HOLMES AND BRENNAN

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ABSTRACT

This Article jointly examines legal biographies of two landmark First Amendment decisions and the Justices who produced them. In The Great Dissent *(Henry Holt and Co. 2013), Thomas Healy explores Oliver Wendell Holmes's dissent in* Abrams v. United States *(1919), which arguably laid the cornerstone for modern American free speech jurisprudence. In* The Progeny *(ABA 2014), Stephen Wermiel and Lee Levine explore William J. Brennan's majority opinion in* New York Times v. Sullivan *(1964) and the development and evolution of its progeny over Brennan's remaining twenty-five years on the Court. The Article then explores three ideas: (1) the connections and intersections between these watershed opinions and their revered authors, including how Brennan in* New York Times *and its progeny brought to fruit the First Amendment seeds that Holmes planted in* Abrams*; (2) three recent Supreme Court decisions that show how deeply both decisions are engrained into the First Amendment fabric; and (3) how Brennan took the speech-protective lead in many other areas of First Amendment jurisprudence.*

INTRODUCTION

A short list of the Supreme Court's most rhetorically powerful and influential opinions protecting the freedom of speech necessarily includes Justice Oliver Wendell Holmes's 1919 dissent in *Abrams v. United States* and Justice William J. Brennan's 1964 opinion for the Court in *New York Times Co. v. Sullivan*.[1]

But these opinions and the Justices who authored them share a more substantial connection. Holmes arguably invented modern freedom of speech in his *Abrams* dissent, promoting constitutional primacy for speech in matters of public concern and protection for dissenting ideas so they can be tested and seek to prevail in the marketplace of ideas. From its birth in *Abrams*, "freedom to express oneself" has become "our preeminent constitutional value and a defining national trait."[2] Forty-five years after

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1. Abrams v. United States, 250 U.S. 616 (1919); New York Times Co v. Sullivan, 376 U.S. 254 (1964). Other entries on the list include: Justice Kennedy's majority opinion in *Citizens United, Inc. v. FEC*, 558 U.S. 310 (2010); Justice Brennan's majority opinion in *Texas v. Johnson*, 491 U.S. 397 (1989); the various opinions in the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); Justice Harlan's majority opinion in *Cohen v. California*, 403 U.S. 15 (1971); the per curiam opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); Justice Jackson's majority opinion in *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); and Justice Brandeis's concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927).

2. THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 7 (2013); *see also* Ronald K.L. Collins, *Epilogue: The Long Shadow*, *in* THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 349, 377 (Ronald K.L. Collins, ed. 2010).

Abrams, Brennan's *New York Times* opinion represented a Court majority's first full-throated adoption of the idea that speech on public and governmental affairs must be uninhibited, robust, and wide-open.[3] And while Brennan implicitly rejected Holmesian ideas about clear and present danger, falsely shouting fire, and crowded theatres, he wholeheartedly embraced the ideal of broad liberty to criticize government and government officials, even in "vehement, caustic, and sometimes unpleasantly sharp" terms.[4] *New York Times* and its progeny demonstrate that Holmes's dissent "continues to influence our thinking about free speech more than any other single document."[5]

Two recent books catalogue how each Justice pursued his respective jurisprudential landmark. Both are narrative historiographies, telling the stories of the cases, Justices, Courts, cultural and legal milieus, and deliberative processes leading to the seminal opinions. Both books draw from the papers of their subject Justices and their correspondence with other Justices, policymakers, intellectuals, opinion makers, and friends.

In *The Great Dissent*, Thomas Healy "unravel[s] the mystery" behind *Abrams* and Holmes's transformation on free speech—how he moved from general disinterest in, if not outright hostility towards, broad freedom of speech to laying the groundwork for the First Amendment's uniquely prominent place in American constitutional law.[6] Healy focuses on a seventeen-month period from spring 1918 to fall 1919, in which Holmes wrote four major opinions considering First Amendment protection for radical (and even criminal) socialist, unionist, and anarchist political speech during and just after World War I—three for a unanimous Court rejecting the free speech defense, followed by his historic dissent.

In *The Progeny*, Lee Levine and Stephen Wermiel explore how Brennan established extraordinary free speech immunity from defamation liability in *New York Times*, then spent the next twenty-five years (until his 1990 retirement) trying to preserve and expand it in the face of shifting Court membership, preferences, majorities, and legal and factual contexts. They focus on the many permutations of a single free speech issue that occupied Brennan's attention for almost his entire tenure. In fact, Levine and Wermiel explain this as the reason for the book. Wermiel and a different co-author published a definitive Brennan biography in 2010,[7] but

3. *New York Times*, 376 U.S. 254; *cf.* Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 299–300 (describing "distorted" historical understanding by many that the expansion of the First Amendment that began with Holmes was an unquestioned victory for the political left).

4. *New York Times*, 376 U.S. at 270.

5. HEALY, *supra* note 2, at 7.

6. HEALY, *supra* note 2, at 7.

7. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010).

space constraints limited them to only seven pages on *New York Times* and little space to subsequent developments in that doctrinal area. *The Progeny* is the answer to that problem, a way to isolate "Brennan's role in formulating what we now understand to be the freedom of expression guaranteed by the First Amendment."[8]

Abrams and *New York Times* represent their respective authors' enduring free-speech achievements. *Abrams* burnished Holmes's reputation as a great, iconic Justice and (along with his *Lochner* dissent)[9] as the great dissenter[10]—although, ironically, Healy argues, Holmes at the time did not relish the prospect of dissenting.[11] Upon his retirement, Brennan regarded *New York Times* as his greatest judicial accomplishment and he was anxious that it be maintained after he left the Court.[12] It thus makes sense for these books to deep-dive into these special jurisprudential achievements. And given the direct line from what Holmes sowed in *Abrams* to what Brennan reaped in *New York Times*, it is appropriate to consider the books, the opinions, and the Justices together. This joint consideration is especially well timed. *New York Times* marked its fiftieth anniversary in 2014, prompting several symposia on the case.[13] *Abrams* marks its centennial in 2019.

This Article is divided into five parts. Part I examines *The Great Dissent*, along with Healy's companion article in the *Journal of Supreme Court History*.[14] Part II examines *The Progeny*. The next three parts use the two books as a starting point to identify and explore broader themes and connections between these Justices and these decisions. Part III explores connections between the two opinions, the judicial giants who created them, and the underlying themes in the two books. Part IV examines three recent "progeny" cases that demonstrate the continued vitality of *New York Times* and the First Amendment ideals Holmes and Brennan espoused. Part V explores other areas in which Brennan opinions established, or attempted to establish, a speech-protective jurisprudence, thus showing that, even had Holmes not changed his mind in *Abrams*, Brennan might have been the Justice to lead the First Amendment to a position of constitutional prominence.

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8. LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN*, at xi (2014).

9. Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

10. Collins, *supra* note 2, at 352–53; Brad Snyder, *The House That Built Holmes*, 30 LAW & HIST. REV. 661, 664–65, 681–83 (2012).

11. HEALY, *supra* note 2, at 70.

12. LEVINE & WERMIEL, *supra* note 8, at 342.

13. *See* Symposium, *The Press and the Constitution 50 Years after* New York Times v. Sullivan, 48 GA. L. REV. 691 (2014); Symposium, 127 HARV. L. REV. 2173 (2014).

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

I. *THE GREAT DISSENT*

In *The Great Dissent*, Healy tells a seventeen-month story through the lens of Holmes, the cast of characters in Holmes's life, and four cases before the Supreme Court.

Healy begins in June 1918, with Holmes and his wife preparing to board a train from Washington, D.C. to their summer home in Massachusetts, following completion of October Term 1917. To that point, Holmes's most significant published First Amendment decision had been *Patterson v. Colorado*, in which he insisted that the "main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[15] This view of free speech, associated historically with William Blackstone and more recently with the historical work of Leonard Levy,[16] left the political branches with virtual carte blanche to punish speech post-publication for any harm it might cause. And, Healy argues, that was consistent with Holmes's overall, if underdeveloped, constitutional vision. Holmes viewed the First Amendment as he viewed substantive due process—skeptically, as an unwarranted and usually improper effort to limit the power of political majorities to make law and public policy and to address social ills.

In March 1919, Holmes authored three unanimous opinions upholding convictions under the Espionage Act of 1917 for speech critical of World War I, the U.S. role in the war, and the draft. The Espionage Act punished willfully obstructing the military draft, causing insubordination in the military, or publishing false reports intended to interfere with the war effort. In the first case, *Schenck v. United States*,[17] Holmes announced the governing legal standard, using rhetoric that has endured as among his most famous. First, the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[18] Instead, the

> question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that

15. Patterson v. Colorado, 205 U.S. 454, 462 (1907); *see also* Fox v. Washington, 236 U.S. 273 (1915) (affirming conviction for editing material tending to encourage disrespect for law).

16. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

17. 249 U.S. 47 (1919).

18. *Id.* at 52.

> Congress has a right to prevent. It is a question of proximity and degree.[19]

But, Healy argues, it is not clear what Holmes actually was doing here—or whether Holmes himself fully understood. As a standard (although not one originating with Holmes[20]), this sounded more speech-protective than the prevailing "bad tendency" test. But it also might have been mere rhetoric, something for which Holmes had become rather infamous. Indeed, the shouting-fire metaphor,[21] which the federal prosecutor had used during the contemporaneous jury trial of socialist Eugene V. Debs,[22] soon took on a life of its own. There are good arguments that the metaphor is entirely inapt, certainly as applied to political ideas, as scholar Ernst Freund argued in 1919.[23] Although it endures to this day in popular discourse, it ultimately—and fortunately—lost sway in judicial discourse.[24]

Having announced this potentially more protective legal standard in *Schenck*, Holmes then proceeded to write for a unanimous Court in preserving all three convictions in relatively short order, without having to restate or elaborate on the constitutional standard. In none of the cases did the government show any genuine immediate risk that the speech would interfere with the draft or the war. *Schenck* arose from a leaflet—mailed to some draftees—questioning the constitutionality of the draft, encouraging readers to write their congressmen and urge repeal of the draft, and advising men to register (lawfully) as conscientious objectors.[25] *Frohwerk v. United States* arose from a small German-language newspaper publishing relatively tame anti-war op-eds and truthful reporting about the war and about draft riots.[26] *Debs v. United States* arose from a two-hour policy speech by the Socialist Party leader and former presidential

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19. *Id.*

20. Collins, *supra* note 2, at 234–35.

21. *Id.* at 231–33.

22. HEALY, *supra* note 2, at 268–69.

23. HEALY, *supra* note 2, at 134–35; Ernst Freund, *The* Debs *Case and Freedom of Speech,* NEW REPUBLIC, May 3, 1919, at 14; *see also* Snyder, *supra* note 10, at 682–83 (discussing reactions to the fire metaphor). *See generally* Carlton F.W. Larson, *"Shouting Fire in a Theater": The Life and Times of Constitutional Law's Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181 (2015) (tracing the origins and evolution of the fire analogy, concluding that the "central analogy of First Amendment law has become an abstract debating point, stripped of immediate relevance or any sense of serious danger").

24. Harry Kalven, Jr., *The* New York Times *Case: A Note on the "Central Meaning" of the First Amendment*, 1964 SUP. CT. REV. 191, 205 (celebrating that First Amendment analysis no longer focuses on "the sterile example of a man falsely yelling fire in a crowded theater").

25. Schenck v. United States, 249 U.S. 47, 48–50 (1919); HEALY, *supra* note 2, at 82–83, 94–102.

26. Frohwerk v. United States, 249 U.S. 204, 205 (1919); HEALY, *supra* note 2, at 84–85, 102–03.

candidate during the run-up to the 1918 mid-term elections, a speech which only briefly mentioned the war or the draft at all.[27]

Nothing in Holmes's analysis in any of the cases sounded in that higher clear-and-present danger rhetoric. In *Frohwerk*, the conviction could be upheld because "it [was] impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame."[28] Similarly, Debs' conviction was proper simply because his utterances might encourage listeners to obstruct recruiting services, even if the general theme of the speech—promoting socialism and socialist positions on the eve of democratic elections—was protected.[29] All of which suggests to Healy that *Schenck* was largely rhetorical. Holmes did not truly create or apply some new speech-protective test in these cases and, as of spring 1919, "was not yet ready to embrace free speech in full."[30]

Eight months later, the Court affirmed another conviction in *Abrams v. United States*.[31] This was a prosecution under the Sedition Act of 1918, a broader amendment to the 1917 Act that criminalized speech and conduct that was "disloyal" or "scurrilous" about the United States' form of government, that encouraged resistance to the war against Germany, or that was intended to curtail production of arms.[32] Healy describes the underlying events in great detail. Abrams and his three co-defendants (all Jews of Russian origin) "published" several leaflets by throwing them from the roofs of buildings in New York City. The leaflets criticized U.S. intervention in the Russian Revolution; called on the "Workers of the World" to awake, arise, and put down the enemy of capitalism; and urged munitions workers to stop manufacturing bullets that would be used to murder those fighting for freedom in Russia. They each were sentenced to between fifteen and twenty years in prison.[33] After quoting the flyers at length, Justice John H. Clarke's majority opinion insisted that the "plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe."[34] At a minimum, the portion of the leaflets

27. Debs v. United States, 249 U.S. 211, 212 (1919); HEALY, *supra* note 2, at 85–89, 103–04. Despite his obvious political notoriety, Debs is never mentioned by name in the opinion.

28. *Frohwerk*, 249 U.S. at 209.

29. *Debs*, 249 U.S. at 212–13.

30. HEALY, *supra* note 2, at 102.

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

32. *See id.*

33. HEALY, *supra* note 2, at 169–81.

34. *Abrams*, 250 U.S. at 623.

calling for the general strike among munitions workers was sufficient to support the convictions on some counts.[35]

This time, however, Justice Holmes dissented, along with Louis Brandeis. In fewer than 2,500 words, Holmes invented what eventually would become the cornerstone of modern free speech doctrine. Healy describes Holmes's drafting process in great detail, although the significant pieces of the dissent are well known. There is the call for toleration and humility—recognition that suppression of dissenting speech is "perfectly logical" when one is certain of one's ideas, but less so when one recognizes that "time has upset many fighting faiths."[36] There is the insistence 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.[37]

There is the call for being "eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."[38] And there is explicit application of the clear and present danger idea he launched (although arguably did not apply) in *Schenck*—the First Amendment runs out only when words "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[39]

Healy's book (and companion article) tries to understand and explain the evolution of Holmes's thinking on the First Amendment between June 1918 and November 1919. He explores the nature of this groundbreaking jurisprudential shift, particularly the intellectual influences that pushed him in this new direction. This is a rich and detailed narrative exploration, from which several themes emerge.

The prevailing focus is the roster of people who encouraged and influenced Holmes's change of mind. The first and most famous of these is Judge Learned Hand, at the time a judge on the United States District Court for the Southern District of New York. In 1917, Hand had issued a highly speech-protective decision (ultimately reversed by the Second Circuit) that limited the reach of the Espionage Act with respect to political opinion and criticism. Hand expressly declined to allow the Act to reach words that fall "within the range of opinion and of criticism . . . within the scope of that

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35. *Id.* at 623–24.
36. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
37. *Id.*
38. *Id.*
39. *Id.*

right to criticise either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority."[40] More importantly, he insisted that speech could be punished only if it can be "thought directly to counsel or advise" unlawful action, such as resistance to the war or the draft.[41] Rather, to "assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government."[42]

Holmes and Hand met by accident on that train to Massachusetts in June 1918, sparking a conversation and exchange of letters in which Hand attempted to convince Holmes of the need to tolerate opposing political viewpoints.[43] Healy shows these efforts as initially unsuccessful, with Holmes holding firmly to the idea that society can impose its will on individuals, that it possesses and exercises a "sacred right to kill the other fellow when he disagrees."[44] Certainly Holmes had not moved by March 1919, when he wrote *Schenck*, *Frohwerk*, and *Debs*.

A second influence was a group of young Washington progressives with whom Holmes surrounded himself. These young men admired Holmes's prior dissents that happened to further progressive causes (notably *Lochner*), while Holmes enjoyed the recognition and reverence they showed him. Among those joining together in the "House of Truth" were Felix Frankfurter, a rising star at Harvard Law School then serving several stints in the federal government; journalist Walter Lippmann; the editors of *The New Republic*; and historian, social theorist, and politician Harold Laski, an English Jew working as a lecturer at Harvard at the time.[45]

Of these, Laski[46] emerges as the greatest influence, because their relationship is the closest—according to Healy, Holmes saw Laski as the son he never had. Despite vast differences in age (Holmes was in his late 70s at this point, Laski his mid-20s), background, and politics, Laski became a Holmes favorite.[47] Beyond their visits and exchanges of letters in Massachusetts during the summers of 1918 and 1919, Laski urged Holmes

40. Masses Publ'g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y. 1917), *rev'd* 246 F. 24 (2d Cir. 1917).

41. *Id.* at 540–41.

42. *Id.* at 540.

43. The story of that exchange is told from Hand's perspective, crediting Hand with far more influence on Holmes, in Gerald Gunther's biography of Hand. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 161–64 (1994); *see also* Thomas E. Baker, *Clear and Present Dangers: The Importance of Ideas and the Bowels in the Cosmos*, 16 CONST. COMMENT. 485, 485–86 (1999).

44. HEALY, *supra* note 2, at 21.

45. *Id.* at 29–30; Healy, *supra* note 14, at 28; Snyder, *supra* note 10, at 664, 670–71.

46. *Cf.* HAROLD J. LASKI, AUTHORITY IN THE MODERN STATE (1919).

47. HEALY, *supra* note 2, at 30–35.

to read progressive thinkers and ideas. Most notable of these was John Stuart Mill's *On Liberty*, from which Holmes drew the idea (expressed in *Abrams*) of broad distribution of expression as an essential part of the search for truth.[48]

Holmes also came to appreciate the need for toleration of dissenting speech and the threat of intolerance through his friendships with Laski and Frankfurter. Throughout 1919, both men faced criticism and threats of sanctions for their political speech and activity. Laski was an outspoken advocate and supporter of an aborted strike by Boston police officers, which lead to calls for his termination from Harvard. Frankfurter was responsible for establishing labor policies for the War Department during and after World War I; in doing so, he publicly criticized management practices and pushed for adoption of progressive ideas such as shorter workdays. Those efforts were met with public hostility and similar calls for his removal from the Harvard faculty.

Healy writes that Holmes had little sympathy for the causes that Frankfurter or Laski were fighting for or the positions they were taking; his sympathy was for his friends. Nevertheless, these incidents illustrated for Holmes the potential power of speech. In minimizing the potential harm from the leaflets in *Abrams*, Holmes derided the "surreptitious publishing of a silly leaflet by an unknown man."[49] But in seeing the risk that intolerance posed to his beloved friends, Holmes finally recognized the need to protect the speech of known and more powerful men espousing more important ideas. Holmes, Healy argues, recognized the need to speak one's mind and to allow others to speak theirs, even if one disagreed with the viewpoints expressed.

Interestingly, Healy identifies far less intellectual influence or persuasion coming from Holmes's fellow Justices. He explores Brandeis's role as Holmes's friend, confidante, and intellectual ally. Brandeis had personally and successfully lobbied Holmes (Holmes described it to Laski as having been "catspawned") to dissent in an earlier Espionage Act case.[50] And Brandeis responded immediately and enthusiastically to the circulated draft of the *Abrams* dissent, writing "I join you heartily & gratefully. This is fine—very."[51] And Brandeis authored his own dissents, joined by Holmes, in two Sedition Act cases decided shortly after *Abrams*.[52] But Healy identifies no conversation or consultation between them on

48. *Cf.* Collins, *supra* note 2, at 213 (identifying Mill's *On Liberty* as one of several books that seem to have informed Holmes's thinking in *Abrams*).

49. Abrams v. United States, 250 U.S. 616, 628 (1919).

50. HEALY, *supra* note 2, at 70–76. *See* Baltzer v. United States, 248 U.S. 593 (1918).

51. HEALY, *supra* note 2, at 214.

52. *See* Pierce v. United States, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting); Schaefer v. United States, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting).

Abrams.[53] Indeed, Holmes generally disdained conferencing and discussing cases with his fellow Justices.

The strongest lobbying effort within the Court occurred in the other direction. On the evening of Friday, November 7, Justices Mahlon Pitney and Willis Van Devanter (along with an unknown third Justice) visited Holmes at home and urged him to withdraw his dissent. They argued that the ongoing national turmoil in fall 1919—labor strife, race riots, political tensions, foreign revolutions, President Wilson's recent stroke—demanded that the Court speak in a single voice, so as not to "weaken the country's resolve and give comfort to the enemy."[54] In fact, the visit from the Justices occurred the same evening as the infamous Palmer Raids.[55] But Holmes was unmoved, even by arguments about the Court's institutional interests, something he often respected and protected. Holmes had firmly shifted to a position in favor of broad protection for free speech and that trumped institutional concerns.

Following *Abrams*, Holmes basked in the adulation and gratitude from the House of Truth, even if embarrassed by their effusiveness. Among the most effusive was Hand, who wrote that, "I am quite confident that whether it is avowed or not, in the end your views must prevail, after people get over the existing hysteria."[56] While Holmes's reputation as a First Amendment leader largely took hold after his death,[57] *Abrams* stands as a significant starting point for that recognition. Which is not to say that the praise was universal—John Henry Wigmore wrote a blistering attack on the decision, although his long friendship with Holmes caused him to avoid referring to any Justice by name.[58]

The general praise heaped on the *Abrams* dissent, then and now, obscures an open question—whether Holmes actually changed his views on free speech or realized that he might have changed those views. Healy explores this in the book and even more so in the companion article. His extensive review of the historical record reveals both that Holmes did change and the reasons why this remains a subject of debate.

Part of the problem is the way Holmes wrote his opinions. In *Patterson*, Holmes had squarely adopted the Blackstonian view of free speech. In subsequently rejecting that view in *Schenck*, Holmes only

53. Those dynamics might have been a product of the architecture of their time. The Court did not have a separate building and the Justices did not have chambers at the Court; Holmes worked singularly from his home and walked to the Court for arguments.

54. HEALY, *supra* note 2, at 5.

55. *Id.* at 214–15.

56. *Id.* at 221–22.

57. Collins, *supra* note 2, at 352.

58. HEALY, *supra* note 2, at 225–30.

acknowledged that the Court "intimated" that view[59]—a dramatic understatement, given that Holmes had written the earlier opinion—without overruling the earlier opinion. Similarly, Holmes expressly accepted *Schenck*, *Frohwerk*, and *Debs* as rightly decided,[60] despite their apparent inconsistency with his position in *Abrams*. All Holmes would say of *Debs* was that he hated to write the opinion and would have voted to acquit had he been a juror on the case, but his hands were tied on the constitutional question—again ignoring that he tied those hands with his own opinion in *Schenck*. Holmes ran from his prior opinions, although never explicitly, leaving himself room to insist on his own consistency and leaving the historical record cloudy.[61]

A further problem, Healy shows, is that the outcomes of the cases are arguably flipped. The evidence in *Abrams* was far stronger than in the earlier cases—the fliers, had they convinced anyone, explicitly urged a general strike of munitions workers that would have interfered with the war effort. This contrasts with the "tame" reportage of the German-language newspaper in *Frohwerk* or to Debs's lengthy stump speech delivered on the eve of an election. In other words, if any conviction could possibly be constitutionally appropriate in any of these cases, it was in *Abrams*, the one case in which Holmes insisted that the speaker could not be punished. These disparate outcomes must indicate that between March and November 1919, Holmes had a broader change of heart as to what the First Amendment does and does not protect and what Congress can and cannot legislate against. It also explains why Holmes took pains in *Abrams* to minimize the possible harm from "a silly leaflet by an unknown man."[62]

Holmes's correspondence is marked by a similar gentility, with no writer wanting to acknowledge disagreement or challenge the other. For example, Holmes began his second letter to Hand in June 1918 by saying "I agree with [Hand's earlier letter]," then spent the remainder of his missive revealing the dramatic intellectual and constitutional distance between them.[63] Laski studiously avoided disagreeing with the older Holmes directly and often rushed to defend him against those who criticized his initial free speech opinions. One sharp critic was Ernst Freund, who decried Holmes's *Debs* opinion in the pages of *The New Republic*[64] (an ironic forum, given that the editors were active in the House of Truth). Holmes drafted a defensive letter to the editor in response, then sent the letter to Laski so he could relay it to the magazine. Although nothing ever became

59. Schenck v. United States, 249 U.S. 47, 51–52 (1919).
60. Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).
61. Healy, *supra* note 14, at 51–52.
62. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).
63. HEALY, *supra* note 2, at 56–57.
64. Freund, *supra* note 23, at 14.

of that exchange, Laski took Holmes's side against his critics, even if he likely agreed with the critics on the substance of the matter.

The one error Holmes ever admitted was not *Schenck*, *Frohwerk*, or *Debs*, but *Patterson*. In a 1922 letter to law professor Zachariah Chafee, Holmes said he "simply was ignorant" for adhering to the Blackstonian view that the First Amendment only prohibited prior restraint but not post-publication punishment.[65] Eight years later, Holmes was similarly forthright during oral argument in *Near v. Minnesota*,[66] a challenge to a state law permitting courts to declare certain publications a nuisance subject to abatement and injunction. When counsel for the state reminded Holmes of *Patterson*, Holmes responded, "I was much younger when I wrote that opinion than I am now, Mr. Markham. If I did make such a holding, I now have a different view."[67] Even then, of course, Holmes was coy as to whether he actually had adopted that holding.

Healy's point is that a close reading of the cases leading to *Abrams*, and all the surrounding events and interactions, reveal a genuine change of heart on the scope and reach of the freedom of speech. Holmes did change his mind—ultimately to the eternal advantage of the First Amendment.

Despite Hand's happy words, it would take a while before a majority of the Court or the public came around to Holmes's vision. Holmes's remaining thirteen years on the Court largely involved more dissents and separate opinions, his own and those of his First Amendment ally, Brandeis.[68] He never won a majority over to his position and did not live to see a truly speech-protective jurisprudence emanating from the Court. He did remain on the Court long enough to join the majority in *Near*, the first Supreme Court decision invalidating a state law on First Amendment grounds.[69]

Nevertheless, *The Great Dissent* is a fundamentally optimistic book. Holmes evolved from a jurist who saw no value in protecting dissent or dissenters and who viewed the First Amendment with great skepticism. And even if Holmes remained largely in dissent until the end of his time on the Court, Healy could safely describe what has grown from the seeds

65. HEALY, *supra* note 2, at 243.

66. 283 U.S. 697 (1931).

67. FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 132 (1981).

68. *See, e.g.*, United States v. Schwimmer, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., joined by Holmes, J., concurring); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Leach v. Carlile, 258 U.S. 138, 140 (1922) (Holmes, J., joined by Brandeis, J., dissenting); U.S. *ex rel* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407 (1921) (Holmes, J., dissenting); Pierce v. United States, 252 U.S. 239, 253 (1920) (Brandeis, J., joined by Holmes, J., dissenting); Schaefer v. United States, 251 U.S. 466 (1920) (Brandeis, J., joined by Holmes, J., dissenting); *see also* Collins, *supra* note 2, at 398–99 (providing statistics on Holmes's votes in free speech cases).

69. *Near*, 283 U.S. at 722–23; *see* FRIENDLY, *supra* note 67, at 172–74.

planted in that *Abrams* opinion. Indeed, Holmes arguably could do more in dissent at the early stages—dissents cost him little personally and the Court little institutionally, as it upheld each of the convictions. This might explain why Holmes resisted his colleagues' pre-*Abrams* entreaties not to release what would become his iconic dissent.

II. *THE PROGENY*

New York Times v. Sullivan turned fifty in 2014, making it and its progeny an ongoing story. Levine and Wermiel cover twenty-six of those years, examining in-depth twenty-seven cases from *New York Times* until Brennan's retirement from the Court in 1990, with brief discussion of three cases decided in the next decade. The book's structure is straightforward, moving chronologically and in great and revealing detail through *New York Times* and each of the subsequent cases. This is "Brennan's story, his take on how the constitutional law of defamation and related claims came to be."[70] But Brennan's story simultaneously tells the story of the Court, changing membership, and evolving First Amendment doctrine.

It is difficult to overstate the changes wrought by *New York Times*. The Court shifted defamation from the realm of tort to the realm of constitutional law[71]—as William Van Alstyne puts it, it "switched the orbit of libel law from far out frozen darkness to the sunny warmth of the first amendment."[72] The Court, via Justice Brennan, insisted that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[73] Moreover, because some factual error is inevitable in free debate, free expression needs "breathing space" to survive.[74] That breathing space comes from strict constitutional limitations on the reach of state defamation law. As a matter of the First Amendment, a public official could not recover damages for even false and defamatory speech relating to his official conduct unless he could show by clear and convincing evidence that the statements were false, that they were "of and concerning" that particular identifiable government official, and that they were spoken with "actual malice," that

70. LEVINE & WERMIEL, *supra* note 8, at xii.

71. HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 56 (1965); Kalven, *supra* note 24, at 192 (calling constitutional law the "Valhalla of the law school curriculum").

72. William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution"*, 25 WM. & MARY L. REV. 793, 793 (1984) (footnote omitted).

73. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

74. *Id.* at 272.

is, knowing the statements were false or with reckless disregard for their truth or falsity.[75]

From these beginnings, the Court sought to refine and define these skeletal free speech principles in subsequent cases, and *The Progeny* carries the reader through the various steps and missteps, using the papers of Brennan and other Court members. The Court extended the protections to criminal liability,[76] defined when expression is "of and concerning" a particular, identifiable plaintiff,[77] and applied the actual malice requirement to speech involving "public figures," those who "play an influential role in ordering society," enjoy access to mass communications to influence public affairs and counter criticism, and have achieved a degree of notoriety or have thrust themselves into public controversies.[78] Brennan even momentarily led a plurality to apply actual malice to all cases involving speech on matters of public or general interest, regardless of the nature or identity of the plaintiff.[79] Although the Court quickly retrenched from that,[80] the public nature of the speech has not dropped from the analysis entirely—speech on matters of public concern is presumptively true, placing on even a private plaintiff the burden of proving falsity.[81] In addition, the Court applied First Amendment principles to other torts[82] and explored how substantive First Amendment considerations affected underlying procedural and jurisdictional issues.[83]

The Progeny shows how each of these doctrinal developments came to pass, laying out the facts and litigation posture of each case and describing in rich detail the arguments, internal deliberations, discussions, and dynamics that produced each decision. The focus, of course, is Brennan. As the author of *New York Times*, he had the most invested in maintaining the strongest and most vigorous version of that doctrine; protecting his First Amendment conception became a major cause of his time on the Court. The book is largely descriptive, which is not a negative—it provides details, background, analysis, and critique that are essential to

75. *Id.* at 277, 279, 285–86.

76. Garrison v. Louisiana, 379 U.S. 64 (1964).

77. Rosenblatt v. Baer, 383 U.S. 75, 80–83 (1966).

78. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result). Brennan strongly influenced what became Warren's conception of public figures. *See* LEVINE & WERMIEL, *supra* note 8, at 76–77.

79. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43–44 (1971) (plurality opinion of Brennan, J.).

80. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974); *see also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166–69 (1979).

81. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986).

82. Fla. Star v. B.J.F., 491 U.S. 524 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Time, Inc. v. Hill, 385 U.S. 374 (1967).

83. Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Herbert v. Lando, 441 U.S. 153 (1979).

understanding the evolution in this area of law. In the course of that narrative, however, some normative themes emerge.

One is how shifting personnel and coalitions affected the jurisprudential direction over the next quarter-century (and even to today). When the Court decided *New York Times*, Brennan and the "actual malice" test garnered six votes and reflected a more moderate form of immunity. Three Justices—Hugo Black, William Douglas, and Arthur Goldberg—urged a categorical constitutional rule prohibiting any defamation liability against media defendants for any speech about government, public issues, and public officials, even if the speaker knew the statements were false.[84] Brennan, with memories of Senator Joseph McCarthy's effective political use of intentionally false statements fresh in his mind and personal experience, was unwilling to go so far. While he expressed sympathy for the more speech-protective absolutist view, he clung to a position that constitutional protection ran out at the intentional lie or knowing untruth.[85]

Maintaining coalitions and majorities proved difficult almost immediately. Within three years, "what had previously been the Court's public consensus on such matters had largely disappeared."[86] Only three Justices—Chief Justice Earl Warren, Brennan, and Byron White—really wanted to extend the actual malice requirement to public figures. And Warren went along only reluctantly, while also agreeing that the media defendant in *Curtis Publishing Co. v. Butts*[87] had acted with actual malice, the only early case in which a defamation plaintiff prevailed before the Court.[88] Neither Black nor Douglas ever embraced the actual malice standard, other than as a "necessary inconvenience on the path to what they hoped would eventually become absolute First Amendment protection for debate about public issues."[89]

Shifting coalitions coincided with shifting personnel. *New York Times* was decided during the short period in the mid-1960s in which Brennan was at the height of his power as the Warren's Court's intellectual engine; as Lucas Powe argues, the appointment of Goldberg in 1962 provided five assured votes for the civil libertarian position and little need to convince any wavering Justices.[90] The *New York Times* progeny developed just as that majority was disappearing. One year later, Goldberg resigned from the Court and was replaced by Abe Fortas; while a reliable liberal vote on

84. New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., joined by Douglas, J., concurring); *id.* at 298 (Goldberg, J., joined by Douglas, J., concurring in the result).

85. LEVINE & WERMIEL, *supra* note 8, at 19.

86. *Id.* at 78.

87. 388 U.S. 130 (1967) (plurality opinion).

88. *Id.* at 169–70 (Warren, C.J., concurring in the result).

89. LEVINE & WERMIEL, *supra* note 8, at 78.

90. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 303–04 (2000).

many issues, Fortas provided the deciding vote in favor of the plaintiff in *Butts*, a vote Goldberg certainly would not have cast.[91] Within a decade, only three Justices—Brennan, Potter Stewart (generally a reliable vote on free speech issues), and White—remained from the *New York Times* Court. By 1971, only Chief Justice Warren Burger and Harry Blackmun joined Brennan in extending actual malice to speech on all matters of "public or general interest."[92] And with Warren no longer wielding the assignment power and relying on Brennan as his right hand, *Rosenbloom* marked the last time Brennan wrote for the Court in a progeny case.[93]

Rosenbloom embodies the collapsing and shifting coalitions and the increased difficulty for Brennan in producing a majority.[94] A common criticism of Brennan is that his desire to "get a Court" would cause him to compromise constitutional principle, drafting the opinion to ensure a majority rather than to push the best First Amendment rules.[95] But now recognizing that a majority was not to be had—Black continued to insist that liability was not available even for the knowing lie[96] and White wanted to focus on reporters' privilege rather than actual malice[97]—Brennan was willing to go it alone and push actual malice in the unique direction he wanted, a position he would continue to urge, without majority support, for the remainder of his time on the Court.[98]

White, even more than Warren, ultimately soured on the actual malice regime altogether, which he viewed as over-protecting speech and under-protecting individual reputation. The distance between Brennan and White can be seen in *Gertz*, where the Court held that a private figure could recover actual damages on a lesser showing than actual malice (such as simple negligence), although a showing of some fault was necessary for liability and a showing of actual malice was required for punitive damages.[99] Both Brennan and White dissented, but for polar-opposite reasons. Brennan continued to insist that actual malice should apply to

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91. LEVINE & WERMIEL, *supra* note 8, at 66–81.

92. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 31 (1971) (plurality opinion). And both seemed more concerned with ruling against the plaintiff because he was a "smut peddler" who published nudist magazines. *See* LEVINE & WERMIEL, *supra* note 8, at 117.

93. LEVINE & WERMIEL, *supra* note 8, at 125.

94. *Id.* at 116.

95. *But see* Eric J. Segall, *The Court: A Talk With Judge Richard Posner*, N.Y. REV. BOOKS, Sept. 29, 2011, at 47 (quoting Posner, a former Brennan clerk, as defining this as Brennan's strength as a Justice).

96. *Rosenbloom*, 403 U.S. at 57 (Black, J., concurring in the judgment). Douglas did not participate in the case.

97. *Id.* at 62 (White, J., concurring).

98. LEVINE & WERMIEL, *supra* note 8, at 117; *see, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 779–80 (1986) (Brennan, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 323, 361 (1974) (Brennan, J., dissenting).

99. *Gertz*, 418 U.S. at 347–49.

media reports about private persons involved on matters of public or general interest, meaning the majority erroneously constricted the First Amendment's scope.[100] White believed that the majority unduly infringed state power to determine the scope of civil liability for defamation, thereby erroneously expanding the First Amendment's scope.[101]

A second theme of *The Progeny* is a certain pessimism surrounding the fate of the speech-protective regime Brennan initiated in *New York Times*. Some of this is endemic to writing about William Brennan; biographies show him fretting about his legacy and the endurance of the precedents he helped establish.[102] Given the near-complete turnover and the fact that Brennan wrote no opinions for the Court in this area for his final nineteen years on the bench, *The Progeny* depicts him waging a rearguard action, fighting through concurrences and dissents and through personal behind-the-scenes persuasion (for which Brennan was famous and uniquely skilled[103]) to keep things as close to where he wanted them to go. For example, he effusively praised Chief Justice William Rehnquist's opinion in *Hustler Magazine v. Falwell*[104] holding that a public figure could not recover from a magazine for intentional infliction of emotional distress over a parody advertisement—Brennan told his colleague that he would "enthusiastically join your splendid opinion."[105] Brennan singled *Hustler* as the opinion that "wipes away" any concerns about the survival of *New York Times*.[106] Of course, that did not stop him from fretting about a retrenchment once he was no longer on the Court to "stand guard against future assaults on his handiwork."[107]

Ironically, given the pessimistic tone, *The Progeny* demonstrates that Brennan got most of what he wanted doctrinally. Although *Gertz* rejected Brennan's *Rosenbloom* extension of actual malice to all cases involving speech on matters of public or general interest, the nature of the speech remains part of the constitutional analysis, thanks to *Philadelphia Newspapers, Inc. v. Hepps*.[108] In an opinion that Brennan assigned[109] to

100. *Id.* at 361 (Brennan, J., dissenting).

101. *Gertz*, 418 U.S. at 370 (White, J., dissenting); LEVINE & WERMIEL, *supra* note 8, at 124–25.

102. HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 277, 280 (1995); STERN & WERMIEL, *supra* note 7, at 544.

103. CLARK, *supra* note 102, at 7; Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990) ("The skill in building coalitions and taste for compromise that had stood him in such good stead in the years of glory enabled him to project his influence long after the balance of power had shifted against him.").

104. 485 U.S. 46 (1988).

105. LEVINE & WERMIEL, *supra* note 8, at 307.

106. *Id.* at 308.

107. *Id.* at 342.

108. 475 U.S. 767 (1986).

109. With Burger in dissent, Brennan, then the senior-most Justice in the majority, assigned the opinion.

Sandra Day O'Connor specifically as a reward for voting with him,[110] the Court held that where speech is on a matter of public concern, it is presumptively true and even a private-figure plaintiff bears the burden of proving falsity, even if she need not prove actual malice.[111] And even Brennan's "loss" in his final progeny case of *Milkovich v. Lorain Journal Co.*[112] has not proven devastating, as lower courts continue to closely analyze and allow liability only on statements that can reasonably constitute factual assertions capable of being proven true.[113]

Unlike *The Great Dissent*, *The Progeny* need not grapple with whether Brennan changed or regretted his earlier approaches, as he remained a consistent champion of broad free speech throughout. Brennan did come to believe that he erred in using "actual malice" to describe the constitutional standard; the term "only confused things" between malice in its ordinary sense of ill will or hatred, and malice as he intended, meaning knowing or reckless falsehood.[114] He took pains in *Garrison v. Louisiana*[115] (the first post-*New York Times* case, decided only a few months later) to emphasize that the malice at issue was "intent to inflict harm through falsehood," rather than a more general attempt to inflict harm.[116] Nevertheless, the confusion has continued. In one of the first cases after Brennan's retirement, Anthony Kennedy wrote for the Court to acknowledge that it would be better to instruct juries not about "actual malice," but about "publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity."[117]

III. HOLMES AND BRENNAN, *ABRAMS* AND *NEW YORK TIMES*

Abrams and *New York Times* are both as important for what they say as for what they portend. Learned Hand assured Holmes that in time, the Court could not help but accept and implement Holmes's ideas from *Abrams*.[118] In his famous *Supreme Court Review* essay written just after *New York Times*, Harry Kalven similarly predicted the decision's extension, insisting that "the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the

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110. LEVINE & WERMIEL, *supra* note 8, at 295.

111. *Phila. Newspapers, Inc.*, 475 U.S. at 768–69.

112. 497 U.S. 1 (1990) (rejecting rigid fact/opinion distinction and holding that liability could attach even to statements of opinion and conjecture).

113. LEVINE & WERMIEL, *supra* note 8, at 338–39.

114. *Id*. at 342.

115. 379 U.S. 64 (1964).

116. *Id.* at 73–74.

117. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 511 (1991).

118. HEALY, *supra* note 2, at 219–22.

public domain, like art, seems to me to be overwhelming."[119] While *The Great Dissent* ends on potential, *The Progeny* traces the progression that Kalven predicted. Yet the books end in paradoxical places. *The Great Dissent* ends with Holmes largely in dissent, but with a hopeful future. *The Progeny* ends with Brennan mainly in the majority, in that the fundamentals of *New York Times* remain secure, but sometimes in dissent, often writing separately, and ultimately exhausted from having worked so hard to protect those fundamentals and anxious about the future.

In some ways, *New York Times* departed from Holmes and *Abrams*. Notably, it made no mention of "clear and present danger" or the Court's World War I cases, a silence Kalven called "deafening."[120] And *New York Times* found a better metaphorical touchstone for the First Amendment than the "sterile example of a man falsely yelling fire in a crowded theater."[121]

In more significant ways, however, *New York Times* is the jurisprudential heir to the *Abrams* dissent, the first significant triumph of Holmes's First Amendment vision, and the case that proved Hand correct. In fact, *New York Times* marked the first time Brennan ever cited the *Abrams* dissent as a member of the Supreme Court, as he finally pursued, identified, and isolated what he called the "central meaning of the First Amendment."[122]

First, both opinions questioned the viability of seditious libel under the First Amendment. This concern was obvious in *Abrams*. The Espionage Act, as amended by the Sedition Act of 1918, was a seditious libel statute, prohibiting speech and conduct that could bring government officials or the "form of government" into "contempt, scorn, contumely, and disrepute."[123] *New York Times* dealt with the tort of defamation, not on its face seditious libel or even analogous to seditious libel. But the case arose out of a coordinated campaign of Southern officials using defamation suits and potential multi-million-dollar judgments to punish the *Times* and other national newspapers for criticizing or expressing dissenting views towards Southern governments, Jim Crow, and segregation—creating the functional equivalent of seditious libel.[124]

119. Kalven, *supra* note 24, at 221.

120. *Id.* at 213–14.

121. *Id.* at 205.

122. *Id.* at 208.

123. Abrams v. United States, 250 U.S. 616, 617 (1919).

124. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 42–43 (1991); Kalven, *supra* note 24, at 200; Howard M. Wasserman, *A Jurisdictional Perspective on* New York Times v. Sullivan, 107 NW. U. L. REV. 901, 909 (2013); *infra* notes 260–273 and accompanying text.

Both opinions thus reached out to address the still-open question of the constitutionality of the Sedition Act of 1798, a seditious libel law enacted less than a decade after ratification of the First Amendment (the law lapsed three years after its enactment, before the opportunity for final judicial review). Holmes insisted that "[h]istory seems to me against the notion" that seditious libel could exist under the First Amendment, pointing out that "the United States through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that it imposed."[125] Brennan was more emphatic on the point. After describing contemporaneous objections to the Act by James Madison and others, Brennan insisted that "the attack upon its validity has carried the day in the court of history," pointing to subsequent legislation repaying fines, as well as opinions of several Justices, including Holmes, assuming that statute's invalidity.[126] This revealed a "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[127]

Second, for both opinions the core of the First Amendment was political speech and the right (indeed, obligation) to criticize government, government policy, and government officials. The discussions of seditious libel offered a new starting point—"defamation of the government is an impossible notion for a democracy."[128] This is the significance of Holmes's "fighting faiths" idea—conflicting political opinions, exhortations, and ideas must be given an opportunity to compete for acceptance, and government may not check expression of competing ideas that may prove more appealing or ultimately successful. The "truth"—whatever that may mean in the realm of opinion and ideas—might prevail in that competition and government should not interfere.

This anticipates what would come in *New York Times*.[129] While he did not talk about a marketplace of ideas, Brennan emphasized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[130] an idea that necessarily disables government from inhibiting debate. Critics of government must be free from both liability and the self-censorship created by fear of liability—regardless of whether liability is civil or criminal and regardless of whether

125. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (citation omitted).

126. New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

127. *Id.*; KALVEN, *supra* note 71, at 58; *see also* Kalven, *supra* note 24, at 205–07.

128. Kalven, *supra* note 24, at 205.

129. *See* David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33, 33 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

130. *New York Times*, 376 U.S. at 270.

imposed by federal or state government.[131] And even in the realm of statements of fact, error is inevitable; to give freedom of expression the necessary "breathing space," falsity and defamatory content alone do not provide a basis for removing speech from the protection of the First Amendment.[132]

Third, each opinion is a product of its own unique crisis—*Abrams* of the post-World War I Red Scare, *New York Times* of the Civil Rights Era. Vincent Blasi calls these "pathological" periods, "historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[133] The "core commitments" of the First Amendment "are those regarding the practical wisdom and moral propriety of tolerating unorthodox, disrespectful, potentially disruptive ideas."[134] First Amendment doctrine must respond vigorously to pathological periods, to ensure that reviewing courts recall and abide by those core commitments and do not allow society to abandon them. Blasi praises both the *New York Times* majority and *Abrams* dissent as doing just that—"instances of brilliant and highly sophisticated judicial innovation" necessary for application in the worst of times to protect unpopular speakers in stressful situations.[135]

Blasi additionally highlights *New York Times* as demonstrating the uniquely localized nature of some pathologies and the significance of a federal court decision that "defused or effectively repudiated a program of systematic repression of unpopular speakers by local officials. Precisely because these were local pathologies, the national judiciary was for the most part immune from the pressures and fears that so exercised local officials."[136] Of course, the First Amendment was only available to respond to this localized pathology because of a different Holmes-era innovation—incorporation of the First Amendment against the states through the Fourteenth Amendment.[137]

Finally, *New York Times* follows naturally from the *Abrams* dissent in the system of common law constitutionalism that defines the modern First Amendment. As David Strauss argues, the "emergence" of American free speech is a "common-law story" of evolution and precedent, with features

131. Garrison v. Louisiana, 376 U.S. 64, 67 (1964); KALVEN, *supra* note 71, at 58–59.

132. *New York Times*, 376 U.S. at 271–73.

133. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

134. *Id.* at 462.

135. *Id.* at 475, 476.

136. *Id.* at 509.

137. Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that the First Amendment applied against the states); *id.* at 672 (Holmes, J., dissenting) ("The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used . . . .").

"hammered out" in a series of judicial decisions and extrajudicial developments.[138] American free expression is not about the text of the First Amendment or about the views or intentions of the drafters.[139] The First Amendment was not built around "clear and present danger" before Holmes wrote those words in *Schenck*. And to the extent the First Amendment was "decreed" in Holmes's application of that test to protect (for the first time) dissenting speech in *Abrams*, that decree was announced in a dissent, an opinion carrying no force of law.[140] It took another half century of judicial evolution, up to and including *New York Times*, which similarly fits not within the Framers' intent or historical understanding, but within the common-law chain of precedent dating back to *Abrams*.[141]

IV. EXTENDING THE PROGENY

Brennan was pessimistic about the future and continued vitality of *New York Times* upon his 1990 retirement.[142] *The Progeny* reflects that pessimism when discussing the mixed results of the three progeny cases from the first decade after Brennan left the Court.

In *Cohen v. Cowles Media Co.*, the Court rejected the media defendant's claim of First Amendment immunity from a source's breach of contract suit for the defendant's failure to maintain his promised anonymity.[143] In *Masson v. New Yorker Magazine, Inc.*, the Court recognized that inaccurate quotations can form the basis for liability only if the alteration results in a "material change" in the meaning of those words, such that they would have a different effect on the mind of the reader than if they were accurate.[144] But *Masson* remanded for further fact-finding as to several quotations, prolonging litigation that already had lasted seven years, would last another five, and would cost the media defendants millions of dollars.[145] Finally, a purported majority in *Bartnicki v. Vopper* held that media defendants could not be liable for broadcasting a recording of an unlawfully intercepted phone call touching on a matter of public concern, where defendants were uninvolved in the unlawful interception and

138. Strauss, *supra* note 129, at 33.

139. *Id*.

140. *Id.* at 49.

141. *Id.* at 58; *but see* Ronald A. Cass, *Weighing Constitutional Anchors:* New York Times Co. v. Sullivan *and the Misdirection of First Amendment Doctrine*, 12 FIRST AMEND. L. REV. 399, 410 (2014) (criticizing the *New York Times*'s "infidelity to decisional constraints evidenced in Brennan's casting off the lines of historical understanding of the Amendment's meaning").

142. LEVINE & WERMIEL, *supra* note 8, at 342.

143. 501 U.S. 663, 672 (1990). *Cohen* was a 5–4 decision, with Justice David Souter, Brennan's replacement, writing a dissent, *id.* at 676, exactly where we expect Brennan would have been.

144. 501 U.S. 496, 517 (1991).

145. LEVINE & WERMIEL, *supra* note 8, at 343–48.

obtained the recording lawfully.[146] The opinion by John Paul Stevens closed with a strong reaffirmation of Brennan's *New York Times* principles that "would almost certainly have brought a smile to his face."[147] On the other hand, three Justices dissented.[148] And while purporting to join the majority, Stephen Breyer, joined by Justice O'Connor, applied a more even balancing analysis, one seemingly inconsistent with the majority and one that might produce a different result in a different case.[149]

Fortunately for Brennan's vision of the First Amendment, *The Progeny* ends early. In the past five years, the Court has produced three new cases that comfortably fit into the *New York Times* progeny. Interestingly, none involved a defamation claim or an institutional media defendant, befitting the Court's seeming lack of interest in issues relating to the press.[150] Nevertheless, the speech claimant prevailed in all three cases. And all three produced at least plurality opinions that would have pleased (and likely been joined by) both Brennan and post-*Abrams* Holmes.

In fact, that the cases involved non-defamation and non-media contexts demonstrates the lasting power and influence of what Brennan established in *New York Times*. He created not merely constitutional rules for defamation, but broad constitutional principles protecting a wide range of unpopular speakers and speech from a wide range of civil and criminal liabilities.[151] To the extent Brennan (or his biographers) were concerned about the survival of his greatest First Amendment legacy, these cases should lay those concerns to rest.

A. Snyder v. Phelps

The defendants in *Snyder* were leaders of the Westboro Baptist Church, a small religious denomination (its membership consisting mainly of members of the Phelps family) that believed God was punishing the United States for a variety of public-policy sins, primarily related to homosexuality, by causing the deaths of soldiers fighting in Iraq and Afghanistan. Westboro became infamous for picketing funerals of soldiers

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146. 532 U.S. 514, 525, 535 (2001).

147. LEVINE & WERMIEL, *supra* note 8, at 364–65.

148. *Bartnicki*, 532 U.S. at 541 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting).

149. *Bartnicki*, 532 U.S. at 541 (Breyer, J., joined by O'Connor, J., concurring); LEVINE & WERMIEL, *supra* note 8, at 362–63; *see also* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1113 (2002); Howard M. Wasserman, Bartnicki *as* Lochner*: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 442 (2006).

150. Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1820, 1833–34 (2012).

151. *See id.* at 1822 (discussing the Roberts Court's commitment to protecting unpopular speakers).

and celebrities, as well as for the content of its messages, with slogans such as "Thank God for Dead Soldiers," "Thank God for 9/11," and "God Hates Fags."

Westboro protested the funeral of Matthew Snyder, a Marine killed in the line of duty in Iraq.[152] Snyder's father learned of the content of the signs displayed at his son's funeral (although only from seeing television reports later that day—the protesters were several hundred feet away from the cemetery entrance and he did not see the signs himself) and about comments about his son on Westboro's web site. He brought claims for defamation and intentional infliction of emotional distress against Westboro and its leaders; a jury found for Snyder on the intentional infliction claim and awarded almost $11 million in damages, later remitted to $5 million.[153]

In an opinion for eight Justices, Chief Justice John Roberts held that the First Amendment protects Westboro from any tort liability.[154] He began with several ideas culled directly from *New York Times*—the profound national commitment to uninhibited, wide-open, and robust public debate; that speech on matters of public concern is "more than self-expression; it is the essence of self-government,"[155] therefore entitled to special protection;[156] and that free speech requires breathing space to survive.[157] Roberts also pointed to the risk of juries imposing liability simply because they dislike particular speakers and speech,[158] a motivating concern in *New York Times*, in turn traceable to Holmes's insistence that the core constitutional commitment must be "freedom for the thought that we hate."[159]

Snyder most closely recalls *Hustler Magazine v. Falwell* in that the plaintiff attempted to use the tort of intentional infliction as an end-run around defamation and the *New York Times* limitations on defamation liability for speech concerning public figures and matters of public concern.[160] Levine and Wermiel discuss *Falwell* at length as one of Brennan's final progeny cases; Brennan had cheered Rehnquist's unanimous opinion in that case as demonstrating the continued vitality of *New York Times* and laying to rest any concerns for its survival.[161]

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152. Snyder v. Phelps, 562 U.S. 443, 448–49 (2011).
153. *Id.* at 450.
154. *Id.* at 461.
155. *Id.* at 452.
156. *Id.* at 451–52.
157. *Id.* at 458 (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).
158. *Id.*
159. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).
160. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52–54 (1988).
161. LEVINE & WERMIEL, *supra* note 8, at 307–08.

Critically, both Matthew Snyder and his father were private figures.[162] *Snyder* thus presented an open issue from *Hustler*—what if the plaintiff had been not Jerry Falwell, unquestionably a public figure,[163] but Falwell's mother, also mentioned in the ad parody but unquestionably a private figure? Roberts's answer was that it did not matter. The critical issue was not the nature of the plaintiff but the nature of the speech—that Westboro's protests addressed matters of public concern. Roberts adopted a broad definition, according special protection for any speech that "can 'be fairly considered as relating to any matter of political, social, or other concern to the community'"[164] or that touches a "subject of general interest and of value and concern to the public."[165] Courts must analyze the "content, form, and context"[166] of speech as indicated by the record as a whole—reaffirming the constitutional obligation (also drawn from *New York Times*) to independently examine the record to ensure that any "'judgment does not constitute a forbidden intrusion on the field of free expression.'"[167]

Applying that standard, the Court easily found Westboro's speech to be on a matter of public concern. Westboro's messages included "Don't Pray for the USA" and "Thank God for Dead Soldiers."[168] While such slogans "may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[169] That did not change because some of the signs were directed at private figures such as the Snyders, since the "overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."[170]

Roberts deemphasized the Snyders' private-figure status, focusing instead on the content of even the narrowest, most directed messages (such as suggestions that Matthew Snyder was in hell). This reflects Brennan's position from his *Rosenbloom* plurality and *Gertz* dissent—constitutional significance attaches to the subject and content of the expression, broadly understood, not to the status of the plaintiff.[171] For Brennan, Elmer Gertz was a private person involved in matters of public concern about which the

162. *Snyder*, 562 U.S. at 470 (Alito, J., dissenting).

163. *Hustler*, 485 U.S. at 49.

164. *Snyder*, 562 U.S. at 453 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

165. *Id.* (quoting City of San Diego v. Roe, 543 U.S. 77, 84 (2004)).

166. *Id.* (quoting Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 761(1985)).

167. *Id.* (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)); *see also* Wasserman, *supra* note 124, at 913.

168. *Snyder*, 562 U.S. at 448.

169. *Id.* at 454.

170. *Id.*

171. Gertz v. Robert Welch, Inc., 418 U.S. 323, 362 (1974) (Brennan, J., dissenting); Rosenbloom v. Metromedia, Inc. 403 U.S. 29, 43 (1971) (plurality opinion).

defendant had spoken, such that the speech deserved heightened protection;[172] so too for Roberts, the Snyders were private persons involved in matters of public concern about which Westboro was speaking. Once again, the doctrine had come around to reflect much of what Brennan wanted.[173]

The Court then returned to *Hustler*'s insistence that "outrageousness," the standard the jury used to impose liability against Westboro, is never an appropriate or meaningful standard with respect to speech on matters of public concern. As *New York Times* made clear, public debate may be "vehement, caustic, and sometimes unpleasantly sharp,"[174] and the First Amendment cannot countenance jury verdicts, grounded in distaste for that sharpness and vehemence, as instruments for suppressing such attacks.[175]

Roberts closed the opinion with rhetoric about the import of the freedom of speech that certainly would have pleased the wordsmith Holmes:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[176]

B. United States v. Alvarez

Congress enacted the Stolen Valor Act of 2005, which made it a crime to "falsely represent[]" oneself as having "been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States," with an enhanced penalty for false representations related to the Congressional Medal of Honor.[177] Alvarez, an elected member of the Three Valley Water District Board in California, announced at a public meeting that, "I'm a retired marine of 25 years. I retired in the year 2001. Back in

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172. *Gertz*, 418 U.S. at 363 (Brennan, J., dissenting) (quoting *Rosenbloom*, 403 U.S. at 46–47).

173. *Supra* notes 102–113 and accompanying text.

174. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

175. *Snyder*, 562 U.S. at 458.

176. *Id*. at 460–61.

177. United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (plurality opinion) (quoting 18 U.S.C. § 704(b) (2012)).

1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy"—all of which was untrue.[178]

A 6–3 majority held that Alvarez's conviction under the Act could not survive First Amendment scrutiny. In a plurality opinion, Anthony Kennedy (joined by Chief Justice Roberts and Ruth Bader Ginsburg and Sonia Sotomayor) rejected the government's argument that false statements lack all value and enjoy no constitutional protection.[179] Kennedy acknowledged a number of precedents in the *New York Times* line in which the Court suggested as much, including Brennan's majority opinion in *Garrison v. Louisiana*, decided several months after *New York Times*.[180] But those cases all arose from particularized contexts—defamation and other torts—in which a legally cognizable harm arose from the false statements.[181] In other words, it was not falsity alone that had stripped speech of its constitutional immunity in those prior cases, but the legally cognizable harm flowing from falsity. Kennedy also described *New York Times* as a rule designed to ensure more speech, not less,[182] meaning it would be perverse for such a rule to be repurposed as a basis for restricting speech in a new context.

Having concluded that false statements of fact are not categorically without First Amendment protection, Kennedy analyzed the Stolen Valor Act as a content-based measure subject to strict scrutiny, finding insufficient the government interest in preserving the integrity of the military honors system. First, there was no evidence that false claims to having won military honors dilute the public's perception of those awards or of the people who actually won them. Second, any confusion from false statements could be overcome by truthful counterspeech as the remedy for false speech, citing both Holmes in *Abrams* and Brandeis in *Whitney*.[183] Kennedy specifically pointed to the community outrage over Alvarez's false statements as demonstrating that no criminal law or criminal prosecution was necessary for the public to express support for its military heroes[184] or its opposition to those who lie about being heroes. And similarly channeling Holmes's aphoristic tendencies, Kennedy added that "[o]nly a weak society needs government protection or intervention before

178. *Id.* at 2542 (quoting United States v. Alvarez, 617 F.3d 1198, 1201–02 (9th Cir. 2010)). Alvarez also claimed, falsely, that he played hockey for the Detroit Red Wings and that he married a Mexican starlet. *Id.*

179. *Id.* at 2544–45.

180. *Id.* (citing cases).

181. *Id.* at 2545.

182. *Id.*

183. *Id.* at 2550 (citing Whitney v. California, 254 U.S. 357, 377 (1927) (Brandeis, J., concurring) and Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

184. *Alvarez*, 132 S. Ct. at 2549–50.

it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication."[185]

Kennedy's opinion reflects several important features of both Brennan's and Holmes's First Amendment. In his *Gertz* dissent, Brennan insisted that the knowing or reckless lie on matters of public concern is unprotected only to "strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations."[186] But when, as under the Stolen Valor Act, false statements in no way implicate individual reputation or otherwise cause individual legal harms, there is no longer a need for any accommodation, thus no justification for restricting even knowing lies touching on matters of public concern. In addition, the Act bore the hallmarks and risks of seditious libel, establishing a "political crime that does not punish harm but instead tries to enforce respect for the government."[187] Both Brennan and Holmes recognized seditious libel's fundamental incompatibility with the First Amendment.[188]

Finally, Kennedy's reliance on counterspeech and the marketplace of ideas to preserve the dignity of military awards and award recipients sounds like Brennan's majority opinions in the flag-burning cases[189] (arguably Brennan's second greatest free-speech contribution).[190] As Brennan put it, the "way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."[191] Similarly, Kennedy insisted that, however strong the governmental desire to preserve sanctity and respect for patriotic symbols and awards, it does not justify punishing those who disrespect those symbols.

Appropriately, Kennedy has emerged as Brennan's speech-protective heir on the Court. While Levine and Wermiel somewhat question that perception based on Kennedy's approach in defamation cases in his early days on the Court,[192] his voting record overwhelmingly favors First Amendment claimants.[193]

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185. *Id.* at 2550–51.

186. Gertz v. Robert Welch, Inc., 418 U.S. 323, 361 (1974) (Brennan, J., dissenting).

187. Christina E. Wells, *Lies, Honor, and the Government's Good Name: Seditious Libel and the Stolen Valor Act*, 59 UCLA L. REV. DISC. 136, 160 (2012), http://www.uclalawreview.org/?p=3110.

188. Kalven, *supra* note 24, at 204; *supra* notes 122–127 and accompanying text.

189. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

190. *See infra* Part V.C.

191. *Johnson*, 491 U.S. at 419.

192. LEVINE & WERMIEL, *supra* note 8, at 334.

193. Ashutosh Bhagwat & Matthew Struhar, *Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis*, 44 MCGEORGE L. REV. 167, 175 (2013); Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191, 1193 (2001). In Chief Justice Roberts's decade on the Court, he has emerged as a similarly strong vote and author for the speech-protective position. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518 (2014); McCutcheon v. FEC, 134 S. Ct. 1434 (2014); United States v. Stevens, 559 U.S. 460 (2010).

The other two votes for invalidating the Act came from Breyer, joined by Elena Kagan, although concurring only in the judgment. Breyer echoed many of the plurality's themes with respect to constitutional protection for false statements of fact. He insisted that prior judicial statements about falsehoods lacking protection "cannot be read to mean 'no protection at all,'" since false statements of fact may serve useful human objectives, both private and public.[194] He recognized that empowering government to punish false statements creates a risk of selective prosecution of unpopular speakers and unpopular speech.[195] And he emphasized the limited scope of statutes at issue in prior cases—whether because they required proof of specific harms to identifiable individuals (the key to defamation liability in *New York Times*), required mens rea, or were limited only to specific contexts likely to produce specific harms, such as false statements to law enforcement or perjury in judicial proceedings.[196]

Breyer's point of departure with the plurality was the level of scrutiny—he refused to commit to a "strict categorical analysis," instead performing what he called a "proportionality analysis"[197] resembling intermediate scrutiny. As in his concurring opinion in *Bartnicki*, Breyer demanded a less weighted, more even and open-ended ad hoc balancing. In both cases, that balancing invalidated the statutes before the Court because the government had not carried its burden.[198] But such an even balance, one with less of a thumb on the scale in favor of speech,[199] might produce different, less speech-protective results in other cases and circumstances. It also demonstrates the expansive gap between Brennan's free-speech jurisprudence and Breyer's.

Levels of scrutiny to one side, however, *Alvarez* featured six firm votes that even knowingly false statements of fact may enjoy constitutional protection absent special contexts or circumstances, namely legally cognizable harms to identifiable persons. Surely Brennan would agree. While unwilling to accepted complete immunity for all false statements in

194. United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment); *see also* United States v. Alvarez, 638 F. 3d 666, 674–75 (9th Cir. 2011) (Kozinski, J., concurring in the denial of rehearing en banc) (insisting that "for mortals living means lying" and providing a laundry list of examples of everyday lies).

195. *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring in the judgment).

196. *Id.* at 2553–54.

197. *Id.* at 2551–52.

198. *Compare id.* at 2556 (Breyer, J., concurring in the judgment) (insisting that the government had not explained why a more finely tuned statute would not work) *with* Bartnicki v. Vopper, 532 U.S. 514, 538 (2001) (Breyer, J., concurring) ("[T]he statutes, as applied in these circumstances, do not reasonably reconcile the competing constitutional objectives.").

199. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 624 (1982).

New York Times, his focus on knowledge as the constitutional line for false speech assumed speech about, and harmful to, an identifiable person.[200]

C. Air Wisconsin Airlines Co. v. Hoeper

The most recent progeny case is *Air Wisconsin Airlines Co. v. Hoeper*.[201] This one did not generate attention or excitement since it did not involve media and was not a true First Amendment case, instead involving statutory immunity. Nevertheless, it shows how much Brennan's *New York Times* handiwork has entwined itself into the legal fabric, in Congress as well as the Court.

Just after 9/11, Congress enacted the Aviation and Transportation Security Act of 2001 (ATSA); the statute created the Transportation Security Administration (TSA), then placed primary onus on the airlines, as the actors with consistent and direct contact with the flying public, to identify and report threats and suspicious behavior to TSA.[202] Congress granted airlines and airline employees immunity from civil liability for such reporting, except where the report was made with actual knowledge that it was false, inaccurate, or misleading, or with reckless disregard as to its truth or falsity.[203] In other words, Congress codified *New York Times* and actual malice.[204]

But *Air Wisconsin* unanimously took one more step, insisting that, unless Congress provided to the contrary (which it had not in ATSA), the statute incorporated the complete body of *New York Times* jurisprudence at the time the statute was enacted.[205] This included the principle that liability only attaches to false statements of fact; more precisely, liability attaches only where statements are "materially false," meaning minor inaccuracies do not render a statement false so long as "the substance, the gist, the sting, of the libelous charge" is true.[206] A statement is materially false only if it would produce "'a different effect on the mind of the reader [or listener] from that which the . . . truth would have produced.'"[207] Under ATSA, the

200. Rosenblatt v. Baer, 383 U.S. 75, 83 (1966) (Brennan, J., for the Court) (requiring that false implications from statements be specifically of and concerning the plaintiff); *id.* at 86 (stating that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation," but that the Constitution limits those protections where the interest in public discussion is sufficiently great); *see* LEVINE & WERMIEL, *supra* note 8, at 19; *supra* note 85 and accompanying text.

201. 134 S. Ct. 852 (2014).

202. *Id.* at 852, 857–58.

203. 49 U.S.C. § 44941 (2012).

204. *Air Wis.*, 134 S. Ct. at 861.

205. *Id.* at 864–65.

206. *Id.* at 861.

207. *Id.* at 861, 863 (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991)).

relevant listener is a reasonable TSA officer receiving a report from airline officials.[208]

Air Wisconsin arose when the plaintiff, a pilot for Air Wisconsin, failed a flight simulator test; he had agreed with the company in advance that he would be terminated if he failed this final test. The plaintiff responded angrily to failing, slamming his headset and loudly accusing airline officials of railroading him. Several hours later, after extensive discussion, airline officials contacted TSA about the plaintiff, who was booked on a flight from Virginia (where the simulator test had been administered) to Denver. They reported (1) that the plaintiff was a Federal Flight Deck Officer (FFDO)—a pilot deputized by TSA and authorized to carry a firearm while flying, although not when traveling as a passenger or attending training—"who may be armed"; (2) that an "unstable pilot" (or someone about whose "mental stability" they were concerned) was (3) "terminated today."[209]

While the Court was unanimous on the appropriate standard of material falsity, it divided on application. Writing for a six-Justice majority, Sonia Sotomayor granted the airline immunity by applying the materiality standard in a highly forgiving way. Importantly, she refused to too-finely parse the defendant's statements, to second-guess specific word choices made in the heat of the moment in trying to handle fast-moving situations, or to demand qualification of every statement to avoid any risk of misinterpretation. As to each of the challenged statements:

(1) While airline officials had no reason to believe the plaintiff actually was armed at the time, since he was not authorized to carry a firearm when flying to and from training, that misstatement was not material.[210] It would be enough for a reasonable TSA officer that an FFDO was upset about losing his job and was getting on a plane, regardless of indications about whether he was in a position to presently be armed.[211]

(2) While speaking of the plaintiff as "unstable" could carry connotations of mental illness that were not true, officials could as easily and as accurately have described him as having "blown up" following the test, which would have had the same material effect on a listener.[212]

(3) While the plaintiff was not actually terminated until the following day (and thus the statement to TSA officials that he had been "terminated today" was false when made), the plaintiff had agreed in advance that he would be terminated if he failed the final simulator test. It was not material

208. *Id.* at 864.
209. *Id.* at 859.
210. *Id.* at 864–65.
211. *Id.*
212. *Id.* at 865–66.

that he had not yet been fired, when he knew firing was inevitable and imminent.[213]

This all reflects a decidedly speech-protective version of the *New York Times* principles and ideals.

The one limit on *Air Wisconsin* might be that it was a national security case more than a free speech case, which might explain the greater solicitude from the Court. The case did not directly involve the First Amendment, the media, or expression on matters of public concern. The case threatened neither the institutional press covering a social-change movement nor the lonely critic tossing leaflets off the roof. Imposing liability here would have borne no resemblance to seditious libel, as would a judgment against the *Times* in 1960s Alabama. Any chilling effect would not have affected public debate, but only a company reporting suspicious behavior to a government agency.

Moreover, the majority emphasized the fast-moving and potentially dangerous situations involved in TSA reporting, which weighed against requiring "precise wording" as a condition for statutory immunity.[214] Such fast-moving conditions are absent in the typical defamation case, where a media outlet has the time, infrastructure, and expectation of precise wording, especially for the written word. This might cause the Court to demand greater linguistic precision in a different case.

V. IF NOT HOLMES, THEN BRENNAN?

The fundamental premise of *The Great Dissent* is that Holmes's change of heart and mind in *Abrams* transformed the First Amendment and America's connection to, and conception of, free speech.[215] Subsequent to the book's publication, Healy and Michael Dorf debated a different world: What if Holmes had not changed his mind about the freedom of speech in *Abrams*, but had continued to adhere to his views from *Schenck*, *Frohwerk*, and *Debs*? Would any other Justice or judge have picked up the mantle of free speech? Dorf believes we might have gotten to a similar place, since others were thinking about the First Amendment during and after Holmes's time.[216] Healy considers several likely candidates, but finds each lacking.[217]

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213. *Id.* at 865.

214. *Id.*

215. HEALY, *supra* note 2, at 7; *see also* Collins, *supra* note 2, at 377 ("It is undeniable: free speech in America was never the same after 1919.").

216. Mike Dorf, *Holmes, Speech and the Power of Ideas*, DORF ON LAW (Aug. 5, 2013), http://www.dorfonlaw.org/2013/08/holmes-speech-and-power-of-ideas.html.

217. Thomas Healy, *Holmes, Speech and the Power of Ideas—A Response*, DORF ON LAW (Aug. 8, 2013), http://www.dorfonlaw.org/2013/08/holmes-speech-and-power-of-ideas_8.html.

The obvious candidate would have been Brandeis, Holmes's contemporary, friend, and jurisprudential ally, who certainly shared a broad vision for the freedom of speech. Brandeis made his own contribution to early First Amendment canon with his concurring opinion (joined by Holmes) in *Whitney v. California*,[218] which Vincent Blasi labeled "arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment."[219] Brandeis struck similar themes to Holmes, stressing the constitutional import of protecting dissenting, even noxious, viewpoints as the means of discovering political truth; the value of counter-speech and the competition of ideas; and the power of time and thought to correct evil or wrong ideas.[220] But they reached the same conclusion from different points—as Blasi explains, "Holmes emphasized fatalism. Brandeis stressed courage."[221] In fact, some scholars argue that the core of the modern First Amendment—centrality of political expression, strong protection for political dissenters, and the "nearly universal acceptance" of broad protection for speech—reflects Brandeis and democracy, populism, and republican self-government more than it does Holmes and his marketplace of ideas.[222]

Healy doubts Brandeis could have taken the lead, however. Brandeis virtually never parted with the majority in First Amendment cases without Holmes—he joined the Court without comment in *Schenck*, *Frohwerk*, and *Debs*—and did not dissent on his own until "Holmes broke the ice."[223] Rather than dissenting himself, Brandeis instead would convince Holmes to dissent (Holmes once described it to Laski as having been "catspawned"), then join that opinion.[224] More importantly, even had Brandeis gone off on his own, he might not have brought anyone with him. Brandeis largely remained an outsider as the first Jewish Justice who was held in contempt by many in the establishment,[225] even including Holmes's wife, who generally snubbed Brandeis and made no efforts to socialize with him or his wife.[226]

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218. 274 U.S. 357 (1927).

219. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 668 (1988).

220. *Whitney*, 274 U.S. at 375, 377 (Brandeis, J., concurring).

221. Blasi, *supra* note 133, at 463.

222. Ashutosh A. Bhagwat, *The Story of* Whitney v. California*: The Power of Ideas*, *in* CONSTITUTIONAL LAW STORIES 406 (Michael C. Dorf ed., 2d ed. 2009); *see* Collins, *supra* note 2, at 376.

223. Healy, *supra* note 217. *But see* Gilbert v. Minnesota, 254 U.S. 325 (1920) (Brandeis, J., dissenting).

224. HEALY, *supra* note 2, at 70.

225. *Id.* at 69.

226. *Id.* at 70.

A second possibility is Learned Hand, shown as the first mover among the correspondents pushing Holmes in his First Amendment evolution. But Hand's authority necessarily was limited by never serving on the Supreme Court. His highly speech-protective *Masses* opinion in 1917 (which formed the basis for his correspondence with Holmes during the summer of 1918) was reversed on appeal.[227] And Hand's First Amendment vision, as reflected in *Masses*, gave way to a much different, much less speech-protective approach as a judge on the Second Circuit, reflected in his opinion for the panel in *United States v. Dennis*, ultimately affirmed by the Supreme Court.[228] After a "wearisome analysis" of Supreme Court precedent, Hand held that in "each case they must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[229] This, Healy argues, smacked of the old "bad tendency" test, without Hand's (or Holmes's) earlier gloss that any harm be imminent as a condition of punishing speech.[230] Moreover, Healy argues, Hand's commitment to judicial restraint trumped all, pushing him to reject most judicial enforcement of constitutional rights and most instances of courts invalidating the acts of elected legislators.[231] By contrast, Gerald Gunther, as Hand's biographer, is far more solicitous of Hand's First Amendment position. He insists that Hand adhered to his *Masses* formula, but was hamstrung by erroneous Supreme Court precedent that he could not change and which forced him to reject the free speech arguments in *Dennis*.[232]

A third possibility is Black, whose First Amendment absolutism (under which "'no law' means no law," "without any ifs, buts, or whereases")[233] outflanked Brennan in many areas, including defamation. As Black concurred in *New York Times*, the First Amendment not only "delimits" (Brennan's word[234]) a state's power to award damages to public officials against critics of their official conduct, it "completely prohibit[s]" the exercise of such power.[235] But Black could not always get other Justices to come along with him. As Levine and Wermiel show in several early

227. Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917), *rev'g* 244 F. Supp. 535 (S.D.N.Y. 1917); *supra* notes 40–44 and accompanying text.

228. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) (Hand, J.), *aff'd*, 341 U.S. 494 (1951).

229. *Id.* at 212.

230. HEALY, *supra* note 2, at 247–48.

231. *Id.* at 248.

232. GUNTHER, *supra* note 43, at 604–05. *But cf.* Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2141 (2014) (criticizing Gunther's biography for "turn[ing] Hand into a civil libertarian and constitutional law scholar"—in other words, for "turn[ing] Hand into Gunther").

233. Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553, 559 (1962).

234. New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

235. *Id.* at 293 (Black, J., concurring).

progeny cases, Black continued to adhere to his position of absolute immunity from liability, even at the risk of a majority.[236] More importantly, Black notoriously shifted rightward in his later years on the Court, primarily on criminal procedure issues, but also in free speech cases involving civil rights sit-ins and demonstrations.[237]

Surprisingly, however, Healy never mentions a fourth possibility—William Brennan. Brennan would be intimately identified with the First Amendment for *New York Times* (and its progeny) alone.[238] Beyond that case, he was a consistent vote in favor of free speech claimants—in thirty-five years on the Court, it may be easier to enumerate the few cases in which he did not accept the speech-protective position.[239]

There are admittedly several limitations on anointing Brennan as the one to lead the First Amendment charge absent Holmes's change of mind. The first involves the inherent folly of counter-factual inquiry.[240] Brennan was not painting on a blank canvas. He had a First Amendment foundation on which to build via the Court's common law decision-making processes,[241] some of it laid by post-*Abrams* Holmes; to remove Holmes is to remove that foundation. Healy acknowledges as much with respect to Black.[242] Of course, this means no modern Justice could pass that test.[243] Timing is everything; as Ronald Collins puts it, "[o]ne of the main reasons Holmes is considered the father of modern free speech jurisprudence is

236. LEVINE & WERMIEL, *supra* note 8, at 117; *see, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57 (1971) (Black, J., concurring in the judgment); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 170 (1967) (Black, J., concurring in the result and dissenting); Garrison v. Louisiana, 379 U.S. 64, 79 (1964) (Black, J., concurring).

237. STERN & WERMIEL, *supra* note 7, at 287–88; *see* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 303 (2000); *see, e.g.*, Walker v. City of Birmingham, 388 U.S. 307 (1967) (Justice Black provided fifth vote affirming conviction of civil rights protesters for violating injunction prohibiting protest); Adderley v. Florida, 385 U.S. 39 (1966) (Black, J., for the Court) (affirming trespass convictions of students demonstrating outside county jail); Bell v. Maryland, 378 U.S. 226, 318 (1964) (Black, J., dissenting from decision reversing trespassing convictions of sit-in demonstrators).

238. POWE, *supra* note 237, at 304.

239. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 669 (1990) (Brennan, J., concurring) (joining majority opinion upholding ban on corporate election expenditures); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (White, J., joined by Brennan and Marshall, JJ., dissenting from opinion declaring unconstitutional state limits on corporate campaign expression); United States v. O'Brien, 391 U.S. 367 (1968) (joining majority opinion affirming constitutionality of prohibition on destroying draft-registration cards).

240. *See, e.g.*, RICHARD J. EVANS, ALTERED PASTS: COUNTERFACTUALS IN HISTORY (2013); Cass R. Sunstein, *What if Counterfactuals Never Existed?*, NEW REPUBLIC (Sept. 20, 2014), http://www.newrepublic.com/article/119357/altered-pasts-reviewed-cass-r-sunstein.

241. *See* Strauss, *supra* note 129, at 33.

242. Healy, *supra* note 217.

243. *See* Sunstein, *supra* note 240 (arguing that some counterfactuals are beneficial and inevitable in trying to explain events).

because he wrote what he did, when he did, and voted as he did in *Abrams* and its progeny."[244]

Second, and the flipside to the timing question, we do not know how Holmes would have responded to the very different forms of expression that Brennan encountered a half-century later. Healy shows Holmes's impatience and even distaste for the radical socialist, communist, unionist, anti-capitalist, and anarchist speech around him, even from his surrogate son, Laski. How would the Brahmin Holmes have reacted to pornography, profane comedy routines, provocative literature, and civil rights marches? How would the thrice-wounded Civil War veteran have viewed burning flags, lies about military honors, and offensive protests outside soldiers' funerals? Such uncertainty is inherent in the way any later Justice builds on the opinions and ideas of those before him. Holmes had to begin the free-speech revolution in *Abrams* at the right's core—political dissent and policy dissent prosecuted for seditious libel—with Brennan tackling an analogous threat to that core in *New York Times*. Having done so, Brennan was freer to expand those basic ideas to a wider range of expression, often far from that core. As Kalven explains, Brennan channeled Holmes to isolate the First Amendment's "central meaning" of protecting political dissent, while understanding that this was not the "whole meaning" of the Amendment and that other speech was protected beyond that center.[245] Brennan had the fortuity of serving on the Court at a point in which he could expand the right away from the core and out to the margins.

A final limitation is singular to Brennan—his desire and ability to forge Court majorities and coalitions. That willingness to compromise in search of coalitions and to focus on the creation of workable doctrine that could pull his colleagues along is precisely why he was better able to create binding First Amendment law than the more absolutist Black.[246] On the other hand, that desire sometimes prompted him to abandon constitutional clarity or constitutional principles, even on the First Amendment, for fear of losing a majority.[247] Much again depends on timing. As discussed previously, Brennan was at the height of his powers in the mid-1960s, approximately a decade into his service on the Court, when Goldberg's presence guaranteed a majority for the civil libertarian position.[248] That certain majority was gone by 1970, as was the ease with which Brennan

244. Collins, *supra* note 2, at 378.

245. Kalven, *supra* note 24, at 208.

246. POWE, *supra* note 237, at 303; Segall, *supra* note 95 (quoting Judge Richard Posner, a former Brennan clerk, describing Brennan's willingness to compromise as his strength that "made it much easier for him to get a majority than it would have been for more 'principled' justices").

247. STERN & WERMIEL, *supra* note 7, at 545; *id.* at 263 (describing criticism that Brennan "would change votes to get a result").

248. *See* POWE, *supra* note 237, at 303–04; *supra* notes 90–101 and accompanying text.

could get his desired outcomes. He never again wrote for the Court in a progeny case after *Rosenbloom* (a plurality, not a majority) in 1971.[249] In his later years on the Court, he often found himself writing separately, just as Holmes had.

Nevertheless, Brennan led efforts to enhance the freedom of speech across several issues and areas, whether writing majority opinions or strong concurrences and dissents attempting to create a body of speech-protective rules. This Part considers five doctrinal areas defined by high-profile, highly speech-protective Brennan opinions and efforts.

A. Advocacy of Unlawful Conduct

If we are to link Holmes to Brennan in driving a speech-protective vision of the First Amendment, it is appropriate to begin with incitement and advocacy of unlawful conduct. This was the expression at issue in the Court's earliest free speech cases (in which the speech claimants all lost), in Holmes's clear-and-present danger test in *Schenck*, and in Holmes's change of heart in *Abrams*.

Fifty years after *Abrams*, the Court in *Brandenburg v. Ohio* restated and reconstructed the test for unprotected incitement, without ever using the words "clear and present danger."[250] In a state criminal syndicalism prosecution of a Ku Klux Klan leader over statements at a public rally, the Court held that "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[251] This standard reflected the modern evolution of First Amendment doctrine, which now distinguished "abstract teaching" of the need for violent action from preparing and steeling a group to such action.[252] The Ohio statute and conviction, which made no distinction between "mere advocacy" and incitement to imminent lawless action, could not stand.[253]

Although *Brandenburg* was published as a per curiam opinion, Brennan's hand is recognized and significant. The opinion originally had been assigned to Fortas, who resigned in May 1969, after his draft had circulated but before the opinion was announced. Brennan took over the opinion and made one significant change—rather than Fortas's requirement

249. LEVINE & WERMIEL, *supra* note 8, at 125; *supra* notes 108–113 and accompanying text.

250. *See* 395 U.S. 444, 449 (1969) (Black, J., concurring).

251. *Id.* at 447.

252. *Id.* at 447–48 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

253. *Id.* at 448–49.

(modeled on Holmes) that speech be "attended by present danger that such action may in fact be provoked," Brennan insisted that speech be "likely" to incite or produce such action.[254]

One Brennan biographer labeled this a "clean break" from clear-and-present danger; whatever the standard's Holmesian origins, the Court (except, of course, for Holmes and Brandeis in non-majority opinions) had never applied it to truly protect vigorous dissenting speech.[255] Brennan similarly failed to even mention clear-and-present danger in *New York Times*, which Harry Kalven took as a sign that the test, at least in those words and with their presumed meaning, had disappeared from First Amendment jurisprudence.[256] Five years later, Brennan proved him correct in the realm of incitement and advocacy of unlawful conduct, perhaps hoping the new language would reflect a new, more speech-protective attitude.

While *Brandenburg* marks the most direct connection between the free speech opinions of Holmes and Brennan, it may be the least significant area for modern speech. The Court has not decided a true clear-and-present danger case in more than forty years.[257] The more recent focus is not on speech urging listeners to break the law, but rather on "true threats," in which a speaker threatens unlawful harm to a listener.[258] Instead, clear-and-present danger stands for a general requirement of temporal imminence between speech and harm, providing rhetorical justification for what David Strauss calls the "persuasion principle"—speech cannot be regulated out of fear that it might persuade listeners to act in a (lawful) way that government may not like.[259]

B. Free Speech and the Civil Rights Movement

New York Times was a civil rights case.[260] The editorial advertisement at issue—titled "Heed Their Rising Voices"—described civil rights protests on a college campus in Montgomery and over-officious police responses to

254. STERN & WERMIEL, *supra* note 7, at 318; *see* Morton J. Horwitz, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 23, 28 (1997).

255. STERN & WERMIEL, *supra* note 7, at 318.

256. Kalven, *supra* note 24, at 213–14.

257. Collins, *supra* note 2, at 376.

258. *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001 (2015); Virginia v. Black, 538 U.S. 343 (2003).

259. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 338–39 (1991).

260. Kalven, *supra* note 24, 192; Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 79.

them, and sought public and financial support for the movement.[261] The events occurred during the period of "massive resistance" to *Brown v. Board of Education*[262] and organized counterattacks against efforts to undo Southern apartheid.[263] Sullivan sued not only the *Times*, but also four African-American civil rights leaders who had signed the ad.[264] And while the *Times* had gotten a stay of the $500,000 judgment pending appeal, the individual defendants had not, so Sullivan sought to collect on the judgment against them by attaching their real and personal property.[265] Nor was this an isolated case. Sullivan's was one of five defamation actions filed in response to "Heed," seeking a total of $3 million.[266] And those five lawsuits were part of a larger coordinated effort by Alabama officials statewide to use libel litigation to silence the Civil Rights Movement and the national press covering it,[267] perhaps with explicit approval by some state judges.[268] By the early 1960s, the *Times* faced potential libel judgments approaching $300 million.[269] *New York Times* was essential to ending this practice and to protecting both civil rights protesters and the national media covering them.

This context is critical to the outcome in *New York Times* and to the Court's willingness to discard years of state defamation law in the name of free speech.[270] The context also explains a significant, but overlooked, component of First Amendment protection established in the case—the power of independent appellate review over constitutional facts (such as actual malice, "of and concerning," and falsity) through which the Court itself determined that Sullivan could not prevail on his claim.[271] Although the Court remanded to state court, it had done all the necessary fact-finding, leaving the lower court nothing meaningful to do but enter

261. New York Times Co. v. Sullivan, 376 U.S. 254, 256–57 (1964); LEWIS, *supra* note 124, at 5–8; *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25, *reprinted in* LEWIS, *supra* note 124, at 2–3.

262. 347 U.S. 483 (1954).

263. *See* LEWIS, *supra* note 124, at 19–22; Wasserman, *supra* note 124, at 909.

264. All four were Alabama citizens and it is generally agreed that Sullivan sued them, but none of the other signatories of the ad, to destroy diversity of citizenship and keep the case in Alabama state court and out of federal district court. Wasserman, *supra* note 164, at 905–06.

265. LEWIS, *supra* note 124, at 43–44.

266. *Id.* at 12–14; Mary-Rose Papandrea, *The Story of* New York Times Co. v. Sullivan, *in* FIRST AMENDMENT STORIES 229, 237 (Richard W. Garnett & Andrew Koppelman eds., 2012).

267. LEWIS, *supra* note 124, at 35–36.

268. *Id.* at 26.

269. Papandrea, *supra* note 266, at 237–38.

270. *But see* Cass, *supra* note 141, at 410 ("The decision's strength in First Amendment theory was matched by its weakness in judicial decision-making, particularly its infidelity to decisional constraints evidenced in Brennan's casting off the lines of historical understanding of the Amendment's meaning.").

271. New York Times Co. v. Sullivan, 376 U.S 254, 285–88 (1964); Wasserman, *supra* note 124, at 913.

judgment for defendants.[272] Clearly, the Justices did not trust a Southern state court to play any role in determining the rights of the speakers in this case.[273]

But the Court's concern for civil rights was not limited to *New York Times*. Some of the Warren Court's most important First Amendment jurisprudence arose in that same cauldron of the movement and the public protests that defined it.[274] *Brown* aside (and certainly never to understate the power of *Brown*), the movement might have produced more significant free speech law than equal protection law, at least from the Supreme Court.[275] The Court offered broad protection to the rights to publicly protest,[276] sit-in on private property,[277] organize and associate for political purposes,[278] advocate,[279] and speak anonymously,[280] all from cases involving demonstrations (in the South and elsewhere) against race discrimination, segregation, and denial of voting rights.[281]

Two Brennan opinions stand out in this area. One is *NAACP v. Button*,[282] which reflects as significant and important an expansion of the First Amendment as either Holmes's *Abrams* dissent or Brennan's *New York Times* majority. *Button*, decided in 1963, established that the state cannot foreclose constitutional scrutiny of its laws by the "mere labels" that it places on some speech or conduct;[283] that "the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental

272. Wasserman, *supra* note 124, at 913.

273. LEVINE & WERMIEL, *supra* note 8, at 20.

274. *See, e.g.*, KALVEN, *supra* note 71, at 6; TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 47–49 (2009); Kalven, *supra* note 24, at 192–93; Neuborne, *supra* note 260, at 77–82.

275. The dominant pieces of equality protection came from Congress through the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Brennan helped ensure that the Court avoided any Equal Protection pronouncements that might derail those legislative efforts. *See* POWE, *supra* note 237, at 228–29. The Court ultimately was called on to assess (and uphold) the constitutionality of these laws, although again by talking not about equal protection but about interstate commerce. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 271 (1964).

276. *See, e.g.*, Gregory v. Chicago, 394 U.S. 111 (1969); Brown v. Louisiana, 383 U.S. 131 (1966) (plurality opinion); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

277. Bell v. Maryland, 378 U.S. 226 (1964). *See generally* CLARK, *supra* note 102, at 220–25 (describing handling of sit-in cases, which deeply divided the Court).

278. *See, e.g.*, Louisiana v. NAACP, 366 U.S. 293 (1961); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

279. NAACP v. Button, 371 U.S. 415, 452 (1963).

280. *See* Talley v. California, 362 U.S. 60 (1960).

281. *See* ZICK, *supra* note 274, at 47; Neuborne, *supra* note 260, at 77–82.

282. 371 U.S. 415 (1963); *see also* Ronald K.L. Collins, *Richard Posner &* NAACP v. Button—*A Short History*, CONCURRING OPINIONS (June 18, 2014), http://www.concurringopinions.com/archives/2014/06/richard-posner-naacp-v-button-a-short-history.html.

283. *Button*, 371 U.S. at 429.

intrusion";[284] and that "First Amendment freedoms need breathing space to survive."[285] Brennan emphasized those ideas one year later in *New York Times*.

At issue in *Button* were state laws prohibiting lawyer solicitation, as applied to the NAACP and its efforts to locate parents to serve as plaintiffs in school-desegregation actions. Lawyers would speak at NAACP-sponsored meetings, often asking parents to authorize someone (sometimes that lawyer, sometimes a lawyer-to-be-named-later) to initiate litigation on that parent's behalf. But Virginia had redefined prohibitions on "runners" and "cappers" to include any "agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."[286]

In an opinion for five Justices, Brennan extended the First Amendment to protect the NAACP's litigation strategies and practices as "a form of political expression"; they reflected "a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country."[287] Litigation was a way for groups and individuals, having been unable to achieve their objectives in the political arena, to associate and attempt to achieve those objectives in the courts—in effect, civil rights organizations were doing what New Deal opponents had done, without inhibition, thirty years earlier.[288] The Court already had made clear that the First Amendment protected peaceful organized group activity; litigation was simply one more such activity.[289] Virginia's interest in regulating the legal profession did not justify regulating the NAACP's activities; the group's politically motivated litigation efforts bore no resemblance to the type of unethical attorney conduct ordinarily justifying prohibition—there was no profit motive, no showing of conflicts of interest, no showing that the organization prevented anyone from obtaining other counsel, and no showing that it prevented competing lawyers from finding clients to take such cases.[290] The law also was so broad as to effectively eliminate all group litigation, particularly on politically and socially unpopular positions and issues.[291]

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284. *Id.*

285. *Id.* at 433.

286. *Id.* at 423.

287. *Id.* at 429.

288. *Id.* at 429–30.

289. *Id.* at 430–31.

290. *Id.* at 442–44.

291. *Id.* at 435–36; *see also* CLARK, *supra* note 102, at 218–20; KALVEN, *supra* note 71, at 87–88; STERN & WERMIEL, *supra* note 7, at 214–15.

Button, and Brennan's authorship of it, was a fortuitous product of the Warren Court's evolving membership in the early 1960s. The case first came to the Court during October Term 1960; the Court divided 5–4 in favor of upholding the law, with Frankfurter writing the majority and Black writing a dissent for himself and Warren, Douglas, and Brennan. But the case was held over in the spring of 1961, when Frankfurter and Charles Whittaker left the Court. It returned in October Term 1962, with President Kennedy having appointed Goldberg and White. Following reargument, the 5–4 divide now was to declare the laws invalid, with Goldberg joining the original dissenters to form a majority and White concurring in part and dissenting in part.[292]

Commentators celebrate *Button* as a First Amendment landmark, seeing it as more practically significant than *New York Times*, although lacking the same reputation or regard. *Button* took the First Amendment to a new place, offering what Kalven calls "a generous view of the range of First Amendment protection, a view which seems to me [to be] indisputably correct although the Court had never previously been given an appropriate occasion for announcing it."[293] The decision obviously boosted immediate NAACP efforts in the South,[294] but it also endorsed and breathed constitutional life into a particular model of public-interest and law-reform litigation.[295]

In fact, Kalven suggests that the opinion's real weakness was that Brennan did not "stand on his First Amendment point" and hold that all recruiting for all constitutional litigation is constitutionally protected activity, relying instead on the potential application of vague and overbroad state law to innocuous activities.[296] Brennan could have gone further, had he "had the courage of his First Amendment convictions."[297] Once again, it may return to Brennan's desire to hold together a majority, an especially salient concern in this case, in which the outcome depended on changes in personnel producing changes in outcome.

The second Civil Rights Movement case is even more telling as a measure of Brennan's bona fides as a leader in efforts to protect free speech. *Walker v. City of Birmingham*[298] held that civil rights protesters could not use the appeal of a contempt conviction to challenge the

292. MICHAL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 339 (2004); STERN & WERMIEL, *supra* note 7, at 214; Collins, *supra* note 282.

293. KALVEN, *supra* note 71, at 82–83; *see* Collins, *supra* note 282.

294. *See* CLARK, *supra* note 102, at 219.

295. Collins, *supra* note 282.

296. KALVEN, *supra* note 71, at 86; *see* NAACP v. Button, 371 U.S. 415, 433–34 (1963).

297. KALVEN, *supra* note 71, at 85.

298. 388 U.S. 307 (1967).

constitutionality of even a facially invalid underlying injunction, marking the one time the Court rebuffed civil rights advocates' First Amendment arguments.[299] Brennan authored one of three dissents.

Anticipating protests during Easter Week in 1963, Birmingham officials obtained an ex parte state court injunction prohibiting leaders from encouraging or participating in mass parades or mass processions without obtaining a permit, as required by a constitutionally dubious local law that the court copied into its injunction. Despite the injunction, marches went forward on Good Friday and Easter Sunday.[300] Protest leaders never sought to comply with the injunction by seeking a permit and never moved to dissolve or appeal it as constitutionally defective—both of which likely would have been futile. Writing for the Court, in an opinion joined by Black (thus highlighting his shift away from absolute protection for speech, at least in some contexts[301]), Justice Stewart accepted the state procedural rule that a person subject to an injunction cannot ignore the injunction and then challenge it in opposing a contempt citation; he must obey the court order unless he can successfully dissolve it or have it reversed on appeal.[302] The Court declined to find a constitutional exception or limitation on that rule or to read the First Amendment to mean that people "were constitutionally free to ignore all the procedures of the law and carry their battle to the streets."[303]

Brennan's dissent, joined by Warren, Douglas, and Fortas, emphasized that the First Amendment only can survive in a system in which people have "the right to speak first and challenge later,"[304] meaning to speak in the face of a restriction on speech, then challenge the restriction if the state chooses to penalize that expression ex post. He rejected the "inscrutable legerdemain" by which that principle could be altered simply because government first took the time to have a judge issue a constitutionally defective ex parte judicial order reciting the words of a constitutionally defective ordinance.[305] The First Amendment limits both legislative and judicial power—if speech cannot be punished, it cannot be punished as contempt of an ex parte injunction or as a violation of a legislative enactment.[306] By saying otherwise, the majority created a "devastatingly

299. Neuborne, *supra* note 260, at 80; *see also* CLARK, *supra* note 102, at 241 (arguing that the decision sent a bad message to civil rights advocates, who questioned whether the courts were reliable allies in their cause).

300. *Walker*, 388 U.S. at 309–11.

301. *See* STERN & WERMIEL, *supra* note 7, at 289.

302. *Walker*, 388 U.S. at 313–15.

303. *Id.* at 321.

304. *Id.* at 345 (Brennan, J., dissenting).

305. *Id.* at 345–46.

306. *Id.* at 349.

destructive weapon" with "complete invulnerability" that can be used to stifle public expression and infringe essential public freedoms.[307]

Although events giving rise to *Walker* occurred in 1963, Brennan saw the case and the majority opinion in the broader social and political milieu at the time of the decision in 1967. By that point, riots, Vietnam, and rising militancy within the Civil Rights Movement had dampened Northern (white) sympathy for civil rights protesters[308] and patience for the public disorder associated with public protest.[309] In Blasian terms, the fear that led to Southern efforts to restrain the Civil Rights Movement had reflected a local pathology;[310] in protecting speech claimants in those earlier cases, the Court functioned as a national institution remaining above a limited pathology.[311] By 1967, with unrest extending north and the tenor of the movement changing, the pathology had nationalized. And, unfortunately, the Court responded in *Walker* much as it had during the national pathologies of World War I and the post-War Red Scare. At least in this case, Brennan found himself playing the same dissenting role that Holmes had played in *Abrams* and subsequent Red Scare cases.

Brennan highlighted those broader social concerns in the closing paragraph of his dissent, insisting that the altered context should not alter the scope of the First Amendment or the right of public protest. "We cannot permit fears of 'riots' and 'civil disobedience' generated by slogans like 'Black Power' to divert our attention from what is here at stake—not violence or the right of the State to control its streets and sidewalks," but protection of First Amendment rights.[312] In fact, that closing reflected greatly modulated language. In earlier drafts, Brennan explicitly reminded readers that the case was about a protest from 1963, "before 'Black Power' and 'Long Hot Summer' became part of the jargon of the civil rights movement."[313] When Warren said he could not join the dissent if those references to current events remained, Brennan, a coalition-builder even in dissent, modified his language.[314]

307. *Id.* at 346–47, 349.
308. *See* CLARK, *supra* note 102, at 241; STERN & WERMIEL, *supra* note 7, at 289–90.
309. ZICK, *supra* note 274, at 52.
310. Blasi, *supra* note 133, at 451.
311. *Id.* at 451, 509.
312. Walker v. City of Birmingham, 388 U.S. 307, 349 (1967) (Brennan, J., dissenting).
313. STERN & WERMIEL, *supra* note 7, at 290.
314. *Id.*

C. Flag Burning

Brennan's opinions for the Court in the two flag-burning cases[315] represent his final notable First Amendment victory.[316] Through his opinions for the Court, Brennan controlled the outcome of one of the most heated, if not practically significant, political and expressive debates of the day.

The American flag became part of the national political agenda by accident in the late 1980s. During the 1988 presidential election, then-Vice President and Republican presidential nominee George H.W. Bush made a political issue out of the Democratic candidate, former Massachusetts Governor Michael Dukakis, vetoing a Massachusetts bill that would have required public school teachers to lead students in daily recitation of the Pledge of Allegiance. Combined with Dukakis's "card-carrying member[ship]" in the ACLU, the flag and patriotism became topics of presidential politics and national debate.[317]

The following June, the Court decided *Johnson*,[318] a prosecution under Texas's flag-burning prohibition, arising from events at the 1984 Republican National Convention in Dallas. Writing for a five-Justice majority,[319] Brennan began by concluding that burning a flag is conduct "'sufficiently imbued with elements of communication' to implicate the First Amendment."[320] The government asserted two interests in support of the law—preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. The first interest was not implicated, as there was no record of any breaches of the peace and the Court refused to treat flag burning as fighting words.[321] The second interest was implicated, but was related to the suppression of expression, in that the interest was endangered only when burning the flag conveyed a message that the government did not like.[322]

Brennan then concluded that while this second interest was compelling, the law could not survive strict scrutiny. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself

315. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

316. CLARK, *supra* note 102, at 271–73.

317. Alan K. Chen, *Forced Patriot Acts*, 81 DENV. U. L. REV. 703, 718–19 (2004).

318. 491 U.S. 397 (1989).

319. O'Connor initially was a sixth vote with Brennan, but she changed her mind, without explanation, and joined Chief Justice Rehnquist's dissent. STERN & WERMIEL, *supra* note 7, at 526.

320. *Johnson*, 491 U.S. at 406 (citation omitted) (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

321. *Id.* at 409–10.

322. *Id.* at 410.

offensive or disagreeable."[323] This, of course, recalls Holmes's ideal of "freedom for the thought that we hate."[324] The government had never been permitted to prohibit particular uses of any symbol so as to limit the views expressed through that symbol, and the Court declined to create any American flag exception to the "joust of principles protected by the First Amendment."[325]

Brennan closed the opinion in Holmesian[326] fashion:

> We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today. . . . And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.[327]

The negative reaction to Brennan's opinion was swift and unexpected, even by a Justice who by that point had spent thirty-three years on the Court. Conservative talk-radio listeners mailed flags to his chambers and a neighbor draped an American flag over his front door in Brennan's plain view.[328] The Senate, by a 97–3 vote, passed a resolution condemning the decision, and the House passed a similar resolution expressing "profound concern."[329] Amid calls from President Bush and members of Congress for

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323. *Id.* at 414.

324. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

325. *Johnson*, 491 U.S. at 415–18.

326. He also may have been going for Justice Jackson and his majority opinion in *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).

327. *Johnson*, 491 U.S. at 419–20.

328. STERN & WERMIEL, *supra* note 7, at 527.

329. *Id.*; Daniel H. Pollitt, *The Flag Burning Controversy: A Chronology*, 70 N.C. L. REV. 553, 571 (1992).

a constitutional amendment to overturn *Johnson*, Congress enacted the Flag Protection Act of 1989[330] on overwhelming bipartisan votes in both houses.[331] The Act flatly banned all desecration of the flag (including mutilating, defacing, physically defiling, burning, maintaining on the ground, or trampling), except for disposal of a worn or soiled flag, for any reason and with any motive or purpose.[332]

With Brennan writing for the same 5–4 split, the Court held in *Eichman* that the federal Act violated the First Amendment.[333] Although the law prohibited all flag desecration, regardless of the speaker's motive or message, the government's asserted interest—maintaining respect for the flag as a symbol—remained related to the suppression of expression because of its content.[334] This could be seen in the statute's text, which prohibited only conduct (mutilating, defacing, defiling) that "unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value," while still permitting respectful disposal by burning.[335] Because the federal law remained content-based, *Johnson* and the First Amendment principles espoused there controlled. And Brennan again closed with high rhetoric, insisting that "[p]unishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."[336]

Now the only option was a constitutional amendment, the push for which began when "[t]he ink had hardly dried on the *Eichman* opinion."[337] Within less than a month, a proposed amendment fell thirty-four votes short of the necessary supermajority in the House and nine votes short in the Senate.[338] By the time Brennan announced his retirement in July, his final free speech victory appeared safe—at least for the moment. Flag desecration silently remains the free speech issue that will not die. Proposals for a constitutional amendment have been made in one or both houses in every Congress since the 104th (the first of the Gingrich Revolution) in which Republicans have controlled one or both houses. Several proposals have passed the House; none have passed the Senate, although the closest, in the 109th Congress, fell one vote short.[339]

330. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777.
331. Pollitt, *supra* note 329, at 575.
332. United States v. Eichman, 496 U.S. 310, 314–15 (1990) (quoting statute).
333. *Id.* at 318–19.
334. *Id.* at 315–16.
335. *Id.* at 317.
336. *Id.* at 319.
337. Pollitt, *supra* note 329, at 589.
338. *Id.* at 606–07, 612.
339. S.J. Res. 12, 109th Cong. (2006) (final vote of 66–34).

Ironically, for all the criticism and vitriol initially directed at Brennan, the flag burning cases no longer are intimately associated with their author. Instead, the decisions are better remembered for the surprising line-ups—the normally liberal Stevens dissented,[340] while originalist Antonin Scalia joined the majority.[341] In fact, *Johnson* has become far more associated with Scalia than Brennan—twenty-five years later, it remains the singular (if not the only) example of how Scalia's textual originalism did not invariably produce constitutional outcomes matching his conservative political preferences.[342]

D. Obscenity and Sexually Explicit Speech

Other than *New York Times*, the First Amendment area most regularly associated with Brennan is obscenity. For more than a decade he wrote the lion's share of opinions for the Court, likely because no one else wanted to write them and Warren had no one else to assign them to.[343] Brennan was never a First Amendment absolutist,[344] never more obviously than with respect to sexually explicit material, which he believed an "abomination."[345] And Warren, who similarly disliked this content, immediately identified Brennan as the Justice who could figure out how to strike the proper balance between First Amendment freedoms and the ability of society to protect itself from "smut-peddlers."[346]

In 1957, Brennan wrote for the Court in *Roth v. United States*.[347] He accepted the longstanding idea that obscenity is a category of speech entirely without First Amendment protection.[348] But that still left to the

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340. Although Stevens often departed from Brennan's First Amendment vision on *New York Times* issues. *See* LEVINE & WERMIEL, *supra* note 8, at 364.

341. *See* STERN & WERMIEL, *supra* note 7, at 526 (discussing Brennan's early relations with Scalia). Kennedy also joined Brennan in the majority in both cases, which seemed surprising at the time (just two years after Kennedy's appointment to the court) but has proven perfectly consistent with Kennedy's speech-protective judicial philosophy. *See* Texas v. Johnson, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("[T]he fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free."); *supra* note 192–193 and accompanying text.

342. ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 17 (2012); Volokh, *supra* note 193, at 1196–97; Howard Wasserman, *Scalia, Judicial Ideology, and Flag Burning*, PRAWFSBLAWG, Aug. 31, 2012, http://prawfsblawg.blogs.com/prawfsblawg/2012/08/stop-talking-about-flag-burning.html.

343. CLARK, *supra* note 102, at 182–83; STERN & WERMIEL, *supra* note 7, at 123.

344. CLARK, *supra* note 102, at 183.

345. *Id.* at 187, 189.

346. *Id.* at 185; STERN & WERMIEL, *supra* note 7, at 123.

347. 354 U.S. 476 (1957).

348. *Id.* at 481–85; Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2171 (2015). *But see id.* at 2168, 2177 (questioning the historical basis for the distinctions between protected and unprotected categories of speech).

Court the task of defining precisely what obscenity is and to clearly demarcate the constitutional boundary between protected and unprotected expression.[349] Importantly, Brennan recognized that "sex and obscenity are not synonymous. . . . Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[350] Speech thus was not obscene simply because it dealt with sex.

Instead, speech only was obscene, and thus unprotected, where it lacked "even the slightest redeeming social importance" and "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[351] Brennan eventually refined *Roth* into a three-part test, defining obscenity as material

> that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[352]

Although the Court affirmed the convictions of the defendants in the consolidated cases (one on federal charges, the other on state charges),[353] free speech advocates widely cheered the decision, believing the sharpened and narrowed definition of obscenity would rein in censors, keeping them from suppressing art, literature, science, and political material dealing with sex and sexuality.[354] Of course, this was not enough for Douglas and Black, who dissented in favor of giving "the broad sweep of the First Amendment full support," leaving no room for unique treatment of "noxious literature."[355] And it was too much for John Marshall Harlan, who feared *Roth* "may result in a loosening of the tight reins which state and federal courts should hold upon the enforcement of obscenity statutes."[356]

For the next sixteen years, the Court attempted to apply this standard in a series of cases, many of them authored by Brennan; most reversed

349. *Roth*, 354 U.S. at 488; Lakier, *supra* note 348, at 2208.
350. *Roth*, 354 U.S. at 487.
351. *Id.* at 484, 489.
352. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).
353. *Roth*, 354 U.S. at 489, 494.
354. CLARK, *supra* note 102, at 190–91.
355. *Roth*, 354 U.S. at 514 (Douglas, J., joined by Black, J., dissenting).
356. *Id.* at 496 (Harlan, J., concurring in the result in part and dissenting in part).

obscenity convictions, usually through pluralities[357] and ultimately through per curiam opinions,[358] while some affirmed.[359] This period is best remembered for the farce of "dirty movie days," when the Justices (except Black and Douglas) watched the challenged pornographic movies in the Court basement.[360] The decisional high point remains *Jacobellis v. Ohio*, in which Justice Stewart threw up his hands in a concurring opinion; he could not define obscenity, but famously insisted "I know it when I see it, and the motion picture involved in this case is not that."[361]

Brennan ultimately came to question whether he could ever create a workable legal standard that simultaneously allowed for regulation of obscenity and protected free speech.[362] Finally, he had enough. *Roth* "cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure."[363] The "outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments," because the Court had "failed to formulate a standard that sharply distinguishes protected from unprotected speech."[364] Any test the Court could develop was too vague to provide sufficient notice of what material is protected, thereby producing a chill on expression and putting stress on the judiciary to figure it all out.[365]

Tellingly, however, Brennan was unwilling to follow Douglas (Black had by this point retired) in holding that the First Amendment categorically barred suppression of any sexually oriented expression.[366] Instead, Brennan relied, essentially, on strict scrutiny. He would treat sexually explicit material as a category of protected speech, then examine whether the government possessed a substantial interest justifying its suppression.[367] He further insisted that while states may have strong interests in protecting juveniles and non-consenting adults from exposure to such material, they

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357. *Memoirs*, 383 U.S. 413 (plurality opinion of Brennan, J.); Jacobellis v. Ohio, 378 U.S. 184 (1964) (plurality opinion of Brennan, J.).

358. Redrup v. New York, 386 U.S. 767 (1967) (per curiam).

359. Ginsberg v. New York, 390 U.S. 629 (1968) (Brennan, J., for the Court); Mishkin v. New York, 383 U.S. 502 (1966) (Brennan, J., for the Court); Ginzburg v. United States, 383 U.S. 463 (1966) (Brennan, J., for the Court).

360. CLARK, *supra* note 102, at 203–04.

361. *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

362. CLARK, *supra* note 102, at 199; STERN & WERMIEL, *supra* note 7, at 365–66.

363. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73–74 (1973) (Brennan, J., dissenting); CLARK, *supra* note 102, at 204–05; STERN & WERMIEL, *supra* note 7, at 366.

364. *Paris Adult Theatre I*, 413 U.S. at 83 (Brennan, J., dissenting).

365. *Id.* at 93.

366. *Id.* at 102–03.

367. *See id.* at 103.

had no interest in regulating the reading and viewing habits of consenting adults substantial enough to justify suppressing the material.[368]

The parallels between Holmes and Brennan are clearest in their journeys on political dissent and obscenity, respectively. Holmes's initial resistance to protecting speech was grounded in distaste for the antics of dissenting anarchists and unionists; Brennan's initial resistance as to obscenity was similarly driven by an intense dislike for pornography smut peddlers. Like Holmes, Brennan changed his mind, coming to recognize limits on what government can do to squelch speech that it does not like. And like Holmes, Brennan ended the day in dissent on the issue, where he stayed for the remainder of his time on the Court, continuing to insist that any regulation of obscenity as to consenting adults is facially unconstitutional.[369]

The evolution of the Court's obscenity jurisprudence from *Roth* also parallels the Court's defamation jurisprudence from *New York Times*. As to both, Brennan authored an opinion that accepted a theory of the First Amendment in which some speech is categorically unprotected, then sought to narrowly and sharply confine its unprotected contours. As to both, the Court then spent years figuring out how to elaborate and apply that decision through its process of common law constitutionalism. In fact, as the early consensus on *New York Times* unraveled, several Justices recognized the parallel with obscenity, expressing concern that defamation would repeat the same mistakes—where differing views and plurality opinions would prevent the Court from providing sufficient constitutional guidance.[370]

And as to both, Brennan neither entirely succeeded nor entirely failed in guiding the doctrine. *The Progeny* reveals that although defamation jurisprudence did not go precisely where Brennan would have liked,[371] particularly after *Gertz*, *New York Times* remains a vigorous and highly protective part of First Amendment jurisprudence, largely reflecting Brennan's constitutional goals. While Brennan did not succeed in guiding obscenity doctrine in the same way, he did not entirely fail either. Even under the less-protective *Miller*[372] test that Brennan rejected,[373] courts have never returned to the pre-*Roth* era in which art, literature, science, and

368. *Id.* at 107–14.

369. *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 507–08 (1987) (Brennan, J., dissenting); Wood v. Georgia, 450 U.S. 261, 274–75 (1981) (Brennan, J., concurring in part and dissenting in part); *see also* New York v. Ferber, 458 U.S. 747, 776 (1982) (Brennan, J., concurring in the judgment) (arguing that application of the child pornography prohibition to images having serious literary, artistic, scientific, or medical value would violate the First Amendment).

370. LEVINE & WERMIEL, *supra* note 8, at 50, 74.

371. *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 172 (1979) (Brennan, J., dissenting).

372. Miller v. California, 413 U.S. 15, 23–24 (1973).

373. *See id.* at 47 (Brennan, J., dissenting).

political speech were regularly targeted for obscenity prosecution.[374] And the rise of the Internet and the wide availability of all manner of pornographic and sexually explicit speech confirms that society, if not doctrine, has followed Brennan's lead.

Having come around to greater protection for sexually explicit speech, Brennan naturally opposed efforts to regulate speech that could not be obscene even under *Miller*. Consider his dissent in *FCC v. Pacifica Foundation*.[375] The Court upheld a prohibition on indecent-but-not-obscene speech on broadcast radio and FCC fines for an afternoon broadcast of comedian George Carlin's famous "Filthy Words" routine, in which he identified (and repeatedly uttered) the seven words that cannot be said on television.[376] The Court emphasized the supposedly unique attributes of the broadcast medium—its intrusiveness into the home, its pervasiveness, and its easy accessibility to children—to justify regulating speech that could not have been punished outside that specific medium.[377]

Brennan began an unusually angry dissent with the following: "I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose *its* notions of propriety on the whole of the American people so misguided, that I am unable to remain silent."[378] The opinion reflects several themes common to Brennan's evolved approach to sexually explicit speech. One is the essential narrowness of any defined category of unprotected expression. Speech is regulable as obscene, even as to minors, only if it is in some "significant way, erotic."[379] Mere profanity as used in the Carlin monologue could not appeal to a prurient interest in sex, thus the FCC's ban did nothing more than shield children from ideas government did not like.[380]

Second, and related, is the freedom of willing adults to have access to such expression. By elevating the rights of the offended listener to avoid profane or offensive speech in the home (even though he could "simply extend his arm and switch stations or flick the 'off' button"), the Court failed to sufficiently weigh the interests of the willing listener who wanted to hear this expression—it permitted "majoritarian tastes completely to preclude a protected message from entering the homes of a receptive,

374. Edward de Grazia, *How Justice Brennan Freed Novels and Movies During the Sixties*, 8 CARDOZO STUD. L. & LITERATURE 259 (1996). *See generally* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992) (describing early-twentieth century obscenity prosecutions).

375. 438 U.S. 726 (1978).

376. *See id.* at 729–30, 50–55 (Appendix to Opinion of the Court) for the "Filthy Words" transcript.

377. *Id.* at 748–49.

378. *Id.* at 762 (Brennan, J., dissenting).

379. *Id.* at 767 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n.10 (1975)).

380. *Id.* at 767–68.

unoffended minority."[381] Moreover, by preventing adults from accessing Carlin's monologue, the decision "violates in spades" the principle that adults cannot be limited only to hearing what is appropriate for children—especially given that Brennan doubted the speech could even be kept from children.[382]

The third theme is an exceedingly broad conception of protected and permissible human conversation. Brennan decried the decision's potential to sweep from the public airwaves all manner of "dirty words," regardless of context and regardless of artistic or political merit—potentially banning Shakespeare, Chaucer, Hemingway, and other great literature, as well as politically significant expression, such as the then-recent Nixon tapes.[383] He quoted Holmes's famous line about the variable, changing, and subjective nature of words in human conversation.[384] And he recognized that Carlin's monologue was itself about words and their political content, meant to illustrate the silliness of public attitudes about those words; by affirming the FCC's power to punish the broadcast, the majority made Carlin look prescient with a decision validating those same silly attitudes.[385]

Once again, however, Brennan's position has arguably prevailed culturally. Even if not "harmless,"[386] *Pacifica* certainly has not been as bad as it might have been. It is widely reviled.[387] Although the Court has twice declined opportunities to reconsider or overturn the precedent,[388] it has explicitly declined to extend its First Amendment theory to any other medium—including cable,[389] telephone dial-in services,[390] and, most importantly, the Internet (in an opinion by Justice Stevens, the author of the primary *Pacifica* opinion).[391] Each time, the Court insisted that these media were sufficiently different from broadcasting with respect to those three

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381. *Id.* at 766.

382. *Id.* at 768.

383. *Id.* at 771.

384. *Id.* at 776 ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.") (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.))).

385. *Id.* at 777.

386. *Id.* ("Whether today's decision will similarly prove 'harmless' remains to be seen. One can only hope that it will.").

387. L.A. Powe, Jr., Red Lion *and* Pacifica*: Are They Relics?*, 36 PEPP. L. REV. 445, 445 (2009) (labeling *Pacifica* and other broadcast-is-different cases "an embarrassment"); *see also* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2321 (2012) (*Fox II*) (Ginsburg, J., concurring in the judgment) (arguing that *Pacifica* was wrong at the time and that time, technology, and the FCC's "untenable" rules justify reconsidering the opinion).

388. *Fox II*, 132 S. Ct. at 2320; FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009) (*Fox I*).

389. Turner Broad. Sys. v. FCC, 512 U.S. 622, 637 (1994).

390. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989).

391. Reno v. ACLU, 521 U.S. 844, 868–69 (1997).

attributes; they thus could not be subject to the same content-based regulation of dirty words and non-obscene explicit speech.

E. Student Speech

In many areas—notably, for our purposes, *New York Times*—Brennan's First Amendment vision prevailed, explicitly or implicitly, in the years since his retirement. But in one area the jurisprudence has gone in the opposite direction—student speech. While students still do not shed their First Amendment rights at the schoolhouse gate,[392] schools can and do get away with regulating a massive amount of student speech.[393] The goal of this Part has been to consider additional areas in which Brennan led the effort for broad speech protection, even if ultimately unsuccessfully. In the realm of student speech, three Brennan opinions stand out.

In *Bethel School District v. Fraser*,[394] the Court held that a school could constitutionally suspend a student for a school-assembly speech laced with sexual innuendo, recognizing the school's power to prohibit students' use of "vulgar and offensive terms in public discourse" or "offensively lewd and indecent speech," as well as its power to decide for itself what constituted such terms.[395] Brennan agreed that the school could punish the plaintiff, although he concurred only in the judgment. He tried to reign in the reach of the majority opinion, keeping the case in the student-speech framework created by *Tinker*, under which a school could punish this speech because it was "materially disruptive" of the high-school assembly.[396] But he insisted that, absent such disruption, the student could not have been punished simply because the content was (in the view of school administrators) "inappropriate" or "offensive" or because school officials disagreed with its substance.[397] This gambit has proved unsuccessful, as *Fraser* has come to mean that lewd and sexual speech

392. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

393. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 410 (2007) ("The First Amendment does not require schools to tolerate at school events student expression that contributes" to dangers such as unlawful drug use); Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 776–77 (9th Cir. 2014); Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 28–29, 37–39 (10th Cir. 2013) (rejecting First Amendment right for students opposed to abortion rights to distribute rubber fetus dolls to other students during school); A.M. *ex rel.* McCallum v. Cash, 585 F.3d 214, 217, 222 (5th Cir. 2009) (rejecting challenge to ban on purses bearing Confederate Flag). *But see* B.H. *ex rel* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 297–98 (3d Cir. 2013) (rejecting school ban on bracelets bearing the breast-cancer-awareness slogan "I [heart] boobies!").

394. 478 U.S. 675 (1986).

395. *Id.* at 683, 685.

396. *Tinker*, 393 U.S at 512–13.

397. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688–90 (1986) (Brennan, J., concurring in the judgment).

constitutes a unique category for which a school need not show disruption to regulate or punish student speakers.[398]

Two years later, the Court upheld a school's authority to control the content of a student newspaper produced as part of the school's curriculum.[399] Brennan wrote a vigorous dissent that attempted to expand the sphere of protected student speech. He wrote in vivid language of students "expect[ing] a civics lesson" on operating a forum for expressing their ideas and appreciating the rights of journalists under the First Amendment; of the principal breaching a promise to those students by excising articles without consultation simply because he viewed them as inappropriate and unsuitable for student consumption;[400] and of the Court, in rejecting their claims, teaching precisely the wrong civics lesson.[401] He decried the principal's "unthinking contempt for individual rights," more egregious when done by a school official with "whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees."[402]

For Brennan, *Tinker* provided the appropriate framework, but the school made no showing of any actual or substantial risk of disruption.[403] He emphatically refused to accept the majority's distinction between personal speech (subject to *Tinker*) and school-sponsored speech (subject to plenary school control), or the power of a school to restrict speech that the school deems incompatible with its pedagogical message.[404] "The First Amendment permits no such blanket censorship authority."[405]

Brennan was particularly incensed by the notion that educators possess authority to shield high school students from exposure to potentially sensitive topics, unacceptable viewpoints, or conduct "otherwise inconsistent with 'the shared values of a civilized social order.'"[406] The problem was "how readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics."[407] Brennan even branched into the sarcastic. Responding to the majority's suggestion that the principal intended his actions as a "lesson on the nuances of journalistic responsibility," he pointed out that the principal

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398. *B.H.*, 725 F.3d at 298.

399. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262, 263–66 (1988). The principal objected to and excised two pages of the paper, containing stories on the impact of divorce on students and the experiences of several students dealing with pregnancies. *See id.*

400. *Id.* at 277 (Brennan, J., dissenting).

401. *Id.* at 290–91.

402. *Id.* at 290.

403. *Id.* at 280.

404. *Id.* at 280–82.

405. *Id.* at 280.

406. *Id.* at 285 (citations omitted).

407. *Id.* at 288.

never consulted the students before censoring their work and did not explain his actions in anything but vague generalities, such that "the lesson was lost on all but the psychic [paper] staffer."[408]

The final notable student speech case is *Island Trees Union Free School District v. Pico*.[409] Brennan wrote a plurality opinion as the Court held that a school district violated the First Amendment by removing a number of books, several of them classics, from library shelves. As in *Rosenbloom*, finding himself unable to secure a majority, Brennan went off on his own (joined only by Thurgood Marshall and Stevens) in a highly speech-protective direction.

Pico reflects several of Brennan's free-speech ideals, all grounded in the uniqueness of libraries as First Amendment institutions. Like all libraries, a school library is "a place dedicated to quiet, to knowledge, and to beauty" and the locus of student freedom to inquire, study, evaluate, and understand.[410] It thus was wrong to focus on the "inculcative functions" of secondary education or the acknowledged discretion school boards should have in transmitting values through the compulsory curriculum.[411] Because students choose whether to use the library for self-education and individual enrichment and they choose what books to read in doing so, the school board does not wield the same discretion.[412] The unique nature of libraries implicated a student's First Amendment right to receive information and ideas, a "necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."[413]

Brennan thus famously distinguished decisions to purchase and add books to the library shelves from decisions to remove books already purchased from the shelves, with schools exercising broad discretion as to purchasing decisions, but less discretion as to removal decisions. Because only the removal power potentially allowed for suppression of ideas, only removal was subject to First Amendment limitations against the school exercising its power based on dislike for the ideas contained in the challenged books.[414]

Unfortunately, Brennan's *Pico* opinion has gained little traction and been largely forgotten, making it arguably his most underrated First Amendment opinion.[415] In one challenge to removal of a book from the shelves of a school library, the Eleventh Circuit insisted that because *Pico*

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408. *Id.* at 285.
409. 457 U.S. 853 (1982).
410. *Id.* at 868 (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966) (opinion of Fortas, J.)).
411. *Id.* at 869.
412. *Id.*
413. *Id.* at 867.
414. *Id.* at 871–72.
415. Thanks to Thomas Baker for suggesting that description.

was a plurality, it "is a non-decision so far as precedent is concerned. It establishes no standard."[416]

Brennan's distinction between purchasing and removing books enjoyed a brief revival in the early Internet days in controversies over filters on public-library computer terminals. Litigants, governments, and courts debated whether filtering was analogous to a library removing some online material having purchased the entire Internet (in which case Brennan's *Pico* opinion limited the library's discretion) or to declining to purchase particular online material (in which case library officials were entitled to greater discretion). One district court adopted the former analogy in holding that filters violated the First Amendment.[417] But the Supreme Court made virtually no mention of *Pico* or the purchase-removal distinction in upholding a federal statute requiring that all libraries receiving federal funds (that is, almost all public libraries) install filters.[418] Only David Souter (appropriately, Brennan's successor on the Court) followed Brennan's lead, insisting that filtering Internet content is analogous "either to buying a book and then keeping it from adults lacking an acceptable 'purpose,' or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults."[419]

CONCLUSION

By any measure, Holmes and Brennan are two of the driving forces of modern free speech law, greatly responsible for its exalted status in the constitutional regime. By showing the processes that lead to their two greatest First Amendment contributions, *The Great Dissent* and *The Progeny* illustrate how and why these opinions, and the Justices who wrote them, made, and continue to make, their historic contribution.

416. ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1200 (11th Cir. 2009).

417. Mainstream Loudoun v. Bd. of Trustees of Loudoun Cnty. Library, 2 F. Supp. 2d 783, 793–94 (E.D. Va. 1998).

418. United States v. Am. Library Ass'n, 539 U.S. 194, 208 (2003) (plurality opinion) (stating that, because a library cannot individually evaluate the web sites it chooses, it is permitted to make categorical judgments).

419. *Id.* at 237 (Souter, J., dissenting).