THE FUNDAMENTAL HOLMES

No figure stands taller in the world of First Amendment law than Oliver Wendell Holmes Jr. This is the first anthology of Justice Holmes's writings, speeches, and opinions concerning freedom of expression. Prepared by a noted free speech scholar, the book contains eight original essays designed to situate Holmes's works in a historical and biographical context. The volume is enriched by extensive commentaries concerning its many entries, which consist of letters, speeches, book excerpts, articles, state court opinions, and U.S. Supreme Court opinions. The edited materials – spanning Holmes's 1861–64 service in the Civil War to his 1931 radio address to the nation – offer a unique view of the thoughts of the father of the modern First Amendment. The book's epilogue, which includes a major discovery about Holmes's impact on American statutory law, explores Holmes's free speech legacy. In the process, the reader comes to know Holmes and his jurisprudence of free speech as never before.

Ronald K. L. Collins is the Harold S. Shefelman Scholar at the University of Washington School of Law. He is a noted authority on free speech law. His last book, *The Trials of Lenny Bruce* (with David Skover), was selected by the *Los Angeles Times* as one of the best books of the year. Collins is the coauthor (with Sam Chaltain) of the forthcoming *We Must Not Be Afraid to Be Free: Stories of Free Speech in America*. His scholarly articles have appeared in the *Harvard Law Review*, *Stanford Law Review*, and *Supreme Court Review*, among other places. He is also a Fellow at the First Amendment Center.

Photo of Holmes's study in his home in Washington, D.C. Holmes frequently read in the leather chair to the right of his desk. The crossed swords over the mantle and other military paraphernalia all belonged to his grandfather, Charles Jackson, and had been used in the Indian Civil Wars. Courtesy of Historical & Special Collections, Harvard Law Library.

The Fundamental Holmes

A FREE SPEECH CHRONICLE AND READER

Selections from the Opinions, Books, Articles, Speeches, Letters, and Other Writings by and about Oliver Wendell Holmes Jr.

Edited with essays, notes, and comments by

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To
Susan Abby Cohen

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge.

– Justice Oliver Wendell Holmes, dissenting in
Abrams v. United States (1919)

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Timeline: Holmes's Life and Free Speech Jurisprudence, 1841–1935

1841	
March 8:	Born in Boston to Oliver Wendell Holmes Sr. and Amelia Lee Jackson.
1857	
Autumn:	Enters Harvard College.
1861	
April:	Withdraws, without permission, from senior class at Harvard and enlists as a private in the New England Guards, a Boston unit of the Massachusetts Volunteer Militia, commonly known as the Fourth Battalion of Massachusetts Volunteers.
May 25:	Tour of duty ends. Returns to Harvard after a short duty of service and after his battalion breaks up.
July 17:	Graduates from Harvard College.
July 23:	Commissioned first lieutenant in Company A of Twentieth Regiment Massachusetts Volunteers, a three-year regiment.
October 21:	Wounded at the Battle of Ball's Bluff in Virginia.
1862	
September 17:	Shot through the neck and wounded at Antietam Creek, Maryland.
1863	
May 3:	Wounded (shot in heel) at Fredericksburg, Virginia.
1864	
July 17:	End of military service, discharged at Petersburg, Virginia.
September:	Enters Harvard Law School.
1866	
Summer:	Graduates from Harvard Law School.
1867	
March 4:	Admitted to the Massachusetts Bar. Enters private practice at Chandler, Shattuck, and Thayer.

1870
Spring: Serves as Harvard College lecturer in constitutional law.
October: Becomes coeditor of the *American Law Review*.
1871
April 28: President and Fellows of Harvard appoint Holmes the university lecturer on jurisprudence at Harvard College.
1872
June 17: Marries Fanny Bowditch Dixwell.
1872–73 Fills post of lecturer in jurisprudence at Harvard Law School.
1873 "Gas-Stokers' Strike" article published in the *American Law Review*.
December: *Kent's Commentaries* (12th ed.) published with Holmes as editor.
1880
November–December: Gives Lowell Lectures on the common law.
1881
February: *The Common Law* published shortly before his fortieth birthday.
1882
September: Starts teaching at Harvard Law School.
December: Resigns Harvard post and accepts appointment to Supreme Judicial Court of Massachusetts.
1884
May 30: Memorial Day Address at Keene, New Hampshire.
June 27: *Cowley v. Pulsifer* decided (majority opinion).
1887–89 Mother and sister die.
1892
January 6: *McAuliffe v. Mayor of New Bedford* decided (majority opinion).
1893
June 21: *Hanson v. Globe Newspaper Co.* decided (majority opinion).
1894 "Privilege, Malice, and Intent" published in the *Harvard Law Review*.
October 7: Oliver Wendell Holmes Sr. dies at the age of eighty-five.
1895
January 1: *Commonwealth v. Davis* decided (majority opinion).
May 30: Delivers Memorial Day address "The Soldier's Faith."
1896
October 26: *Vegelahn v. Guntner* decided (dissent).
1897
January 8: Delivers "The Path of the Law" lecture at Boston University, which is later published in the *Harvard Law Review*.
1899
August 2: Becomes chief justice of Massachusetts Supreme Judicial Court.
1901
January 1: *Commonwealth v. Peaslee* decided (majority opinion).

1902
August 11: At the age of sixty-one, nominated to the U.S. Supreme Court by President Theodore Roosevelt, recess appointment.
December 4: Unanimously confirmed by Senate.
December 8: First day as associate justice, U.S. Supreme Court.

1903
March 13: Remarks at a meeting of the Second Army Corps Association, Washington, D.C.

1904
May 16: Votes with the majority upholding the Alien Immigration Act, in *United States ex rel. Turner v. Williams*, in which a First Amendment claim was raised.

1905
April 17: *Lochner v. New York* decided (dissent) (economic due process).

1907
April 15: *Patterson v. Colorado* decided (majority opinion).

1909
January 18: *Moyer v. Peabody* decided (majority opinion) (habeas corpus).
May 17: *Peck v. Tribune Co.* decided (majority opinion).

1912
Early that year: Befriended by Harvard Professor Felix Frankfurter.
January 9: *Gandia v. Pettingill* decided (majority opinion).

1915
February 23: *Fox v. Washington* decided (majority opinion).

1916
June 1: Brandeis confirmed by the Senate (47–22).
July: Felix Frankfurter introduces Holmes to Harold Laski. *Harvard Law Review* tribute to Holmes on the occasion of his seventy-fifth birthday.

1918 "Natural Law" published in the *Harvard Law Review*.
June 10: *Toledo Newspaper Co. v. United States* decided (dissent).
December 3: Draft of Holmes's dissent in *Baltzer v. United States* distributed.

1919
March 3: *Schenck v. United States* decided (majority opinion).
March 10: *Debs v. United* States and *Frohwerk v. United States* decided (majority opinions).
November 10: *Abrams v. United States* decided (dissent).

1921
March 7: *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson* decided (dissent).
December 19: *American Column & Lumber Co. v. United States* decided (dissent).

1922
February 27: *Leach v. Carlile* decided (dissent).
1924
June 2: Receives the Roosevelt Medal of Freedom.
1925
June 8: *Gitlow v. New York* decided (dissent).
1929
April 30: Wife Fanny Holmes dies at the age of eighty-nine.
May 27: *United States v. Schwimmer* decided (dissent).
1931
March 8: National radio address on occasion of his ninetieth birthday.
August: Suffers mild heart attack.
1932
January 12: Retires from the Supreme Court.
1935
March 6: Dies of bronchial pneumonia, two days before his ninety-fourth birthday.
March 8: Funeral service at All Souls Unitarian Church. Buried at Arlington National Cemetery.

Prologue: The Father of the Modern First Amendment

He liked the idea of risk.
– Louis Menand[1]

Holmes's footprint on the American law of free speech is gigantic. Like Atlas, he is a titan in that world. No one else quite casts a shadow so long. Although James Madison is the grand pater of the historical First Amendment, its modern father figure is surely Justice Oliver Wendell Holmes Jr. (1841–1935). His thought can be found in bold relief in many Supreme Court opinions on freedom of expression, in every contemporary history of the subject, in every casebook and textbook used in law schools and in colleges, and in every serious scholarly treatment of the matter. This is so because "Holmes laid the foundations . . . for the expansive modern view of free speech. . . . "[2] Having done so, he then "left a profound imprint on the law of free speech."[3] Without exaggeration, then, it would be impossible to have any serious discussion of modern free speech theory or law without some consideration of his views.

But from what well does Holmes's fame spring? Does it derive mainly from three opinions – *Schenck v. United States*, *Abrams v. United States*,

[1] Louis Menand, "Bettabilitarianism," *New Republic*, November 11, 1996, at 56 (reviewing *The Collected Works of Justice Holmes*). *See also* Oliver Wendell Holmes Jr., "Remarks at the Dinner of the Chicago Bar Association," October 21, 1902, reproduced in Sheldon M. Novick, ed., *The Collected Works of Justice Holmes* (Chicago: University of Chicago Press, 1995), at 3:532–33 ("If [a judge] aims at the highest, he must take risks."); Max Lerner, *Ideas are Weapons* (New York: Viking Press, 1939), at 56–57, 63 (noting the "gambler" aspect of Holmes's character).

[2] Richard A. Posner, ed., *The Essential Holmes* (Chicago: University of Chicago Press, 1992), at xii.

[3] Richard A. Posner, "Foreword, Symposium: The Path of the Law 100 Years Later: Holmes's Influence on Modern Jurisprudence," 63 *Brooklyn Law Review* 7, 8 (1997).

and *Gitlow v. New York* – issued late in the long life span of this great jurist and scholar? If so, did the ideas for those landmark opinions jet out of his psyche with a singular thrust of insight, or were there some seeds that had been stirring in the soil of his mind for years or even decades before? As with so many other great figures in law, the answer is a combination of both, and yet other things, too.

Fame in the free speech arena did not come to Holmes either early or easily. It is revealing that most commentators have confined their commentary to that corpus of Holmes's free speech jurisprudence that centered on a handful of his later opinions in cases decided between 1919 and 1925.[4] This is so notwithstanding the fact that, by the time the justice sat down to author his two legendary wartime opinions – *Schenck* and *Abrams* – he had already been writing on free speech for several decades in almost a dozen state and federal cases, not to mention his various scholarly publications.

Generally speaking, two things are characteristic of Holmes's pre-1919 Supreme Court opinions: He seldom voted to sustain a claim of free speech or free press, and he seldom, if ever, wrote judicial opinions with the verve so characteristic of his most memorable First Amendment opinions. And yet that pre-1919 body of work did play a role in the evolution of his thought bearing on freedom of expression. In some illuminating ways, Holmes's early writings shed important light on his later First Amendment jurisprudence as evidenced, for example, by his 1896 dissent in *Vegelahn v. Gunter*, a labor-picketing case. In that state court opinion, rendered nearly a quarter century prior to *Schenck* and *Abrams*, Judge Holmes stressed the importance of "free competition"[5] in ideas, be they economic or political ones. In such writings, we see a few jurisprudential seeds germinating. So, too, with Holmes's pre-1919 scholarly writings, wherein his theories of liability, foreseeability, proximity, conspiracy, and social policy are a part of the thinking that would later blossom in his great free speech opinions.

Still, the path to those opinions – especially the analytical toll road from *Schenck* to *Abrams* – was not always linear or consistent. As a scholar, jurist, essayist, public speaker, and habitual letter writer, he did not run from contradictions. On the one hand, he much admired the philosopher with a grand sweep of theories. "[T]he chief end of man is to form general

[4] *Cf.* Silas Bent, *Justice Oliver Wendell Holmes: A Biography* (New York: Vanguard Press, 1932), at 179–242 (discussing certain state court opinions by Holmes).
[5] 167 Mass. 92, 106 (1886) (Holmes, J., dissenting).

ideas,"[6] is how he once phrased it. To discover those unifying principles or "general propositions"[7] made life meaningful. In that sense, he was a philosopher with a keen eye to first principles. On the other hand, the same Holmes could add, with no less confidence, "no general proposition is worth a damn."[8] In that sense, he was a pragmatist with an ardent interest in context. Holmes was also like Faust's Mephistopheles; sometimes he liked to "provoke, dazzle and puzzle."[9] This side of him invited "stimulating paradoxes."[10] Or as he once told Harold Laski: "There is nothing like a paradox to take the scum off your mind."[11]

It is against that conceptual setting that we come upon Holmes's oft-repeated maxim in *Schenck v. United States* about "falsely shouting fire in a theatre," and his celebrated clear-and-present-danger test from the same opinion.[12] Few phrases in the law have enjoyed more generalized application; few propositions have been invoked with greater certitude; and few have been summoned forth more often in the absence of critical thinking. Too many times, they have become almost talismanic in our jurisprudence of free speech. Despite the occasional value of such general propositions, it is easy to forget Holmes's admonition: "Too broadly generalized conceptions are a constant source of fallacy."[13] More to the point, he also held that it "is one of the misfortunes of the law that ideas become

[6] Letter from Holmes to Morris R. Cohen in Felix S. Cohen, "The Holmes-Cohen Correspondence," 9 *Journal of the History of Ideas* 1, 8 (1948).

[7] Letter from Holmes to Sir Frederick Pollock, in Mark DeWolfe Howe, ed., *The Holmes-Pollock Letters* (Cambridge, MA: Harvard University Press, 1941), at 2:13.

[8] *Ibid.*

[9] Mathias Reimann, "Lives in the Law: Horrible Holmes," 100 *Michigan Law Review* 1676, 1683 (2002). On Holmes as a pragmatist, compare Max Fisch, "Justice Holmes, The Prediction Theory of Law, and Pragmatism," 39 *Journal of Philosophy* 85 (1942) (portraying Holmes as pragmatist) with Patrick J. Kelley, "Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument," 14 *Southern Illinois Law Journal* 427 (1990) (portraying Holmes as positivist). Perhaps the best single treatment of Holmes as a pragmatist thinker is to be found in Thomas Grey's opus, "Holmes and Legal Pragmatism," 41 *Stanford Law Review* 787, 792 (1988), wherein he engages in a "binocular effort to present pragmatism through the lens of Holmes while at the same time presenting Holmes through the lens of pragmatism."

[10] Thomas C. Grey, "Plotting the Path of the Law," 63 *Brooklyn Law Review* 19, 32 (1997).

[11] Holmes to Laski, December 22, 1921, in *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1935* (Cambridge, MA: Harvard University Press, 1953), at 1:389.

[12] 249 U.S. 47, 52 (1919).

[13] *Lorenzo v. Worth*, 170 Mass. 598, 600 (1898).

encysted in phrases and thereafter for a long time cease to provoke further analysis."[14]

In the jurisprudential swirl of things, let us not forget that the man who wrote with magisterial eloquence about the importance of tolerating "noxious" legislation in the name of state experimentation[15] was likewise the one who readily struck down state legislation in the name of experimentation in search of elusive truths.[16] So, too, the jurist who championed judicial restraint in *Lochner v. New York* (1905)[17] was also the jurist who allowed the Fourteenth Amendment to be tapped to strike down another law enacted by the same state in *Gitlow v. New York* (1925). In other words, Holmes was very much the inventor (or one of the main ones) of the "double standard in constitutional adjudication that is so conspicuous a feature in modern constitutional law: laws restricting economic freedom are scrutinized much less stringently than those restricting speech and other noneconomic freedoms."[18] So, Holmes had his enigmatic side.[19] He could be of two minds even as he forged ahead in first developing common law principles and then in transforming them into constitutional ones adorned with majestic phrases bearing on the law of the First Amendment.

As one peeks behind the curtain of Holmes's great trio of First Amendment cases, one sees a wizard far less enamored of the plight of those on

[14] *Hyde v. United States*, 225 U.S. 347, 390 (1912) (Holmes, J., dissenting).

[15] *See Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). *Accord Baldwin v. Missouri*, 281 U.S. 586, 595 (Holmes, J., dissenting) (Fourteenth Amendment economic due process).

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

[17] 198 U.S. 45, 74 (1905) (Holmes, J. dissenting) (economic due process).

[18] *The Essential Holmes*, *supra* note 2, at xii. Compare G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), at 281 ("To the extent that he did consider constitutional questions during his Massachusetts tenure, . . . Holmes gave no indication of treating economic and noneconomic issues differently."); Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (Cambridge, MA: Harvard University Press, 1938), at 50 ("the liberty of man to search for truth was of a different order that some economic dogma. . . . ").

[19] In the most extended single book treatment of Holmes's overall free speech jurisprudence, H. L. Pohlman offers the following assessment: "Justice Holmes had a coherent and a moderately protective doctrine of free speech. He was not speech's greatest defender, but he was hardly hostile to it or insensitive to its value." *Justice Oliver Wendell Holmes: Free Speech and the Living Constitution* (New York: New York University Press, 1991), at 254. For an assessment of a different order, see G. Edward White's useful summary and thoughtful critique of Holmes's free speech jurisprudence in *Justice Oliver Wendell Holmes*, *supra* note 18, at 412–54, 607.

whose behalf he sometimes wrote so passionately. This is evidenced not only by Holmes's dismal free speech record while on the Massachusetts high court, and his equally disappointing pre–*Debs v. United States* (1919) voting record in the U.S. Supreme Court, but also by some of his personal comments about those whose free speech cause he occasionally championed. Take, for example, Holmes's memorable dissent in *United States v. Schwimmer* (1929),[20] wherein the eighty-eight-year-old jurist came to the legal defense of a pacifist immigrant. Holmes, his liberal reputation notwithstanding, had little sympathy for the radical likes of Rosika Schwimmer and her crowd. He thought such "dame[s]" to be "damned fools" who harbored "silly" ideas grounded in a "hyperaethereal respect for human life."[21] Hardly the words of a Brandeis progressive. The point, however, is not to denounce Holmes but to place the man and his free speech jurisprudence in a fuller and more illuminating frame.[22]

When new light is cast on Holmes and his work, it appears both convincing and disappointing, one and the same. "Brilliantly insightful here, analytically unpersuasive there, rhetorically robust elsewhere" is the impression sometimes left with the attentive reader. It makes one wonder whether his influence was due more to his rhetoric than to his reasoning. Was the charm of his word craft[23] and phrasemaking, often penned in longhand at a stand-up desk, so great as to overwhelm the minds of his audience? Did his hyperbole hide the incongruities of his jurisprudence? That is, was he a "great judge *because* he was a great literary artist"?[24] It is easier

[20] That dissent inspired the title of a recent book published by the Pulitzer Prize–winning columnist Anthony Lewis. The title *Freedom for the Thought We Hate* (New York: Basic Books, 2007) comes from Holmes's dissent in *Schwimmer*.

[21] Holmes to Harold Laski, April 13, 1929, in *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1935* (Cambridge, MA: Harvard University Press, 1953), *supra* note 11, at 2:1146. *See also* Ronald Collins and David Hudson, "Remembering 2 Forgotten Women in Free-Speech History," First Amendment Center, http://www.firstamendmentcenter.org/analysis.aspx?id=19957.

[22] Although some who see him as an "[a]theist, Darwinian, eugenicist, moral relativist, aesthete, and man of the world" (*The Essential Holmes*, *supra* note 2, at xvi) have roundly condemned him.

[23] *See* Richard A. Posner, *Law and Literature*, rev. ed. (Cambridge, MA: Harvard University Press, 1998), at 266–73; Bernard Schwartz, *Main Currents in American Legal Thought* (Durham, NC: Carolina Academic Press, 1993), at 394–96. See also Appendix 1 to this volume.

[24] *The Essential Holmes*, *supra* note 2, at xvii (emphasis in original). In 2002, Holmes received a posthumous Burton Award for being "the best judicial writer of the twentieth century" as judged by law school deans.

to answer that question if we have before us other works by Holmes – books,[25] opinions, articles, and speeches – by which to compare how he offers up his thoughts. Some were wooden, others unimaginative, and still others poorly reasoned. But when he wished, he could write in such a way as to make words "feathered arrows . . . that carried to the heart of the target. . . ."[26] Though he could be self-indulgent at times, he nonetheless had an uncanny ability to compact his thought into the confines of a powerful paragraph or a poignant sentence or a poetic phrase. By that gauge, were his metaphors, like the shouting "fire" in *Schenck*, more misleading than informative? Or maybe not? Then again, was the inspiring rhetoric in his *Abrams* dissent akin to the heroic rhetoric in his 1895 "Soldier's Faith" speech? If so, then Holmes was a "writer-philosopher" capable of infusing "literary skill and philosophical insight into his legal work."[27]

In all of the foregoing ways and others, we stand to experience a far richer understanding of Holmes's free speech jurisprudence if we do not cabin ourselves to a few First Amendment opinions penned by the octogenarian while he sat on the Supreme Court. In addition, there is more to Holmes's thinking than mere words or ideas or principles or even his pragmatism. There is the *man*. His understanding of freedom of expression, like his constitutional jurisprudence generally, simply cannot be removed from the cauldron of his own life experiences:

- The son of a great physician and poet descended from a great family[28]
- A Harvard-educated man
- An impressionable student exposed to the poetic thoughts of Ralph Waldo Emerson and the scientific theories of his day[29]
- An educated man who read Greek, French, and German
- The editor of the *American Law Review* and *Kent's Commentaries*
- A lawyer who argued cases in the state and federal high courts

[25] In *The Common Law* (1881), Holmes prefaced a relatively dull written work with one of the most famous passages in law: "The life of the law has not been logic: it has been experience."
[26] Francis Biddle, *Mr. Justice Holmes* (New York: Charles Scribner's Sons, 1943), at 2.
[27] Posner, *The Essential Holmes*, *supra* note 2, at xvi.
[28] Consider the father-son relationship as discussed in Peter Gibian, "Style and Stance from Holmes Senior to Holmes Junior," in *The Legacy of Oliver Wendell Holmes, Jr.*, ed. Robert W. Gordon (Palo Alto, CA: Stanford University Press, 1992), at 186–215.
[29] *See* Joseph A. Russomanno, "The Firebrand of My Youth: Oliver Wendell Holmes and the Influence of Emerson," 5 *Communications Law and Policy* 33 (2000).

- An intellectual who in his spare time read books voraciously (some 3,475),[30] including books on history, philosophy, anthropology, economics, and language
- The author of scholarly works, including *The Common Law*
- A state high-court jurist (1882–1902)
- A man with an amazing circle of friends and colleagues (e.g., Sir Frederick Pollock, Learned Hand, Zechariah Chafee, Harold Laski, Felix Frankfurter, Louis Brandeis) who likewise played a crucial role in the development of his thought
- A gifted speaker who delivered many powerful "occasional addresses" and the like
- A voluminous letter writer who often revealed his thinking in more candid, condescending, passionate, and philosophical ways[31] in the countless letters he penned[32]
- A man who relished and collected prints and engravings by great artists
- A man with an enormous ambition who wished to be seen as a great cultural figure[33]

It was undeniable: Holmes's ambition made him; his rivalrous mindset invigorated him; his passion (for life and sometimes romantic love) delighted him; his wit charmed others; his mind impressed many; and his heroic spirit when expressed in speeches left still others awestruck. Then again, Holmes could be cold, detached, elitist, and even puritanical at times. In his near century of living, no single life experience influenced his thinking about free speech and other matters more than his military service during the Civil War. At the age of twenty, in July 1861, he enlisted in the Union Army. That three-year experience – first grounded in the earth of the calamity of the Battle of Ball's Bluff, where he almost

[30] *See* John S. Monagan, *The Grand Panjandrum: Mellow Years of Justice Holmes* (Lanham, MD: University Press of America, 1988), at 103–08.

[31] *See* G. Edward White "Holmes as Correspondent," 43 *Vanderbilt Law Review* 1707 (1990) (an informative and insightful analysis of Holmes's letter writing). *See also* Henry Steele Commager, "Justice Holmes in His Letters," *New York Times*, March 23, 1941, Book Review, at 1.

[32] Remarkably, to this day many, even thousands, of his letters remain unpublished. There are thirty-two thousand items in the Harvard Law School collection of Holmes papers; they span the years 1861–1935. The story of the posthumous publication of many of Holmes's writings is complicated. See Robert M. Mennel and Christine L. Compston, eds., *Holmes and Frankfurter: Their Correspondence, 1912–1934* (Hanover, NH: University Press of New England, 1996), at xxix–xlii.

[33] *See* G. Edward White, "Holmes's 'Life Plan': Confronting Ambition, Passion, and Powerlessness," 65 *New York University Law Review* 1409 (1990).

died – remained with Holmes and shaped his views of life and law. Recall, for example, those lasting lines from his *Abrams* dissent:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .

Earlier, on the occasion of an 1884 Memorial Day Address, he noted that his life and those of his fellow Civil War soldiers had been "set apart by its experience," one that touched the hearts of all who fought "with fire."[34] Or as he put it a decade or so later in his "Soldier's Faith" remarks: "I believe that struggle for life is the order of the world, at which it is vain to repine."[35] That contact with war was the "maturing force in Holmes's life."[36] Indeed, both literally and metaphorically, it left him a marked man. In a still larger sense, the Civil War also left its mark on the mind of America. Although that war alone did not make America modern, it nonetheless helped usher in "the birth of modern America."[37] There was a transformation in ideas, a different lens by which to view life and law, and also a different way of conceptualizing freedom. Holmes, ever the soldier, played a vital role in the transformation.

Hence, an effort has been made in the pages that follow to develop a picture of Holmes's free speech jurisprudence that offers up his own emerging thoughts against the backdrop of his various life experiences.

The measure of a great man, Holmes once wrote, is this: "The men whom I should be tempted to commemorate would be the originators of transforming thought." He was referring to John Marshall, that "great ganglion in the nerves of society. . . ."[38] To put it another way, a great thinker is one whose ideas are so immense (or swollen) as to transform our own opinions about the things that matter most to us. If that is indeed the

[34] Memorial Day Address, May 30, 1884, reproduced in *The Collected Works of Justice Holmes*, supra note 1, at 3:462, 467.
[35] *Ibid.*, at 3:486, 487.
[36] Max Lerner, *The Mind and Faith of Justice Holmes* (New York: Little, Brown, 1946), at 5. More about this matter is set out in the introductory essay to Part I, wherein "The Memorial Day Address," "The Soldier's Faith," and Holmes's remarks to the Second Army Corps Association are excerpted. *See generally* Mark DeWolfe Howe, ed., *Touched with Fire: Civil War Letters and the Diary of Oliver Wendell Holmes, Jr.* (New York: Fordham University Press, 2000).
[37] Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus & Giroux, 2001), at ix.
[38] "John Marshall," February 4, 1901, reproduced in *The Collected Works of Justice Holmes*, *supra* note 1, at 3:501, 502.

touchstone, then Holmes was a great jurist. This is not, of course, to say that his great ideas were good or wise or liberal, only transformative. Holmes changed the currents of our thinking about many things, especially the law of free speech in America.

How did he do it? Where did he begin? How did his thoughts develop? What were his values? What was his sense of those whose freedom he sometimes safeguarded? How did his star ascend, and how much of that was made possible by the continued efforts of a close circle of influential admirers? And how in the end might we view Holmes's jurisprudence of free speech? These and related issues are the focus of this book, which ventures to answer such questions largely by way of Holmes's own words offered alongside his various life experiences.

In what follows, I typically present the materials in a chronological fashion. Sometimes, however, as in Part I, chronological preferences yield to substantive ones. Thus, my discussion of Holmes's Civil War views, both at the time and years afterward, prefaces the remainder of the materials. In addition, although some of the writings and cases presented do not explicitly concern free speech matters or doctrines – this is especially so in some of what is set out in Parts I and II – they are included because they are a part of Holmes's larger look at such matters. I have selected them because they inform the reader of the wellspring from which Holmes's free speech jurisprudence flowed. For example, his writings and speeches on topics ranging from war to natural law to common law notions of the crimes of attempt and conspiracy do provide the reader with many key ideas by which to understand what Holmes would later write in his most famous opinions concerning the First Amendment. Finally, citations to cases, statutes, and secondary sources listed within a book or article have been omitted unless there is some important reason to include them.

The biography is determinative or often so. One cannot understand Holmes in any meaningful way without having some basic grasp of his life. I believe that the presentation of Holmes's free speech writings, without more, is insufficient to adequately inform readers. Accordingly, I preface each of the six parts of this book with biographical essays sketching the time period in which the materials offered were written. Obviously, these sketches are meant not to be comprehensive historical or topical accounts but to provide the reader with some historical backdrop and general overview of the subject matter. In a similar vein, I provide certain materials concerning the cases selected, including a statement of the facts, the names of the lawyers arguing the matter, the dates of oral arguments and the decision, the vote, and the authors of the majority and separate

opinions. For both cases and other materials, I likewise offer introductory essays to help set up what follows. I also offer commentaries (by me and learned others) following the materials to supplement the primary texts. At the risk of seeming unduly scholarly, specific citations to the works drawn on are included, if only to allow the reader to check such sources. In all of this, I have been the beneficiary of Holmes's first significant biographer, Mark DeWolfe Howe, as well as his major modern biographers, especially G. Edward White, Liva Baker, and Sheldon M. Novick. I have tried to incorporate the biographical backdrop in such a way as not to overwhelm the reader with the essays, commentaries, and citations. My hope is that by the end of the book the reader has some sense of Holmes the man and mind along with some informed sense of Holmes's free speech jurisprudence. The aim is to succeed in doing this without producing a laborious book. Of course, there are always trade-offs, so I leave to my readers' judgments whether I have included too much or too little.

I am indebted to Daniel O'Neil, of Massachusetts, who offered valuable assistance in developing this book and who did so with patience, excellence, and a measure of commitment well beyond what was expected of him. So let the record show my grateful indebtedness to Dan. And thanks also go out to Rachel Weizman for all her research and editorial help.

Countless hours of home time were devoted to this project. Hence, I owe a debt, yet again, to my wife, Susan A. Cohen, to whom this book is lovingly dedicated. Selflessly, she has stayed with me, supported me, encouraged me, and allowed me a measure of freedom without which my life would be impossible.

Consistent with its venerable centuries-old practice, Cambridge University Press sent out an early version of my manuscript to learned reviewers for anonymous critiques. In my decades of writing books and articles, I have never received such objective, informed, and worthwhile criticisms, which were tendered with a welcome collegial spirit. Thus, my work has been improved thanks to the generous efforts of Professors Paul Horwitz and Timothy Zick. Any lingering mistakes or omissions are, however, my sole responsibility. I am also indebted to my editor, John Berger, who was supportive from the outset and who (as only he can) steered my ship of text to safe harbor.

Alan F. Rumrill, of the Historical Society of Cheshire County, was helpful in providing me with information related to Justice Holmes's 1884 Memorial Day address delivered in Keene, New Hampshire. I also benefited greatly from the treasure trove of information available online from

the Harvard Law School's Oliver Wendell Holmes Jr. Digital Collection and from a variety of other resources too numerous to list.

To those living and past, it is impossible to do any serious work on Holmes without incurring some real indebtedness to the works of others, such as Liva Baker, Silas Bent, Francis Biddle, Zechariah Chafee, Mark DeWolfe Howe, Sheldon Novick, and G. Edward White. And then there are Albert Alschuler, Stephen Feldman, Felix Frankfurter, Robert Gordon, Gerald Gunther, Michael H. Hoffheimer, Morton J. Horwitz, Frederic Rogers Kellogg, Max Lerner, Louis Menand, John S. Monagan, H. L. Pohlman, Richard Polenberg, Richard Posner, David Rabban, and Geoffrey R. Stone. Not to be overlooked are the authors of some of the finest articles on Holmes and his jurisprudence: David S. Bogen, Edward Corwin, Ernst Freund, Thomas C. Grey, Harry Kalven, Patrick J. Kelley, Hans Linde, H. L. Mencken, James M. O'Fallon, Fred D. Ragan, Robert D. Richardson, Yosal Rogat, Frank Strong, Adrian Vermeule, John Wigmore, and Edmond Wilson. Finally, in the Civil War category, the works of certain authors were indispensable, including those of George A. Bruce, Byron Farwell, Drew Gilpin Faust, Mark DeWolfe Howe, Louis Menand, Richard F. Miller, James McPherson, Francis Winthrop Palfrey, Dorst Patch, Stephen W. Sears, Saul Touster, and Hiller Zobel. No doubt I have unintentionally overlooked some names, which can readily be found in the source materials.

As my life clock clicks sixty, I look back to when Holmes first lit my imagination afire with thoughts, all sorts of crackling thoughts. No doubt, it began when I was a law student in the early 1970s, when I read his opinions in my big blue constitutional casebook edited by Gunther and Dowling. That experience pointed me to a book that had a profound impact on my life – *The Mind and Faith of Justice Holmes*, edited by Max Lerner. That work, first published in 1943, turned my mind around again and again, leaving me to wrestle with its words. And then I met Max, a giant of a mind and a true free spirit, who became a dear friend with whom I spent many a delightful day drunk in discourse. When his Holmes book was republished and expanded in 1989, Max signed and inscribed a copy for me with these words: "To Ron, whose idea it was, with affection and gratitude."[39] Holding that book in my hands two decades later reminds

[39] Max was similarly kind when it came to other projects on which we both worked. *See* Max Lerner, *Nine Scorpions in a Bottle* (New York: Arcade Publishing, 1994), at xii. Liva Baker was another friend of mine, one who became a Holmes biographer. *See* her *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New

me of just how much I miss Max and all those marvelous discussions we had in the sun of southern California, discussions about life, law, love, and so many other things that matter.[40] His mark on me remains, for I have returned to Holmes . . . though not always as much the admirer that Max was. Why? Well, I have come to see Holmes through other lenses, including the wide one employed by Louis Menand in his various insightful treatments of Holmes. So, too, with Judge Richard A. Posner in his always-instructive writings and in his reader titled *The Essential Holmes*. Then there is Professor G. Edward White's monumental biographical work, which consistently offers a nuanced and therefore complex look at Holmes. And after reading Albert Alschuler's engaging and thought-provoking *Law without Values*,[41] I surely agree with the Posnerian view that Holmes "wasn't perfect" or moral, or humanitarian; "he was only great." Judge Posner goes a step further and maintains that Holmes's "massive distinction has not been dented by his many detractors."[42] I respectfully disagree. Holmes's overall distinction has surely been dented, many times and on many fronts. On that score, I think wise old Max Lerner was closer to the target's eye: "There will be . . . dips and rises in his reputation. A figure like Holmes becomes a way of looking into the mirror of ourselves and our time."[43]

York: HarperCollins, 1991). Although I did not work with Liva on the Holmes biography, we nonetheless shared many long conversations about the justice and his views on free speech. Liva described Max as one of those bright young intellectuals who "joined the cult of Holmes's admirers." *Ibid*., at 9. Although that is not entirely true – Max was always suspicious of anything cultlike – it is close enough to the mark to accept as a general possibility. Still, late in his life Lerner declared: "Holmes never walked on water for us." Max Lerner, *The Mind and Faith of Justice Holmes* (New Brunswick, NJ: Transaction Publishers, 1989), at 457.

[40] *See* Ronald Collins, "Max Lerner's Immortality," *Forward*, June 19, 1992, at 6 (national edition).

[41] Published by the University of Chicago Press in 2000. Any serious study of Holmes should include some reflection on the powerful points made in Professor Alschuler's book, if only to prevent one from being unduly charmed (and that is the word) by Holmes and his word power. That said, for a thoughtful reply, actually a partial one, to Alschuler, *see* Mathias Reimann's review essay of Alschuler's book, "Lives in the Law: Horrible Holmes," *supra* note 9. For an earlier reply to similar criticisms of Holmes, *see* Mark DeWolfe Howe, "The Positivism of Mr. Justice Holmes," 64 *Harvard Law Review* 529 (1951). *See generally*, G. Edward White, "The Rise and Fall of Justice Holmes," 39 *University of Chicago Law Review* 51 (1971).

[42] The last set of quotations, including the "wasn't perfect" one, come from *The Essential Holmes*, *supra* note 2, at xxx.

[43] *The Mind and Faith of Justice Holmes*, *supra* note 39, at 470.

One more matter: it is well to bear in mind the epigraph to this book, which is referenced again in the Epilogue, wherein Holmes cautioned that his constitutionalism was "an experiment, as all life is an experiment."[44] And so, if Holmes is the pater of the modern First Amendment, he is also the father of experiment, of risk taking,[45] of taking chances though the heavens may fall. Yes, Louis Menand was right: "He did not believe that the experimental spirit will necessarily lead us, ultimately, down the right path. Democracy is an experiment, and it is in the nature of experiments sometimes to fail. He had seen it fail once."[46] In a legal world where *balancing* and *security* are today's watchwords, one wonders whether the cramped law of *Schenck*, which survives,[47] or the invigorated law of the *Abrams* dissent, which grows, will prevail when the day of danger next befalls us.

In that experimental vein, then, I invite you to ponder what you read – challenge it, grapple with it, look through it, think beyond it, agree with it, or even repudiate it. For the splendid spirit of the First Amendment thrives not on lockstep agreement but on an ever-rebellious tug-of-war in the minds and hearts of all Americans.

Ronald Collins
Bethesda, Maryland
April 2010

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

[45] Perhaps I should say he took calculated risks, though I am unsure. After all, Holmes voluntarily served three stints in the military at a time when death was everywhere in the air, though he did have the good sense not to test his luck a fourth time. See Part I of this volume.

[46] *Metaphysical Club*, *supra* note 37, at 433.

[47] *See* Ronald Collins and David Skover, "What Is War? Reflections on Free Speech in 'Wartime,'" 36 *Rutgers Law Journal* 833, 848–53 (2005) (noting that *Schenck* and its progeny have never been formally overruled and that *Brandenburg v. Ohio* is readily distinguishable because it is not a wartime case).