



HOLMES AND THE FREE SPEECH PARADOX

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In his dissenting opinion in *Gitlow v. New York*, Justice Oliver Wendell Holmes suggests that free speech must tolerate even those ideas that, were they accepted, would spell the end of the constitutional system on which free speech rests. Scholars have long puzzled over this suggestion, wondering whether to take it seriously or to regard it as mere bluster uttered in the confidence that such a result would never come to pass.

In this essay marking the centenary of *Gitlow*, I attempt to resolve the puzzle. Although there are a number of reasons to doubt Holmes's sincerity, including his pragmatism and love of country, I argue that his suggestion in *Gitlow* is consistent with his lifelong skepticism, his aversion to stasis, his openness to change, and his respect for adaptation. Thus, I believe we should take Holmes at his word when he says we must accept speech that could lead to fundamental, radical, even unimaginable, change.

But I also identify important limits to Holmes's position. The fundamental change he had in mind happens over "the long run" and comes about through "beliefs expressed," not through violent acts that threaten "a present conflagration." Moreover, Holmes did not view such fundamental change as preordained. He believed that destiny is shaped by human effort and that the only way to ensure the future we want is through struggle. We should therefore view his dissent in *Gitlow* not only as a statement about the meaning of free speech but as a reminder that democracy will survive only if we fight for it.

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INTRODUCTION

There is a paradox at the heart of free speech. If the government allows people to say anything they want, some people may use that freedom to say things that lead to the overthrow of the government—and to the destruction of the very freedom that enabled them to achieve that result. Freedom of speech, if not curtailed, thus contains the seeds of its own demise. Or, to paraphrase a memorable saying from another context, free speech will eat itself.¹

Free speech is not unique in this way. Other manifestations of liberalism are also vulnerable to self-cancellation. Toleration, if taken to its logical end point, means tolerating the intolerant, who, if they gained power, would repudiate toleration.² Neutrality is likewise paradoxical. If we were to adhere strictly to neutrality, we would have to be neutral toward the idea of neutrality itself, which would make it impossible to practice neutrality.³ Liberalism, like freedom, is always under threat from the very conditions it creates.⁴

¹ See David Quantick, *Pop Will Eat Itself*, NEW MUSICAL EXPRESS, Jan. 3, 1987, at 2, <https://perma.cc/X6L9-S5LU>.

² See KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 581 (2011) (“Unlimited tolerance must lead to the disappearance of tolerance.”); see also GAETANO MOSCA, *THE RULING CLASS* 50 (Hannah D. Kahn trans., 1939) (“If tolerance is taken to the point where it tolerates the destruction of those same principles that made tolerance possible in the first place, it becomes intolerable.”).

³ Cf. STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 246 (1999) (“Skepticism, to be truly skeptical, must be skeptical of itself, and in being so it ceases to be skepticism and becomes a form of faith.”).

⁴ See generally TIMOTHY SNYDER, *ON TYRANNY* 16 (2024) (noting that the founding generation understood that American democracy “must be defended from *Americans* who would exploit its freedoms to bring about its end”).

Advocates of free speech and toleration have long been aware of this problem and have mostly resolved it by stepping away from the brink—by declining to protect expression that threatens the foundation on which the system of free speech rests. When Milton argued for toleration in *Areopagitica*, he made clear that he did not mean “tolerated popery and open superstition, which, as it extirpates all religions and civil supremacies, so itself should be extirpate.”⁵ Locke also limited his call for toleration, arguing that “no opinions contrary to human society or to those moral rules which are necessary to the preservation of civil society are to be tolerated by the magistrate.”⁶

Modern thinkers have been equally unwilling to follow free speech and toleration off the cliff. Karl Popper warned that “if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed.”⁷ Justice Robert Jackson wrote that a doctrinaire approach to free speech would “convert the constitutional bill of rights into a suicide pact.”⁸ And Robert Bork argued that those who would use free speech to destroy the government that guarantees their freedom are not entitled to its protections.⁹ In fact, it is hard to find

⁵ JOHN MILTON, *AREOPAGITICA* 241 (The Harvard Classics vol. 3, P.F. Collier & Son 1909). Milton reinforced the point when he added, “That also which is impious or evil absolutely either against faith or manners no law can possibly permit, that intends not to unlay itself.” *Id.* I interpret the words “unlaw itself” to mean “undo itself.”

⁶ John Locke, *A Letter Concerning Toleration*, in *THE WORKS OF JOHN LOCKE* 1 (Thomas Tegg 1823) (first published 1689). Milton and Locke were not alone in their view that toleration cannot tolerate the intolerant. Thomas Jefferson argued that “[a] strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means.” Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), 12 *WRITINGS OF THOMAS JEFFERSON* 418, 418 (1905).

⁷ POPPER, *supra* note 2, at 265 n.4.

⁸ See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

⁹ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 30–31 (1971) (arguing that free speech does not protect efforts to destroy the government that guarantees it). Bork’s view is similar to that of Learned Hand. See Letter from Learned Hand to Elliot Richardson (Feb. 29, 1952), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 266–67 (Irving Dilliard ed., 2d ed. 1953) (“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

a modern thinker, liberal or otherwise, who doesn't blink when faced with the prospect that free speech and toleration could lead to the elimination of the very system that makes such principles possible.¹⁰ Even John Rawls, who argued that a "just society must tolerate the intolerant," left considerable wiggle room, writing that the freedom of the intolerant can be restricted "when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger."¹¹

One apparent exception to this consensus is Justice Oliver Wendell Holmes, who in his dissenting opinion in *Gitlow v. New York* suggests that free speech must tolerate even those ideas that, were they accepted, would spell the end of free speech. "If in the long run," Holmes writes, "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."¹²

In this essay, I will explore what Holmes meant by this statement, which goes further than any other judicial writing on the scope of free speech.¹³ Did Holmes really mean to embrace the idea that the Constitution is "a suicide pact," such that we must protect speech that would destroy democracy itself? Or should we regard Holmes's statement as mere bluster, uttered in the confidence that the hypothetical future he described would never come to pass? And if Holmes was writing in earnest, was he correct? Does free speech obligate us to accept the expression of beliefs that would subvert a liberal system of government (as happened in Germany in the decade after *Gitlow*)? If not, what are the limits of the speech we must accept?

I. FREE SPEECH LOGIC

I want to note at the outset that the paradox at the heart of free speech was not new to Holmes when he wrote his dissent in *Gitlow*. He had long been cognizant of

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?"

¹⁰ Hard but not impossible. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 57 (1960) ("Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours.").

¹¹ JOHN RAWLS, A THEORY OF JUSTICE 193, 220 (1971).

¹² *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

¹³ See MARC LENDLER, GITLOW V. NEW YORK: EVERY IDEA AN INCITEMENT 119 (2012).

the way in which freedom could be used to destroy the very society that guaranteed it. That's the primary reason he had been hostile to free speech for most of his adult life, referring to it on at least one occasion as "logically indefensible."¹⁴ To Holmes, it was perverse to allow people to use the freedom you granted them to destroy you. Life is a struggle for survival, he believed, and it is both natural and justifiable to favor one's own life and liberty over that of others. "If a man is on a plank in the deep sea that will float only one, and a stranger lays hold of it, he will thrust him off if he can," he wrote in *The Common Law*. "When the state finds itself in a similar position, it does the same thing."¹⁵

Holmes made a similar point about free speech several times in the months and years leading up to his 1919 dissent in *Abrams v. United States*.¹⁶ During a discussion with Learned Hand in the summer of 1918, he responded to the argument that we should be tolerant of those with dissenting views by telling Hand, "You strike at the sacred right to kill the other fellow when he disagrees."¹⁷ A week before writing his *Abrams* dissent, he explained to his friend Harold Laski that he didn't believe in free speech as a theory and that "on their premises it seems to me logical in the Catholic Church to kill heretics and the Puritans to whip Quakers."¹⁸ Even in his *Abrams* dissent, he reiterated his lifelong view that "[p]ersecution for the expression of opinions seems to me perfectly logical."¹⁹

Holmes never changed his view about the logic of persecution. Instead, in *Abrams* he relied on an argument from experience, writing that "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."²⁰ In other words, Holmes

¹⁴ See Thomas Healy, *The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story Behind Abrams v. United States*, 39 J. SUP. CT. HIST. 35, 45 (2014).

¹⁵ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 40 (1881).

¹⁶ *Abrams v. United States*, 250 U.S. 616 (1919).

¹⁷ Letter from Learned Hand to Oliver Wendell Holmes, Jr. (June 22, 1918) (on file with the Harvard Law School Library), <https://perma.cc/5Q7L-N9VG>.

¹⁸ Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Oct. 26, 1919), in *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD LASKI, VOLUME I: 1916–1925*, at 217 (Mark DeWolfe Howe ed., 1953) [hereinafter 1 *HOLMES-LASKI LETTERS*].

¹⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁰ *Id.*

came to believe that we should resist the logical appeal of persecution because the benefits of free speech are worth it, because we are more likely to achieve “the ultimate good desired” if all views are heard, even those “we loathe and believe to be fraught with death.”²¹ Experience, not surprisingly for the author of *The Common Law*, counted more than logic.

But Holmes did not deny the implications of the position he had adopted, and with his statement in *Gitlow* he acknowledges it squarely. Note that he doesn’t claim to be describing the “best meaning” of free speech or his preferred meaning. He writes that this is the “only meaning” of free speech, which suggests he’s not making a normative claim as much as he’s making a logical one.²² *If you believe in free speech*, Holmes appears to be saying, *this is what you’re committing yourself to as a matter of logic. I had resisted free speech most of my life for this very reason, but now that I’ve accepted it this is what I’m also committing to.*

Yet the question remains whether to believe him. Was Holmes genuinely committed to a principle of free speech that would enable the destruction of constitutional democracy and the First Amendment? Or, like nearly everyone else, would he step back from the brink when push came to shove?

II. THE PRAGMATIC HOLMES

There are several reasons to think Holmes would step back.

To begin with, Holmes was, both intellectually and temperamentally, a pragmatist. He rejected ideologies and dogmas that led to extreme results. He wrote that “absolute beliefs are a rum thing,”²³ and he believed, like most pragmatists, that ideas should be judged on their usefulness, not on their correspondence to some abstract theory of morality or goodness. He was similarly moderate in his personal life, favoring routine and predictability over risk-taking and recklessness. (He rarely drank or smoke, slept eight hours a night, avoided going out in bad weather,

²¹ *Id.*

²² See LENDLER, *supra* note 13, at 119 (describing Holmes’s statement as “common sense decked out in Holmesian rhetorical style”).

²³ Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Apr. 25, 1920), in HOLMES AND FRANKFURTER, THEIR CORRESPONDENCE, 1912–1934, at 88 (Robert M. Mennel & Christine L. Compston eds., 1996) [hereinafter HOLMES-FRANKFURTER LETTERS].

and placed a high value on regular bowel movements.²⁴) It would thus be at least somewhat out of character for him to support an absolutist, unyielding view of free speech. Indeed, most pragmatists have taken the opposite approach. Richard Posner, who in many ways is the intellectual heir of Holmesian pragmatism, wrote an entire book arguing that the Constitution is “Not a Suicide Pact.”²⁵ Given Holmes’s realism and his belief in “justifiable self-preference,”²⁶ it’s not hard to imagine him agreeing with this position.

Holmes also had a deep affection for the United States and a patriotic streak that sometimes verged on jingoism. During World War I, he wrote to a friend that his views were summed up by a sign that read, “Damn a man who ain’t for his country right or wrong.”²⁷ Nor was his patriotism merely symbolic. Holmes fought for the survival of the Union during the Civil War and was wounded three times, twice nearly losing his life. He was also a lifelong government official, serving for half a century combined on the Massachusetts and U.S. Supreme Courts. And when he died, he left the bulk of his estate to the federal government, the largest individual bequest received by the United States to that point.²⁸ Could a man who loved his country and government enough to dedicate his life, career, and fortune to it so casually accept its destruction?

Moreover, Holmes was prone to these kinds of exaggerated statements. He enjoyed shocking and provoking his friends in conversations and letters. Recall his statement to Learned Hand that “you strike at the sacred right to kill the other fellow when he disagrees.” Or his repeated assertion that “every society rests on the

²⁴ See THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 69 (2013).

²⁵ RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

²⁶ HOLMES, *supra* note 15, at 44.

²⁷ See HEALY, *supra* note 24, at 48–49.

²⁸ See STEPHEN BUDIANSKY, *OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS* 49–51, 55, 395 (2019).

death of men.”²⁹ Or his appalling line in *Buck v. Bell* that “three generations of imbeciles are enough.”³⁰ With Holmes, the desire to say something clever or memorable often got the better of him. That is why contemporary observers described him as a “literary feller” with a “strong tendency to be brilliant rather than sound”³¹ and why one critic wrote that he was “a master of epigrammatic expression” who “does not think through a difficult matter to the end.”³²

Finally, there is reason to suspect that Holmes adopted such a bold line in *Gitlow* only because he thought there was no danger of a proletarian dictatorship actually coming to fruition. As a number of scholars have pointed out, Holmes was often dismissive of the speech he voted to protect. In *Abrams*, he referred to the defendants’ speech as a “silly leaflet” and to the defendants as “poor and puny anonymities,”³³ while he described the Left Wing Manifesto at issue in *Gitlow* as “redundant discourse”³⁴ in his dissent and as “drool” in a letter to his friend Sir Frederick Pollock.³⁵ Several decades later, Justice William Douglas would emphasize the ineffectual nature of subversive speech as a reason for allowing it.³⁶ It would not be surprising if Holmes’s statement in *Gitlow* was based on a similar rationale.

²⁹ Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Washington, D.C., Feb. 1, 1920), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 36 (Mark de Wolfe ed., Harvard Univ. Press 1941).

³⁰ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

³¹ *More Brilliant than Sound: Evening Post Says Judge Holmes Is Able, Not Great—At Least He Is Not a Corporation Lawyer*, BOSTON EVENING TRANSCRIPT, Aug. 12, 1902, at 3.

³² John M. Zane, *A Legal Heresy*, 13 ILL. L. REV. 431, 439–40 (1918–19).

³³ *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

³⁴ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

³⁵ See Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (June 18, 1925), in 2 HOLMES-POLLOCK LETTERS, *supra* note 29, at 255. Holmes’s low opinion of the efficacy of *Gitlow*’s speech was shared by many others, including Harvard Law Professor Zachariah Chafee, who wrote that “any agitator who read the thirty-four pages of the Manifesto” would not be moved “to violence except perhaps against himself.” Zechariah Chafee, Jr., *The Gitlow Case*, NEW REPUBLIC, July 1, 1925, at 141.

³⁶ See *Dennis v. United States*, 341 U.S. 494, 589 (1951) (Douglas, J., dissenting) (describing Communist Party leaders in the United States as “miserable merchants of unwanted ideas; their wares remain unsold”). Harold Laski’s belief in tolerance was grounded in similar reasoning. See Letter from Harold Laski to Oliver Wendell Holmes, Jr., July 5, 1918, in 1 HOLMES-LASKI LETTERS, *supra* note 18, at 159–60 (“I mean that there are all kinds of theories, e.g. Christian science, which

For these reasons, it is certainly possible that Holmes's statement in *Gitlow* was little more than the kind of shocking and provocative claim he was fond of, made in confidence that the ideas of proletarian dictatorship would never find a sufficient audience in the United States to make them a real threat to the country he loved and had been willing to die for.

III. THE SKEPTICAL HOLMES

But there are also reasons to think otherwise, reasons that suggest Holmes was quite serious in his commitment to an understanding of free speech that would enable fundamental, radical, even unimaginable, change to society and our system of government.

Perhaps the defining characteristic of Holmes as a thinker was his skepticism. Born in 1841, Holmes grew up in a world that was changing rapidly, a world in which "science superseded theology as the dominant discourse in American intellectual life"³⁷ and long-accepted verities were up for debate. Holmes was well aware of these changes and celebrated them. Writing in the *Harvard Magazine* as a seventeen-year-old freshman, he described his generation as "almost the first of young men who have been brought up in an atmosphere of investigation, instead of having every doubt answered."³⁸ Later, as a young lawyer in Boston, he joined the debate as a member of the Metaphysical Club, an informal discussion group that included the psychologist William James, the philosopher Chauncey Wright, and the mathematician Charles Sanders Peirce. Like the other members of the club, Holmes was heavily influenced by the scientific method and its embrace of probabilistic thinking. Rejecting the search for universal laws that had dominated an earlier era, these men believed one could never know anything for certain. Instead, one could only "know with greater or lesser degrees of probability."³⁹ Moreover, they believed that "all propositions are subject to perpetual testing. And that process of testing, whether it takes the form of systematic observation, controlled experiment, logical

seem to be stupid and wrongheaded, but looking at the natural history of such theories I don't think either their stupidity or wrongheadedness has a sufficient chance of survival to penalize the ideas themselves.").

³⁷ See LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 81 (2002)

³⁸ *Id.* at 81.

³⁹ *Id.* at 182.

derivation, or probabilistic calculation, must always hold out at least the possibility that prior understandings will be displaced.”⁴⁰

The result of this upbringing was that Holmes possessed a deep, almost radical, skepticism. He doubted the existence of timeless and universal truths. He believed that truth was contingent. He thought the universe was unknowable and that the best we can do is place wagers on it. “I believe that we can bet on the behavior of the universe in its contact with us,” he wrote to Sir Frederick Pollock in 1929. “We bet we can know what it will be.”⁴¹ That is why Holmes referred to himself as a “bettabilitarian.”⁴² That is also why he expressed such scorn for those who lacked his epistemic humility. “I detest a man who knows that he knows,” he wrote on one occasion.⁴³ “Certitude is not the test of certainty,” he wrote on another.⁴⁴

Paired with Holmes’s skepticism was a deep appreciation for the role of change and adaptation in law and society. This was not surprising. *On the Origin of Species* was published in 1859, the year Holmes turned eighteen, and it had a major influence on his thinking. Already predisposed to challenge authority and reject orthodoxy, he developed a strong aversion to anything that reeked of stasis, complacency, passivity, and conformity, and a profound respect for the novel, the surprising, the unexpected.⁴⁵ He read deeply and widely. He welcomed debate and disagreement. In the words of Edmund Wilson, he was “alert and attentive, always inquiring and searching, to find out some further answers.”⁴⁶

Holmes’s appreciation for change was reinforced by his own life experiences. One does not have to minimize the evil of slavery to acknowledge that the Thir-

⁴⁰ Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 20.

⁴¹ Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Aug. 30, 1929), in 2 HOLMES-POLLOCK LETTERS, *supra* note 29, at 251–52.

⁴² See Healy, *supra* note 24, at 116.

⁴³ Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Oct. 24, 1930), in HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, VOLUME II: 1926–1935, at 1291 (Mark De Wolfe Howe ed., 1953).

⁴⁴ Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

⁴⁵ See Blasi, *supra* note 40, at 20 (“He reserved his strongest ire for persons and philosophies that were not capable of adaptation or reassessment.”).

⁴⁶ EDMUND WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 781 (1962).

teenth Amendment brought about a radical overhaul in property rights. To a slaveholder in the early nineteenth century, the elimination of chattel slavery was no more imaginable than a guild takeover of industry was to a capitalist in 1925. Yet Holmes had seen the abolition of slavery after a brutal war. Not to mention the radical change brought about by the American Revolution, which had ended less than sixty years before Holmes was born and about which he recalled his grandmother talking.⁴⁷

Holmes also knew from his historical research that society was in a constant state of flux. He knew that legal regimes had changed dramatically over time. He was aware that ideas are eternally being adopted, adapted, rejected, and replaced. As he put it in *The Common Law*, “The truth is, that the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off.”⁴⁸ Holmes knew too that radical, fundamental change doesn’t happen all at once. It happens gradually, as society adjusts to changing circumstances and to the “felt necessities of the time.”⁴⁹ Rules laid down to deal with problems at one point in time are later altered to deal with new problems. While it is happening, the change appears superficial, incremental. But looking back from a distance, one can see that it is fundamental.

These two characteristics—his skepticism and his appreciation for change and adaptation—made Holmes unusually open to new ideas and to ways of thinking that were different from his own. One can see this in many of the positions he took over the years: in his approach to precedent and custom (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV”);⁵⁰ in his willingness to uphold laws he disagreed with (“I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law”);⁵¹ even in his view of our system of government

⁴⁷ See Remarks at a Dinner of the Alpha Delta Phi Club (Sept. 27, 1912), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 532 (Sheldon M. Novick ed., 1995) (recalling his grandmother describing the move “out of Boston when the British troops came in, before the Revolution”).

⁴⁸ Holmes, *supra* note 15, at 35.

⁴⁹ *Id.* at 1.

⁵⁰ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁵¹ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

(“The Constitution is an experiment”).⁵² One can also see it in his general attitude toward ideas. He once remarked that “all books are dead in 25 years,”⁵³ while on another occasion he observed that “every original book contains seeds of its own death in it.”⁵⁴

Holmes’s openness informed not only his thinking but his relationships as well. Unlike many men of his age and station, Holmes cultivated friendships with those outside his social class. He was a prolific letter writer who kept in close contact with an eclectic mix of correspondents: a Chinese law student, an Irish priest, a pacifist suffragette.⁵⁵ And in his later years, many of his closest friends were Jewish intellectuals half a century younger than him. Holmes’s less broadminded peers sometimes mocked him for his attachment to these men, with one asking him whether he was still “thoroughly Anglo-Saxon.”⁵⁶ But Holmes cherished his friendships with the younger generation. He delighted in their idealism, their exuberance, and their willingness to challenge conventional wisdom. According to one journalist at the time, he received “their ideas with the courtesy, admiration and speculative curiosity accorded to honored guests.”⁵⁷

This was true even though their ideas were often far different than his own. One of the truly striking things about Holmes is how close he was to young men whose ideas were genuinely radical. Harold Laski, who Holmes viewed almost like a son,

⁵² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁵³ Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (July 9, 1912), in 1 HOLMES-POLLOCK LETTERS, *supra* note 29, at 195; *see also* Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Dec. 31, 1911), in 1 HOLMES-POLLOCK LETTERS, *supra* note 29, at 188 (“Rosetti justifies to my mind my proposition that everything is dead in 25 years. What seemed to that lot (and very likely to all of us, then, exquisite and passionate speech now produces somewhat the effect of the fashions of the same time—self-conscious and faded and more or less bogus.”).

⁵⁴ Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Feb. 1, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 18, at 183.

⁵⁵ Respectively, John Wu, Canon Patrick Sheehan, and Rosika Schwimmer.

⁵⁶ Letter from Oliver Wendell Holmes, Jr. to Nina Gray (Mar. 5, 1921) (on file with the Harvard Law School Library).

⁵⁷ Elizabeth Shipley Sergeant, *Oliver Wendell Holmes*, NEW REPUBLIC, Dec. 8, 1926, at 61; *see also* ROBERT POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930, at 172 (2024) (“And unlike his conservative colleagues, Holmes took pleasure, amounting almost to empathy, at the fighting faiths of those with whom he philosophically disagreed.”).

had been a revolutionary syndicalist in England before coming to the United States. As a student at Oxford, he once led a raid on the House of Commons; another time, he planted a bomb in a railway lavatory.⁵⁸ Holmes may not have known about those exploits, but he certainly knew where his young friend stood on the class struggle. In Laski's first letter to Holmes, he enclosed a copy of the syndicalist tract *Reflections on Violence* by the French writer Georges Sorel, a vocal supporter of the Russian Revolution.⁵⁹ And Laski was candid about his desire for a guild takeover of the economy, going so far as to support a strike by the Boston police force in the fall of 1919. Instead of distancing himself from Laski, though, Holmes came to his defense when Harvard and the Boston establishment tried to run him out of town.⁶⁰

Holmes also engaged seriously with socialist ideas, reading numerous books on the subject and discussing them in letters to various correspondents.⁶¹ While serving on the Massachusetts Supreme Judicial Court, he even visited the home of a local labor leader to ask what the workers wanted. And although Holmes was not persuaded by the man's arguments, he told a friend that they had "discoursed several times with some little profit."⁶²

The point is that Holmes, remarkably for someone of his background and position, was not afraid of change. He did not think the world as he knew it was the only possible world. He believed, perhaps paradoxically, that change was constant. And he believed it was necessary to adapt in response to that change.

Thus, when Holmes contemplated a radical alteration in the society he had grown up in, he didn't recoil in horror as many of his peers did. He might not favor the alteration; he might argue against it; he might even fight against it. But he could display a remarkable degree of composure in the face of new and unsettling ideas, and he didn't fully understand those who reacted otherwise. "I do not see any rational ground for demanding the superlative — for being dissatisfied unless we are

⁵⁸ See Healy, *supra* note 24, at 32.

⁵⁹ Letter from Harold Laski to Oliver Wendell Holmes, Jr. (Sep. 13, 1916), in 1 HOLMES-LASKI LETTERS, *supra* note 18, at 20.

⁶⁰ See Healy, *supra* note 24, at 33, 127–31, 184–87.

⁶¹ See Oliver Wendell Holmes, Jr. to Harold J. Laski (Feb. 1920), in 1 HOLMES-LASKI LETTERS, *supra* note 18, at 96; see also Blasi, *supra* note 40, at 5 & n.17.

⁶² Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Jan. 20, 1893), in 1 HOLMES-POLLOCK LETTERS, *supra* note 29, at 44.

assured that our truth is cosmic truth, if there is such a thing,” he wrote in his essay *Natural Law*.⁶³

All of this suggests that when Holmes wrote his dissent in *Gitlow*, he was not engaged in mere bluster. He was drawing on a skepticism, an openness to change, and a respect for adaptation that was deeply embedded in his personality and his world view. He believed in the Constitution; he had been willing to give his life for it. But he also believed that “the Constitution is an experiment,”⁶⁴ and he knew that experiments sometimes fail.

IV. THE LIMITS OF HOLMES’S DISSENT

So I take Holmes at his word. When he writes in *Gitlow* that free speech requires us to accept speech that might lead to proletarian dictatorship, I believe he means what he says and that, unlike most advocates of tolerance, he has no plans to blink in the face of ideas that threaten his view of the world.

But there are important limits to Holmes’s dissent—limits that help to reconcile his openness to change with his pragmatism and love of country. To understand these limits, we must look again at his statement in *Gitlow*. For although Holmes could sometimes be careless or unsystematic in his thinking, he was not, in my estimation, a careless writer. He put considerable thought into his opinions, fussing over each word and aiming for both style and precision.⁶⁵ It is worthwhile, therefore, to look closely at what he writes in *Gitlow*:

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.

There are five phrases in this sentence that establish important limits on Holmes’s understanding of free speech.

⁶³ Holmes, *supra* note 44, at 43. He put the point slightly differently in a letter to Harold Laski: “A man who calls everyone a damn fool is like a man who damns the weather. He only shows that he is not adapted to his environment, not that the environment is wrong.” Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Feb. 1, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 18, at 183.

⁶⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁶⁵ See Healy, *supra* note 24, at 209; see also Budiansky, *supra* note 28, at 12 (“[T]o Holmes, the act of writing was above all the act of thinking. Finding the right words was not rhetorical ornamentation: it was the very essence of his work of thinking through a complex legal problem.”).

First, *in the long run*. Holmes emphasizes at several points in his dissent that the defendant's speech in *Gitlow* was not designed or likely to bring about an immediate change in the form of government. He notes that there was "no *present* danger of an attempt to overthrow the government by force," that the speech "had no chance of starting a *present* conflagration," and that the case might have presented a different question if there had been "an attempt to induce an uprising against government *at once*, and not at some *indefinite time in the future*."⁶⁶

Why is Holmes willing to accept efforts to achieve proletarian dictatorship "in the long run" but not immediately? It could be for the same reason Brandeis embraced the clear and present danger test: because harms in the future can be guarded against through counterspeech whereas immediate harms are harder to prevent.⁶⁷ But that answer isn't wholly convincing since Holmes is imagining a situation in which the harm—acceptance of proletarian dictatorship—does come to pass.

Instead, I think Holmes emphasizes the long run because he understands that societies evolve in ways that are difficult to predict ahead of time. An attempt to establish a proletarian dictatorship in 1925 would almost certainly result in violence and chaos since support for such an attempt would be minimal and opposition fierce. But in the distant future, who knows? The writers of the Left Wing Manifesto might gain adherents. The socialist movement might grow, capitalism might falter, and some day, years or decades from now, even those who once would have been horrified by the elimination of private property or a guild takeover of industry might change their minds, and proletarian dictatorship might come about through means viewed as legitimate.⁶⁸ Holmes had seen too much change, both in his own life and in his research for *The Common Law*, to rule out this possibility, and he did not view it as his job to place certain outcomes off limits.

⁶⁶ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (emphasis added).

⁶⁷ See *Whitney v. California*, 284 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

⁶⁸ See Blasi, *supra* note 40, at 31 (observing that Holmes "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").

Second, *the beliefs expressed*. Holmes makes clear that he is protecting only the expression of beliefs that might lead to proletarian dictatorship, not violent action that might bring it about. He confirms this in the final paragraph of his dissent, which he added in an attempt to retain the support of Chief Justice Taft, who had voted with the dissent at conference.⁶⁹ Explaining that the case might be different if there was evidence of an attempt to induce an uprising against the government, Holmes notes that “the indictment alleges the *publication*, and nothing more.”⁷⁰

Why does Holmes draw a distinction between the expression of beliefs and violent action? Here, I think the obvious answer is the correct one. Holmes is leaving open the possibility that society’s views about proletarian dictatorship might change over time, as its advocates make their case in the “competition of the market.”⁷¹ But persuading others of your views and attempting to impose those views by force are two different things, and Holmes’s belief in “justifiable self-preference” does not allow him to treat them the same. He is a liberal, not a chump. He believes a government can and should defend itself against violence, even as it leaves open the channels of change through the expression of beliefs.⁷²

Third, *destined to be accepted*. It is tempting to read Holmes’s reference to destiny here as a statement of resignation, as though fate will determine whether the United States becomes a proletarian dictatorship. I think that would be a mistake. As a skeptic of universal truth and an agnostic who viewed the universe as indifferent to human existence, Holmes was not inclined to believe in predestination. To the contrary, he placed primary emphasis on human agency. “The mode in which the inevitable comes to pass is through effort,” he wrote in his essay *Ideals and*

⁶⁹ See Robert Post, *The Enigma of Gitlow: Positivism, Liberty, Democracy, and Freedom of Speech*, 6 J. FREE SPEECH L. 569, 593–95 (2025). The attempt was unsuccessful; Taft ultimately signed on to the majority opinion.

⁷⁰ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting) (emphasis added). Brandeis, with Holmes joining, drew a similar distinction in his *Whitney* concurrence. See *Whitney*, 284 U.S. at 379 (Brandeis, J., concurring) (noting that there was evidence “which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member”).

⁷¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁷² See Budiansky, *supra* note 28, at 13 (“My old formula is that a man should be an enthusiast in the front of his head and a sceptic in the back. Do his damndest without believing that the cosmos would collapse if he failed. One should have the same courage for failure that many have for death.”).

Doubts. “Consciously or unconsciously we all strive to make the kind of a world that we like.”⁷³

Thus, I do not read his dissent in *Gitlow* as fatalistic. I read it as an acknowledgement that the beliefs expressed in proletarian dictatorship might prevail in the battle of ideas. But the flip side of this acknowledgment is that those beliefs might also be defeated. The outcome is in our hands, and Holmes is not making a prediction one way or the other. He is instead reminding us that the future we want comes about only through struggle, and that “there is every reason for doing all that we can to make a future such as we desire.”⁷⁴ If we want to preserve free speech and democracy, in other words, we must fight for it—not by barring the expression of disagreeable ideas but by proving that our own ideas are superior.

Fourth, *the dominant forces of the community*. It is not enough for Holmes that the beliefs expressed in proletarian dictatorship are accepted by a few, for the few can impose their preferred form of government on the many only through coercion and violence. Instead, the future Holmes is prepared to accept is one in which proletarian dictatorship is accepted by “the dominant forces of the community.” This increases the odds that such a dictatorship will come about not through violent revolution but through some peaceful and orderly means—and in conformity with the community’s wishes, not in defiance of them.

But note that Holmes refers to “the dominant forces of the community,” not to a “majority of the community.” What is the significance of this distinction? I view it as a recognition by Holmes that numerical majorities do not necessarily control the destiny of a country. That destiny is often controlled by a smaller segment of society that has the ability to bring the rest along without coercion. With the support of that segment, even a numerical minority can prevail; without it, a numerical advantage alone is unlikely to be sufficient.

In his own time, I expect Holmes would have viewed the dominant forces as including the industrialists and capitalists who controlled much of the nation’s wealth, which means that the prospect of proletarian dictatorship prevailing was slim. But I also expect he would have recognized that the identity of the dominant forces can change over time. If the socialists gained converts and community sentiment shifted in their favor, the industrialists might lose some of their dominance.

⁷³ Oliver Wendell Holmes, Jr., *Ideals and Doubts*, in *COLLECTED LEGAL PAPERS* 305 (1920).

⁷⁴ *Id.*

Or they might switch sides to stay in power and minimize their losses. In either scenario, proletarian dictatorship could come about in a non-revolutionary way only if the dominant forces—whoever they might be—accepted its premises.

Fifth, *given their chance*. Holmes believed in competition. He believed that each side in a contest should have a fair opportunity to make its case and achieve its goals. This was evident as far back as *Vegelahn v. Guntner*,⁷⁵ a labor decision he dissented from as a judge on the Massachusetts Supreme Judicial Court. Objecting to an injunction that prohibited two or more union members from picketing outside their workplace, he invoked the policy of “free competition,” which he deemed synonymous with the “free struggle for life.”⁷⁶ The workingman and the capitalist were engaged in such a struggle, he declared, the former “to get the most he can for his services,” the latter to get those services “for the least possible return.”⁷⁷ And if capitalists were permitted to join forces in this struggle, he argued, workers should be allowed to as well. “Combination on one side is patent and powerful,” he wrote. “Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equitable way.”⁷⁸

Holmes reaffirmed this view two decades later in *Abrams* when he wrote that “the best test of truth is the ability of the thought to get itself accepted in the competition of the market.”⁷⁹ In both cases, he opposed rules that would disadvantage one side in a contest, effectively rigging the result ahead of time. Yet giving the other side “their chance” is not the same as ceding the field. As with his reference to destiny above, Holmes should not be interpreted as predicting a winner or advising resignation. He is asserting only that the competition must be open to all comers, to the advocates of laissez-faire capitalism as well as to the proponents of proletarian dictatorship.

V. AN INESCAPABLE CHOICE

The limitations reflected by these five phrases serve to blunt the more drastic implications of Holmes’s statement in *Gitlow*. He is not suggesting that a democratic government committed to free speech is powerless to protect itself against

⁷⁵ 167 Mass. 92 (1896).

⁷⁶ *Id.* at 107 (Holmes, J., dissenting).

⁷⁷ *Id.* at 108.

⁷⁸ *Id.*

⁷⁹ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

imminent attempts at violent overthrow. He is arguing only that such a government must allow for the expression of beliefs that could, over the long run, lead the dominant forces of the community to accept a radically different form of government. If that were to happen, he concludes, those beliefs must be permitted to *have their way*.

But although these limitations help to reconcile Holmes's dissent with his pragmatism and patriotism, they do not resolve the free speech paradox. If the reason Holmes supports the freedom to advocate for radical change is because such freedom is necessary for society to adapt and evolve, he should be troubled by the possibility of a proletarian dictatorship regardless of when or how it comes about. Such a government would almost certainly do away with the very freedom Holmes supports for its adaptation-enhancing attributes. So why isn't he willing to limit free speech now in order to preserve it later?

I can think of several possible answers. First, it is conceivable that a proletarian dictatorship would not do away with free speech. We don't know exactly what Holmes had in mind when he contemplated proletarian dictatorship. Nor do we know precisely what the authors of the Left Wing Manifesto had in mind. In his trial testimony, Benjamin Gitlow described proletarian dictatorship as "a form of government that is based on representation of industry. . . . The men in the shoe industry vote as shoe workers and choose their representatives to the council in the government, and the national government is the representative of the working class."⁸⁰ The Left Wing Manifesto described proletarian dictatorship as a transitional stage designed "to end class divisions and class rule, to realize the industrial self-government of the workers which alone can assure peace and liberty to the peoples."⁸¹ Both descriptions allow for the possibility that a proletarian dictatorship might retain some aspects of a liberal democracy, including free speech.

Admittedly, this is a slim possibility. We know with the advantage of hindsight that proletarian dictatorships almost always maintained their dictatorial quality, and that rights such as free speech were rarely recognized. But even if Holmes was not counting on a proletarian dictatorship to protect free speech, he might have thought it would still be vulnerable to challenge and change. As Vincent Blasi has pointed out, "Even in a regime that represses dissent systematically and without

⁸⁰ LENDLER, *supra* note 13, at 43.

⁸¹ Post, *supra* note 69, at 585.

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.”⁸² Blasi concedes that it is unclear whether such underground dissent is sufficient “to effectuate the evolutionary process.” But Holmes may have thought it was. As he put it in *Natural Law*, “A dog will fight for his bone.”⁸³

The problem with this resolution of the paradox is that it would seem to conflict with Holmes’s view that change should come about through the open exchange of ideas rather than through force or subversion. And even if one supports the use of violence to overthrow a repressive regime (as Holmes surely would), it’s hard to see how this solves the basic problem, which is that allowing advocacy of proletarian dictatorship could lead to a system in which the evolutionary process that free speech enables is blocked and the only way to bring about change is through bloodshed. How could Holmes accept this? How can we?

Perhaps the answer is that there is no better choice for someone committed to free speech. Yes, allowing advocacy of proletarian dictatorship runs the risk that free speech will be curtailed later. But not allowing such advocacy guarantees that it will be curtailed now. There is no sure way to preserve free speech in the long run, but there is one sure way to lose it—by turning one’s back on it in anticipation that someone else might do the same down the road. In the words of Alexander Meiklejohn, one of the few modern thinkers to agree with Holmes’s *Gitlow* dissent, “Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves.”

Is this a sufficient answer? Could we not allow a modest exception to free speech now to ensure it is not eliminated entirely in the future? Is it really such an all or nothing proposition?

Holmes does not explicitly address this objection in *Gitlow*, but he did allude to it in a letter to his friend Lewis Einstein a month after the *Gitlow* ruling. “[T]he usual notion is that you are free to say what you like if you don’t shock me,” he wrote. “Of course, the value of the Constitutional right is only when you do shock

⁸² Blasi, *supra* note 40, at 32–33.

⁸³ Holmes, *supra* note 44, at 42.

people.”⁸⁴ His point, as I interpret it, is that carving out exceptions for the speech we fear most is tantamount to carving the heart out of the First Amendment. There is no middle path, in Holmes’s view, no way out of the paradox. Free speech will eat itself (in theory at least) one way or the other. Our only choice is whether we will sacrifice it now or fight to preserve it as long as we can.

CONCLUSION

Holmes once wrote that “a paradox takes the scum off your mind.”⁸⁵ Like many of his aphorisms, this one has a cryptic quality that makes it difficult to comprehend on first reading. But if we reflect on it for a moment, his meaning becomes evident. Scum is the layer of dirt or residue that builds up over time on a surface that hasn’t been cleaned or attended to. It is a sign of laziness and neglect, and it clouds our vision. When we remove the scum, from a window or a body of water, things that were previously obscured come into view.

That is what Holmes is doing in his *Gitlow* dissent. By reminding us that free speech allows for the expression of ideas that might lead to the destruction of free speech itself, he is attempting to clarify our thinking. He is forcing us to confront the difficult choice we face, to understand what we gain and what we risk when we commit to free speech. He embraces the paradox of free speech not to frighten us away from its implications, but to help us see its meaning more clearly.

⁸⁴ Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (July 11, 1925), in *THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903–35*, at 243–44 (James Bishop Peabody ed., 1964). Justice Jackson made a similar point two decades later. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“The freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. It means freedom to differ as to things that touch the heart of the existing order.”).

⁸⁵ Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Dec. 23, 1921), in *HOLMES-FRANKFURTER LETTERS*, at 133.

