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ABRAMS v. UNITED STATES: REMEMBERING THE AUTHORS OF BOTH OPINIONS

James F. Fagan, Jr.*

INTRODUCTION

It is difficult to find a case more pivotal in the development of the constitutional tradition of First Amendment jurisprudence than *Abrams v. United States*.¹ At the time of the *Abrams* decision First Amendment jurisprudence was in its infancy² and provided no speech protection.³ Unfortunately, the *Abrams* deci-

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1. 250 U.S. 616 (1919).

2. *But see* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L. J. 514 (1981) [hereinafter Rabban I].

3. *See, e.g.,* *Patterson v. Colorado ex rel. The Attorney General of the State of Colorado*, 205 U.S. 454 (1907). In *Patterson*, a publisher of an article and cartoon, that "reflected upon the motives and conduct of the Supreme Court of Colorado in cases still pending and were intended to embarrass the court in the impartial administration of justice[,]” was held in contempt of court. *Id.* at 459. In upholding the information for contempt, the majority, in an opinion by Justice Holmes, held that the main purpose of the first amendment is “to prevent all such previous restraints upon publications as

sion did not change this state. However, Justice Holmes' dissent⁴ in *Abrams* did sow the seeds of a new tradition that would bear fruit in later times.⁵ In other words, one could argue that the development of constitutional protection for free speech has its roots in the *Abrams* dissent. Indeed, in *Holmes'* dissent, "meaningful technical and theoretical content to first amendment guarantees"⁶ was introduced for the first time.

Many factors alter the dialectical progress of constitutional tradition, including changed circumstances, increased knowledge and evolved/altered valuations.⁷ With such changes, the fundamental values of society also change and constitutional law gives "formal expression" to these values.⁸ What, then, is the role of a judge in formulating constitutional tradition? Professor Sandalow has stated that "[j]udges . . . must demonstrate that principles upon which they propose to confer constitutional status express values that our society does hold to be fundamental."⁹

Judges are the critical influence in tradition-building because it is the judge who defines constitutional doctrine. Gaining an understanding of the judicial decision making process is therefore

had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Id.* at 462 (quoting *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314 (Mass. 1825); citing *Republica v. Oswald*, 1 Dallas 319, 325 (Penn. 1788)) (emphasis omitted). Justice Harlan, in dissent, stated: "I cannot assent to [the majority's] view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done." *Id.* at 465 (Harlan, J., dissenting). However, during World War I, this is what occurred. *See infra* notes 30-46 and accompanying text.

4. *Abrams*, 250 U.S. at 624-31.

5. David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 99 (1983).

6. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1303 (1983) [hereinafter Rabban II].

7. Terance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1063 (1981) [hereinafter Sandalow]; *See also* DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 70 (1976) (three factors are goals, rules, and situation) [hereinafter ROHDE & SPAETH].

8. Sandalow, *supra* note 7, at 1068.

9. *Id.* at 1069.

crucial to understanding the evolution of modern constitutional jurisprudence. Often, judges shape law in accordance with their own personal policy preferences.¹⁰ According to at least one commentator, such a “preference system” is comprised of a judge’s beliefs, attitudes and values.¹¹ Additionally, “[a] judge’s character and personality are vital variables in every decision he or she makes.”¹² Furthermore, these traits and beliefs frequently provide the foundation for the reasoning behind a particular judge’s decision.¹³ Clearly, the way judges vote is influenced by their “attitudes toward public policy issues, rather than [by] . . . purely legalistic consideration[s].”¹⁴ These principles demonstrate that judges are “full-fledged political decision makers.”¹⁵ Therefore, it is apparent that constitutional tradition is built upon the particular beliefs and attitudes of the individual judges towards the issues in a given case.

There is reason to believe that the majority and dissenting opinions in *Abrams* were the results of this decision making process. Given the process just described, the *Abrams* decision is particularly interesting because of the Justices involved.¹⁶ The majority opinion in *Abrams* was delivered by Justice John H. Clarke,¹⁷ while the dissent was delivered by Justice Oliver Wendell Holmes.¹⁸

10. HAROLD J. SPAETH, *SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION* 111 (1979) [hereinafter SPAETH]. The author notes three reasons why the justices of the Supreme Court have freedom to utilize personal policy preferences: 1) the justices are not electorally accountable; 2) they lack ambition for higher office; and 3) the Supreme Court is the court of last resort. *Id.* at 113.

11. ROHDE & SPAETH, *supra* note 7, at 75.

12. *Preface* to DONALD D. JACKSON’S *JUDGES* vii (1974).

13. ROHDE & SPAETH, *supra* note 7, at 128.

14. SPAETH, *supra* note 10, at 128.

15. *Id.* Consequently, the pattern of a Justice’s decisions on issues will be influenced by their ideological dimensions. LAWRENCE BAUM, *THE SUPREME COURT* 136 (2d ed. 1985).

16. The Justices of the Supreme Court during the term were Chief Justice White, Associate Justices McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis and Clarke. 250 U.S. iii (1919).

17. *Abrams*, 250 U.S. at 616.

18. *Id.* at 624 (Holmes, J., dissenting).

Justice Holmes was "savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak."¹⁹ He was "deeply conservative" and "unsympathetic to most of the reforms advocated by the liberals"²⁰ On the other hand, Justice Clarke was a "progressive on social and economic matters and [a] liberal on civil rights and liberties[.]"²¹ whose "philosophy was considerably to the left of Wilson and Brandeis (and much closer to the position of the man who ultimately succeeded Brandeis, William O. Douglas)."²² Yet, it was Justice Holmes who "was moved to a burst of eloquence about free speech that was to enrich and permanently to alter the constitutional tradition of the first amendment."²³

The purpose of this Article is two-fold. Initially, the focus will be on the *Abrams* case itself, looking at the political climate²⁴ of the nation and the state of the judicial system at the time,²⁵ as well as an in depth analysis of both briefs to the United States Supreme Court.²⁶ The focus will then shift to the two Justices whose opinions conflicted in the case.²⁷ Critical to the inquiry is the identification of a change in Holmes' philosophy from conservative to "libertarian," and the cause for this change. If there was such a shift, it is curious that it was Clarke, the progressive, who took up the torch of the hard-line position against freedom of speech. If judicial decisions are formed in

19. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 49 (1977).

20. Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 344 (1984).

21. HENRY J. ABRAHAM, *JUSTICES & PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 182 (2d ed. 1985).

22. *Id.*

23. Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition: Professor Ernst Freund and Debs v. United States*, 40 U. CHI. L. REV. 235, 238 (1973) [hereinafter Kalven].

24. See *infra* notes 30-89 and accompanying text.

25. See *infra* notes 90-135 and accompanying text.

26. See *infra* notes 136-214 and accompanying text.

27. See *infra* notes 215-57 and accompanying text.

accordance with the process described above,²⁸ an analysis of the two Justices' philosophies is crucial to comprehending a result as pivotal as that in *Abrams*.²⁹

I. THE POLITICAL CLIMATE AND THE JUDICIAL SYSTEM

The *Abrams* case arose when five Russian-born American residents distributed, on August 23, 1918, leaflets condemning United States intervention in internal Russian activities.³⁰ The criminal prosecution was based on an indictment containing four counts of violation of the Espionage Act of 1917,³¹ as amended

28. See *supra* notes 7-15 and accompanying text.

29. See *infra* notes 258-419 and accompanying text.

30. *Abrams*, 250 U.S. at 617-18. See ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 108-09 (1941) [hereinafter CHAFEE, FREE SPEECH]. This Article will only undertake an overview of the background of the case. For a complete discussion see *id.* at 108-40.

31. Espionage Act of 1917, ch. 30, 40 Stat. 217, 219 (codified as amended at 18 U.S.C. §§ 11, 791-94, 2388, 3241 (1988); 22 U.S.C. §§ 213, 220-22, 401-08 (1988); 50 U.S.C. §§ 191, 192, 194 (1988)). The Espionage Act of 1917 provided, in part:

SECTION 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section six of this title; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids

another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both.

SEC. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same

shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

SEC. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

SEC. 5. Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offense under this title shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than two years, or both.

SEC. 6. The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title: Provided, That he shall determine that information with respect thereto would be prejudicial to the national defense.

SEC. 7. Nothing contained in this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or

naval courts-martial under sections thirteen hundred and forty-two, thirteen hundred and forty-three, and sixteen hundred and twenty-four of the Revised Statutes as amended.

SEC. 8. The provisions of this title shall extend to all Territories, possessions, and places subject to the jurisdiction of the United States whether or not contiguous thereto, and offenses under this title when committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable hereunder.

SEC. 9. The Act entitled "An Act to prevent the disclosure of national defense secrets," approved March third, nineteen hundred and eleven, is hereby repealed.

Id.

The Act was amended in 1918 and stated in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section three of title one of the Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June fifteenth, nineteen hundred and seventeen, be, and the same is hereby, amended so as to read as follows:

SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States, and whoever, when the United States is at war, shall willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the

in 1918.³² The first and second counts stemmed from the new amendment to the Espionage Act, which sounded in seditious libel.³³ The amendment prohibited language intended to hold “the form of government in the United States . . . [in] contempt, scorn, contumely, [and] disrepute”³⁴ The third and fourth counts were grounded in the prior statute, which prohibited the use of speech to “incite, provoke and encourage resistance to the United States”³⁵

The United States entered World War I after the declaration of war on April 6, 1917.³⁶ It was a divided nation that entered the

United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both: Provided, That any employee or official of the United States Government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States shall be at once dismissed from the service. Any such employee shall be dismissed by the head of the department in which the employee may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official.

Espionage Act of 1918, ch. 75, 40 Stat. 553 (codified as amended at 18 U.S.C. §§ 11, 791-94, 2388, 3241 (1988); 22 U.S.C. §§ 213, 220-22, 401-08 (1988); 50 U.S.C. §§ 191, 192, 194 (1988)).

32. *Id.*; see *supra* note 31 for pertinent parts of amendment.

33. *Abrams*, 250 U.S. at 616-17.

34. *Id.* at 617-18; see *supra* note 31 at § 3 of 1918 amendment.

35. *Abrams*, 250 U.S. at 617.

36. JOHN A. THOMPSON, REFORMERS AND WAR: AMERICAN PROGRESSIVE

war, after years of debate on neutrality.³⁷ Social tensions increased during the war with the focus of ethnic hatred on German-Americans.³⁸ After the Russian Revolution, there was an identification of the Soviet government with the German government.³⁹ There existed fear of "Prussian battalions" and "Bolshevik mobs."⁴⁰

Considering this environment, it is not surprising that "outside the courtroom waited a nation that feared and loathed every word that Abrams had spoken."⁴¹ Abrams and his codefendants fared no better inside the courtroom. Judge Clayton, who was transferred from Alabama to relieve crowded dockets, could not overcome the belief that, in war-time, speech freedoms must yield.⁴² To Clayton and most Americans, free speech would not protect those who opposed the cause for which men were dying in Europe.⁴³ Judge Clayton could have focused the trial on the fact that Russian operations were not part of the war, therefore requiring proof that the speech by defendants interfered with the supply of munitions for use in the war.⁴⁴ "Instead, Judge Clayton him-

PUBLICISTS AND THE FIRST WORLD WAR 177 (1987).

37. *Id.* Those on both sides of the debate over whether or not to enter the war feared that entrance by the United States would present threats to civil liberties. *Id.* at 159.

38. JAMES L. ABRAHAMSON, *THE AMERICAN HOME FRONT* 123 (1983).

39. CHAFEE, *FREE SPEECH*, *supra* note 30, at 117.

40. ZECHARIAH CHAFEE, JR., *THIRTY-FIVE YEARS WITH FREEDOM OF SPEECH* 4 (1952) [hereinafter CHAFEE, *THIRTY-FIVE YEARS*].

41. CATHERINE D. BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* 390 (1945).

42. CHAFEE, *FREE SPEECH*, *supra* note 30, at 112. Professor Chafee noted that the "emotions generated by the two simultaneous cataclysms of war and revolution swept unchecked through American prosecutors, judges, jurymen, and legislators." CHAFEE, *THIRTY-FIVE YEARS*, *supra* note 40, at 4. Judge Clayton, well-known for the Clayton Act, belonged to a distinguished Alabama family. CHAFEE, *FREE SPEECH*, *supra* note 30, at 112. Therefore, one could conclude that Judge Clayton would be in the mainstream of society against any radical position such as attack on private property which was part of the Russian Revolution. CHAFEE, *THIRTY-FIVE YEARS*, *supra* note 40, at 4.

43. CHAFEE, *THIRTY-FIVE YEARS*, *supra* note 40. *See* Rabban II, *supra* note 6, at 1215 (there was "nationwide repression of even the mildest and most respectable dissenters").

44. CHAFEE, *FREE SPEECH*, *supra* note 30, at 121-23.

self repeatedly proclaimed the unsound theory of guilt, that if the defendants intended to oppose the government's Russian policy they had *ipso facto* violated the law."⁴⁵ Consequently, the defendants were convicted on all four counts and given strict sentences.⁴⁶

Before analyzing the Supreme Court's decision in *Abrams*, other aspects of the social and political climate of the day should be noted. Despite the conservative environment caused by the war, proponents of speech protection were not invisible. The most prominent advocate of free speech was Theodore Schroeder, whose theories attempted to shield minorities from majoritarian excesses.⁴⁷ Schroeder was allied with Emma Goldman in the Free Speech League, formed in 1911,⁴⁸ whose policy opposed governmental restrictions on free expression.⁴⁹ In the legal arena, those arguing for expansion of free speech included Professor Schofield, who wrote a paper entitled *Freedom of the Press in the United States*,⁵⁰ and Roscoe Pound, who published an article in

45. *Id.* at 121. For a transcription of Judge Clayton's cross examination of the defendant see *id.* at 122-23.

46. *Id.* at 126, 128. After the sentencing, one of the defendants, Lipman, indicated that he did not expect anything better, whereby Judge Clayton stated: "And may I add, that you do not deserve anything better." *Id.* at 128. One defendant was acquitted based upon the insufficiency of the evidence. *Id.* at 126.

47. Schroeder thought that freedom of expression was a natural right guaranteed by the Constitution, not a liberty by permission provided to the chosen few. THEODORE SCHROEDER, "OBSCENE" LITERATURE AND CONSTITUTIONAL LAW 145 (Da Capo Press 1972) (1911). Schroeder's position can be seen in the following passage:

Of course only those ideas which were unpopular with the ruling classes were ever suppressed. The essence of the demand for free speech was that this discrimination should cease. In other words every inequality of intellectual opportunity, due to legislative enactment, was and is an unwarranted abridgment of our natural liberty, when not required by the necessity for the preservation of another's right to be protected against actual material injury.

Id. at 153.

48. Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. OF LEGAL HISTORY 56, 62 (1980).

49. *Id.*

50. Henry Schofield, *Freedom of the Press in the United States*, 9 AM.

the Harvard Law Review entitled *Equitable Relief Against Defamation and Injuries to Personality*.⁵¹ Pound's thesis was that society's interest in the free development of the individual must be weighed against the interest of the state in functioning as a social entity.⁵²

The judiciary also had some proponents of free speech protection. Although the normal judicial philosophy may have been that freedom of speech protects "criticism which is made friendly to the government, friendly to the war, friendly to the policies of the government,"⁵³ not all judges rejected protection for nonconformist speech.

One of the most important pronouncements on behalf of free speech was United States District Court Judge Bourquin's opinion in *United States v. Hall*.⁵⁴ Judge Bourquin determined that the Espionage Act of 1917 did not reach prosecutions for "opinions, beliefs, intentions, and arguments" because such actions were in the nature of seditious libel, which exceeded the federal government's jurisdiction.⁵⁵ Unfortunately, the *Hall* decision had a boomerang effect. The opinion stimulated the Department of Justice to seek the 1918 amendment to the Espionage Act, which included the provision punishing seditious libel.⁵⁶ Other judicial

Soc. Soc'y 67 (1914).

51. Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1915-16).

52. *Id.* at 682. Prior important works included THOMAS M. COOLEY, CONSTITUTIONAL LAW (Fred B. Rothman & Co. 1981) (1903) and JOHN S. MILL, ON LIBERTY (1859).

53. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 966 (1919) [hereinafter Chafee, *Speech in War Time*].

54. 248 F. 150 (D. Mont. 1918).

55. *Id.* at 152. "The Espionage Act is not intended to suppress criticism or denunciation, truth or slander, oratory or gossip, argument or loose talk, but only false facts, willfully put forward as true, and broadly, with the specific intent to interfere with army or navy operations." *Id.* at 153. See also Rabban II, *supra* note 6, at 1240 (for an additional analysis of the *Hall* decision).

56. See *supra* note 28. Attorney General Gregory indicated that the department had procured the passage of the Espionage Act of 1917. *Suggestions of Attorney-General Gregory to Executive Committee in Relation to the Department of Justice*, 4 A.B.A. J. 305, 306 (1918). He indicated that the *Hall* case required an amendment to the Espionage Act. *Id.* at 306-07. This

decisions, although few, did provide some protection to non-mainstream speech.⁵⁷ The means employed by these courts was to require “‘proximity’ between language and the crimes defined by the Espionage Act.”⁵⁸ Therefore, the judiciary inadvertently helped to bring about the enactment of the 1918 amendment.

The most prominent decision of this era on free speech, not handed down by the Supreme Court, was Judge Learned Hand’s opinion in *Masses Publishing Co. v. Patten*.⁵⁹ In *Masses*, the Postmaster General of New York State refused to accept the August issue of the journal *The Masses* for delivery in the United States mail.⁶⁰ The postmaster claimed authority under the Espionage Act of 1917, claiming the publication sought to convey false reports or false statements with intent to interfere with the operation or success of the war effort.⁶¹ The postmaster specifically objected to four cartoons and four articles appearing in the journal.⁶² The publisher sought a preliminary injunction against the postmaster for the refusal to accept the journal,⁶³ which Judge Hand granted.⁶⁴ Judge Hand expounded an incitement standard which required that there be a “direct incitement to violent resistance” before speech was punishable under the Espionage Act.⁶⁵ Judge Hand elaborated that “[i]f one

was due to the fact that it was “practically impossible in the district in which [Judge Bourquin] presides to punish the disloyalty denounced by [the Espionage Act of 1917].” *Id.* See Rabban II, *supra* note 6, at 1240 n.188.

57. Rabban II, *supra* note 6, at 1241 n.194.

58. *Id.* at 1241.

59. 244 F. 535 (S.D.N.Y.), *rev’d.*, 246 F. 24 (2d Cir. 1917).

60. *Id.* at 536; *see also* Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1, 5 (1990) (for a further discussion of the *Masses* decision).

61. *Masses*, 244 F. at 536.

62. *Id.* at 536-37 and 543-45; Blasi, *supra* note 60, at 6-8.

63. *Masses*, 244 F. at 536.

64. *Id.* at 543.

65. *Id.* at 540. Judge Hand noted that words can be a trigger of action and therefore are not part of “public opinion which is the final source of government in a democratic state.” *Id.* This shows that Judge Hand’s position on free speech is not based upon “a theory of individual rights or a tradition of respect for minorities” but as “providing the authority on which rests the

stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."⁶⁶ This standard "focus[ed] on the speaker's words, not on their probable consequence[]."⁶⁷

Unfortunately, this "extraordinarily speech-protective" philosophy did not go far; the decision was reversed by the United States Court of Appeals for the Second Circuit.⁶⁸ In rejecting the incitement test, the court adopted the "bad tendency" test. Under this test, "[s]peech could be restricted when it might lead to bad consequences in the form of individual or social harms."⁶⁹ The court held that:

If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested.⁷⁰

Such language as used in the Beatitudes⁷¹ would not have been punished under Judge Hand's test. Remarkably, however, the circuit court held that such rhetoric *should* be punished under the Espionage Act.⁷² However, Judge Ward's concurring opinion seemingly adopted Judge Hand's philosophy by stating that "[i]n addition to the natural effect of the language on the reader, the

government's very claim to power." Blasi, *supra* note 60, at 12.

66. *Masses*, 244 F. at 540.

67. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN L. REV. 719, 725 (1975).

68. *Masses Publishing Co. v. Patten*, 246 F. 24, 39 (2d Cir. 1917).

69. Blasi, *supra* note 60, at 12. The likelihood of the result could be minimal and the time for such results need not be imminent. *Id.*

70. *Masses*, 246 F. at 38.

71. Matthew 5: 3-10.

72. *Masses*, 246 F. at 38. In granting the stay of the injunction pending appeal, Judge Hough noted that the Beatitudes do not state "Go thou and do likewise," although such is the natural desire. He believed that such rhetoric was a direct incitement to action. The court cited and agreed with his reasoning. *Id.* Judge Hand would later refer to this "Marc Antony type" of speech. *See infra* notes 85-86 and accompanying text.

intention to discourage is essential.”⁷³ However, Judge Ward deferred to the Postmaster General’s determination of the existence of intent.⁷⁴

After his decision in *Masses* was reversed, Judge Hand pursued two avenues. Privately, he attempted to persuade Justice Holmes, prior to the *Schenck v. United States*⁷⁵ decision, to adopt the incitement test as the proper analysis.⁷⁶ However, he did not continue to advocate adoption of the incitement test in the judicial forum.⁷⁷

Another case involving the Espionage Act soon presented the issue to Judge Hand. In *United States v. Nearing*,⁷⁸ “Scott Nearing and the American Socialist Society were indicted for conspiracy to violate and attempted violation of the Espionage Act.”⁷⁹ Nearing had written a pamphlet entitled “The Great Madness,” which was printed by the American Socialist Society.⁸⁰ The pamphlet attempted “to show that America’s entrance into the war was” for money.⁸¹ It was alleged that members of the military had been distributing these pamphlets;⁸² defendants demurred.⁸³ Judge Hand overruled the demurrer except for two counts that failed to allege the requisite specific intent.⁸⁴ In so holding, Judge Hand attempted to establish that his incitement test met the criticism announced by the Second Circuit. He asserted that “Marc Antony type” speech would be

73. *Masses*, 246 F. at 39 (Ward, J., concurring).

74. *Id.*

75. 249 U.S. 47 (1919); for a discussion of *Schenck* see *infra* notes 99-106 and accompanying text.

76. Gunther, *supra* note 67, at 732-34.

77. *United States v. Nearing*, 252 F. 223, 227 (S.D.N.Y. 1918).

78. *Id.*

79. *Id.* at 224. The jury later acquitted Nearing, but found the society guilty on two counts. The American Socialist Society sought to set the verdict aside, which was denied by Judge Mayer. *United States v. Nearing*, 260 F. 885 (S.D.N.Y. 1919), *aff’d*, 266 F. 212 (2d Cir.), *cert. denied*, 254 U.S. 637 (1920).

80. *Nearing*, 252 F. at 225.

81. *Id.*

82. *Id.* at 224.

83. *Id.*

84. *Id.* at 231.

punished under his test because the “actual meaning of words to their hearers” would determine if there was an incitement to violence.⁸⁵ Because there was no Supreme Court precedent, Judge Hand had the chance to continue the fight to have his test accepted. Judge Hand believed that the Second Circuit’s test made words a crime “if they were in fact the cause of the results forbidden, and if they were uttered with the specific intent of producing those results.”⁸⁶ Although Judge Hand appeared to give up the battle by stating “I tried unsuccessfully in *Masses Pub. Co. v. Patten* . . . to suggest an analysis of what is included in those terms [counsel or advice],⁸⁷ and shall not attempt it again,”⁸⁸ a close reading of Hand’s definition of the circuit court’s test indicates that he read his incitement test into it, thereby keeping it alive.⁸⁹

85. *Id.* at 228.

86. *Id.*

87. Judge Hand indicated that at common law, to establish criminal liability, the words uttered must amount to “counsel” or “advice” to commit the forbidden acts. *Id.* at 227.

88. *Id.* (citations omitted; footnote added). The former part of the test was the circuit court’s test while the latter was Judge Hand’s attempt to attach his earlier incitement test. This was clearly Judge Hand’s motivation since the test, as he saw it, was “not objective only, but in part subjective.” *Id.* at 228. Yet, the circuit court was only using an objective causation test.

89. “In short, the test [in *Masses*] was made, not objective only, but in part subjective, as is indeed often the case in the definition of crime. At least this is as I understand that case” *Id.* However, the circuit court had stated:

If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested. That one may willfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one’s interest, seems to us too plain for controversy.

Masses Publishing Co. v. Patten, 246 F. 24, 38 (2d Cir. 1917).

II. PRE-ABRAMS UNITED STATES SUPREME COURT DECISIONS

Prior to *Abrams*, any philosophy of expansive freedom of speech protection fell on deaf ears at the Supreme Court. Two lines of cases provide an important background to the *Abrams* decision. The first line of cases were decided in 1918, and involved the Selective Draft Law.⁹⁰ The cases were *Ruthenberg v. United States*,⁹¹ *Kramer v. United States*,⁹² and *Goldman v. United States*.⁹³ These cases involved antiwar speakers who advocated that persons should refuse to register for the draft.⁹⁴ Although the attorney for Goldman and Kramer, Harry Weinberger, who later represented Abrams, made free speech arguments,⁹⁵ no discussion of freedom of speech under the First

90. Selective Draft Law, ch. 15, 40 Stat. 76 (1917). Other cases challenging the constitutionality of the law were heard and decided under the title of Selective Draft Law Cases, 245 U.S. 366 (1918) (finding the Selective Draft Law constitutional). The decision in the *Selective Draft Law Cases* determined the challenge raised in *Ruthenberg v. United States*, *Kramer v. United States* and *Goldman v. United States*. *Id.* at 389-90. However, because these three defendants were convicted under the act and raised objections to the constitutionality of the act by direct writ of error, a separate opinion was issued in each case. *See infra* notes 91-93.

91. 245 U.S. 480 (1918).

92. 245 U.S. 478 (1918).

93. 245 U.S. 474 (1918).

94. 245 U.S. at 475; 245 U.S. at 478-79; 245 U.S. at 481; *see* Rabban II, *supra* note 6, at 1245.

95. Weinberger put his freedom of speech argument under the point heading that the Selective Draft Law violated the due process clause of the Fifth Amendment. Brief for Plaintiffs in Error at 93, *Goldman v. United States*, 245 U.S. 474 (1918) (No. 702). Weinberger stated:

The history of civilized man is the history of the insistent conflict between liberty and authority. Each victory for liberty marked a new step in the world's progress; so that we can measure the advance of civilization by the amount of freedom acquired by human institutions. The first great struggle for liberty was in the realm of thought. But the authoritarians protested that freedom of thought would be dangerous; that a few were divinely appointed to think for the people. The power of church and state were arrayed against the libertarians; but after the sacrifice of many great men and many great women, freedom in thought

Amendment was advanced by the Court's decisions.⁹⁶ Ultimately, the Selective Draft Law was held constitutional.⁹⁷

The other collection of cases involved the Espionage Act of 1917.⁹⁸ The leading case is *Schenck v. United States*,⁹⁹ where the Court, in an opinion delivered by Justice Holmes, stated that speech could only be regulated where "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."¹⁰⁰ "Charles Schenck was [the] general secretary of the Socialist Party of Philadelphia[,] and . . . Elizabeth Baer, [co-defendant,] was the recording secretary of the party"¹⁰¹ The executive committee of the party

was won. The second momentous contest was for the liberty to speak. The third contest was for liberty of the press. The state said free speech and free press were dangerous. It was not the duty of citizens to think and speak, but to obey. It was perilous to permit people to speak their minds -- they might speak the truth. The fourth struggle was for liberty of assembly. The fifth important contest for liberty was in the field of religion. In these five important spheres of human action there have been against a sea of ignorance and tradition five great victories for freedom. Liberty wherever applied has proved a benefit to humanity; furthermore, the most important steps in human progress would have been impossible without it; and if civilization is to advance, that advance can come only as a result of broader and more complete freedom in all human relations.

Id. at 93-94. Weinberger adopted this position in his brief in the *Kramer* case. Brief for Plaintiffs in Error at 9, *Kramer v. United States*, 245 U.S. 478 (1918) (No. 261).

96. The Court did state that the Selective Draft Law did not interfere with the free exercise of religion due to exemption clauses in the Act. *Selective Draft Law Cases*, 245 U.S. at 389-90. The main focus of the decision was that the Constitution granted to Congress the power to raise and support armies which includes the power to compel military service. *Id.* at 382-88. Furthermore, the Court noted that allowing a draft did not impose involuntary servitude in violation of the prohibitions of the thirteenth amendment. *Id.* at 390.

97. *Id.* at 389-90.

98. *See supra* note 31.

99. 249 U.S. 47 (1919).

100. *Id.* at 52.

101. Brief for the United States at 2, *Schenck v. United States*, 249 U.S. 47 (1919) (Nos. 437, 438).

adopted resolutions for the secretary to print 15,000 leaflets.¹⁰² One side of the leaflet was entitled *Long Live the Constitution of the United States. Wake Up, America. Your Liberties are in Danger.*¹⁰³ Some of the leaflets were mailed to drafted men,

102. *Id.*

103. *Id.* at 3-4. The leaflet included the following statements:

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a freeman. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the conscription act.

The reverse side of the circular is headed "Assert Your Rights." This contained the following passages:

The Socialist Party says that any individual or officers of the law intrusted with the administration of conscription regulations violate the provisions of the United States Constitution, the supreme law of the land, when they refuse to recognize your right to assert your opposition to the draft.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

In lending tacit or silent consent to the conscription law, in

while others were found at the Socialist Party headquarters when the defendants were arrested.¹⁰⁴ The defendants were indicted on three counts, one of which included a violation of the Espionage Act and two of which involved unlawful use of the mails.¹⁰⁵ They were found guilty on all three counts.¹⁰⁶ After *Schenck*, the cases of *Frohwerk v. United States*¹⁰⁷ and *Debs v. United States*¹⁰⁸ were decided.

Frohwerk was indicted on thirteen counts for the publication of twelve articles in a newspaper entitled *Missouri Staats Zeitung*.¹⁰⁹ The articles, it was argued, violated the Espionage Act.¹¹⁰ Frohwerk was convicted on all but one count.¹¹¹

neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. You are a citizen; not a subject! You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants; not your masters. Their wages come from the expenses of government which you pay. Will you allow them to unjustly rule you?

Id. at 4-5.

104. *Id.* at 7-8; *Schenck*, 249 U.S. at 48-49.

105. *Schenck*, 249 U.S. at 48-49.

106. *Id.* at 49.

107. 249 U.S. 204 (1919).

108. 249 U.S. 211 (1919).

109. *Frohwerk*, 249 U.S. at 205.

110. *Id.*; Brief for Plaintiff in Error at 39, *Frohwerk v. United States*, 249 U.S. 204 (1919) (No. 685).

For example, one of the articles included the following passage:

Our American neighbors and friends are entitled to this information. Not to utter it would be treason to this - now our country.

This feeling of duty to America prompts us in warning and in protesting against the sending of troops to France even at the danger of being misunderstood.

We feel, our American friends agree with us in regretting the necessity of a war with Germany -- with any country for that matter.

Having been involved, should it not be our duty to see to it, that the result should be as little disastrous to ourselves as possible.

Germany has not as yet recognized in any way our declaration of war.

We are being told that unless we fight now on the fields of France, the Allies will be overpowered and Germany will collect her war

In *Debs*, Eugene Debs made a public speech at the Ohio State Socialist Party convention.¹¹² The audience included men of draft age.¹¹³ Although the main thrust of the speech was socialism, part “of the more general utterances was to encourage those present to obstruct the recruiting service”¹¹⁴ Debs noted that he had visited some associates that were in jail, including Ruthenberg.¹¹⁵ Debs was indicted under the Espionage Act, as amended,¹¹⁶ and was found guilty.¹¹⁷

indemnities from us. If this is the reason of our sending troops over to France, we submit as a wiser course, that every American soldier be kept at home against the time when Germany shall attempt to do her collecting from us. To attack us here at home, she would be at as great a disadvantage as we are now in attacking her. Both propositions are equally preposterous and impossible.

Id. at 39.

The Indictment included articles in the newspaper from July 6, 1917 to December 7, 1917. *Frohwerk*, 249 U.S. at 205. For a review of all of the articles see Brief for Plaintiff in Error at 35-89.

111. *Frohwerk*, 249 U.S. at 205-06.

112. Brief for Plaintiff in Error at 2, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714). For the full text of the speech see *id.* at 2-31. Part of the speech included the following passage:

And now is the time for all of us to do our duty. The call is ringing in our ears. It is your duty to respond: and you cannot falter without being convicted of treason to yourselves. Do not worry, please; don't worry about the charge of treason to your masters, but be concerned about the treason that involves yourselves Be true to yourself, and you can not be a traitor to any good cause on earth.

Id. at 30.

113. *Id.* at 2.

114. *Debs*, 249 U.S. at 212-13.

115. *Id.* at 213. The speech included the following:

I have just returned from a visit over yonder (pointing to the workhouse), where three of our most loyal comrades are paying the penalty for their devotion to the cause of the working class They have come to realize, as many of us have, that it is extremely dangerous to exercise the constitutional right of free speech in a country fighting to make Democracy safe in the world.

Brief for Plaintiff in Error at 3, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714).

Ruthenberg was the one whose conviction was upheld by the Supreme Court. *Ruthenberg v. United States*, 245 U.S. 480 (1918).

116. *Debs*, 249 U.S. at 212.

Although most students of constitutional theory learn of the trilogy of Espionage Act cases, *Schenck*, *Frohwerk* and *Debs*, there was a fourth case, *Sugarman v. United States*,¹¹⁸ which also involved the Espionage Act.

Abraham L. Sugarman attended a meeting of the Socialist Party with printed forms addressed to Congress asking for a referendum on the Selective Service Act, with the intent to obtain signatures.¹¹⁹ In the crowd were people registered under the Selective Draft Law, but not yet called to service.¹²⁰ The government's chief witnesses characterized Sugarman's speech as predominantly socialistic, in that Sugarman claimed that such capitalists as J. P. Morgan and Rockefeller were President Wilson's "pals" and that he said it was "a rich man's war."¹²¹ Sugarman was tried in the district court for violation of the Espionage Act and was found guilty.¹²² He then raised thirty-one exceptions to the trial judge's decision.¹²³ The Supreme Court, in a decision authored by Justice Brandeis, dismissed the writ of error, holding that twenty nine of the exceptions did not rise to a constitutional level.¹²⁴ Two exceptions involved jury instructions requested by Sugarman that did include constitutional language.¹²⁵ The Supreme Court held that the court's

117. *Id.*

118. 249 U.S. 182 (1919). This case is not cited in most casebooks. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW (12th ed. 1991).

119. *See* Brief for the United States at 3, *Sugarman v. United States*, 249 U.S. 182 (1919) (No. 345). Unfortunately, any argument that petitioning the government is a form of speech so fundamental to the political system that it should be given special protection has been rejected. *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

120. Brief for the United States at 2-3, *Sugarman* (No. 345).

121. *Id.* at 4.

122. *United States v. Sugarman*, 245 F. 604 (D. Minn. 1917), *writ of error dismissed*, 249 U.S. 182 (1919).

123. *Sugarman*, 249 U.S. at 184.

124. *Id.* at 183-84.

125. *Id.* at 184-85. The exceptions were that the district court refused to give the following instructions:

(a) The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of

instruction¹²⁶ “embodied the substance of the two” requested instructions and a “judge [is] not obligated to adopt the exact language of the instructions requested”¹²⁷ Therefore, the Court held that “no substantial constitutional question was presented . . .” and dismissed the writ of error for want of jurisdiction.¹²⁸

In all four cases the government argued that the speech in controversy attempted to cause insubordination or obstructed re-

grievances. This right has been deemed so essential and necessary to free institutions and a free people that it has been incorporated in substance in the constitutions of all the states of the Union. These constitutional provisions referred to are not abrogated, they are not less in force now because of war, and they are as vital during war as during times of peace, and as binding upon you now as though we were at peace.

(b) This provision of our Constitution will not justify or warrant advocating a violation of law. A man may freely speak and write and petition, but he is responsible for the consequences of what he may say, write or publish; and if what he says and publishes has a natural tendency to produce a violation of law, that is to impel the persons addressed to violate the law, and the person using the language intends that it should produce a violation of law, then the person using such language is subject to punishment and this is not inconsistent with the right and protection guaranteed by the Constitution of the United States and of this state.

Id.

126. The instruction used by the district court was follows:

Now, considerable has also been said in this case about freedom of speech. The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech. This provision of the Constitution is of course in force in times of war as well as in times of peace. But ‘freedom of speech’ does not mean that a man may say whatever he pleases without the possibility of being called to account for it. A man has a right to honestly discuss a measure or a law, and to honestly criticize it. But no man may advise another to disobey the law, or to obstruct its execution, without making himself liable to be called to account therefor.

Id. at 185.

127. *Id.* (citations omitted).

128. *Id.* This was one of the government’s positions — that there was no basis for jurisdiction. Brief for the United States at 35-38, *Sugarman* (No. 345).

cruitment in violation of the Espionage Act.¹²⁹ The government recommended in both *Schenck* and *Sugarman* that the appeals should be dismissed because punishment for an attempt to violate a valid statute did not trigger the First Amendment's protection.¹³⁰ Although *Schenck* is the more famous case, it was in

129. In *Schenck*, the government noted:

The defendants chose as the recipients of the circulars young men who had been accepted by the draft boards and were simply awaiting the orders to report for duty. This in itself is sufficient to support the verdict of the jury that the intent of the defendants was to influence the conduct of persons subject to the draft and to influence that conduct in relation to the draft.

Brief for the United States at 12-13, *Schenck v. United States*, 249 U.S. 47 (1919) (Nos. 437, 438).

In *Frohwerk*, the government noted that defendants were not accused of levying war, i.e. treason, but went on to state the following:

We fail to see, however, why this fact that an obstruction of the process of raising an army in a great and vital war may arise out of a treasonable intent or take the form of treason either deprives Congress of the power to legislate against other forms or obstruction of the process

Brief for the United States at 1-18 and 21, *Frohwerk v. United States*, 249 U.S. 204 (1919) (No. 685).

In *Debs*, the government stated:

Under these circumstances, the nature of the acts of these men and women, the fact that they had been convicted of inducing violations of the Selective Service Act, or of attempting to cause insubordination in the military forces of the United States or of obstructing the recruiting and enlistment service bore obviously on the defendant's purpose in his speech, and tended to show that he had the same unlawful purpose as those whom he praised so highly and asked others to emulate.

Brief for the United States at 29, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714).

In *Sugarman*, the government argued that: "The language used by the defendant and addressed the members of the military forces was plainly of a nature to stir up disloyalty and insubordination [and], in fact, counseled disobedience to the requirements of the draft law" Brief for the United States at 35, *Sugarman v. United States*, 249 U.S. 182 (1919) (No. 345). See also Rabban II, *supra* note 6, at 1247.

130. The first pointhead of the government's brief in *Schenck* is as follows: "First amendment of the Constitution not involved in this case - Defendant's claim of unconstitutionality frivolous and unsubstantial and insufficient upon which to base an appeal to the jurisdiction of this court." Brief for the United States at 12, *Schenck v. United States*, 249 U.S. 47

Sugarman that the government made “their most detailed arguments against the relevance of the First Amendment issue to the Espionage Act litigation.”¹³¹ As noted above, the Court did dismiss the appeal in *Sugarman*.¹³²

Although the existing legal and social environment at the time *Abrams* went before the Supreme Court was hostile to free speech claims, this hostility was not absolute. Literature arguing for expansive rights,¹³³ coupled with the cessation of World War I,¹³⁴ and the fact that the Espionage Act clearly sounded in seditious libel,¹³⁵ provided the defendants with some hope for a favorable decision. Although earlier Espionage Act decisions upheld the community’s right to limit individuals’ speech, the end of the war marked a shift towards tolerance.

(1919) (Nos. 437, 438). See also Rabban II, *supra* note 6, at 1253. The last pointhead of the government’s brief in *Sugarman* is as follows: “Statute clearly constitutional-Defendant’s contention unsubstantial and without merit and insufficient on which to base jurisdiction of this court in this case.” Brief for the United States at 35, *Sugarman v. United States*, 249 U.S. 182 (1919) (No. 345).

131. Rabban II, *supra* note 6, at 1252. Brief for the United States at 8-32, *Sugarman v. United States*, 249 U.S. 182 (1919) (No. 345). The government’s argument was that the Espionage Act “is a blanket clause, intended to cover all attempts, successful or unsuccessful, to cause unlawful disobedience to the constituted authorities on the part of men either already in the military service or subject to call into that service.” *Id.* at 28. In that position one must conclude, although the brief does not explicitly state, that the first amendment offers no protection.

132. See *supra* notes 118-24 and accompanying text.

133. See, e.g., Zechariah Chafee, Jr., *Freedom of Speech*, THE NEW REPUBLIC, November 16, 1918, at 66.

134. Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, U.S.-F.R.G., 2 U.S.T. 43.

135. Seditious libel is punishment for false, scandalous and malicious writings against the government if intended to defame the government or excite hatred of the people against the government. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 29 (1920). In non-wartime, prosecutions under the Sedition Act were unpopular. *Id.* at 21-29. During the war, it was claimed that the Espionage Act was distinct from the Sedition Act because it requires overt acts. *Id.* at 56. In reality, it was applied without distinction. *Id.* at 128.

III. THE BRIEFS IN *ABRAMS*

In *Abrams*, the defendants were indicted on four counts of violation of the Espionage Act, as amended.¹³⁶ Defendants were convicted on all four counts.¹³⁷ There were eight assignments of error, but the questions raised were reduced to two before being presented to the Supreme Court.¹³⁸ The questions involved were:

First. Was the enactment by Congress of section 3, Title I, of the act of June 15, 1917, in the respects in which it was amended by the act of May 16, 1918, 40 Stat. 553, clearly in excess of any power conferred upon the Congress by the Constitution?

Second. Was there any evidence in the case at bar to go to the jury of a violation of that act by the plaintiffs in error?¹³⁹

A. Brief for the Plaintiffs in Error

In *Abrams v. United States*,¹⁴⁰ Harry Weinberger, no stranger to espionage cases,¹⁴¹ raised two points on appeal. One was a standard criminal tactic: the indictment did not charge a crime and the evidence did not prove a crime.¹⁴² The other and more important point raised was that the defendants' actions were pro-

136. Brief for the United States at 2, *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316).

137. CHAFEE, *FREE SPEECH*, *supra* note 30, at 126 & 128. For a discussion of all counts of the indictment see Brief for the United States at 2-3, *Abrams* (No. 316).

138. Brief for the United States at 1, *Abrams* (No. 316).

139. *Id.*

140. 250 U.S. 616 (1919).

141. Harry Weinberger was counsel to Emma Goldman and Alexander Berkman in their fight against deportation to Russia and Grover Cleveland Bergdoll, a famous draft dodger of World War I. *H. Weinberger*, 58, *Copyright Expert*, N.Y. TIMES, March 6, 1944, at 19, col. 3. Weinberger, a Republican at the time, supported President Wilson's attempt to keep the United States out of the war. *Id.* Weinberger later specialized in copyright law with clients including Eugene O'Neill and Rudolph Schildkraut. *Id.*

142. Brief for Plaintiffs in Error at 11, *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316). *See Abrams* 250 U.S. at 619.

tected by the First Amendment.¹⁴³

In his brief, Weinberger began by making assertions. With respect to the first two counts -- those involving the seditious libel action -- the defendants claimed that no words referring to the government were employed.¹⁴⁴ He argued that the defendants

143. Brief for Plaintiffs in Error at 11, *Abrams* (No. 316).

144. *Id.* at 12. The leaflets stated as follows:

Government's Exhibit I.

The Hypocrisy of the United States And Her Allies

"Our" President Wilson, with his beautiful phraseology, has hypnotized the people of America to such an extent that they do not see his hypocrisy.

Know, you people of America, that a frank enemy is always preferable to a concealed friend. When we say the people of America, we do not mean the few Kaisers of America, we mean the "People of America." You people of America were deceived by the wonderful speeches of the masked President Wilson. His shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.

The President was afraid to announce to the American people the intervention in Russia. He is too much of a coward to come out openly and say: "We capitalistic nations cannot afford to have a proletarian republic in Russia." Instead he uttered beautiful phrases about Russia, which, as you see, he did not mean and secretly, cowardly, sent troops to crush the Russian Revolution. Do you see how German militarism combined with allied capitalism to crush the Russian revolution?

This is not new. The tyrants of the world fight each other until they see a common enemy -- WORKING CLASS -- ENLIGHTENMENT as soon as they find a common enemy, they combine to crush it.

In 1815 monarchic nations combined under the name of the "Holy Alliance" to crush the French Revolution. Now militarism and capitalism combined, though not openly, to crush the Russian revolution.

What have you to say about it?

Will you allow the Russian Revolution to be crushed? YOU: Yes, we mean YOU the people of America!

THE RUSSIAN REVOLUTION CALLS TO THE WORKERS OF THE WORLD FOR HELP.

The Russian Revolution cries: "WORKERS OF THE WORLD! AWAKE! RISE! PUT DOWN YOUR ENEMY AND MINE!"

Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM.

It is a crime, that workers of America, workers of Germany, workers of

Japan, etc., to fight THE WORKERS' REPUBLIC OF RUSSIA.
 AWAKE! AWAKE, YOU WORKERS OF THE WORLD!

REVOLUTIONISTS

P.S. It is absurd to call us pro-German. We hate and despise German militarism more than do your hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House.

Brief for the United States at 16-17, *Abrams* (No. 316).

The second leaflet was printed in Yiddish but was translated and reproduced by the Government in their Exhibit B-II:

WORKERS--WAKE UP.

The preparatory work for Russia's emancipation is brought to an end by his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!

America, together with the Allies, will march to Russia, not, "God Forbid," to interfere with the Russian affairs, but to help the Czecho-Slovaks in their struggle against the Bolsheviki.

Oh, ugly hypocrites; this time they shall not succeed in fooling the Russian emigrants and the friends of Russia in America. Too visible is their audacious move.

Workers, Russian emigrants, you who had the least belief in the honesty of our government, must now throw away all confidence, must spit in the face of the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war. With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.

You who emigrated from Russia, you who are friends of Russia, will you carry on your conscience in cold blood the shame spot as a helper to choke the Workers Soviets? Will you give your consent to the inquisitionary expedition to Russia? Will you be calm spectators to the fleecing blood from the hearts of the best sons of Russia?

America and her Allies have betrayed (the workers). Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that not only the Russian worker fights for freedom, but also here in America lives the spirit of revolution.

Do not let the government scare you with their wild punishment in

had acted within their rights in a manner normally associated with political parties.¹⁴⁵ The evidence of this was “so plain,” Weinberger maintained, that “it require[d] almost no argument”¹⁴⁶ With respect to the third and fourth counts, which involved the crime of intending “to incite, provoke and encourage resistance to the United States in said war with the Imperial German Government . . . ,”¹⁴⁷ the defendants argued that the pamphlets “dealt only with the question of Russian intervention”¹⁴⁸ Therefore, “if language means anything, no intent to cripple and hinder the United States in the prosecution of said war with Germany can possibly be found in said pamphlets.”¹⁴⁹

Weinberger then made a constitutional argument that indicated that the law was unconstitutional as applied to the defendants. His initial argument, although not under the constitutional point heading, asked: “Can an individual in America, with honest for public good motives, tell what he believes is the real truth on public questions? Can he tell the truth as he sees it, with the desire to form public opinion according to his own?”¹⁵⁰ Interestingly, Weinberger found the answer in the words of President Wilson: “If there is one thing that we love more deeply than any other in the United States, it is that every man should have the privilege, unmolested and uncriticized, to utter the real convictions of his mind.”¹⁵¹ Weinberger cited the United States Attorney General’s

prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight.

Three hundred years had the Romanoff dynasty taught us how to fight. Let all rulers remember this, from the smallest to the biggest despot, that the hand of the revolution will not shiver in a fight.

Woe unto those who will be in the way of progress.

Let solidarity live!

THE REBELS

Id. at 18-19.

145. Brief for Plaintiffs in Error at 12-13, *Abrams* (No. 316).

146. *Id.* at 12.

147. *Id.* at 14, 16.

148. *Id.* at 14, 17-16.

149. *Id.* at 16.

150. *Id.* at 17.

151. *Id.* Obviously, Weinberger was not familiar with another remark by Wilson: “Once [you] lead this people into war and they’ll forget there ever

instruction on the enforcement of the Espionage Act, which states that the Act "should not be permitted to become the median whereby efforts are made to suppress honest, legitimate criticism of the administration or discussion of governmental policies."¹⁵² To further support his position, Weinberger cited several judicial opinions that construed the Act in the same way.¹⁵³ Therefore, Weinberger concluded, the defendants were merely involved in public discussion and "if they were wrong, a counter-statement of the truth alone would be a sufficient answer."¹⁵⁴

Weinberger continued this line of reasoning throughout his brief.¹⁵⁵ He claimed that the United States Constitution provides an "absolute defense" for prosecution of speech defined within the realm of public discussion.¹⁵⁶ Citing *Frohwerk v. United States*,¹⁵⁷ Weinberger expanded the absolute protection to include speech made during the intolerance of a war period.¹⁵⁸ Interestingly, Weinberger offered a practical, rather than a theoretical, reason for this protection. Without such protection, he argued, people desiring to expound on public issues would be

was such a thing as tolerance The spirit of ruthless brutality will enter the very fibre of our national life." JOHN D. STEVENS, *SHAPING THE FIRST AMENDMENT: THE DEVELOPMENT OF FREE EXPRESSION* 44 (1982).

152. Brief for Plaintiff in Error at 17, *Abrams* (No. 316).

153. *Id.* at 18-19 (citing *United States v. Hall*, 248 F. 150 (D. Mont. 1918); *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917)).

154. Brief for Plaintiffs in Error at 21, *Abrams* (No. 316). *Cf.* *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) ("best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

155. Weinberger's dissection of the two issues is unclear. He argued, on page 42 of his brief, that an application of the Espionage Act to defendants was unconstitutional under the first amendment. Brief for Plaintiffs in Error at 42, *Abrams* (No. 316). Yet, all his prior arguments about public discussion are not attacks on the evidence, but come under the umbrella of the first amendment and are treated as such for this Article.

156. *Id.* at 23. It is assumed that this derives from the first amendment. As Weinberger stated: "The discussion of public Questions is absolutely immune under the First Amendment to the Constitution, when that is the only intention in the discussion." *Id.* at 24.

157. 249 U.S. 204 (1919).

158. Brief for Plaintiffs in Error at 23, *Abrams* (No. 316).

driven to “underground propaganda.”¹⁵⁹ He attempted to establish that the pamphlets were accurate, and that the reason for their publication was to rebuff “[t]he press [which] ha[d] been filled with anonymous lies and libels in reference to the Bolsheviks and the revolution in Russia”¹⁶⁰ Thus, Weinberger attempted to drive home the point that the pamphlets were pro-Russian and not pro-German.¹⁶¹

Although the trial court concluded that the clandestine manner used to distribute the pamphlets was evidence of the defendants’ evil intent,¹⁶² Weinberger asked the Supreme Court to take judicial notice of the fact that the proper means of distribution of the pamphlets was “prevented by agents of the Department of Justice and public officials during the war”¹⁶³ This position related to Weinberger’s earlier argument that government persecution forces democratic activity underground and undermines democratic processes.¹⁶⁴ Again, Weinberger resorted to massive citations for the proposition that the Russian intervention was erroneous and anti-democratic.¹⁶⁵ The purpose of these citations was “to show that these defendants [were] not alone in their opinions, and that the same opinions were expressed both before and since the armistice.”¹⁶⁶ An indirect conclusion is that the prosecutions were for the beliefs held by *these* defendants, since the ideas they conveyed were already in print in other forms, published by other individuals. A direct conclusion is that “[i]f the people have the right to alter or abolish the Government, they certainly have the right to discuss every act of the

159. *Id.* at 24.

160. *Id.* at 24-25.

161. *Id.* at 28-32. He also attempted to show that the pamphlets were pro-American. *Id.* at 29.

162. CHAFEE, *FREE SPEECH*, *supra* note 30, at 123-24.

163. Brief for Plaintiffs in Error at 32, *Abrams* (No. 316).

164. *Id.*

165. *Id.* at 32-40. “Leading public men, Senators, newspapers and magazines have demanded that we withdraw our troops from Russia both before the armistice and since the armistice.” *Id.* at 38.

166. *Id.* at 40. These include articles from the *Nation* and Senate debates. *Id.* at 32-40.

Government."¹⁶⁷

The second pointhead of Weinberger's brief was a direct constitutional challenge to the amendment to the Espionage Act.¹⁶⁸ He asserted that it was unconstitutional "if construed and applied so as to punish any individual for speaking or publishing his opinion on any public measure of the Government."¹⁶⁹

His brief analyzed the history of the Constitution and arrived at the conclusion that "[t]he right guaranteed in the Constitution was intended to enlarge intellectual opportunity as against abridgment either by prior restraint or subsequent punishment."¹⁷⁰ Since speech is not an overt act, our society has "always assumed the right of unrestricted discussion of public affairs."¹⁷¹ Weinberger seemed to go beyond Professor Pound's theory that the First Amendment is a balance of the rights of individuals versus society by stating that "[e]ven if the expression of an opinion on a public question should be injurious to the public welfare, the prevention of its free expression is unconstitutional"¹⁷² Having cited numerous authorities, Weinberger concluded that "absolute freedom of speech is the only basis upon which the Government can stand and remain free."¹⁷³

Although Weinberger's brief is an articulate analysis of the First Amendment theory during the *Abrams* era, it is more inter-

167. *Id.* at 41. This idea was based upon the Declaration of Independence. *Id.* Therefore, Weinberger rejected the premise that the government had the right and obligation to protect itself.

168. *Id.* at 42.

169. *Id.* at 50-51. It seems he included the argument that it would be unconstitutional as applied in the first pointhead, and that is the way this Article treats the brief.

170. *Id.* at 45.

171. *Id.* at 45-46.

172. *Id.* at 47. Of course, Professor Pound was not an absolutist. He stated that the social interest in the free development of the individual must be weighed against the social interest in the state as a social institution. *See supra* notes 51-52 and accompanying text. Weinberger seems to have taken the position that no social interest could be strong enough to override the social interest in free speech.

173. *Id.* at 50. Some of the authorities from which this conclusion was derived were Milton's *Areopagitica* and President Wilson's *The New Freedom*. *Id.* at 48-49.

esting for what was missing. Although both *Debs*¹⁷⁴ and *Frohwerk*¹⁷⁵ were cited, *Schenck*¹⁷⁶ was not. As a natural consequence, there is no analysis of the clear and present danger test and no application of the test to the facts of the case. In *Schenck*, Justice Holmes stated:

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.¹⁷⁷

In using that language, Holmes was really using the “bad tendency” test, but noting it must be applied on a case-by-case basis.¹⁷⁸ There was no requirement that the consequences of the speech be “specific, tangible, and imminent.”¹⁷⁹ Weinberger must have known of the “clear and present danger” test and its implications since he was involved in earlier cases and because he cited *Debs* and *Frohwerk* in his brief. Yet, it seems he took the option of putting all his eggs in one basket by intentionally excluding a case which might undermine his arguments, and advocated only an absolutist position.

To rule in favor of the defendants, the Supreme Court would have had to reverse three unanimous determinations handed down within the preceding year. Of course, had Weinberger included a discussion of the clear and present danger test he would have diluted the strength of the argument for absolute First Amendment protection. In hindsight, Weinberger’s method was a disservice to his clients, because he would have had a better opportunity for success by first trying to distinguish *Schenck*, rather than asking the Court to overrule it.

174. 249 U.S. 211 (1919).

175. 249 U.S. 204 (1919).

176. 249 U.S. 47 (1919).

177. *Schenck*, 249 U.S. at 52 (emphasis added).

178. Blasi, *supra* note 60, at 17-19.

179. *Id.* at 19. There is a tendency to project more freedom of speech into the clear and present danger test than really existed. I would assume that the growth of respect for Justice Holmes would be reason for this.

B. Brief For the United States

The government's brief countered Weinberger's factual and legal arguments. First, the government claimed that "there is nothing in [the defendants'] own testimony to rebut the inference that they intended in the leaflets to refer to the form of government of the United States" ¹⁸⁰ This provided the government with a basis to argue that the amendment to the Espionage Act was constitutional.

The government argued that the amendment was within congressional power. ¹⁸¹ The power to protect the government's reputation is "inherent in the very nature of the Government established by the Constitution" ¹⁸² Protecting the government's reputation is part of its "power of self-preservation." ¹⁸³ Furthermore, the duty of self-preservation is not for the Congress alone. ¹⁸⁴ Prior case law established that "the power of the Executive and of the courts to restrain and put down organized obstruction of and interference with the lawful functions of the Government . . ." exists. ¹⁸⁵

The brief noted that Congress has the constitutional power to define treason. ¹⁸⁶ Under such power, Congress defined seditious conspiracy. ¹⁸⁷ The Espionage Act made conspiracy an offense without requiring overt acts; that power follows the same logic as

180. Brief for the United States at 8, *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316). Language such as "'Our' President Wilson . . ." and "[Wilson's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity," established this position. See *supra* note 144 for full text. The government later noted that the jury determined that such statements were not only an attack on the Wilson administration, but criminal acts under the Espionage Act. Brief for the United States at 35, *Abrams* (No. 316).

181. *Id.* at 9-18.

182. *Id.* at 10.

183. *Id.* This is seditious libel, but the brief indicates that seditious libel was accepted before the Constitution was adopted and immediately following adoption, so it is a power of Congress. *Id.* at 18.

184. *Id.* at 14.

185. *Id.*

186. *Id.* at 15.

187. *Id.*

that of seditious conspiracy, at least under the government's argument.¹⁸⁸ "It is too late to argue, since the decisions of this court in *Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States*, that the publication of words may not be considered by Congress equivalent to deeds for this purpose."¹⁸⁹ Derived from this is the belief that punishment of seditious libel is within congressional authority.¹⁹⁰ Since the amendment "does not adopt the common law offense in its full stature[,]" there can "be no doubt of the power of Congress to enact it."¹⁹¹

The government continued its main objective — establishing that the Constitution never forbade laws against seditious libel — by arguing that the First Amendment never meant to eliminate the power to punish seditious libel.¹⁹² The government stated that the First Amendment "clearly refers us back to the law prior to the adoption of the Constitution, and intends to fix the liberty of the press by that law."¹⁹³ The government noted Sir William Blackstone's position of forbidding only prior restraint.¹⁹⁴ Yet, while noting that *Patterson v. Colorado ex. rel. the Attorney*

188. *Id.* The problem with this logic is that any grant of power could be curtailed by grants of rights of individuals under the first amendment.

189. *Id.* at 16 (citations omitted).

190. *Id.* at 18.

191. *Id.*

192. *Id.* This position has been more recently advocated by Professor Leonard W. Levy who states: "If . . . a choice must be made between two propositions, first, that the [first amendment] substantially embodied the Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the evidence points strongly in support of the former proposition." LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 281 (1985). Sir William Blackstone's position on freedom of speech was stated in his *Commentaries on English law*. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no PREVIOUS restraints upon publications, and not in freedom from censure for criminal matter when published." WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 151 (Tucker ed. 1969). In other words, the only protection is that of no prior restraints of speech.

193. Brief for the United States at 19, *Abrams* (No. 316).

194. *Id.* at 19-20. See *supra* note 192 for discussion of Blackstone's position.

*General of the State of Colorado*¹⁹⁵ may be precedent for this argument, the government stated that the “better way to look at the matter” is to use the analysis of Sir James Stephen which was more protective than Blackstone’s.¹⁹⁶ Even under this more protective analysis, “no liberty of the press was conceived of which included the unlimited right to publish a seditious libel.”¹⁹⁷ The government attempted to establish a thesis that echoed Professor Levy’s ideas forty years later:

It is clear that, in so far as the common law of England was concerned, the liberty of the press never did and does not now include the absolute right to publish a seditious libel. It is equally clear that it was not supposed to go to this extent by any person in this country at the time the Constitution was adopted.¹⁹⁸

Therefore, all that needed to be established was that the amendment was a subset of a seditious libel theory and, therefore, permissible under the First Amendment. “Surely” holding the form of government in “contempt, scorn, contumely, or disrepute” was “fully included in the definition of a seditious libel at common law.”¹⁹⁹

The last part of the government’s brief dealt with whether there was any evidence to go to a jury, the issue ultimately before the

195. 205 U.S. 454 (1907); *see supra* note 3.

196. Brief for the United States at 20, *Abrams* (No. 316). Sir James Fitzjames Stephen stated that the practical enforcement of seditious libel was “inconsistent with any serious public discussion of political affairs . . . and so long as it was recognized as the law of the land all such discussion existed only on sufferance.” JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 348 (1883). It is clear that when the Constitution was being written, the British government tolerated political speech which violated the letter of the seditious libel laws. *Id.* Therefore, the government’s brief conceded, it would be illogical to believe that the framers of the first amendment were adopting the common law of freedom of speech (Blackstone’s position) when in practice in England it was not enforced. Brief for the United States at 20, *Abrams* (No. 316). *See* STEPHEN, *supra*, at 351-54.

197. Brief for the United States at 20, *Abrams* (No. 316).

198. *Id.* at 21. *See* LEVY, *supra* note 192, at 147-48. Levy’s idea is more conservative in that he believed the framers did adopt Blackstone’s idea, but clearly that it incorporates the quoted position.

199. Brief for the United States at 24, *Abrams* (No. 316).

Court in the *Abrams* case.²⁰⁰ The government assumed that the conspiracy and overt act were admitted.²⁰¹ Therefore, it maintained, the only question was whether the leaflets could be found to contain language that abused the form of government or that was intended to incite resistance to the war effort against Germany.²⁰² The government made the standard deference to the trier of fact argument.²⁰³ It then isolated the passages that established a rational basis for the verdict.²⁰⁴ The government

200. *Id.* at 25-37.

201. *Id.* at 25.

202. *Id.* The logic follows that the meaning of the leaflets "would naturally incite resistance to the United States in its war with Germany, and that they incite curtailment of production of munitions of war in such a manner and at such a time as naturally to cripple the United States in the prosecution of the war." *Id.* at 34.

203. *Id.* at 26.

204. *Id.* at 28-34. The brief goes through the two pamphlets as follows:

The English one is headed: "The Hypocrisy of the United States and Her Allies," and is signed "Revolutionists." The heading means that the United States Government, as regards its regular functioning in the war, is that despicable character, a hypocrite, assuming a virtue, viz., of establishing democracy and freeing peoples which it does not have.

The first paragraph calls the President a hypocrite, and implies that, though constitutionally holding his office, he is not the President of the writers, nor, perhaps, of the "people" whom they address.

The second paragraph amplifies this "hypocrisy" and contrasts the "People of America" with "the few Kaisers of America," the latter presumably being the persons who exercise the real power under the form of government established in this country. It also speaks of "the hypocrisy of the plutocratic gang in Washington," which presumably includes Congress and the other functionaries of the Government in that city.

The third paragraph states that the President was afraid to announce to "the American people" the intervention in Russia, this in face of the fact that the decision to send the troops was announced in the public press August 5, 1918. It then gives the reason for his "cowardice," viz., he was afraid to say, "We capitalistic nations can not afford to have a proletarian republic in Russia;" meaning that the form of government in the United States is "capitalistic," i.e., an oligarchy of the rich; that the true form of government is a proletarian republic, i.e., an oligarchy of the poor, and that the real reason for the intervention in Russia was the fear that if an oligarchy of the proletariat

were ever established there, it would, like Pharaoh's lean kine, swallow up the established governments in other countries, including this. In brief, the form of government in this country is capitalistic, and "the workers" should see to it at once that it be made a proletarian republic by any means.

The fourth paragraph speaks of "the tyrants of the world" and their "common enemy" "working class enlightenment" which they combine to crush. The meaning is that the form of government in the United States is tyrannical, that it does not represent working class enlightenment, but, on the contrary it opposes it and desires to crush it.

The fifth paragraph states that the Holy Alliance crushed the French Revolution, and in the same manner "militarism and capitalism" are now combined, though not even openly, to crush the Russian Revolution; meaning that the form of government of the United States is not only militaristic and capitalistic, but meanly and aggressively so.

The moral of these statements is then pointed in six brief, glaring, and passionate paragraphs. The readers are first asked what they have to say about it, and whether they will allow the Russian Revolution to be crushed; meaning whether they will allow the capitalistic government of the United States to crush the much finer proletarian republic of Russia; and they are vehemently reminded in the language of Job: "Indeed ye are the people and wisdom died with you."

It is then stated that "The Russian Revolution" calls to the workers of the world for help and cries to them "Awake! Arise! Put down your enemy and mine!" meaning that the workers of the United States should arise and put down by force the hypocritical, aristocratical, oligarchical, capitalistic government in this country.

To make this clear, it is added that the workers have only one enemy, namely, "Capitalism;" meaning that the form of government of the United States was the only enemy of the working man.

The last paragraph states that "it is a crime" that the workers of this country should fight the "Workers' Republic of Russia;" meaning that it is a crime to support the Government of the United States as at present established by law.

The fitting close to this discord is "Awake! Awake, You Workers of the World!" Signed "Revolutionists"; meaning that the workers should arise and put down by force the hypocritical, capitalistic, reactionary government established in the United States.

The Yiddish leaflet is headed, "Workers--Wake Up."

The first paragraph states that Russia's emancipation has been brought to an end by "his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors"; meaning that the President, while engaged in the exercise of his lawful powers under the Constitution, viz., faithfully executing the laws declaring war on Germany and Austria and acting as

Commander in Chief of the Army and Navy, is a tyrant, and as such is preventing the establishment of the better and contrasted form of Government, viz., the Soviet Government of Russia.

The fourth paragraph calls upon the Russian emigrants, provided they are also "workers," to throw away their confidence in the honesty of the Government of the United States, to "spit in the face" of the military propaganda which has deceived them, calling forth their help in the prosecution of the war, and reminds them that their money, and labor in so far as it is employed in ammunition factories, are producing munitions of war to "murder" their dearest and best fighting for freedom; meaning that they should throw off their allegiance to this country . . . and should violently oppose the war, which was in substance a war against the Soviet republic.

The fifth and sixth paragraphs refer to "the shame spot" of "a helper to choke the Workers' Soviets," to the "fleecing blood from the hearts of the best sons of Russia," to the betrayal of the workers by America, and to its robberish aims; meaning that the Government of the United States as by law established has been and is guilty of these things.

The seventh paragraph calls the action of the Government of the United States "barbaric," and specifically advocates "a general strike." This general strike is to be an open challenge to the Government of the United States and is to show it that the Russian Worker "fights for freedom," and that in this country lives "the spirit of revolution"; meaning that a general strike of all workers should be had in order to stop the production of munitions, and to overthrow by force the form of government of the United States as by law established.

The eighth paragraph urges the "workers" not to be scared by the wild punishment in prisons, hanging and shooting, and not to betray the splendid fighters of Russia, ending with the exhortation "Workers, up to fight"; meaning that the punishments inflicted by the Government of the United States in the due course of law under the Constitution were "wild," i.e., without reason, savage, and that the "workers" should consequently destroy the Government as the fighters of the Soviets had destroyed the Kerensky government, namely by force of arms.

The ninth paragraph states that the Romanoff dynasty had taught "us" how to fight, and admonishes all rulers that the hand of the revolution will not shiver in a fight; meaning that the "workers" should overthrow by force of arms the despotic government established in the United States in the same manner and for the same reasons as in the overthrow by the "workers" of the Romanoff dynasty.

The last paragraph cries out, "Woe unto those who will be in the way of progress," and the whole is signed "The Rebels;" meaning that unless the Government of the United States voluntarily removes itself to

argued that these passages would “naturally incite resistance to the United States in its war with Germany”²⁰⁵ Also, the words “appeal to passion, prejudice, and hatred with the intent to loosen the social bond, and thus to dissolve the state into anarchy as preliminary to the establishment by force . . . of another form of government.”²⁰⁶ Consequently, the government concluded that there was a sufficient basis to sustain the verdict on all four counts.²⁰⁷

Like the defendants’ brief, an interesting aspect of the government’s brief is that it did not attempt to establish that the words created a clear and present danger. It is probable the government assumed that having already won that argument in *Schenck*, they should persuade the Court in *Abrams* to validate the Espionage Act’s seditious libel provision. Yet, even though the constitutionality of the Espionage Act was legal precedent, its application to speech must be established by showing the existence of a clear and present danger. The government neglected to make such a showing. Rather, it merely read the clear and present danger test as the bad tendency test, quoting *Schenck*:

‘It seems to be admitted that if an actual destruction of the recruiting service were proved, liability for words that produced that effect might be enforced If the act (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the crime.’²⁰⁸

The brief ended by noting that the jury could find that the language intended to bring the form of government into contempt, scorn, contumely, and disrepute, therefore violating the Espionage Act’s seditious libel provision.²⁰⁹

make way for a soviet form of government, it will be removed by a rebellion of the “workers” instituted and carried on by force of arms.

Id.

205. *Id.* at 34; see *supra* note 202 and accompanying text.

206. Brief for the United States at 36, *Abrams*, (No. 316).

207. *Id.* at 37.

208. *Id.* at 16 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

209. *Id.* at 37.

It has been stated that the functions of an appellate brief are to deal with the “impact of decisions on particular litigants,” and to be “concerned with the general principles which govern the affairs of persons other than those who are party to the cases decided.”²¹⁰ Although both parties’ briefs do represent their clients’ position, one can see arguments focused at our nation’s fundamental principles. At the very least, the briefs provided the Court with sufficient research to understand the case before them.

Neither brief in *Abrams* focused on the “clear and present danger” test.²¹¹ Instead, the crux of the debate was over the scope of the First Amendment. The positions taken were at the extremes of the speech protection spectrum. The defendants claimed absolute protection for speech involving public issues,²¹² while the government claimed that seditious libel was punishable.²¹³ Legal precedent lay somewhere in the middle.²¹⁴

IV. THE SUPREME COURT RESPONDS

In its decision in *Abrams*, the majority of the Supreme Court refused to enter the constitutional debate.²¹⁵ The Court held that the constitutional challenge to the Espionage Act had been resolved in *Schenck* and *Frohwerk*.²¹⁶ Therefore, for the majority the only focus was on whether, as a matter of law, there was evi-

210. PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 3 (1976).

211. See *supra* notes 174-77 and accompanying text.

212. Brief for Plaintiffs in Error at 44, *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316).

213. Brief for the United States at 20, *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316).

214. There was the “bad tendency” requirement that at least required the words to have some tendency to bring about acts in violation of the law. Chafee, *Speech in Wartime*, *supra* note 53, at 968. However, the “clear and present danger” test did not provide any further protection at this juncture. *But see* Edward J. Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283 (1988). For further discussion of the bad tendency test see Rabban I, *supra* note 2, at 533-49.

215. *Abrams v. United States*, 250 U.S. 616, 619 (1919).

216. *Id.*

dence sufficient to sustain the guilty verdicts.²¹⁷ The Court stated that, since the sentence did not exceed what lawfully could be imposed for any single count, it would focus only on the third and fourth counts.²¹⁸ The majority's formulation of the case raises a problem. The counts that it focused on do not deal with the amendment to the Espionage Act.²¹⁹ The reason may be the belief that the amendment was unconstitutional. This is suggested later when the Court noted that:

A technical distinction may perhaps be taken between disloyal and abusive language applied to the *form* of our government or language intended to bring the *form* of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war.²²⁰

It is submitted that the majority knew that seditious libel was unconstitutional and therefore sidestepped the issue. As noted above, the majority held that the constitutionality of the Espionage Act had been "sufficiently discussed and is definitely negated in *Schenck v. United States* . . . and in *Frohwerk v. United States*."²²¹ Yet those cases involved the Espionage Act before the Act was amended to make seditious libel a crime.²²²

217. *Id.*

218. *Id.*

219. Counts one and two involved unlawful and wilful conspiracy to utter, print, write and publish disloyal, scurrilous and abusive language about the form of government of the United States. Brief for Plaintiffs in Error at 12-14, *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316). Counts three and four dealt with writing to incite and advocate curtailment of the war effort. *Id.* at 14-16.

220. *Abrams*, 250 U.S. at 623-24.

221. *Id.* at 619 (citations omitted).

222. The Espionage Act was amended by the Act of May 16, 1918; see *supra* note 31. *Schenck* printed the leaflets in August, 1917. *Schenck v. United States*, 249 U.S. 47, 49-50 (1919). *Frohwerk's* publications were from July, 1917 to December, 1917. *Frohwerk v. United States*, 249 U.S. 204, 205 (1919). *Debs's* action occurred on June 16, 1918. *Debs v. United States*, 249 U.S. 211, 212 (1919). Furthermore, the case noted that the indictment was under the Espionage Act as amended. *Id.* However, the *Abrams* majority does

Thus, only the third and fourth counts should have passed constitutional muster. Even so, noting how much of the government's brief was allocated to the argument on counts one and two,²²³ and that the constitutionality of the amendment was one of the two issues raised on appeal,²²⁴ the doubt of the amendment's constitutionality must be accepted.

With respect to counts three and four, the majority accepted the government's analysis of the case.²²⁵ The question presented was whether there was "some evidence, competent and substantial,

not even cite the case. *Abrams*, 250 U.S. at 619. It is conceded that it would not help because the three counts of the indictment in *Debs* did not include a charge of violation of the amended section of the Espionage Act. Brief for Plaintiff in Error at 2, 31, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714).

223. Brief for the United States at 2-37, *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316).

224. See *supra* note 139 and accompanying text.

225. The government's brief stated:

As to the third and fourth counts of the indictment, viz., those charging incitement of resistance to the United States in the war, and curtailment of production of munitions of war, the leaflets directly violate these counts, and the jury was clearly justified in finding them guilty thereon. Nothing we can say in addition can make this any more evident than does the analysis of the papers submitted above. A general strike in the munitions factories is specifically urged in the most violent manner, and this, not to improve the condition of the employees either as to wages or hours of labor, but generally to prevent, at a most critical period of the war, the manufacture and shipment of munitions. Rebellion and revolution are passionately demanded for the purpose of creating a condition where the United States shall have an enemy in its midst as well as in its front.

Brief for the United States at 35-36, *Abrams* (No. 316).

The Court held as follows:

[The leaflets are] not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

Abrams, 250 U.S. at 622.

before the jury, fairly tending to sustain the verdict.”²²⁶ The Court adopted the position of the government’s brief: “the conspiracy and the doing of the overt acts charged were largely admitted and were fully established.”²²⁷

As for the requirement that there must be some relationship between the words spoken or written and the consequence which the law can protect, namely a causation element, which is the focus of the clear and present danger test,²²⁸ the majority indicated that the test is read as the bad tendency test when it stated: “Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.”²²⁹ Citing the leaflets, and even conceding that assistance to the Russian Revolution was the “primary purpose and intent”²³⁰ of the defendants, the majority concluded that the plan of action was to minimize the production of ammunition “necessarily involved” in the war with Germany.²³¹ The majority found that the leaflets did not indicate that the democratic process would be fostered by “candid discussion,” but that “the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and as they hoped, revolution, . . .” to the detriment of the “military plans of the Government in Europe.”²³²

Justice Holmes, joined by Justice Brandeis,²³³ dissented in

226. *Abrams*, 250 U.S. at 619 (citations omitted).

227. *Id.* at 618.

228. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Holmes noted that speech can be regulated to protect against “substantive evils that Congress has a right to prevent.” *Id.* For further discussion see *supra* note 176-79 and accompanying text.

229. *Abrams*, 250 U.S. at 621. Holmes did not clearly state that the *Schenck* “clear and present danger” test was not equivalent to the “bad tendency” test. Blasi, *supra* note 60, at 17.

230. *Abrams*, 250 U.S. at 621. The majority noted that the primary focus of the words do not provide the only consequence that can be punished. *Id.* The leaflets hoped to aid the Russian cause by stopping the production of ammunition, but such action “necessarily involved, before it could be realized, defeat of the war program . . .” *Id.*

231. *Id.*

232. *Id.* at 623.

233. For an excellent discussion of Justice Brandeis’ first amendment

what proved to be a classic dissertation on free speech. After providing his own summary of the leaflets, Holmes concluded that no argument is necessary "to show that these pronunciamientos in no way attack[ed] the form of government of the United States."²³⁴ According to the dissent, as a matter of law, there was insufficient evidence to sustain the jury verdict on counts one and two.²³⁵ Later in his thesis, Holmes stated that, as a matter of law, the First Amendment rejected the common law of seditious libel.²³⁶ Although Holmes did not cite any authority, it is the United States' "repentance for the Sedition Act of 1798" which led him to this conclusion.²³⁷ This repentance is shown by the repayment of fines imposed by the Sedition Act of 1798.²³⁸

Next, the dissent attacked the majority's criminal analysis of the *mens rea* requirement in the Espionage Act.²³⁹ The intent required for these crimes, as noted from common law, must be specific.²⁴⁰ That is to say that a person could be found liable, criminally or civilly, "if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not."²⁴¹ However, for Holmes, when words instead of an act were used, "then a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."²⁴² Therefore, a subjective analysis of the words was required.²⁴³ Furthermore, Holmes noted, the Espionage Act "must be taken to use its words

jurisprudence see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

234. *Abrams*, 250 U.S. at 626 (Holmes, J., dissenting).

235. *Id.*

236. *Id.* at 630.

237. *Id.*

238. *Id.*

239. *Id.* at 626-29.

240. *Id.* at 626.

241. *Id.* at 626-27.

242. *Id.* at 627.

243. *Id.* *Contra* Bogen, *supra* note 5, at 186 ("The focus of Holmes' dissent was not the subjective purpose of the defendants.").

in a strict and accurate sense.”²⁴⁴ Therefore, to establish a violation of the Espionage Act by words, the words must have had as the proximate motive the aim of producing resistance to the war efforts.²⁴⁵ For Holmes this was the *mens rea* required under the Espionage Act -- specific intent.²⁴⁶ He believed that no such intent was proved in this case.²⁴⁷

Finally, Justice Holmes turned to First Amendment analysis. It seems odd that he initiated an analysis, highly regarded by those who believe in expansive freedom of speech, by reaffirming the *Schenck*, *Frohwerk* and *Debs* decisions.²⁴⁸ Holmes stated that the Constitution allows punishment of “speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”²⁴⁹ Holmes believed that “only the present danger of immediate evil or an intent to bring it about . . .” invites punishment.²⁵⁰ This is the same dichotomy that Judge Learned Hand noted in *United States v. Nearing*,²⁵¹ where he imposed his incitement test onto the circuit court’s ruling.²⁵² Examining these “silly leaflet[s]” published by “an unknown man,” Holmes concluded that there was no immediate danger of hindering the government’s war effort.²⁵³ If the pub-

244. *Abrams*, 250 U.S. at 627.

245. *Id.* “This new definition signaled Holmes’ rejection of indirect intent” Rabban II, *supra* note 6, at 1306.

246. *Abrams*, 250 U.S. at 627.

247. *Id.* Holmes gave an example of a patriot who thought that “we [Americans] were wasting money on aeroplanes, or making more cannon of a certain kind than we needed and might advocate curtailment with success” *Id.* Holmes noted that “no one would hold such conduct a crime.” *Id.* Note that “all of [Justice Holmes’] examples in *Schenck* were of instances of speech that demand[ed] regulation.” Blasi, *supra* note 60, at 19.

248. *Abrams*, 250 U.S. at 627.

249. *Id.*

250. *Id.* at 628. The definition changes “present” to “imminent” and adds “certain” with respect to substantive evils. These two changes seem to be the areas that Justice Brandeis picked upon. See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

251. 252 F. 223 (S.D.N.Y. 1918) (Hand, J.).

252. *Id.* at 228; see *supra* notes 176-79 and accompanying text.

253. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting). Holmes noted that

lishing of these leaflets was for the purpose of obstructing the war effort in Germany, and the requisite "intent" was present, Holmes would probably allow punishment.²⁵⁴ This indicates some acceptance of the incitement test.²⁵⁵ Holmes concluded his analysis with his "free market of ideas" speech, which, despite his humble wish that he could elaborate on the topic more eloquently,²⁵⁶ is a masterpiece of philosophy. He stated:

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.²⁵⁷

the power is "greater in time of war than in time of peace because war opens dangers that do not exist at other times." *Id.*

254. *Id.*

255. Judge Hand believed the dissent did not accept his incitement test. See Gunther, *supra* note 67, at 743-45. This may be due to the fact that intent was intertwined with Holmes' analysis of intent in the statute. Holmes did not continue this dichotomy in *Gitlow v. New York*, 268 U.S. 652, 672 (1925).

256. *Abrams*, 250 U.S. at 631.

257. *Id.* at 630. The paragraph opened, however, stating that: "Persecutions for expression of opinions seems to me perfectly logical." Holmes believed "in the survival of the fittest, but he was now willing to let ideas battle each other rather than brute force." Rabban II, *supra* note 6, at 1311.

V. JUSTICE HOLMES AND HIS PREFERENCE SYSTEM

This philosophical dissertation could indicate a change in the direction of the thinking of a great Justice of the Supreme Court.²⁵⁸ It was, at least, a break with the unanimity of the Court on free speech issues. So important was the change in the Court's direction that three Justices decided to visit Justice Holmes in an attempt to persuade him to be a good soldier and join ranks.²⁵⁹ There is an indication that Holmes was wavering when he wrote a friend, Sir John Pollack,²⁶⁰ on November 6, 1919, that "no doubt I shall hear about [the *Abrams* dissent] on Saturday at our conference and perhaps be persuaded to shut up" ²⁶¹

Despite this "pressure from his fellow justices," Justice Holmes refused to change his position because many of the cases he dealt with made his "blood boil."²⁶² This uncompromising

258. Holmes changed his understanding of "clear and present danger" from a "bad tendency" test to requiring actual intent. Bloustein, *supra* note 214, at 298-99. Furthermore, his opinion also indicated that freedom of speech had some importance to self-government. Blasi, *supra* note 60, at 24. This is shown by Holmes' rejection of seditious libel. *Abrams*, 250 U.S. at 630. More fundamentally, it breathed life into the first amendment, by arguing for protection "of expressions of opinions and exhortations." *Id.* at 630-31.

259. DEAN ACHESON, MORNING AND NOON 119 (1965). Two of the Justices were Pitney and Van Devanter but the identity of the third Justice is not known. *Id.*

260. Sir Frederick Pollack was a friend Justice Holmes had met in the summer of 1874. John G. Palfrey, *Introduction* to 1 HOLMES-POLLACK LETTERS xv (Mark D. Howe ed. 1941). Both "were in the early stages of law practice" *Id.* They would begin writing letters in 1874 while Holmes was in England, and the correspondence would continue the rest of their lives. *Id.* at xvi-xxii. Pollack became a Bencher of Lincoln's Inn in 1906, King's Counsel in 1921, and Treasurer of Lincoln's Inn in 1931. *Id.* at xxi. Pollack was also appointed the Judge of the Admiralty Court of the Cinque Ports in 1914. *Id.* Pollack died in 1937, two years after Holmes. *Id.* at xxii.

261. 2 HOLMES-POLLACK LETTERS 29 (Mark D. Howe ed. 1941) [hereinafter 2 HOLMES-POLLACK LETTERS].

262. BOWEN, *supra* note 41, at 389. Holmes felt it was his "duty" to dissent. 2 HOLMES-POLLACK LETTERS, *supra* note 261, at 29. It is unfortunate

position was his response when his dissent “seemed to create no feeling . . . in most of [his] brethren.”²⁶³ Yet, was Holmes’ new philosophy that of a libertarian or that of a fatalist? Holmes seemed to indicate both possibilities when he wrote:

I regard my view [in *Abrams*] as simply upholding the right of a donkey to drool. But the usual notion is that you are free to say what you like if you don’t shock me. Of course the value of the constitutional right is only when you do shock people.²⁶⁴

No matter what drove the new Holmes, we must focus on what changed the old Holmes.

The early Holmes never indicated any preference for speech protection.²⁶⁵ As a state court judge he ranked speech low as compared to state interests.²⁶⁶ On the Supreme Court, prior to 1919, there was no indication that Holmes’ views on free speech had changed. In *Patterson v. Colorado ex rel. The Attorney General of the State of Colorado*,²⁶⁷ he adopted the Blackstonian definition of speech protection²⁶⁸ -- the First Amendment prevents prior restraint but does not protect speech from subsequent punishment.²⁶⁹ In *Fox v. Washington*,²⁷⁰ Holmes upheld a con-

that only one page of this letter, which discusses Holmes’ feelings on his *Abrams* dissent, has been found. *Id.* at 29 n.4.

263. BOWEN, *supra* note 41, at 389.

264. THE HOLMES-EINSTEIN LETTERS 244 (James B. Peabody ed. 1964).

265. See Bogen, *supra* note 5, at 122-31.

266. See, e.g., *Commonwealth v. Davis*, 162 Mass. 510 (1895); *McAuliffe v. New Bedford*, 155 Mass. 216 (1892). In neither opinion did Holmes seriously consider the risk of inhibiting speech or the social interest in public discussion, although speech was involved in both cases. In *McAuliffe*, a police officer was sanctioned for being involved in political campaigns contrary to local rules. 155 Mass. at 220. In *Davis*, a defendant was convicted of public speech on public property without a permit. *Davis*, 162 Mass. at 513. Bogen, *supra* note 5, at 123-25; Yosel Rogat & James M. O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion*, 36 STAN. L. REV. 1349, 1354 (1984).

267. 205 U.S. 454 (1907).

268. *Id.* at 462. For William Blackstone’s position on free speech see *supra* note 192.

269. *Patterson*, 205 U.S. at 462. Yet even this discussion now is read for support of first amendment rights because it “provides greater protection against prior restraint than against subsequent punishments.” Rabban I, *supra* note 2, at 534 n. 87.

viction²⁷¹ for editing printed matter tending to encourage and advocate disrespect for law based upon an editorial advocating a boycott in support of nude bathing.²⁷² He continued the philosophy that deference should be accorded legislative determinations and that individual rights should not outweigh societal interests.²⁷³ Therefore, implicit in Holmes' opinions is the belief that literature which incites lawless action, even indirectly, was punishable.²⁷⁴

When the Espionage cases came before the Court, the three main cases were assigned to Holmes.²⁷⁵ The reason for these assignments is not clear. As indicated above, Holmes had been insensitive to free speech.²⁷⁶ Yet, Holmes believed that he was assigned the opinions because he had the most liberal views on free speech.²⁷⁷ He believed he took "the extremist view in favor

270. 236 U.S. 273 (1915).

271. *Id.* at 278.

272. *Id.* at 275-76. The statute under which defendants were charged provided:

Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor.

Id.

273. *Fox*, 236 U.S. at 277. Holmes used words such as "tends" and "encouragement" in looking at the words and their possible result. *Id.* This is the "bad tendency" test and not that of the *Abrams* dissent.

274. "Thus by *indirection* but unmistakably the article encourages and incites a persistence in what we must assume would be a breach of the state laws" *Id.* (emphasis added). See also, Rabban I, *supra* note 2, at 535 n.92.

275. *Schenck*, 249 U.S. at 47; *Frohwerk*, 249 U.S. at 204; *Debs*, 249 U.S. at 211. Holmes indicated that he would have gone farther in protecting speech than the majority would desire, "and I daresay it was partly on that account that the C.J. [White] assigned the [cases] to me." 2 HOLMES-POLLACK LETTERS, *supra* note 261, at 7.

276. At this time, Holmes never showed any indication of sensitivity beyond that of Blackstone.

277. See *supra* note 275. Justice Brandeis later admonished himself for

of free speech.”²⁷⁸ In light of the fact that Justice Brandeis was given the other Espionage opinion,²⁷⁹ this position may be valid. However, it is difficult to believe this self-analysis. *Schenck* gave Holmes “an opportunity to discourse in a limited fashion upon the Constitution’s guarantee of free speech.”²⁸⁰ Yet, although the decision did depart from the Blackstone treatment of speech, Holmes, by his own admission, dealt with the subject “somewhat summarily.”²⁸¹ As a result, there was no evidence of Holmes’ “extreme position.”²⁸²

There is conjecture on the actual strength of the clear and present danger test during World War I.²⁸³ Did it really go beyond the analysis used in *Fox*, which seemed to be a bad tendency test?²⁸⁴ Assuming that *Debs* was controlled by the clear and present danger test, it is clear that the test initially was defined by its author as the bad tendency test. Justice Holmes stated that words could be punished if “their natural tendency and reasonable probable effect” was to obstruct recruiting.²⁸⁵ Clearly, *Debs* did not go beyond the bad tendency test.²⁸⁶

Holmes disposed of the Espionage cases quickly.²⁸⁷ While he may have adopted his philosophy from the common law of at-

failing to join in the dissent in the Espionage cases. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 316 (1984).

278. 2 HOLMES-POLLACK LETTERS, *supra* note 261, at 29.

279. *Sugarman v. United States*, 249 U.S. 182 (1919).

280. JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920 at 366 (1978).

281. 2 HOLMES-POLLACK LETTERS, *supra* note 261, at 7.

282. SEMONCHE, *supra* note 280, at 366.

283. Compare Blasi, *supra* note 60, at 19 (test was to reaffirm the traditional principle) with STRUM, *supra* note 277, at 316 (“clear and present danger” test provided more protection than traditional test).

284. See *supra* notes 270-74 and accompanying text.

285. *Debs*, 249 U.S. at 216. In *Fox*, Holmes noted the harm resulting from the words can be indirect. *Fox*, 236 U.S. at 277.

286. Rabban II, *supra* note 6, at 1263-68.

287. The texts of the three opinions of *Schenck*, *Debs* and *Frohwerk* total fifteen pages. *Schenck*, 249 U.S. at 48-53; *Frohwerk*, 249 U.S. at 205-210; *Debs*, 249 U.S. at 212-17. After factual and procedural development, little analysis is involved. Some may argue that today’s jurists should learn something from this.

tempt,²⁸⁸ it more likely appears to have been his “mistaken view of attempt”²⁸⁹ which provided the basis for the clear and present danger test. To Holmes, the crime of attempt did not focus on the intent, except that “[a]cts should be judged by their tendency under the known circumstance.”²⁹⁰ He believed attempt focused on actions and potential harms, not on actual intent.²⁹¹ Using attempt as the basis for the clear and present danger test allowed its employment in a strong or weak form.²⁹² The inherent ambiguity of the test clearly permitted varying applications in practice.

Consequently, the *Abrams* dissent has been read as incorporating the clear and present danger standard’s opportunity for change within its own structure.²⁹³ Some believe that *Abrams* gave teeth to the clear and present danger test by changing it “from an apology for repression into a commitment to oppose authority.”²⁹⁴ Others have read *Abrams* as a maturing and refinement of *Schenck*.²⁹⁵ If expansiveness was required, it was only because the original meaning of the clear and present danger

288. Holmes devoted much of his book, *THE COMMON LAW*, completed in 1881, to the area of criminal attempt. Rabban II, *supra* note 6, at 1271. To Holmes, the failure of an act to produce its natural consequences provided the basis for attempt. *Id.*

289. Yosel Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 214 (1964).

290. OLIVER W. HOLMES, *THE COMMON LAW* 66 (1881).

291. *Id.*

292. Rogat, *supra* note 289, at 215.

293. Holmes himself intimated that the general principle of the clear and present danger test led to the *Abrams* dissent. 2 HOLMES-POLLACK LETTERS, *supra* note 261, at 32.

The general principles laid down by me [in *Schenk*] I think correct, and the particular conclusion I adhere to, because even if there were evidence of a conspiracy to obstruct, etc., the overt act laid must be an act done to effect the object of the conspiracy and it seems to me plain that the only object of the leaflets was to hinder our interference with Russia. I ought to have developed this in the opinion. But that is ancient history now.

Id.

294. Robert M. Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 373 (1981).

295. See Rabban II, *supra* note 6, at 1311-12 (indicating that it was Holmes’ position that the *Abrams* dissent grew out of *Schenck*).

test was misunderstood.²⁹⁶ *Abrams* was “the product of Holmes’ frustration at what he considered the misreading by critics and the public of his position in *Schenck*.”²⁹⁷

It is clear that Justice Holmes altered his position from the time of deciding *Schenck* to *Abrams*. *Schenck* provided no protection for speech.²⁹⁸ The *Abrams* dissent, citing no precedent, would protect speech.²⁹⁹ Holmes did have free speech arguments before him in *Schenck*. The brief of plaintiffs in error in *Schenck* contains numerous citations for expanding free speech which could have facilitated an *Abrams* type of analysis.³⁰⁰ Although *Schenck* did repudiate Blackstone’s definition,³⁰¹ the government’s brief had conceded that Blackstone’s definition should no longer prevail.³⁰² Therefore, the argument that *Schenck* is a protective decision because it repudiated Blackstone’s definition is unpersuasive.³⁰³ It is difficult to believe that Holmes was biding his time for the proper case, all the while holding back his protective ideas of free speech.³⁰⁴

296. Bogen, *supra* note 5, at 99.

297. *Id.*

298. The opinion only gives examples of unprotected speech without showing any protection. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

299. The “free market of ideas” theory provides some protection. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

300. Brief for Plaintiffs in Error at 5-15, *Schenck v. United States*, 249 U.S. 47 (1919) (Nos. 437, 438). After analyzing case law, including Judge Hand’s opinion in *Masses* and Judge Bourquin’s opinion in *Hall*, the brief states:

it would seem that the fair test of protection by the constitutional guarantee of free speech is whether an expression is made with sincere purpose to communicate honest opinion or belief, or whether it masks a primary intent to incite to forbidden action, or whether it does, in fact, incite forbidden action.

Id. at 14.

301. *Schenck*, 249 U.S. at 52.

302. See *supra* notes 196-98 and accompanying text.

303. Bogen, *supra* note 5, at 149.

304. But see CHAFEE, FREE SPEECH, *supra* note 30, at 86. Since Holmes informed Pollack that the *Schenck* decision was done “somewhat summarily,” it is difficult to see how Chafee could have believed that Holmes had planned on waiting for the proper case. See *supra* note 281 and accompanying text. The theory that Holmes underwent a metamorphosis between the two cases is

What influences were responsible for the shift in Holmes' First Amendment views from no protection of speech, using the bad tendency test, to providing protection of speech, under a market place of ideas philosophy? While theorists have debated this question, it is impossible to answer it with any certainty. Nevertheless, there are several possibilities. One event that seemed to focus Holmes' attention on the Espionage Act decisions was the discovery by the post office of a mail bomb addressed to him, in April of 1919.³⁰⁵ Holmes believed the reason for the attempt on his life was his opinion in *Debs*.³⁰⁶ This stimulated Holmes to reevaluate his stance on free speech.³⁰⁷ He concluded that he was the most sensitive member of the Court on such issues.³⁰⁸ It appears that this mad act of an extremist may have led Holmes to shore up or alter his position on speech protection.

Another thing that may have influenced Holmes was the fact that several of his friends, including Professor Frankfurter, were

strengthened by the *Debs* decision, which had to be the ideal case, if any, for endorsing an expansive notion of freedom of speech. Kalven, *supra* note 23, at 238.

305. Bogen, *supra* note 5, at 176.

306. *Id.*

307. *Id.* Holmes indicated in a letter to Lewis Einstein that those who sought to kill him did not understand his position on freedom of speech. HOLMES-EINSTEIN LETTERS, *supra* note 264, at 186. Lewis Einstein, who was over thirty years Holmes' junior, met and befriended Holmes in 1903. *Preface to THE HOLMES-EINSTEIN LETTERS* v (James B. Peabody ed. 1964). Einstein's life was involved in diplomacy, including being United States Minister in Czechoslovakia from 1921 to 1929. *Id.* at vii. Of course, no one else saw this position from the opinions authored by Holmes. In any case, Holmes felt that his position of freedom of speech should be clear. 2 HOLMES-POLLACK LETTERS, *supra* note 261, at 28. ("I see various conflicts of opinion ahead on freedom of speech cases and even have prepared dissenting statements in one or two cases . . .").

308. 2 HOLMES POLLACK LETTERS, *supra* note 261, at 29. Holmes stated: It is one of the ironies that I, who probably take the extremist view in favor of free speech, (in which, in the abstract, I have no very enthusiastic belief, though I hope I would die for it), that I should have been selected for blowing up.

Id.

being punished for unpopular ideas.³⁰⁹ It would seem one thing that a “noted agitator”³¹⁰ could be punished for words. When close and respected friends were being punished, however, Holmes probably believed “a strong statement on behalf of freedom of opinion was earnestly desired.”³¹¹

In addition to these two events, Justice Holmes started the October 1919 term with the criticism of his earlier decisions from the scholarly community.³¹² Furthermore, Justice Holmes was communicating with Judge Hand.³¹³ Hand was trying to persuade Holmes to model the free speech test on Hand’s decision in *Masses*.³¹⁴ According to *Masses*, words could only be punished when they are a direct incitement to illegal action.³¹⁵

309. Bogen, *supra* note 5, at 174. Dean Pound was also targeted for removal from his position because of his views. *Id.*

310. 2 HOLMES-POLLACK LETTERS, *supra* note 261, at 7 (a characterization Holmes gave Debs).

311. Bogen, *supra* note 5, at 175.

312. See Chafee, *Speech in War Time*, *supra* note 53, at 968 (“it is regrettable that Justice Holmes did nothing to emphasize the social interest behind free speech, and show the need of balancing even in war time”); see also Ernst Freund, *The Debs Case and Freedom of Speech*, THE NEW REPUBLIC, May 3, 1919, at 13, reprinted in Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 239 (1973) [hereinafter Freund, *The Debs Case*]. Professor Freund stated:

Yet Justice Holmes would make us believe that the relation of the speech to obstruction is like that of the shout of Fire! in a crowded theatre to the resulting panic! Surely implied provocation in connection with political offenses is an unsafe doctrine if it has to be made plausible by a parallel so manifestly inappropriate.

Freund, *The Debs Case*, *supra*, at 241. See *infra* notes 316-20 and accompanying text.

313. See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) (entire article devoted to correspondence between Judge Hand and Justice Holmes).

314. *Id.* at 720.

315. *Id.* at 740. (“The responsibility only began when the words were directly an incitement.”) (quoting from the March, 1919 letter from Hand to Holmes). It should be noted that Holmes’ preference system was probably affected by John Stuart Mill’s “On Liberty” which Holmes had read in his early life. Bogen, *supra* note 5, at 114-15. Mill indicated that: “Wrong opinions and practices gradually yield to fact and argument; but facts and

Two distinguished professors criticized Holmes' earlier decisions. Professor Ernest Freund published an article in the New Republic attacking the *Debs*' decision.³¹⁶ He argued that the *Debs* case was a case of "arbitrariness" and that "Justice Holmes [took] the very essentials of the entire problem for granted . . . ;" that is, toleration of political liberty.³¹⁷ The error of *Debs*, according to Freund, was the fluctuation "between constitutional immunity and common law uncertainty"³¹⁸ If the latter is the standard for public discussion, society is "adrift on a sea of doubt and conjecture."³¹⁹ Freund's article is important because it strikes at the heart of Holmes' analysis in *Schenck*.³²⁰ There is evidence that Holmes read the article and even drafted a letter to Herbert Croly, editor of the New Republic, defending the decision.³²¹ Interestingly, Judge Hand communicated with Freund, noting that he took "great comfort" in the article.³²² It thus appears that Freund's article stimulated Hand and Holmes, and, as it seemed to one theorist, was to "mark the starting point in the movement from *Debs* to the *Abrams* dissent."³²³

The final, and possibly most influential, factor which stimulated the conversation was a series of articles by Professor

arguments, to produce any effect on the mind, must be brought before it." JOHN S. MILL, UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM 146 (Mary Warnock ed. 1965). This sounds like the market place of ideas theory of *Abrams* dissent. Bogen, *supra* note 5, at 115. Professor Bogen argues that "even a half century later, Holmes would have recalled his early exposure to Mill and would thus have been responsive to Hand's argument on an intellectual level." Bogen, *supra* note 5, at 137.

316. Freund, *The Debs Case*, *supra* note 312, at 239.

317. *Id.* at 240.

318. *Id.* at 241.

319. *Id.* at 240.

320. *Id.* 240-41.

321. Bogen, *supra* note 5, at 177. Holmes never sent the letter. *Id.*

322. Douglas H. Ginsburg, *Afterword* to Harry Kalven, Jr.'s, *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 243, 244 (1973) (reprinting letter from Judge Hand to Professor Freund dated May 7, 1919).

323. *Id.* at 242. Of course, this is not an exhaustive list of the possible influences. Pound's article must have had an influence. Pound, *supra* note 51.

Chafee.³²⁴ The first appeared in the *New Republic*,³²⁵ and was expanded upon in the *Harvard Law Review*.³²⁶ Chafee stated:

The most important purpose of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and the truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale.³²⁷

In analyzing the Espionage Act decisions, Chafee concluded that free speech and the search for truth was not subordinate to the social interest in national security.³²⁸ Chafee's conclusion was that speech should be punished only when it "cause[s] direct and dangerous interference with the conduct of the war."³²⁹ After publication of these articles, a meeting was arranged between Chafee and Holmes.³³⁰ Although there has been speculation about what happened at the meeting, Chafee probably lobbied for the position that freedom of speech established a policy favoring the search for truth.³³¹

It is impossible, of course, to know for certain which of the above factors were pivotal in causing the evolution of Holmes' First Amendment jurisprudence.

324. Rabban II, *supra* note 6, at 1283-1303.

325. Zechariah Chafee, Jr., *Freedom of Speech*, THE NEW REPUBLIC, November 16, 1918, at 66.

326. See generally Chafee, *Speech in War Time*, *supra* note 53.

327. *Id.* at 956-57.

328. *Id.* at 960. In *Debs*, Holmes did not mention any social interest in free speech and, consequently, there was no balancing. *Id.* at 968.

329. *Id.*

330. Rabban II, *supra* note 6, at 1315.

331. *Id.* at 1315-16; see also Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HISTORY 24, 43 (1971).

It is interesting, moreover, to note that the change in Holmes' philosophy was not total. In at least one instance Holmes did indicate that he may have erred in *Abrams*. When Pollack wrote that there may have been sufficient evidence to go to the jury on the fourth count,³³² Holmes agreed: "I think it possible that I was wrong in thinking that there was no evidence on the fourth count in consequence of my attention being absorbed by the two leaflets that were set forth."³³³ Nevertheless, Holmes reaffirmed his conviction that his theory was correct as applied to the first two counts, in that "specific intent in fact, and not an intent imputed to the defendant by way of inference" was required for punishment of speech.³³⁴ Clearly, Holmes remained faithful to his protective position.

The end product of the early Holmes was the bad tendency test.³³⁵ The most intriguing fact about *Abrams* was the author who picked up the torch of the bad tendency test. Why didn't Chief Justice Edward Douglass White decide to write the opinion himself so he could "back broad exercise of federal power," as he was known to do?³³⁶ White could have assigned it to Justice Joseph McKenna, who was "classifiable as politically conservative;"³³⁷ to Justice William Rufus Day, who had demonstrated his republican fealty through his hard work for presidential candidates;³³⁸ to either Justice Willis Van Devanter or to Justice James C. McReynolds, both of whose intellectual conservatism saddled them as part of the "four horsemen;"³³⁹ or to Justice Mahon Pitney, whose nomination was strongly opposed by liberals and labor forces.³⁴⁰ White chose none of the above,

332. 2 HOLMES-POLLOCK LETTERS, *supra* note 261 at 31.

333. *Id.* at 32.

334. *Id.* at 44-45.

335. As indicated, the "clear and present danger" test of *Schenck* was only the bad tendency test. See *supra* notes 99-106 and accompanying text.

336. ABRAHAM, *supra* note 21, at 169.

337. *Id.* at 153.

338. *Id.* at 161-62.

339. *Id.* at 171. The "four horsemen" was a name given the four Justices who were anti-New Deal, Justices Van Devanter, McReynolds, George Sutherland and Pierce Butler. *Id.*

340. *Id.* at 173.

instead it was Justice John H. Clarke, “a noble and sensitive spirit,” chosen to write the opinion.³⁴¹ Perhaps White was doing to Clarke what Holmes had accused White of having done to him with *Schenck*, *Frohwerk* and *Debs*,³⁴² that is, assigning the opinion to the Justice with the most extreme position in favor of protecting free speech.

The remaining part of this Article will examine Justice Clarke’s philosophy and life in order to gain some understanding of the preference system of the man who kept the bad tendency test alive.

VI. JUSTICE CLARKE’S PHILOSOPHY

A quick biography of John H. Clarke is useful. Two years after graduating from Western Reserve College and passing the bar, Clarke purchased a one-half interest in the weekly democratic newspaper of Youngstown.³⁴³ The paper’s philosophy was “the Grover Cleveland brand of liberalism in national policy coupled with a humanitarian concern for measures to promote the well-being of labor.”³⁴⁴ Clarke did not fear powerful local groups. In a major election, the paper fought against the American Protective Association, a bigoted anti-Catholic, secret society.³⁴⁵ Although risking the future of the paper, Clarke argued that the focus of the election was the struggle between government by a secret anti-Catholic society versus freedom of conscience.³⁴⁶ Clarke’s candidate won.³⁴⁷

Clarke was politically active in the 1896 presidential campaign, where he was a delegate to the democratic convention.³⁴⁸ Yet,

341. *Id.* at 174.

342. 2 HOLMES POLLACK LETTERS, *supra* note 261, at 7.

343. HOYT L. WARNER, THE LIFE OF MR. JUSTICE CLARKE: A TESTAMENT TO THE POWER OF LIBERAL DISSENT IN AMERICA 3-5 (1959).

344. *Id.* at 9.

345. *Id.* at 17.

346. *Id.* at 18.

347. *Id.*

348. *Id.* at 22.

his opposition to free silver³⁴⁹ left him at odds with the presidential nominee, William Jennings Bryan.³⁵⁰ He declared that he would not vote for Bryan.³⁵¹ He allied himself with the conference of gold democrats,³⁵² who had formed the party of national democrats.³⁵³ He supported the presidential candidacy of Illinois Senator John M. Palmer.³⁵⁴ As history establishes, the "gold bug" ticket was soundly defeated.³⁵⁵ Clarke felt that he had unfortunately assisted the republican ticket.³⁵⁶ He would remain a loyal democrat thereafter.³⁵⁷

Soon thereafter, Clarke entered the steady practice of law in Cleveland as a railroad attorney.³⁵⁸ Among his partners was William Cushing, a classmate of Justice Brandeis.³⁵⁹ Clarke's legal work earned him an excellent reputation.³⁶⁰ Like Justice Brandeis, however, this work broadened his sympathies and increased his activities in the struggle for political and social jus-

349. "Free Silver" was a movement for the "free, unlimited, and independent coinage of silver" by the government for anyone presenting silver to the United States Mint (at a rate of sixteen-to-one, silver to gold ratio). PAUL W. GLAD, *McKINLEY, BRYAN, AND THE PEOPLE* 121-22 (1964). William Jennings Bryan's famous "Cross of Gold" speech at the 1896 democratic convention allied the Democratic Party with the free silver movement, which would have also included the consequence of cheap money. *Id.* at 136-39. The Republican Party's position opposed free silver due to its effect of currency depreciation and, therefore, supported a gold standard. *Id.* at 113-14. For further discussion of free silver and the 1896 campaign see STANLEY L. JONES, *THE PRESIDENTIAL ELECTION OF 1896* (1964).

350. WARNER, *supra* note 343, at 23.

351. *Id.* Clarke did this by public announcement in a letter he printed in a newspaper, the *Vindicator*, of which he was a stockholder. *Id.* at 23, 24. The paper, however, continued to support Bryan as it had done from the moment he had become the party's nominee. *Id.* at 24.

352. *Id.* at 24.

353. *Id.* at 26.

354. *Id.* at 25.

355. *Id.* at 26.

356. *Id.*

357. *Id.*

358. *Id.* at 29.

359. *Id.*

360. *Id.* See Carl Wittke, *Mr. Justice Clarke in Retirement*, 1 W. RESERVE L. REV. 28, 28 (1949).

tice.³⁶¹

Justice Clarke's philosophy was progressive.³⁶² The progressive agenda included the direct election of senators, anti-trust action, a federal income tax, eight-hour work-days, popular primaries, suffrage for women and workers' compensation laws, to name some important issues.³⁶³ An issue of very great importance to Clarke, one that ultimately would drive him from the Court, was for America to become more international.³⁶⁴ His work, both in law and politics, kept him busy until he was appointed a Federal District Court Judge for the Northern District of Ohio in 1914 by President Wilson.³⁶⁵

Clarke's appointment was pushed by two figures. One was Newton Baker, a close friend of Clarke, who was to become President Wilson's Secretary of War.³⁶⁶ More surprising was the push from then Attorney-General James McReynolds,³⁶⁷ who later came to loathe Clarke as a fellow Supreme Court Justice and who is credited with being a factor in Clarke's decision to leave the Court.³⁶⁸ The ill will ran so deep that McReynolds refused to sign the departure letter for Clarke.³⁶⁹

Most of Clarke's decisions on the district court were not reported.³⁷⁰ However, one reported case, *Ex parte Woo Shing*,³⁷¹

361. WARNER, *supra* note 343, at 27. "He supported civil service reform, and belonged to that remarkable group of young men who admired and supported Tom L. Johnson, Cleveland's famous reform mayor." Wittke, *supra* note 360, at 28.

362. WARNER, *supra* note 343, at 44.

363. *Id.* at 44-46.

364. *Id.* at 56-57.

365. *Id.* at 60.

366. *Id.* at 59.

367. *Id.*

368. ABRAHAM, *supra* note 21, at 177.

369. 260 U.S. vi (1922). Justice McReynolds often boasted that among other things, he was a bigot. Yet, surprisingly, he "not only had quietly adopted thirty-three young children victimized by the Nazi blitz in Europe, but he bequeathed the majority of his estate to local charities including nearly \$100,000 for the children's hospital in Washington, D.C. and the Salvation Army." ABRAHAM, *supra* note 21, at 227-28.

370. There are fifteen reported opinions, three of which involve the same case. *Panther Rubber Mfg. Co. v. ITS Rubber Co.*, 234 F. 377 (D.C. Ohio

indicated that Clarke was not isolated from the political and social environment. In construing the Immigration Act in an alien deportation case, he noted that "[a]ny person acquainted with the history of our times . . ." would rule for deportation.³⁷² He also established an atmosphere of deference toward legislative determination in the political process in *American Ball Bearing Co. v. Adams*.³⁷³ In deciding that there was no *de facto* corporation in the case before him,³⁷⁴ he stated that such action would make judges "de facto legislators."³⁷⁵ Thus, "[j]udicial lawmaking is a sufficiently active cause of complaint against the courts to deter them from unnecessarily inviting further criticism, especially just criticism."³⁷⁶ These cases identify a philosophy that could justify sustaining the *Abrams* decision.

Still, when Clarke was nominated to the Supreme Court in

1916), *aff'd*, 250 F. 253 (6th Cir. 1918); Warren Bros. Co. v. Pace, 247 F. 117 (D.C. Ohio 1916), *appeal dismissed*, 248 F. 1023 (6th Cir. 1917); Ivanoff v. Mechanical Rubber Co., 232 F. 173 (D.C. Ohio 1916); MacBeth Evans Glass Co. v. General Electric Co., 231 F. 183 (D.C. Ohio 1916), *aff'd*, 246 F. 695 (6th Cir. 1917), *cert. denied*, 246 U.S. 659 (1918); Cary v. International Agr. Corp., 243 F. 475 (D.C. Ohio 1916); Kellogg Switchboard & Supply Co. v. Dean Electric Co., 231 F. 197 (D.C. Ohio 1915); Kellogg Switchboard & Supply Co. v. Dean Electric Co., 231 F. 194 (D.C. Ohio 1915); Kellogg Switchboard & Supply Co. v. Dean Electric Co., 231 F. 190 (D.C. Ohio 1915); *Ex parte* Woo Shing, 226 F. 141 (D.C. Ohio 1915); United States v. Penn. Co., 237 F. 471 (D.C. Ohio 1915), *aff'd*, 241 F. 824 (6th Cir. 1917); Rockefeller v. O'Brien, 224 F. 541 (D.C. Ohio 1915), *aff'd*, 239 F. 127 (6th Cir.), *cert. denied*, 244 U.S. 650 (1917); American Ball Bearing Co. v. Adams, 222 F. 967 (D.C. Ohio 1915), *rev'd*, 231 F. 950 (6th Cir. 1916); Philadelphia Rubber Works Co. v. Portage Rubber Co., 227 F. 623 (D.C. Ohio 1915), *modified*, 241 F. 108 (6th Cir. 1917); Coulston v. H. Franke Steel Range Co., 221 F. 669 (D.C. Ohio 1915); Cerri v. Akron-People's Tel. Co., 219 F. 285 (D.C. Ohio 1914).

371. 226 F. 141 (D.C. Ohio 1915).

372. *Id.* at 143. Clarke cited Justice Holmes' opinion in *United States v. Wong You*, 223 U.S. 67 (1912), stating that: "No justice of that court uses language with more precision than does Justice Holmes." *Id.* at 144. Interestingly, Holmes' precision did not persuade Clarke in *Abrams*.

373. 222 F. 967 (1915).

374. *Id.* at 977.

375. *Id.*

376. *Id.*

1916,³⁷⁷ many believed in his liberal, progressive philosophy.³⁷⁸ The Literary Digest stated that he was “not as radical as Justice Brandeis”³⁷⁹ and “John H. Clarke takes to the nation’s highest court a sympathy with aspiration of the average man, woman, and child, and an appreciation of their rights under the laws.”³⁸⁰ The comparison with Brandeis is not surprising since Brandeis lobbied Wilson on Clarke’s behalf.³⁸¹ This support was based upon the belief that Clarke could be depended on for his liberal and enlightened interpretation of the law.³⁸² Wilson thought that he had “unusual sympathy as a judge towards the underprivileged.”³⁸³ Brandeis had to be pleased with Clarke’s positions during the first three years they both served on the Court.³⁸⁴ Yet, in 1918, there was an erosion of what was becoming the Brandeis-Clarke block.³⁸⁵ This erosion was clearly shown by *Abrams*.³⁸⁶

But this is not to say that it was only Justice Clarke who had changed. During his term, Justice Clarke continued to buck the

377. ABRAHAM, *supra* note 21, at 181. The seat became open when Justice Hughes resigned to run for the presidency. *Id.*

378. See, e.g., *Another Supreme Court Radical*, THE LITERARY DIGEST, July 29, 1916, at 240 (article indicates that Clarke was the second radical chosen by President Wilson, the first being Justice Brandeis).

379. *Id.*

380. *Id.*

381. ABRAHAM, *supra* note 21, at 181.

382. SEMONCHE, *supra* note 280, at 372.

383. *Id.*

384. I have not been able to find any opinion authored by Justice Brandeis during 1916 through 1918 in which Justice Clarke dissented. Nor have I been able to find any opinion by Justice Clarke during the same period in which Justice Brandeis dissented. With respect to Justice Brandeis’ dissent in *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1916), Justice Clarke wrote: “Only the Lord can so harden their heads (meaning the other justices) as well as their hearts as to prevent their confessing their sin of ignorance when voting in so grave a matter. No matter what decision is rendered this [dissent] will soon be the law of the case.” IRIS NOBLE, *FIREBRAND FOR JUSTICE: A BIOGRAPHY OF LOUIS DEMBITZ BRANDEIS* 149 (1969).

385. SEMONCHE, *supra* note 280, at 373.

386. In my research, *Abrams* was the first opinion where the two Justices were on different sides of an opinion when one of the Justices had authored the majority opinion.

conservative wing of the Court on many occasions. For example, the conservative wing was committed to civil order.³⁸⁷ In labor disputes this required that streets not be used for discussion.³⁸⁸ For Brandeis and Holmes, order was not the ultimate objective, but only a means for popular government.³⁸⁹ Therefore, Professor Cover concluded that Justice Brandeis was the most sympathetic Justice to labor.³⁹⁰ Yet, Professor Cover's own data establishes that it was Clarke who was labor's closest friend on the Court.³⁹¹ In all but one case that Professor Cover cites for his proposition, Clarke joined the Brandeis position for labor.³⁹² The only times that Brandeis and Clarke were at odds occurred when Clarke was the only dissenter in favor of labor.³⁹³ This is just one example of Justice Clarke's position against the conservative majority. Although Holmes has the reputation as a dissenter, during Clarke's tenure, Clarke dissented more often than any other member of the Court.³⁹⁴

As noted above, Clarke was a progressive.³⁹⁵ On the Court, his "new liberalism" held that positive government should give the people a fair share of the comfort and safety that was

387. Cover, *supra* note 294, at 363.

388. *Id.*

389. *Id.*

390. *Id.* at 369-71.

391. *Id.* at 358-59. Cover notes that Holmes and Brandeis joined the majority in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), which upheld restraining orders under the Clayton Act where it was "politics of the streets." *Id.* Only Clarke dissented. I will concede Professor Cover's point to the extent that Justice Brandeis did articulate his position on labor more clearly than Justice Clarke. Justice Clarke wrote no dissenting opinion in *American Steel*, 257 U.S. at 213.

392. Cover, *supra* note 294, at 352-71.

393. In fact there were two opinions, *The Child Labor Tax Case*, 259 U.S. 20 (1922) and *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). In both cases Justice Clarke dissented without opinion. In the *American Steel* case, Justice Brandeis concurred "in substance" in the judgment of the court without opinion. *Id.* at 213.

394. My research indicates that during the period of 1916 through 1922, Justice Clarke was in dissent 85 times, Justice Brandeis in dissent 67 times and Justice Holmes in dissent 43 times.

395. See *supra* notes 362-65 and accompanying text.

available.³⁹⁶ Yet, he viewed the Constitution as a “human and therefore imperfect instrument which must be slowly modified to adopt [it] to the needs [it] is designed to serve as experience shall show [it] to be.”³⁹⁷

The record indicates that Justice Clarke did not adopt the “human” Constitution to free speech, as his record in that area was a “spotty one.”³⁹⁸ Of course, he was part of the unanimous Court in the first three Espionage cases.³⁹⁹ He also joined the nonprotective opinions of *Pierce v. United States*⁴⁰⁰ and *Gilbert v. Minnesota*,⁴⁰¹ although Holmes also concurred in the result in the latter.⁴⁰² The former case involved socialists, who, as *Abrams* indicated, received little sympathy from the majority which included Clarke.⁴⁰³ In *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*,⁴⁰⁴ Clarke spoke for the Court in allowing the postmaster’s censorship of mail.⁴⁰⁵ In upholding the postmaster’s action, Clarke analyzed the free speech position as follows:

Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists. The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it.⁴⁰⁶

Clarke also wrote the opinion upholding the power of the

396. David M. Levitan, *The Jurisprudence of Mr. Justice Clarke*, 7 MIAMI L. Q. 44, 71 (1952).

397. *Id.*

398. *Id.*

399. *Schenck v. United States*, 249 U.S. 47 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919) and *Debs v. United States*, 249 U.S. 211 (1919); for a complete discussion of these cases see *supra* notes 99-117 and accompanying text.

400. 252 U.S. 239 (1920).

401. 254 U.S. 325 (1920).

402. *Id.* at 335.

403. *Pierce*, 252 U.S. at 241-42.

404. 255 U.S. 407 (1921).

405. *Id.* at 415-16.

406. *Id.* at 414.

postmaster to issue fraud orders barring the mailing of literature advertising medicine tablets.⁴⁰⁷ But Clarke dissented in *Schaefer v. United States*,⁴⁰⁸ a case involving a conviction under the Espionage Act of 1917.⁴⁰⁹ Although his dissent was based upon a flagrant mistrial, he stated that the statute could punish only if the speech was made with the intent to promote the success, and there was of a nature reasonably likely to promote the success, of the enemy of the United States.⁴¹⁰ This language seems more expansive than *Abrams*, since the intent was not assumed,⁴¹¹ and therefore is closer to the *Abrams* dissent.

Are there reasons why Clarke took a more conservative position with civil liberties? Freedom of expression was only a peripheral issue to the progressive agenda.⁴¹² Also, the progressive elite was against the "ill-mannered socialists and anarchists."⁴¹³ Although Holmes belonged to the same patrician class,⁴¹⁴ he was able to shed this prejudice. Clarke was not. Also, Clarke had studied and written about the Soviet Union for *The Nation* in 1918.⁴¹⁵ Newton Baker stated that the articles established that Clarke had the insight that few had about the Soviet Union and communism.⁴¹⁶ Perhaps this insight made him fear those associated with communism. Also, although the war was over, in 1919 there was a rash of strikes that made the Court overly concerned by *Abrams*' message.⁴¹⁷ This may have influenced Clarke's preference system, combined with his understanding of the Soviet Union to interject a real fear about "silly leaflets" so that an usually understanding jurist would

407. *Leach v. Carlite*, 258 U.S. 138, 138 (1922).

408. 251 U.S. 466, 495 (1920) (Clarke, J., dissenting).

409. *Id.* at 468.

410. *Id.* at 497-98. Clarke also argued that the excessive punishment should be reduced as it was imposed during war hysteria. *Cf. Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

411. *Schaefer*, 251 U.S. at 498.

412. Wittke, *supra* note 360, at 37.

413. WARNER, *supra* note 343, at 100.

414. *Id.*

415. Wittke, *supra* note 360, at 37.

416. *Id.* (citing a letter from Baker to Clarke, Dec. 28, 1918).

417. Bogen, *supra* note 5, at 120.

author the *Abrams* decision.

Many theorists note that had Clarke remained on the bench, with the addition to the Court of Justices Harlan Fiske Stone and Benjamin Cardozo, there would have been a liberal majority on the Hughes Court before the New Deal Legislation.⁴¹⁸ This is a logical assumption considering Clarke's preference system. But the most important question is whether Clarke would have been persuaded to change his free speech position and join Holmes and Brandeis in their later dissenting (or concurring) opinions in favor of free speech. Unfortunately, as of 1944, Clarke stated that he was entirely satisfied with his position in *Abrams*.⁴¹⁹ Preference systems are sometimes hard to alter.

CONCLUSION

I think that a focus of constitutional law should include an attempt to understand the preference systems of justices involved in important cases. There should be a look at the ingredients that combine in a recipe for the preparation of a decision. These ingredients include the justices' background, mass media opinions and career experiences.⁴²⁰ Also, some of the spices that have an influence include public opinion and the opinions of the legal community.⁴²¹ It is important to understand these factors, because decisions are not prepared in a vacuum.

Abrams is one of the turning points in First Amendment jurisprudence,⁴²² therefore, it is important to understand the

418. The Justices who dissented in the early cases where New Deal Legislation was invalidated were Chief Justice Charles Evans Hughes, Justices Brandeis, Stone and Cardozo. See, e.g., *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 374 (1935) (Hughes, C.J., dissenting).

419. WARNER, *supra* note 343, at 100 (citing a letter from Clarke to W.F. Maag, Jr. dated April 1, 1944).

420. BAUM, *supra* note 15, at 135.

421. *Id.* at 126-31.

422. Blasi, *supra* note 60, at 28. Professor Blasi notes other turning points in the shaping of modern first amendment jurisprudence such as *Cohen v. California*, 403 U.S. 15 (1971) (profane and offensive language is protected under the first amendment and may not be suppressed under the guise of regulating the manner of the speech); *New York Times v. Sullivan*, 376 U.S.

factors involved in order to fully understand the decision. This Article has attempted to bring together some of those factors: the legal precedents, the briefs of the parties, the justices' backgrounds, the public environment and the legal community's positions. The combination of such ingredients produced two opinions, one which is relegated to the back burner and the other determined to be of blue ribbon quality. There is a tendency to analyze cases in terms of theoretical models, without looking at the basic ingredient in the decision, the preference system of the individual justices involved in the opinion. I do believe that theoretical models are excellent as far as they go. There must be an analysis of the decision, however, and a turn towards the human factor.

254 (1964) (seminal case which established that state defamation laws are limited by first amendment principles and held that a public official may not recover damages for defamatory falsehoods unless he proves that the statement was made with actual malice); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (freedom of speech, though not absolute, is nevertheless protected against censorship unless there can be shown a clear and present danger of serious evil that rises far above public inconvenience, annoyance or unrest); *Bridges v. California*, 314 U.S. 252 (1941) (to justify suppression of speech, there must be reasonable grounds to fear that serious harm will result from the speech and that the danger of harm is imminent).