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Recommended Citation

Vincent A. Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2005).

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HOLMES AND THE MARKETPLACE OF IDEAS

At least five basic values might be served by a robust free speech principle: (1) individual autonomy; (2) truth seeking; (3) self-government; (4) the checking of abuses of power; (5) the promotion of good character. Free speech might serve one or more of these values by functioning in at least three different ways: (1) as a privileged activity; (2) as a social mechanism; (3) as a cultural force. My contention is that the conventional understanding of the most familiar metaphor in the First Amendment lexicon, the “marketplace of ideas,” has had the undesirable effect of focusing attention too much on the truth seeking and self-government values and on the function of free speech as a social mechanism.

The detriment in this emphasis is threefold. First, the case for a high level of protection for free speech has been weakened by being made to depend too much on unconvincing claims regarding how the phenomenon of provocative speech followed by countervailing “more speech” produces a satisfactory process of collective delib-

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AUTHOR'S NOTE: Drafts of this paper were vetted by colleagues and workshops too numerous to list. Their input has improved it immeasurably. I am especially indebted to Anuj Desai, Alan Hyde, Petros Mavroidis, Richard Posner, Seana Shiffrin, Kim Szurovy, Jeremy Waldron, and G. Edward White for detailed written comments; to Simon Canick and JoAnn Koob for extraordinarily helpful research assistance; and to Irene ten Cate for her insightful student work comparing the free speech philosophies of Holmes and John Stuart Mill.

eration. Second, the identification of the freedom of speech with the ideal of a well-functioning market in ideas has generated distracting and dangerous regulatory proposals that attempt to redistribute communicative power as a means of realizing that ideal. Third, as a result of viewing free speech primarily as a plebiscitary mechanism designed to produce collective understanding and political legitimacy, we have failed to appreciate how it serves as a cultural force that contributes to the control of abuses of power and the promotion of adaptive character traits.

In this article I do not attempt to defend the claims just stated. Rather, I seek to demonstrate that Justice Oliver Wendell Holmes's dissent in *Abrams v United States*,¹ the canonical opinion that gave rise to the arresting figure of the "marketplace of ideas," contains the seeds of an understanding of the First Amendment that has more to do with checking, character, and culture than with the implausible vision of a self-correcting, knowledge-maximizing, judgment-optimizing, consent-generating, and participation-enabling social mechanism. This project of looking beneath the surface of Holmes's metaphor is designed not so much to invoke the authority of his stature and eloquence as to suggest promising lines of thought concerning the value and function of free speech.

The *Abrams* dissent is remarkable on many counts. Its peroration articulates in a single paragraph a highly sophisticated if cryptic philosophical justification for the freedom of speech. Surprisingly perhaps, the paragraph begins by explaining the unassailable logic of repression:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.²

Then suddenly Holmes switches gears, true to his celebrated observation thirty-eight years earlier, "the life of the law has not been

¹ 250 US 616, 624 (1919).

² Id at 630.

logic: it has been experience.”³ He notes how prudence born of experience should temper the “natural” and “perfectly logical” desire to extirpate disturbing ideas:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁴

In perhaps his most daring move, Holmes then asserts that this prudence is embodied in the positive law of the U.S. Constitution:

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.⁵

Next, consistent with his preference for experience over logic as the source of law, he invokes the authority of history:

I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.⁶

Finally, Holmes characterizes the First Amendment as a “sweeping command” subject to limitation only on the occasion of an “emergency that makes it immediately dangerous to leave the correction of evil counsels to time.”

³ Oliver Wendell Holmes, Jr., *The Common Law* 5 (1881).

⁴ 250 US at 630.

⁵ Id.

⁶ Id.

As should be apparent, Holmes managed to pack into this paragraph an astonishingly rich set of allusions. His market metaphor is only one of many suggestive and loaded figurations. Notice, for example, his pointedly mundane account of religious devotion: “time has upset many fighting faiths”; “we have to wager our salvation upon some prophecy based upon imperfect knowledge.” Or his deflating retort to the Constitution worshipers of his day: “It is an experiment, as all life is an experiment.” The challenge for one who would make sense of Holmes is to avoid being swept away by any one of his seductive formulations. To that end, we must try to understand his market metaphor in the light of the observations and judgments that surround it in the *Abrams* peroration. Considering the metaphor in isolation can lead to a failure to appreciate what it has to offer, as well as an inaccurate account of Holmes’s surprisingly coherent argument for a robust freedom of speech.

I. EQUILIBRIUM

“The best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁷ This statement, together with his call for “free trade in ideas,”⁸ might suggest that Holmes based his interpretation of the First Amendment on the assumption that ideas should be evaluated the way consumer goods and services are: not by any kind of political or intellectual authority but rather by an open-ended process that measures and integrates the ongoing valuations of all the individuals who comprise the relevant community. In this view, the crucial concept is “equilibrium,” the balance of valuations at any given moment. The benefit of free speech is its role in generating the individual choices regarding ideas, and the public awareness of those choices, that add up to the equilibrium of the moment. In support of this interpretation, we might note that Holmes once claimed that “the function of private ownership is to divine in advance the equilibrium of social desires.”⁹ On another occasion he asked: “What proximate test of excellence can be found except correspondence to the actual equilibrium of

⁷ Id.

⁸ Id.

⁹ Oliver Wendell Holmes, *Law and the Court*, in *Collected Legal Papers* 294 (1920).

force in the community—that is, conformity to the wishes of the dominant power?”¹⁰

Holmes was interested in economics. In *The Path of the Law* he famously said: “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”¹¹ He sprinkled his correspondence with approving references to the first-ever professional economist,¹² the statistically minded sage of scarcity and diminishing returns, T. R. Malthus. Holmes once told Harold Laski: “I am a devout Malthusian.”¹³ In a different letter to Laski he reported: “Fred Pollock speaks of Saint Jane (Austen). I shall speak of Saint Malthus.”¹⁴ When Laski described Adam Smith as “a very great writer and the best observer of his time; I know nothing like his book in the whole of economic literature,”¹⁵ Holmes wrote back: “I am with you on Smith’s *Wealth of Nations*. I was staggered when Marx patronized him.”¹⁶ Earlier he had complained to Laski: “I never read a socialist yet . . . and I have read a number, that I didn’t think talked drool.”¹⁷ We can be confident that Holmes was

¹⁰ Oliver Wendell Holmes, *Montesquieu*, in id at 250, 258.

¹¹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv L Rev 457, 469 (1897).

¹² See William J. Barber, *A History of Economic Thought* 57 (1967) (“History”).

¹³ Letter from Holmes to Harold J. Laski (Sept 16, 1924), in Mark De Wolfe Howe, ed, 1 *Holmes-Laski Letters* 658–59 (1953).

¹⁴ Letter from Holmes to Laski (June 14, 1927), in 2 *Holmes-Laski Letters* at 950. See also Letter from Holmes to Laski (Dec 9, 1921), in 1 *Holmes-Laski Letters* at 385 (“In short I believe in Malthus—in the broad—not bothering about details.”); Letter from Holmes to Laski (July 23, 1925), id at 762 (“But I look at men through Malthus’s glasses—as like flies—here swept away by a pestilence—there multiplying unduly and paying for it.”); Letter from Holmes to Lewis Einstein (Sept 2, 1914), in James Bishop Peabody, ed, *Holmes-Einstein Letters* 99 (1964) (“I was delighted with Malthus and his quiet, English, unemphatic way of expressing penetrating thought over which a modern German sociologist or Mathew Arnold would have cackled for half a volume.”). See also Letter from Holmes to Laski (July 30, 1920), in 2 *Holmes-Laski Letters* at 272.

¹⁵ 1 *Holmes-Laski Letters* at 471 (cited in note 13).

¹⁶ Id at 474. See also id at 161.

¹⁷ Id at 96. In a subsequent letter to Laski, Holmes expatiated further on his preference for the capitalist worldview: “I don’t at all agree to describing [capitalism’s] tyrannies with resentment, as coming from bad men when you gloss those on the other side. I think that most of the so-called tyrannies of capital express the economic necessities created by the pressure of population—a pressure for which capitalism is not responsible and for which communism has offered no remedy. If I praised or blamed (which I don’t) either one, I should blame the communists as consciously and voluntarily contemplating their despotism whereas on the other side it is largely unconscious and the automatic result of the situation. I may add that class for class I think the one that communism would abolish is more valuable—contributes more, a great deal more, than those whom Communism exalts.” 2 *Holmes-Laski Letters* at 945 (cited in note 13).

familiar with and sympathetic to the general worldview and many of the specific observations of the laissez-faire economists. But as is often the case with Holmes,¹⁸ we know more about *which* thinkers he liked than about exactly *what* he liked in their work. Adam Smith, T. R. Malthus, David Ricardo, and their cohorts had many ideas—and many disagreements—about the virtues and limitations of markets.¹⁹ Which, if any, might Holmes have drawn upon in formulating his understanding of the freedom of speech?

Should we, for example, read Holmes as resting his defense of free speech on the assumption that a cognitive Invisible Hand continually generates informational, critical, and rhetorical correctives that keep patterns of belief in a welfare-maximizing state of dynamic equilibrium? Someone who took this claim to be the underpinning of Holmes's marketplace theory might question whether the process by which ideas are generated, disseminated, and validated in contemporary mass culture accurately measures and fairly computes the beliefs of the individuals who constitute the society.²⁰

One reason to doubt the efficacy of the market mechanism as a means of ordering beliefs derives from the concept, well recognized by economists, of market failure.²¹ Except in models, markets are imperfect. Differential access to information distorts markets.²² Collective behavior can distort markets.²³ So too can free riders: persons who are in a position to benefit from the transactions of others without having to pay the price.²⁴ A different type of "externality" undermines efficiency when the full quantum of social costs generated by an activity cannot practically be ob-

¹⁸ See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan L Rev 787, 788 (1989).

¹⁹ See Davide Fiaschi and Rodolfo Signorino, *Consumption Patterns, Development and Growth: Adam Smith, David Ricardo and Thomas Robert Malthus*, 10 Euro J Hist Economic Thought 5 (2003).

²⁰ See, for example, C. Edwin Baker, *Human Liberty and Freedom of Speech* 12–17 (1989) ("*Human Liberty*"); Owen Fiss, *Liberalism Divided* 9–10, 17–20 (1996).

²¹ See, for example, Alvin I. Goldman and James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 Legal Theory 1, 19–26 (1996); Albert Breton and Ronald Wintrobe, *Freedom of Speech vs. Efficient Regulation in Markets for Ideas*, 17 J Econ Behav & Org 217 (1992).

²² See Hal R. Varian, *Intermediate Microeconomics* 630–50 (4th ed 1996); Goldman and Cox, 2 Legal Theory at 19–23 (cited in note 21).

²³ See Varian, *Intermediate Microeconomics* at 458–79 (cited in note 22).

²⁴ Id at 616–18; Richard Posner, *Free Speech in an Economic Perspective*, 20 Suffolk U L Rev 1, 19–24 (1986).

served, measured, or assessed against those who engage in the activity.²⁵

If the markets for goods and services are prone to such distortions, the market for ideas would seem to be especially divergent from the economists' ideal.²⁶ Individuals and groups who would peddle their ideas to the public enjoy enormously disparate access to the channels of mass communication. To a greater degree than is true for commodity and service markets, cultural affinities and psychological predispositions distort the way ideas are bought and sold, as does the fact that some ideas are more easily packaged than others. Differences among humans in such capacities as articulateness and comprehension also contribute to market failure: ideas that favor intelligent, well-spoken people—the priority accorded higher education might be one example—have a distinct and unfair advantage in the marketplace. In most speech settings, the audience could fairly be described as a veritable convention of free riders.²⁷ And as Frederick Schauer has demonstrated, the costs created by speech are seldom borne by the speakers.²⁸

One can imagine a regulatory regime designed to correct or mitigate these disparities and externalities. Some reformers have found in Holmes's market metaphor a justification for various governmental interventions that would attempt to redistribute communicative opportunity.²⁹ Opponents of such reforms have argued that

²⁵ This disability can derive from inadequately defined property rights, see Varian, *Intermediate Microeconomics* at 561 (cited in note 22), from the fact that some social costs take the form of the loss or diminution of "goods" the very character of which prevents them from being computed or realized in the idiom of private property or revealed preferences, see Elizabeth Anderson, *Value and Ethics in Economics* 144–47 (1993) ("*Value and Ethics*"), or from physical and epistemological limitations in observing and understanding causal relationships.

²⁶ For an argument that in terms of economic analysis the market for ideas is probably more in need of regulation, due to greater externalities, than the market for goods, see R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 *Am Econ Rev: Papers & Proc* 384 (1974).

²⁷ Judge Posner regards the free rider phenomenon to be especially important in the case of political speech. See Posner, 20 *Suffolk U L Rev* at 19–22 (cited in note 24). For an elaboration of the implications of viewing free speech as a public good due in part to the prevalence of audience free riders, see Daniel A. Farber, *Free Speech without Romance: Public Choice and the First Amendment*, 105 *Harv L Rev* 554 (1991).

²⁸ See Frederick Schauer, *Uncoupling Free Speech*, 92 *Colum L Rev* 1321 (1992).

²⁹ See, for example, Fiss, *Liberalism Divided* at 17–21 (cited in note 20); Cass R. Sunstein, *Democracy and the Problem of Free Speech* 16 (1993); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 *Harv L Rev* 1641 (1967); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 *Yale L & Policy Rev* 236, 239–45 (1991); Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *Duke L J* 431, 466–73.

the intervention of government in the realm of speech is likely to take us even further from the free market ideal so far as the distribution of communicative influence is concerned.³⁰ However, before the concept of market failure or success is deemed to have any kind of First Amendment relevance deriving from Holmes's memorable figure of speech, we must confront the fundamental objection that ideas cannot properly be treated as consumer goods, that discussion and persuasion cannot be analogized to competitive exchange.³¹ If we pursue the analogy beyond the first level, the strength of this objection can be appreciated.

Markets for goods and services generate prices and levels of output. A market for ideas generates a collection of individual beliefs and, in some sense, the production of observations and arguments. Scarcity, both of production and consumption resources, is the phenomenon that drives markets for goods and services. (For this purpose, information is better treated as a "good" than an "idea.") Scarcity of a sort also limits what ideas can be believed and communicated: a person must choose whether to believe *p* or not-*p*; she must decide which few ideas from a nearly infinite universe will command her finite attention and which of her numerous thoughts she will attempt to disseminate. Nevertheless, the generation and consumption of ideas is characterized by choices that are less stark, less categorical, less discrete—more qualified, more variegated, more continual, more reversible, more nuanced, more synergistic, more holistic—than are the choices faced by producers and consumers of most goods and services. One reason for this difference is that the process of transmitting ideas, even in the large and among strangers, has dimensions of cooperation, reciprocity, and mutual ongoing identification—a bonding, if mainly symbolic, between the sender and the receiver—that are not endemic to the phenomenon of competitive exchange in product markets, the efficiency of which is a function of their capacity to execute discrete impersonal transactions. Moreover, the production of an idea does not deplete resources available to the

³⁰ See, for example, Lillian R. BeVier, *The Invisible Hand of the Marketplace of Ideas*, in Lee C. Bollinger and Geoffrey R. Stone, eds, *Eternally Vigilant: Free Speech in the Modern Era* 232 (2002); L. A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 Supreme Court Review 243, 280–84; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U Chi L Rev 225, 250–53 (1992); Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 Ariz L Rev 1125 (1996).

³¹ See, for example, Anderson, *Value and Ethics* at 158–63 (cited in note 25); Margaret Jane Radin, *Contested Commodities* 164–83 (1996).

producer as occurs when production priorities are established regarding goods and services; more often the production of an idea creates additional intellectual resources that facilitate future production. Similarly, when one consumer “buys” an idea, the supply of that idea available to other consumers is not thereby diminished. In these respects, the phenomenon of scarcity does not determine how ideas are socially ordered in quite the way it determines the allocation and distribution of conventional “rivalrous” goods and services.

Nor do substitution effects, a critical component of microeconomic analysis,³² operate in the realm of ideas the way they do in markets for goods and services. Appealing ideas do not command less assent when ideas that are almost but not quite as appealing become available at a lower price. One reason is that the very concept of “price” is problematic when the object of consumption is ideas. What is it that a person must give up in order to “consume” an idea other than the opportunity to believe conflicting ideas?³³ The forming of a belief sometimes entails costs to one’s reputation, and perhaps to one’s sense of personal identity, such that alternative beliefs that exact less of a price in these terms might represent a better “bargain” for the consumer. But even if available substitutes sometimes figure in the process of belief formation in this odd manner, the impact of such behavior on the aggregate demand for an idea is not something that contributes to an “efficient” outcome in the social project of truth seeking. If beliefs are considered valuable primarily for their expressive function by which persons forge identities and make interpersonal connections,³⁴ the choice to embrace a less costly substitute belief entails, if not conscious insincerity, at least cognitive dissonance that would seem to call into question the expressive value of the belief so chosen, assuming that it is even possible to choose to “believe” a less costly substitute. If, on the other hand, the instrumental value of a belief—its contribution to future thought and conduct—is to be emphasized, the practice of intellectual avoidance and denial is not likely to generate either the cognitive commitment or the cognitive resources that its practitioners will need to serve their personal utility functions in

³² See Varian, *Intermediate Microeconomics* at 38–40, 48–52, 111–12 (cited in note 22).

³³ See Alvin I. Goldman, *Knowledge in a Social World* 203–04 (1999).

³⁴ For an argument that many exchanges, not only of ideas, serve such expressive purposes and for that reason ought not to be governed by market norms, see Anderson, *Value and Ethics* at 150–58 (cited in note 25).

the face of the choices with which they will be confronted by the ever-changing course of events. Whatever collective belief patterns emerge from this phenomenon of intellectual substitution cannot be considered a socially functional equilibrium analogous to the equilibrium that results when available substitutes inform producer and consumer choices in the realm of goods and services.

The analogy breaks down over the concept of price in another respect, moreover. In a commodity or service market, at a given point in time there is such a thing as a market price; participants in the market ignore that price at their peril. Possibly one could analogize a current consensus of belief, if such there be, to a market price, but can we say that participants in the market for ideas are bound to respond to the current consensus in anything like the way economic actors must respond to the market price? It is, of course, true that someone trying to “sell” an idea ordinarily will want to take into account the prevailing baseline of belief in deciding which potential buyers to address and with what kinds of appeals. Moreover, inertia probably plays as large a role in belief formation and retention as in consumption decisions regarding conventional goods and services. In fact, one could turn to Holmes for the best aphorism on this point: “property, friendship, and truth have a common root in time.”³⁵ Nevertheless, ideas that defy the current consensus often get “consumed” in ways that are not replicated for material goods that languish on the shelves because they are priced too far above the going market rate. Such ideas can be the seeds of future intellectual, cultural, and political growth. They also can provide current value for dissident thinkers too idiosyncratic, too reticent, or too isolated to constitute even a niche market.

The analogy cannot be saved by switching the focus from the mechanism of price setting to the process of consumer choice. In a commodity or service market, consumers are expected much of the time to be self-interested in a rather narrow sense. The aggregation of individual preference-maximizing decisions provides the best available measure of what people want, and hence what ought to be and will be produced. In this regard, there is a normative dimension to the concept of a commodity or service market. I doubt that anyone would contend as a normative matter that consumer choice in the market for ideas should be self-interested to anything like the same

³⁵ Oliver Wendell Holmes, Jr., *Natural Law*, 32 Harv L Rev 40 (1918).

degree as in economic markets. We do not want listeners and readers to be looking simply for ideas that will best serve their personal needs narrowly conceived to encompass only private use. We expect them to be, in one way or another, searching for ideas that are valuable in a broader sense. In deciding what to believe, consumers of ideas should and do take into account the desires, needs, opinions, and experiences of other people. We also expect consumers of ideas to believe some things they wish were not so. The social value of ideas lies to a large extent in how their production and consumption generates benefits over time for persons other than the immediate producers and consumers. Such positive externalities are likely to be greater the less ephemeral and parochial, and hence personal to the point of being inapplicable to others, are the choices made by the immediate consumers of the ideas.

Of course, decisions to consume goods and services also are not invariably self-interested and short-sighted. Often consumers of goods and services make their selections motivated in part by focused altruism or generalized social responsibility. But that phenomenon is not really analogous to what occurs when consumers of ideas decide, sometimes reluctantly, what to believe. The fundamental difference is that even when economic consumption is not narrowly self-interested, the phenomenon of discretionary choice predominates to a degree that is not replicated in the formation of beliefs. Even if one holds that there is no such thing as a mind-independent Truth “out there,” even if one believes that the measure of an idea’s truth is the practical effect of adopting it, even if one thinks that reality is irreducibly a function of perspective, the experience of holding a genuine belief entails a quality of personal identification and (at least temporary) commitment that is approximated by only the most unusual of consumer purchases. Holmes put the point succinctly when he characterized his beliefs as his “can’t helps,”³⁶ and the driving ideas of common law development as “felt necessities.”³⁷

³⁶ Letter from Holmes to Sir Frederick Pollock (Oct 27, 1901), in Mark D. Howe, ed, 1 *Holmes-Pollock Letters* at 100 (1941) (“all I mean by truth is the road I can’t help travelling”); id at 139 (“all I mean by truth is what I can’t help thinking”); Letter from Holmes to Laski (Jan 11, 1929), in 2 *Holmes-Laski Letters* at 1124 (cited in note 13) (“[W]hen I say that a thing is true I only mean that I can’t help believing it—but I have no grounds for believing that my can’t helps are cosmic can’t helps—and some reasons for thinking otherwise. I therefore define the truth as the system of my intellectual limitations—there being a tacit reference to what I bet is or will be the prevailing can’t help of the majority of that part of the world that I count.”).

³⁷ Holmes, *The Common Law* at 5 (cited in note 3).

All the more problematic is the analogy of ideas to economic resources when the production function is taken into account. To a large extent, ideas are not generated in response to demand. Nor would we want them to be. We even have a derogatory term for the practice: pandering. (Again, notice that information is different.) The expressive reward of producing an idea makes that experience a form of socially valuable “consumption” by the author even of an idea that convinces no one. Moreover, ideas that are not selling often serve a social function precisely because they can be productively used—as foils, as partial truths to be selectively scavenged, as options available for future use as conditions change³⁸—by persons who do not “buy” them at the time they are placed on the market. There are, of course, analogies in the way that economic goods and services generate value to persons who either produce them or use them for purposes other than consumption. Some entrepreneurs offer goods and services in the spirit of self-expression. Most buyers develop their consumption preferences by learning from the possibilities and pitfalls of products they decide not to purchase. But here the differences of degree are telling. The nonconsumption sources of social value are not integral to economic production in the way that the sincerity, integrity, and personal identification of the speakers and the multifarious, radiating, and delayed uses of ideas actually constitute a major part of their value.

These comparisons suggest that the sources of social value in the market for ideas are so different from those in conventional economic markets that one cannot persuasively develop a philosophy of free speech by drawing upon the insights of classical and neoclassical economics regarding the interaction of supply and demand. In a way, Holmes acknowledged this. In their extended and intellectually rich correspondence, Frederick Pollock tried repeatedly to get Holmes to read Alfred Marshall, the doyen of the neoclassical movement in economics and the writer who by working out the implications of marginal analysis put the concept of equilibrium at the center of microeconomic theory. Here is Holmes’s response: “I do not get much nourishment except when the writers [on economics] become sociological (I remember getting much pleasure from Adam Smith because there he gives his

³⁸ Each of these sources of the value of ideas was emphasized by Mill. See John Stuart Mill (David Bromwich and George Kateb, eds), *On Liberty* 97–98, 103–17 (2003).

general views of life). So I have been excusing myself from reading your Marshall.”³⁹

II. SKEPTICISM

If Holmes’s market theory of the First Amendment does not rest upon a conception of cognitive fine-tuning via the elegant equilibrium-seeking mechanics of neoclassical economics, on what does it rest? What “general views of life” did he find in the sociology of the market? Perhaps what Holmes liked about markets is their nonprescriptive character, embodied in their designed function of enabling participants to implement their understandings and preferences whatever (within broad limits) they might be. Recall that his references quoted above⁴⁰ to the phenomenon of equilibrium were not to a supposed *cognitive* equilibrium but rather to “the equilibrium of social desires” and “the equilibrium of actual force in the community.” His invocation of the market metaphor in the *Abrams* peroration may have been to make the point that truth reduces to choice. Perhaps the imagery that we should take from Holmes’s figure of speech is not that of a highly structured price-determining *market* such as a stock exchange, a mechanism designed to achieve plebiscitary and transactional precision, but rather a choice-proliferating *marketplace*, a site for spontaneous and promiscuous browsing, comparing, tasting, and wishing, a paean to peripatetic subjectivity amid abundance.⁴¹ Applied to ideas, the image evokes intellectual serendipity.

³⁹ Letter from Holmes to Pollock (July 28, 1911), in 1 *Holmes-Pollock Letters* at 183 (cited in note 36). On Marshall’s role in developing general equilibrium theory, see Barber, *History* at 168–97 (cited in note 12).

⁴⁰ See notes 9 and 10.

⁴¹ The second earliest reference to a “marketplace” of (or for) ideas that I have been able to discover, in either legal or popular discourse, uses the metaphor in precisely this sense. Touting the forthcoming 1939 New York World’s Fair, Grover A. Whalen, the exhibition’s president, boasted that conditions affecting lives in every category would be shown, together with all the possibilities existing in science, art, medicine, mechanics, education, play, and industry: “The fair, planned to entertain and delight every one with its beauty, its comfort, its magnificence, and its variegated amusements will be a market place for ideas, the birthplace of a wonderful new era.” *New York Times* 27 (Oct 9, 1936). One year earlier, David M. Newbold wrote a letter to the *New York Times* in which he reassured readers that if neither Herbert Hoover nor William Borah, the ideal candidates, were willing to challenge President Roosevelt in the 1936 presidential election, “then their likes will issue not from a dark room at 2 o’clock in the morning, but as the result of men and ideas competing in the market place of ideas where public opinion is formed.” *New York Times* 14 (Dec 28, 1935). So far as I can tell, Mr. Newbold deserves the prize for first transforming Holmes’s “competition of the market” into a “marketplace of ideas.”

Holmes certainly was a pluralist. Throughout his adult life, in a variety of intellectual endeavors, he displayed an instinctive aversion to assertions of “absolute” truth. He wrote to John Wu: “I don’t believe or know anything about absolute truth.”⁴² He once described truth as “the majority vote of that nation that could lick all others.”⁴³ In a law review article published the year before he wrote the *Abrams* dissent, Holmes expressed in characteristically colorful terms his utter disdain for absolutist modes of thought:

There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher’s effort to prove that truth is absolute and of the jurist’s search for criteria of universal validity which he collects under the head of natural law.⁴⁴

His pluralism born of skepticism permeates his writings. In the critique of natural law just quoted, Holmes explained further his aversion to transcendent truth claims:

What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one’s experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism.⁴⁵

Holmes called himself a skeptic, as did his admirers, but Grant Gilmore found that his skepticism crossed the border into cynicism:

Put out of your head the picture of the tolerant aristocrat, the great liberal, the eloquent defender of our liberties, the Yankee from Olympus. All that was a myth, concocted principally by Harold Laski and Felix Frankfurter about the time of World War I. The real Holmes was savage, harsh, cruel, a bitter and lifelong pessimist who saw in the course of human life nothing

⁴² Letter from Holmes to John C. H. Wu (June 16, 1923), in Harry C. Shriver, ed., *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 164, 165 (1936).

⁴³ Holmes, *Natural Law* at 40 (cited in note 35).

⁴⁴ *Id.*

⁴⁵ *Id.* at 41.

but a continuing struggle in which the rich and the powerful impose their will on the poor and weak.⁴⁶

Alexander Meiklejohn considered Holmes's market conception of truth to be

a fruitful source of intellectual irresponsibility and of the errors which irresponsibility brings. We Americans, when thinking in that vein, have taken the "competition of the market" principle to mean that as separate thinkers, we have no obligation to test our thinking, to make sure that it is worthy of a citizen who is one of "the rulers of the nation." That testing is to be done, we believe, not by us, but by "the competition of the market." Each one of us, therefore, feels free to think as he pleases, to believe whatever will serve his own private interests. . . . [T]he intellectual degradation which that interpretation of truth-testing has brought upon the minds of our people is almost unbelievable. . . . It has made intellectual freedom indistinguishable from intellectual license. And to that disastrous end the beautiful words of Mr. Holmes have greatly contributed.⁴⁷

What matters here is not the proper label to be attached to Holmes's view of the world, but whether his irreverent attitude toward the concept of truth provides a discrediting key to understanding his market metaphor. However irritating may be the pretensions of self-righteous moralists and self-appointed guardians of the public interest, we cannot help but be troubled by the cognitive and normative abyss that Holmes might be understood to embrace.⁴⁸ Moreover, one must ask whether a constitutional interpretation can claim sufficient pedigree if it rests on radical premises—moral, political, or epistemological—that have never commanded much assent in the relevant political community. In this regard, the nihilism that some have discerned in Holmes's concept of truth is indeed troubling.

There is another problem with grounding a strong free speech principle on an intensely skeptical attitude toward the concept of truth. Steven Smith has shown that extreme skepticism is a double-edged sword in First Amendment analysis. Just as skepticism tends

⁴⁶ Grant Gilmore, *The Ages of American Law* 48–56 (1977).

⁴⁷ Alexander Meiklejohn, *Political Freedom* 70–71 (1948).

⁴⁸ A hard-hitting, detailed, and well-informed critique of Holmes in this vein is Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (2000).

to undercut the arguments of those who would regulate speech in the name of ideological decency, skepticism also tends to undercut the arguments of those who assert that speech is a special human activity deserving of extraordinary constitutional protection.⁴⁹ If truth really does reduce entirely to arbitrary preference and power, as Holmes seems to say in some of his saltier moments,⁵⁰ why treat speech disputes as exceptional in terms of the principles of deference and separation of powers that limit the judicial role in a constitutional democracy?

These are powerful objections, but they have purchase only if Holmes's market metaphor does indeed express an extreme form of skepticism bordering on nihilism. It does not. Recall that in his *Abrams* dissent Holmes says *two* things about truth. First, he states that the competition of the market provides the "best test of truth." Then he asserts "that truth is the only ground upon which [men's] wishes safely can be carried out."⁵¹ This second step in the argument is crucial. Even if we could be confident that free speech leads to truth, the case for protecting speech in the face of the harms it might cause depends on the further proposition that knowing the truth is a value of overriding importance.⁵² Holmes apparently believed that the pursuit of truth *is* that important. He certainly lived

⁴⁹ Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S Cal L Rev 649 (1987).

⁵⁰ See, for example, Holmes, *Natural Law* at 40 (cited in note 35); Letter from Holmes to Pollock (Oct 26, 1929), in 2 *Holmes-Pollock Letters* at 255–56 (cited in note 36); Letter from Holmes to Laski (April 6, 1920), in 1 *Holmes-Laski Letters* at 259 (cited in note 13).

⁵¹ *Abrams v United States*, 250 US 616, 630 (1919) (Holmes, J., dissenting).

⁵² It is possible to read Holmes's statement "that truth is the only ground upon which [men's] wishes safely can be carried out" as if the word "that" were italicized so as to shift the emphasis from "truth" to "that," thereby transforming "that" from a conjunction to a demonstrative adjective. In this reading, the "truth" he is talking about is simply his proposed test of truth, not truth in all its manifestations. The interpretative consequence would be to read Holmes as saying nothing about the priority to be accorded the activity of truth seeking, but rather as asserting that his market test of truth, as compared with alternative tests that are more transcendent or inflexible, is to be preferred on grounds of safety and efficacy. Such a reading cannot be definitively refuted by Holmes's syntax and rhetorical context. Nevertheless, it is some internal evidence against this revisionist interpretation that earlier in the same sentence, in clauses structurally parallel to the clause at issue, Holmes twice used the word "that" as a conjunction rather than an adjective: "they may come to believe . . . that the ultimate good desired . . . that the best test of truth . . ." Moreover, Holmes's penchant for discussing metaphysical and epistemological matters in global albeit humble terms, see text at note 44 and also note 75, together with his skeptic's disinclination to label his specific controversial claims "truths," leads me to conclude that Holmes's meaning in this crucial sentence is better captured by reading it to say "that *truth*" rather than "*that* truth," and thus to be asserting the priority of truth seeking. On the importance in the overall truth-centered argument for the freedom of speech of this claim that truth seeking has a special social priority, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* 29 (1982).

his life as though he did. Edmund Wilson particularly admired this quality in Holmes:

He was not merely a cultivated judge who enjoyed dipping into belles lettres or amusing himself with speculation: he was a real concentrator of thought who had specialized in the law but who was trying to determine man's place, to define his satisfactions and duties, to try to understand what humanity is. . . . In spite of his . . . fundamental skepticism as to human convictions and systems . . . he is always alert and attentive, always inquiring and searching, to find out some further answers.⁵³

One manifestation of Holmes's inquisitiveness was his fascination with science. In February of 1919 the philosopher Morris Cohen asked Holmes in a letter whether his reading of Voltaire had had an important influence on his views concerning truth.⁵⁴ Holmes answered:

Oh no—it was not Voltaire—it was the influence of the scientific way of looking at the world—that made the change to which I referred. . . . The Origin of Species I think came out while I was in college—Herbert Spencer had announced his intention to put the universe into our pockets—I hadn't read either of them to be sure, but as I say it was in the air.⁵⁵

Although Holmes never pursued scientific knowledge systematically, he was interested in the scientific method and the role of science in society. During the 1870s he participated in a discussion group that called itself the Metaphysical Club. The group's leader was, by all accounts, Chauncey Wright, a latter-day Socrates who wrote very little, achieved no public recognition, but persistently challenged his conversational partners with the power and probity of his mind. Wright was both a practicing scientist, trained in mathematics, biology, and physics, and a philosopher of science.⁵⁶ With

⁵³ Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* 781 (1962).

⁵⁴ Letter from Morris Cohen to Holmes (Feb 3 or 4, 1919), described in Felix Cohen, ed, *The Holmes-Cohen Correspondence*, 9 J Hist Ideas 3, 14 n 27 (1948).

⁵⁵ Letter from Holmes to Morris Cohen (Feb 5, 1919), id at 14.

⁵⁶ Wright was a fascinating character who had an important influence on Holmes. See note 62; Letter from Holmes to Laski (Nov 29, 1923), in 1 *Holmes-Laski Letters* at 565 (cited in note 13) ("It seemed to me that [Peirce] was overrated especially allowing for what he owed to Chauncey Wright . . ."). William James also held Wright in awe: "If power of analytic intellect pure and simple could suffice, the name of Chauncey Wright

the regular participation also of William James and Charles Sanders Peirce, both trained scientists who became philosophers, the Metaphysical Club provided Holmes with an opportunity to discuss the nature and meaning of science with some of the ablest thinkers of his generation. James and Peirce, of course, were later to develop the philosophy of pragmatism, which builds on a view of truth that is derived from the scientific method.⁵⁷

Holmes maintained an interest in science throughout his life. Save only his book *The Common Law*, probably his most ambitious publication is an article entitled "Law in Science and Science in Law," published in the *Harvard Law Review* in 1899.⁵⁸ When speaking in 1902 at the dedication of the Northwestern University Law School building, Holmes said:

If [a university training] could give to every student a scientific point of view . . . I should think it had more than paid for itself. . . . I cannot believe that anything else would be so likely to secure prosperity as the universal acceptance of scientific premises in every department of thought.⁵⁹

In the last two decades of his life, Holmes conducted a regular correspondence with Morris Cohen, one of the founders of the academic discipline of philosophy of science.⁶⁰

would assuredly be as famous as it now is obscure, for he was not merely the great mind of a village—if Cambridge will pardon the expression—but either in London or Berlin he would, with equal ease, have taken the place of master which he held with us. The reason why he is now gone without leaving any work which his friends can consider as a fair expression of his genius, is that his shyness, his want of ambition, and to a certain degree his indolence, were almost as exceptional as his power of thought." William James, *Chauncey Wright*, 21 *The Nation* 194 (1875), reprinted in Edward H. Madden, *Chauncey Wright and the Foundations of Pragmatism* 143 (1963). The best brief account of Wright's life and thought that I have found is the chapter devoted to him in Philip P. Wiener, *Evolution and the Founders of Pragmatism* 31–69 (1949, 1972) ("Evolution"). For a less flattering estimate of Wright's originality and influence, see Bruce Kuklick, *The Rise of American Philosophy* 63–79 (1977).

⁵⁷ For portraits of the Metaphysical Club and its participants, see Louis Menand, *The Metaphysical Club: A Story of Ideas in America* 201–32 (2001) ("Metaphysical Club"); Wiener, *Evolution* at 18–30 (1972) (cited in note 56); Morton White, *Science and Sentiment in America* 120–216 (1972). For perceptive accounts of Holmes's complex relationships with the leading pragmatist thinkers, see Grey, 41 *Stan L Rev* at 787 (cited in note 18); David A. Hollinger, *The Tough-Minded Justice Holmes, Jewish Intellectuals, and the Making of an American Icon*, in Robert W. Gordon, ed, *The Legacy of Oliver Wendell Holmes, Jr.* 216–22 (1992).

⁵⁸ 12 *Harv L Rev* 443 (1899).

⁵⁹ *Address of Chief Justice Holmes*, in Richard A. Posner, ed, *The Essential Holmes* 98, 99 (1992).

⁶⁰ Portions of the correspondence are reprinted in Cohen, ed, 9 *J Hist Ideas* (cited in note 54).

As a young man, Holmes studied the writings of John Stuart Mill, particularly his influential account of the scientific method, *A System of Logic*.⁶¹ That book can be viewed as the culmination of the British empiricist tradition in philosophy, stretching back to Locke and Hume. A key tenet of that tradition is that all propositions are subject to perpetual testing. And that process of testing, whether it takes the form of systematic observation, controlled experiment, logical derivation, or probabilistic calculation, must always hold out at least the possibility that prior understandings will be displaced. Time, after all, has upset many scientific laws. In short, no matter how elegant and coherent the explanation and supportive the current data, we might be wrong. This guiding principle has come to be called fallibilism. Both Mill and Holmes believed in it passionately.⁶² It is noteworthy that Holmes reread Mill's essay *On Liberty*, which depends heavily on the premise of fallibilism in arguing for the freedom of speech, during the early months of 1919, the year of his *Abrams* dissent.⁶³

This emphasis on fallibilism puts in perspective Holmes's many breezy statements about the nature of truth. He discussed the concept of truth in several letters with two of his favorite correspondents, Sir Frederick Pollock and Harold Laski. On almost every occasion when he spoke dismissively about truth, Holmes included

⁶¹ See Mark De Wolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years 1841–1870* 212–17 (1957); Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 SIU L J 427, 436–37 (1990).

⁶² See Letter from Holmes to Pollock (Aug 30, 1929), in 2 *Holmes-Pollock Letters* at 252 (cited in note 36):

If there is anything that has been supposed to be compulsory upon us short of not affirming nonsense I should think it was that every phenomenon must have a cause. Yet I find scientific men suggesting nowadays (e.g. Eddington) that there are phenomena for which no causes can be discovered and seemingly believing that they are outside the category of cause and effect. I am far from believing with them, but I am entirely ready to believe it on proof. Chauncey Wright, a nearly forgotten philosopher of real merit, taught me when young that I must not say *necessary* about the universe, that we don't know whether anything is necessary or not.

See also Letters from Holmes to Laski (Nov 29, 1923 and July 23, 1924), in 1 *Holmes-Laski Letters* at 565, 634 (cited in note 13). For a concise and lucid explanation of Mill's theory of induction and its relationship to his premise of fallibilism, see John Skorupski, *John Stuart Mill* 5–12 (1989). See also Geoffrey Scarre, *Mill on Induction and Scientific Method*, in John Skorupski, ed., *The Cambridge Companion to Mill* 112–38 (1998).

⁶³ Letter from Holmes to Laski (Feb 28, 1919), in 1 *Holmes-Laski Letters* at 187 (cited in note 13).

a criticism of moral or intellectual absolutism.⁶⁴ After setting out his majority-vote-of-the-strongest-nation theory of truth in *Natural Law*, he added: "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."⁶⁵ He reserved his strongest ire for persons and philosophies that were not capable of adaptation or reassessment: "When you know that you know persecution comes easy."⁶⁶ The animating idea of Holmes's book *The Common Law* is that seemingly absolute principles of law must be seen in their historical context, studied with attention to their patterns of development, and evaluated according to their adaptability to modern conditions.⁶⁷ I think Holmes would have embraced almost any test of truth that rendered the concept of an absolute principle incoherent. He associated the rejection of absolutist thinking with the scientific method.

That association may help us to unpack Holmes's bugbear. "Absolute" could refer to any of a number of properties bearing on the derivation, strength, scope, constancy, purity, singularity, contingency, fundamentality, corrigibility, or exclusivity of a proposition. Recall Holmes's identification of "the effort to prove that truth is absolute" with "demand for the superlative" and "search for criteria of universal validity."⁶⁸ One might be tempted from these formulations to enter Holmes in the lists of various modern debates over moral realism,⁶⁹ moral relativism,⁷⁰ and moral particularism.⁷¹ While his thought can be mapped along some of these

⁶⁴ See, for example, Letters from Holmes to Laski (Feb 26, 1918, April 6, 1920, and Jan 11, 1929), in 1 *Holmes-Laski Letters* at 139, 259 (cited in note 13), and 2 *Holmes-Laski Letters* at 1124–25; Letter from Holmes to Lady Pollock (Sept 6, 1902), in 1 *Holmes-Pollock Letters* at 105 (cited in note 36); Letter from Holmes to Frederick Pollock (Oct 26, 1929), in 2 *Holmes-Pollock Letters* at 255–56.

⁶⁵ Holmes, *Natural Law* at 40 (cited in note 35).

⁶⁶ Letter from Holmes to Pollock (Aug 30, 1929), in 2 *Holmes-Pollock Letters* at 253 (cited in note 35).

⁶⁷ See Benjamin Kaplan, *Encounters with Oliver Wendell Holmes, Jr.*, 96 Harv L Rev 1828, 1829 (1983).

⁶⁸ See text at note 44.

⁶⁹ Compare, for example, Gilbert Harman, *The Nature of Morality* (1977), and J. L. Mackie, *Ethics: Inventing Right and Wrong* (1977), with Charles Larmore, *The Morals of Modernity* 89–117 (1996).

⁷⁰ Compare, for example, Bernard Williams, *The Truth in Relativism*, in *Moral Luck* 132 (1981), with Thomas Nagel, *The View from Nowhere* (1986).

⁷¹ Compare, for example, Jonathan Dancy, *Moral Reasons* (1993), with Joseph Raz, *The Truth in Particularism*, in *Engaging Reason* (1999).

coordinates—he was a moral relativist and not a moral realist⁷²—Holmes’s focus on fallibilism indicates that the absolutism he rejected with such vehemence is that which places certain ideas and practices beyond the need for ongoing evaluation and modification in the light of criticism, evidence, experience, changing conditions, and changing “felt necessities.” Stasis and certitude bothered him more than conceptual overreach or metaphysical pretension.⁷³ This aversion to intellectual rigidity, surely an attribute of all wise persons but peculiarly central to Holmes’s thought, transcends differences over moral realism, relativism, and particularism.

Indeed, such was Holmes’s broad-ranging curiosity that he even liked to ponder elusive intimations regarding the mysteries of the universe. Here is how he concludes *The Path of the Law*:

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.⁷⁴

This passage is not aberrational. Addressing his Harvard classmates on the occasion of their fortieth reunion, Holmes observed:

Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but wholly adequate significance is as parts of the unimaginable whole. It suggests that even while we think that we are egotists we are living to ends outside ourselves.⁷⁵

⁷² For an especially illuminating overview of Holmes’s theory of value, see David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 Duke L J 449, 461–88 (1994).

⁷³ See Holmes, 10 Harv L Rev at 466 (cited in note 11) (“certainty generally is illusion and repose is not the destiny of man”).

⁷⁴ Id at 478 (1897).

⁷⁵ Holmes, *The Class of ‘61*, in *The Essential Holmes* at 94, 95 (cited in note 59). See also Holmes, *Natural Law* at 44 (cited in note 35) (“Philosophy does not furnish motives but it shows men that they are not fools for doing what they already want to do. It opens to the forlorn hopes on which we throw ourselves away, the vista of the farthest stretch of human thought, the chords of a harmony that breathes from the unknown.”); Holmes, *Law in Science and Science in Law* at 462–63 (cited in note 58) (“... without ideals what is life worth? They furnish us our perspectives and open glimpses of the infinite.”); Letter from Holmes to Wu (Sept 20, 1923) at 167 (cited in note 42) (“A man’s spiritual history is best told in what he does in his chosen line. Life having thrown me into the law, I must try to put my feeling of the infinite into that, to exhibit the detail with such hint of a vista as I can, to show in it the great line of the universal.”); Holmes, *The Profession of the*

Elsewhere he noted how absolutist patterns of thought not only stunt observation and thwart speculation but also impair action. For he associated the absolutist “demand for the superlative” with eventual disillusionment, and with the paralysis, disengagement, and despair that flows therefrom:

If a man sees no reason for believing that significance, consciousness and ideals are more than marks of the finite, that does not justify what has been familiar in French sceptics; getting upon a pedestal and professing to look with haughty scorn upon a world in ruins. . . . Why should we employ the energy which is furnished to us by the cosmos to defy it and shake our fist at the sky? It seems to me silly.⁷⁶

To Holmes, the challenge we all confront is to abandon comforting illusions and appreciate the limits of human understanding, and then live life to the fullest with energy, wonder, dedication, and joy in the struggle. The duty and dignity of mundane engagement was a theme that stirred his imagination:

When it is said that we are too much occupied with the means of living to live, I answer that the chief worth of civilization is just that it makes the means of living more complex; that it calls for great and combined intellectual efforts, instead of simple, uncoordinated ones, in order that the crowd may be fed and clothed and housed and moved from place to place. Because more complex and intense intellectual efforts mean a fuller and richer life. They mean more life. Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it.⁷⁷

Law, in *Collected Legal Papers* at 29–30 (cited in note 9) (“a man may live greatly in the law as well as elsewhere . . . there as elsewhere his thought may find its unity in an infinite perspective”); Holmes, *Brown University—Commencement 1897*, id at 165, 166 (“I care not very much for the form if in some way [a man] has learned that he cannot set himself over against the universe as a rival god, to criticize it, or to shake his fist at the skies, but that his meaning is its meaning, his only worth is as a part of it, as a humble instrument of the universal power . . . not merely a necessary but a willing instrument in working out the inscrutable end.”). For an interesting comparison of Holmes’s observations concerning what he termed “the infinite” and “the cosmos” with those of Ralph Waldo Emerson, whom Holmes emulated as a young man, see Catherine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 Nw U L Rev 541, 560–61 (1988).

⁷⁶ Id at 43.

⁷⁷ Holmes, *Speech to the Bar Association of Boston*, in *Collected Legal Papers* at 244, 247–48 (cited in note 9). See also Letter from Holmes to Wu (March 26, 1925) at 178 (cited in note 42), in which Holmes describes his “imaginary society of jobbists, who were free to be egotists or altruists on the usual Saturday half holiday provided they were neither while

Holmes was indeed a skeptic by temperament and self-training. But he was not a cynic or nihilist or disengaged agnostic.⁷⁸ The operational skepticism that is integral to the scientific method bears little resemblance to the skepticism of cynical withdrawal. That difference is of the essence in trying to understand Holmes's thought in general and his views about free speech in particular. He did not treat ideas, his own or those of others, as trivial play-things. To the contrary, he believed that forming and defending strong opinions—not just self-serving preferences—is the stuff of life. He considered the freedom to do so “the principle of the Constitution that more imperatively calls for attachment than any other.”⁷⁹

As is true of the law of supply and demand, the rubric of nihilism cannot elucidate Holmes's market metaphor. We might stop here and conclude that for all his brilliance and eloquence Holmes simply was not a systematic thinker, however remarkable he might have been at producing the felicitous aphorism or the penetrating aperçu. At the least we might conclude that he failed to articulate a coherent argument on the occasion of the *Abrams* dissent. My project, however, is to look further, to see whether more can be gleaned from his opinion than the inadequate explanations considered so far.

on the job. Their job is their contribution to the general welfare and when a man is on that, he will do it better the less he thinks either of himself or his neighbors, and the more he puts all his energy into the problem he has to solve.” Emphasizing this existentialist dimension, Richard Posner has described Holmes as “the American Nietzsche.” See Richard Posner, *The Problems of Jurisprudence* 239–42 (1990); Posner, *The Essential Holmes* at xviii–xx, xxviii (cited in note 59). This characterization is defended at length in Brian Leiter, *Holmes, Economics, and Classical Realism*, in Steven J. Burton, ed., *The Path of the Law and Its Influence* 285–301 (2000). It is elaborated with important qualifications in Luban, 44 Duke L J at 485–88 (cited in note 72). In an encomium to the late Chief Justice of Massachusetts, Walbridge Abner Field, Holmes gave expression to a philosophy of heroic engagement: “Our last word about the unfathomable universe must be in terms of thought. If we believe that anything is, we must believe in that, because we can go no further. We may accept its canons even while we admit that we do not know that we know the truth of truth. Accepting them, we accept our destiny to work, to fight, to die for ideal aims. At the grave of a hero who has done these things we end not with sorrow at the inevitable loss, but with the contagion of his courage; and with a kind of desperate joy we go back to the fight.” See *The Essential Holmes* at 213 (cited in note 59).

⁷⁸ The *locus classicus* of the argument that “[t]o a remarkable degree Holmes simply did not care” is Yosai Rogat, *The Judge as Spectator*, 31 U Chi L Rev 213, 255 (1964). For a convincing refutation that discerns very different implications from the central role that skepticism played in Holmes's thought, see Thomas C. Grey, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 Or L Rev 521 (1992).

⁷⁹ *United States v Schwimmer*, 279 US 644, 653 (1928) (Holmes, J., dissenting).

III. EVOLUTION

Holmes never used the phrase “marketplace of ideas.” That is a paraphrase supplied by his interpreters.⁸⁰ The phrase he actually employed in the *Abrams* opinion, “competition of the market,” may suggest a focus on neither the price- and output-determining, utility-maximizing characteristics of markets nor their celebration of discretionary choice, but rather on the harsh fact that economic actors and their products are pitted against one another. This interpretation gains support from Holmes’s particular affinity for the work of Malthus, who emphasized scarcity and challenged some of the more ambitious claims of his fellow economists regarding inevitable market self-corrections.⁸¹ Perhaps the key word in Holmes’s phrase is not “market” but “competition.” In this view, precisely because “truth is the only ground upon which their wishes safely can be carried out,”⁸² what is needed for ideas is a vibrant, brutal weeding-out process analogous to the function markets for goods and services perform in killing off inefficient enterprises and forcing unproductive workers to be fired.⁸³ In an unsent letter to Herbert Croly, composed in the year of his *Abrams* dissent, Holmes said: “in the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat.”⁸⁴ As he put it to John Wu, one of his favorite correspondents in later life: “Every society is founded on the death of men.”⁸⁵ Every society is also founded, he might have added, on the death of ideas.

⁸⁰ The precise phrase “marketplace of ideas” was first employed in a Supreme Court opinion in Justice Brennan’s majority opinion in *Lamont v Postmaster General*, 381 US 301, 308 (1965). For a detailed survey of the Court’s use of the phrase, see Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* 49–72 (1992). For the earliest uses of the phrase in popular discussion, see note 41.

⁸¹ See text at note 13; Barber, *History* at 68–72 (cited in note 12); Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics: A Study in Nineteenth Century Intellectual History* 80–81 (1983).

⁸² See text at notes 50–51.

⁸³ The classic justification of economic elimination is Schumpeter’s notion of “creative destructive.” See Joseph Schumpeter, *The Theory of Economic Development* (1911). On the analogy between selective survival in nature and in economic markets, compare Milton Friedman, *The Methodology of Positive Economics*, in *Essays in Positive Economics* 3 (1953), with Richard R. Nelson and Sidney G. Winter, *Evolutionary Theorizing in Economics*, 16 *J Econ Perspectives* 23 (2002).

⁸⁴ See Letter from Holmes to Laski (May 12, 1919), in 1 *Holmes-Laski Letters* at 204 (cited in note 13).

⁸⁵ Letter from Holmes to Wu (July 21, 1925), in Max Lerner, ed, *The Mind and Faith of Justice Holmes* 427–28 (1943).

Holmes was fascinated by lethal force. As befits a soldier who was seriously wounded at Ball's Bluff, Antietam, and yet again near Fredericksburg,⁸⁶ his writings abound with military metaphors and paeans to the dignity of struggle.⁸⁷ The centrality of conflict and contest is a recurrent theme in his philosophical musings.⁸⁸ Recall his description of life as a "roar of bargain and battle."⁸⁹ After his youthful brushes with death and the carnage on a grand scale that he witnessed, it is no wonder that the subject of survival engaged his attention, or that he was intrigued by the discoveries of his fellow Malthusian, Charles Darwin.⁹⁰ Holmes considered himself a Darwinist and concentrated his scholarly energies on the question of how law evolves.⁹¹ When Holmes was attending the meetings of the Metaphysical Club during the early 1870s, Chauncey Wright, the group's leader whom Holmes treated as a mentor,⁹² was in the midst of an extended, mutually supportive correspondence with Darwin.⁹³

A possible difficulty with reading into the market metaphor a

⁸⁶ See Liva Baker, *Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* 114–19, 131–36, 142–43. For an account of how Holmes's experience in the Civil War had a profound influence on his thought, see Menand, *Metaphysical Club* at 23–69 (cited in note 57).

⁸⁷ See, for example, Holmes, *The Fraternity of Arms*, in *The Essential Holmes* at 73 (cited in note 59); *The Soldier's Faith*, id at 87.

⁸⁸ See, for example, Letter from Holmes to Pollock (Feb 1, 1920), in 2 *Holmes-Pollock Letters* at 36 (cited in note 36) ("... I do think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force"); Letter from Holmes to Einstein (Oct 12, 1914), in *Holmes-Einstein Letters* at 100–01 (cited in note 14) ("I suppose the war was inevitable . . . it shows us that classes as well as nations that mean to be in the saddle have got to be ready to kill to keep their seat; and that the notion that all that remained for the civilized world was to sit still, converse, and be comfortable was humbug.").

⁸⁹ See text at note 75.

⁹⁰ On Darwin's considerable intellectual debt to Malthus, see Jonathan Hodge, *The Notebook Programmes and Projects of Darwin's London Years*, in *The Cambridge Companion to Darwin* 40, 60–61 (2003); Jonathan Howard, *Darwin* 14–15, 19 (1982); Ernst Mayr, *One Long Argument: Charles Darwin and the Genesis of Modern Evolutionary Thought* 75–79, 85–86 (1991).

⁹¹ See J. W. Burrow, *Holmes in His Intellectual Milieu*, in Gordon, ed, *The Legacy of Oliver Wendell Holmes, Jr.* at 17 (cited in note 57); E. Donald Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J Legal Stud 113 (1984); Wiener, *Evolution* at 172–89 (cited in note 56); Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 Cal L Rev 343 (1984).

⁹² See text at note 56; Letter from Holmes to Pollock (Aug 30, 1929), in 2 *Holmes-Pollock Letters* (cited in note 36).

⁹³ See Wiener, *Evolution* at 48–60 (cited in note 56).

Darwinist concern for intellectual adaptation is that Holmes was struck by how resistant to change are the ideas that people hold dear: "One can not be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one's life."⁹⁴ Much as he believed that traditional beliefs regarding population and progress had been disproved by Malthus, Holmes chafed at their resilience: "Malthus pleased me immensely—and left me sad. A hundred years ago he busted fallacies that politicians and labor leaders still live on. One thinks that an error exposed is dead, but exposure amounts to nothing when people want to believe."⁹⁵ Holmes may have welcomed the death of ideas but, given his understanding of the psychology of belief formation, one wonders how he could have considered the marketplace of ideas to be the Grim Reaper he sought.

Actually, the theory of evolution might help to explain why a robust freedom of speech can be extremely valuable even when most individuals remain stubbornly impervious to demonstrably valid refutations of their beliefs. For the engine that drives evolution is not change in the characteristics of individual creatures but rather change over time in the makeup of populations. Natural selection causes the creatures with the most adaptive traits to predominate and those with the least adaptive traits to recede within a population.⁹⁶ Applied to the realm of ideas, this selection process causes new entrants to a community who hold more adaptive beliefs to constitute over time a larger proportion of the population. The newcomers with the better-suited ideas arrive due to generational changeover and immigration. As the population changes with the infusion of new persons with different ideas, the pattern of beliefs within the community changes, even if no single individual ever embraces a new idea or discards an old one.

⁹⁴ Holmes, *Natural Law* at 40 (cited in note 35).

⁹⁵ Letter from Holmes to Pollock (Aug 30, 1914), in 1 *Holmes-Pollock Letters* at 219 (cited in note 36). See also Letter from Holmes to Laski (Dec 26, 1917), in 1 *Holmes-Laski Letters* at 122 (cited in note 13): ("When I read Malthus I thought he had ripped the guts out of some humbugs—but they are as alive as ever today. Humbugs have no guts—and live all the better without them.").

⁹⁶ See Howard, *Darwin* at 22 (cited in note 90) ("It is meaningless to say that individuals evolve: evolution is the change in the average constitution of a population of individuals as the generations succeed one another."); Mayr, *One Long Argument* at 43–44 (cited in note 90) ("Darwinian evolution is discontinuous because a new start is made in every generation when a new set of individuals is produced. That evolution nevertheless appears to be totally gradual is because it is populational and depends on sexual reproduction among the members of the population.").

For this dynamic to occur, however, it is essential that the newcomers not simply replicate the preexisting pattern of beliefs. In Darwinist terms, what is needed is variation. To provide that, the newcomers must have the capacity to exercise independent judgment and to form opinions that draw upon experiences different from those that produced the earlier pattern of beliefs. Here is where the freedom of speech comes in. A political regime that discourages and punishes free thought reduces the incidence of variation in the realm of ideas, variation both in the production of new ideas and in the embrace of previously unpopular ideas.

An unregulated marketplace of ideas encourages free thought not so much by determining the equilibrium of the moment as by keeping low the barriers to entry, barriers that take the form not only of coercive sanctions but also social and intellectual peer pressures toward conformity. The sheer proliferation of ideas in a free market complicates perceptions in a manner that helps to weaken such barriers. In addition, the market metaphor makes a statement about the dynamic and chronically incomplete character of understanding and the value of intellectual contest and innovation. Such a statement by the constitutional regime can help to legitimate dissent and discredit demands for orthodoxy, and in that way lend much needed support to newcomers whose heretical notions will almost always engender strong resistance laced with accusations of illegitimacy if not disloyalty.

This demographic account of intellectual evolution assumes that individuals never change their minds about questions that matter to them. That, of course, is an exaggeration. Holmes was impressed by how seldom and slowly people yield to telling criticism, but he never maintained that such resistance is for most persons absolute. When ideas cease to work, whether as guides to conduct or further inquiry, they tend to be abandoned by the individuals whose projects are frustrated as a result. The process takes time and the admission of inefficacy does not come easily for most believers. Much more than rational or empirical refutation in the abstract is required. Usually pressure builds up gradually before it becomes unbearable. But changes of mind do occur, if only rarely, for all but the most refractory zealots. Whether or not it is accurate to call Holmes a pragmatist—a question that has produced a rich literature⁹⁷—he

⁹⁷ Compare Posner, *The Essential Holmes* at 242–44 (cited in note 59); Wiener, *Evolution* at 172–89 (cited in note 56); Morton White, *Social Thought in America: The Revolt Against*

embraced the pragmatist tenet that ideas tend to flourish when they work and wither when they don't. His explicit and extravagant admiration for the writings of John Dewey, though never explained by Holmes in any detail, was very likely because of what Dewey had to say in support of a pragmatist conception of justifiable belief. Holmes said of *Experience and Nature*, Dewey's magnum opus elaborating his theory of knowledge:

although Dewey's book is incredibly ill written, it seemed to me after several rereadings to have a feeling of intimacy with the inside of the cosmos that I found unequalled. So me-thought God would have spoken had He been inarticulate but keenly desirous to tell you how it was.⁹⁸

Formalism 59–75 (1947, 1957); Edward J. Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 Rutgers L Rev 283 (1988); M. H. Fisch, *Justice Holmes, The Prediction Theory of Law, and Pragmatism*, 39 J Philosophy 85 (1942); Grey, 41 Stan L Rev (cited in note 18); Hantzis, 82 Nw U L Rev (cited in note 75); Luban, 44 Duke L J at 464 n 41 (cited in note 72); Note, *Holmes, Peirce, and Legal Pragmatism*, 84 Yale L J 1123, with H. L. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* 163–64 (1984); Robert Gordon, *Holmes's Common Law as Legal and Social Science*, 10 Hofstra L Rev 719, 722–26 (1982); Hollinger, *The Tough-Minded Justice Holmes* at 217–22 (cited in note 57); Kelley, 14 SIU L J (cited in note 61).

Three arguments in John Stuart Mill's *On Liberty*, which as mentioned above Holmes reread the same year he wrote the *Abrams* dissent, see text at note 63, lend support to the effort to establish a link between Holmes and the pragmatists on the specific question of how people change their minds. Mill had much more faith than Holmes in the power of rational persuasion, but he did note in *On Liberty* that one of the advantages that truth has over falsehood is that it can be continually rediscovered in different eras until eventually conditions are ripe for its acceptance. Further signaling his recognition of how large a part context plays in the process of belief formation, Mill claimed (implausibly) that all the great advances in modern Western thought occurred in just three brief periods when the society-wide level of intellectual ferment was extraordinary. And on the respective roles of logic and experience, Mill said in *On Liberty*: "All languages and literatures are full of general observations on life, both as to what it is, and how to conduct oneself in it; observations which everybody knows, which everybody repeats, or hears with acquiescence, which are received as truisms, yet of which most people first truly learn the meaning, when experience, generally of a painful kind, has made it a reality to them." Mill, *On Liberty* at 97–98, 102–03, 110 (cited in note 38). It would be inaccurate to label Mill a pragmatist and controversial to consider him a protopragmatist, but Mill's recognition of the importance of experience and context in how persons process ideas, articulated in a text well known to Holmes, is a further indication that Holmes did not envision a marketplace of ideas in which the actors readily change their minds.

⁹⁸ Letter from Holmes to Pollock (May 15, 1931), in 2 *Holmes-Pollock Letters* at 287 (cited in note 36). See also Holmes's remark about Dewey in an earlier letter to Pollock: "he is a bad writer and I found him very hard reading. Still his view of the universe came home to me closer than any other I know." Letter from Holmes to Pollock (July 26, 1930), in id at 272. To Harold Laski Holmes wrote: "I am reading a book by John Dewey, *Experience and Nature* . . . Few indeed are the books which hold so much of life with an even hand. If you asked me for a summary I couldn't give more than a page of ideas, but the stimulus and the quasi-aesthetic enjoyment are great—and the tendencies those which I agree with." Letter from Holmes to Laski (Dec 4, 1926), in 2 *Holmes-Laski Letters* at 900 (cited in note 13). In a subsequent letter to Laski, Holmes continued to rave about

The Darwinist/pragmatist strain in Holmes's thought helps to explain how he could have valued the freedom of speech highly, at least by the time of the *Abrams* dissent and thereafter,⁹⁹ while nevertheless holding that "beliefs and wishes have a transcendental basis in that their foundation is arbitrary. You can not help entertaining and feeling them, and there is an end of it."¹⁰⁰ Neither demographically driven changes in the pattern of beliefs nor the abandonment of ideas that are not working will occur if people do not take their beliefs seriously. Casual attitudes about belief formation and retention invite conformity, the path of least resistance. Improperly understood, the First Amendment itself can contribute to such dysfunctional conformity. Deprived by the freedom of speech of the comforts of certitude and centralized intellectual authority, people may be tempted to take their beliefs lightly. The market metaphor offers an antidote to this temptation: a powerful image that treats beliefs as significant, even self-defining, and of the highest social priority, all the while being contingent, probabilistic, and tentative. As expounded by Holmes, the market in ideas is not about intellectual gratification and whimsy. It is about important choices with practical consequences under difficult conditions of uncertainty and change. The truths that people come to by free trade in ideas are, remember, "the only ground upon which their wishes safely can be carried out."¹⁰¹ Conformity, deference to authority, stasis, passivity in the realm of beliefs is not just unfortunate or unwise but *dangerous*.

The constructive, urgent role that speech can play in the evolution of beliefs under a pragmatist conception of truth insulates

Experience and Nature: "truly a great book . . . he seems to me . . . more honestly to see behind all the current philosophers than any book I can think of on such themes." Letter from Holmes to Laski (Dec 15, 1926), in id at 904–05. See also Holmes's extravagant praise for *Experience and Nature* in a letter to John C. H. Wu, the friend who originally suggested to Holmes that he read the book: "I thought it great. It seemed to me to *feel* the universe more inwardly and profoundly than any book I know, at least any book of philosophy." Letter from Holmes to Wu (Jan 30, 1928), in Shriver, ed, *Justice Oliver Wendell Holmes* at 193 (cited in note 42).

⁹⁹ On whether Holmes changed his views in the direction of valuing free speech more highly on the occasion of the *Abrams* dissent, compare H. L. Pohlman, *Justice Oliver Wendell Holmes: Free Speech and the Living Constitution* (1991), Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 Supreme Court Review 303, 353–61, and David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 Hofstra L Rev 97 (1982) (no change), with David M. Rabban, *Free Speech in Its Forgotten Years* 346–55 (1997), Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 198–211 (2004) ("Perilous Times"), and G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 Cal L Rev 391 (1992) (change).

¹⁰⁰ Holmes, *Natural Law* at 41 (cited in note 35).

¹⁰¹ See text at note 51.

Holmes's market metaphor from some of the standard criticisms to which it is subjected. The value of free trade in ideas does not depend on the assumption that there is an objective, perdurable truth to be discovered.¹⁰² It does not depend on the claim that personal beliefs are more or less independent of the believer's social position, psychological propensities and needs, adventitious experiences, and ideological inheritance.¹⁰³ Those assumptions might be implicit in a market metaphor that evoked a finely calibrated measurement of the equilibrium of well-grounded rational beliefs. They are not implicit in Holmes's Darwinist invocation of "the competition of the market."

Markets move quickly; evolution takes forever. Many of the pragmatists, Dewey most prominently, were reformers who sought to remake various social institutions and practices in a fundamental way and without delay.¹⁰⁴ They may have been inspired by Darwin, but the pace of change that one associates with biological or geological evolution was not what inspired them. If the value of a free market in ideas lies in its contribution to the evolution of adaptive beliefs, at what pace are those beliefs supposed to evolve? And does the legal immunizing of speech that is perceived by governing majorities to be subversive of political or moral authority yield the optimal rate of change? What did Holmes think about the relationship between free speech and the rate of social change?

One of Holmes's guiding convictions was that the dominant forces in the society are entitled to have their way. He took the point of political institutions to be to enable the majority to implement its (arbitrary) preferences, "the kind of world that we should like."¹⁰⁵ He expressed none of the concern about the tyranny of the majority that informs the political thought of Madison, Tocqueville, and Mill.¹⁰⁶ Louis Menand well captures this dimension of his thought:

¹⁰² Compare Baker, *Human Liberty* at 6, 12–14 (cited in note 20); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L J 1, 15 (1984).

¹⁰³ Compare, Baker, *id.* at 6–7, 14–17; Ingber, *id.* at 15; Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal L Rev 1101, 1157–62 (1993).

¹⁰⁴ See generally James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought 1870–1920* 349–94 (1986); Robert B. Westbrook, *John Dewey and American Democracy* (1991).

¹⁰⁵ Holmes, *Natural Law* at 41 (cited in note 35).

¹⁰⁶ Characteristically, Holmes was no absolutist on the subject of majority rule: he saw a role for minority rights. But he did not fear majorities the way many leading political thinkers have. His dissent in *Lochner v. New York*, 198 US 45, 76 (1905), expresses his enthusiasm for majority rule: "Every opinion tends to become a law. I think that the word

The key to Holmes's civil liberties opinions is the key to all his jurisprudence: it is that he thought only in terms of aggregate social forces; he had no concern for the individual. The spectacle of individuals falling victim to dominant political or economic tendencies, when those tendencies had been instantiated in duly enacted laws, gave him a kind of chilly satisfaction. It struck him as analogous to the death of soldiers in a battlefield victory, and justified on the same grounds—that for the group to move ahead, some people must inevitably fall by the wayside.¹⁰⁷

Unlike many of his privileged contemporaries, however, Holmes did not believe that the dominant forces have any moral claim to maintain their dominance. He thought that change is both inevitable and enduring. He never spelled out a theory of legitimate change—it would have been against his very nature to have done so—but his approach to constitutional interpretation depended on an attitude, if not a theory, about change.

Holmes's general approach to constitutional interpretation was to defer to legislative judgments. He was skeptical, at times even contemptuous, of much of the progressive era legislation that was challenged in the Supreme Court during his tenure, but he was loathe to hold that legislation unconstitutional.¹⁰⁸ He believed that when the dominant forces in the community were (regrettably) bitten by the bug of progressive reform, that preference had to be permitted to prevail. The previously dominant forces of laissez-faire capitalism were not entitled, in Holmes's view, to preserve their power indefinitely against the rise of the emergent forces of progressivism. Dominant forces emerge and recede. "Time has upset many fighting faiths."¹⁰⁹

Disputes over the freedom of speech raise an interesting question for someone who respects the claims of force.¹¹⁰ On the one hand, legislation restricting speech, especially speech that challenges ex-

liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

¹⁰⁷ Menand, *Metaphysical Club* at 65–66 (cited in note 57).

¹⁰⁸ See, for example, *Lochner v New York*, 198 US 45, 75 (1905) (Holmes, J, dissenting); *Coppage v Kansas*, 236 US 1, 26 (1915) (Holmes, J, dissenting); *Adair v United States*, 208 US 161, 190 (1908) (Holmes, J, dissenting).

¹⁰⁹ *Abrams v United States*, 250 US 616, 630 (1919) (Holmes, J, dissenting).

¹¹⁰ See Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 Cal L Rev 761 (1986).

isting social and political arrangements, can be seen as just another example of the dominant forces in the community having their way. In this view, one prerogative of political ascendancy is the authority to control the terms of debate. On the other hand, one might argue that, at least in a democracy, the dominant forces are entitled to prevail only if they are able to maintain their dominance in the face of open challenges to their authority. Political arrangements should reflect the ascendancy of forces, but new forces must have some opportunity to emerge and eventually gain ascendancy.

I may be guilty here of trying to impose on Holmes's thought a conception of procedural legitimacy that is entirely alien to his way of thinking. He was a Darwinist, he did believe in change, and he viewed society in terms of forces, but he simply did not like to think about political issues in terms of so morally tinged a notion as legitimacy. Still, a judge has to decide cases, and it is impossible to do that, I would argue, without repairing in some way to a view of legitimacy. In any event, there is reason to believe that Holmes at first thought that free speech cases are constitutionally similar to economic regulation cases in that legislatures should be given broad authority to implement their preferred policies. At least on the occasion of *Abrams*, and arguably eight months earlier,¹¹¹ Holmes seems to have shifted to the view that the dominant forces of the community do not have broad power to determine which challenges to their authority shall be heard.

There is no premise or metric internal to the theory of evolution that can determine the answer to this fundamental question of how much the dominant forces are entitled to mobilize the resources of law to extend their dominance by slowing the pace or altering the direction of inevitable change. Even in a regime that represses dis-

¹¹¹ *Schenck v United States*, 249 US 47 (1919); *Frohwerk in United States*, 249 US 204 (1919); *Debs v United States*, 249 US 211 (1919). These are decisions, with Holmes writing for a unanimous court, that upheld criminal convictions of various socialists for antiwar polemics that today clearly would qualify for First Amendment protection. Nevertheless, by employing the "clear-and-present-danger" test and by declining to suspend it even "[w]hen a nation is at war," *Schenck*, 249 US at 52, Holmes can be read to evince an appreciation of the value of political criticism. By insisting that First Amendment protection remains "a question of proximity and degree," not a matter of the innate tendency of the idea, Holmes implemented an approach that was, in theory at least, more protective of controversial speakers than the "bad tendency" test that previously had dominated First Amendment interpretation and that was being urged in many quarters as a justification for the widespread prosecution of war protestors. See Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 Supreme Court Review 411, 446-47. On the bad tendency test generally, see Rabban, *Free Speech in Its Forgotten Years* at 132-46 (cited in note 99).

sent systematically and without constitutional constraint, the forces of nascent displacement still can operate underground, and still have means for bringing about change ranging from anonymous protest to peaceful civil disobedience to violent revolution. Is that enough to effectuate the evolutionary process? To decide, one needs more than an understanding of variation, adaptation, and natural selection. One needs a political or constitutional theory, or a reading of history.

IV. SEDITION

Holmes realized this. Recall the passage of his *Abrams* dissent quoted earlier:

I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.¹¹²

This allusion to the nation's ill-fated effort during its fledgling years to enforce a political orthodoxy¹¹³ has not received the attention it deserves.¹¹⁴ The passage is not just boilerplate rhetoric; it is integral to Holmes's argument. The Espionage Act of 1918, the federal statute that the defendants in the case were charged with violating, was really a sedition act. It prohibited ideological disloyalty as much

¹¹² 250 US 616, 630 (1919) (Holmes, J, dissenting).

¹¹³ See generally Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 56–66 (1991); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956); Stone, *Perilous Times* at 16–78 (cited in note 99).

¹¹⁴ A notable exception is Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in Bollinger and Stone, eds, *Eternally Vigilant* at 156–61 (cited in note 30). Post marks Holmes's reference to the rejection of seditious libel as "the precise point in American constitutional history when First Amendment theory enters into the construction of First Amendment doctrine, for Holmes's bold assertion required him to explain why the First Amendment prohibited the punishment of seditious libel." Id at 156–57. Post concludes, however, that although Holmes was prompted by the issue of the constitutional status of seditious libel to develop a First Amendment theory, he "chose not to elaborate a political conception of the First Amendment" but rather "proposed the now-famous theory of the marketplace of ideas." Id at 157. My claim, to be elaborated below, is that Holmes's market metaphor does indeed embody "a political conception of the First Amendment."

as material interference with the war effort.¹¹⁵ The government lawyers in the *Abrams* appeal did not shrink from this characterization but rather embraced it.¹¹⁶ Their brief, written by Assistant Attorney General Robert Stewart, maintained that the First Amendment was never meant to invalidate the old crime of seditious libel. Rather, the power to punish sedition remained a prerogative of sovereignty even in the *novus ordo seclorum*. The legitimate objective of the crime of seditious libel, so the brief claimed, was to control hostile criticism in order to protect the government's reputation and thereby preserve political stability, a fragile condition in the seventeenth and eighteenth centuries, the heyday of seditious-libel prosecutions. A modern equivalent like the Espionage Act of 1918, in this view, was not constitutionally problematic, particularly in light of the need to preserve political stability in time of war.¹¹⁷

Stewart may have been goaded into making this provocative argument by a brief filed earlier that year in the case of *Debs v United States* by the noted civil liberties lawyer Gilbert Roe.¹¹⁸ That brief had argued that the very purpose of the First Amendment is to protect fundamental political criticism of the sort historically punished as seditious libel. To sustain that contention, Roe constructed his brief around James Madison's *Virginia Report*, the classic challenge to the Sedition Act of 1798 by the principal author of the First Amendment.¹¹⁹ In Madison's view, the distinctive "genius" of the American republic, based on the concepts of limited government, divided powers, and popular sovereignty, not to mention revolutionary heritage, is a dynamic of political opposition, ac-

¹¹⁵ The *Abrams* defendants were convicted on four counts of violating the Espionage Act of 1918. Two of those counts clearly sound in sedition: (1) publishing "disloyal, scurrilous and abusive language about the form of Government of the United States"; and (2) publishing language "intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute." See *Abrams v United States*, 250 US 616, 617 (1919). The convictions were affirmed by the Supreme Court on the other two counts, for language encouraging resistance and curtailment of production. *Id.* The majority did not reach the issue of whether conviction on the first two counts standing alone would have violated the First Amendment.

¹¹⁶ Brief of the United States in *Abrams v United States*, 250 US 616 (1919) (No 316), p 36. See Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* 232–33 (1987).

¹¹⁷ *Id.* at 19–21, 25.

¹¹⁸ Brief of Gilbert E. Roe as Amicus Curiae in *Debs v United States*, 249 US 211 (1919) (No 714), pp 32–42.

¹¹⁹ James Madison, *Report on the Alien and Sedition Acts* (1800) ("Report"), in Jack N. Rakove, ed, *James Madison: Writings* 608–62 (Library of America, 1999).

countability, and checks and balances that makes inapplicable many English political notions, including that of seditious libel.¹²⁰

At the time of the Court's decision in *Debs*, Roe was unable to persuade Holmes to adopt this Madisonian understanding of the First Amendment; in fact, Holmes wrote the majority opinion that upheld Debs's conviction.¹²¹ But in the *Abrams* dissent eight months later, Holmes saw fit to state explicitly his conclusion that, whatever else the freedom of speech means in the American context, it means that dissenters cannot be punished for undermining the authority of government by disseminating seditious ideas.¹²² Even his rhetoric in *Abrams* has a Madisonian ring: "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death"¹²³ In deciding whether, in a system committed to political evolution, the dominant forces may employ the authority of law to stifle or weaken dissent, Holmes turned to one of the premier object lessons of the nation's history and to the concept of legitimate political opposition that it spawned.

To appreciate the significance of this move, one must realize how controversial it was in Holmes's day. Many persons who conceded the value of dissent stopped short at the notion that a constitutional principle such as the freedom of speech could be invoked by persons who advocate the use of force or violence to effectuate a fundamental change of political regime.¹²⁴ In this view, the Constitution

¹²⁰ Id at 329–31.

¹²¹ *Debs v United States*, 249 US 211 (1919).

¹²² 250 US at 630.

¹²³ Id.

¹²⁴ See, for example, John H. Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 U Ill L Rev 539, 559–60 (1920):

The truth is that the constitutional guarantee of freedom of speech is being invoked more and more in misuse. It represents the unfair protection much desired by impatient and fanatical minorities—fanatically committed to some new revolutionary belief, and impatient of the usual process of rationally converting the majority. . . . Certain leaders of thought—some idealists, some materialists—see only red when their own particular doctrines are balked of immediate general acceptance. Impatient of that "free trade in ideas" which the Minority Opinion assures us will exhibit ultimately the "power of the thought to get itself accepted," these fanatical leaders invoke club-law. They call for "direct action" (this cowardly euphemism for brutal mob violence must now be familiar to all readers of recent periodical literature). And when their urgent propaganda of club-law meets lawful interference, they invoke the sacred constitutional guarantee of "freedom of

provides for change but only by the prescribed method of peaceful protest directed toward eventual success at the polls; radicals unwilling to play by those rules should not be permitted to claim the benefit of the very freedoms they seek to displace. This position was not the exclusive preserve of reactionaries. Even Learned Hand drew the line at the explicit advocacy of law violation:

Every society which promulgates a law means that it shall be obeyed until it is changed, and any society which lays down means by which its laws can be changed makes those means exclusive If so, how in God's name can an incitement to do what will be unlawful if done, be itself lawful?¹²⁵

Holmes, in contrast, did not believe that the Constitution should be read to lock in place an absolute procedural truth regarding the exclusive means for effectuating political change. In *Abrams* he voted to protect the speech of anarchists who had called for a general strike, never even considering whether that tactic was forbidden by law.¹²⁶ Six years later, in *Gitlow v New York*,¹²⁷ Holmes argued in dissent that the explicit advocacy of "revolutionary mass action" was entitled to First Amendment protection in the particular circumstances of the case. On that occasion, he made even more explicit his Darwinist understanding of the dynamics of political change, adopting the very position that Learned Hand considered incoherent.

Hand's view, most fully elaborated in his great opinion in *Masses Publishing Co. v Patten*,¹²⁸ was that under democratic theory incitements to law violation fall outside the ambit of the freedom of speech as a matter of principle, irrespective of whether the context indicates an imminent danger of illegal conduct by persons exposed to the speech. Hand held that view because he considered incitements to law violation not to be among the "exclusive" means laid down by a democratic society "by which its laws can be changed."

speech." It is simply a profanation of that term.

For a retrieval and defense of this view in the modern era, see Robert H. Bork, *Neutral Principles and Some Modern First Amendment Problems*, 47 Ind L J 1, 31 (1971).

¹²⁵ Letter from Learned Hand to Elliot Richardson (Feb 29, 1952), quoted in Gerald Gunther, *Learned Hand: The Man and the Judge* (1994).

¹²⁶ 250 US at 630.

¹²⁷ 268 US 652 (1925) (Holmes, J, dissenting).

¹²⁸ 235 F 535 (SDNY 1917), rev'd 246 F 24 (2d Cir 1917).

“Words,” he explained, “which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.”¹²⁹ On the other hand, “political agitation which can be shown to be apt to create a seditious temper” is indeed, so long as it falls short of the direct advocacy of law violation, a part of “that public opinion which is the final source of government,” and as such deserves protection as among the proper means by which the laws of a democratic society can be changed.¹³⁰ Thus Hand, possibly influenced by another Madisonian brief filed by Gilbert Roe,¹³¹ rejected the legitimacy of the crime of seditious libel. Notwithstanding that judgment—itself an important moment in the history of thought about the freedom of speech—Hand believed that incitement to law violation can be prohibited; he did not consider the punishment of such incitement to be precluded by the rejection of seditious libel.

Holmes declined to follow Hand in this last respect. While joining his friend in finding the crime of seditious libel to be incompatible with the First Amendment, Holmes saw no reason to exclude incitement to law violation from the protection of his imminent danger standard, no reason to exclude the explicit and impassioned advocacy of lawbreaking from the means by which political change may be brought about so long as the likely or intended effects are not imminent.¹³² He put the point memorably, with pragmatist resonance, in *Gitlow*:

¹²⁹ Id at 540.

¹³⁰ Id.

¹³¹ Gilbert Roe was the counsel of record for the magazine in *Masses Publishing Co. v Patten*. See 244 Fed 535, 537 (1917). I have not been able to locate the papers he submitted to Judge Hand in the District Court. It is possible, in light of Hand’s reference in his *Masses* opinion to the illegitimacy of prohibiting speech on the ground that it is likely to create a seditious temper, that in arguing the case before Judge Hand Roe invoked Madison’s *Virginia Report* in much the way he did twenty months later in the amicus brief he filed in the *Debs* case. See text accompanying notes 118–20. Such a speculation gains support from the fact that not long before he tried the *Masses* case in Judge Hand’s courtroom, Roe testified against the Espionage Act to the House Committee on the Judiciary. See Hearings Before the House of Representatives Committee on the Judiciary, 65th Cong, 1st Sess, Hearings on HR 291 at 36–43 (Apr 9 and 12, 1917). On that occasion as well, Roe discussed the controversy over the Sedition Act of 1798. See Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U Chi L Rev 335, 351 (2003).

¹³² In the *Abrams* dissent, Holmes stated that a person can be punished for speech “that produces or is intended to produce a clear and imminent danger.” 250 US at 627 (emphasis added). A page later, he repeated his belief that a speaker’s intent to create an imminent

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrow sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.¹³³

As if to underscore his differences with Hand regarding the sources and limits of political authority, Holmes added:

If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.¹³⁴

Hand understood the rejection of seditious libel to entail a rejection of the power of the state to enforce any kind of orthodoxy of acceptable political ends; he was the first judge to interpret the freedom of speech to imply a strong principle of substantive viewpoint neutrality.¹³⁵ In doing so, he anticipated an idea that has come to be the cornerstone of modern First Amendment doc-

danger can justify regulation even of speech that appears under the circumstances to be unlikely to have that effect. This is because such an intent "might indicate a greater danger and at any rate would have the quality of an attempt." Id at 628. In *Gitlow*, Holmes voted to protect a defendant who had engaged in abstract advocacy of revolution. He specified, however, that if the speaker had been convicted of "an attempt to induce an uprising against government at once and not at some indefinite time in the future," then the "object would have been one with which the law might deal, subject to the doubt . . . whether [the speech] was not futile and too remote from possible consequences." 268 US at 673. This last caveat indicates Holmes's recognition of a futility defense, which he had seemed to reject in *Abrams*.

The important point is that Holmes's willingness to punish speakers on the basis of their specific intentions as well as the likely effects of their speech extended only to the intention to create *imminent* harm. He did not embrace a content-based, context-independent conception of illegitimate speech akin to Learned Hand's view that the advocacy of law violation is, as a matter of democratic principle, outside the ambit of First Amendment protection. Holmes understood the rejection of seditious libel to mean that a critic of government must be free, whatever his long-term objectives, to say that a law should be violated or a regime overthrown by force, so long as the requisite connection to imminent consequences has not been established. Hand did not agree.

¹³³ 268 US at 673.

¹³⁴ Id.

¹³⁵ See Letter from Learned Hand to Zechariah Chafee, Jr. (Jan 8, 1920), in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan L Rev 719, 765 (1975) ("any State which professes to be controlled by public opinion, cannot take sides against any opinion except that which must express itself in the violation of law.").

trine.¹³⁶ Holmes went further. In addition to the rejection of an orthodoxy of ends, he took the rejection of seditious libel to entail the rejection of an orthodoxy of means, specifically the orthodoxy establishing democratic deliberation as the exclusive means of political change. Both judges knew, of course, that violence or the threat thereof has throughout history played a large role in bringing about political change, salutary and nefarious, in constitutional democracies as well as in other systems. Both judges had no qualms about punishing dissidents who themselves engage in violence. The difference between them, I believe, is that Holmes, the old soldier and proud Darwinist, thought that one of the valuable functions of dissenting speech, including speech that advocates violent revolution, is its capacity to generate some of the grievances, aspirations, and mobilizations that force political adaptation and transformation. Such energies are activated and sustained not only by respectful petition and rational persuasion but also by incitement, recruitment, and organization for collective action. Probably the most energizing contribution that the freedom of speech can make is simply to leave people free to follow their political thoughts wherever they might lead—free, that is, to think the unthinkable regarding political loyalty, consent, obedience, and violence. That no viable political community could possibly recognize a comparable freedom to act does not, in this view, render incoherent or dysfunctional a capacious freedom to disseminate heretical political ideas, including ideas about the appropriate means for bringing about change.

To understand Holmes on this point, one must appreciate how far he was from a modern procedural liberal concerned more about the right than the good, and thus how wrong it is to try to turn his marketplace of ideas into a systematic process to be evaluated according to standards of fairness, neutrality, and efficiency.¹³⁷ Holmes consistently talked about dissenting speech in terms of the energies it releases or fails to release,¹³⁸ not the quality of decisions or opportunities for participation that it makes possible. Understood

¹³⁶ See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189 (1983); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U Pa L Rev 615 (1991).

¹³⁷ For an otherwise interesting critique of the market metaphor that founders by making this mistake, see Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U Colo L Rev 1061, 1071–73 (1993).

¹³⁸ See text at notes 84 and 133.

in these Darwinist/pragmatist terms, such speech achieves its effect mainly by influencing the culture of political struggle. This can happen when the visibility of dissenting ideas, made possible in part by legal protection, emboldens persons in the minority to hold out hope for change, to fight back when ridiculed, exploited, or ignored, perhaps to find confederates in the project of resistance. It can happen when persons who hold views currently in the ascendancy find it more difficult, due to the constitutionally sanctioned legitimacy of seditious speech, to dismiss protestors as beneath political recognition, in effect beyond the pale. It can happen when the sheer plurality of perspectives in play forces all actors to “realize that time has upset many fighting faiths” and that one’s “preferences dogmatic for oneself” grew out of unique experiences such that “others, poor souls, may be equally dogmatic about something else.”¹³⁹

The cultural/intellectual/political combat facilitated by free speech is, in Holmes’s vision, messy, unpredictable, often nasty, and impossible to domesticate. But it is what human flourishing in a competitive, evolving world is all about. A letter that Holmes wrote to Learned Hand the year before his *Abrams* dissent best articulates the view of life that led Holmes to see value in the speech of dissenters who refuse to play by the rules:

You tempt me to repeat an apologue that I got off to my wife in front of the statue of Garrison on Commonwealth Avenue, Boston, many years ago. I said—If I were an official person I should say nothing shall induce me to do honor to a man who broke the fundamental condition of social life by bidding the very structure of society perish rather than he not have his way—Expressed in terms of morals, to be sure, but still, his way. If I were a son of Garrison I should reply—Fool, not to see that every great reform has seemed to threaten the structure of society,—but that society has not perished, because man is a social animal, and with every turn falls into a new pattern like the Kaleidoscope. If I were a philosopher I should say—Fools both, not to see that you are the two blades (conservative and radical) of the shears that cut out the future. But if I were the ironical man in the back of the philosopher’s head I should conclude—Greatest fool of all, Thou—not to see that man’s destiny is to fight. Therefore take thy place on the one side or the other, if with the added grace of knowing that the Enemy is as good a

¹³⁹ Holmes, *Natural Law* at 41 (cited in note 35).

man as thou, so much the better, but kill him if thou canst.¹⁴⁰

When Holmes was required by his office shortly thereafter to determine what legal tools should be available for “killing” a political enemy “as good a man as thou,” he gave no weight to whether the enemy was observing the prescribed procedures for cutting out the future.

Why prefer Holmes’s more radical, more cultural, less procedural interpretation of the meaning of the rejection of seditious libel? The market metaphor suggests some reasons. Markets are notable for their decentralization of authority. Consumers rather than producers or planners are sovereign in that their choices ultimately determine the allocation of economic resources. The placement of authority anywhere else runs the risk of discouraging productive adaptation and innovation, and providing opportunities for inefficient corruption and the wasteful perpetuation of privilege. A conception of political sovereignty that denies to officials the legal power to enforce an ideological orthodoxy of either ends or means likewise is characterized by relatively decentralized authority. Under that constraint on officials, political subjects are given the authority to contemplate and advocate arrangements and practices that have the potential to undermine the projects, and sometimes even the very existence, of the prevailing regime. The energies latent in such an allocation of authority reduce certain risks of political ossification and abuse. In his *Virginia Report* challenging the constitutionality of the Sedition Act of 1798, Madison derived his case for the right to express seditious criticism of officials, even to the extent of undermining their authority by stirring up hatred against them, from the premise that “[t]he people, not the government, possess the absolute sovereignty.”¹⁴¹ Those sovereign private citizens, whose authority extends to creating and replacing particular regimes,¹⁴²

¹⁴⁰ Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), in Gunther, 27 Stan L. Rev. at 756–57 (cited in note 135).

¹⁴¹ Madison, *Report* at 645 (cited in note 119).

¹⁴² Madison noted in the *Virginia Report* that had all seditious speech been successfully censored during the years leading up to the founding of the current regime, “might not the United States have been languishing, at this day, under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?” Id. at 647–48. In an opinion that Holmes joined, Justice Brandeis invoked the nation’s revolutionary heritage in developing his argument for the First Amendment right to advocate the overthrow of an entire regime: “Those who won our independence by revolution were not cowards. They did not fear political change.” *Whitney v. California*, 274 US 357, 377 (1927) (Brandeis, J., concurring).

can be analogized to the sovereign consumers in a market. Pressures from below stimulate adaptation and help to contain corruption in both the political and economic realms.

An egalitarian might be tempted to run with this logic to the extent of finding in the market metaphor support for a First Amendment ideal of equal opportunity to persuade (or incite or organize collective pressure). I doubt that the sovereignty enjoyed by consumers as a whole in most markets implies any such principle of equal worth of individuals. Markets are egalitarian in that a pauper's dollar buys as much as a prince's and the division of labor that markets make possible can spread opportunity,¹⁴³ but inequalitarian in that markets greatly facilitate the leveraging of (unequally distributed) wealth and economic savvy. Perhaps an economic cooperative would be a stronger (though still problematic) source of analogical support for a conception of political equality. In any event, we can be confident that Holmes had no such egalitarian implication in mind when he invoked the competition of the market in his *Abrams* dissent. He once infamously dismissed an equal protection contention as "the usual last resort of constitutional arguments."¹⁴⁴ Throughout his career on the Supreme Court, "he treated the Equal Protection Clause as having virtually no effect."¹⁴⁵ What Holmes liked about markets so far as the role of consumers is concerned is not the way purchasing power is distributed among them, but rather the power that consumers exercise as a collective force that induces producers to adapt and innovate. The proper analogy is to the power that sovereign political subjects in combination can exert in holding officials, and even entire regimes, roughly accountable over time through the threat of disaffection, noncooperation, and resistance.

This focus on the role of force as the arbiter of political power means that the freedom of speech implied by a reliance on the market metaphor is not confined to settings where the social prerequisites for meaningful persuasion and participation are operative. Accordingly, neither the town meeting nor the philosophy seminar should be seen as the prototypical free speech situation. In this view, the First Amendment is primarily about the location of political

¹⁴³ For an illuminating account of the often-overlooked egalitarian dimensions of Adam Smith's thought, see Samuel Fleischaker, *On Adam Smith's Wealth of Nations* 72–80 (2004).

¹⁴⁴ *Buck v Bell*, 274 US 200, 208 (1927).

¹⁴⁵ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 348 (1993).

authority, and more broadly about the cultural conditions that foster political accountability and adaptation. Deliberation among relatively open-minded persons plays a role in such matters, but far more is entailed by this understanding of the function of free speech than an exclusive concern for rational inquiry and debate. Communicative experiences that are important mainly in promoting solidarity among like-minded persons, or in helping individuals and groups to mark out a distinctive identity, might qualify as having First Amendment salience even if “persuasion” in the narrow sense is not what those experiences are about.¹⁴⁶ That the market metaphor implies the extension of First Amendment concern to some such activities leaves unresolved all sorts of difficult questions regarding the proper scope of the principle of freedom of speech.¹⁴⁷ It is important, nevertheless, to realize that an understanding of the First Amendment that includes protection for many communicative endeavors that bear no resemblance to the town meeting or the philosophy seminar does not represent a departure from the view of free speech that underlies Holmes’s market metaphor.

That the First Amendment may be as much about political combat between ideologically committed, power-hungry actors as about disinterested inquiry and deliberation also suggests a rationale for the clear-and-present-danger test which Holmes elaborated in the *Abrams* dissent. The dominant forces of the community are not entitled to freeze themselves in power, but they *are* entitled to protect their interests as they see them. Thus, speech can be regulated when it is likely in light of the context of its dissemination to lead directly and immediately to tangible harm, as defined by what threatens the material interests of the dominant forces. Such harms are “substantive evils that Congress has a right to prevent.”¹⁴⁸ To disallow all preemptive regulatory authority regarding them would be to deny the dominant forces the power to protect their interests. However, speech that is likely to cause harm only over

¹⁴⁶ For an important development of this line of justification for the principle of freedom of speech, see the chapter entitled “Free Expression and Personal Identification,” in Joseph Raz, *Ethics in the Public Domain* 131 (1994).

¹⁴⁷ For sophisticated arguments that demonstrate how difficult it is to determine the proper scope of the freedom of speech, see C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L Rev 964 (1978); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv L Rev 1765 (2004); Richard Vernon, *John Stuart Mill and Pornography: Beyond the Harm Principle* 106 Ethics 621 (1996).

¹⁴⁸ *Schenck v United States*, 249 US 47, 52 (1919).

time, if at all, cannot be regulated because the legitimate ongoing process of displacing preexisting dominant forces with newly emergent dominant forces requires that such nonimminent and/or non-material “harms” be permitted to occur. Political evolution, like evolution in the natural world, is based on harm. Some groups, previously dominant, lose out in the struggle for existence and necessarily suffer great harm. It is not one of the prerogatives of the ascendancy of force to abort that evolutionary process.

Notice that this understanding of the clear-and-present-danger test does not depend on the far-fetched assumption that, except when the time frame is imminent, “more speech” ordinarily will reach and dissuade potential wrongdoers who otherwise would be prompted to act by the speaker’s words. Holmes’s position is that sometimes we have to live with those remote harms. They can be inseparable from adaptive political change. Notice also that the legitimization of fundamental political opposition manifested by the rejection of seditious libel goes far to explain the principle, explicitly stated by Holmes earlier in the *Abrams* dissent¹⁴⁹ and integral to the clear-and-present-danger test, that speakers cannot be punished for “the creed they avow”—that is, for their lack of commitment to the ideals, symbols, and procedures around which the political community is currently organized—but only for the material threat their speeches and writings pose to the specific endeavors of the community. The clear-and-present-danger test is not the only (or necessarily the best) doctrinal standard that one might derive from placing the rejection of seditious libel at the heart of the First Amendment, but Holmes’s understanding of why the crime of seditious libel cannot be squared with the First Amendment provides the best justification for the clear-and-present-danger test.

V. CONCLUSION

In a lecture entitled “The Influence of Darwin on Philosophy,” delivered ten years before Holmes’s *Abrams* dissent, John Dewey observed:

The conceptions that had reigned in the philosophy of nature and knowledge for two thousand years, the conceptions that had become the familiar furniture of the mind, rested on the assumption of the superiority of the fixed and final; they rested

¹⁴⁹ 250 US at 629.

upon treating change and origin as signs of defect and unreality. In laying hands upon the sacred ark of absolute permanency, in treating the forms that had been regarded as types of fixity and perfection as originating and passing away, the "Origin of Species" introduced a mode of thinking that in the end was bound to transform the logic of knowledge, and hence the treatment of morals, politics, and religion.¹⁵⁰

What the theory of evolution, the legitimation of fundamental political opposition, and the renunciation of philosophical absolutes all have in common is an emphasis on change. Such emphasis is shared also by free markets. That, I believe, is why Holmes's invocation of all four phenomena in his succinct justification for the freedom of speech is more coherent, and less intellectually peripatetic, than is commonly assumed. A constitutional regime fearful of political entrenchment and dedicated to continual adaptation has every reason to accord high priority to the freedom of speech and to interpret that freedom with reference to the dynamism of free markets. In this regard, the features of markets that merit attention are those that also figure prominently in efficacious governance, scientific inquiry, and natural selection: openness to new ideas and capabilities, thirst for better information, responsiveness to changing conditions, encouragement of innovation and initiative, swift punishment of rigidity, slowness, lack of awareness, or the failure to audit. Whatever their limits and shortcomings, free markets are a powerful force against inertia. So is free speech.

This reading of the *Abrams* dissent ascribes to Holmes a justification for the freedom of speech that rests not upon highly contentious epistemological and moral premises but rather on the historical acceptance of the political principle of legitimate opposition. So interpreted, Holmes's argument is more modest, more persuasive, and of better constitutional pedigree than is often claimed. The argument is not dependent on heroic assumptions regarding human rationality or self-correcting social dynamics. It offers no support to idealists who would turn his vision of free trade in ideas into a charter for regulatory interventions designed to correct "market failures" in the domain of political and social disputation. As Holmes understood the notion, the marketplace of ideas does not offer the prospect of a just distribution of the opportunity to per-

¹⁵⁰ John Dewey, *The Influence of Darwin on Philosophy*, Popular Science Monthly (July 1909), reprinted in *The Influence of Darwin on Philosophy and Other Essays* 1 (1997).

suade. It does not offer the prospect of wisdom through mass deliberation, nor that of meaningful political participation for all interested citizens. What the marketplace of ideas does offer is a much needed counterweight, both conceptual and rhetorical, to illiberal attitudes about authority and change on which the censorial mentality thrives. It honors certain character traits—inquisitiveness, capacity to admit error and to learn from experience, ingenuity, willingness to experiment, resilience—that matter in civic adaptation no less than economic. It devalues deference and discredits certitude, and in the process holds various forms of incumbent authority accountable to standards of performance. It offers a reason to interpret the First Amendment to protect some gestures of opposition and resistance that have nothing to do with dialogue or dialectic. In these respects, Holmes's arresting metaphor serves better as a cultural statement than as a mechanism of social or intellectual ordering. So conceived, it does valuable work.