution to this problem lies in the social contract. Through this agreement, individuals undertake to form a community and to invest it with the power to make and enforce laws for the protection of their rights against invasion by others.[30] On this view, law has an important moral dimension, for it is concerned with the protection of rights and the prevention or punishment of wrongs.[31]

In addition to explaining the nature of law and government, natural rights theory provides an account of fundamental rights. When individuals enter into society, they alienate a portion of their natural liberty in return for the protection they receive from the community.[32] At the same time, they retain other aspects of their liberty, which are inalienable.[33] The difference between these two forms of liberty can best be understood in terms of a distinction between the internal and the external. External interaction can bring individuals into conflict with one another. Thus, two persons may both claim the same property, or one of them may demand compensation for an injury allegedly caused by the other. In a state of nature, disputes of this sort ultimately can be resolved only by force and violence.[34] It is precisely to avoid this condition that

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[25] *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. XXI, §§ 4–13, at 234–40 (Peter H. Nidditch ed., Clarendon Press 1975) (1700) [hereinafter LOCKE, HUMAN UNDERSTANDING].

[26] *See id.*, §§ 51–52, at 266–67; JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 4, at 269 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698) [hereinafter LOCKE, GOVERNMENT]; 1 BLACKSTONE, *supra* note 23, at *125, *129–40.

[27] *See* LOCKE, GOVERNMENT, *supra* note 26, bk. II, § 123, at 350; 1 BLACKSTONE, *supra* note 23, at *129–40; 2 KENT, *supra* note 23, at *1–37.

[28] *See* LOCKE, GOVERNMENT, *supra* note 26, bk. II, § 6, at 270–71.

[29] *Id.*, §§ 123–27, at 350-52; 1 BLACKSTONE, *supra* note 23, at *125.

[30] LOCKE, GOVERNMENT, *supra* note 26, bk. II, §§ 87–89, 127–31, at 323–25, 352–53.

[31] 1 BLACKSTONE, *supra* note 23, at *122. As Blackstone explains, the law of torts is concerned with private wrongs or those against individuals, while criminal law is concerned with public wrongs or those against the community. *Id.*

[32] *See* LOCKE, GOVERNMENT, *supra* note 26, bk. II, §§ 128–31, at 352–53; 1 BLACKSTONE, *supra* note 23, at *125.

[33] *See, e.g.*, LOCKE, GOVERNMENT, *supra* note 26, bk. II, § 131, at 353.

[34] *See id.*, § 125, at 351.

civil society is formed.[35] When individuals enter into the social contract, they give up the unrestrained power to act as they see fit, as well as the power to determine whether others have violated their rights.[36] These powers are transferred to the political community, which is vested with the authority to make laws regulating the liberty and property of its members and to resolve disputes about these matters.[37] In this way, rights come to be determined and disputes to be resolved not by force but by the reasoned judgment of the community, or of the governing bodies that it has established.[38]

For the natural rights tradition, then, the proper role of law and government is confined to the realm of external interaction between individuals.[39] By contrast, other matters fall within the sphere of internal freedom. On this view, there is a realm of purely private conduct that is beyond the legitimate authority of the state.[40] And this is even more true of the realm of thought and belief.[41] At the deepest level, thought is constitutive of individual personality: the consciousness of one's self over time, the ability to determine one's actions, and the capacity to be responsible for them are what make one a person.[42] Moreover, the thoughts and beliefs that an individual holds cause no external injury to others.[43] For these reasons, freedom of thought and belief are inalienable rights.[44] Although the state must be able to use force to implement the laws and to adjudicate external disputes, coercion is wholly out of place in the internal realm of thought and belief, which cannot be determined by force but only by reason.[45]

The right to freedom of speech rests on a similar basis. Although speech involves interaction with others, this is essentially different than the sort of interaction that

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[35] *See id.* § 127, at 352.

[36] *See id.*, §§ 87–89, 128–30, at 323–25, 352–53.

[37] *See id.*

[38] *See id.*, §§ 87–89, at 323–25.

[39] *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION, *in* A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 12–13 (Mark Goldie ed., Liberty Fund 2010) (1690) [hereinafter LOCKE, TOLERATION].

[40] *See* 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 428 (Ronald Hamowy ed., Liberty Fund 1995) (1755) [hereinafter CATO'S LETTERS] (Letter No. 62, Jan. 20, 1721); 1 BLACKSTONE, *supra* note 23, at *123–24.

[41] *See, e.g.*, LOCKE, TOLERATION, *supra* note 39, at 12–14; 1 CATO'S LETTERS, *supra* note 40, at 428 (Letter No. 62, Jan. 20, 1721).

[42] *See* LOCKE, HUMAN UNDERSTANDING, *supra* note 25, bk. II, ch. XXVII, §§ 9, 26, at 335, 346–47.

[43] *See* LOCKE, TOLERATION, *supra* note 39, at 45–46. As Thomas Jefferson puts it, "[I]t does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." THOMAS JEFFERSON, *Notes on the State of Virginia* query XVII (1787), *reprinted in* WRITINGS 123, 285 (Merrill D. Peterson ed., Library of Am. 1984).

[44] *See* LOCKE, HUMAN UNDERSTANDING, *supra* note 25, bk. II, ch. XXI, § 10, at 353; LOCKE, TOLERATION, *supra* note 39, at 13; James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 1 (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

[45] *See* LOCKE, TOLERATION, *supra* note 39, at 12–13; VA. DECLARATION OF RIGHTS of 1776, art. XVI.

requires regulation by the law of the state. The function of speech is to communicate ideas from one mind to another.[46] In this way, speech has the same inward quality as thought. It follows that, as a general matter, law and force are out of place here as well.[47]

In addition to being inalienable rights of individuals, freedom of speech and thought have an important political function. According to the natural rights tradition, all political power originally belongs to the people.[48] But the business of law and government cannot be effectively transacted by the community as a whole. For this reason, the community institutes a government and entrusts it with the power to make and enforce laws.[49] Yet the community always retains the power to oversee the ways in which the government uses this authority.[50] Moreover, if the people are wise, they will delegate power only for limited periods of time and only to persons whom they elect. Freedom of speech and press are key means by which the people oversee the conduct of public affairs and exercise their power within an elective system of government.[51] This is what Americans of the founding generation meant when they declared that those freedoms were "essential to the security of freedom in a state."[52]

For the natural rights tradition, people are entitled to liberty of speech, thought, and belief not only as private individuals and republican citizens, but also as intellectual and spiritual beings whose happiness both in this world and the next depends on their ability to inquire into and follow truth.[53] Accordingly, late eighteenth-century Americans conceived of these freedoms in broad terms.[54] As the Jeffersonian jurist St. George Tucker put it, liberty of speech encompassed

> the . . . right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; and of inquiring into and . . . examining the nature of truth, whether moral or metaphysical; the expediency or inexpediency of all public measures, with their tendency and probable effect;

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[46] *See* LOCKE, HUMAN UNDERSTANDING, *supra* note 25, bk. III, ch. I, § 2, at 402; *id.* ch. II, §§ 1–2, at 404–05; St. George Tucker, *Of the Right of Conscience; and of the Freedom of Speech and of the Press*, *in* 1 BLACKSTONE, *supra* note 23, app., note G, at 11.

[47] As I shall explain, however, some acts of speech violate the rights of others, and in such cases the law properly can intervene. *See infra* text accompanying notes 55–58.

[48] *See, e.g.*, LOCKE, GOVERNMENT, *supra* note 26, bk. II, §§ 87–89, 127–32, at 323–35, 352–54; PENN. CONST. of 1776, art. IV.

[49] LOCKE, GOVERNMENT, *supra* note 26, bk. II, §§ 132, 134, at 354–55.

[50] *Id.*, §§ 149, 240, at 366–67, 426–27.

[51] *See, e.g.*, 1 CATO'S LETTERS, *supra* note 40, at 111 (Letter No. 15, Feb. 4, 1720); James Madison, *Report on the Virginia Resolutions* (1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 44, at 141, 144–46.

[52] MASS. CONST. of 1780, pt. 1, art. XVI.

[53] *See, e.g.*, LOCKE, TOLERATION, *supra* note 39, at 13–16, 44–48.

[54] *See, e.g.*, Tucker, *supra* note 46, at 11.

> the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name.[55]

As this passage indicates, however, the natural rights tradition did not regard freedom of speech as an absolute. Although speech may be described as internal in the sense that it communicates thoughts from one mind to another, it is also capable of causing the kinds of harm that are properly the concern of the state. For example, threats and incitement can invade an individual's right to personal security, while defamation can wrongfully injure her right to reputation.[56] Even strong libertarians and republicans like Tucker believed that in such cases the law could properly restrict speech to protect the rights of others.[57] Blackstonian conservatives went further and held that, like other forms of liberty, freedom of speech and press were also subject to regulation to promote the public good.[58] Both of these views had many adherents in eighteenth and nineteenth century America.[59]

B. Liberal Humanism in Contemporary First Amendment Jurisprudence

The natural rights tradition had a strong influence not only on the adoption of the Bill of Rights, but also on the enactment of the Fourteenth Amendment—the provision that has made the Bill of Rights applicable to the states.[60] In the decades after the Civil War, natural rights thought increasingly fell into disfavor.[61] Over the past half-century, however, the idea of fundamental rights has undergone a substantial revival,

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[55] *Id.* A similarly broad view can be found in a well-known statement by the First Continental Congress in 1774, which declared that

> [t]he importance of [the freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

Letter from the Continental Congress to the Inhabitants of the Province of Quebec (Oct. 26, 1774), *reprinted in* NEIL H. COGAN, CONTEXTS OF THE CONSTITUTION 693, 695 (1999).

[56] *See, e.g.*, 3 BLACKSTONE, *supra* note 23, at *120 (discussing threats); *id.* at *123–26 (discussing defamation).

[57] *See, e.g.*, Tucker, *supra* note 46, at 11, 28–30; HEYMAN, FREE SPEECH, *supra* note 15, at 9, 12, 19.

[58] *See* 4 BLACKSTONE, *supra* note 23, at *151–52; HEYMAN, FREE SPEECH, *supra* note 15, at 9–11.

[59] *See* HEYMAN, FREE SPEECH, *supra* note 15, at 9, 12, 19.

[60] *See id.* at 20–22 & 216 n.58.

[61] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 116, 138–39, 153–59, 204–05 (1992).

not only in the First Amendment area but also in other areas of constitutional law[62] and political thought.[63] Although we no longer speak in terms of "natural rights," the main outlines of the classical view are still recognizable in the liberal humanist strand of contemporary First Amendment jurisprudence.

First, like the classical view, contemporary jurisprudence regards freedom of speech and thought as aspects of individual liberty. At the heart of this liberty is "a right of self-determination in matters that touch individual opinion and personal attitude."[64] That right means, to begin with, that the government may not use its power to intrude into the inner realm of thought and belief. The leading case is *West Virginia State Board of Education v. Barnette*,[65] in which the Supreme Court declared that the efforts of local authorities to compel school children to salute the American flag in violation of their religious beliefs "transcends constitutional limitations on [the government's] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[66]

In addition to safeguarding the inner lives of individuals, the First Amendment protects the positive right to form and express one's own thoughts and feelings. As Thomas I. Emerson puts it:

> The right to freedom of expression . . . derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. Man is distinguished from other animals principally by the qualities of his mind. He has powers to reason and to feel in ways that are unique in degree if not in kind. He has the capacity to think in abstract terms, to use language, to communicate his thoughts and emotions, to build a culture. He has powers of imagination, insight and feeling. It is through development of these powers that man finds his meaning and his place in the world.[67]

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[62] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a constitutional right to privacy that includes the use of contraception); Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy extends to abortion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming the basic holding of Roe); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down antisodomy laws under the Fourteenth Amendment); McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is a fundamental right that applies to the states).

[63] *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

[64] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).

[65] *Id.*

[66] *Id.* at 642.

[67] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) [hereinafter Emerson, *General Theory*].

For Emerson, it follows that individuals have a right to engage in self-expression, and that a denial of this right is "an affront to the dignity of man" and "a negation of man's essential nature."[68]

A second contemporary justification for the First Amendment focuses not on individual liberty but on the requirements of democratic self-government. This view finds classic expression in the writings of Alexander Meiklejohn.[69] For Meiklejohn, citizens must be able to speak freely on matters of public concern so that all relevant views may be heard.[70] Only in this way can the polity reach wise and fully informed decisions on public issues.[71] The First Amendment is designed to prevent the "*mutilation of the thinking process of the community*" that results when government censors expression that it considers "false or dangerous."[72]

Meiklejohn's view is sometimes said to be an instrumentalist one, which seeks to protect free speech simply as a means to informed decision-making.[73] But in fact the basis of his view lies deeper. According to Meiklejohn, "Whether it be in the field of individual or of social activity, men are not recognizable as men unless, in any given situation, they are using their minds to give direction to their behavior."[74] In this way his argument for free speech is connected with a conception of human nature and dignity—"the dignity of men who govern themselves."[75] Democracy is possible only on the basis of an "attitude of mutual regard" among free and equal individuals who

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[68] *Id.* For some other leading statements of the individual liberty rationale, see BAKER, HUMAN LIBERTY, *supra* note 9; MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9-86 (1984); DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 165–227 (1986); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). In recent years, Vincent Blasi has advanced a related rationale: that expressive liberty should be protected because it tends to promote courage, independence, open-mindedness, and other character traits that make a valuable contribution to social and political well-being in modern society. *See, e.g.*, Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT : FREE SPEECH IN THE MODERN ERA 61 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). This essay is reprinted in *Ideas of the First Amendment*, a casebook which contains a wealth of material on liberal-humanist and other theories of free expression. VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT 929 (2006).

[69] *See, e.g.*, MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 10; Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961) [hereinafter Meiklejohn, *Absolute*]. Other important statements of this view include JOHN HART ELY, DEMOCRACY AND DISTRUST 105–16 (1980); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

[70] MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 10, at 24–28.

[71] *Id.* at 26–28.

[72] *Id.* at 27.

[73] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785–87 (2d ed. 1988).

[74] MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 10, at 13.

[75] *Id.* at 68.

"have succeeded in binding themselves together into a fellowship" that is committed to being a self-governing community.[76]

A third rationale holds that freedom of speech and thought are essential to the "search for truth"—an argument that is most fully developed in John Stuart Mill's essay *On Liberty*.[77] Mill asserts that, "on every subject on which difference of opinion is possible," one can determine the truth only by considering competing views.[78] This is true even in the natural sciences, in which alternative explanations of the same phenomenon can always be advanced.[79] And it is especially true in the areas of "morals, religion, politics, [and] social relations."[80] The truth about human well-being is inherently complex and multisided: it can be apprehended only through an effort to reconcile opposing values such as wealth and equality, cooperation and competition, sociality and individuality, and liberty and order.[81] Accordingly, Mill argues that

> the only way in which . . . human being[s] can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind.[82]

In this way, Mill believes that free speech is required for the discovery of truth on matters of deep concern to human beings.[83] It would be a mistake, however, to conclude that Mill values free speech only for the objective truths that it may reveal. Instead, he believes that it is no less valuable for the impact that it has on the minds and characters of those who engage in it. In *On Liberty*, he maintains that "the end of man . . . is the highest and most harmonious development of his powers to a complete and consistent whole."[84] By thinking for ourselves and by participating in free and open discussion with others, we develop our intellectual faculties and in this way attain "the dignity of thinking beings."[85] Moreover, no matter how valid a particular belief may be, "if it is not fully, frequently, and fearlessly discussed," it will tend to degenerate into "a dead dogma" rather than a "living truth."[86] Thus, free discussion is necessary so that individuals may come to have a "lively apprehension" of the

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[76] *Id.* at 69–70.

[77] JOHN STUART MILL, ON LIBERTY 27 (David Spitz ed., W.W. Norton 1975) (1859).

[78] *Id.* at 36.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 46.

[82] *Id.* at 21.

[83] *Id.* at 28.

[84] *Id.* at 54 (quoting and translating WILHELM VON HUMBOLDT, THE SPHERE AND DUTIES OF GOVERNMENT 11–13 (1851)).

[85] *Id.* at 34.

[86] *Id.* at 34–35.

meaning of the beliefs that they profess, and so that those beliefs may have a real effect on their feelings and conduct.[87] In all of these ways, liberty of thought and discussion are vital not only for the "intellectual" but also for the "moral" "well-being of mankind."[88]

In short, the contemporary liberal humanist view, like the classical view, holds that freedom of speech and thought are justified because of their relation to individual liberty, democratic self-government, and the search for truth. Although it is sometimes said that these rationales are opposed to one another,[89] they are more commonly regarded as mutually reinforcing elements of a unified theory of free expression.[90] One of the most eloquent expressions of this view can be found in the quotation from Justice Harlan's opinion in *Cohen v. California*[91] that forms the first epigraph to this Article.

II. HOLMES'S EARLY FREE SPEECH JURISPRUDENCE

In many ways, Holmes's approach to law and freedom of expression is diametrically opposed to the liberal humanist theory that I have just outlined. In this Part, I explore his general views on law as well as his early views on free speech, as expressed in opinions like *Schenck v. United States*[92] and *Debs v. United States*.[93] These views provide essential background for understanding his later First Amendment jurisprudence, which is the subject of Part III.[94]

A. Holmes's Philosophy of Law

Holmes's disagreement with liberal humanism went to the very root of that view: the idea that we are free beings who have a capacity for self-determination.[95] As a determinist, Holmes denied the idea of free will,[96] and instead held that human action

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[87] *Id.* at 38–40; *see also id.* at 43, 50–51.

[88] *Id.* at 38, 50.

[89] For example, Meiklejohn insists that the First Amendment is concerned only with democracy, not with individual self-expression. *See* MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 10, at 54–56.

[90] *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970) [hereinafter EMERSON, SYSTEM].

[91] 403 U.S. 15 (1971).

[92] 249 U.S. 47 (1919).

[93] 249 U.S. 211 (1919).

[94] For an excellent collection of materials on Holmes and the First Amendment, see THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER (Ronald K.L. Collins ed., 2010).

[95] *See, e.g.*, Letter from Oliver Wendell Holmes to Frederick Pollock (Aug. 30, 1929), *in* 2 HOLMES-POLLOCK LETTERS 251, 252 (Mark DeWolfe Howe ed., 1941).

[96] *See, e.g.*, *id.*; *see also* H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE 135 (1984).

ultimately was produced by the same forces and was subject to the same laws of cause and effect that governed all other phenomena in the universe.[97]

In dismissing the ideas of human freedom and self-determination, Holmes also rejected the principles that were said to flow from them, especially the concept of natural rights. In a 1918 essay entitled *Natural Law*, Holmes observed that even "[t]he most fundamental of the supposed pre[e]xisting rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it."[98] Likewise, he poured scorn on the notion of human dignity, as expressed, for example, in the Kantian injunction to treat every person as an end in himself.[99] In a 1926 letter to his friend John C.H. Wu, a legal philosopher in the idealist tradition, Holmes wrote:

> I don't believe that it is an absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it. Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough.[100]

These views led Holmes to develop a fundamentally different conception of law. As I have noted, the traditional conception of law was based on the idea of human liberty.[101] Actions were understood as expressions of free will.[102] Individuals had the right to do as they chose so long as they did not act wrongfully by violating the laws of the community, which were made to protect the rights of others and to promote the common good.[103] In this way, law was about rights and wrongs.[104]

This moral dimension of traditional legal theory was anathema to Holmes, who believed that it only obscured the nature of law.[105] Indeed, Holmes sometimes suggested

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[97] *See, e.g.*, OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 180 (1920) [hereinafter HOLMES, *Path*]; OLIVER WENDELL HOLMES, *Ideals and Doubts*, *in id.* at 303, 305 [hereinafter HOLMES, *Ideals and Doubts*].

[98] OLIVER WENDELL HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 310, 314 [hereinafter HOLMES, *Natural Law*]. For an insightful discussion of this essay, see MICHAEL H. HOFFHEIMER, JUSTICE HOLMES AND THE NATURAL LAW 11–14 (1992).

[99] *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 37–40 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881) [hereinafter HOLMES, COMMON LAW]; HOLMES, *Ideals and Doubts*, *supra* note 97, at 304.

[100] Letter from Oliver Wendell Holmes to John C.H. Wu (Aug. 26, 1926), *in* THE MIND AND FAITH OF JUSTICE HOLMES 431, 431 (Max Lerner ed., 1943) [hereinafter MIND AND FAITH].

[101] *See supra* text accompanying notes 24–26.

[102] *See* 1 BLACKSTONE, *supra* note 23, at *125.

[103] *See id.*

[104] *See id.* at *122.

[105] *See, e.g.*, HOLMES, *Path*, *supra* note 97, at 169–79.

that it would be desirable "if every word of moral significance"—such as "rights," "duties," "malice," "intent," and so on—"could be banished from the law altogether."[106]

By contrast, Holmes adopted what he regarded as a more rigorous approach to legal analysis, an approach that reflected the tenets of scientific positivism. He defined an "act" as "a voluntary muscular contraction, and nothing else."[107] On this view, acts have no inherent moral quality; instead, as he wrote in *Aikens v. Wisconsin*,[108] an act "derives all its character from the consequences which will follow it under the circumstances in which it was done."[109] Likewise, Holmes understood law in strictly nonmoral and instrumentalist terms: it consisted of the use of "the public force,"[110] and its goal was to bring about the consequences that were most strongly desired by the community.[111] Rights and duties were not the foundation of law, but were merely the terms that were used to describe the fact that, for consequentialist reasons, the state had decided to protect certain interests or to impose certain burdens.[112]

B. Holmes's Early Views on Freedom of Speech

Against this background, it is not difficult to understand Holmes's early views on the freedom of speech. For Holmes, speaking was simply one form of external action. An act of speech had no value in itself, but derived all of its value from the consequences that it produced. If those consequences were likely to be harmful, there was no reason why the speech should be immune from restriction. Instead, "we should deal with the act of speech as we deal with any other overt act that we don't like."[113] As Holmes told Judge Learned Hand in the summer of 1918, free speech was no more sacrosanct than any other form of liberty, such as "freedom from vaccination."[114]

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[106] *See id.* at 171, 179.

[107] HOLMES, COMMON LAW, *supra* note 99, at 73–74.

[108] 195 U.S. 194 (1904).

[109] *Id.* at 205.

[110] *E.g.*, HOLMES, COMMON LAW, *supra* note 99, at 169; HOLMES, *Path*, *supra* note 97, at 167, 170; *see also* Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 225 n.51 (1964) ("Law means force" (quoting Letter from Oliver Wendell Holmes to Morris R. Cohen (Nov. 23, 1919), *in The Holmes-Cohen Correspondence*, 9 J. OF THE HIST. OF IDEAS 3, 17 (1948))).

[111] *See, e.g.*, HOLMES, *Path*, *supra* note 97, at 184; OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 210, 231–32, 238–39 [hereinafter HOLMES, *Law in Science*]; HOLMES, *Ideals and Doubts*, *supra* note 97, at 306–07.

[112] HOLMES, COMMON LAW, *supra* note 99, at 169; HOLMES, *Natural Law*, *supra* note 98, at 313.

[113] Letter from Oliver Wendell Holmes to Harold J. Laski (July 7, 1918), *in* 1 HOLMES-LASKI LETTERS 160, 161 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES-LASKI LETTERS].

[114] Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), *in* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 756, 756–57 (1975). Some years before, the Supreme Court had rejected a Fourteenth Amendment challenge to a compulsory vaccination law in *Jacobson*

This was the reasoning that underlay Holmes's opinion in *Schenck v. United States*,[115] the first great modern free speech case.[116] Schenck and Baer were Socialist Party officials who had printed circulars attacking the Conscription Act as well as the nation's involvement in World War I, and had mailed those circulars to men who were subject to the draft.[117] The defendants were convicted of conspiring to violate section 3 of the Espionage Act of 1917 by attempting to obstruct the draft.[118] They appealed their convictions to the Supreme Court on the ground that the circulars fell within the First Amendment freedoms of speech and press.

On March 3, 1919, the Court unanimously rejected this contention.[119] After setting out the facts, Holmes observed that "[o]f course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."[120] Turning to the constitutional issue, he wrote:

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v. Massachusetts, 197 U.S. 11, 37 (1905)—a case that Holmes was fond of citing as an illustration of the broad power that majorities should have to enact their own notions of public policy in spite of any impact this might have on individual liberty. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[115] 249 U.S. 47 (1919).

[116] Holmes also took a restrictive view in many earlier cases involving expression. *See, e.g.*, Burt v. Advertiser Newspaper Co., 28 N.E. 1, 4 (Mass. 1891) (holding that the common law privilege of fair comment in libel cases does not extend to false statements of fact accusing the plaintiff of corruption, even if the defendant reasonably believed them to be true); McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (rejecting free speech claim by a police officer who was fired for engaging in political activity with the observation that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."); Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895) ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."), *aff'd*, 167 U.S. 43 (1897); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (upholding a conviction for criminal contempt for accusing a state court of unconstitutional conduct, and asserting that the First Amendment was intended only to prevent previous restraints on speech); Fox v. Washington, 236 U.S. 273, 278 (1915) (rejecting a constitutional challenge to a conviction for encouraging violation of a state law against indecent exposure). *See generally* Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1352–60 (1984) (criticizing these opinions). In a handful of cases, Holmes took a more protective position. *See, e.g.*, Toledo Newspaper Co. v. United States, 247 U.S. 402, 422–26 (1918) (Holmes, J., dissenting) (voting to overturn a contempt conviction for newspaper articles criticizing a federal judge); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 414 (1993) (discussing Holmes's unpublished dissent in *Baltzer v. United States*, 248 U.S. 593 (1918), in which he voted to overturn a conviction for attempting to obstruct the draft by writing antiwar letters to public officials).

[117] *Schenck*, 249 U.S. at 49–50.

[118] *Id.* at 48–49.

[119] *Id.* at 52–53.

[120] *Id.* at 51.

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . 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. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[121]

Several points about this reasoning are remarkable. First, Holmes says nothing whatever about the value of free speech. Instead, he treats speech no differently than any other act, and asserts that its "character" will "depend[ ] upon the circumstances in which it is done"—a proposition for which he cites his opinion in *Aikens*.[122]

Second, this passage can be read to reflect a deterministic view of action. For Holmes, the paradigm case is that of the man who "falsely shout[s] fire in a theatre and caus[es] a panic."[123] When the theatregoers hear the cry of fire, they react in a largely instinctive way and rush for the exits. Thus, the man's speech plausibly can be said to "caus[e]" their actions with little free choice on their part. Holmes seems to regard the draftees in *Schenck* in a similar light. He says that the circulars could be "expected to have [a definite effect] upon persons subject to the draft," namely, to lead them to obstruct its implementation.[124] In this passage, Holmes does not portray the draftees as autonomous individuals who are capable of considering the arguments made in the circulars, or of deciding for themselves whether or not those arguments are persuasive or should lead them to engage in draft resistance. Nor does he consider the possibility that the circulars might lead the recipients to engage in other forms of action, such as lawful efforts to challenge the validity of the draft or to secure repeal of the Conscription Act.[125]

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[121] *Id.* at 52 (citations omitted).

[122] *Id.*

[123] *Id.*

[124] *Id.* at 51.

[125] Although the circular denounced the war and the draft in impassioned terms, even the most militant calls to action merely urged the recipients to exercise "your right to assert your opposition to the draft." *Id.* at 51; *see* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM

Finally, although Holmes asserts that words lack constitutional protection only when they "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,"[126] he makes little if any effort to show that the circulars did create such a danger. This suggests that, as formulated in *Schenck*, the "clear and present danger" test was not meant to be a very demanding one.[127] Instead, the opinion appears to allow speech to be restricted whenever it is likely to cause harm to other social interests.[128] In this way, *Schenck* provides very little protection for freedom of speech.

This conclusion is reinforced by two other Espionage Act opinions that Holmes delivered a week after *Schenck*. In *Debs v. United States*,[129] the Socialist leader and four-time presidential candidate Eugene V. Debs had been convicted of attempting to obstruct the draft by means of a speech that he made in June 1918 "at the state convention of the Socialist Party of Ohio, held at a park in Canton, Ohio, on a . . . Sunday afternoon before a general audience of 1,200 persons."[130] As Holmes observed, "The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success."[131] In the course of the speech, Debs also denounced the war, praised comrades who had gone to prison for obstructing the draft, and told his working-class audience that "you need to know that you are fit for something better than slavery and cannon fodder."[132] In contrast to the facts of *Schenck*, the main purpose of Debs's speech was not to promote opposition to the draft, and his rhetoric was not specifically directed toward men who were subject to conscription. Nevertheless, Holmes did not believe that *Debs* posed any First Amendment problem that had not already been "disposed of in *Schenck*."[133] So long as the jury could reasonably find that "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service"[134]—a test that Holmes apparently thought equivalent to *Schenck*'s "clear and present danger"—and so long as the defendant specifically intended his words to have that effect, it made no difference that encouraging draft resistance may have been only an "incidental" purpose of the speech, or that it was "part of a general program and expressions of a general and conscientious belief."[135] The clear-and-present-danger test provided no more protection in *Frohwerk v. United States*,[136] a

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OF SPEECH IN AMERICA 131 (Jamie Kalven ed., 1988). On one reading, this language simply encouraged them to contest the legality of conscription in hearings before local draft authorities, as well as to petition for repeal of the act.

[126] *Schenck*, 249 U.S. at 52.

[127] *See, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 280–81 (1997).

[128] *See, e.g.*, *id.* at 279–85.

[129] 249 U.S. 211 (1919).

[130] STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT 5 (4th ed. 2006).

[131] *Debs*, 249 U.S. at 212.

[132] *Id.* at 213–14.

[133] *Id.* at 215.

[134] *Id.* at 216.

[135] *Id.* at 214–15.

[136] 249 U.S. 204 (1919).

case in which Holmes upheld another Espionage Act conviction for publishing a series of newspaper articles that denounced conscription and expressed sympathy with the German cause.[137]

III. HOLMES'S LATER FREE SPEECH JURISPRUDENCE

A. The Transformation of Holmes's Views on Free Speech

In October 1919, less than eight months after the decisions in *Schenck* and *Debs*, the Supreme Court heard oral arguments in *Abrams v. United States*.[138] The defendants were avowed "revolutionists" and "anarchists" who had distributed leaflets warning that the American government was planning to intervene in Russia to suppress the Bolshevik revolution.[139] The leaflets called on workers to shut down the munitions factories, which were "producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom."[140] The defendants were convicted of several violations of the Espionage Act, including conspiring to encourage resistance to the United States in the war and conspiring to advocate the curtailment of things necessary for prosecution of the war.[141] Relying on *Schenck*, *Debs*, and *Frohwerk*, a majority of the Court upheld the convictions in an opinion by Justice John H. Clarke.[142] Remarkably, Holmes wrote a passionate dissent which was joined by Justice Louis D. Brandeis.[143] This opinion marked a watershed change in Holmes's views on the First Amendment.

Although the causes of this transformation have always been something of a mystery, several factors seem to have played a role. First, Holmes apparently felt a good deal of ambivalence about *Debs* and the other cases decided in March 1919. Although he never expressed any misgivings about the reasoning or the results in those cases,[144] he told his friend Harold J. Laski on March 16 that he "greatly

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[137] *Id.* at 205.

[138] 250 U.S. 616 (1919). For an excellent historical account of the case, see RICHARD POLENBERG, FIGHTING FAITHS: THE *ABRAMS* CASE, THE SUPREME COURT, AND FREE SPEECH (1987).

[139] *Abrams*, 250 U.S. at 617–23.

[140] *Id.* at 621.

[141] *Id.* at 616–17.

[142] *See id.* at 619.

[143] *Id.* at 624–31 (Holmes, J., dissenting).

[144] *See, e.g.*, *id.* at 627 ("I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk* and *Debs* were rightly decided."); Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 16, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 113, at 189, 190 ("[O]n the only questions before us I could not doubt about the law."). However, Holmes seems to have found *Schenck* a difficult opinion to write. In an apparent reference to that decision, he told Laski about "a case . . . that I hoped the Chief would give me, but which wrapped itself around me like a snake in a deadly struggle to present the obviously proper in the forms of logic—the real substance being: Damn

regretted having to write them" and that he was sorry "that the Government pressed them to a hearing."[145] He added that "[t]he federal judges seem to me . . . to have got hysterical about the war," and suggested that the President should issue some pardons in those cases.[146] Holmes's ambivalence was only heightened by the sharp criticism that the decisions received from some leading progressives, such as that contained in a May 1919 article in *The New Republic* by Ernst Freund of the University of Chicago Law School.[147]

Second, over the course of the year, Holmes engaged in conversations and correspondence with several progressive intellectuals including Laski, Hand, and Zechariah Chafee, Jr., who all urged him to take a broader view of freedom of speech.[148] At their suggestion, Holmes read a number of works on the subject, including John Stuart Mill's *On Liberty*.[149] Laski also gave Holmes a copy of a law review article by Chafee that put forward a rationale for free speech that may have "touched a chord within" Holmes.[150] Chafee argued that freedom of speech served to promote "the discovery and spread of truth on subjects of general concern," and that this freedom should be subject to restriction only in situations where its value was clearly outweighed by other important social interests such as national security.[151] Moreover, he maintained that this strong protection could be afforded by a more rigorous interpretation of the "clear and present danger" formula that Holmes had announced in *Schenck*.[152] In *Abrams*, Holmes adopted a position much like this.[153]

The facts and the law in that case may also have contributed to Holmes's change of mind. Although they had much in common with those of the earlier cases, there are at least two critical differences. First, as Holmes read the record, the speech in *Abrams* was not intended to interfere with the war against Germany; instead, its aim was to prevent American military intervention in Russia.[154] Evidently Holmes felt that it was one thing to say that speech was unprotected when it sought to obstruct the

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your eyes—that's the way 'it's' going to be." Letter from Oliver Wendell Holmes to Harold J. Laski (Feb. 28, 1919), *in id.* at 186, 186.

[145] Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 16, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 113, at 189, 190.

[146] *Id.* at 142–43. Other expressions of Holmes's ambivalence can be found in his letters to Pollock on April 5 and 27, see 2 HOLMES-POLLOCK LETTERS, *supra* note 95, at 7, 11, and in his letter to Herbert Croly. *See infra* note 155.

[147] Ernst Freund, *The* Debs *Case and Freedom of Speech*, THE NEW REPUBLIC, May 3, 1919, at 13.

[148] For accounts of these interactions and their influence on Holmes, see POLENBERG, *supra* note 138, at 218–28, and WHITE, *supra* note 116, at 422–30.

[149] *See* POLENBERG, *supra* note 138, at 224–27; WHITE, *supra* note 116, at 427, 577 n.125.

[150] WHITE, *supra* note 116, at 427.

[151] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 956–57 (1919).

[152] *Id.* at 967–69.

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

[154] *See id.* at 628–29.

prosecution of a declared war in which soldiers were currently risking their lives, and quite another thing to say that speech could be punished simply because it opposed other potential uses of military force.[155]

Another key difference related to the statutes at issue. In the March 1919 cases, the defendants had been convicted of conspiring or attempting to violate a provision of the 1917 Espionage Act that prohibited obstructions of military recruitment.[156] Arguably, that statute was directed not at the expression of opinion as such, but rather at speech or conduct that sought to bring about a concrete form of harm. By contrast, the defendants in *Abrams* were prosecuted under the Espionage Act as it had been amended by the Sedition Act of 1918.[157] Much of that statute plainly was directed against the expression of opinion, including a provision that made it a crime, "when the United States is at war, [to] willfully utter . . . or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States," and another provision that made it a crime to use "any language intended to bring the form of government of the United States . . . into contempt, scorn, contumely, or disrepute."[158] The *Abrams* defendants were convicted of both of these offenses as well as the other two described above.[159] Holmes seems to have reacted differently to *Abrams* in part because of his belief that the defendants were "be[ing] made to suffer not for [obstructing the war against Germany] but for the creed that they avow."[160] In *Frohwerk*, he had intimated that the First Amendment "prohibit[s] legislation against free speech as such," even though the Amendment allows restrictions on the consequentialist grounds set forth in cases like *Schenck*.[161]

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[155] This point is suggested by Holmes's remark in *Schenck* that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight." Schenck v. United States, 249 U.S. 47, 52 (1919). Similarly, in May 1919, he defended his Espionage Act opinions in a private letter that he wrote to the editor of *The New Republic* but decided not to send. There Holmes asserted that the statutory provisions at issue "not only were constitutional but were proper enough while the war was on. When people are putting out all their energies in battle I don't think it unreasonable to say we won't have obstacles intentionally put in the way of raising troops—by persuasion any more than by force." Letter from Oliver Wendell Holmes to Herbert Croly (May 12, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 113, at 202, 203-04.

[156] Espionage Act of 1917, Pub. L. No. 65-24, § 3, 40 Stat. 219.

[157] Pub. L. No. 65-150, 40 Stat. 553 (1918). This statute was repealed shortly after the war ended. *See* Act of March 3, 1921, ch. 136, 41 Stat. 1359, 1360.

[158] 40 Stat. 553 (1918).

[159] *Abrams*, 250 U.S. at 616–17 (Holmes, J., dissenting); *see supra* text accompanying note 141.

[160] 250 U.S. at 629 (Holmes, J., dissenting).

[161] Frohwerk v. United States, 249 U.S. 204, 206 (1919). Holmes expressed a similar view in *Fox v. Washington*, 236 U.S. 273 (1915). There the defendant had been convicted of violating a state law that made it an offense, inter alia, "to encourage or advocate disrespect for law." *Id.* at 275–76. Holmes upheld the statute on the understanding that it was "confined to encouraging an actual breach of law," but suggested that it might be unconstitutional if it were

Whatever the reasons for his change of mind, Holmes wrote a forceful dissent in *Abrams*.[162] The first part of the opinion is devoted to a rather technical argument that the defendants lacked the intent required for conviction under the statute because their purpose was to prevent interference with the Russian revolution rather than "to cripple or hinder the United States in the prosecution of the war" with Germany.[163] Although this part of the opinion is not entirely persuasive, it merely forms the prologue to Holmes's discussion of the constitutional issue—a discussion that constitutes one of the most powerful and influential defenses of free speech ever written. The key passage reads as follows:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. 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.[164]

This passage is worth exploring in depth, for it is the fullest statement of Holmes's later position on the First Amendment.

"construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." *Id.* at 277.

[162] *Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting).

[163] *Id.* at 626–29.

[164] *Id.* at 630.

B. Idealism and the Logic of Persecution

Remarkably, Holmes's defense of free speech begins by presenting a rationale for censorship: "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[165] Although it may seem that Holmes is speaking ironically here, or that this is no more than a rhetorical flourish, there is good reason to regard this statement as a serious expression of his own views. The same argument appears repeatedly in his correspondence, and it is quite consistent with the position that he takes in *Schenck*.[166]

Holmes's discussion of censorship can best be understood in relation to his views on idealism. Although he was an implacable critic of neo-Kantian idealism—a philosophy that sought to derive objective ethical principles from concepts like human dignity[167]—Holmes frequently endorsed a different form of idealism, one that was rooted in the drive to realize one's own subjective conception of the good. Although Holmes never articulated this theory in a systematic way, I believe it can be understood as follows. To live is to act. At first, one's actions are simply means to an end, namely, one's own survival. Over time, however, the pursuits that one engages in become "an end in itself," that is, an "ideal."[168] Accordingly, our actions are directed not only toward ensuring our own material existence but also toward the realization

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[165] *Id.*

[166] *See* Schenck v. United States, 249 U.S. 47, 51–53 (1919). Holmes's censorship theorem first appears in a letter to Laski in the summer of 1918:

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

Letter from Oliver Wendell Holmes to Harold J. Laski (July 7, 1918), *in* 1 HOLMES-LASKI LETTERS, *supra* note 113, at 160, 160–61. Holmes reiterated this argument to Laski on the eve of his *Abrams* dissent and again more than a decade later. *See infra* text accompanying notes 258–67.

[167] *See, e.g.*, HOLMES, COMMON LAW, *supra* note 99, at 37–38, 163–67; HOLMES, *Ideals and Doubts*, *supra* note 97, at 303–05; HOLMES, *Natural Law*, *supra* note 98, at 312–14; Letter from Oliver Wendell Holmes to John C.H. Wu (Aug. 26, 1926), *in* MIND AND FAITH, *supra* note 100, at 431, 431–32.

[168] Letter from Oliver Wendell Holmes to Morris Cohen (Sept. 6, 1920), *in* THE ESSENTIAL HOLMES 105, 105 (Richard A. Posner ed., 1992). As Holmes put it in a speech on the fiftieth anniversary of his class's college graduation, "Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal." Oliver Wendell Holmes, *The Class of '61*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES 504, 504 (Sheldon M. Novick ed., 1995) [hereinafter COLLECTED WORKS].

of our ideals in the world. "Consciously or unconsciously we all strive to make the kind of a world that we like."[169] But this striving inevitably brings us into conflict with other human beings, who are equally determined to make the kind of a world *they* like.[170] According to Holmes, conflicts of this sort cannot be resolved by reason but only by force.[171] That is why in *Abrams* he refers to ideals as "fighting faiths."[172]

This vision of the world lies at the core of his political and legal thought. For Holmes, human life is characterized by a fundamental and ineradicable conflict between groups—a conflict that is fueled not only by competing material interests but also by clashing ideologies.[173] The ultimate form of this conflict is war[174]—a notion that was burned into Holmes's mind by his experience of the Civil War, in which he was wounded three times and saw the death of many of his close friends and comrades.[175]

Likewise, Holmes understood social and political life in terms of group conflict, such as the struggle between workers and employers.[176] He saw the constitutional order as a neutral framework for channeling such conflict and resolving it by lawful means.[177] This is the view that animates the other judicial opinion for which he is best known—his dissent in *Lochner v. New York*.[178] There he writes that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."[179] Instead, the

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[169] HOLMES, *Ideals and Doubts*, *supra* note 97, at 305; *see also* HOLMES, *Natural Law*, *supra* note 98, at 311.

[170] HOLMES, *Natural Law*, *supra* note 98, at 311–12.

[171] *See id.* at 312; *see also* HOLMES, COMMON LAW, *supra* note 99, at 38 ("[I]t seems to me clear that the *ultima ratio*, not only *regum*, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference."); Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 1, 1920), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 95, at 36, 36 ("I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force.").

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

[173] *See supra* notes 168–172 and accompanying text; *see also* Oliver Wendell Holmes, *The Gas-Stokers' Strike*, *in* 1 COLLECTED WORKS, *supra* note 168, at 323, 325 [hereinafter Holmes, *Gas-Stokers' Strike*].

[174] *See*, HOLMES, *Natural Law*, *supra* note 98, at 310; Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 26, 1919), *in* HOLMES-LASKI LETTERS, *supra* note 113, at 217, 217; Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 1, 1920), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 95, at 36, 36; Letter from Oliver Wendell Holmes to John C.H. Wu (Aug. 26, 1926), *in* MIND AND FAITH, *supra* note 100, at 431, 431–32.

[175] For valuable discussions of Holmes's Civil War experience and the impact it had on him, see 1 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES 80–175 (1957); LOUIS MENAND, THE METAPHYSICAL CLUB 49–69 (2001); WHITE, *supra* note 116, 49–86.

[176] *See* Vegelahn v. Guntner, 44 N.E. 1077, 1081–82 (Mass. 1896) (Holmes, J., dissenting).

[177] *See* OLIVER WENDELL HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 291, 294–95 [hereinafter HOLMES, *Law and the Court*].

[178] 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

[179] *Id.* at 75.

Constitution establishes an arena within which groups with "fundamentally differing views" can struggle for dominance.[180] "Every opinion tends to become a law," and except in the most extreme cases, the courts should not interpret the Constitution to prevent "the natural outcome of a dominant opinion" or to interfere with "the right of a majority to embody their opinions in law."[181]

Holmes's discussion of censorship in *Abrams* reflects the same general views that I have just outlined. The ideals or beliefs that are held by a group reflect its desires and its conception of the good.[182] Every group seeks to translate its beliefs into action and ultimately into law.[183] In a democratic system, the power to make law rests with the majority. If the majority has no doubt about the validity of its ideal, has a strong desire to achieve it, and is confident of its power to do so, it will "naturally express [its] wishes in law and sweep away all opposition" from other groups who are fighting to make the world conform to their own competing ideals.[184] For all of these reasons, censorship is "perfectly logical."[185]

C. Holmes's Defense of Free Speech

1. The Negative Dimension of Holmes's Argument: A Skeptical View of the World

Holmes began his first major work, *The Common Law*, by observing that "[t]he life of the law has not been logic: it has been experience."[186] His defense of free speech in *Abrams* reflects the same movement of thought.[187] Having explained why censorship is "perfectly logical," he goes on to contend that our experience has led—or should lead—the American people to reject it in favor of freedom of expression.[188] The experience that Holmes points to is the "realiz[ation] that time has upset many fighting faiths."[189]

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[180] *Id.* at 76.

[181] *Id.* at 75–76.

[182] *See supra* notes 168–169 and accompanying text.

[183] *See* OLIVER WENDELL HOLMES, *Introduction to the General Survey*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 298, 298 ("Beliefs, so far as they bear upon the attainment of a wish (as most beliefs do), lead in the first place to a social attitude, and later to combined social action, that is, to law.").

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

[185] *Id.*

[186] HOLMES, COMMON LAW, *supra* note 99, at 5.

[187] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). For similar observations, see WHITE, *supra* note 116, at 435; Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 2–3 [hereinafter Blasi, *Holmes*].

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

[189] *Id.*

In this way, Holmes's argument for free speech is based on a highly skeptical view of the world. "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."[190] For this reason, it is important to explore the factual basis of our ideals. As Holmes explains in an essay called *Ideals and Doubts*, our ideals can be seen as "imperfect social generalizations expressed in terms of emotion. To get at [their] truth, it is useful to omit the emotion and ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained."[191] Ideals rest on two sorts of "postulates" (or what in *Abrams* he calls "premises"): (1) "that such and such a condition or result is desirable," and (2) "that such and such means are appropriate to bring it about."[192] Holmes adds:

> To know what you want and why you think that such a measure will help it is the first but by no means the last step towards intelligent legal [or social or political] reform. The other and more difficult one is to realize what you must give up to get it, and to consider whether you are ready to pay the price.[193]

Because these issues involve difficult empirical questions, it makes sense to be skeptical about ideals, particularly when they seek to bring about "wholesale social regeneration" through measures such as the socialization of property or suffrage for women.[194]

The sources of Holmes's skepticism run much deeper than this, however. Although the effectiveness of a measure in promoting a particular end may be an empirical question that is subject to rational assessment, the "desirab[ility]" of the end is not.[195] According to Holmes, our desires are "arbitrary" and have no rational foundation.[196] And the same is true of our beliefs insofar as they embody our desires.[197] In a passage of *Natural Law* that sheds great light on *Abrams*, Holmes writes that "truth" is "root[ed] in time":

> What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may

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[190] HOLMES, *Natural Law*, *supra* note 98, at 311.
[191] HOLMES, *Ideals and Doubts*, *supra* note 97, at 306.
[192] *Id.*
[193] *Id.* at 307.
[194] *Id.* at 306–07.
[195] *Id.* at 306.
[196] HOLMES, *Natural Law*, *supra* note 98, at 312.
[197] *Id.*

> be equally dogmatic about something else. And this again means scepticism. Not that one's belief or love does not remain. Not that we would not fight and die for it if important—we all, whether we know it or not, are fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief. Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.[198]

As this passage makes clear, Holmes's skepticism is founded not only on uncertainty about the factual basis of particular ideals, but also on the notion that at bottom those ideals are merely subjective. Although the beliefs that I hold have meaning for me, I have no reason to believe that they possess any "universal validity."[199] Instead, I can recognize that just as my beliefs arise from my own experience, the beliefs of other people arise from theirs. This point does *not* lead Holmes to conclude that I should respect the right of others to hold their own beliefs. According to Holmes, "we all . . . are fighting to make the kind of a world that we should like," and it is perfectly reasonable for me to use force against those who stand in my way.[200]

Thus, Holmes is not arguing that we have a duty to tolerate or respect the opinions of others. But the skepticism that he articulates in essays like *Ideals and Doubts* and *Natural Law* does illuminate the argument that he makes in *Abrams*—in particular, by pointing to difficulties in the rationale for censorship. That rationale states that "[i]f you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[201] Holmes's skepticism shows that we have reason to question our premises and to ask whether we do want a particular result with all our hearts. At the same time, it raises questions about whether we actually have the power to achieve our ideals, both because they may not have a sufficient basis in fact, and because other people will oppose our efforts and fight for their own ideals "with equal sincerity or belief."[202] Finally, even if we succeed in realizing our beliefs in the world, the fact that they are "root[ed] in time"[203] also means that they are fated to pass away with time.

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[198] *Id.* at 311–12.

[199] *Id.* at 310.

[200] *Id.* at 311–12.

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

[202] HOLMES, *Natural Law*, *supra* note 98, at 312; *see also* Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.

[203] HOLMES, *Natural Law*, *supra* note 98, at 311.

2. The Positive Dimension of Holmes's Argument

This discussion helps to explain the skeptical move that Holmes makes in *Abrams*—the assertion that our experience teaches that "time has upset many fighting faiths."[204] Standing alone, however, this move is not sufficient to justify a commitment to freedom of speech.[205] As Holmes wrote to Hand in June 1918 (at about the same time that he wrote *Natural Law*), "if for any reason you did care enough [to suppress free speech in a particular situation,] you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act."[206]

In *Abrams*, Holmes undertakes to explain why, even though it is logical to censor opposing views, the majority nevertheless may decide to restrain itself from doing so by adopting a constitutional provision that protects the freedom of speech—and by accepting a broad interpretation of that provision today.[207] To make this case, Holmes needs to formulate a justification that goes beyond skepticism to show that the members of society can better promote their good by allowing free speech than by suppressing it. This is his central argument:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—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.[208]

Holmes's marketplace-of-ideas metaphor struck a deep chord in American culture.[209] Americans have often understood this image to represent an arena for the free

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

[205] As Holmes indicates in *Natural Law*, the form of skepticism that he embraces "has no bearing upon our conduct"; "[w]e still shall fight," not only for survival but also to make the sort of world we would like. HOLMES, *Natural Law*, *supra* note 98, at 311, 315–16.

[206] Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), *in* Gunther, *supra* note 114, at 756, 757.

[207] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). For a persuasive argument that Holmes believed that the First Amendment and other constitutional provisions ultimately should be interpreted in accord with the views of contemporary society rather than original meaning, see H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION 222–41 (1991).

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

[209] As Justice O'Connor has remarked, over time Holmes's "metaphor . . . has become almost as familiar as the principle that it sought to justify." Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 483 (1988) (O'Connor, J., dissenting).

and open exchange of views, an institution which allows individual liberty to flourish and at the same time promotes the good of society.[210] American legal and political discourse has often taken the image the same way.[211] In these respects, Holmes's notion of a marketplace of ideas undeniably has had a positive impact on American law, politics, and culture. I want to show, however, that this is only part of the story and that the image also reflects a darker and more problematic vision of human life.

a. The Marketplace of Ideas

In asserting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"[212] Holmes of course is drawing an analogy between free discussion and the marketplace for goods. According to classical economic theory, market competition tends to ensure the success of those goods that satisfy the needs and desires of consumers to the greatest extent and at the lowest cost.[213] In the same way, Holmes suggests that the ideas that prevail in public debate will be those that best promote the interests of society's members.[214] It follows that just as economic competition advances social welfare, so does competition in the marketplace of ideas.

In this way, it may seem that Holmes believes that "free trade in ideas"[215] will promote the good of the community as a whole. But as he makes clear in one of his earliest writings—his note on the *Gas-Stokers' Strike*—there is no such thing as a common good or an "identity of interest" within the community.[216] Instead, as we have seen, he holds that the society consists of different groups with conflicting interests and beliefs.[217] If that is true, then the ideas that prevail in the market will be those that promote the interests and beliefs of the predominant portion of the society.

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[210] *See, e.g.*, RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 7–8 (1992).

[211] *See, e.g.*, ERIC BARENDT, FREEDOM OF SPEECH 35, 48 (2d ed., 2007).

[212] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). Holmes's notion of the marketplace of ideas has generated a great deal of scholarly discussion. For some commentary that is generally sympathetic to this notion, see Lillian R. BeVier, *The Invisible Hand of the Marketplace of Ideas*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA, *supra* note 68, at 232; Blasi, *Holmes*, *supra* note 187; Richard A. Posner, *The Speech Market and the Legacy of* Schenck, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA, *supra* note 68. For some commentary that is generally critical, see BAKER, HUMAN LIBERTY, *supra* note 9, at 6; MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 10, at 60–65, 71–75; FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–34 (1982); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 782–83 (1987).

[213] *See, e.g.*, Paul J. McNulty, *Economic Theory and the Meaning of Competition*, 82 Q.J. ECON. 639, 643–44 (1968).

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

[215] *Id.*

[216] Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 324–25.

[217] *See supra* text accompanying notes 173–76.

And that is exactly what he says in *Gitlow v. New York*:[218] if ideas like "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."[219]

b. Holmes's Darwinism and the Marketplace of Ideas

In this respect, Holmes's theory of free speech is consistent with his deeply held Darwinian views about life and law. Although he may not have read *The Origin of Species*, Holmes was deeply influenced by the theory of evolution—a theory which was at the cutting edge of science in the late nineteenth and early twentieth centuries, and which plays a pervasive role in his thought.[220] According to Holmes, the natural world is characterized by a "struggle for life" that "tend[s] in the long run to aid the survival of the fittest."[221] Moreover, this "struggle does not stop [with the lower animals], but is equally the law of human existence."[222] The most dramatic illustration of this point may be found in those extreme situations where one can save one's own life only at the expense of another's: "If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can."[223] But the principle is not limited to those cases. Within a civilized society, self-interest is "mitigated by sympathy, prudence, and all the social and moral qualities," but "in the last resort a man rightly prefers his own interest to that of his neighbors,"[224] and this

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[218] 268 U.S. 652 (1925).

[219] *Id.* at 673 (Holmes, J., dissenting).

[220] For good discussions of Holmes's Darwinism, see 2 HOWE, *supra* note 175, at 44–50; Blasi, *Holmes*, *supra* note 187, at 24–33; E. Donald Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113 (1984); Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 363–67 (1984); and the essays in THE LEGACY OF OLIVER WENDELL HOLMES, JR. (Robert W. Gordon ed., 1992).

[221] Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.

[222] *Id.* This Darwinian vision of human life was the basis for Holmes's own social ideal: the use of science to improve the quality of the race. This eugenic ideal can be found throughout his writings. *See, e.g.*, Holmes, *The Soldier's Faith*, *in* 3 COLLECTED WORKS, *supra* note 168, at 486, 487 [hereinafter Holmes, *The Soldier's Faith*]; HOLMES, *Law and the Court*, *supra* note 177, at 296; HOLMES, *Ideals and Doubts*, *supra* note 97, at 306. The same ideal was at the heart of his notorious opinion in *Buck v. Bell*, 274 U.S. 200 (1927). In upholding a compulsory sterilization law, he wrote that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Id.* at 207. As Holmes later told Laski, in this decision "I . . . felt that I was getting near to the first principle of real reform." Letter from Oliver Wendell Holmes to Harold J. Laski (May 12, 1927), *in* 2 HOLMES-LASKI LETTERS, *supra* note 113, at 941, 942.

[223] HOLMES, COMMON LAW, *supra* note 99, at 38.

[224] Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.

principle lies "at the bottom of all private relations."[225] For example, individuals compete with one another in the economic arena, as do organized groups such as workers and employers.[226]

As we have seen, Holmes believes that politics and law also involves battles between different social groups, which have different material interests as well as different ideals and views of the world.[227] In this way, the "struggle for life" between different groups also involves a "struggle for life among competing ideas," leading to "the ultimate victory and survival of the strongest."[228]

Thus, Holmes's Darwinism sheds a good deal of light on his argument in *Abrams*.[229] When he speaks of the "the power of the thought to get itself accepted in the competition of the market,"[230] he means much the same thing as he does in earlier writings when he refers to "the struggle for life among competing ideas."[231] This struggle does not take place in the abstract; instead, it is part and parcel of the "struggle for life" between different social groups.[232] It follows that, for Holmes, the beliefs that will prevail in the marketplace of ideas are not those that are intrinsically more true or correct—Holmes always eschews any idea of absolute truth[233]—but rather those that come to be accepted by the most powerful part of the community.[234]

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[225] HOLMES, COMMON LAW, *supra* note 99, at 38.

[226] *See, e.g.*, Plant v. Woods, 57 N.E. 1011, 1016 (Mass. 1900) (Holmes, C.J., dissenting) ("[T]he strike [is] a lawful instrument in the universal struggle of life . . . ."); Vegelahn v. Guntner, 44 N.E. 1077, 1080–82 (Mass. 1896) (Holmes, J., dissenting); HOLMES, *Privilege, Malice, and Intent*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 117, 120–21 [hereinafter HOLMES, *Privilege, Malice, and Intent*].

[227] *See supra* text accompanying notes 173–85.

[228] HOLMES, *Law in Science*, *supra* note 111, at 220. For similar language, see *id.* at 221 ("the struggle for existence between competing ideas"); HOLMES, *Holdsworth's English Law*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 285, 287 ("the struggle for life carried on among ideas"); *id.* at 288 ("the development of ideas and their struggle for life").

[229] For another discussion of this point, see Blasi, *supra* note 187, at 24–31.

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

[231] HOLMES, *Law in Science*, *supra* note 111, at 220. Many of Holmes's writings implicitly treat competition as a form of the struggle for life, and he makes this point explicit in his dissenting opinion in *Vegelahn v. Guntner*, 44 N.E. 1077 (Mass. 1896):

> I have seen the suggestion made that the conflict between employers and employed was not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term "free competition," we may substitute "free struggle for life." Certainly, the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests.

Id. at 1081 (Holmes, J., dissenting).

[232] *See, e.g.*, *id.*; Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.

[233] *See, e.g.*, HOLMES, *Ideals and Doubts*, *supra* note 97, at 304–05; Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), *in* Gunther, *supra* note 114, at 756, 757.

[234] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

c. Holmes's Theory of Force

Holmes's Darwinism was merely one element of his broader scientific or philosophical view of the world—a view that provides the most comprehensive framework for understanding his approach to the First Amendment and indeed to law in general. According to Holmes, all of the phenomena in the universe are governed by the same principles.[235] The terms that he most often uses to describe these principles are "force," "energy," and "power"—words that he treats as more or less synonymous. For Holmes, these principles shape the workings of the universe on every level.[236] The "force of gravitation" governs "the conduct of bodies in space."[237] The Darwinian forces of natural selection shape the development of species in the natural world.[238] The social world is no different: it too is governed by forces, from the competitive forces which govern the market,[239] to the struggle between different groups such as workers and employers,[240] to the political process, which is governed by "the will" of whatever body or class currently possesses the "supreme power in the community."[241] Holmes defines law itself as the application of "the public force," which seeks to bring about certain results either directly through the "use of force" or indirectly "through men's fears."[242]

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[235] HOLMES, *The Bar as a Profession*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 153, 159; HOLMES, *Path*, *supra* note 97, at 180.

[236] One important source for this notion seems to have been the theory of *vis viva*. This theory, which originated with Gottfried Leibniz and was popular in some mid-nineteenth-century scientific and philosophical circles, posited that there was "a dynamic force—the *vis viva*—[that was] common to all nature." Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 465, 476 (1998). William James introduced Holmes to the theory in 1867, and he read and thought about the subject for several weeks before turning to other matters. *See* 1 HOWE, *supra* note 175, at 255–56.

[237] HOLMES, *Natural Law*, *supra* note 98, at 313.

[238] Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.

[239] *See, e.g.*, Vegelahn v. Guntner, 44 N.E. 1077, 1080–82 (Mass. 1896) (Holmes, J., dissenting).

[240] *See, e.g.*, *id.*

[241] Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.

[242] HOLMES, COMMON LAW, *supra* note 99, at 42, 169; HOLMES, *Path*, *supra* note 97, at 167, 170. In accord with this view, Holmes defines "[a] legal right" as "nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force." HOLMES, COMMON LAW, *supra* note 99, at 169. And he maintains that the business of the legal profession is "the prediction of the incidence of the public force through the instrumentality of the courts," since "[p]eople want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves." HOLMES, *Path*, *supra* note 97, at 167. This is the meaning of Holmes's famous image of the "bad man": law essentially consists in the application of force, because if

> you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons

A careful reading of Holmes's opinions and extrajudicial writings shows that he understands speech and thought in the same terms. Human beings do not create the forces that exist in the world, but they can "giv[e] a direction to [those] force[s]" through the use of "intelligence."[243] The architect does this to a greater degree than the brick layer because the architect determines the structure of the entire building.[244] On a higher level, Holmes suggests that "the abstract speculations" of Descartes and Kant have "become a [greater] practical force controlling the conduct of men" than the conquests of Napoleon.[245] Thus, "the most far-reaching form of power" that human beings can aspire to "is the command of ideas."[246]

This is the theory that underlies the argument for free speech in *Abrams*. Holmes equates the "truth" of an idea with the amount of "power" that it has.[247] In turn, the "power of [a] thought" lies in its ability to gain acceptance and to thereby "become a practical force controlling the conduct of men."[248] It follows that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[249]

D. Summarizing Holmes's Argument

If we pull together the various strands of Holmes's argument, we can summarize his view as follows. Human beings act in order to live and to promote their own

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> for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Id. at 171.

[243] HOLMES, *Economic Elements*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 279, 281; Letter from Oliver Wendell Holmes to Harold J. Laski (May 12, 1927), *in* 2 HOLMES-LASKI LETTERS, *supra* note 113, at 941, 942; *see also* Letter from Oliver Wendell Holmes to Harold J. Laski (May 21, 1927), *in id.* at 945, 945-46.

[244] *See* Letter from Oliver Wendell Holmes to Harold J. Laski (May 12, 1927), *in* 2 HOLMES-LASKI LETTERS, *supra* note 113, at 941, 942.

[245] HOLMES, *Path*, *supra* note 97, at 201–02.

[246] *Id.* at 201.

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

[248] *Id.*; HOLMES, *Path*, *supra* note 97, at 201–02.

[249] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). This test is parallel to the one that Holmes applied to human beings themselves. As he said in 1897:

> I know of no true measure of men except the total of human energy which they embody—counting everything, with due allowance for quality, [from physical stamina and courage to the capacity for poetic expression or philosophical speculation]. The final test of this energy is battle in some form—actual war—the crush of Arctic ice—the fight for mastery in the market or the court.

Holmes, *George Otis Shattuck*, *in* 3 COLLECTED WORKS, *supra* note 168, at 492, 494.

Holmes also used the notion of energy or power to describe the relationship between human beings and the broader forces at work in the universe. As he wrote to Cohen, "I think the best image for man is an electric light—the spark feels isolated and independent but really is only a moment in a current." Letter from Oliver Wendell Holmes to Morris Cohen (Sept. 6, 1920), *in* THE ESSENTIAL HOLMES, *supra* note 168, at 105, 106.

welfare, and they form beliefs about what will best promote these ends. Initially, these actions and beliefs have only instrumental value, but over time they come to be regarded as ends in themselves, that is, as ideals. Conflicts arise between groups who have differing ideals and material interests. These conflicts cannot be resolved by reason but only by force.

In a modern democratic society, the "supreme power in the community" rests with the majority.[250] If the majority strongly believes in a particular ideal and has no doubt about its power to achieve it, it will naturally write that ideal into law and punish anyone who tries to obstruct its realization, whether that obstruction takes the form of conduct or expression.

It follows that censorship is a "perfectly logical" course of action.[251] But experience teaches that our efforts to achieve an ideal are likely to fail in the end. We may not have fully thought out what we want or what means will be effective to attain it. We may lack the power to realize our ideals in view of the forces at play within the society or the natural world. Finally, because any given ideal is rooted in experiences at a particular place and time, it will also fade over time. For these reasons, it makes sense to adopt a more skeptical attitude toward our ideals. Although we will still fight for them with all our strength, we should believe even more strongly in the workings of the marketplace of ideas, a forum in which different ideals compete with one another for acceptance. Competition will lead to the optimal results in this marketplace just as it does in the economic marketplace. This competition can be understood as a Darwinian "struggle for life among competing ideas,"[252] which reflects the deeper "struggle for life" between the groups who hold them.[253] In both cases, the struggle will "tend in the long run to [promote] the survival of the fittest."[254] To put it another way, the ideas that prevail in the marketplace will be the most powerful ones, that is, the ones that are best able to gain acceptance from the community, or, more specifically, from the most powerful groups within it. In this way, the marketplace of ideas reflects the interaction of forces in the larger world. Although we may not be able to see it, the outcome of this conflict has been determined ahead of time, because human affairs are governed by the same deterministic forces that apply to all other phenomena. If the outcome is predetermined, then it is futile to oppose it by censoring speech: if certain beliefs "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."[255] The ideas that prevail in this process can be described as the "truth"[256] because they represent the conception of the good that is held by the dominant group,

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[250] Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.
[251] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
[252] HOLMES, *Law in Science*, *supra* note 111, at 220.
[253] *E.g.*, Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.
[254] *Id.*
[255] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
[256] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

and because this group and the beliefs that it holds have emerged though a process that reflects the objective workings of the forces that govern the world. This process provides the best test that we have to determine the validity or truth of our beliefs, and only beliefs that survive this process can provide a reliable basis for seeking "the ultimate good" that we desire.[257]

IV. A LIBERAL HUMANIST CRITIQUE OF HOLMESIAN FREE SPEECH THEORY

A. The Inadequacy of Holmes's Argument for Free Speech

The first problem with Holmes's argument in *Abrams* is that it does not provide a convincing theory of freedom of speech. This is not simply my judgment—it is Holmes's. On October 26, 1919, at virtually the same time that he was drafting the *Abrams* dissent, Holmes wrote a letter to Laski.[258] Laski, who was then teaching at Harvard Law School, was under fire for criticizing the Boston police commissioner and for siding with striking police officers during a labor dispute.[259] While Holmes expressed sympathy for his friend's plight, he also wrote that he didn't "believe in [free speech] as a theory."[260] In language that has much in common with the *Abrams* opinion, he continued:

> Of course when I say I don't believe in it as a theory I don't mean that I do believe in the opposite as a theory. But on their premises it seems to me logical in the Catholic Church to kill heretics and the Puritans to whip Quakers—and I see nothing more wrong in it from our ultimate standards than I do in killing Germans when

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[257] *Id.* Just as the truth that prevails within a particular society ultimately depends on force, so does the truth that prevails on an international level. This was the meaning of Holmes's remark that "truth was the majority vote of that nation that could lick all others." HOLMES, *Natural Law*, *supra* note 98, at 310; Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), *in* Gunther, *supra* note 114, at 756, 757.

[258] Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 26, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 113, at 217, 217–18. The *Abrams* case was argued on October 21 and 22, 1919. *Abrams*, 250 U.S. at 616. Some of Holmes's letters suggest that he drafted his dissent no later than October 26, the same day on which he wrote to Laski. *See* Letter from Oliver Wendell Holmes to Frederick Pollock (Oct. 26, 1919), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 95, at 27, 28–29 (stating that he has "prepared dissenting statements in one or two cases, subject to what may happen," and immediately adding, "I hope that we have heard the last, or nearly the last, of the Espionage Act cases"); Letter from Oliver Wendell Holmes to Frederick Pollock (Nov. 6, 1919), *in id.* at 29 (referring to "a case that I can't mention yet [apparently *Abrams*] to which I have sent round a dissent that was prepared to be ready as soon as the [majority] opinion was circulated").

[259] For a brief account of the controversy, see 1 HOLMES-LASKI LETTERS, *supra* note 113, at 213, 213 n.1 (editor's note to Laski's letter of Oct. 8, 1919).

[260] Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 26, 1919), *in id.* at 217, 217.

> we are at war. When you are thoroughly convinced that you are right—wholeheartedly desire an end—and have no doubt of your power to accomplish it—I see nothing but municipal regulations to interfere with your using your power to accomplish it.[261]

As this passage makes clear, Holmes means what he says in *Abrams* when he asserts that censorship is "perfectly logical."[262] According to Holmes, it is natural for human beings to use their power to achieve their ideals and "to make the kind of a world that [they] should like."[263] To this end, they naturally use force against anyone who stands in their way.[264] If one understands human action in this manner, it is very difficult to explain why the dominant group should not simply impose its own view and "sweep away all opposition."[265] Holmes formulated this view before the Espionage Act cases ever reached the Supreme Court,[266] and he never abandoned it: more than a decade after *Abrams*, he was still writing to Laski in the same vein.[267]

What, then, is the status of free speech? In his October 26 letter, Holmes refers to the First Amendment as a mere "municipal regulation[ ]"[268]—that is, a positive rule that has been adopted in a particular legal system, but that lacks any universal validity or compelling theoretical justification. Likewise, in *Abrams*, he says that free speech is "an experiment" that is "based upon imperfect knowledge" as to the best way of promoting the security and well-being of the society.[269] But these descriptions do not sound compelling enough to show that the Constitution should be interpreted to impose a broad limitation on "the right of a majority to embody their opinions in law."[270]

Of course, one could simply rely on the "sweeping" language of the First Amendment to justify strong judicial protection for freedom of speech, and Holmes does make this move in *Abrams*.[271] But the constitutional text is hardly a model of clarity. Earlier the same year, in *Schenck*, *Debs*, and *Frohwerk*, Holmes himself had adopted a much less protective interpretation which allowed the government to restrict speech whenever it had a tendency to harm other social interests.[272] In an earlier case,

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[261] *Id.*

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

[263] *Id.*; HOLMES, *Natural Law*, *supra* note 98, at 311.

[264] *See* HOLMES, *Natural Law*, *supra* note 98, at 311–12.

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

[266] *See* Letter from Oliver Wendell Holmes to Harold J. Laski (July 7, 1918), *in* 1 HOLMES-LASKI LETTERS, *supra* note 113, at 160, 160–61, *quoted in* note 166 above.

[267] *See* Letter from Oliver Wendell Holmes to Harold J. Laski (May 18, 1930), *in* 2 HOLMES-LASKI LETTERS, *supra* note 113, at 1249, 1250.

[268] Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 26, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 113, at 217, 217.

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

[270] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[271] *Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting).

[272] *See supra* Part II.B.

Patterson v. Colorado,[273] he had taken an even narrower view and had asserted that the First Amendment was meant to embody the Blackstonian doctrine that free expression consisted in immunity from previous restraint but not from subsequent punishment.[274] Thus, Holmes's appeal to the constitutional language was not enough to make up for the lack of a convincing theoretical argument.[275]

This leads to one of the most remarkable and ironic features of Holmes's position. Because he cannot give a strong reasoned defense of the First Amendment, he transforms free speech itself into a kind of "fighting faith."[276] This comes across in a striking way in the *Abrams* dissent: within just a few lines, Holmes moves from a deeply skeptical view of the world ("when men have realized that time has upset many fighting faiths"), to a powerful statement of belief ("they may come to believe even more than they believe the very foundations of their own conduct"), and finally to a stirring call to arms ("we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death").[277] This rhetoric echoes his letter to Laski, in which he says that while "I don't believe in [free speech] as a theory," "I hope I would die for it."[278] In this way, free speech becomes a sort of ideological or existential commitment without any strong rational foundation.[279] As

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[273] 205 U.S. 454 (1907).

[274] *Id.* at 462.

[275] Similarly, while Holmes alluded to the controversy over the Sedition Act of 1798, he made no effort to demonstrate that his interpretation of the First Amendment had substantial historical support. *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[276] *Id.*

[277] *Id.*

[278] Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 26, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 113, at 217, 217. On the same day, Holmes wrote to Pollock in like terms: "in the abstract, I have no very enthusiastic belief [in free speech], though I hope I would die for it." Letter from Oliver Wendell Holmes to Frederick Pollock (Oct. 26, 1919), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 95, at 27, 29.

[279] This understanding of Holmes's views on the First Amendment is consistent with many of the statements that he makes elsewhere about faith. The best known appears in *The Soldier's Faith*, a Memorial Day speech that he delivered at Harvard in 1895. Holmes, *The Soldier's Faith*, *supra* note 222, at 486. There he says:

> I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, . . . and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.

Id. at 487; *see also id.* at 488 ("[Y]ou know that man has in him that unspeakable somewhat which makes him capable of miracle, able to lift himself by the might of his own soul, unaided, able to face annihilation for a blind belief."); Holmes, *Ipswich*, *in* 3 COLLECTED WORKS, *supra* note 168, at 502, 503 ("We all, the most unbelieving of us, walk by faith. We do our work and live our lives not merely to vent and realize our inner force, but with a blind and trembling hope that somehow the world will be a little better for our striving."). Statements like these have led some scholars to describe Holmes as an existentialist. *See, e.g.*, ALBERT W. ALSCHULER,

Abrams shows, this can make for a rhetorically powerful defense of free speech. But it also makes it very hard to determine the scope and limits of that freedom in a reasoned way.

B. Free Speech and Holmes's Theory of Force

The second problem with Holmes's view is that it rejects the basic tenets of the liberal humanist approach to freedom of expression, and instead conceives of that freedom in a way that connects it with force and domination.

This point can best be made by comparing Holmes's view with that of Justice Louis Brandeis, whose judicial opinions contain some of the classic liberal humanist defenses of free speech and other "fundamental personal rights."[280] In *Whitney v. California*, Brandeis articulated his own vision of the First Amendment in this way:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in

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LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 18–19 (2000); *cf.* Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES, *supra* note 168, at xxix ("Holmes believed in blind commitment, and in this we can see folly if we like, or an echo of Kierkegaard and an anticipation of Sartre and Camus, or merely an admission of human fallibility: all our commitments must be blind because we are blind.").

[280] Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) (footnote omitted).

> the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[281]

In this passage, Brandeis advances two major justifications for freedom of speech and thought. First, he contends that liberty is "an end" in itself because it "make[s] men free to develop their faculties."[282] These faculties include "reason" as well as "thought, hope, and imagination."[283] This suggests that the inner lives of individuals have value in themselves—a theme that Brandeis developed the following year in his dissenting opinion in *Olmstead v. United States*.[284] "The makers of our Constitution," he wrote,

> undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[285]

In *Olmstead*, Brandeis was speaking of the privacy protected by the Fourth Amendment's ban on unreasonable searches and seizures.[286] But the language that he used clearly can also be applied to the liberties secured by the First Amendment.[287]

In *Whitney*, Brandeis also put forward a second justification for freedom of expression: that it is essential for democratic deliberation.[288] Citizens have a right as well as a duty to take part in public debate, and this freedom is "indispensable to the discovery and spread of political truth."[289] In this connection, Brandeis draws a strong contrast between reason and force. He contends that the founders "[b]eliev[ed] in the power of reason as applied through public discussion," and that they sought

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[281] *Id.* at 375–76.
[282] *Id.* at 375.
[283] *Id.*
[284] 277 U.S. 438 (1928).
[285] *Id.* at 478 (Brandeis, J., dissenting).
[286] *Id.*
[287] For the Supreme Court's recognition of this point, see *infra* text accompanying notes 439–43.
[288] *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).
[289] *Id.*

to ensure "that in [our] government the deliberative forces should prevail over the arbitrary."[290] By contrast, he describes censorship as "the argument of force in its worst form."[291]

Holmes joined Brandeis's opinion in *Whitney*,[292] just as Brandeis had joined Holmes's dissents in *Abrams* and *Gitlow*.[293] It is clear, however, that Holmes does not share the liberal humanist beliefs expressed in the *Whitney* opinion (much less those expressed in the *Olmstead* dissent, which he did not join). As we have seen, Holmes denies the most basic premise of liberal humanism: the idea that we are inherently free beings who are capable of directing our own actions in accord with reason.[294] Instead, he holds that human action ultimately is determined by the same forces that govern other aspects of the world.[295]

In denying the idea of human liberty, Holmes also rejects Brandeis's view that the freedom of thought and expression is entitled to respect as an end in itself. Of course, Holmes recognizes that beliefs have meaning and value for those who hold them.[296] But this meaning and value are merely subjective.[297] For Holmes, an understanding of law must reflect a "cold[ ]," analytical, objective point of view;[298] and from that perspective, ideals and their expression have no value except to the extent that they contribute to the workings of the marketplace of ideas.

For these reasons, Holmes does not believe that freedom of speech can be based on the value of protecting the inner lives of individuals or on the value of self-expression as such. On the contrary, he often denigrates the individuals whose rights he so eloquently defends. In *Abrams*, for example, he describes the defendants or their writings as "poor and puny anonymities," and their views as a "creed of ignorance and immaturity."[299] In private correspondence, Holmes is even more dismissive of the litigants who come before him. He refers to his *Gitlow* dissent as an argument "in favor of the rights of an anarchist (so-called) to talk drool in favor of the proletarian

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[290] *Id.*

[291] *Id.* at 376. The *Whitney* opinion also suggests a third rationale for freedom of speech: that it promotes a more stable society by affording individuals an opportunity to air their grievances and to seek remedies for them. *See id.* at 375. For a discussion of this function of free expression, see Emerson, *General Theory*, *supra* note 67, at 884–86.

[292] *See Whitney*, 274 U.S. at 380.

[293] *See* Abrams v. United States, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

[294] *See supra* text accompanying notes 95–97.

[295] *Id.*

[296] *See, e.g.*, HOLMES, *Natural Law*, *supra* note 98, at 311, 316.

[297] *See, e.g.*, *id.* at 311–12.

[298] Oliver Wendell Holmes, *Remarks at a Meeting of the Second Army Corps Association*, *in* 3 COLLECTED WORKS, *supra* note 168, at 537, 537; *see also* HOLMES, *Path*, *supra* note 97, at 169–79; HOLMES, *Ideals and Doubts*, *supra* note 97, at 306–07.

[299] *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting); *see also id.* at 628 (referring to the conduct at issue as "the surreptitious publishing of a silly leaflet by an unknown man").

dictatorship."[300] And in a letter to Laski discussing *United States v. Schwimmer*[301]—the case in which he defends the right of a pacifist to become an American citizen and declares that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate"[302]—Holmes characterizes the woman involved as a "damned fool[ ]," and adds, "All 'isms seem to me silly—but this hyperaethereal respect for human life seems perhaps the silliest of all."[303]

Nor does Holmes subscribe to Brandeis's second rationale—the idea that free speech is necessary for democratic deliberation—in its liberal humanist form. To begin with, Holmes denies that there is any normative justification for democracy itself.[304] Democratic institutions exist not because the people have a right to govern themselves, but simply because in modern society "the majority have the power in their hands" and constitute "the de facto supreme power in the community."[305] Holmes also rejects the Brandeisian belief in the capacity of reason to discern the common good. According to Holmes, the idea of a common good "presupposes an identity of interest between the different parts of a community which does not exist in fact."[306] Instead, the community is composed of different groups who possess fundamentally different interests and beliefs. Contrary to Brandeis's view, the conflict between these competing views cannot be resolved by reasoned discussion.

For these reasons, Holmes rejects the basic distinction between reason and force on which liberal humanism rests. Instead, he adopts a view that identifies truth with power. On this view, "the best test of truth is the power of the thought to get itself accepted in the competition of the market"[307] or (as he puts it in *Gitlow*) by "the dominant forces of the community."[308]

This view can be criticized on both epistemological and moral grounds. First, it is doubtful that the process that Holmes describes should be regarded as "the best test of truth."[309] Surely that is not the case with regard to matters of fact. The best test of whether cigarette smoking causes cancer, or of whether human action is contributing to climate change, is not whether most people in the society believe that it does. Holmes holds that, to rationally pursue our own good, we must subject our factual beliefs to critical examination, and it seems clear that this is one important function that

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[300] Letter from Oliver Wendell Holmes to Frederick Pollock (June 18, 1925), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 95, at 163, 163 & n.2.

[301] 279 U.S. 644 (1929).

[302] *Id.* at 654–55 (Holmes, J., dissenting).

[303] Letter from Oliver Wendell Holmes to Harold J. Laski (Apr. 13, 1929), *in* 2 HOLMES-LASKI LETTERS, *supra* note 113, at 1146, 1146.

[304] Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.

[305] *Id.*

[306] *Id.* at 324.

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

[308] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

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

the marketplace of ideas is meant to perform.[310] But there is no warrant for his further contention that the best test of an idea's validity is whether it prevails in the market. As Holmes recognizes, the market is not a rational process that is governed by a concern with factual accuracy, but instead is a battlefield for conflicts based on interest and ideology.[311] Clearly, it is possible for "the dominant forces of the community"[312] to believe that their own position is best served by the acceptance of beliefs that are not in fact accurate.

What about normative beliefs? Of course, they are not subject to verification in the same way as factual ones. Nevertheless, it seems deeply counterintuitive to claim, as Holmes does, that the best test of their validity is whether they are accepted by the dominant part of the community.[313] For example, during much of American history, the dominant forces believed that African Americans were inferior and could rightfully be subjected to slavery and segregation,[314] while in Nazi Germany the dominant forces believed that Jews were subhuman and should be subjected to genocide.[315] Yet few people would now say that those beliefs represented the "truth" even for the times and places in which they were held. Both historically and today, our commitment to freedom of speech and thought rests in large part on the belief that the existing order does not necessarily embody the truth, and that it must be subjected to critical evaluation.[316]

The liberal humanist view offers a different account of political discussion and the community's search for truth. It portrays them as collective activities that are possible only among people who recognize one another as human beings and citizens who are capable of engaging in reasoned discussion.[317] This mutual recognition is not only

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[310] *See supra* text accompanying notes 190–94.

[311] *See supra* text accompanying notes 215–19.

[312] *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

[313] *Id.*

[314] For a classic statement of this view, see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (asserting that, at the time the Constitution was adopted, blacks were universally "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit").

[315] *See, e.g.*, RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS (3d ed. 2003).

[316] Holmes was well aware that there can be different tests of truth. For example, in one essay he refers to the development of legal procedure from "[1] the priest's test of truth, the miracle of the ordeal, and [2] the soldier's, the battle of the duel, to [3] the democratic verdict of the jury," and then suggests that "the great increase of jury-waived cases" may lead to "a later transition yet—to [4] the commercial and rational test of the judgment of a man trained to decide." HOLMES, *Law in Science*, *supra* note 111, at 212–13. In these terms, the test of truth that Holmes articulates in *Abrams* would seem to be another version of the "democratic" test that in the legal process takes the form of the jury. *Id.* at 212. As I explain below, one can agree with Holmes that the best test of truth in the political sphere is a democratic one without accepting the particular way in which he conceives of that test, which identifies truth with power.

[317] *See* HEYMAN, FREE SPEECH, *supra* note 15, at 177–78, 193; Steven J. Heyman, *Hate*

a precondition for the search for truth, it is also the first and most fundamental truth that emerges from this process. From that point on, the search for truth is understood to consist in free and open discussion that reflects a serious effort to ascertain the facts and to discern the good. This is the image of public discourse that emerges from the writings of Brandeis, Meiklejohn, and Mill.[318] It would be a mistake to believe that, on this view, public discourse is a wholly rational and dispassionate process that is guaranteed to arrive at the truth. Liberal humanists recognize that public discussion may be deeply contentious and ideological. As Mill puts it, "in the human mind, one-sidedness has always been the rule, and many-sidedness the exception."[319] For this reason, efforts to determine the truth generally must "be made by the rough process of a struggle between combatants fighting under hostile banners."[320] Even when a society makes some progress toward the truth, the result generally is only to "substitute [] . . . one partial and incomplete truth for another; improvement consisting chiefly in this, that the new fragment of truth is more wanted, more adapted to the needs of the time, than that which it displaces."[321]

In these respects, Mill's view is quite similar to Holmes's. At the same time, it is crucial to recognize the fundamental differences between the two views. For Mill, people begin by holding one-sided opinions, but they need not end there. Through a process of thought and discussion, they are capable of developing a broader and more comprehensive view that seeks in some measure to reconcile opposing values and perspectives.[322] For Holmes, on the other hand, truth is inescapably subjective and one-sided. People are bound to their own partial perspectives and they "cannot help" holding the views that they do.[323] It is impossible even in principle to resolve deep-seated disagreements through the use of reason.[324] Instead, those disagreements can be resolved only by a resort to force, in which the dominant group imposes its values and beliefs on everyone else.[325] If there is a truth that goes beyond the beliefs held by the dominant group, it is simply the Holmesian truth that, like all other phenomena, human life is governed by force.

In the course of discussing the epistemological objections to Holmes's position, we have begun to consider the moral objections as well. The most basic problem is that Holmes regards free speech as a means of dominating others. We articulate and fight for our ideals as part of a "struggle for life" in which we seek to achieve

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Speech and the Theory of Free Expression, *in* HATE SPEECH AND THE CONSTITUTION, at lxii–lxiii (Steven J. Heyman ed., 1996).

[318] *See supra* text accompanying notes 69–88, 280–91.

[319] MILL, *supra* note 77, at 45.

[320] *Id.* at 46.

[321] *Id.* at 45.

[322] *See id.* at 46; *supra* text accompanying notes 77–82.

[323] HOLMES, *Ideals and Doubts*, *supra* note 97, at 304.

[324] HOLMES, *Natural Law*, *supra* note 98, at 312.

[325] *See supra* text accompanying notes 168–85.

superiority over other people and to make the sort of world that we like.[326] In Holmes's view, the First Amendment protects speech primarily because of the role that it plays in this process.

The Holmesian view that free speech essentially involves a struggle for power and domination over others continues to be influential in contemporary First Amendment jurisprudence. The best illustration is Judge Frank Easterbrook's opinion in *American Booksellers Association v. Hudnut*,[327] which addresses the constitutionality of a feminist antipornography ordinance. In enacting this law, the Indianapolis city council found that pornography caused a variety of serious harms to women.[328] Remarkably, Easterbrook does not question the existence of these harms.[329] Instead, he writes:

> [W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]."[330]

Nevertheless, Easterbrook responds that "this simply demonstrates the power of pornography as speech."[331] Elaborating on this point, he writes:

> Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.[332]

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[326] *See supra* text accompanying notes 227–34.
[327] 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).
[328] *Id.* at 328–29.
[329] *Id.* at 329.
[330] *Id.* (quoting INDIANAPOLIS CODE § 16-1(a)(2)).
[331] *Id.*
[332] *Id.* at 327–28.

In these passages, Easterbrook expresses a deeply Holmesian view of the First Amendment. According to Easterbrook, the ordinance in *Hudnut* in effect distinguishes between two different world views: one that regards women as equal citizens and one that regards them as "sexual objects" that are subordinate to men.[333] The First Amendment requires the state to remain neutral between these two views. That position will allow the ideas that have the greatest "power" to prevail, even though this may result in the subordination and oppression of a large group of people. In this way, the Holmes-Easterbrook view seems deeply problematic.

This criticism is not meant to imply that the result in *Hudnut* was necessarily wrong.[334] The issue of pornography is one of the most difficult and controversial in free speech jurisprudence, and strong arguments have been made on both sides of the debate.[335] For present purposes, there is no need to resolve this dispute.[336] Instead, the point that I wish to make here is that Easterbrook approaches the issue in the wrong way when he maintains that, for constitutional purposes, it is irrelevant whether pornography causes serious harm to women—a position that reflects the Holmesian view that the First Amendment protects speech precisely because of its role in a struggle for power and domination.[337]

This discussion also points to a broader problem with Holmes's view. Contrary to the impression that may be conveyed by the expression "free trade in ideas,"[338] Holmes does not believe that free speech does or should involve an interaction between autonomous subjects. Instead, he sees speech as an activity in which the speaker treats others as objects. This may involve an effort to dominate them, but it may simply involve an effort to use them to achieve the speakers' own ends. As we have seen, this view of speech plays an important role in the *Schenck* opinion.[339] It sheds light on

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[333] *Id.* at 325, 328.

[334] The Indianapolis ordinance suffered from serious vagueness problems, and this was one ground on which the district court struck it down. *See* Am. Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1337–39 (S.D. Ind. 1984), *aff'd on other grounds*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1132 (1986). The ordinance could also have been held unconstitutionally overbroad because it made no exception for material with serious value, which is protected under current doctrine. *See* Miller v. California, 413 U.S. 15, 23 (1973).

[335] For some arguments in favor of regulation, see HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY 213–27 (1996); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 127–213 (1987); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589. Arguments on the other side include RONALD DWORKIN, A MATTER OF PRINCIPLE 335–72 (1985); 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW 97–189 (1985); NADINE STROSSEN, DEFENDING PORNOGRAPHY (1995). For an excellent collection of feminist perspectives on all sides of the debate, see FEMINISM AND PORNOGRAPHY (Drucilla Cornell ed., 2000).

[336] In earlier work, I have argued that certain forms of pornography—those that glorify violence against women and that have no serious literary, artistic, scientific, or political value—can properly be restricted within a liberal humanist framework. *See* HEYMAN, FREE SPEECH, *supra* note 15, at 186–94.

[337] *See supra* text accompanying notes 220–57.

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

[339] *See supra* text accompanying notes 123–25.

Holmes's example of shouting fire in the theatre, and it also explains his assertion that the only effect that the circulars could be expected to have was to influence its recipients to obstruct the draft, without any consideration of their ability to evaluate the arguments for themselves. These aspects of *Schenck* reflect his deterministic view of the world: for Holmes, individuals are not autonomous beings who can direct their actions in accord with reason, but rather behave in accord with the same laws of cause and effect that govern other phenomena.[340]

Holmes does not abandon these views in *Abrams*, but instead gives them forceful expression in his *Gitlow* dissent.[341] Responding to the majority's contention that the defendant's revolutionary manifesto was not a mere theory but "an incitement," Holmes writes: "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[342] Here again Holmes suggests that speakers effectively cause listeners to act,[343] and in this way treat them as means to the speakers' own ends. This instrumentalist conception of speech accords with Holmes's general view that human beings are not ends in themselves, and that it is perfectly legitimate to treat them as means to an end, or even—when they stand in one's way—as "obstacle[s] to be abolished."[344] By contrast, the liberal humanist view understands speech, in the paradigm case, as an interaction between free and equal persons.

C. Expression That Causes Harm to Others

This discussion leads to the last general objection that I wish to raise to Holmes's First Amendment theory: that it unjustifiably allows expressive freedom to override other fundamental values and to cause serious harm to other individuals and the community.

According to Holmes, beliefs generally are oriented toward action: they represent an individual's or a group's view of their own good, and inspire them to work toward the attainment of that good.[345] For the most part, the law allows people to express and act upon their beliefs because that tends to promote social welfare.[346] Yet some beliefs tend to produce actions that cause harm to social interests that the majority desires to promote by means of law. As we have seen, prior to *Abrams*, Holmes believed that

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[340] *See supra* text accompanying notes 95–97.

[341] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[342] *Id.*

[343] Some passages in *Hudnut* reflect a similarly deterministic view of the impact of speech, although (as in Holmes's later opinions) they insist that this in no way undermines the rationale for protecting it. *See, e.g.*, Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (discussing forms of expression that "provoke unconscious responses"), *aff'd mem.*, 475 U.S. 1132 (1986).

[344] HOLMES, *Ideals and Doubts*, *supra* note 97, at 304.

[345] *See, e.g.*, HOLMES, *General Survey*, *supra* note 183, at 298.

[346] *See* HOLMES, COMMON LAW, *supra* note 99, at 77.

the law could properly restrict the expression of such beliefs. On this view, speech was entitled to no more protection that any other overt act that tended to cause harm.[347] *Abrams* marked a fundamental change in Holmes's position. Although he continued to believe that speech was capable of causing harm like any other kind of action, he took the view that this harm was outweighed by the benefits that flowed from allowing the free functioning of the marketplace of ideas.[348]

On this view, freedom of speech essentially consists in *a privilege to cause harm*. This idea is consistent with Holmes's understanding of other privileges. For example, as he explains in *The Common Law*, although "the manifest tendency of slanderous words is to harm the person of whom they are spoken," the law recognized a privilege to speak freely in certain situations, such as that of a lawyer making an argument or a master responding to an inquiry about the character of a former servant.[349] In such cases, "the law considered the damage to the plaintiff of less importance than the benefit of free speaking."[350] Likewise, an individual is permitted to start a business that he knows will ruin a competitor—a privilege that "rests on the economic postulate that free competition is worth more to society than it costs."[351] Holmes's rationale in *Abrams* embraces both of these ideas—it holds that the First Amendment protects speech that causes harm to other interests on the ground that "free trade in ideas" and "the competition of the market" will promote the social good.[352]

In this way, Holmes transforms the First Amendment freedom of speech—which the framers understood as an inalienable natural right—into a privilege to cause harm. He conceives of this harm as a loss to social welfare, and, more specifically, as a set-back to the particular interests or ideals that the majority would like to promote through law.[353] In *Schenck* and *Debs*, Holmes had allowed the government broad latitude to prevent such harms by imposing restrictions on speech.[354] By contrast, in *Abrams*, he reinterprets the First Amendment to allow such restrictions only in the most extreme situations, those in which there is "a clear and imminent danger" of serious harm.[355]

In *Abrams*, Holmes hints that a less demanding analysis may be appropriate "where private rights are . . . concerned."[356] And he later joined a majority opinion that maintained that the First Amendment does not abolish the common law rules

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[347] *See supra* Part II.B.

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

[349] HOLMES, COMMON LAW, *supra* note 99, at 110–11.

[350] *Id.*

[351] HOLMES, *Privilege, Malice, and Intent*, *supra* note 226, at 120–21.

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

[353] *See id.*

[354] *See supra* text accompanying notes 115–35.

[355] *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

[356] *Id.* at 628 ("It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion *where private rights are not concerned*.") (emphasis added).

that impose liability for defamation.[357] However, the logic of Holmes's view would extend the broad First Amendment privilege to cause harm to cases involving private rights as well. After all, Holmes does not believe that those rights have any independent foundation. Instead, they are mere "interest[s]" that gain legal protection only insofar as they advance social welfare,[358] and that may and should be "sacrificed without a scruple . . . whenever the interest of society, that is, of the predominant power in the community, is thought to demand it."[359]

For these reasons, the Holmesian view would appear to give broad protection to speech not only when it causes harm to social welfare, but also when it causes harm to private rights. And this is especially true of rights such as privacy and reputation. To use Brandeisian language, these rights are rooted in respect for the "dignity" and "personality" of individuals[360]—notions that Holmes rejects.[361] Moreover, these rights serve to protect a person's inner life or self.[362] As we have seen, however, Holmes has no respect for the inner life as such; instead, he emphasizes the ways in which external forces shape the natural and social world.[363] And this attitude lies at the foundation of his First Amendment theory, which holds that we protect free speech in order to allow those social groups and ideas that have the greatest power to prevail in the struggle for existence. It is difficult to see how rights that are meant to protect inwardness could stand up against the external forces at work in this process.

In short, the tendency of the Holmesian view is to allow free speech to override all other values, including the value of protecting individual personality. Some theorists working in the liberal humanist tradition would not find this problematic, because they reach the same result by a different route. According to these theorists, the First Amendment grants absolute protection to expression—a position that they derive from the demands of individual liberty,[364] from the paramount importance of free speech for democratic self-government,[365] or from a complex of such values.[366]

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[357] Near v. Minnesota, 283 U.S. 697, 715 (1931).

[358] *See* HOLMES, *Natural Law*, *supra* note 98, at 313–14.

[359] *Id.* at 314; *see also* HOLMES, COMMON LAW, *supra* note 99, at 37–39.

[360] *See* Senn v. Tile Layers Protective Union, 301 U.S. 468, 482 n.5 (1937) ("The State has . . . power to afford protection to interests of personality, such as 'the right of privacy.'"); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205, 214 (1890) (arguing for legal recognition of a right to privacy which flows from "the dignity . . . of the individual" and from the right to "an inviolate personality").

[361] *See supra* text accompanying notes 98–100.

[362] This is clearly true of the right to privacy, which protects the inner lives of individuals from unwarranted intrusion by or exposure to others. And while the right to reputation has an important external dimension, at its core it protects the integrity of an individual's personality against unjustified accusations that degrade her in the eyes of others. For further discussion of these two rights, see HEYMAN, FREE SPEECH, *supra* note 15, at 55–59.

[363] *See supra* text accompanying notes 235–42, 296–303.

[364] *See, e.g.*, BAKER, HUMAN LIBERTY, *supra* note 9.

[365] *See, e.g.*, MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 10.

[366] *See, e.g.*, EMERSON, SYSTEM, *supra* note 90, at 6–8.

In earlier work, I have developed an alternative, rights-based version of the liberal humanist approach.[367] According to this view, freedom of speech is a fundamental right that is based on respect for human dignity and autonomy. But those principles also give rise to other essential rights. Speech that violates those rights may be regulated through narrowly drawn laws, except in cases where the value of the speech is so great as to justify the injuries that it causes.[368]

To determine what rights are sufficiently important to justify limitations on speech, this view looks to the same principles that support freedom of speech itself. First, free speech may be understood as a form of external freedom, or the right to control one's own body without unwarranted interference by others.[369] But of course other individuals have this right as well. At the core of external freedom is personal security or the right to be free from actual or threatened violence. Immunity from violence is a right that belongs not only to individuals but also to the community as a whole, which has both the authority and the responsibility to preserve the peace and to protect its citizens.[370] Speech violates these rights of individuals and the community when it constitutes an assault or a threat of violence, when it amounts to "fighting words," or when it incites its audience to commit violent acts against third parties.[371]

Second, freedom of speech is protected because of its relationship to individual autonomy and self-fulfillment. But these values also support other important rights including reputation, privacy, and emotional tranquillity. Under the rights-based view, the law should be allowed to protect these rights through some kinds of restrictions on defamation, invasion of privacy, and intentional infliction of emotional distress.[372]

A third justification for free speech is the one associated with Brandeis and Meiklejohn.[373] As citizens, individuals are members of a self-governing community who have both a right and a duty to participate in public discussion on matters of common concern. Unwarranted restrictions on political speech violate the rights not only of the affected individuals but also of the community as a whole. At the same

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[367] HEYMAN, FREE SPEECH, *supra* note 15.

[368] In this respect, the rights-based theory accords with the natural rights tradition, which also held that free speech was limited by the rights of others. *See supra* text accompanying notes 54–58. Many contemporary liberal democratic nations also hold that the law must seek to reconcile freedom of expression with other rights. *See, e.g.*, BARENDT, *supra* note 211, at 39–73, 205–26 (discussing the balancing approaches taken in England, Canada, Germany, France, and Australia); RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 26–27, 93–95, 140–42, 184–85 (2006) (discussing the different balancing tests employed in Canada, Germany, Japan, and the United Kingdom). International human rights law takes a similar position. *See, e.g.*, International Covenant on Civil and Political Rights art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 171.

[369] HEYMAN, FREE SPEECH, *supra* note 15, at 48.

[370] *Id.* at 50.

[371] *See id.* at 48–51.

[372] *See id.* at 51–59.

[373] *See supra* text accompanying notes 69–76, 288–91.

time, however, democratic principles also support some restrictions on political speech. For example, in *Garrison v. Louisiana*,[374] Justice William J. Brennan, Jr., explains that while the First Amendment protects false and defamatory statements about public officials that are honestly made, "calculated falsehood" should be denied protection because it is "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[375] For the same reasons, speech that incites an imminent overthrow of the government falls outside of the broad protection for political speech recognized in *Brandenburg v. Ohio*.[376]

Of course, Holmes also would deny First Amendment protection to incitement that is unprotected by the *Brandenburg* rule—a rule that closely resembles the position that he takes in *Abrams*. Nor is there any reason to believe that he would protect other forms of speech that promote or threaten imminent violence. It remains true, however, that the approach that he takes to harmful speech is significantly different from the rights-based, liberal humanist view that I have just outlined. On that view, speech can be regulated when it unjustifiably invades other rights that are essential to individual fulfillment and democratic citizenship. By contrast, Holmes regards those rights as mere interests that generally are trumped by the constitutional protections for freedom of speech—a right that he understands as a privilege to cause harm.[377]

The difference between these two views is well illustrated by the 1989 case of *Florida Star v. B.J.F.*[378] After she was raped at knifepoint by an unknown assailant, B.J.F. reported the attack to the county sheriff's department.[379] When the department posted the crime report in its press room, it inadvertently failed to white out her name and address.[380] This information was subsequently published in the *Florida Star*.[381] B.J.F. and her family then suffered various forms of harassment, including a telephone call from a man who threatened to rape her again.[382] A Florida jury ordered the newspaper to pay her $100,000 in compensatory and punitive damages for recklessly violating a state statute that made it unlawful to publish the name of a sexual assault victim in any medium of mass communication.[383] On appeal, the Supreme Court overturned the award on First Amendment grounds.[384] Writing for a six-to-three majority, Justice Thurgood Marshall declared that a state could impose liability for the publication of

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[374] 379 U.S. 64 (1964).

[375] *Id.* at 75.

[376] 395 U.S. 444 (1969) (per curiam). *Brandenburg* holds that the state may restrict speech that advocates unlawful action only where the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

[377] *See supra* text accompanying notes 349–63.

[378] 491 U.S. 524 (1989).

[379] *Id.* at 527.

[380] *Id.* at 546 (White, J., dissenting).

[381] *Id.* at 527 (majority opinion).

[382] *Id.* at 528.

[383] *Id.* at 526, 529.

[384] *Id.* at 532.

truthful, lawfully obtained information on a matter of public concern only if the state could show that this was necessary to advance state interests of the highest order—a demanding standard that he found was not satisfied in this case.[385]

From the standpoint of the liberal humanist, rights-based approach that I have described, the decision in *Florida Star* was tragically misguided. On one hand, the publication of B.J.F.'s name was a gross violation of her rights to privacy and emotional well-being, as well as her right to security against violence. On the other hand, while the public has a legitimate interest in knowing where and when a particular crime took place, it has no legitimate interest in knowing the identity of the victim—at least in a case like *Florida Star*, in which no one had been arrested or tried for the crime. Under the rights-based view, then, the newspaper's action in this case should be regarded as an unwarranted infringement of B.J.F.'s rights and should not be protected by the First Amendment.

In *Florida Star*, the majority takes a very different approach: it conceptualizes the case not as a conflict between two different sets of rights, but rather as a clash between freedom of speech and social welfare, or what the Court calls "state interest[s]."[386] On this view, values such as individual privacy, personal dignity, and emotional well-being are mere interests which generally do not warrant limitations on the process of public discussion—a process that is thought to promote the ultimate good of the society even though it may result in sacrificing values of vital importance to the individuals concerned. In these ways, decisions like *Florida Star* follow the path marked out in Holmes's prior First Amendment jurisprudence.[387]

V. HOLMES AND CONTEMPORARY FIRST AMENDMENT DOCTRINE

In Part IV, I criticized Holmes's theory of the First Amendment from a liberal humanist perspective. In this Part, I extend this critique and make it more concrete by exploring the implications of his thought for several important areas in contemporary First Amendment doctrine, including the protection of political speech, of private and artistic expression, and of speech by public employees.

A. Political Speech

For the most part, the Holmesian and liberal humanist views take the same, highly protective position with regard to political or ideological expression, as one might suppose from the fact that Holmes and Brandeis generally were able to join one another's opinions in this sphere.[388] Nevertheless, there are at least two important areas in which these views may diverge: corporate political speech and public hate speech.

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[385] *Id.* at 533–41.
[386] *Id.* at 533.
[387] *See supra* text accompanying notes 349–63.
[388] *See supra* text accompanying notes 292–93.

1. Corporate Political Speech

Last Term, in *Citizens United v. Federal Election Commission*,[389] a deeply divided Supreme Court struck down a longstanding ban on the use of a corporation's general treasury funds to pay for speech supporting or opposing a candidate for federal office.[390] At first glance, Justice Anthony M. Kennedy's majority opinion appears to rest on liberal humanist principles. According to Kennedy, a corporation is simply an "association[ ] of citizens" that has the same First Amendment rights as any other speaker.[391] When the government silences a corporation because of its "identity" as a speaker, the government "commit[s] a constitutional wrong" by depriving the corporation of "the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[392] Kennedy further argues that prohibitions on corporate electoral speech undermine "an essential mechanism of democracy" by interfering with the "right of citizens"—including those using the corporate form—"to inquire, to hear, to speak, and to use information to reach consensus," which is "a precondition to enlightened self-government and a necessary means to protect it."[393]

As Justice John Paul Stevens shows in a powerful dissent,[394] these arguments are deeply flawed. To begin with, corporations are "not natural persons": they "have no consciences, no beliefs, no feelings, no thoughts, no desires."[395] Nor does a corporation's political advertising necessarily express the personal views of its shareholders or employees, or even of its officers and directors. Thus, the First Amendment value of individual "self-expression" or "self-realization" is not implicated in this case: "Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least."[396] As for the democratic self-government rationale, Stevens contends that corporations are not actually "members of our political community."[397] Allowing them to use their vast aggregations of wealth to "flood the market" for political advertising before an election endangers rather than promotes democratic deliberation, because it "may

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[389] 130 S. Ct. 876 (2010).

[390] *Id.* at 913.

[391] *Id.* at 904, 906, 908; *see also id.* at 928 (Scalia, J., concurring).

[392] *Id.* at 899 (majority opinion).

[393] *Id.* at 898.

[394] *Id.* at 929 (Stevens, J., concurring in part and dissenting in part).

[395] *Id.* at 947, 972.

[396] *Id.* at 972 (internal quotations marks and citations omitted).

[397] *Id.* at 947; *see also id.* at 972 (asserting that, although "their 'personhood' often serves as a useful legal fiction," corporations "are not themselves members of 'We the People' by whom and for whom our Constitution was established").

decrease the average listener's exposure to relevant viewpoints, and . . . diminish citizens' willingness and capacity to participate in the democratic process."[398]

As this exchange suggests, the dispute in *Citizens United* ultimately turns on differing understandings of the political process and the marketplace of ideas. The majority views that process as an arena in which individuals and groups pursue their own private interests. On this view, there is nothing wrong with using "resources amassed in the economic marketplace" to obtain "an . . . advantage in the political marketplace."[399] The First Amendment bars the government from interfering with the political marketplace by making "judgments about which strengths should be permitted to contribute to the outcome of an election."[400] By prohibiting corporate election advertising, the government had "muffle[d] the voices that best represent the most significant segments of the economy"[401] and had thereby "interfere[d] with the 'open marketplace' of ideas protected by the First Amendment."[402] In these ways, the majority opinion seems to rest on an essentially Holmesian view, according to which the political process and the marketplace of ideas should reflect "the actual equilibrium of force in the community."[403]

Stevens responds that the majority's position would allow corporations to use the wealth and power that they have obtained in the economic realm to "dominat[e] . . . the electoral process."[404] "The marketplace of ideas," he contends, "is not actually

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[398] *Id.* at 974–76.

[399] *Id.* at 904 (majority opinion) (internal quotation marks omitted) (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659 (1990)); *see also id.* at 905 ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech."). By the same token, Kennedy contends that there is nothing wrong with using one's wealth to gain "influence over or access to elected officials." *Id.* at 910. As he wrote in an earlier case:

> Favoritism and influence are . . . [un]avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

Id. at 910 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)).

[400] *Id.* at 904 (quoting Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2774 (2008)).

[401] *Id.* at 907 (quoting *McConnell*, 540 U.S. at 257–58 (opinion of Scalia, J.)); *see also id.* at 929 (Scalia, J., concurring) ("[T]o exclude or impede corporate speech is to muzzle the principal agents of the modern free economy.").

[402] *Id.* at 906 (majority opinion) (citation omitted).

[403] OLIVER WENDELL HOLMES, *Montesquieu*, *in* COLLECTED LEGAL PAPERS, *supra* note 97, at 250, 258.

[404] *Citizens United*, 130 S. Ct. at 977 (Stevens, J., concurring in part and dissenting in part). Although Stevens concurred in that part of the majority opinion which upheld the constitutionality of disclosure requirements, he dissented from the rest of the opinion.

a place where items—or laws—are meant to be bought and sold, and when we move from the realm of economics to the realm of corporate electioneering, there may be no 'reason to think the market ordering is intrinsically good at all.'"[405] Although the dissent also invokes the marketplace of ideas, it reinterprets that image to reflect a more Meiklejohnian conception of the First Amendment: according to Stevens, restrictions on corporate electoral speech may actually "*facilitate* First Amendment values by preserving some breathing room around the electoral 'marketplace' of ideas, . . . the marketplace in which the actual people of this Nation determine how they will govern themselves."[406]

Thus, in *Citizens United*, the contrast between the Holmesian and the liberal humanist views emerges in sharp relief. The majority condemns restrictions on corporate speech because they hamper the workings of the marketplace of ideas, an arena in which the most powerful forces in the society are entitled to prevail.[407] The dissenting Justices do not deny the powerful role that corporate speech can play in the political process. Indeed, their opinion is the only one to use the term "power" to describe corporate speech.[408] Unlike the majority, however, the dissenters are acutely conscious of the dangers that such power can pose to the values of individual liberty and "republican self-government" that the First Amendment was meant to promote.[409]

2. Political Hate Speech

Another issue on which the liberal humanist and Holmesian views may diverge is that of hate speech, or expression that is intended to abuse or degrade others on the

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[405] *Id.* (quoting David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1386 (1994)).

[406] *Id.* at 976 (citations omitted).

[407] *See supra* text accompanying notes 399–403.

[408] *See Citizens United*, 130 S. Ct. at 953 (Stevens, J., concurring in part and dissenting in part) (explaining that the Tillman Act of 1907 was based on a concern about "the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption"); *id.* at 971 (contending that the availability of great resources "may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas" (citations omitted)); *id.* at 977 ("The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve.").

[409] *Id.* at 964. The notion that law exists to protect liberty not only against the government but also against private power did not emerge for the first time in modern progressive thought. Instead, that notion is deeply rooted in the liberal tradition. *See, e.g.*, LOCKE, GOVERNMENT, *supra* note 26, bk. II, § 222, at 412–14 (asserting that laws are made to protect individual rights and "to limit the Power, and moderate the Dominion of every Part and Member of the Society"); 3 BLACKSTONE, *supra* note 23, at *2 (stating that legal institutions are established "in order to protect the weak from the insults of the stronger"). *See generally* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

basis of characteristics like race, religion, gender, and sexual orientation. It is generally agreed that the state may restrict such speech when it falls within an unprotected category such as threats or fighting words.[410] But a great deal of controversy surrounds the issue whether the state may restrict other forms of hate speech, especially when they are political or ideological in nature.[411]

Some liberal theorists have made strong arguments for granting protection to political hate speech. According to these arguments, respect for individual liberty requires that people be allowed to express their own views and to hear and evaluate the views of others, no matter how offensive the views in question may be.[412] Moreover, it is said that in a democratic society debate must be open to the views of all, and that the state would lose legitimacy if it sought to exclude some ideas from public discourse.[413]

However, it is not clear that political hate speech should receive protection under the liberal humanist view, for powerful arguments have been made that the protection of that speech would undermine rather than promote the values on which free expression is based.[414] These arguments contend that individuals have no right to pursue their own self-realization in a way that intentionally interferes with the self-realization of others.[415] Moreover, the right to political free speech is a right to engage in deliberation with other members of the community. Such deliberation is possible only on the basis of mutual respect.[416] Political hate speech attacks the status of its targets as human beings and members of the community.[417] In this way, it not only violates their right to equal citizenship, but also undermines the ability of the community to engage in democratic deliberation.[418]

Considerations like these have led most liberal democratic nations to hold that some forms of political hate speech fall outside their own constitutional guarantees of freedom of expression.[419] By contrast, American courts generally take the opposite

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[410] In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), all nine Justices agreed on this point, although they were sharply divided in other respects. *See id.* at 382–83 (majority opinion), 399 (White, J., concurring in judgment), 415 (Blackmun, J., concurring in judgment), 416 (Stevens, J., concurring in judgment).

[411] For collections of writings on this issue, see HATE SPEECH AND THE CONSTITUTION, *supra* note 317; HENRY LOUIS GATES, JR. ET AL., SPEAKING OF RACE, SPEAKING OF SEX (1994); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

[412] *See, e.g.*, BAKER, HUMAN LIBERTY, *supra* note 9, at 86–87; RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 200–01, 203–05 (1996).

[413] *See, e.g.*, POST, *supra* note 69, at 303–04, 327.

[414] *See, e.g.*, MATSUDA ET AL., *supra* note 411, at 9 (examining "when hate speech is antithetical to the underlying liberal democratic principles that inform . . . the first amendment").

[415] *See* HEYMAN, FREE SPEECH, *supra* note 15, at 166.

[416] *See id.* at 177.

[417] *See id.* at 168–83.

[418] *See id.* at 164–83.

[419] *See, e.g.*, S. AFR. CONST., 1996, § 16(2)(c) (stating that freedom of expression does not extend to "advocacy of hatred that is based on race, ethnicity, gender or religion, and that

position. The leading case is *Collin v. Smith*,[420] in which the United States Court of Appeals for the Seventh Circuit held that a neo-Nazi group had a First Amendment right to march in Skokie, Illinois, a heavily Jewish town that was home to several thousand Holocaust survivors.[421] Although the court conceded that the speech at issue was "repugnant to the core values" of a civilized society and that it might well result in "the infliction of psychic trauma" on its targets, the court concluded that the Nazi speech was "indistinguishable in principle" from other forms of political speech.[422] Similarly, in *Virginia v. Black*,[423] the Supreme Court declared that while the Constitution does not protect cross-burning that is used to make concrete threats of violence against others, the burning of a cross to express belief in white supremacy is a form of "lawful political speech at the core of what the First Amendment is designed to protect."[424]

In this way, the American position on political hate speech has come to be markedly different than that taken by other liberal democracies. Although many explanations can be offered for this difference, one important factor is the legacy of Justice Holmes for American free speech jurisprudence. The liberal humanist arguments for regulating hate speech are based on the notion that this speech violates the fundamental rights of its targets, as well as the principles of human dignity and autonomy on which those rights are founded.[425] Holmes rejects those principles and the rights which flow from them.[426] It follows that for Holmes there are no objective normative grounds on which to distinguish between rightful and wrongful speech. Instead, our reactions to allegedly wrongful speech are merely subjective, emotional responses. As Holmes once put it, we "naturally" feel hatred for anything that poses an "obstacle[ ]

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constitutes incitement to cause harm"), *available at* http://www.info.gov.za/documents/constitution/1996/96cons2.htm#16; R. v. Keegstra, [1990] 3 S.C.R. 697, 701 (Can.) (upholding a ban on willful promotion of hatred against racial, ethnic, and religious groups); Holocaust Denial Case, Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungericht [BVerfGE] 241 (Ger.), *in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 385 (2d ed. 1997) (upholding the state government of Munich's imposition of the condition that the National Democratic Party of Germany not deny the existence of the Holocaust in order to hold a meeting); Jersild v. Denmark, 19 Eur. Ct. H.R. 1, 16–17 (1994) (indicating that some restrictions on racist speech are compatible with European Convention on Human Rights). International human rights conventions take the same position. *See, e.g.*, International Covenant on Civil and Political Rights art. 20(2), Dec. 16, 1966, 999 U.N.T.S. 171, 178 ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

[420] 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916.

[421] *Id.* at 1201.

[422] *Id.* at 1200, 1205–06.

[423] 538 U.S. 343 (2003).

[424] *Id.* at 365.

[425] *See, e.g.*, HEYMAN, FREE SPEECH, *supra* note 15, at 164–83.

[426] *See supra* text accompanying notes 95–100.

to our making the kind of world we like."[427] This is what he means when he speaks of "opinions that we loathe"[428] and "the thought that we hate."[429] As he argues in *Abrams*, however, the First Amendment does not allow us to restrict speech on these grounds, but only when necessary to prevent a clear and imminent danger of serious harm.[430]

From a Holmesian perspective, then, there is no principled distinction between hate speech and any other form of political expression. Indeed, hate speech does what he believes all forms of political speech do: it is an effort by one group of people to assert dominance over another group.[431] That is not to say that from a Holmesian point of view there is nothing wrong with hate speech. Like any other form of speech, its factual premises should be subjected to critical evaluation.[432] In addition, Holmes believes that, in a civilized society, "the spread of an educated sympathy" ought to impose some limits on the unbridled pursuit of self-interest and thereby "reduce the sacrifice of minorities to a minimum."[433] Thus, he might well agree with the Seventh Circuit that extreme forms of hate speech are "repugnant to the core values" of a civilized society.[434] In the end, however, it seems clear that he would say that, under our political system, advocates of group hatred should be just as free as anyone else to "fight[ ] to make the kind of a world that [they] should like,"[435] and that if their views "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."[436] On this view, political hate speech should receive full protection under the First Amendment. As I have suggested, contemporary American courts generally take the same position, and it seems likely that this is due in considerable part to the deep influence that Holmes has had on our free speech jurisprudence.[437]

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[427] Letter from Oliver Wendell Holmes to Lewis Einstein (May 21, 1914), *in* THE ESSENTIAL HOLMES, *supra* note 168, at 114, 114.

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

[429] United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[430] *Abrams*, 250 U.S. at 627, 630 (Holmes, J., dissenting).

[431] *See supra* text accompanying notes 215–57.

[432] *See supra* text accompanying notes 190–94.

[433] Holmes, *Gas-Stokers' Strike*, *supra* note 173, at 325.

[434] Collin v. Smith, 578 F.2d 1197, 1200 (7th Cir. 1978), *cert. denied*, 439 U.S. 916; *see, e.g.*, HOLMES, COMMON LAW, *supra* note 99, at 37 (observing that, although "[n]o society has ever admitted that it could not sacrifice individual welfare to its own existence[,] . . . no civilized government sacrifices the citizen more than it can help").

[435] HOLMES, *Natural Law*, *supra* note 98, at 311.

[436] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). For a criticism of this position, see ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 76–77 (1975).

[437] The influence of Holmesian thought in this area may be seen in Justice Brennan's assertion that "[t]he First Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas." Texas v. Johnson, 491 U.S. 397, 418 (1989).

B. Private and Artistic Expression

Although they may part company on a few issues such as corporate electoral advertising and political hate speech, the Holmesian and liberal humanist views generally come out the same way in cases involving political or ideological expression, however much their reasoning may differ. The difference between the two approaches emerges much more sharply in cases involving nonpolitical expression, including private and artistic expression.

1. Freedom of Speech and Privacy

At the core of the liberal humanist view is a recognition of the inviolability of "the inward domain of consciousness."[438] Freedom of thought and belief allows individuals to develop a rich inner life. In this way, there is a close relationship between First Amendment liberties and the right to privacy. Perhaps the clearest expression of this relationship can be found in *Stanley v. Georgia*,[439] which holds that the state may not ban the mere possession of obscene material in an individual's own home.[440] In reaching this conclusion, Justice Marshall invokes the principles of both the First and the Fourth Amendments, and he quotes the statement in Brandeis's dissenting opinion in *Olmstead v. United States*[441]—a Fourth Amendment case—that "[t]he makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[442] Marshall continues:

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. . . . If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[443]

It is difficult to see how Holmes could have reached the same result in a case like *Stanley*. Although he too dissented in *Olmstead*, he declined to join Brandeis's discussion of the constitutional issues;[444] even in a Fourth Amendment case, Holmes was

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[438] MILL, *supra* note 77, at 13.
[439] 394 U.S. 557 (1969).
[440] *Id.* at 559.
[441] 277 U.S. 438 (1928).
[442] *Stanley*, 394 U.S. at 564 (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).
[443] *Id.* at 565.
[444] *See Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting).

unwilling to recognize a fundamental right to privacy. As we have seen, this is consistent with his refusal to attribute any special value or importance to the inner lives of individuals.[445] Holmes's jurisprudence is based on the notion of outward force, not inward freedom. On this view, the First Amendment does not protect thoughts and feelings for their own sake, but only insofar as they have an impact on the external world and help to shape the forces that determine the course of human life.

2. Artistic Expression

For similar reasons, liberal humanism and Holmesianism take very different approaches to the question whether artistic expression is entitled to protection under the First Amendment. Of course, this issue is an easy one for those forms of liberal humanism that see individual self-expression as a basic value of the First Amendment.[446] The problem is more difficult for those forms that focus on the importance of free speech for democratic self-government or the search for truth. In a well-known 1960 article on free speech and obscenity, Harry Kalven, Jr., questioned whether the theories of Meiklejohn and Mill could provide a justification for protecting art and literature.[447] With regard to Meiklejohn's view, Kalven observed that "[n]ot all communications are relevant to the political process. The people do not need novels or dramas or paintings or poems because they will be called upon to vote."[448]

The following year, Meiklejohn responded to this challenge by arguing that the First Amendment should be understood to protect not only speech that is directly relevant to self-government, but also a broader "range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express."[449] According to Meiklejohn, these forms of communication included art and literature as well as philosophy, science, and education in the broadest sense.[450]

Likewise, there is no reason to doubt that Mill's theory would protect artistic expression. As we have seen, Mill's argument that free speech is necessary for the search for truth is integrally connected with his broader view that the highest end for human beings is to develop their faculties and their individuality.[451] This "ideal of

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[445] *See supra* text accompanying notes 296–303.

[446] *See, e.g.*, BAKER, HUMAN LIBERTY, *supra* note 9, at 51–54; REDISH, *supra* note 68, at 68–76.

[447] Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15–16.

[448] *Id.* at 16.

[449] Meiklejohn, *Absolute*, *supra* note 69, at 256.

[450] *Id.* at 257. Similarly, Emerson writes that the First Amendment principle that everyone has a right to participate in decision making "carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge." EMERSON, SYSTEM, *supra* note 90, at 7.

[451] *See supra* text accompanying notes 84–88.

self-development," which he identifies with classical Greece,[452] has an important aesthetic dimension. As Mill puts it:

> It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating . . . .[453]

It is difficult to see how this aesthetic dimension, and the "high thoughts and elevating feelings" that it gives rise to, could be fully captured by rational discourse.[454] Instead, it seems clear that on Mill's view artistic and literary expression are also necessary to fully express the truth about human life.

In contrast, Holmes denies that art and literature have anything to do with truth, a domain that he identifies with modern science. As he explains in some remarks delivered in 1900:

> Today the whole domain of truth concerning the visible world belongs to science. . . . We know that the epoch making ideas have come not from the poets but from the philosophers, the jurists, the mathematicians, the physicists, the doctors,—from the men who explain, not from the men who feel. We realize that explanation and feeling are at the opposite poles of intellectual life, and require and come from opposite interests and opposite gifts. We no longer ask of *belles lettres* that they should be a "criticism of life," in Matthew Arnold's phrase, or that they should help us to fix our attitude toward the world. We do not read novels for improvement or instruction. . . . [W]e want only to be amused, to be moved, to be uplifted, and to be charmed.[455]

In short, for Holmes, the purpose of art is not to pursue or represent "truth," but merely "to pull the trigger of an emotion."[456]

On this view, art and literature do not seem to contribute anything substantial to the marketplace of ideas, and so do not fall within the rationale that Holmes articulates

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[452] MILL, *supra* note 77, at 59.

[453] *Id.*

[454] *Id.*

[455] Oliver Wendell Holmes, *Remarks at a Tavern Club Dinner for Dr. S. Weir Mitchell*, *in* 3 COLLECTED WORKS, *supra* note 168, at 525, 525.

[456] *Id.*

in *Abrams*. Fortunately, in this area, the Supreme Court has generally followed the liberal humanist view rather than Holmes's and has accorded literary and artistic expression full protection under the First Amendment.[457]

C. Speech by Public Employees

The final area that I wish to discuss involves speech by public employees. In *McAuliffe v. Mayor of New Bedford*,[458] Holmes and his colleagues on the Massachusetts Supreme Judicial Court considered a free speech claim brought by a police officer who had been fired for engaging in political activity.[459] Holmes dismisses the claim with the observation that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[460] He continues, "There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him."[461]

In *McAuliffe*, Holmes treats the "constitutional right[ ] of free speech" as an ordinary private right which can be waived through contract.[462] This position accords with the rest of his early free speech jurisprudence, which regards freedom of speech as no different than any other liberty.[463] Of course, his view of free speech changes radically after *Abrams*, but there is reason to doubt that this would have led him to completely abandon the position that he takes in *McAuliffe*. Holmes's defense of free speech is based on the idea of power. In *Abrams*, he conceives of the marketplace of ideas as a sphere in which the most powerful beliefs will prevail, thus enabling the dominant forces in the community to formulate and implement their will.[464] This leads him to change his earlier view that the government has broad power to restrict private expression. But it does not follow that this rationale would prevent the government from exercising its traditional authority to control its own employees. Instead, the Holmesian logic of power would seem to favor the government in cases like *McAuliffe*.

By contrast, the liberal humanist view focuses not on issues of power, but rather on the question of what rule would best promote the positive values of the First

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[457] *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602 (1998) (Souter, J., dissenting) (collecting cases to illustrate the point that "[i]t goes without saying that artistic expression lies within this First Amendment protection"). Even in the area of obscenity, which the Court has held outside the First Amendment guarantee, material is protected if it has "serious literary [or] artistic . . . value." Miller v. California, 413 U.S. 15, 24 (1973).

[458] 29 N.E. 517 (Mass. 1892).

[459] *Id.* at 517.

[460] *Id.*

[461] *Id.* at 517–18.

[462] *Id.*

[463] *See supra* Part II.B.

[464] *See supra* text accompanying notes 215–34.

Amendment, including individual self-expression, the ability of citizens to attain information about and to debate public issues, and the pursuit of truth. For this reason, liberal humanists are more inclined than Holmesians to limit the power of government to restrict public employee speech that serves these values.

Modern free speech jurisprudence has moved a considerable distance away from the Holmesian position on this issue. In a series of cases, the Supreme Court has rejected the view that the government can condition public employment on the abandonment of one's right to free speech.[465] And in *Pickering v. Board of Education*,[466] the Court ruled that when an employee is disciplined or fired for her speech, a court must balance "[1] the interests of the [employee], as a citizen, in commenting upon matters of public concern and [2] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[467]

Unfortunately, in recent years, the Court has retreated from the relatively protective position that it took in *Pickering*. In *Connick v. Myers*,[468] a five-to-four majority ruled that the First Amendment affords no protection to employee speech on matters that are not of public concern, a term that it defined in an unduly narrow way.[469] And most recently, in *Garcetti v. Ceballos*,[470] another five-to-four majority announced a categorical rule that speech that falls within an employee's job responsibilities is beyond the protection of the First Amendment, no matter how important the speech may be to the public interest.[471] Once again, decisions like this reflect the unfortunate legacy that Holmes's thought has had for many aspects of First Amendment doctrine.

CONCLUSION

This Article has explored a paradox that lies at the heart of contemporary First Amendment jurisprudence. On one hand, the courts assert that the Constitution protects freedom of expression in order to promote basic liberal values such as individual self-fulfillment, democratic deliberation, and the search for truth. Yet on the other hand, the courts often accord First Amendment protection to racist hate speech, violent pornography, invasion of privacy, and other kinds of expression that undermine those fundamental values.

In this Article, I have argued that, to a considerable extent, this Jekyll-and-Hyde quality is a result of the deep influence that Justice Holmes has had on our First Amendment tradition. Holmes rejects the traditional view that freedom of speech is an essential aspect of individual liberty and democratic citizenship. Instead, he

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[465] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972).
[466] 391 U.S. 563 (1968).
[467] *Id.* at 568.
[468] 461 U.S. 138 (1983).
[469] *Id.* at 146.
[470] 547 U.S. 410 (2006).
[471] *Id.* at 421.

argues in *Abrams* that the social interest in the attainment of truth is best promoted by allowing free competition in a marketplace of ideas.[472] At first glance, this contention appears to reflect a strong liberal faith in the capacity of free and open discussion to discern the truth and thereby to promote the good of the society as a whole. On closer examination, however, it becomes clear that Holmes adheres to a very different view. For Holmes, there is no such thing as a common good or an identity of interest within the society. Instead, human life involves a struggle for existence and power between different social groups. The Holmesian marketplace of ideas is a mechanism for determining what "the dominant forces of the community" want and how they can best achieve it.[473]

I have contended that the Holmesian approach to the First Amendment is fundamentally flawed for several reasons. First, as Holmes himself recognized, the argument that he sketches in *Abrams* does not provide a convincing rationale for freedom of speech because it does not satisfactorily explain why the most powerful group should not simply impose its beliefs through law and "sweep away all opposition."[474] Second, there is no good reason to identify the truth with the views that are accepted by the dominant group in the society. Third, the Holmesian view equates truth with power, and thereby allows speech to be used to dominate less powerful groups. On this view, there is nothing anomalous about extending First Amendment protection to racist hate speech and other expression that aims to subordinate others: according to Holmes, that is what all kinds of speech ultimately seek to do. Finally, Holmes understands freedom of speech as a privilege to cause harm, and thus implies that the First Amendment should protect expression even when it causes serious and unjustified injury to others.

In all of these ways, the Holmesian view undermines the liberal values that traditionally have been understood to justify freedom of speech. For this reason I believe that we should move away from the Holmesian view and more fully adopt a liberal humanist approach to the First Amendment. Although this would not resolve all of the difficulties that arise in this area of law, it would focus the inquiry on what should be the central question: what resolution of a particular controversy would best promote the principles of human dignity and autonomy that lie at the core of our constitutional commitment to freedom of expression.

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

[473] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

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