



GITLOW AS A GUIDE TO HOLMES

Joseph Blocher*

Introduction.....	775
I. “... and if believed it is acted on ...”—Holmes and Pragmatism.....	780
II. “Eloquence may set fire to reason.” —Rhetoric and Realism	787
III. “... redundant discourse before us ...”— Harm, Deference, and Levels of Generality.....	794
Conclusion: “... destined to be accepted ...”	798

INTRODUCTION

The last First Amendment opinion ever written¹ by free speech’s first great judicial defender is often omitted from the pantheon of free speech cases.² Of course

* Lanty L. Smith ’67 Distinguished Professor of Law and Vice Dean, Duke Law School. Many thanks to Ash Bhagwat, Vince Blasi, Thomas Healy, Jim Weinstein and the other organizers of this symposium, to Jane Bambauer, Danny Li, Luke Smith Morgan and Jeff Powell for insightful comments, and to John Godfrey for excellent research assistance.

Deepest gratitude to the late Fred Schauer, who was scheduled to be part of the symposium and who was—and always is—a part of the discussion nonetheless.

¹ Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion—the Speech Cases*, 36 STAN. L. REV. 1349, 1396 (1984) (calling Holmes’ *Gitlow* dissent “the last opinion he wrote directly involving the first amendment”). Holmes’ later opinions in First Amendment cases are also important in understanding his approach to free expression. Many thanks to Jeff Powell for reminding me that Holmes’ famous line about “freedom for the thought that we hate” came from his dissent in *United States v. Schwimmer*, 279 U.S. 644 (1929), which was technically a case about naturalization. *Id.* at 655 (Holmes, J., dissenting).

² David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 879 (1986) (“Why, then, are *Schenck*, *Frohwerk*, *Debs*, and *Abrams* generally considered the origins of First Amendment law? The answer is found not in holdings but in rhetoric—the rhetoric of Justice Holmes.”); see also Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*,

there are exceptions,³ as scholars have explored how the Court's decision in *Gitlow v. New York*⁴ approached the issue of incorporation,⁵ its illustration of the "bad tendency" test,⁶ and what it shows about the sometimes-competing currents of First and Fourteenth Amendment doctrine at the time.⁷ But even the most thoughtful and thorough treatments of Justice Oliver Wendell Holmes' free speech jurisprudence have typically treated his dissent in *Gitlow* as "too compressed to be clear"⁸ or "better characterized as an example of Holmes' distinctive consciousness as a judge than as an attempt to forge a new path in First Amendment jurisprudence after *Abrams [v. United States]*."⁹

The aim of this Essay is to argue that Holmes' dissent in *Gitlow*, brief as it is, provides a surprisingly comprehensive guide to some of the most important and consistent themes in his thought, and thus to the development of free speech law and American legal thought more broadly. That map emerges from careful parsing of the opinion's text—not only the famous-if-obscure declaration that "[e]very

99 B.U. L. REV. 2061, 2067 (2019) (listing the same four cases as the end of the First Amendment's "quiescence").

As Robert Post notes, the decision actually did make substantial headlines at the time, most of them lauding the Court's rejection of *Gitlow*'s claim. See Robert Post, *The Enigma of Gitlow: Positivism, Liberty, Democracy, and Freedom of Speech*, 6 J. FREE SPEECH L. 569, 609–12 (2025). That the opinion was celebrated on those grounds then helps explain why it is generally not celebrated today.

³ Thomas C. Mackey, "They Are Positively Dangerous Men": *The Lost Court Documents of Benjamin Gitlow and James Larkin Before the New York City Magistrates' Court, 1919*, 69 N.Y.U. L. REV. 421 (1994) ("Few individual stars shine as brightly in the constellation of American civil liberties cases as *Gitlow v. New York*.").

⁴ 268 U.S. 652 (1925).

⁵ Coenen, *supra* note 2, at 2067–75 (arguing that *Gitlow*'s assumption of incorporation "spawned a quiet constitutional revolution").

⁶ Rogat, *supra* note 1, at 1398 (calling the majority's opinion "the standard textbook example of the 'bad tendency' rule").

⁷ Post, *supra* note 2.

⁸ Rogat, *supra* note 1, at 1402; *id.* ("Holmes not only failed to mark out the appropriate degree of judicial deference to the legislative judgment. He also completely avoided discussing the extent to which the Court can independently determine the likelihood of danger from a particular expression.").

⁹ G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 454 (1992).

idea is an incitement,”¹⁰ but the phrases that surround it. Close reading of Holmes’ imaginative language is nothing new; entire free speech literatures have arisen around imagery like “the marketplace of ideas”¹¹ and “falsely shouting fire in a theatre and causing a panic,”¹² to say nothing of doctrinal phrases like “clear and present danger.”¹³ Such metaphors and aphorisms have been treated both as guides to understanding Holmes and as lodestars for the First Amendment. This Essay attempts the same for some of *Gitlow*’s lesser-analyzed language.

The goal is not to wring a complete and coherent account of free speech law or theory out of Holmes’ dissent, which consists of just 500 words spread out across a few paragraphs. The hope instead is to weave the *Gitlow* dissent into the broader tapestry of scholarship on Holmes and free speech law—to show that despite its brevity the opinion illustrates some of the fundamental intellectual and doctrinal currents at work in the early development of American free speech law. Holmes’ words provide the necessary threads.

The dissent opened by re-endorsing the “clear and present danger” test Holmes had articulated six years earlier in *Schenck v. United States*,¹⁴ and which he said “was

¹⁰ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting). See also White, *supra* note 9, at 453 (“Although this has been a regularly quoted passage, its implications for First Amendment analysis are somewhat obscure.”)

¹¹ Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 448–51 (2019) [hereinafter Blocher, *Justified True Belief*] (noting influence of marketplace metaphor).

¹² *Schenck v. United States*, 249 U.S. 47, 52 (1919). See also Vincent Blasi, *Shouting “Fire!” in A Theater and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535, 560 (2011) (citations omitted) [hereinafter Blasi, *Shouting “Fire!”*] (“The fire-in-a-theater example has taken on a life of its own. It has become a staple of popular debate about the limits of free speech, but Holmes’ specification that the shout is false is often omitted, as is the datum that a panic actually ensues. And for some reason, the theater is always described as crowded, though Holmes never said that.”).

¹³ 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent.”). See also *Dennis v. United States*, 341 U.S. 494, 503 (1951) (“No important case involving free speech was decided by this Court prior to *Schenck v. United States*.”).

¹⁴ 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent.”).

departed from” in *Abrams v. United States*¹⁵—the case that occasioned Holmes’s best-known and arguably most thorough statement of free speech principles.¹⁶ In *Gitlow*, he said “the convictions that I expressed in [*Abrams*] are too deep for it to be possible for me as yet to believe that it and *Schaefer v. United States* have settled the law.”¹⁷ A proper application of the clear and present danger test, Holmes said, showed “that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views.”¹⁸ The most straightforward reading of the *Gitlow* dissent, then, is a defense of the clear-and-present-danger test, a suggestion that it should be applied more stringently than it was in *Abrams*, and a clear rejection of the *Gitlow* majority’s “bad tendency” test.

But it is the middle paragraph of Holmes’ opinion that has gotten the overwhelming share of attention, and which will be the basis of the analysis here:

It is said that this manifesto was more than a theory, that it was an incitement. 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 narrower sense is the speaker’s enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. 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.¹⁹

¹⁵ 250 U.S. 616 (1919).

¹⁶ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 153 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (noting that in *Abrams*, *Schenck*, and *Debs*, Justice Holmes “virtually invented both First Amendment theory and First Amendment doctrine. He advanced the theory of the marketplace of ideas, and he demonstrated how doctrine would have to evolve to implement this new theory”).

¹⁷ 268 U.S. at 673 (Holmes, J., dissenting) (internal citations omitted). In *Schaefer v. United States*, 251 U.S. 466 (1920), the Court affirmed the convictions of three German newspaper editors under the Espionage Act of 1917 (codified at 18 U.S.C. § 792 *et seq.*). Justice Holmes joined Justice Brandeis’s dissent, which argued that the defendants who criticized the war effort did not create “a clear and present danger that they would bring about the evil which Congress sought . . . to prevent” under the Act. *Schaefer*, 251 U.S. at 483 (Brandeis, J., dissenting).

¹⁸ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

¹⁹ *Id.*

Most *Gitlow* commentary has focused on the typically-for-Holmes quotable phrase “[e]very idea is an incitement.” But just as one must investigate what Holmes meant by “truth” to make sense of *Abrams*’ famous line that “the best test of truth is the power of the thought to get itself accepted in the competition of the market,”²⁰ so too must one consider the remainder of the *Gitlow* opinion to understand what Holmes meant by his invocation of ideas and incitement.

The remainder of this Essay focuses on three phrases in *Gitlow* that highlight important themes, some of which are standard fare in Holmesian scholarship and others of which are somewhat more speculative. The first is Holmes’ much-debated relationship to pragmatism and its conceptualization of beliefs and acts, which illuminates and is illuminated by his statement in *Gitlow* that every idea “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.” Analyzing Holmes as a realist is of course nothing new; here I mean to focus specifically on how his realism intersects with his views on rhetoric and reason.

The second, which has received far less attention, is the relationship in Holmes’ thought—and in legal thought at the time—between rhetoric, reason, and realism.²¹ The essential metaphor (which was much more fundamental to Holmes than that of the marketplace) is that of fire, and the key line in *Gitlow* is “Eloquence may set fire to reason.”

The third is how to understand speech harms—and, in particular, whether only harmless speech is entitled to protection (“whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration”) and whether such harms are best assessed through broad legislative classifications or instead by judges in particular cases (“... before us ...”).²²

Finally, and admitting a parochial interest,²³ the conclusion addresses how Holmes understood the roles of persuasion and change at the individual and social

²⁰ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). See also Blocher, *Justified True Belief*, *supra* note 11 (suggesting that cognitive theories of the First Amendment might be reframed around justified true belief rather than truth alone).

²¹ *Infra* Part II.

²² *Infra* Part III.

²³ Joseph Blocher, “*The Road I Can’t Help Travelling*”: *Holmes on Truth and Persuadability*, 51 SETON HALL L. REV. 105 (2020) (describing persuadability as a First Amendment virtue).

level (“If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community”)²⁴ as well as the reality and role—ever present for Holmes—of violence.

Some of these connections may have implications for doctrinal formulation and case resolution, for example in rejecting a clear line between ideas and acts²⁵ or in framing questions at the level of individual cases rather than legislatively-drawn categories.²⁶ More broadly, though, *Gitlow* provides something of a map to the rocky terrain of the Justice’s mind, on which so much First Amendment law and theory have been constructed.

I. “ . . . AND IF BELIEVED IT IS ACTED ON”—HOLMES AND PRAGMATISM

For his role in publishing the “Left Wing Manifesto,” Benjamin Gitlow was prosecuted under the New York Criminal Anarchy Act of 1902, which was adopted following the assassination of President William McKinley,²⁷ and which criminalized advocacy of the “doctrine that organized government should be overthrown by force or violence . . . or by any unlawful means.”²⁸ Gitlow’s trial proceedings focused to a striking degree on the substance of the beliefs expressed in the Manifesto,²⁹ but the Justices in the *Gitlow* majority focused more on the tendency of those expressions to undermine orderly government—a standard application of the then-prevailing “bad tendency” test.³⁰ This test permitted the punishment of speech “if its natural tendency and probable effect was to bring about the [kind of] substantive evil” a legislature might prevent.³¹

²⁴ *Infra* Conclusion.

²⁵ See *infra* notes 36–50 and accompanying text.

²⁶ See *infra* notes 107–117 and accompanying text.

²⁷ MARC LENDLER, *GITLOW V. NEW YORK: EVERY IDEA AN INCITEMENT* 1 (Peter Charles Hoffer & N. E. H. Hull eds., 2012).

²⁸ *Gitlow*, 268 U.S. at 654 (quoting statute).

²⁹ LENDLER, *supra* note 27, at 36–44.

³⁰ Ronald K.L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis’s Vote in Whitney v California*, 2005 SUP. CT. REV. 333, 367 (“*Gitlow* was nothing if not a reaffirmation of the bad tendency test.”).

³¹ *Gitlow*, 268 U.S. at 671.

It was this characterization that led Holmes to remark, “It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement.”³² The rich scholarly literature on incitement has substantially deepened our understanding of what those words might mean as a matter of free speech theory and doctrine.³³ But when it comes to understanding Holmes’s views on pragmatism and the relationship between ideas, beliefs, and acts, the next line in *Gitlow* provides perhaps the more important clues: “[Every idea] 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.”³⁴

Holmes’ connection to pragmatism has long been debated,³⁵ but in *Gitlow*, at least, he is all but quoting from its standard texts. Charles Saunders Peirce, widely recognized as the founder of pragmatism, “once described pragmatism as ‘scarce more than a corollary’ of the English psychologist Alexander Bain’s definition of a belief as ‘that upon which a man is prepared to act.’”³⁶ The connection between belief and action—Holmes’ precise focus in *Gitlow*—was central to the entire notion of pragmatism, as Thomas Grey explains:

Peirce . . . described a belief as a ‘habit of mind’ that enables the organism to cope with some aspect of its environment. When action on a habitual belief does not produce the expected result, the believer experiences the ‘irritation of doubt.’ ‘Inquiry,’ which Peirce described as ‘a struggle to attain a state of belief’ or ‘settlement of opinion,’ is supposed to resolve the irritation of doubt in favor of some belief that can once again reliably guide the believer’s action.³⁷

³² *Id.* at 673 (Holmes, J., dissenting).

³³ See, e.g., White, *supra* note 9, at 425 (describing the difference between Learned Hand’s approach to incitement and the clear and present danger test).

³⁴ *Id.*

³⁵ See, e.g., FREDERIC R. KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* (1984); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 839 (1989); Cathrine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 543 (1988); Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975).

³⁶ Grey, *supra* note 35, at 803 n.64 (quoting C.S. Peirce, *Historical Affinities and Genesis* (1906), in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE para. 91 (C. Hartshorne & P. Weiss eds., 1934)).

³⁷ Grey, *supra* note 35, at 797 (citing Charles Sanders Peirce, *The Fixation of Belief*, in 5 COLLECTED PAPERS, *supra* note 36, at ¶¶ 358, 367, 374–75).

On this view, ideas were not merely representations of some external reality but guides to action. It is in that sense flatly contrary to Clarence Darrow's closing argument on *Gitlow*'s behalf, which described the Manifesto as "only a history, a statement of facts Not a word inciting anyone to violence, not a word inciting to unlawful action," and that it was simply "pointing out something that will some day happen."³⁸ Far from being a simple recitation of facts, the Manifesto concluded with the exhortation: "The Communist International calls the proletariat of the world to the final struggle!"³⁹

The pragmatist connection between ideas and action seemed congenial to Holmes and appears not only in the *Gitlow* dissent⁴⁰ but throughout his correspondence and other non-judicial writings. Though Holmes was seemingly loathe to praise his erstwhile friend (and leading pragmatist) William James, he did begrudgingly acknowledge that James had "made a valuable contribution in pointing out that ideas were not necessarily faint pictures of original experience."⁴¹ Perhaps thinking of James, he wrote nearly a decade later, that "[t]he philosophers teach us that an idea is the first step toward an act"⁴² and that "all thought is social, is on its way to action."⁴³

Holmes extended this line of thinking from philosophy to law, writing that "law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action."⁴⁴ Notably, in this passage, he seems to treat "beliefs" and "ideas" as more or less interchangeable (or at least that some beliefs are eligible to be drafted into the battle of ideas) while maintaining a distinction between them

³⁸ Post, *supra* note 2, at 20 (internal citations omitted).

³⁹ *Id.* at 19 (internal citation omitted).

⁴⁰ Grey, *supra* note 35, at 804 ("He himself often invoked this pragmatist insight into the instrumental character of thought, most notably in the words of his *Gitlow* dissent.").

⁴¹ 1 HOLMES-POLLOCK LETTERS 191 (Mark De Wolfe Howe ed. 1941) (letter dated Apr. 26, 1912).

⁴² Oliver Wendell Holmes, Jr., *Introduction to the General Survey by European Authors in the Continental Legal Historical Series* (1913), in OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 298, 298 (1920).

⁴³ Oliver Wendell Holmes, Jr., *John Marshall* (1901), in COLLECTED LEGAL PAPERS, *supra* note 42, at 270.

⁴⁴ Oliver Wendell Holmes, Jr., *Law and the Court*, in COLLECTED LEGAL PAPERS, *supra* note 42, at 294–95.

and “action.”⁴⁵ That distinction expresses itself temporally as well as causally (“and *then* have translated themselves into action”) which is in keeping with the notion that “an idea is a *first step* toward an act” and Peirce’s own description of pragmatism itself as being centrally concerned with the proposition that a belief is “that upon which a person is *prepared* to act.”

The conceptual and temporal distinction between belief/idea and act appears in Holmes’ other First Amendment opinions as well. As David Dow notes, in his *Abrams* dissent “Holmes assumed at the outset of his analysis that there comes a moment when speech *becomes* an act.”⁴⁶ (Interestingly, that dissent cites *Gompers v. Bucks Stove & Range Company*, in which the Court had concluded that the force of speech could be so strong as to be a “verbal act,”⁴⁷ which would seem to remove the temporal element. The echoes of that line of thinking can be heard in the modern “true threat” cases⁴⁸ rather than those, like *Gitlow* or for that matter *Abrams* itself, which involved charges like incitement or sedition.) Though their doctrinal approaches clearly diverged,⁴⁹ Holmes and Learned Hand seemed to have common ground regarding pragmatism generally as it relates to speech. As Hand put it in *Masses v. Patten*, “Words are not only the keys of persuasion, but the triggers of action.”⁵⁰

⁴⁵ Though I do not pursue it here, there is also potentially much to be gleaned from the words “and *if* believed”—indicating that not every idea is accepted by those who hear it. This seems to point in the direction of Holmes’ views on persuasion, which I address briefly below, *see infra* Part I.C, and in somewhat more detail elsewhere. Blocher, “*The Road I Can’t Help Travelling*”, *supra* note 23.

⁴⁶ David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL RTS. J. 733, 736 (1998) (emphasis added).

⁴⁷ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 493 (1911). *See also Schenck*, 249 U.S. at 52 (citing *Gompers* for the principle that the First Amendment “does not even protect a man from an injunction against uttering words that may have all the effect of force”).

⁴⁸ *See, e.g., Counterman v. Colorado*, 600 U.S. 66 (2023) (holding that true threats can be punished, but a speaker must have some subjective understanding—at least as high as recklessness—that his words were threatening).

⁴⁹ *See generally* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209.

⁵⁰ *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev’d*, 246 F. 24 (2d Cir. 1917).

But of course not *all* ideas or beliefs become actions. The space between the two is important both as a matter of free speech doctrine⁵¹ and for understanding Holmes himself. For all his rhetoric about the connection between belief and action—often expressed in distinctly martial terms—Holmes constantly vacillated between internal and external perspectives on law and the merits (or not) of a detached life of the mind.⁵² Whatever the reason, “[t]his ambivalence about the roles of actor and witness characterized Holmes’ entire career in the law.”⁵³ Perhaps, then, Holmes’ *Gitlow* dissent is an attempt to wrestle with both the doctrinal and personal implications of the gap between belief and action. He suggests that an idea will be acted on “unless some other belief outweighs it or some failure of energy stifles the movement at its birth.” And in the very next sentence, seemingly pursuing the same theme, he suggests that “[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.”⁵⁴

There are at least three threads worth isolating here. The first is that a believed idea will translate itself into action unless a weightier belief points in a different direction. (Though *Gitlow* does not say as much, one might pair that simple observation with the standard reading of *Abrams* and say that good or true beliefs will tend in the long run to be weightier, thus leading to better acts.) That countervailing belief could be one that the would-be-actor already holds. A person might feel murderous rage upon coming to believe that someone else has committed a horrible wrong. But the execution of revenge could be “stifle[d]” by a countervailing belief that killing is wrong or, from the perspective of the Bad Man, simply that it would be discovered and punished.⁵⁵ The countervailing belief could also be one that the

⁵¹ *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring) (“The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.”).

⁵² Grey, *supra* note 35, at 838–40.

⁵³ *Id.* at 839.

⁵⁴ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting). In his generous comments on an earlier draft of this Essay, Vince Blasi noted that Holmes’ invocation of “enthusiasm” here is hard to understand, and does not appear to explain any differences between expression and incitement. I do my best to unpack it a bit below. See *infra* notes 59–64 and accompanying text.

⁵⁵ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the

would-be actor acquires later—for example, that the object of their murderous rage is innocent after all.

As Vince Blasi has illustrated elsewhere, one way (though not the only one) to understand Holmes' insistence on *imminence* of harm as a condition for the regulation of speech is that in situations of long-run harm we must give speech a chance to work itself out⁵⁶—in effect, to give “other belief[s]” a chance. Only the equivalent of a market failure in the marketplace of ideas can justify intervention. A false cry of “fire” does not “creat[e] panic” in all situations, after all. If I yell it at a couple of picnickers rather than in a theater, the context gives people the time (and thus access to information) necessary to evaluate the claim and act accordingly.

The second possible ground Holmes gives for an idea's failure to become an action is “some failure of energy.” This is a particularly interesting phrase because it does not seem to fit comfortably with Holmes' profound fatalism and sense of the inevitable. What possible relevance could “energy” have in a world where outcomes are preordained?

Here, Holmes' tendency to valorize faith and effort seemingly overcomes his general tendency to describe them as “true and adorable” but doomed.⁵⁷ As he put it, “the mode in which the inevitable comes to pass is through effort,” and as a practical matter “‘we must be serious in order to get work done,’ but ultimately the human sense of power over events [is] only ‘the trick by which nature keeps us at our

material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).

⁵⁶ Vince Blasi, *Holmes's Understanding of His Clear-and-Present-Danger Test: Why Did He Require Imminence?*, 51 SETON HALL L. REV. 175, 204 (2020) [hereinafter Blasi, *Holmes's Understanding*].

⁵⁷ 3 Oliver Wendell Holmes, Jr., *The Soldier's Faith*, in THE COLLECTED WORKS OF OLIVER WENDELL HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 486, 487 (Sheldon M. Novick ed., 1995) (“I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use.”).

job.”⁵⁸ This is challenging to parse, let alone translate into First Amendment doctrine. Is effort merely a “mode,” not a requirement for ideas to have effect? In the context of speech in particular, do words have the ability to shape behavior in any meaningful sense, or is the die already cast? Surely there are instances when an exhortation causes action that would not otherwise have occurred, and which the state has a legitimate interest in prohibiting (or, for that matter, that contributes to the pursuit of truth—else the marketplace of ideas would not seem to have much instrumental value).

Perhaps a clue might be found in the third thread: the suggestion that a speaker’s “enthusiasm,” rather than listeners’ “energy,” provides the line between opinion and incitement—which, in this context, maps reasonably well onto the line between belief and act. Doctrinally, this would suggest attention to the mental state of the speaker: whether he or she *intended*, in the words of *Schenck*, “to create a clear and present danger that [the words] will bring about the substantive evils that [the State] has a right to prevent.”⁵⁹ And yet such an approach would seem to fly in the face of the basic lesson of *The Common Law*: that the law should concern itself not with subjective mental states but with objective evidence.⁶⁰

Interestingly, Holmes used “energy” and “enthusiasm” not only to explain the roles of listeners or speakers, but to understand the viewpoint of would-be censors using law (which, recall, he described as beliefs that had become acts⁶¹) to silence speech with which they disagree. Six years earlier in *Abrams*, he had written: “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.”⁶² Echoing the pragmatic connection between belief and action—and emphasizing how enthusiasm for the former increases the odds of the latter—Holmes wrote to Hand: “If for any reason you did care enough [to stop a particular speech

⁵⁸ Grey, *supra* note 35, at 846 (internal citations omitted).

⁵⁹ 249 U.S. 47, 52 (1919).

⁶⁰ See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 38 (Little, Brown & Co. ed. 1946) (“[W]hile the terminology of morals is still retained, . . . the law . . . is continually transmuting these moral standards into external or objective ones . . .”).

⁶¹ See *supra* note 44.

⁶² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

act] you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act."⁶³ Or, as he put it in a letter to Harold Laski in 1918:

My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power—you will do what you believe efficient to bring about what you want—by legislation or otherwise.

In most matters of belief we are not cocksure, we don't care very much, and we are not certain of our power. But in the opposite case we should deal with the act of speech as we deal with any other overt act that we don't like.⁶⁴

This maps perfectly onto Peirce's approach to belief as "that upon which a man is prepared to act"—a belief backed by the power of law can resolve into censorship with sufficient energy and enthusiasm. Of course, the ultimate conclusion of *Abrams* is that the First Amendment does not allow this, at least not without limits, and that regulators' "fighting faiths" cannot be given the force of law. Justifying that conclusion is a—perhaps the—major task of First Amendment theory in the wake of *Abrams*.⁶⁵

II. "ELOQUENCE MAY SET FIRE TO REASON." —RHETORIC AND REALISM

As in many of the other First Amendment cases of the time, there was general agreement that Benjamin Gitlow's speech had not in fact caused any immediate harm. But under the prevailing "bad tendency" test, that was not the question. As the *Gitlow* majority put it, "A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."⁶⁶

The metaphor, if not the conclusion, was distinctly Holmesian. Though the marketplace metaphor might be his most famous or at least most influential in free

⁶³ THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 24 (2014).

⁶⁴ Letter from Oliver Wendell Holmes, Jr. to Harold Laski (July 7, 1918), in HOLMES-LASKI LETTERS 160–61 (Mark De Wolfe Howe ed., 1953). See also John Inazu, *Holmes, Humility, and How Not to Kill Each Other*, 94 NOTRE DAME L. REV. 1631 (2019).

⁶⁵ In his letter to Laski, Holmes is discussing the certainty, enthusiasm, and power of would-be regulators. But Jane Bambauer notes that a similar analysis of *speakers* can yield interesting results. That is, perhaps Holmes is reluctant to permit punishment of speakers like Gitlow because those speakers actually lack one or more of those qualities—most likely power. This point dovetails with the discussion of rhetoric in Part II and harmless speech in Part III below.

⁶⁶ *Gitlow v. New York*, 268 U.S. 652, 669 (1925).

speech circles, his favorite seemed to be that of fire, often used to invoke transformation and a sense of the ineffable. Sometimes the power of fire could be cleansing and inspirational, as in his experience of the Civil War: “Through our great good fortune, in our youth our hearts were touched with fire.”⁶⁷ But it could also connote ultimate if honorable defeat. Vince Blasi notes that Holmes’ last published words, written a week before his death, opened with “We aim at the infinite and when our arrow falls to earth it is in flames.”⁶⁸ And, of course, Holmes’ other famous free speech metaphor—right up there with *Abrams*’ marketplace—is *Schenck*’s admonition that “[t]he most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.”⁶⁹

In *Gitlow* his focus was not on a false shout of danger, but of *eloquence* “set[ting] fire to reason.” In keeping with Holmes’ use of fire metaphors elsewhere, there are at least two ways to reach the phrase. One is fundamentally positive: of eloquence imbuing reason with flame—touching its heart with fire, as it were. That would be keeping with Holmes’ own love and mastery of language. Mark De Wolfe Howe, who is probably as responsible as anyone else for sustaining Holmes’ place in the forefront of American legal thought, concluded that “his greatest gifts and most ardent tastes were for clarifying *apercus*, rather than for systematic thought.”⁷⁰ As G. Edward White notes, in an analysis of *Gitlow* no less, “Holmes was often driven in his opinions by his attraction for language itself. Such phrases as ‘every idea is an incitement’ and ‘the only meaning of free speech’ were characteristic of his style. Although the phrases are more arresting and memorable because of their unqualified language, they consequently collapse as analytical guidelines.”⁷¹ Perhaps Holmes was imply reflecting on—and modeling—the power of language, and

⁶⁷ Holmes, *The Soldier’s Faith*, *supra* note 57.

⁶⁸ Blasi, *Shouting “Fire!”*, *supra* note 12, at 561 (quoting Oliver Wendell Holmes, Jr., *The Arrow in Flames*, in *THE MIND AND FAITH OF JUSTICE HOLMES* 451, 451 (Max Lerner ed., 1943)).

⁶⁹ *Schenck v. United States*, 249 U.S. 47, 52 (1919). *See also* Blasi, *Shouting “Fire!”*, *supra* note 12, at 560 (citations omitted).

⁷⁰ 2 MARK DE WOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES* 281 (1963).

⁷¹ White, *supra* note 9, at 454. *See also* Cole, *supra* note 2, at 879; Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 680 (1982) (“If . . . we ask what lay behind *The Common Law*, we will find the answer as much in terms of literary values as in legal or philosophic analysis.”).

even setting up a distinction between words that matter and Gitlow's own "redundant discourse," as the following Part explores in more detail.

But in the context of the *Gitlow* dissent, Holmes seemed to be more concerned than celebratory. In the very next sentence, and continuing with the metaphor, he concluded that Gitlow's speech "had no chance of starting a present conflagration"—that apparently being a reason why it could not be prohibited. If a "present conflagration" *could* be subject to prohibition, and if eloquence were to set that fire, then the case for speech regulation would seem all the stronger. Such a negative invocation of fire would be more in keeping with Holmes' opinion for the Court in *Frohwerk v. United States*, which concluded that on the record before the court "it is impossible it say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."⁷²

There are many ways to understand this tension between distrust of eloquence and reliance on it, and like many aspects of Holmes it might not lend itself to a clear resolution. One particularly intriguing possibility—in keeping with this essay's effort to connect the *Gitlow* dissent to broader themes in Holmes' thought—is that the phrase highlights something important about his views of rhetoric and realism.

Others have suggested that classical rhetoric and legal realism have some deep and meaningful similarities, especially in the degree to which they focus centrally on the audience.⁷³ And indeed the two have always been intertwined, as James Boyd White captured in his (appropriately rhetorical) question: "Let us begin with the idea that the law is a branch of rhetoric. Who, you may ask, could ever have thought it was anything else?"⁷⁴ To the degree that Holmes is the American legal realist *par*

⁷² 249 U.S. 204, 208–09 (1919).

⁷³ Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 UMKC L. REV. 285, 294 (1998) ("Rhetoric and realism have much in common. The former studies the manner in which the advocate can persuade an audience; the latter observes in particular what that audience decides, rather than the body of authority the audience may rely upon in making its decision. Despite differences in emphasis, both the legal realist and the classical rhetorician keep the audience center stage.").

⁷⁴ James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

excellence,⁷⁵ one might equally expect him to be both the hero and champion of law and rhetoric.

But on this second reading of *Gitlow*, Holmes sets up rhetoric (“Eloquence”) as the enemy of reason—indeed, as something that can overwhelm and destroy it.⁷⁶ In doing so, he seems to be answering in the negative Anthony Kronman’s question: “Does the craft of rhetoric have a separate and legitimate place in human life, in between pure reason and pure power?”⁷⁷ Eloquence, if it can incinerate reason rather than enliven it, appears more akin to “pure power” than a means of persuasion.

It is hard not to wonder about the degree to which Holmes’s views on the relationship between rhetoric and law were influenced by his connections to Harvard, where he studied as an undergraduate and law student, delivered his most significant academic lectures, and briefly took a turn in the “half-life” of a professor⁷⁸ before joining the bench. Indeed, Harvard’s evolving approach to the academic status and study of rhetoric seems to map on to Holmes’. Early in the 1800s, Harvard prioritized the study of classical rhetoric, even hiring then-Senator John Quincy Adams as the first Boylston Professor of rhetoric and oratory (he promised to teach “reason, clothed with speech”).⁷⁹ But by the time Holmes enrolled at Harvard, the position was occupied by Francis James “Stubby” Child, who was “[s]olidly anti-

⁷⁵ Holmes is often credited as a kind of spiritual father to American legal realism, and certainly some of the leading Realists claimed him as their own. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 (1930) (“Holmes’ mind had traveled most of the road two generations back.”); Jerome Frank, *Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist*, in LAW AND THE MODERN MIND 253 (1930). But in this as many other things, Holmes’ thought and writings are not always easy to characterize. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986).

⁷⁶ See generally Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. INT’L RELS. 35 (2007) (analyzing, *inter alia*, the coercive power of political rhetoric).

⁷⁷ Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 691 (1999).

⁷⁸ Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (July 15, 1913) (“Academic life is but half-life.”), *quoted in* 2 HOWE, *supra* note 70, at 282.

⁷⁹ Jay Heinrichs, *How Harvard Destroyed Rhetoric*, 97 HARVARD MAG. 37, 37 (July–Aug. 1995).

Aristotelian”⁸⁰ (Aristotle being the central figure in classical rhetoric) and “killed off rhetoric at Harvard.”⁸¹

More significantly and closer to Holmes, Harvard Law School in the 1870s was changing the face of legal education with the rise of Christopher Columbus Langdell’s “scientific” approach—a stark contrast to Yale Law School’s focus on rhetoric and persuasion.⁸² Langdell of course prevailed, and “[a]s the Langdellian model became the cornerstone of American legal education, the study of rhetoric and rhetorical theory was abandoned. We can only speculate about the shape of modern American legal education had the Yale approach predominated.”⁸³

Holmes and Langdell have long been connected, compared, and contrasted,⁸⁴ and it would be easy enough to conclude that Holmes, like Langdell, saw law as a science that could be reduced to a relatively limited set of deductive principles, rather than a branch of rhetoric. That might be the “reason” to which eloquence can lamentably set fire.

But that view is hard to square with what is perhaps the Justice’s most famous aphorism—“The life of the law has not been logic, it has been experience”⁸⁵—one that was substantially elaborated in his scholarly and legal writings and reflects a deep (if obscure) insight.⁸⁶ It seems better to understand Holmes, as Grey does, as agreeing with Langdell as to the means of studying law, but not necessarily as to its nature: “[A]lthough Holmes was indeed a conceptualist, he viewed legal systematization as a practical aid in teaching and understanding law. Unlike Langdell,

⁸⁰ *Id.* at 40.

⁸¹ *Id.* at 41.

⁸² See Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 111 (1993) (“Yale had attempted to devise a more practical course of study based on a rhetorical theory of lawyering.” (footnote omitted)).

⁸³ *Id.*

⁸⁴ Posner, *supra* note 75, at 185 (“He thought he was attacking logic; that is, formalist reasoning. He really was attacking what I am calling Langdellism [the smuggling of conclusions into premises].”).

⁸⁵ HOLMES, *supra* note 60, at 1. See Benjamin N. Cardozo, *Mr. Justice Holmes*, in *SELECTED WRITINGS OF BENJAMIN N. CARDOZO* 78 (1947) (“Here is the text to be unfolded. All that is to come will be development and commentary.”).

⁸⁶ Grey, *supra* note 35, at 792 (“[T]he substance of his most famous teaching, the primacy of experience over logic, still seems to me the central, if obscure, truth of American legal thought . . .”).

Holmes did not believe doctrinal conceptualization could produce a deductive system that would make legal reasoning formal and scientific.”⁸⁷ It is therefore probably too simple to resolve the tension by saying that the “reason” Holmes wanted to protect from the incendiary power of eloquence was itself purely Langdellian. And his own love and mastery of language and rhetoric (in the common rather than classical sense) further suggests that it is too simple to conclude that he distrusted all eloquence.

A somewhat more nuanced explanation for Holmes’ views on eloquence and rhetoric might be formed *within* the classical Aristotelian tradition. Perhaps his concern was not with rhetoric in general, but with its potential for misuse in particular forms and contexts—a concern that Aristotle himself shared. Aristotle defined rhetoric as “an ability, in each [particular] case, to see the available means of persuasion,”⁸⁸ and divided it into three forms: *logos* (logical argument), *pathos* (emotional argument), and *ethos* (ethical appeal or credibility). Of these, *logos* is the one most closely corresponding with “reason,”⁸⁹ and is likely the form of rhetoric with which lawyers and judges are most familiar and comfortable.⁹⁰ Although Holmes in *Gitlow* was addressing rhetoric and communication outside of the legal system—in public discourse—it is “reason” and thus *logos* that he is concerned to protect against the potentially immolating power of eloquence.

It is not entirely clear what Holmes had in mind by eloquence, but as a matter of rhetoric (i.e., persuasion) it seems to correlate with the other two Aristotelian

⁸⁷ *Id.* at 816.

⁸⁸ 1 ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 37 (George A. Kennedy, trans., 2007).

⁸⁹ Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1622 (1998).

⁹⁰ Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1555–59 (1990) (“But if law is, at its core, the practice of rhetoric, the *particular* rhetoric that law embraces is the rhetoric of foundations and logical deductions. And that particular rhetoric is one that relies, above all else, upon the denial that it is rhetoric that is being done. Thus, the rhetoric of foundationalism is the essence of philosophy and the antithesis of rhetoric.”). See also Colin Starger, *Criminal Law: The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045, 1057 (2009) (“[A]s doctrine evolves on a specific issue, the individual litigants arguing the issue and judges deciding it necessarily change. In this more abstracted discourse [that is cases on appeal], over time, particularized appeals to ethos and pathos become less significant. As various district and appellate courts moot a particular legal issue, one hopes that logos becomes more prominent.”).

forms: *Ethical* arguments are those that derive strength from the status or character of the speaker,⁹¹ and arguments from *pathos* (“pathetic” arguments in the classical not modern sense) are those that appeal to the emotions.⁹² Those, after all, are precisely the qualities Holmes found lacking in Gitlow’s particular case and others of the time—hence his characterization of the speech as the drool of an ass, and *not* setting fire to reason.⁹³

It follows that one way to understand this passage of *Gitlow* is as an expression of concern not with rhetoric as opposed to reason, but with the risk that *ethos* and *pathos* would override *logos*—an explanation that keeps Holmes within the bounds of rhetoric, as one might expect befits his realism. In fact, Aristotle was largely concerned with the same problem: “It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses.”⁹⁴ Perhaps in an ideal world we would all be governed by reason, but in reality we must account for the power of other forms of persuasion.

What does this reflect about Holmes’ approach to free speech more broadly? One is that his recognition of the flimsiness of *logos* (“reason”) in the face of *ethos* and *pathos* (“Eloquence”) supports the view of those who read Holmes in general—and *Abrams* in particular—as being about something other than the pursuit of a logically-determined “truth.” As Vince Blasi explains, Holmes’ dissent in *Abrams*

⁹¹ Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1394 (2013).

⁹² *Id.* at 1390 (“Much successful constitutional argument is, in a classical sense, pathetic. A pathetic argument is one that appeals to pathos, or emotion.”).

⁹³ See *infra* note 99 and sources cited therein.

⁹⁴ ARISTOTLE, RHETORIC 1. ii 1355b, in *THE RHETORIC AND POETICS OF ARISTOTLE* 25 (W. Rhys Roberts & Ingram Bywater trans., 2d ed. 1984).

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.⁹⁵

Blasi suggests that the opinion can be read to rest “not upon highly contentious epistemological and moral premises but rather on the historical acceptance of the political principle of legitimate opposition.”⁹⁶ Descriptively speaking, then, perhaps *Gitlow* provides further evidence that despite the simplistic truth-maximizing vision of the marketplace of ideas that many associate with Holmes, his own view was distinctly more skeptical about the power of reason to prevail.

III. “. . . REDUNDANT DISCOURSE BEFORE US . . .”—HARM, DEFERENCE, AND LEVELS OF GENERALITY

In addition to providing a positive account of speech’s value—as the marketplace metaphor and other theories attempt to do—a complete approach to the First Amendment must grapple with the speech-related harms that government has a legitimate interest in regulating. *Gitlow* and other cases in the early First Amendment canon were written against a backdrop of genuine and widespread fear of the very political vision that *Gitlow* advocated. This implicitly raises at least two fundamental questions: Can advocacy itself constitute a proscribable harm?⁹⁷ And are such harms to be identified by legislatures through ex ante categorical definitions, or ex post by judges based on context-specific facts?

In many of his best-known free speech opinions, Holmes was sniffily dismissive of the would-be advocates at issue. That is certainly true of *Gitlow*, whose tract—the “redundant discourse” to which Holmes referred—has been described by others as “[r]emarkably turgid, even by the standards of its genre,” such that “it could

⁹⁵ Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 2 [hereinafter Blasi, *Holmes and the Marketplace*]. See also Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35, 39 (2010) (arguing that Holmes “is concerned with neither individual development nor the discovery of some external truth. Rather, he values speech for its role in a dynamic process in which shifting interest groups are vying for dominance in a continually changing world”).

⁹⁶ Blasi, *Holmes and the Marketplace*, *supra* note 95, at 46.

⁹⁷ Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 97.

have served as an acid test for revolutionary zeal and fortitude.”⁹⁸ Writing to Harold Laski in 1925, Holmes declared (apparently in reference to *Abrams*) with a mixture of pride and contempt, “I let out a page of slack on the right of an ass to drool about proletarian dictatorship.”⁹⁹ He similarly called the speech in *Abrams* “the surreptitious publishing of a silly pamphlet by an unknown man”¹⁰⁰—a bunch of “puny anonymities”¹⁰¹—and went on to say that “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.”¹⁰²

These passages could be taken to point to the existence of what Fred Schauer called a “harmless speech tradition”¹⁰³—one protecting only speech that lacks the ability to “set fire to reason.” This would, in effect, make speech punishable based on how persuasive it is;¹⁰⁴ a blow against *ethos* and *pathos*, perhaps. And considering Holmes’ reassurance that the “redundant discourse” in *Gitlow* had “no chance of starting a *present conflagration*,” perhaps the test should consider both immediacy and degree of harm—focusing on conflagrations, not small flames.

⁹⁸ Rogat, *supra* note 1, at 1396. Post calls the Manifesto “long, repetitive, and pedantic” and quotes Zechariah Chafee’s assessment that “any agitator who read the thirty-four pages of the Manifesto” would not be moved “to violence except perhaps against himself.” Post, *supra* note 2, at 16 (quoting Zechariah Chafee, Jr., *The Gitlow Case*, NEW REPUBLIC, July 1, 1925, at 141).

⁹⁹ White, *supra* note 9, at 455 (internal citation omitted).

Drooling donkeys should perhaps join marketplaces and burning theaters in the pantheon of Holmesian speech metaphors. See also Oliver Wendell Holmes, Jr. to Lewis Einstein (July 11, 1925), in THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903–1935, at 244 (James Bishop Peabody, ed., 1964) [hereinafter THE HOLMES-EINSTEIN LETTERS] (“I had my whack on free speech some years ago in the case of one *Abrams* and therefore did no more than recur to that and add that an idea is always an incitement—to show the ardor of the writer is not a sufficient reason for judging him. I regarded my view as simply upholding the right of a donkey to drool.”).

¹⁰⁰ *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

¹⁰¹ *Id.* at 630.

¹⁰² *Id.*

¹⁰³ See generally Frederick Schauer, *Oliver Wendell Holmes, the Abrams Case, and the Origins of the Harmless Speech Tradition*, 51 SETON HALL L. REV. 205 (2020).

¹⁰⁴ Cf. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (arguing that speech cannot be restricted on account of its persuasiveness).

Then again, precisely because Holmes dismissed the effectiveness of the speech in cases like *Gitlow* and *Abrams*, it is hard to know “what he would have done if put to the test.”¹⁰⁵ After all, in *Abrams* Holmes also said that a critic of military production must be free to “advocate curtailment with success . . . even if it turned out that the curtailment hindered . . . the United States in the prosecution of the war” unless doing so would cause an “emergency” such that “an immediate check is required to save the country.”¹⁰⁶ This hypothetical suggests that effective, harmful speech is nonetheless covered by the First Amendment, at least where the harms it presents are not immediate.

One way to conceptualize the underlying question is to frame it as being not necessarily about whether harm is present, but rather who (judge, jury, legislature, etc.) gets to determine whether speech is proscribable, and at what level of generality the question should be pitched (a class of speech versus an individual act, e.g.). This recasts the issue as one of legal process rather than of substance.

The *Gitlow* majority, applying the prevailing bad tendency test, effectively said that the legislature gets to make the determination of harm at a broad level: “[W]hen the legislative body has determined generally . . . that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.”¹⁰⁷ That legislative determination alone sufficed to take the speech out of the range of *Schenck*’s clear and present danger test.¹⁰⁸

Holmes’ dissent, by contrast, focused on the particulars, asserting that “whatever may be thought of the redundant discourse *before us*, it had no chance of starting a present conflagration.” Perhaps this was his attempt to answer the majority’s assertion that courts should defer to legislative judgment regarding harmful speech.¹⁰⁹ As noted above, Holmes did say that the rule of *Schenck* should govern.

¹⁰⁵ Blasi, *Holmes’s Understanding*, *supra* note 56, at 204.

¹⁰⁶ *Abrams*, 250 U.S. at 627, 630 (Holmes, J., dissenting).

¹⁰⁷ *Gitlow*, 268 U.S. at 670.

¹⁰⁸ *Id.* at 671 (saying that *Schenck*’s rule “has no application” in such circumstances).

¹⁰⁹ Post, *supra* note 2, at 38–39 (“To this argument [about deference], Holmes’s *Gitlow* dissent offered no response at all.”).

That test focused the judicial gaze on case specifics: “The question *in every case* is whether the words used are used *in such circumstances* and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”¹¹⁰

This is in keeping with his use of the clear and present danger test not as a constitutional rule compelled by the First Amendment, but as a rule of statutory interpretation¹¹¹—that is, that only such speech could legitimately fall within the ambit of laws like the New York Criminal Anarchy Act under which Gitlow was prosecuted.¹¹² And in its attention to case-specific details, it is a bit of a corrective to the criticism that he, “who had magisterially told us the life of the law has not been logic; it has been experience” nonetheless “continuously resorted to a legalistic logic rather than the counsels of human experience in liberty-sensitive matters.”¹¹³

The question of legislative deference would receive a more thorough and ultimately persuasive treatment two years later in Justice Brandeis’ concurring opinion in *Whitney*—the last major First Amendment opinion that Holmes joined. In Brandeis’ words, “The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the [s]tate, creates merely a rebuttable presumption that these conditions have been satisfied.”¹¹⁴ Thus, “no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.”¹¹⁵

The determination of “imminent” evil is almost inevitably something that must be resolved on a case-by-case basis rather than *ex ante* by a legislature, in contrast

¹¹⁰ *Schenck*, 249 U.S. at 52 (emphasis added).

¹¹¹ Rogat, *supra* note 1, at 1399 (“With the exception of Justice Brandeis’ opinion in *Gilbert*, no one, and certainly not Holmes, had suggested that the clear and present danger doctrine should test the validity of legislation. It had been used only to require a relationship between words and forbidden acts.”).

¹¹² The New York Criminal Anarchy Act of 1902, under which Gitlow was prosecuted, defined criminal anarchy as the “doctrine that organized government should be overthrown by force or violence . . . or by any unlawful means” and provided punishment for the advocacy of such a doctrine. N.Y. PENAL LAW §§ 160, 161 (McKinney 1957).

¹¹³ Touster, *supra* note 71, at 679.

¹¹⁴ *Whitney*, 274 U.S. at 379.

¹¹⁵ *Id.* at 377.

to the *Gitlow* majority's bad tendency test, which would "suppress the threatened danger in its incipency."¹¹⁶ The idea that only imminent harm can justify punishment of speech is, Blasi has argued, Holmes' "most significant influence on First Amendment law"—even more than the marketplace of ideas metaphor.¹¹⁷

CONCLUSION: "... DESTINED TO BE ACCEPTED ..."

There is an apparent tension between Holmes' belief in the power of speech—including its ability to "set fire to reason"—and his fatalism. *Abrams* is celebrated for its designation of the marketplace of ideas as the "best test of truth"; but Holmes elsewhere describes truth itself as something one "can't help" believing.¹¹⁸

What is the point of speaking, or for that matter regulating speech, if the die is already cast and particular ideas are, as Holmes put it in *Gitlow*, "destined to be accepted"? Pointing to these very words in his wonderful critical assessment of Holmes, Yosai Rogat notes: "The extreme sociological fatalism of Holmes' remarks should also be noticed. Holmes assumes here, as he always did, that government itself lacks control or even influence, that it is a passive instrument on which social forces play."¹¹⁹

The relevant metaphor here is not the marketplace but the battlefield, and of course Holmes consistently invoked martial themes when exploring issues of free speech,¹²⁰ for example in saying that "deep-seated preferences cannot be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way."¹²¹ That one-sentence escalation from disagreement about beer to homicidal violence is striking, and elsewhere Holmes suggested that there may be off ramps in "private life": "I agree that the logical result of a fundamental difference is for one side to kill the other, and that persecution has much to be said for

¹¹⁶ *Gitlow*, 268 U.S. at 669.

¹¹⁷ Blasi, *Holmes's Understanding*, *supra* note 56, at 176.

¹¹⁸ Blocher, "The Road I Can't Help Travelling", *supra* note 23, at 122.

¹¹⁹ Rogat, *supra* note 1, at 1403; *see also* Grey, *supra* note 35, at 846 ("Like his Calvinist ancestors, Holmes saw in the sequence of events the unfolding of a predestined tale.").

¹²⁰ Erin C. Carroll, *The Violence of Free Speech and Press Metaphors*, 81 WASH & LEE L. REV. 87 (2024).

¹²¹ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

it; but in private life we think it more comfortable for disagreement to end in discussion or silence.”¹²² And yet “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 man as thou, so much the better, but kill him if thou canst.”¹²³

It is far beyond the scope of this brief Essay to fully explore Holmes’ broader views on violence. And yet without doing so it might well be impossible to fully make sense of his views on free speech specifically or law more generally—indeed, it is not hard to imagine Holmes penning Robert Cover’s famous line, “Legal interpretation takes place in a field of pain and death.”¹²⁴ *Gitlow* alone cannot provide all the answers. But it does provide a remarkably broad guide to understanding Holmes.

¹²² Letter from Oliver Wendell Holmes, Jr. to Lewis David Einstein (July 11, 1918), *reprinted in* THE HOLMES-EINSTEIN LETTERS 168–69.

¹²³ Letter from Oliver Wendell Holmes, Jr. to Learned Hand (June 24, 1918) (on file with the Harvard Law School Library), <https://perma.cc/8AXC-JXN7>.

¹²⁴ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

