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Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment

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Learned Hand, Oliver Wendell Holmes, and Louis Brandeis all had the same problem. They were troubled—Holmes less than the others and later, but eventually—by the widespread and mean-spirited persecution of dissenters they observed as the United States entered World War I and then reacted to the Bolshevik Revolution. Today, most persons so troubled would think that constitutional rights, and particularly the freedom of speech, exist for the very purpose of countermanding zealous political majorities that deny or neglect the claims of dissenters. But Hand, Holmes, and Brandeis, each by his own distinctive path, came to the speech disputes of 1917–1919 with a well-developed regard for majority rule and jurisprudential commitments that denied the existence of natural rights and treated positive rights as exceptional, confined, and instrumental. Ruling that fundamental rights trump majority preferences was for them a heavy lift.

All three had played a key role, in one way or another, in discrediting the jurisprudence now known as "Lochnerism," the practice of the Supreme Court during the last years of the nineteenth century and early years of the twentieth of discovering controversial economic liberty rights in the majestic generalities of the Due Process Clauses of the Fifth and Fourteenth Amendments. Holmes' scathing dissent in *Lochner v. New York*,[1] eviscerating his brethren's holding invalidating a state maximum hours law, remains the *locus classicus* of the view that political majorities possess extensive power to regulate the leveraging of economic power. As a young New York lawyer, Hand authored the definitive law review article about the *Lochner* decision, a blistering critique.[2] Brandeis, a legendary advocate who devoted half of his working hours to pro bono representation, drafted and helped to get enacted several laws designed to constrain economic exploitation, then invented

the "Brandeis Brief" as a means of defending them against Lochneresque constitutional challenges.[1] For Hand, Holmes, and Brandeis, invoking constitutional rights to invalidate laws passed by political majorities did not come naturally, to put it mildly. As a general matter, each considered such an exercise of judicial power to be historically tainted, dangerous, and presumptively illegitimate.

But when the coercive authority of the state is deployed not to prevent economic exploitation but rather to punish political dissenters in the name of civil order and national security, is there not a larger role for rights and a weaker claim for majority rule? Many legal analysts would contend that the text of the First Amendment, with its seemingly categorical injunction "no law abridging the freedom of speech," provides considerable warrant to limit the power of majorities to regulate speakers. However, a text that accords operative significance to terms such as "abridging" and "*the* freedom" (emphasis added) can hardly qualify as categorical in a strong sense, as would a constitutional provision that read, say, "no law regulating speaking." Moreover, the almost universally restrictive judicial interpretation of the freedom of speech in the decades leading up to 1917 meant that judges construing the First Amendment in that era could not help but be influenced by their understandings regarding the nature of rights and the claims of political majorities. It is no surprise, therefore, that Hand, Holmes, and Brandeis found it difficult to embrace the legal arguments of the speakers in the cases growing out of the 1917–1919 wave of repression, even as all three judges were appalled by the spirit of majoritarian intolerance that had taken hold of the country.

As is well known, they found a way. Brilliant minds have a knack for doing that—and make no mistake, these three judges really did possess extraordinary intellects, their celebrity notwithstanding. Each wrote a free speech opinion for the ages. For most beginning students, those opinions constitute the traditional path into First Amendment law and theory. Two features are most striking about the opinions viewed in tandem. First, it is noteworthy how all three judges went out of their way to avoid recognizing a free-standing individual right of expressive liberty that exists apart from and thereby limits the principle of majority rule. Second, despite that common ground, the theories embraced by the three judges differ radically from one another. I know of no better way to get to the heart of the question of how a robust right of free speech can be reconciled with the fundamental premise of popular sovereignty than to probe those differences. It helps, of course, that each line of reconciliation was articulated so powerfully by its judicial proponent.

Learned Hand

The way that Hand solved his problem was by conceiving of the freedom of speech as a majority-creating procedure rather than an individual right.

Anticipating an argument that Alexander Meiklejohn would make famous thirty years later,[4] Hand argued that collective self-criticism is the essential precondition that gives the phenomenon of consent of the governed its authority to coerce compliance. Only laws passed and public opinion generated in the face of what Hand termed "hostile criticism" can claim to embody the will of a governing majority, he maintained.

In *Masses Publishing Company v. Patten*,[5] one of the first judicial interpretations of the Espionage Act of 1917, Hand read the statute to prohibit only a statement that tells a person "it is his interest or his duty" to violate the law. Political advocacy, however critical and intemperate, that falls short of invoking a duty or interest to break the law is "part of that public opinion which is the final source of government in a democratic state." In Hand's understanding of "the normal assumption of democratic government," the "suppression of hostile criticism does not turn upon the justice of its substance or the decency or propriety of its temper." Neither does it turn on the predicted consequences of the speech. The antiwar advocacy under review in the *Masses* case involved sharp accusations that the War was being fought to serve the class interests of economic elites. The issue of the magazine in dispute included admiring portraits of draft resisters. Hand characterized such speech as of a sort that might "enervate public feeling at home," "encourage the success of the enemies of the United States abroad," and "promote a mutinous and insubordinate temper among the troops." However, because the speech amounted to political agitation rather than "direct incitement to violent resistance," it qualified as hostile criticism that serves the democratic function of forging majority will. As such, its predicted consequences were legally inconsequential, at least in the absence of a pellucid expression of congressional will to punish backed up by an invocation of the War Power.

In a later opinion and in letters to Holmes and the Harvard law professor Zechariah Chafee, Hand elaborated on his proposed legal test.[6] He reiterated his statement in *Masses* that he would make controlling not the literal meaning of the words used by the speaker but the message conveyed. He said that Mark Anthony would not escape punishment by his demagogic technique of literally admonishing against rioting to avenge Caesar's murder while unmistakably conveying the opposite message to his plebeian listeners. Hand gave two reasons that legal liability should be a function of the meaning conveyed by the speaker's words rather than either the predicted consequences of the speech or the speaker's illicit intent. First, the meaning conveyed by the speech is what matters most in determining whether it contributes to the hostile criticism that serves the process of constituting a legitimate governing majority. In this view, it is the value of the speech that is the most important variable in deciding whether it is protected. Second, a test that turns on what the speaker actually said rather than what he or she risked causing or intended can take the form of "a qualitative

formula, hard, conventional, difficult to evade." A legal standard of that type, Hand surmised, "might be made to serve just a little to withhold the torrents of passion to which I suspect democracies will be found more subject than for example the whig autocracy of the 18th century."[7]

The two reasons are interrelated in that if the project is to secure a minimum of speech without which legitimate authority cannot be constituted, there is much to be said for a doctrinal safe harbor protecting the requisite speech unqualifiedly. A test that turns on predicted consequences or speaker intent is not well suited to providing such a safe harbor. Those phenomena are difficult to observe, measure, and prove. To identify them, a factfinder ordinarily must rely on speculation, inference, extrapolation, and generalization. What meaning a particular writing or speech conveys to its audience will not always be self-evident—interpretation and judgment cannot be eliminated from the process of applying a speech-protective standard—but the space for erratic or prejudicial assessment is smaller when the operative phenomenon is the operational meaning conveyed by a particular statement rather than its predicted consequences or the speaker's intent.

Hand's preference for a qualitative distinction between protected and unprotected speech was not driven solely by these practical concerns about the efficacy of a safe harbor and the risk of inconsistent or unpredictable application. He considered the distinction between the direct advocacy of law violation and speech falling short of such advocacy to be fundamental as a matter of democratic theory, as this passage in a letter to Zechariah Chafee makes clear:

> Any State which professes to be controlled by public opinion cannot take sides against any opinion except that which must express itself in the violation of law. On the contrary, it must regard all other expression of opinion as tolerable, if not good. As soon as it does not, it inevitably assumes that one opinion may control in spite of what might become an opposite opinion.[8]

Hand considered the commitment not to become "a State based upon some opinion, as against any opinion which may get itself accepted" to be "indubitably the presupposition of democratic states, however little they have lived up to it." In this respect, adherence to the principle of majority rule is a dynamic process, evincing a concern about inchoate, incipient, and potential majorities no less than current ones.

The clearest case of a state being "based upon some opinion, as against any opinion which may get itself accepted" would be if expressing a forbidden opinion were grounds for punishment simply on the ground of its being considered immoral or inconsistent with the polity's basic commitments or identity. But what if the opinion is punished not for being heretical in that way but because its

dissemination is plausibly thought to be likely to lead to harms that the State has legitimate reasons to want to prevent? Does a state that punishes the expression of opinion on that ground thereby become a state "based upon some opinion"? Given the way he dismissed the relevance of the harms he conceded that the speech at issue in the *Masses* case might be expected to cause, it appears that Hand considered that kind of instrumental punishment of opinion to be a violation of democratic principle on account of its adverse impact on the hostile criticism that the creation of political authority depends upon.

Suppose, however, that a writer is punished for publishing an opinion that falls short of telling readers it is their duty or their interest to violate a law, but the basis for the conviction is that the writer published his or her piece for the very purpose of causing law violation? Should such a writing be considered part of the hostile criticism that democratic theory regards as integral to the creation of majoritarian political authority and therefore protected as a matter of first principle? In the same letter to Professor Chafee in which he introduced his "state based upon an opinion" taboo, Hand addressed this very question:

> There could be no objection to the rule of the Supreme Court, tendency plus a purpose to produce the evil, even though the words did not come to the objective [duty or interest] standard, if one were sure of the result in practical administration. The chance that the State would lose any valuable opinion by suppressing those whose purpose was to produce a violation of law, while they kept on the safe side of counseling it, seems to me much too thin for practical estimate.[9]

So at the level of basic principle, the requisite hostile criticism need not include the opinions of ill-intentioned speakers, even as it necessarily includes well-intentioned speech that very likely will cause harm. Hand's objection to punishing ill-intentioned speech was entirely practical: it would expose "all who discuss heated questions to an inquiry before a jury as to their purposes." And "it is precisely at those times when alone the freedom of speech becomes important as an institution, that the protection of a jury on such an issue is illusory." Only for that administrative reason would "the State lose any valuable opinion" by making the speaker's purpose disqualifying.

What is most revealing about these elaborations of his theory is that for the speech he would protect that others might not (hostile criticism likely to cause harm), and also for the speech he would permit society to criminalize that others might think does not justify punishment (direct advocacy of law violation that persuades no one), Hand's ultimate concern is whether regulation would cause society to lose any speech of genuine value. For him, both the justification for protecting controversial speech and the limits to that protection depend on categorical judgments regarding which kinds of speech as a general matter serve

the democratic function of creating a governing majority. But Hand was no formalist. He recognized that words and images are deployed to serve a multiplicity of functions, many of which have nothing to do with contributing to the hostile criticism that enables majority rule. He considered speech serving such extraneous functions not to fall within the domain of the freedom of speech. One characteristically trenchant sentence making this point in his *Masses* opinion reveals how central it was to his analysis:

> Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.[10]

But why exactly is such counseling wholly lacking in the value that Hand ascribes to hostile criticism? ("Purport," by the way, does not mean "intention" but rather "meaning conveyed, professed, or implied.") If the speech he found lacking in democratic function consisted only of private, clandestine counseling of specific illegal acts such as murder—an example Holmes invoked—Hand's categorical denial of protection might seem self-evident. But over the course of history, much of the most consequential public political agitation has been interlaced with calls for illegal, forceful resistance, and not just in revolutionary scenarios. Think of abolitionism or the labor movement. Martin Luther King's "Letter from Birmingham Jail" is one of the classics of American political advocacy. It presents a moving, reasoned case for the violation of unjust laws. But it would be denied protection under Hand's test, or so it seems. Does that make sense?

Hand derived his preferred limit to the freedom of speech from the same source from which he derived his justification for that freedom: the requisites of majority rule. In a letter to Elliot Richardson written more than thirty years after he wrote the *Masses* opinion, Hand defended his refusal to ascribe democratic value to speech that counsels law violation:

> My reasons may sound didactic and too generalized; but here they are. Every society which promulgates a law means that it shall be obeyed until it is changed, and any society which lays down means by which its laws can be changed makes those means exclusive. . . . If so, how in God's name can an incitement to do what will be unlawful if done, be itself lawful? How do words differ from any other way of bringing about an event?[11]

Majorities must be forged and sustained by surviving hostile criticism, and so must their laws, but the authority thereby created is brought into existence to govern, if necessary by deploying the resources of the State to enforce compliance. This is the other side of the coin of democratic function.

Those who understand the freedom of speech in these terms might reasonably disagree about which types of dissenting speech are fundamentally inconsistent with submission to the authority of majority will, and in that respect not part of the very process that makes that freedom essential. At one extreme, some might conclude that the act of flag burning so diminishes the principal symbol of sovereignty as to compromise majority rule. At the other extreme, some might think that only the explicit and specific counseling of violence, perhaps only violence already planned in some detail and designed to be employed on a large scale, sufficiently contradicts majority rule as to fall outside the project of generating political authority by means of hostile criticism. The advocacy of nonviolent civil disobedience to be undertaken openly, with willing submission to punishment, for the purpose of reforming the law—Dr. King's definition of the concept—might readily be considered part of the process of identifying majority will, particularly in the context of massive denial of the right to vote. There is nothing inevitable about where Hand drew the line. What is most significant about his analysis in the *Masses* case is the considerations he took to be relevant in determining the boundary between protected and unprotected speech, considerations that derive from the notion of freedom of speech as a majoritarian procedure.

Oliver Wendell Holmes Jr.

The way that Holmes solved his problem was by conceiving of the freedom of speech as a salutary phenomenon that forces majority understanding and will to adapt to changing conditions.

So far as the freedom of speech is concerned, Holmes is best known for three formulations: (1) his "clear and present danger" test; (2) his limiting example of falsely shouting "Fire!" in a theater and causing a panic; and (3) the "marketplace of ideas" metaphor that has been universally attributed to him even though, ironically, he never used the phrase. Each formulation—the proposed doctrinal standard, the limit case, the suggestive metaphor—is about the role that time plays in human events. When exercising his rare gift for minting aphorisms, Holmes repeatedly spoke about time: "time has upset many fighting faiths";[12] "property, friendship, and truth have a common root in time";[13] "leave the correction of evil counsels to time."[14] The point of his book *The Common Law* is that legal doctrine is all about evolution and adaptation: "The life of the law has not been logic; it has been experience."[15] One might expect that a person who had conversations with John Quincy Adams and Franklin D. Roosevelt would see the world in terms of the passage of time.

His emphasis on the dynamic character of law and knowledge informed Holmes' rights skepticism and defiantly mundane conception of truth. Seldom

has a serious legal thinker been so mocking of the concept of natural law, and by inference natural rights:

> There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law.[16]

He once defined truth as "the majority vote of that nation that could lick all others." He considered his own method of inquiry "the system of my (intellectual) limitations." What gave his convictions objectivity "is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps.*" Rational justification and human dignity impressed him less than energy and force: "We do know that a certain complex of energies can wag its tail and another can make syllogisms."[17] This approach left room for a notion of rights, but only of a contingent nature:

> For legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it. No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a preexisting right. A dog will fight for his bone.[18]

As one might have predicted from this background, in Holmes' early skirmishes as a judge with the issue of freedom of speech he ruled consistently for the regulators. On the Supreme Judicial Court of Massachusetts he rejected a claim that the Boston Common must be made available on an evenhanded basis for speaking events.[19] He upheld a New Bedford law prohibiting police officers from participating in political campaigns.[20] As a Justice of the United States Supreme Court, Holmes wrote an opinion permitting a newspaper editor to be held in contempt of court for publishing an article and cartoon impugning the motives of judges in cases then pending,[21] and another opinion upholding the criminal conviction of a writer whose article extolling nude bathing was thought to encourage breach of the state's law against indecent exposure.[22]

Then came World War I and three cases in the spring of 1919 involving prosecutions of various speakers for statements critical of the War and the draft. Holmes wrote for the Court in each case, upholding convictions under

the Espionage Act of 1917.[23] One of the unsuccessful appellants was Eugene Debs, the well-known leader of the Socialist Party, who a year later would receive almost a million votes for president running from his jail cell in the Atlanta Penitentiary. In those three opinions Holmes was at pains to reject the efforts of lawyers on both sides to frame the issue in terms of some fundamental principle, whether that be that speech rights in wartime are in effect suspended or that only speech that can be proved to have actually caused specific harm can be punished. He considered the issue of speech in wartime to be subject to the pragmatic, consequentialist approach he had attributed to the common law: "It is a matter of proximity and degree." Predictions of harm could be the basis for regulation, but they had to be more specific than broad, breezy generalizations about the "bad tendency" of certain ideas in the abstract. General criticism of the war and draft by speakers who were respected in certain quarters satisfied this specificity requirement, Holmes concluded for a unanimous Court.

In November of 1919 Holmes unexpectedly dissented from a decision upholding convictions under the Espionage Act of 1918 of five Russian immigrants for distributing pamphlets from a Greenwich Village rooftop criticizing President Wilson's dispatch of American troops to Russia to aid forces fighting against the Bolsheviks. When circulated, his proposed dissenting opinion so disturbed his colleagues in the majority that a delegation of them visited his home to implore him not to publish it.[24] Happily for posterity, the old soldier (age seventy-eight) held his ground and resisted their entreaties. And so the most quoted paragraph ever written about the freedom of speech entered the US Reports.[25]

Holmes began that paragraph, the peroration of his dissent in *Abrams v. United States*, by conceding the rational logic of persecution:

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

Then, true to his observation forty years earlier that law is more about experience than logic, Holmes shifted gears:

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

> market, and that truth is the only ground upon which their wishes safely can be carried out.

By framing the issue in terms of how best "safely" to achieve the "ultimate good desired," Holmes found his answer in the dynamic character of human understanding, a premise not only of the common law but also, in his view, of the constitutional regime. Far from being a repository of enduring principles, even the Constitution itself

> 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.

If epistemic humility and adaptability sustained by the continuous competition of ideas is "the only ground" upon which the people's "wishes safely can be carried out," the freedom of speech takes on a special significance that sets it apart from other claims of right:

> While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

This distinctive significance had escaped Holmes' notice in his earlier free speech opinions. The change of attitude was not fleeting. As Holmes would put the matter in another memorable dissent ten years later:

> If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.[26]

An important question to ask about these bursts of eloquence is whether they signal a change of view on Holmes' part regarding not only the importance of free thought and speech but also the nature of rights and the claims of majority rule. I think not. His concern remained collective instrumental efficacy, "the ultimate good desired," how "wishes safely can be carried out." Unpacking his market metaphor supports this reading.

Why exactly did Holmes believe that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"? Market ordering has many defining characteristics. Markets decentralize and privatize decision making, nonprescriptively honoring and implementing preferences

and judgments of all sorts. Markets reward participants who generate and master pertinent information. They respond to changing conditions and lessons learned, in this respect exhibiting a self-correction capacity. They encourage prudent risk-taking and punish both excessive caution and reckless undertakings. They demand skillful prediction. Depending on how they are organized, markets can be more transparent than rival mechanisms for allocating resources and distributing benefits and opportunities, thereby reducing corruption. They accept human differences regarding objectives, needs, wants, and valuation. By facilitating competition, markets identify and punish waste and obsolescence. They stimulate innovation.

Each of these potential advantages of market ordering conceivably could have purchase when the good that is being "traded" is ideas. Which did Holmes have in mind? I believe that the place to start in trying to answer this question is Holmes' oft-proclaimed interest in the work of Charles Darwin. *The Origin of Species* came out when Holmes was a Harvard undergraduate. It had an electrifying effect on the campus, and Holmes was in the middle of that. Later, when he returned home from the Civil War, Holmes joined a high-powered discussion group—other participants included William James and Charles Sanders Peirce—which self-mockingly called itself the Metaphysical Club. Its leader, Chauncey Wright, a thinker Holmes held in awe, at the time was engaged in an extended correspondence with Darwin. Scientific method was frequently discussed by the group.[27] The topic remained fascinating to Holmes all his life. When as a young man he first encountered the writings of John Stuart Mill, it was *A System of Logic*, Mill's spirited defense of induction, not *On Liberty*, which piqued his interest. In his later years, he corresponded regularly with the philosopher of science Morris Cohen.

Someone who brings a Darwinian perspective to the topic of market ordering is likely to be impressed by the way markets force adaptation to changing conditions. This includes attitudinal adaptation, which can be encouraged by having a plethora of points of view on offer. Adaptation also involves weeding out the fallacious and the obsolete. Holmes once explained his late-arriving regard for the freedom of speech in terms of such weeding out: "In the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat."[28] Adaptation frequently demands the redirection of inquisitive energy, a corrective that can be stimulated by competition over ideas. Ordinarily, adaptation requires persons to overcome the forces of custom and inertia. By the way it can excite the passions and energize the will, sometimes even by the anger it generates, free speech can serve as a countervailing force. As with natural selection in biological evolution, adaptive change in the realm of ideas occurs mostly in populations rather than individuals, as demographic developments, most significantly generational turnover, change the mix, and new arrivals with

different priorities deriving from different experiences exert influence enabled by the relative openness of market ordering.

I believe that Holmes came to value the freedom of speech largely for its capacity to generate new ways of thinking, discredit obsolete ideas, and alter priorities of inquiry. Those consequences are what he had in mind when he pronounced "the competition of the market" to be "the best test of truth." They are consequences in the large and over time, in effect public goods whose significance is reflected in a slightly different "test of truth" that Holmes articulated the year before his *Abrams* dissent: "a present or an imagined future majority in favor of our view." Characteristically, he saw the freedom of speech not as a source of individual understanding, assertion, or identity but rather a force—a force for collective adaptation. In that respect, he thought it served majority rule.[29]

Louis Brandeis

The way that Louis Brandeis solved his problem was to view the freedom of speech as an individual liberty important as such but especially important for its contribution to democratic character.

Brandeis' concurring opinion in *Whitney v. California*,[30] decided in 1927, contains his most intellectually ambitious account of the freedom of speech. The prestige of that opinion would be hard to overstate. In modern First Amendment adjudication, duels occasionally break out among the Justices over whose position can best claim support from Brandeis' reasoning in *Whitney*. As with most legal touchstones, the opinion's susceptibility to conflicting interpretations has enhanced its influence.

The four-paragraph segment of the opinion in which Brandeis spells out his general philosophy regarding free speech begins with a cascade of assertions regarding the beliefs of "those who won our independence," beliefs that have a suspicious congruence with those we know Brandeis held. Right away, a complex, interactive relationship between individual liberty and collective well-being is suggested:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.[31]

Deliberative government is a collective good. The development of faculties, presumably what Brandeis is referring to when he says that liberty is valued both "as an end" and as a means, occurs at the level of the individual. Similarly, courage and happiness are traits more often ascribed to individuals than to collectivities. But the discovery and spread of political truth sounds like a collective project. How did Brandeis sort out all these phenomena?

It may help in trying to interpret Brandeis to know that his observation about liberty being the secret of happiness and courage the secret of liberty was lifted from the Funeral Oration of Pericles, as rendered by Thucydides in his *History of the Peloponnesian War*.[32] Pericles attributed Athens' military success to the courage, awareness, and inventiveness that Athenians possessed as a result of their stimulating culture, which offered many opportunities for personal initiative and civic responsibility. His basic point was that individual, civic, and military flourishing are interconnected.[33]

In this regard, it is also noteworthy that throughout his *Whitney* opinion Brandeis seems unable to mention liberty without instantly invoking what it leads to: deliberative forces prevailing over arbitrary forces, happiness, and the discovery and spread of political truth. The list grows as the paragraph progresses:

> [Those who won our independence] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

Order, stable government, the path of safety, the fitting remedy, nonarbitrary resolution of differences—this is a catalog of the most important goods that governments are instituted to provide, and they all flow from the freedom of speech, according to Brandeis.

Not only individual rights but also civic duties are part of this complex web of relationships:

> Those who won our independence believed . . . [t]hat the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Like Madison before him and Meiklejohn afterward, Brandeis viewed the freedom of speech as generated in significant part by duties. Rights and goods

that others think of as protecting individual choice or personal space—privacy, economic security, entrepreneurial opportunity, leisure time—Brandeis prioritized for their contribution to the discharge of the duties of citizenship. It may be revealing that in *Whitney* he defined "the final end of the state" to be to "*make* [not 'leave'] men free to *develop* [not 'exercise'] their faculties." For him freedom was serious business.[34]

Further evidence of this seriousness can be gleaned from the paragraphs that follow Brandeis' account of "the final end of the state." They are mostly about civic character, something that was much discussed in ancient Athens and Rome, as well as during the American founding, less so in Brandeis' time or today. In uncharacteristically soaring prose, first he proclaims:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.

Then he comments on the character of the founding generation:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.

Next, he explains how the clear and present danger test that he and Holmes had earlier embraced is best understood not as a standard marking the threshold of rational regulatory prediction of harm but rather the point when strong character cannot save the situation for lack of time:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.

In short, the freedom of speech is a remedy as much as a right, or rather a right that can best be justified and demarcated by appreciating its role in preserving civic order, identity, and aspiration:

> 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. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

The key to understanding Brandeis, I think, is to realize that when he uses the term "reconciled" in this passage he means "integrated into" rather than "traded

off against." In a republic, freedom of speech is not something that threatens majority rule but rather is a defining element of it. This is true because the ancient Greeks and the American Founders were right: a government based on popular sovereignty depends on the character of its people. Character is a public good, arguably the most precious. Not only does civic courage—the courage of the citizenry to confront unwelcome challenges, the courage to sustain commitment in the face of difficulty or disappointment—constitute the strongest check against evil ideas, it provides the energy of reform and aspiration. For all its dangers and excesses, free discussion is an indispensable ingredient of civic courage.

No one has better captured the essence of Brandeis than his former law clerk, Judge Henry Friendly:

> I go to the great words in the Gospel according to John: "the truth shall make you free." Surely this was the essence of Brandeis' teaching. He was the authentic child of the Aufklärung; he had none of today's doubts as to whether the truth could be ascertained. He did not believe with the evangelist that this truth could be found by abiding in the Word or in becoming the disciple of any leader. Neither did he think it came from intuition or from speculation in metaphysics. He thought it could and would come only from the relentless, disinterested and critical study of facts.[35]

A major reason Brandeis did not treat such concepts as rights, duties, and majority will as formally delineated and hermetically sealed is that he was skeptical of all abstractions. He worked from the ground up. He was not troubled, for example, by the accusation that many of the reforms he championed, maximum hour and minimum wage laws, for example, could be labeled "paternalistic." To him, understanding economic leverage and worker freedom of choice demanded more than a formal account of relationships and a derogatory label. Similarly, understanding democracy demanded as much attention to individual character and collective spirit, and how they interact, as to definitions of rights and powers.

When Brandeis said that the highest office in the land is "citizen"[36] he was not distinguishing individual rights from majority rule—precisely the opposite. Just as the Founders wisely "did not exalt order at the cost of liberty," Brandeis did not exalt liberty at the cost of order. Rather, he insisted that the liberties deserving of special constitutional recognition are *components* of political order. He came to that insistence not only by dreaming of an Athens that may never have been but also, and much more important, by spending most of his life tirelessly contending with various forces of political entrenchment and corruption. Brandeis' integration of individual liberty and majority rule embodied his credo that experience and responsibility are the best teachers. He valued the freedom

of speech mainly for its function of broadening public understanding of and engagement with "supposed grievances and proposed remedies." He considered fact- and experience-driven independent judgment about public issues to be crucial for legislators, administrators, reformers, and other democratic actors, not least ordinary persons occupying "the highest office in the land."

Takeaway and Aftermath

At the dawn of the modern era of First Amendment interpretation, Hand, Holmes, and Brandeis were at pains to protect the speech of political dissent without undermining the claims of majority rule that were given short shrift in the *Lochner* case and its kindred decisions. They did so by conceiving of the freedom of speech as enhancing rather than confining the national experiment in republican governance. The clear implication of their efforts was that claims regarding the scope and depth of the freedom of speech should be evaluated with attention to how the communicative activity at issue fits into the larger constitutional design founded on the principle of popular sovereignty. The landmark First Amendment decisions of the following era—*Stromberg v. California* (1931) (display of red flag as a symbol of opposition to government),[37] *Near v. Minnesota* (1931) (anti-Semitic newspaper accusations of government corruption),[38] *Thornhill v. Alabama* (1940) (labor picketing),[39] *Bridges v. California* (1941) (contempt of court by publication),[40] *Chaplinsky v. New Hampshire* (1942) (face-to-face epithets),[41] *Valentine v. Chrestensen* (1942) (commercial advertising),[42] *West Virginia State Board of Education v. Barnette* (1943) (compulsory school flag salute)[43]—discharged that commission, granting or denying claims with consistent emphasis on the question of democratic function.

Barnette is a particularly instructive decision. The Court ruled that compelling children to salute the flag and pledge their allegiance to it violates a "right of self-determination in matters that touch individual opinion and personal attitude," a formulation that might suggest reliance on a notion of free-standing individual autonomy. But Justice Jackson's renowned majority opinion in *Barnette* did not simply assert the existence of this "right of self-determination." Rather, he described it as implementing the political community's decision to "set up government by consent of the governed." The Bill of Rights, he noted, "denies those in power any legal opportunity to coerce that consent." That an important mission of the public schools is "educating the young for citizenship" was deemed by Jackson to be a significant factor in the case, as was his judgment that "probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public

educational officials shall compel youth to unite in embracing." He questioned whether the worthy goal of inspiring civic commitment was truly served by the flag salute requirement: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." In these respects, the *Barnette* opinion echoed Hand, Holmes, and Brandeis in conceiving of free and independent thought by individuals as both the starting point and the last line of defense of democratic governance.

In recent decades, though, some Justices, at times even a majority, have undertaken to conceptualize the First Amendment as embodying, in Justice Clarence Thomas' words, a "distinctly individualistic" notion of the freedom of speech, designedly independent of concerns relating to democratic function.[44] In a number of often quite important decisions, these Justices have invoked what might be described as "free floating" First Amendment principles, in Justice Stevens' disparaging characterization.[45] Increasingly, autonomy as a First Amendment concept has become a versatile, noninstrumental justification for invalidating a wide variety of laws that in the course of governance regulate or indirectly burden communicative activity.[46]

When the rationale for the freedom of speech becomes noninstrumental, decisions no longer have to be justified in the manner of Hand, Holmes, and Brandeis—that is, with reference to past experience, empirically grounded predicted effects, specific and broadly recognized commitments, or coherent fit within a larger political or social design. Abandoning such markers can lead to a dangerously *ipse dixit* jurisprudence. This is not to suggest that noninstrumental reasoning always has that quality, or that it must play no role in determining the meaning of the freedom of speech. Autonomy arguments anchored in historical conceptions of natural rights or carefully formulated ideals of self-authorship and personal responsibility might properly inform First Amendment interpretation if deployed in a disciplined, grounded, sparing manner. Noninstrumental reasoning becomes a problem, however, when it generates novel rights aggressively, especially if the principles invoked are discrete and "free floating," in effect justified by assertion alone.

This phenomenon is particularly evident in the Court's recent decisions dealing with laws regulating campaign finance. A Supreme Court ruling in 2011, *Arizona Free Enterprise Club PAC v. Bennett*,[47] provides a good illustration. Like some other states, Arizona attempted to make public financing of political campaigns a realistic option for candidates hoping to be truly competitive with privately financed opponents. The mechanism selected, which was adopted by referendum, was to give candidates who agreed to abide by prescribed spending limits an initial public subsidy, which then would be augmented by a second subsidy triggered whenever the candidate's privately financed opponent spent

above a set level. The triggered second subsidy was capped, so that the publicly financed candidate still could be—and usually would be—outspent by the privately financed opponent, whose spending was not capped, and indeed could not be under the Court's 1976 holding in *Buckley v. Valeo*.[48] The point of the limited, triggered supplemental subsidy was to close, even if not eliminate, the spending gap between candidates, such that candidates could opt for public financing with somewhat less fear of being dramatically outspent by their privately financed opponents. Setting the initial subsidy much higher would, of course, serve that objective as well, but only by making the higher level of subsidy available to all publicly financed candidates, even those not facing flush privately financed opponents. Because universally available, noncontingent public financing at a moderate to high level would strain beleaguered state and municipal budgets, the triggering mechanism had become the strategy of choice among proponents of public financing for elections.

A closely divided Supreme Court ruled the Arizona scheme to be in violation of the First Amendment. The debate within the Court between Chief Justice Roberts for the majority and Justice Kagan for the four dissenters was conducted on both sides with great argumentative dexterity. For our purpose, what is striking about that debate is how difficult it was for the two sides truly to engage, despite their skillful lawyerly attention to each other's arguments. The reason is that they were miles apart in terms of what they took to be the most important considerations bearing on the First Amendment issue.

Justice Kagan wanted to contest the majority position by demonstrating how much the Arizona triggered-subsidy scheme advanced such democratic benefits as more overall speech for the electorate, a greater number of potentially viable candidates, a lower likelihood that claims and arguments made by one candidate would go unanswered by the opposing candidate for lack of resources, a reduction in the amount of time candidates needed to devote to fundraising, and more citizen trust that successful candidates would not enter office beholden to special interests. The Chief Justice, on the other hand, thought that the crux of the case was the burden placed on a privately financed candidate by the law's provision that additional spending by her would trigger the supplemental subsidy. Such a triggering, he maintained, would make the privately financed candidate an unwilling agent helping to generate the speech of her opponent, an unacceptable invasion of her personal freedom.

It is true that Chief Justice Roberts cited instances in which privately financed candidates limited or delayed their spending, and thereby their speaking, in order not to trigger the supplemental subsidy for their opponents, an outcome that deprived voters of speech that would have occurred but for the subsidy scheme. But he made no real effort to prove how common this phenomenon was in the face of the privately financed candidate's alternative possible response to

an opponent's triggered subsidy of doubling down to maintain one's advantage. Nor did he explore whether the privately financed speech potentially deterred was more valuable to the electorate than the additional publicly financed speech generated by the subsidy scheme. In short, Roberts and the Court majority viewed the case as governed by a fundamental principle of individual liberty that takes priority over all the considerations invoked by Justice Kagan relating to democratic functioning.

Were the evidence more substantial or the empirical inference more plausible of perverse incentive effects, the holding in *Arizona Free Enterprise Club Freedom PAC* might have been supportable with reference to voter enlightenment, systemic fit, or some other consequence integral to majority rule. Since this was not so, it is no surprise that Chief Justice Roberts, skillful advocate that he is, chose to rest his case on a newly conceived principle of candidate entitlement not to have one's privately financed spending contribute by force of law to the financial viability of the opposing campaign. The principle sounds in personal freedom as an end in itself. In that regard it is noninstrumental and "free floating" in the sense sketched previously, and on that account difficult to reconcile with the priorities at least of Hand, Holmes, and Brandeis in their efforts to understand and elaborate the meaning of the First Amendment.[49]

Of the three, the thought of Justice Brandeis comes the closest to being reconcilable with the noninstrumentalist, "distinctly individualistic" notion of the First Amendment favored by Chief Justice Roberts, Justice Thomas, and others. Recall that in his *Whitney* opinion, a view he ascribed to "those who won our independence," Brandeis proclaimed that the "final end of the state [is] to make men free to develop their faculties." He said that liberty has value "both as an end and a means." In those two claims, the unit of reference is the individual and the good of individual liberty is formulated as partly intrinsic to personhood as such, not wholly derivative from social or political roles, prerogatives, or duties. That said, the most important and enduring contribution Brandeis made to the history of political thought was in the way he analyzed and articulated the *instrumental* value of individual liberty, leading him to conclude that "public discussion is a political duty" because "the greatest menace to freedom is an inert people." As elaborated earlier, for Brandeis, individual liberty, even intrinsic individual liberty, is conceptually integrated with democratic responsibility. That is not how the Chief Justice and Justice Thomas view the matter.

The implication of the Brandeis understanding for interpreting the First Amendment is not categorical but rather proportional. While there is a place in the American constitutional design for noninstrumental liberties, the existence and ambit of such intrinsic liberties must be construed with attention to how their recognition affects the instrumental liberties and prerogatives of self-governing citizens in a republic.[50] Hand and Holmes would surely agree,

assuming that they even had to face the question given their skepticism (greater than Brandeis') about the very notion of "liberty as an end." A First Amendment jurisprudence of expansive, wide-ranging *ipse dixit* rights and free-floating principles, a jurisprudence in which consequences, duties, and matters of political design (including the claims of majority rule) play a subordinate role, fails to satisfy that requirement, and thus represents a departure from the teachings of Hand, Holmes, and Brandeis.

NOTES

Dialogue

1. Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).
2. Abrams v. United States, 250 U.S. 616 (1919).
3. *Id.*, at 630 (Holmes, J., dissenting).
4. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
5. New York Times Co. v. United States, 403 U.S. 713 (1971).
6. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
7. Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960).
8. 249 U.S., at S 2
9. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 26–28 (1971).
10. *See* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).
11. 250 U.S., at 630 (Holmes, J., dissenting).
12. *Id.*, at 630.
13. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (New York: Harper and Brothers, 1948), 24–27.
14. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (New York: W. W. Norton & Company, 2004), 542–550.
15. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY (New York: Oxford University Press, 1986).
16. *See* LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY (New York: Oxford University Press, 2010), 29–43.
17. *See*, e.g., Holder v. Humanitarian Law Project, 5 61U.S. 1 (2010) (addressing the rights of US citizens to interact with foreign groups with less First Amendment protection than would be true with respect to groups within US borders).

Chapter 1

1. 198 U.S. 45, 74 (1905).
2. *See* Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908).
3. *See* PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (Cambridge, MA: Harvard University Press, 1984), 114–131.
4. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (New York: Harper and Brothers, 1948).
5. 244 F. 535 (S.D.N.Y. 1917).

6. *See* United States v. Nearing, 252 F. 223 (S.D.N.Y. 1918); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).
7. Letter from Learned Hand to Zechariah Chafee Jr., January 2, 1921, reprinted in Gunther, *supra* note 6, at 769, 770.
8. Letter from Learned Hand to Zechariah Chafee Jr., January 8, 1920, reprinted in Gunther, *supra* note 6, at 764, 765. Gunther, *supra* note 4, at 765.
9. *Id.* at 766.
10. 244 F. at 540.
11. *See* REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 1897–1961, ed. Constance Jordan (New York: Oxford University Press, 2013) (Letter of January 29, 1952), 311.
12. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
13. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).
14. Abrams v. United States, 250 U.S. at 630.
15. OLIVER WENDELL HOLMES JR., THE COMMON LAW (Boston: Little, Brown and Company, 1881), 1.
16. Holmes, *supra* note 12, at 40.
17. *Id.* at 43. Some students of Holmes believe that his harrowing experience as a Civil War soldier left him preoccupied with forces beyond human control. He was wounded three times, twice nearly mortally. During triage on the battlefield at Antietam, the first attending surgeon classified Holmes as among the badly wounded not worth trying to save, but a medic demurred and had him moved to a farmhouse for treatment. *See* LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES (New York: HarperCollins, 1991), 132–133. His less serious third wound, a heel injury suffered near Fredericksburg, probably saved his life. It required a few months' convalescence back in Boston. This prevented Captain Holmes from joining his regiment at the Battle of Gettysburg, where on the third day the Twentieth Massachusetts was stationed on Cemetery Ridge at the very apex of Pickett's Charge. That day, two-thirds of the officer corps of the Twentieth died. *See* GEORGE A. BRUCE, THE TWENTIETH REGIMENT OF MASSACHUSETTS VOLUNTEER INFANTRY 1861–1865 (New York: Houghton, Mifflin and Company, 1906), 292–298.
18. Holmes, *supra* note 12, at 42.
19. Commonwealth v. Davis, 26 L.R.A. 712 (Mass. 1895).
20. McAuliffe v. New Bedford, 155 Mass. 216 (1892).
21. Patterson v. Colorado, 205 U.S. 454 (1907).
22. Fox v. Washington, 236 U.S. 273 (1915).
23. *See* Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).
24. *See* Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 343.
25. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
26. United States v. Schwimmer, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting).
27. *See* LOUIS MENAND, THE METAPHYSICAL CLUB (New York: Farrar, Straus, Giroux, 2001).
28. Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski, May 12, 1919.
29. *See* Thomas C. Grey, *Holmes, Pragmatism, and Democracy*, 71 ORE. L. REV. 521 (1992). I have developed this interpretation of Holmes' market metaphor in detail elsewhere. *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1.
30. 274 U.S. 357, 372–380 (1927) (Brandeis, J., concurring).
31. *Id.* at 375.
32. *See* PHILIPPA STRUM, *supra* note 3, at 237–238.
33. Every law clerk and extended relative of Brandeis was urged by him to read Alfred Zimmern's book, *The Greek Commonwealth*, a celebration of fifth-century Athens, the central chapter of which is about the Funeral Oration. Strum, *supra* note 27, at 242.
34. In his oral history, Learned Hand recounted how this quality of Brandeis used to unnerve him during their encounters. "I'd have this strange sense of deference to him. I'd say to myself: 'Here you are, what do you do? You sit around and talk a good deal, haven't any very definite convictions. You're not spending your life trying to leave the world better for being in

it. You drink too much. . . . I used to leave him feeling, 'You poor, self-indulgent, inadequate person!' "

35. Henry J. Friendly, *Mr. Justice Brandeis: The Quest for Reason*, 108 U. PA. L. REV. 985, 998–999 (1960).
36. *See* Strum, *supra* note 3, at 66.
37. 283 U.S. 359, 369 (1931).
38. 283 U.S. 697, 717 (1931).
39. 310 U.S. 88, 103 (1940).
40. 314 U.S. 252, 270 (1941).
41. 315 U.S. 568, 579 (1942).
42. 316 U.S. 52, 55 (1942).
43. 319 U.S. 624, 641 (1943).
44. *See*, e.g., Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 476, 505, n. 3 (Thomas, J., dissenting).
45. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 451 (Stevens, J., dissenting).
46. *See*, e.g., Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 18 (1986); Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 797 (1988); Ariz. Free Enter. Club PAC v. Bennett, 564 U.S. 721, 742 (2011).
47. 564 U.S. 721 (2011).
48. 424 U.S. 1, 54–58 (1976).
49. Fulsome recognition of discrete individual autonomy interests is not the only way that some members of the current Court accord less weight to the claims of majority rule than did Hand, Holmes, and Brandeis. A different method is to hold speech regulations that operate by taking into account the subject matter of the speech or the legal status of the speaker as equivalent, in terms of requiring extraordinary justification and precise tailoring, to regulations that are viewpoint discriminatory. This move is by no means a recent invention, but it reached its most extreme application to date in Justice Thomas' majority opinion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), disabling a municipality concerned about visual clutter from regulating event-directional signs more restrictively than political advocacy signs. The principle against viewpoint discrimination follows directly from the commitment to republican government and majority rule, as Judge Hand noted almost a century ago. It is not illogical from the standpoint of majority rule to treat subject matter and speaker sensitivity as possibly problematic in that they sometimes do indeed function as proxies for differential treatment based on viewpoint. In that regard, the restriction on majority rule embraced by the Reed majority is not free-floating. Nevertheless, the proxy phenomenon is occasional and context specific rather than chronic or predominant. As Justice Kagan explained in her concurring opinion in the case, *id.* at 2236, preventing governments from taking subject matter or speaker status into account regardless of context or other indicia of viewpoint discrimination severely limits widespread, long-standing regulatory practices.

    Citizens United v. FEC, 558 U.S. 310 (2010) treated regulation that takes into account the speaker's legal status as equivalent to viewpoint discrimination. However, in that case, the possibility that speaker-status regulation was actually functioning as a proxy for viewpoint discrimination was at least arguable. *Citizens United* evinced a troubling undervaluing of majority rule not so much by its result, but rather by its indiscriminate disfavoring of all speaker-sensitive regulations resulting in its failure to analyze in detail, despite the availability of a voluminous congressional record, whether in the context of campaign finance regulation differential treatment based on the speaker's legal status did indeed serve as a proxy for viewpoint discrimination.
50. For an elaboration of this view, *see* Sorrell v. IMS Health, Inc., 564 U.S. 552, 580 (2011) (Breyer, J., dissenting).

Chapter 2

1. 249 U.S. 47 (1919).
2. Debs v. United States, 249 U.S. 211 (1919). Debs in fact ran for president as a Socialist five times. In 1912 he received over nine hundred thousand votes, which was 6 percent of the total votes cast. He did not run in 1916, and the last of his presidential campaigns was in 1920

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