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Articles

Agon at Agora: Creative Misreadings in the First Amendment Tradition

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Of course, the law is not the place for the artist or the poet. The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.

—Oliver Wendell Holmes*

[T]o be judicious is to be weak, and to compare exactly and fairly is to be not elect

—Harold Bloom**

† Attorney, Center for Constitutional Rights, New York, New York. This article, which celebrates the efforts of lone individuals, could not have been written without the assistance of many, including Ellen Hertz, David Nied, Dan Ortiz and Nina Pillard. Special thanks are owed to Owen Fiss, who first showed me that there is room for poetic greatness in the law by strongly misreading the Federal Rules of Civil Procedure.

* O.W. HOLMES, *The Profession of the Law*, in COLLECTED LEGAL PAPERS 29-30 (1920).

** H. BLOOM, *THE ANXIETY OF INFLUENCE* 19 (1973).

INTRODUCTION

Supreme Court Justices are not often mistaken for poets. The duty of the Justice is to resolve disputes,¹ to implement and articulate fundamental values,² to interpret the Constitution,³ or to protect the democratic process,⁴ depending on which legal scholar you read. The Supreme Court construes and applies the law; penumbras notwithstanding, it does not usually and is not expected to create ideas out of thin air. We value poets for their creative breaks from the past; we ask judges to adhere to established rules and principles.

Given this seemingly fundamental distinction between John Milton and John Marshall, one might question the wisdom of applying a critical model for reading poetry to Supreme Court adjudication. Indeed, the very legitimacy of judicial review seems to rest on the difference. The rules of precedent, central to Anglo-American notions of law, demand that Justices follow past authority and generally forbid the radically creative breaks that we value in the poet. But the lines of distinction are not as sharp as they first appear. Poets, too, are not free from historical influence; a creative act is always a break *from* a past tradition and is defined and understood in terms of its relation to that tradition. Thus, even those whom we identify as most creative are tied to the past.⁵

Just as a complete poetic break from tradition is impossible, so is slavish adherence to judicial precedent unattainable. In order to follow precedent, the Justice must first articulate its meaning. But the meaning of a text is, if not absolutely indeterminate, always open to question. A socially situated reader produces meaning in relation to a text; the text itself does not provide meaning without that intervention. A particular precedent may therefore appear to support several interpretations; the frequency of split decisions demonstrates that, even within the constrained scope of legal reasoning, at least two different readings are arguable.

In an age where the lines between poetry and literary interpretation are increasingly deconstructed,⁶ and in a legal culture that has seen Legal Realism evolve into Critical Legal Studies, it is not implausible to claim that Supreme Court Justices are creative. At a minimum, the Justices are creative insofar as the situations they face demand that a standing body of law be consistently reinterpreted and tailored to novel facts. It may often

1. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

2. FISS, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); GREY, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

3. FREUND, *Mr. Justice Black and the Judicial Function*, 14 UCLA L. REV. 467 (1967).

4. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

5. T.S. ELIOT, *TRADITION AND THE INDIVIDUAL TALENT* (1956).

6. V. NABOKOV, *PALE FIRE* (1962); G. HARTMAN, *CRITICISM IN THE WILDERNESS* (1980).

be impossible simply to fit the facts before them into the puzzle of the Constitution and case law; in landmark cases, it is clear, the Justices alter the puzzle itself and create law. Thus, while judicial legitimacy requires faithful adherence to precedent, legal development turns on creative acts. As a result, we call judges who follow precedent legitimate, but those who successfully break from it great.

This article argues that there is a fundamental tension in the law between legitimacy and greatness, and that this tension manifests itself not only in *Brown v. Board of Education*,⁷ *Lochner v. New York*,⁸ and *Roe v. Wade*,⁹ but in all “strong” opinions.¹⁰ By focusing on these moments of tension, the law, like poetry, can be read as an antithetical struggle for meaning. These moments reveal that, as in poetry, those who ultimately succeed in the struggle and are viewed as great are not those who follow precedent, but those who break radically from tradition by acts of “misreading.”¹¹

In order to reveal the antithetical aspect of judicial character, this arti-

7. 347 U.S. 483 (1954).

8. 198 U.S. 45 (1905).

9. 410 U.S. 113 (1973).

10. A “strong” opinion is one that is viewed by some relevant community—the community of Supreme Court Justices, of academic commentators, or of the public—as influential. I will argue that there are two necessary criteria for strength: (1) the opinion must be successful, in that it guides subsequent legal development; and (2) the opinion must deviate from precedent. Thus, for an opinion to be viewed as strong, and its author as great, it must deviate successfully from precedent.

This definition of strength, or greatness, appears to be non-normative; it requires only that the Justice break from authority and eventually succeed in recapturing authority over the precedents diverged from. It might be argued, therefore, that under these criteria Justice Rehnquist would qualify as a great Justice. Each criterion, however, may also contain an underlying normative component. Thus, where a Justice breaks from the authority of past precedent merely to align himself with the authority of state force, as in the Supreme Court’s recent refusals to take jurisdiction over challenges to state abuses of power, the decision is less a radical break than a switch of allegiances. In such a case, where the Justice surrenders the authority of an independent judiciary to the authority of state violence, the decision can hardly be called strong or great. See Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 56–60 (1983) (characterizing *Rizzo v. Goode*, 423 U.S. 362 (1976), *Younger v. Harris*, 401 U.S. 37 (1971), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 1660 (1983), as failures of the Supreme Court to maintain independent normative authority).

The second criterion also has an implicit normative connotation. The measure of a misreader’s success in recapturing authority will turn on his or her acceptance in a number of distinct communities. None of these communities, it can be assumed, operates wholly without normative criteria. Some communities may be less trustworthy than others in their capacity to render normative judgments at any given moment, and therefore popularity should not be confused with greatness. In the end, however, the normative judgments of communities are all we have. If their approval and respect have no normative significance, then the very idea of a normative criterion for greatness is meaningless.

11. The term “misreading,” as used here, is not meant to be disparaging; rather it defines a necessary condition of interpretation. Harold Bloom, who gave the term its present meaning in literary criticism, argues that all reading and writing involves misreading, and that the crucial issue is the extent or strength of the misreading. See *infra* notes 23–38 and accompanying text. The term implies that although most writers experience a need to appear not to misread, there is no such thing as a “correct” reading. Contemporary philosophy of language supports this notion, insofar as it insists that meaning results only from the interplay between the individual intentions of the author and reader, as well as the social conventions of their respective languages and prejudices. Each reading will necessarily be in some sense a new reading.

cle will suggest an alternative method for reading cases and tracing legal development. The traditional account—precedential incorporation—emphasizes the faithful application of precedent to novel situations and leaves little or no room for the greatness that inheres in breaking from precedent. This article will counterpose to the traditional account an “antithetical model,” drawn from a model for reading poetry devised by literary critic Harold Bloom. The antithetical model focuses on misreadings, i.e., on the rhetorical mechanisms by which Justices manipulate and refashion precedent in order to make their own mark. The model proposed is antithetical in two senses: Internally, its machinery consists of rhetorical struggle between Justices; externally, the model as a whole is antithetical to the more traditional, and arguably incomplete, model of precedential incorporation.

The idea of antithetical struggle, while sharply opposed to the rules of precedent, does find support in the American legal tradition. The very structure of the adjudicative process creates a forum for such struggle, and as basic a legal doctrine as freedom of expression provides its philosophical justification. An alternative adjudicatory system might require consensus or unanimity in judicial decisions; instead, our judicial structure provides room for judges to express their independent views in separate concurring and dissenting opinions.¹² A majority opinion bears precedential weight by definition, but dissents and concurrences may also prove influential in the course of doctrinal development. The structure of American adjudication thus implies a belief in the possibilities of antithetical struggle and encourages the interplay of such struggle with more straightforward precedential development.

The First Amendment suggests why we accord dissenting rhetoric such an important place in legal decision-making. First Amendment theory is founded upon the protection of minority rights; it is the dissenter, the person who stands apart from the mainstream, who needs protection. The First Amendment provides that protection because we believe that the freedom to express one's views furthers both individual autonomy and the

12. It should be noted that in some civil and common law systems, each judge on the bench is required to write an opinion. This practice was followed in the early opinions of the Supreme Court. In such a system, the outcome of the particular case is determined solely by counting votes, and each individual opinion holds no independent precedential authority. Such a system may well provide more play for free-wheeling antithetical struggle, for each case provides the occasion for several misreadings, and no misreading is given the institutional authority that the majority wields in the contemporary American system. The civil and common law systems thus appear especially suited to antithetical analysis; such an analysis, however, is beyond the scope of this article. The complexities introduced by the American system's institutionalization of the majority view, an innovation introduced by Justice Marshall, are developed in Section II. On the early history of Supreme Court decisions, see ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186 (1959).

collective social welfare. The First Amendment therefore clears the field for antithetical battle and affirms the place of such struggles in the self-governance of the nation.¹³

That we have created the conditions for rhetorical struggle in the structure of judicial decision-making and that we justify it in the doctrine of free expression suggests that antithetical development may be more accepted, albeit tacitly, than the rules of precedent would indicate. By suggesting a new method of reading judicial opinions, this article seeks to highlight and reveal the rhetorical struggles that have always fueled jurisprudential development.¹⁴ The analysis focuses more than traditional legal scholarship on the use of linguistic conventions such as metaphor and tone, and on the internal and intertextual commentary that these rhetorical elements provide. Rhetorical analysis of a given text may reveal misreadings that, because of the law's express requirement of precedential fidelity, cannot be acknowledged on the opinion's surface. Attention to the repetition of particular metaphors may suggest how these rhetorical elements exert influence over time. Most importantly, because most of the opinions discussed do not carry the authority of a majority holding, rhetorical persuasion is their primary channel of influence.

13. Justice Holmes himself celebrated this interconnection between legal development and First Amendment values when he stated that "law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action." O. Holmes, *Law and the Court*, reprinted in O. HOLMES, COLLECTED LEGAL PAPERS 294-95 (1974). More recently, Justice Brennan remarked that the function of judicial dissent "reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas. It is as if the opinions of the Court—both for the majority and the dissent—were the product of a judicial town meeting." W. Brennan, In Defense of Dissent 4 (Mathew O. Tobriner Memorial Lecture, Hastings College of Law, Nov. 18, 1985). Antithetical struggle in a free speech dispute exemplifies precisely what First Amendment doctrine is designed to protect: the interplay of the dissenter's voice and the majority's will. The doctrinal context of a First Amendment case may therefore inspire the Justice disposed to antithetical struggle, and may also add subtle reflexive weight to the persuasive effect of dissenting rhetoric. First Amendment jurisprudence therefore offers a fertile field for revealing the influence of rhetorical persuasion that operates in all substantive areas of law.

14. The focus on the rhetoric of individual Justices is not meant to suggest that great Justices are the only or even the primary instruments or initiators of legal change. Any comprehensive analysis of the causes of legal change would require an examination of social forces beyond the scope of this discussion. The persistent, organized demands of the labor movement, the rise and fall of the fear of Communism, the play of economic forces, and conceptions of the role of an activist federal government all contributed significantly to the enhancements and restrictions of Supreme Court protection of speech. See D. Kairys, *Freedom of Speech*, reprinted in THE POLITICS OF LAW (D. Kairys ed. 1982). Antithetical analysis is not intended to downplay these forces. To claim that external conditions determine legal change does not exclude the possibility that individual Justices play a role in formulating change in its distinctively legal form. Even if the Justice's only causal effect is limited to his or her ability to foresee changes that will take hold in the future as a result of altered external conditions, the Justice's foresight will play a role in setting the doctrinal foundation for legal development. The law is a set of rules described by language; at a minimum, Justices translate external conditions into linguistic results. And translators, like interpreters, wield considerable power. This article's focus on rhetoric stems not from a belief that rhetoric controls results in any exclusive manner, but from the conviction that rhetoric both reflects and molds the social, psychological, and political struggles that determine the development of legal doctrine.

Part I of this article sets forth the fundamentals of Harold Bloom's literary theory. Part II translates Bloom's interpretive model into the legal context, demonstrates its congruence with theories of judicial dissent, and concludes with a Freudian parable that suggests how the antithetical and precedential models might interact.

Parts III and IV apply the antithetical model to selective fragments of First Amendment legal history in order to demonstrate the place of rhetorical misreading in doctrinal development. Part III focuses on two of the most significant opinions in the First Amendment tradition: a dissent by Justice Oliver Wendell Holmes, Jr. in *Abrams v. United States*,¹⁵ and a concurrence by Justice Louis Brandeis in *Whitney v. California*.¹⁶ I will suggest that *both* Holmes and Brandeis misread the same precursor—Holmes himself, as he wrote in *Schenck v. United States*,¹⁷ *Frohwerk v. United States*,¹⁸ and *Debs v. United States*.¹⁹

Having considered two strong fathers of First Amendment jurisprudence, the article follows a specific route on a historical "map of misreading"²⁰ in Part IV. The route culminates in the Court's granting federal election candidates a limited right of affirmative access to the broadcast media in *CBS v. FCC*.²¹ It features two strong misreadings by Justice William Brennan, in which he establishes and extends the "marketplace of ideas" metaphor, itself a misreading of Holmes' "free trade in ideas."²² This section considers majority as well as dissenting opinions, and demonstrates the simultaneous operation of mainstream precedential incorporation and an antithetical agonistic undercurrent in Supreme Court jurisprudence.

I. ANTITHETICAL CRITICISM—THE THEORY

The antithetical analysis that will follow finds its roots in a model for reading poetry. This section will present a brief outline of that poetic model in order to suggest links between the poet and the Justice. These links are not meant to establish a one-to-one correspondence between the two; rather, they provide the starting point for a critical enterprise that will require careful comparison of the different institutional forces that influence the poet and the Justice. This section focuses on Harold Bloom's

15. 250 U.S. 616 (1919).

16. 274 U.S. 357 (1927).

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

18. 249 U.S. 204 (1919).

19. 249 U.S. 211 (1919).

20. H. BLOOM, *A MAP OF MISREADING* (1975).

21. 453 U.S. 367 (1981).

22. *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (Brennan, J., concurring); *CBS v. DNC*, 412 U.S. 94, 170 (1973) (Brennan, J., and Marshall, J., dissenting).

poetic model, but its purpose is not so much to explicate the specific mechanics of Bloom's model as to suggest the model's utility for revealing the struggle for influence in both poetic and legal texts.

Bloom's antithetical criticism, introduced in *The Anxiety of Influence*²³ and revised and elaborated in several later works,²⁴ attempts to explain how individual poets respond to the poetic tradition and gain authority within that tradition. This antithetical theory seeks to reveal certain motivating forces behind literary creation, and to describe the ways by which poets attain "greatness." The focus is at once individual and structural: it accounts for the individual poet's greatness expressly in terms of his or her relations to the community of past and present poets. And it posits a conflict at the center of the relationship, a conflict which necessitates struggle and results in misreadings.

Bloom argues that creativity is necessarily revisionist. In his Freudian-influenced terms, we are all belated sons to strong fathers (not, it seems, daughters to strong mothers).²⁵ The poet, the artist, and the critic, in order to be creative, must do battle with the influence of their precursors. The field of battle for the poet and critic, as for the Justice, is the text. Bloom argues that for a novice or "ephebe" to emerge a strong creator, he must constructively misread his most important precursors. If he does not misread them, the ephebe will be trapped in the anxiety of influence:

To be enslaved by any precursor's system . . . is to be inhibited from creativity by an obsessive reasoning and comparing, presumably of one's own works to the precursor's. Poetic Influence is thus a disease of self-consciousness²⁶

Bloom's "obsessive reasoning and comparing" echoes legal method; indeed, the requirements and conventions of legal practice seem to institutionalize the anxiety of influence. This is the legal method of the average

23. H. BLOOM, *THE ANXIETY OF INFLUENCE* (1973).

24. H. BLOOM, *A MAP OF MISREADING* (1975); H. BLOOM, *THE BREAKING OF THE VESSELS* (1982); H. BLOOM, *AGON* (1980); H. BLOOM, *POETRY AND REPRESSION* (1977).

25. By "belated" Bloom means that we cannot escape history. We are born with a past, and that past shapes us as we seek to shape our present. Bloom draws explicitly on Freudian psychology to explain the significance of our belatedness, and thus he speaks in terms of fathers and sons. Bloom makes little or no attempt to counteract the male-centered bias of Freud's theories, and he has been criticized for this. See Kolodny, *A Map of Rereading: Or, Gender and the Interpretation of Literary Texts*, 11 *NEW LITERARY HISTORY* 451 (1980); C. Greenberg, *Reading, Reading: Echo's Abduction of Language*, reprinted in *WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY* 300 (McConnell-Ginet et. al., eds. 1980); S. GILBERT & S. GUBAR, *THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION* (1979). A feminist critique of Bloomian criticism, however, is beyond the scope of this article. Although I agree with feminist critics that Bloom's model is deficient as an exclusive account for creativity, I also believe that it offers a useful method for understanding the influence of the past.

26. H. BLOOM, *supra* note 23, at 29.

lawyer, judge, and Justice, but it is not the method of the poetic genius, nor, I will argue, of the great Justice.

Bloom's interpretive model assumes an intertextual vantage point. "[T]he meaning of a poem can only be another poem," Bloom claims, and "[c]riticism is the art of knowing the hidden roads that go from poem to poem."²⁷ Bloomian criticism constructs a map of misreading, focusing on the anxiety of influence that ties one great poet to another and on the "revisionary ratios"²⁸ that can free them. The antithetical critic is concerned with the rhetorical relationship between great poems, for these relationships are crucial to understanding the act of creation. Bloom thus regards the investigation of a single poem or poet as fundamentally misguided. Because all poets are "belated," their poems can only be understood in relation to their precursors' poems.

Bloom's critical enterprise is based on Freud's family romance, specifically, on the father-son aspect of the Oedipal conflict. Bloom extends the Oedipal conflict beyond the immediate family to suggest that strong poets are creator-fathers to ephebes. The precursors create the traditions within which the belated would-be creators are educated and in which they find themselves firmly planted. In Bloom's theory, Oedipus' patricide becomes a metaphor for denying or overcoming the precursor's influence. At the same time, that influence is to some extent inescapable. Bloom's "revisionary ratios," the textual manifestations of the poet's struggle with the anxiety of influence, are analogous to Freud's defense mechanisms of the ego.²⁹ Just as defense mechanisms repress but cannot destroy unpleasant ideas and affects to allow us to function, so revisionary ratios free the subject for constructive creative action, but cannot destroy or wholly insulate the subject from the effects of the precursors.

The great poets, in Bloom's model, use a variety of revisionary ratios to escape the anxiety of influence. Revisionary ratios describe the possible relationships between a poet and his precursors as a series of increasingly radical misreadings. At one extreme, the young poet merely swerves from the line established by his or her precursor; the new text appears as a gentle corrective movement, developing the idea of the precursor along a slightly different line.³⁰ At the other extreme, the ephebe's misreading is so strong that the precursor's work is viewed thereafter only as an elabo-

27. *Id.* at 95-96.

28. The "revisionary ratios" set out below in the text are drawn primarily from *THE ANXIETY OF INFLUENCE*. See also W. HUBBARD, *COMPLICITY AND CONVICTION: STEPS TOWARD AN ARCHITECTURE OF CONVENTION* (1980) (applying Bloom's ratios to law and architecture).

29. See H. BLOOM, *A MAP OF MISREADING*, *supra* note 24, at 89, 95-101.

30. Bloom labels this revisionary ratio "clinamen." In a similarly gentle misreading, which Bloom calls "tessera," the young poet extends the precursor's line by developing its implications and completing its logic.

ration on it. The new poet recaptures priority over his precursor, so that the precursor's poetry now reads as if it were always already indebted to the new poet's work. The later text so strongly reveals the essence of the prior work that the precursor seems to have imitated the ephebe; the son becomes father to the father.

The revisionary ratios suggest parallels between the poetic and legal functions. The gentle corrective movement appears to describe the type of development contemplated by precedential incorporation; the more extreme revision describes the moment of victory in the antithetical struggle, precedent overruled. Two methods of misreading which fall between these extremes also have special relevance to the legal model. In one revisionary scheme, the outline or form of the precursor's text is retained, but its core is filled with new meaning. In the legal realm, this mechanism allows a Justice to maintain the appearance of following precedent while subtly altering the meaning of that precedent. A second revisionary method consists of generalizing the specific strength of the precursor by absorbing it into the unfocused principles of tradition; the poet is thus able to present, as his own contribution, a clearer, more precise version of the precursor's approach. Both the initial generalization and the belated specification offer vast opportunities for misreading. In the legal context, the artfully exploited string cite is an especially effective mechanism for this type of misreading.³¹

Bloom's revisionary ratios need not be limited to poetic relations. The anxiety of influence afflicts all writers who seek to assert a voice or identity. Any act of interpretation, moreover, requires the articulation of a point of view belonging to the individual reader. Bloom's model implies that all points of view are in some sense revisionary and that those individuals whom we consider "great," "strong," or "influential" are those whose views stand out as *most* revisionary.

Thus, Bloom's model applies to critics as well as to poets. Critics stand in relation to precursor critics just as poets stand in relation to their precursors. The relation between critic and poet is more complicated, but here, too, the critic may feel the fires of agon as he or she seeks to present a new reading of a great poem, one which, if strong, will forever alter the meaning of that poem for future readers.

Justices may be closer to critics than to poets. Like critics, their function is to read texts in a public and definitive way. They interpret the original text of the Constitution and the legislature's laws, and cannot make the poet's assertion of priority. The Justice, like the critic, offers a reading whose authority must rest in part on its apparent fidelity to an

31. For examples of such string cites, see text accompanying notes 170-74, 184-88.

original text. Nevertheless, the Justices are sometimes strong, creative misreaders of the prior texts, and their strength can reroute the path of precedent, change the meaning of the Constitution or federal law, and become a new source of anxiety for their descendants. Strong creativity signals greatness, whether it be in a poet, a critic, or a judge. And, in Bloom's theory, all creativity presupposes an anxiety of influence; the creator must overcome his lack of priority. While the critic and Justice may not be able to do this quite as completely or overtly as the poet, their motivations and anxieties differ only in degree, not in kind. Just as the great critics are those who have introduced new ways of reading, turned traditional criticism on its head, and altered our perceptions of original texts, so the great Justices—here, Oliver Wendell Holmes, Jr., Louis Brandeis, and William Brennan—are those who have introduced and created new analyses, new approaches, and, in the process, new law.

II. THE THEORY TRANSLATED—INSTITUTIONAL ANXIETY AND THE RULE OF LAW

A. *Institutionalized Anxieties*

Although the creative and interpretive functions of poets, critics, and Justices coincide with respect to their relations to past authority, their respective social roles differ sharply. Society's definition of, and expectations for, the Justice simultaneously reinforce, mitigate, and complicate the anxiety of influence. Our highly structured legal system institutionalizes the demands that past authority makes on all readers and writers. The Justice's anxiety of influence is assuaged insofar as legitimacy rests on following precedent, but it is exacerbated to the extent that greatness lies in breaking from precedent.

If legitimacy is all a Justice seeks, he or she may be comforted by the rule of law. Precedent, *stare decisis*, and notions of a restrained judiciary all explicitly constrain the Justice's creative role. As long as the Justice remains safely within these bounds, his or her decisions are generally read as legitimate, though not necessarily strong. Unlike the poet, whose very authority turns on priority, the Justice finds legitimacy in a kind of plodding belatedness.

For a poet, "to be judicious is to be weak, and to compare exactly and fairly is to be not elect."³² But for the Justice, to appear to compare exactly and fairly is necessary. The judge's legitimacy rests on the rule of law, which in turn requires public, accountable, and predictable decision-making. Law is designed to impose order on the vicissitudes of social coex-

32. H. BLOOM, *supra* note 23, at 19.

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istence. A legal order that was subject only to the whim and caprice of a few men in black robes who considered themselves divinely inspired would be little more than despotism; its legitimacy would likely rest on the threat of physical force rather than on the consent of the people. The requirement that law in a democratic society be ordered, principled, and predictable places explicit burdens on the Justice that the poet, or even the critic, does not bear. The typical Justice's anxiety thus more likely arises from a break with precedent than from adherence to the influence of precursors. While the anxiety of influence *suggests* that the poet can never break completely from his past, precedent *demand*s that a jurist never do so.

For the jurist, then, the anxiety that Bloom identifies may be moderated by the law's sanctification of belatedness. The victors at Agon necessarily produce anxieties of influence for their descendants, but incorporation through precedent legitimizes that inevitable influence and reduces the anxiety. The demands of social stability and legal predictability turn the anxiety of influence on its head; where the poet suffers anxiety at the prospect that he or she will not escape from the precursor's shadow, the judge's immediate anxiety arises from the threat that his or her rulings will not be accepted unless they appear consistent with precedent. The poet's job is to break from the past; the judge's duty is to conform to the past.

But as much as we value order and predictability in the law, we also celebrate those judges whose strong, creative visions eventually capture the allegiance of the legal and social culture. A judge who commands a majority by adopting an interpretation that covers no new ground will probably not be remembered as great; to be great, a judge must both break from precedent and ultimately succeed in having his or her views accepted.³³

As noted above, the structure of judicial decision-making provides a

33. This does not claim to be an exclusive definition of greatness. A Justice may also be viewed as great for her or his ability to forge majorities, that is, to provide political rather than rhetorical leadership. Justice Warren, for example, would probably fit the "political" model of greatness more readily than the individualistic, rhetorical one emphasized in this article. Yet even that type of greatness requires a break from precedent and an ability to command a following; bowing to authority simply does not fit under any definition of "greatness."

The breaks accomplished by the politically great Justice may be slightly more masked, and will almost certainly be less extreme, than those available to the lone dissenter who does not need to compromise, but they may prove at least as influential in the long run. Antithetical analysis thus need not look only to individual Justices; a focus on misreadings could be just as fruitfully applied to majority opinions that appear to lay new ground and break from past precedent. What antithetical criticism seeks to reveal in any opinion is the conflict between legitimacy and greatness, between the need to follow authority and the desire to exercise independent authority. But antithetical analysis does insist that more careful attention should be paid to the dissents and concurrences of individual Justices than is traditionally paid under precedential analysis. It does not claim that the separate opinion is the sole arena for greatness, but only that it is a much more important arena than traditional accounts have recognized.

channel for such greatness, and the principle of free speech expressly recognizes its social value. Thus, while we refrain from giving the full weight of institutional authority to the voice of a lone Justice, we ensure that his or her voice may be heard, thereby allowing room for the great individual to exert rhetorical pressure on the development of legal doctrine.

For the strong misreader, then, precedent may prove not a comfort but a bane; it superimposes on the anxiety of influence the anxiety of breaking from that influence. Because the poet's authority rests explicitly on originality, the poet may seek to evade the inescapable influence of his or her precursors by an overt misreading. The Justice, however, must both misread, in order to make space for his or her contribution, and appear not to misread, in order to draw on the authority of precedent.³⁴ The rules of precedent thus confine and complicate the reactive mode of the family romance; one must sanctify one's father at the very moment that one kills him. Subtlety and duplicity are called for, as past precedents are offered up, praised, and misread.

In some respects, the law's fundamental requirement of fidelity to past authority renders legal opinions *more* susceptible to antithetical analysis than poetry. Agonistic undercurrents may run closer to the surface in the legal opinion, insofar as precedential authority must be cited and expressly relied upon. Even where the contours of a misreading are defined by what is not cited, the citation requirement (as well as the threat that a separate opinion may point out missing authorities) makes it more difficult to obscure the influence of a strong precursor.

The explicit requirements of legal reasoning may also bring to the surface the ambivalence felt by a great Justice faced with a strong precursor. The language of the law underscores the extent to which tradition constrains the Justice, while history demonstrates the amount of play in the constraints. Thus, it is a rare Justice who will not insist that precedent *compels* his or her decision, even when it is evident that the result advocated marks a significant revision of prior authority. The tension between proffering a new vision and following the precedential line, between greatness and legitimacy, is distilled at the point where the Justice, through a misreading, simultaneously revises the law and insists that he

34. Even this distinction is only one of degree. The poet may also face the double bind of misreading and appearing not to misread. While originality in poetry is explicitly valued and encouraged, tradition necessarily defines the standards for a strong and effective poetic voice. Readers and critics can only understand and evaluate a new poem in terms that are heavily influenced by prevailing standards. The poet who deviates too sharply, therefore, may be dismissed as misguided rather than celebrated as creative. Thus, both the poet and the Justice must walk a fine line. The difference in their respective misreadings may ultimately reduce to one of emphasis—while the great poet seeks to underscore what is new within a medium that necessarily derives much of its value from what is old and established, the great Justice strives to demonstrate fidelity to the established precedential order in what amounts to a new vision.

or she is doing nothing more than applying the law. Antithetical analysis focuses on these moments of tension.

As noted above, the more traditional and explicit paradigm for judicial progress is the precedential model. In this developmental scheme, precursors provide the groundwork or foundation for later additions. The revisionary movement is at once friendlier and more rational; the epebe incorporates various positive elements of her or his past into a more complete whole, a closer approximation to the Truth, the Good, or the Just. Complexity builds by increments on simple foundations, as each generation adds its discoveries to the ever-increasing fount of knowledge. This positivist notion of accumulation provides the explicit underpinnings for the doctrine of precedent. Truth or justice is approached through ordered, reasoned dialogue; precedent provides stability not only for the public but also for judges.

The antithetical model fills out and complicates the conventional story. It claims that even as precedential development goes on, an undercurrent of agonistic struggle surges, surfacing in the strong opinions of great Justices. It suggests, moreover, that while the Court's legitimacy rests on the promise of organic development, our notions of greatness in a Justice are defined by something other than precedential fidelity. The traditional approach to reading cases emphasizes the organic surface; the reading suggested in this article will search for the equally crucial, often more powerful undertows.

B. *Misreading and the Function of Dissent*

Every judicial opinion misreads past precedent. No judge or group of judges can state unequivocally and without distortion the holding of a prior case or the precise rule to be applied in the case at hand. To find and apply a rule of law requires interpretation of past precedent, and the act of interpretation necessarily involves some degree of misreading. Antithetical criticism therefore should be applicable to all opinions—unanimous, majority, plurality, concurring, and dissenting.

Dissents are nonetheless an especially appropriate focus for antithetical analysis. The agonistic struggle by definition involves a certain element of isolation, because insofar as we are defined and determined by our predecessor's influence, we must, as part of the creative moment, separate our sense of identity from the past that constitutes our present. Breaking from the tradition, we find ourselves alone. This suggests that while both the majority and the dissent will misread precedent, the dissent will often present the more extreme misreading. In dissent, the Justice stands apart; similarly, in concurrence his theory will be his own, even while he agrees with the result.

It is possible, but less likely, that a majority opinion will advance a more radical misreading than a dissent, or even that a unanimous opinion, when viewed against its precedential background, will constitute a strong misreading. Collective misreadings do occur—the American Revolution, the Constitution, and several of the Amendments constitute strong collective misreadings on a grand scale—but they are much more difficult and consequently much less frequent.³⁵ To be valued as great, one must stand out; while collective bodies do at times stand out as great, both the requirement of a radical break and the inherent exclusivity of the term suggest that “greatness” will be found more often in an individual than in a committee. If the antithetical theory holds, then, revisions in the law will often surface initially in dissenting or concurring opinions, and only later, if they are truly strong, will they be incorporated into the mainstream.³⁶

This view of the special affinity between dissents and agonistic struggle is reflected in the academic and popular literature on dissents, as well as in the words of the Justices themselves.³⁷ Many writers have drawn a connection between the choice to dissent and the expression of a strong individual voice addressed to the future. Those critical of dissent have attributed the choice to dissent to an “inflation of the judicial ego,”³⁸ and have called for the appointment of Justices with more “assenting minds.”³⁹ Those who value the role of dissent, most notably the Justices themselves, cast the same connection in a different light. Thus, Justice Charles Evans Hughes insisted that the “dissenting opinion enables a judge to express his individuality,”⁴⁰ and described the dissent as “an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error.”⁴¹ Justice Douglas

35. For an example of a collective misreading, see the discussion of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), *infra* notes 165–75 and accompanying text.

36. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940) (incorporating Holmes' clear and present danger test); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (incorporating Harlan's dissenting approach in *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896)); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (incorporating Brandeis' principle of self-government as First Amendment foundation). An extraordinary number of Justice Holmes' dissents eventually became majority law. See ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 202 n.92 (1959). Dissents in *Chisholm v. Georgia*, *Scott v. Sanford* and *Pollack v. Farmers' Loan & Trust Co.* “influenced the passage of the 11th, 14th and 16th amendments to the U.S. Constitution respectively.” *Recent Decisions*, 24 FORDHAM L. REV. 438, 451 n.9 (1955).

37. In much of the following material on judicial and academic attitudes toward dissent I have drawn upon Susan Russ' incisive survey of the literature on dissent. S. Russ, *Dissenting Opinions* (1984) (unpublished manuscript on file with author).

38. *The Trouble with the Warren Court*, LIFE, June 16, 1958, at 35, *quoted in* ZoBell, *supra* note 36, at 186; see also Hirt, *In the Matter of Dissents Inter Judices de Jure*, 31 PA. B.A.Q. 256, 258–59 (1960).

39. James, 9 A.B.A. J. 398 (1923).

40. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

41. *Id.*; see also B. CARDOZO, *LAW AND LITERATURE* 35–36 (1931) (“[T]he dissenter speaks to the future, and his voice is pitched in a key that will carry through the years.”).

put it more bluntly: "The right to dissent is the only thing that makes life tolerable for the judge of an appellate court It is the right of dissent, not the right or duty to conform, which gives dignity, worth and individuality to man."⁴²

Others have celebrated the role of dissent in fostering growth, flexibility and change in the law,⁴³ and have noted the parallels between the formal judicial mechanism of dissent and the broader function of dissent in First Amendment theory.⁴⁴ Cardozo himself linked dissent with strong rhetoric, explaining that the dissenter is called upon to speak with "an elevation of mood and thought and phrase," and that "[w]e need not be surprised, therefore, to find in dissent a certain looseness of texture and depth of color rarely found in the [majority]."⁴⁵

More recently, Justice Brennan defended the practice of dissent, stating that the most important dissents are those "that seek to sow seeds for future harvest."⁴⁶ In Justice Brennan's words, "[t]hese are the dissents that soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law."⁴⁷ In some cases, Brennan noted, these great dissents "ripen into majority opinions."⁴⁸

Antithetical analysis takes seriously these justifications for and explanations of dissent and seeks to demonstrate how the strong dissenter both does battle with the past and affects the future. Antithetical criticism provides a method for analyzing dissent which itself constitutes a dissent from more traditional legal analysis. And like the best dissents, the antithetical model "straddle[s] the worlds of literature and law," applying the former's critical methods to the latter's texts in order to gain a more complete understanding of legal development.

42. W. DOUGLAS, *AMERICA CHALLENGED* 4-5 (1960).

43. S. Russ, *supra* note 37, at 36-40.

44. Rathjen, *Time and Dissension on the United States Supreme Court*, 7 OHIO N.U.L. REV. 227, 235 (1980). See also *supra* note 13.

45. B. CARDOZO, *supra* note 41, at 35-36.

46. W. Brennan, *In Defense of Dissent 5*, (Mathew O. Tobriner Memorial Lecture, Hastings College of Law, Nov. 18, 1985).

47. *Id.*

48. *Id.* at 11. Brennan cites as examples of such dissents Justice Stone's dissent in *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601 (1940) (refusal for religious reasons to salute flag), adopted in *West Virginia State Bd. of Educ. v. Burnette*, 319 U.S. 624 (1943); Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), adopted in *Brown v. Board of Educ.*, 347 U.S. 483 (1954); Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919); and Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928). He also cited some great dissents that have not yet ripened, such as Justice Jackson's in *Korematsu v. United States*, 323 U.S. 214, 242 (1944). *But cf.* *Hohri v. U.S.*, 782 F.2d 227 (D.C. Cir. 1986) (suit by Japanese-American World War II internees against United States seeking money damages and declaratory judgment).

C. *A Freudian Parable*

It seems only just that we return to Freud, the precedent for Bloom's misreading, to complete the picture presented by antithetical legal analysis. The institutional dynamic defined by the juxtaposition of the rule of law and the drive to dissent is, as we have seen, the force behind misreading. In its broadest sense, it involves a precarious balance between society's need for stability and order and its simultaneous need to promote change and to facilitate individual innovation and greatness. This societal and individual ambivalence was a central concern of much of Freud's work, most notably *Civilization and its Discontents*.⁴⁹ Its particular relation to the the interplay of precedent and agonistic dissent in the law can be represented metaphorically by Freud's myth of the primal horde, from *Totem and Taboo*.⁵⁰

Freud posits a Darwinian patriarchal horde, ruled by a "violent and jealous father who keeps all the females for himself and drives away his sons as they grow up."⁵¹ The horde comes to a dramatic, macabre end when "[o]ne day the brothers who had been driven out came together, killed and devoured their father"⁵² United (in what might be viewed as the first collective misreading), the brothers find the strength to commit the crime that individually none could achieve. The brothers, Freud explains, hold deeply ambivalent feelings for their tyrannical father. They fear, hate, and envy him, but "they love[] and admire[] him too."⁵³ In devouring their father, they identify with him, and "acquire[] a portion of his strength."⁵⁴ Once their hatred and desire for power are temporarily satisfied, the brothers' repressed filial affection for the father returns in a remorseful sense of guilt. They assuage this guilt by "deferred obedience" to the dead father's strictures, and the "dead father [becomes] stronger than the living one had been"⁵⁵ From this deferred obedience Freud derives primitive society's first two laws, which he refers to as the fundamental taboos of totemism: the prohibitions against incest and against the killing of the totem animal (a father-surrogate). Both prohibitions recapitulate the father's wishes in social mores.

The brothers continue to resent their father's influence, however, and

49. S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (J. Strachey trans. 1961).

50. S. FREUD, *TOTEM AND TABOO* 141-59 (1913), reprinted by W.W. Norton & Co. (1950). Although Freud apparently presents the primal horde story as an actual historical account of the birth of society as we know it, I offer it only as a parable. It should not be read to advance a psychological foundation for the legal development I will discuss herein, but merely as an evocation of the dynamics of the interplay between agon and precedent.

51. *Id.* at 141.

52. *Id.* (footnote omitted).

53. *Id.* at 143.

54. *Id.* at 142.

55. *Id.* at 143.

periodically the resentment surfaces: they replay the original murder through a ritualistic killing and eating of the totem animal. The brothers' ambivalence toward the father continues unabated, Freud argues, both collectively—in society, morality, and religion—and individually, in the form of the internalized father, or the super-ego. Freud's account specifically traces the development of religion out of totemism, but the myth offers an equally provocative evocation of the dynamics of legal development.

The two models of legal progress discussed above—antithetical struggle and cumulative incorporation—can be viewed as the dual strains of ambivalent feelings for the father that Freud identified. The rule of precedent, like the totemic system's covenant between the brothers, promises “not to repeat the deed which had brought destruction on their real father.”⁵⁶ Just as “totemism helped to smooth things over and to make it possible to forget the event to which it owed its origin,”⁵⁷ so cumulative incorporation, manifested explicitly in the doctrine of precedent, may be represented as a societal response designed to smooth over and render acceptable past breaks from authority. Freud cites as contemporary evidence of this totemic covenant the following neurotic behavior: “We find it operating in an asocial manner in neurotics, and producing new moral precepts and persistent restrictions, as an atonement for crimes that have been committed and as a precaution against the committing of new ones.”⁵⁸ The conduct of Freud's neurotic, like that of Bloom's weak poet, sounds suspiciously like conventional law-making. Like the neurotic, the legal order spins out increasingly complex restrictions and rules to cover over and atone for radical breaks, be they criminal, revolutionary, or creative.

Cumulative incorporation, represented in Freud's parable by the affectionate, guilt-ridden obedience of the sons to their dead father's strictures, and in Bloom's scheme by the inevitability of influence, is counterposed by an agonistic struggle for independence. Freud's notion of fundamental ambivalence insists on the eternal coexistence of both the affectionate and hostile impulses, just as Bloom's model emphasizes the poet's continuous effort to escape the anxiety of influence through misreading. “The tension of ambivalence was evidently too great for any contrivance to be able to counteract it.”⁵⁹ The hostile drive to agonistic struggle remains despite the socially necessary cumulative incorporation. Thus, Freud finds in the celebration of the totem meal

56. *Id.* at 144.

57. *Id.* at 145.

58. *Id.* at 159 (footnote omitted).

59. *Id.* at 145.

a duty to repeat the crime of parricide again and again in the sacrifice of the totem animal, whenever, as a result of the changing conditions of life, the cherished fruit of the crime—appropriation of the paternal attributes—threatened to disappear.⁶⁰

For Bloom's poet, the "fruit of the crime" is the freedom to create. For the Justice, the fruit of the crime is, ironically, the ability to break from precedent and to create new law—in Freud's terms, to appropriate the attributes of the father. Under the strict rules of precedent, "misreading" is just short of criminal, but in the metaphorical terms of agon, it is the method of greatness. Thus, the very word "misreading" crystallizes the ambivalence between legitimacy and greatness that inheres in the exercise of legal authority.

Freud's account of totemic development, like Bloom's approach to poetic influence, seeks to explain certain dynamic consequences stemming from the individual's existence in society. In Freud's parable, society's need for adherence to order is balanced ambivalently against the individual's desire to exert autonomous authority. In Bloom's more narrow scheme, the influence of precursor poets is set against the individual poet's attempt to develop an independent voice. Both theories envision a conflicted and necessary interplay between individual initiative and social cohesion.⁶¹

Translation of these accounts to the legal paradigm reveals an adjudicative structure that similarly seeks to accommodate social consensus and individual initiative. The structure of judicial decisions grants institutional authority to the will of the Court majority, and extends this authority over time through the rule of precedent. At the same time, the structure leaves room for individual initiative in the separate opinion, whose authority is limited to the force of persuasion and rhetoric. Institutional authority rests with the majority, but room for greatness remains in the rhetorical space left to the individual Justice. Traditional legal scholarship emphasizes the former; antithetical analysis insists on the latter, and calls for an approach that comprehends the dialectic of their interaction over time.⁶²

60. *Id.*

61. A similar dynamic between individual autonomy and social cohesion is described in critical legal studies terms as the "fundamental contradiction." Duncan Kennedy describes it as follows: "Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it." Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211 (1975).

62. Misreading should be viewed primarily as a process that takes place over time, i.e., diachronically. Because the structure of a legal decision requires Justices to offer simultaneously their various misreadings of the relevant precedent, some signs of diachronic misreading may be manifested in a synchronic dimension, for example, in the dissent's misreading of the majority. To the extent that the majority reflects a less radical misreading of the precursor, the dissent may do battle with the precursor in part through the medium of the majority. Thus, a dissenter's synchronic battle with the major-

The interaction of agon and precedent appears to be contemplated not only by our judicial structure, but by the human condition. Thus, Freud implies that the root significance of ambivalence in every individual forecloses its eradication by, and necessitates its incorporation in, such social constructs as judicial review. Bloom insists that the human need for creativity drives us all to agon. I will suggest that the Justice is not spared.

III. THE THEORY APPLIED—ORIGINAL MISREADINGS

A. *Philosophical Origins—Milton, Locke, and Mill*

There are no self-evident origins. Beginning any antithetical reading is necessarily an arbitrary act; the contingency of belatedness pervades the history of humankind. This does not mean, however, that in our quest for a starting place we are reduced to throwing darts at a wall of Supreme Court Reporters. The arbitrary nature of pinpointing an origin need not force us down the slippery slope to nihilism. Rather, the place to begin is with a recognized “strong” opinion; such an opinion, the antithetical model suggests, will simultaneously misread and redefine *its* origins, while becoming, in the process, *an* origin.

The Court in *Dennis v. United States*⁶³ gives us an idea of where to begin: “No important case involving free speech was decided by this Court prior to *Schenck v. United States*.”⁶⁴ In *Schenck*, Justice Holmes, writing for a unanimous Court in 1919, introduced the “clear and present danger” test; but it was not until his dissent in *Abrams v. United States*⁶⁵ eight months later that this test was given the meaning it was to carry for several formative decades in First Amendment jurisprudence. With these Espionage Act cases, freedom of speech began to take its peculiarly American shape.

But the First Amendment was not written in 1919. For 122 years prior to *Schenck*, the clause beginning “Congress shall make no law . . .” stood on the books.⁶⁶ The extent to which the First Amendment marked, at the time of its passage, a strong revision of prior theories of freedom of speech is much disputed.⁶⁷ That it was not written on a clean slate, however, is

ity may be a sign of his diachronic struggle with the precursor.

63. 341 U.S. 494 (1951).

64. *Id.* at 503.

65. 250 U.S. 616 (1919).

66. The First Amendment itself, as well as the rest of the Bill of Rights, marked a strong collective revision of the Constitution. The ratification debates revealed that the original document did not provide sufficient safeguards for individual and state rights. While Madison felt that the underlying philosophy of the sovereignty of the people and the enumerated powers of their government precluded any need for a Bill of Rights, the people apparently disagreed, and the first ten amendments were added in 1791.

67. The traditional view, attributable to Professor Zachariah Chafee, Jr., holds that the First Amendment abolished the common law of seditious libel, thereby strongly revising the Blackstonian

clear. As Justice Holmes remarked in a related context: "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil."⁶⁸ Even the American Revolution, as complete a "revision" as this country has known, did not wipe out the influence of our English past. In its broadest outlines, the American system was defined against the Parliamentary system, and in its particulars much was carried over more or less intact.⁶⁹

Any examination of the First Amendment, then, requires a preliminary overview of the British tradition. Milton's *Areopagitica*, an early tract on the liberty of thought and expression which is often cited, quoted, and misquoted by First Amendment scholars and Justices, bases freedom of expression on the search for Truth: "Truth is compar'd in Scripture to a streaming fountain; if her waters flow not in a perpetuall progression, they sick'n into a muddy pool of conformity and tradition."⁷⁰ Milton was convinced that pluralism and free discussion, within limits, would lead to the discovery of Truth; in this he foreshadowed Holmes' concept of free trade in ideas.⁷¹ Milton's primary concern was for Truth itself, more than for the individuals who might lead humankind to it. For Milton, Truth was a transcendent ideal toward which all good men should strive.⁷² In man's search for Truth, error and vice should be tolerated, but only because fallen men can know good only by contrast with evil.⁷³

Despite the strong rhetoric of Milton's pleas, he was unwilling to extend protection for speech to all speakers or ideas. His Truth bears a capital "T," and he was certain that "popery" (Catholicism), "open superstition," and all that "which is impious or evil absolutely either against

conception of free expression, which limited the protection of speech to the prohibition of prior restraints. See Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 9-30 (1948); *Abrams v. United States*, 250 U.S. at 630 (Holmes, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1952) (Black, J., dissenting); *New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964).

Recent scholars offer a revisionist reading, which asserts that the First Amendment was a weak misreading, if a misreading at all, of the Blackstonian conception, and was intended to leave the law of seditious libel in place. See L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* (1960).

68. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

69. See generally G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

70. J. MILTON, *AREOPAGITICA* (1644), reprinted in *THE TRADITION OF FREEDOM* 22 (M. Mayer ed. 1957).

71. Compare Milton, *supra* note 70, at 28 ("Let [Truth] and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.") with *Abrams v. United States*, 250 U.S. at 630 ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"). Compare Milton, *supra* note 70, at 20 ("Truth and understanding are not such wares as to be monopoliz'd and traded in by tickets and statutes, and standards") with *Associated Press v. United States*, 326 U.S. 1, 28 (1945) ("Truth and understanding are not wares like peanuts or potatoes.") (Frankfurter, J., concurring).

72. Milton, *supra* note 70.

73. *Id.*

faith or maners” had no place in the “streaming fountain.”⁷⁴ Late in his life, Milton suggested that discussion of certain important issues be conducted in Latin, “which the common people understand not.”⁷⁵ In 1651, Milton was himself a censor for Cromwell’s regime.⁷⁶ Milton’s impassioned pleas for liberty of expression must therefore be read in light of his religious and intellectual elitism; in hindsight, his rhetoric appears to have overstepped his theory and practice.⁷⁷ The rhetoric, however, lives on as an important foundation for free speech theory, even while its basis, the belief in an objective, divine Truth, has in many realms collapsed.

The collapse was hardly imminent. John Locke followed Milton in arguing for freedom of expression on grounds of the pursuit of objective truth, though he swerved from Milton’s shadow by emphasizing the ignorance of *all* men. Where Milton envisioned cloistered Protestants discussing *Veritas* in Latin, Locke insisted that “[w]e should do well to commiserate our mutual ignorance.”⁷⁸ Locke questioned man’s ability to know the truth at all: “For where is the man that has incontestable evidence of the truth of all that he holds, or of the falsehood of all he condemns . . . ?”⁷⁹ In Locke’s view, man had fallen further than Milton would admit. Locke’s misreading approaches a recognition of absolute individual uncertainty, but for him, truth still stood apart, above, to be striven for: “let truth have fair play in the world . . . men the liberty to search after it.”⁸⁰

John Stuart Mill, too, seemed to believe in an objective, transcendent standard of truth. In *On Liberty*, he offered three arguments against the suppression of speech, all ultimately based on the objectivity of truth: (1) the suppressed opinion may be true; (2) the suppressed opinion may bear a portion of the truth, and only through conflict with other partially true doctrines will the full truth be known; and (3) falsehood serves, by opposition, to ensure that living truth will not be reduced to stale dogma.⁸¹ Mill’s distinctive contribution was his insistence that freedom of expression has an individual as well as social value. He emphasized the importance of free speech in developing the rational and intellectual capabilities

74. *Id.* at 22, 29.

75. Milton, *Of True Religion, Heresie, Schism, and Toleration* (1673), quoted in L. LEVY, *supra* note 67, at 97.

76. L. LEVY, *supra* note 67, at 97.

77. Alternatively, one might argue that Milton’s rhetoric, as misread by those who have since cited him to support more inclusive theories of free speech, has been extended beyond Milton’s intentions.

78. Locke, “An Essay Concerning Human Understanding,” reprinted in MAYER, *supra* note 70, at 285.

79. *Id.*

80. *Id.* at 283.

81. J. MILL, *ON LIBERTY* 38 (1st ed. 1859) (McCallum ed. 1949).

of autonomous persons, in addition to its role in society's search for truth. Individual autonomy and the discovery of truth thus provided a dual foundation for Mill's free speech arguments.

By 1859, the English soil was rich with the rhetoric and theory of free speech. Though the search for a transcendent truth remained a constant theme, the revisions of Locke and Mill had lessened its significance. Locke, by insisting on man's ignorance, implicitly questioned the possibility of attaining truth. Mill's misreading shifted the focus to the individual, however ignorant, and argued that the silencing of speech would only make people more ignorant still.⁸² Mill, moreover, expressed some doubts about the model of the organic superaddition of knowledge,⁸³ and in this he may have marked the beginning of a shift in free speech theory, from a concern for attaining objective truth to advancing individual autonomy.

It would be a long time before the United States courts developed the implications of Mill's revisions. Protection of speech was almost nonexistent in the first 122 years of adjudication surrounding the First Amendment.⁸⁴ Where the Supreme Court addressed free speech claims at all, it consistently denied them. The Court applied the "bad tendency" test to reject a number of claims;⁸⁵ refused to incorporate the First Amendment into the Fourteenth, thereby leaving the states free from its proscriptions;⁸⁶ and asserted that the First Amendment was limited to Blackstone's view that free speech required only a prohibition on prior restraints.⁸⁷ There were, moreover, widespread restrictions on speech that never reached the Supreme Court: the Alien and Sedition Acts of 1798; mob and state tyranny during the abolitionist era; the suspension of habeas corpus during the Civil War; and the unrelenting suppression of blacks in the South and of workers and aliens in the cities. Legal scholarship in the pre-World War I era argued eloquently for greater protection of First Amendment rights, but the legal reality still belonged to Blackstone.⁸⁸

82. *Id.* at 30.

83. "Even progress, which ought to superadd, for the most part only substitutes, one partial and incomplete truth for another . . ." *Id.* at 40.

84. For an excellent account of the neglected century of First Amendment history, see Rabban, *The First Amendment in Its Forgotten Years*, 90 *YALE L.J.* 514 (1981).

85. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *Turner v. Williams*, 194 U.S. 279, 294 (1904). The "bad tendency" test offered little or no protection to speech; under this test, the state could punish statements "inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace." *Gitlow v. New York*, 268 U.S. 652, 667 (1925).

86. See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875); see also *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Bill of Rights applies only to federal government).

87. See *Patterson*, 205 U.S. at 462; *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

88. See Rabban, *supra* note 84, at 559-79. In scholarship, at least, some English soil had been transplanted. According to Henry Schofield, a commentator of that time, the First Amendment was intended to give constitutional weight to the saying, "And ye shall know the truth, and the truth shall make you free." *Id.* at 563 n.255 (quoting Schofield, *Freedom of the Press in the United States*, 9 *AM. SOC. SOC'Y. PAPERS & PROC.* 116 (1914)).

B. *The Espionage Act Cases—Holmes Misreading Holmes*

In 1919, the Supreme Court heard four crucial cases challenging government prosecutions for anti-war articles and speeches: *Schenck v. United States*,⁸⁹ *Frohwerk v. United States*,⁹⁰ *Debs v. United States*,⁹¹ and *Abrams v. United States*.⁹² In each case, the Court upheld the convictions. In practical results these cases did not deviate from the prevailing judicial hostility to free speech claims. Despite some new language, the majority in each case seems to have applied the traditional “bad tendency” test. Some commentators have argued, with justification, that the Court treated the cases as routine criminal appeals.⁹³ Why, then, are *Schenck*, *Frohwerk*, *Debs*, and *Abrams* generally considered the origins of First Amendment law?

The answer is found not in holdings but in rhetoric—the rhetoric of Justice Holmes. The following passage from *Schenck* soon became the classic First Amendment standard:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.⁹⁴

Schenck was the Supreme Court’s first consideration of the Espionage Act of 1917, which provided that any attempt or conspiracy to cause insubordination in the military, to obstruct recruiting or enlistment, or to interfere with the operations of war would be punishable by a fine not exceeding \$10,000 and/or imprisonment of up to twenty years. Schenck, general secretary of the Socialist Party, had supervised the printing of anti-war circulars to be mailed to men who had passed the draft exemption boards. The circular was two-sided. On one side it “intimated [in impassioned language] that conscription was despotism in its worst form,”

89. 249 U.S. 47 (1919).

90. 249 U.S. 204 (1919).

91. 249 U.S. 211 (1919).

92. 250 U.S. 616 (1919).

93. See Rabban, *supra* note 84, at 585 n.395.

94. 249 U.S. at 52.

but "in form at least confined itself to peaceful measures such as a petition for the repeal of the [Conscription Act]."⁹⁵ The other side alleged that it was everyone's constitutional duty to "maintain, support and uphold" the "right to assert your opposition to the draft."⁹⁶ The right claimed was therefore not *physical* opposition to the draft, but the "right to *assert* your opposition." Thus, the circular was first an argument for the right of free speech and petition, and only derivatively an opposition to the war effort. Its author was found guilty on both counts.

In his opinion for the unanimous Court, Holmes treated the free speech issues in a single paragraph. He assumed that the author's intent was to obstruct the war effort and not to assert the rights of free speech: "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."⁹⁷ Assuming that "bad tendency," Holmes went on to establish the "clear and present danger" test, in the passage quoted above.

Undertaking the contextual analysis that the clear and present danger test mandated, Holmes emphasized that constitutional rights are diminished in wartime. As a descriptive matter, this is certainly accurate,⁹⁸ but as a normative statement of constitutional law it deserves more than the sentence Holmes gave it. He also offered two inapposite examples relating to context: falsely shouting fire and "words that may have all the effect of force." As to the first, truth and falsity were not at issue here. In the case Holmes cited to support the second example, *Gompers v. Bucks Stove and Range Co.*,⁹⁹ words that signaled the beginning of a boycott were enjoined because the Court found that they amounted to "verbal acts;" in other words, they had all the effect of force. The insertion of the word "may" in Holmes' characterization of the *Gompers* holding suggests a continuation of the bad tendency test.

The suggestion that the bad tendency test lived on in the original application of the clear and present danger test is borne out in the rest of the paragraph, as Holmes treated the constitutional issue as subsumed by the statutory issue of conspiracy versus actual obstruction. Because the Act prohibited conspiracy and actual obstruction identically, Holmes concluded that no obstruction need be shown: "[I]f the act, (speaking, or circulating a paper), its tendency and the intent with which it is done are the

95. *Id.* at 51.

96. *Id.*

97. *Id.*

98. See, e.g., Hall, *Free Speech in War Time*, 21 COLUM. L. REV. 526 (1921).

99. 221 U.S. 418 (1911).

same, we perceive no ground for saying that success alone warrants making the act a crime."¹⁰⁰ If the "clear and present danger" test as applied in *Schenck* had been a strong misreading of the prevailing "bad tendency" test, the fact that the statute punished both conspiracy and actual obstruction would not have been dispositive of the constitutional question. By focusing on the statute, Holmes intimated that judicially-determined intention collapses the distinction between rhetoric and action. The tendency is all.

The clear and present danger test introduced in *Schenck*, then, is a weak misreading, if a misreading at all, of the "bad tendency" test. What appears rhetorically to be a swerve from tradition was in fact a straight line. Holmes established the outline of a new test, but applied an old one. As several scholars have pointed out,¹⁰¹ the analysis in *Schenck* is indistinguishable from that of *Fox v. Washington*,¹⁰² an earlier Holmes opinion upholding a Washington state statute that made it criminal to print matter "which shall tend to encourage or advocate disrespect for law."¹⁰³ Like John Milton before him, Holmes' theory and practice in *Schenck* failed to live up to his rhetoric, at least insofar as the rhetoric has subsequently been misread.¹⁰⁴ As Robert Cover has succinctly stated, the clear and present danger test was "born as an apology for repression."¹⁰⁵ But as with John Milton, it was Holmes' rhetoric, rather than his specific actions, that proved influential in the development of the theory of free speech.

One week after *Schenck* the Court upheld two more Espionage Act convictions. These cases—*Frohwerk* and *Debs*—only magnify the weakness of Holmes' *Schenck* opinion. In unanimous opinions also penned by Holmes, the First Amendment question was twice held to have been "disposed of in *Schenck*."¹⁰⁶ In *Frohwerk*, Holmes found "not much to choose between expressions" in several newspaper articles criticizing the war effort and the circulars at issue in *Schenck*.¹⁰⁷ The fact that the newspapers in *Frohwerk* were not directed to enlisted men was disposed of with a metaphor:

[I]t is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would

100. 249 U.S. at 52.

101. See Rabban, *supra* note 84, at 585; Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325, 329 (1952).

102. 236 U.S. 273 (1915).

103. *Id.* at 275.

104. See *supra* note 77 and accompanying text.

105. Cover, *The Left, the Right, and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 372 (1981).

106. *Debs*, 249 U.S. at 215.

107. 249 U.S. at 207.

be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.¹⁰⁸

The metaphor's subliminal allusion to "falsely shouting fire" gives it rhetorical power, but fails to obscure the fact that the metaphor does not answer the question of how clear and present the danger must be. The negative phrasing affirms that it is immaterial that no findings of "inflammability" were made. Under the *Frohwerk* analysis, it seems, the danger need be neither clear nor present.

The *Debs* opinion further reveals the weakness of the clear and present danger test. Eugene Debs, a Socialist Party candidate for President, was convicted and sentenced to ten years' imprisonment for giving a speech on "socialism, its growth, and a prophecy of its ultimate success."¹⁰⁹ Debs made no explicit call to obstruct either the war or conscription, although he did praise several persons who had been convicted of doing so. The emphasis in Holmes' opinion was not on clear and present danger, but on the indicia of purpose and intent required by the criminal statute. Once again the statutory question subsumed the constitutional issue. Holmes found the jury warranted in determining that:

[O]ne purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting . . . [and] that would be its probable effect¹¹⁰

Thus, Holmes' opinions in *Schenck*, *Frohwerk*, and *Debs* appear to have effected little or no change in the prevailing legal approach to the suppression of speech. The fact that each garnered the support of a unanimous Court underscores this conclusion; given the rules of precedent, unanimity will rarely signal radical change.

Eight months later, in the next Espionage Act case, *Abrams v. United States*,¹¹¹ Holmes broke from the majority line that he had helped establish. His dissent may mark as strong a self-revision as American legal culture has known. At the time, the revision drew only one other vote, that of Justice Louis Brandeis. But when scholars and Justices declare that modern First Amendment history begins with *Schenck*, it is because of *Abrams*. *Schenck* is now read and cited as a gloss on the *Abrams* dissent, not as the "bad tendency" test that it truly was. In *Abrams*, Holmes

108. *Id.* at 209.

109. 249 U.S. at 212.

110. *Id.* at 214-15.

111. 250 U.S. 616 (1919).

strongly misread not only binding legal precedent, but precedent that he himself had very recently authored. In thus dissenting from himself, Holmes battled an authority more immediate and perhaps more powerful than any other precursor.

The subject for Holmes' revision in *Abrams* was not significantly distinguishable from the subjects of his previous unanimous opinions. The defendants were five Russian sympathizers who had printed 5,000 leaflets protesting the government's policy toward Russia and calling on other Russian sympathizers, particularly munitions workers, to respond with a general strike. The leaflets were distributed in a somewhat haphazard manner—"some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City."¹¹² The defendants were charged with a four-count indictment, of which only the last two counts need concern us, as the Court refrained from ruling on the constitutionality of the first two. Count three charged conspiracy to publish language "intended to incite, provoke and encourage resistance to the United States in [the war with Germany]." ¹¹³ Count four charged conspiracy "to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war." ¹¹⁴

The Supreme Court, with Justice Clarke writing for a majority of seven, affirmed the convictions on counts three and four. The majority dismissed the petitioner's First Amendment claims in one sentence, citing *Schenck*. There was no explicit discussion of the proximity or degree of danger, though a throwaway phrase, characterizing New York City as "the greatest port in our land, from which great numbers of soldiers were at the time taking ship daily, and in which . . . war supplies . . . were . . . being manufactured,"¹¹⁵ suggests some attempt to consider context. The only intent clear on the face of the leaflets was opposition to the Russia policy, which was not punishable because we were not at war with Russia. The majority, however, found constructive intent to obstruct the war with Germany on the grounds that "[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."¹¹⁶ Without assessing the likelihood that the defendants' speech would in fact obstruct the war effort, the Court found that:

[T]he manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United

112. *Id.* at 618.

113. *Id.*

114. *Id.*

115. *Id.* at 622.

116. *Id.* at 621.

States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.¹¹⁷

Thus, the majority remained faithful to the approach taken in *Schenck*, *Frohwerk*, and *Debs*, and any potential protection promised by the "clear and present danger" test was lost in the equation of bad tendency and evil intention.

Despite obvious similarities to the three previous cases in which he had written unanimous opinions, Holmes dissented in *Abrams*. *Abrams* thus marks the first non-unanimous decision in the Espionage Act cases. As Professor Cover has noted, "[b]y dissenting in *Abrams*, then, Holmes not only argued that the Constitution tolerated dissent, he also exemplified the dissent."¹¹⁸ That the first dissenter was the same man who had led the unanimous Court only eight months before attests both to the strength of Holmes' misreading and to the ability of the judicial structure to accommodate individual initiative.

Holmes' dissenting opinion is more persuasive rhetorically than logically, but again, it is the rhetoric that lives on.¹¹⁹ The lasting power of the *Abrams* dissent lies in its restatement of the "clear and present" danger test, particularly when read in light of the opinion's well-known final paragraph. Holmes revised the test he had enunciated in *Schenck* by elaborating on the elements of proximity and degree. The danger must be "immediate" and of virtually revolutionary proportions, so that "an immediate check is required to save the country."¹²⁰ The immediacy must also be tangible: "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception" to First Amendment protection.¹²¹

These elaborations give concrete meaning to the formal outlines of "clear and present danger." It seems probable that had Holmes suggested these specific thresholds in his original formulation, he would not have

117. *Id.* at 622.

118. Cover, *supra* note 105, at 373.

119. For example, Holmes continued to be preoccupied with the question of intent. He considered it here in two contexts—first as a statutory requirement for the conviction, and second as a part of the constitutional "clear and present danger" test. He raised the question of statutory intent only "to show what I think," asserting after a confusing paragraph that the question was in any event superseded by the First Amendment issue. 250 U.S. at 627. After a revisionary restatement of the clear and present danger test, he argued that the test required a showing of "actual intent" and that here, "[a]n intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war . . ." *Id.* at 628. Thus, Holmes can be said to have decided the specifics of the case on the question of intent alone. His analysis in *Abrams* suggests that he would not have required a showing of actual danger, but only of a clear and present intent to be dangerous.

120. *Id.* at 630 (emphasis supplied).

121. *Id.* at 630-31.

enjoyed majority support, nor could he have upheld Schenck's conviction. Yet his elaboration in *Abrams* reads as if it is only a clarification, rather than a revision, of the earlier test. Thus, he exploits the precedential weight of the *Schenck* formulation while infusing it with new meaning by an antithetical reading. So revised, the clear and present danger test had the potential to offer substantial protection for speech. For the rest of his tenure, Holmes would only rarely concur in the suppression of speech, and his revised test outlived his presence on the Court by decades.

At least as crucial as the reformulation of the test was the opinion's final paragraph. There, in dissenting dicta cited more frequently than many majority holdings, Holmes set out the underlying philosophy of his clear and present danger test. In keeping with the opinion's general tone, the paragraph opens ironically:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.¹²²

"Perfectly logical." The irony launches an understated attack on the certain tones of the majority, and allies the dissenter with those humble enough to recognize the possibility of imperfection, illogic, and doubt. The irony also makes it clear that a "but" will be forthcoming. The passage that follows established the theoretical foundation for all subsequent development of First Amendment law:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.¹²³

This statement laid the ground for Mill's eventual triumph over Blackstone in the Supreme Court. Given this underlying philosophy, which Holmes attributes not only to the First Amendment but to the notion of constitutional government itself, limiting First Amendment protection to

122. *Id.* at 630.

123. *Id.*

speech without "bad tendencies" and to Blackstone's prohibition of prior restraints is plainly insufficient.

The market metaphor introduced by Holmes' "free trade in ideas" concept invokes a laissez-faire conception of the role of government in the regulation of speech. Grounded not so much on the efficiency of the economic market as on the "imperfect knowledge" of participants and overseers alike—in contrast to the purely economic model, which assumes perfect knowledge for all—Holmes' market nevertheless relies on an "invisible hand." "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market" Holmes' test recalls and misreads Milton's vision of the struggle between truth and falsehood.¹²⁴ Milton's wrestling match becomes Holmes' trading market. The directness of the encounter is lost in the translation; popular acceptance replaces raw strength as the test for truth. At the same time, Holmes seems to have endorsed the imperfection of Locke's ignorant man and recognized the distorting influence of persecution based on ignorant certainty. His "free trade in ideas" concept captures these British theories in a peculiarly American metaphor, suggesting the ideal of the small business economy—free, self-interested participation by individuals and a laissez-faire role for government.

Holmes' last paragraph draws rhetorically on two sources, both of which are misread to justify Holmes' own revisions. First, Holmes stresses the uncertainty of human knowledge and suggests that our system of government, and particularly the First Amendment, was devised to take that uncertainty into account by allowing freedom to change. This suggestion, which Holmes roots in the Constitution, indirectly rationalizes Holmes' own move to a dissenting position from the unanimity of the previous majorities. Second, Holmes invokes the "invisible hand" of laissez-faire economics through a metaphorical misreading, thereby cloaking his uncertainty in the scientism of economic theory. The two misreadings serve different rhetorical purposes, respectively emphasizing and resolving doubt. Like Holmes' treatment of the clear and present danger test, however, both rhetorical moves present something new and original—Holmes' vision of free speech—in terms that are established and accepted—the Constitution, and laissez-faire economics. With "free trade in ideas," the clear and present danger test, and ultimately the Constitution itself, Holmes makes the metaphor his own as he exploits the traditional authority of its literal terms.

That the *Abrams* dissent plays a central role in First Amendment case law and scholarship is not disputed. Holmes' self-misreading creates out

124. See *supra* note 71.

of an “apology for repression” a test that protects speech, and out of a long tradition of British theory a peculiarly American metaphor. Why Holmes’ self-revision surfaced when it did is a subject of much academic curiosity. The explanations include: Holmes biding his time;¹²⁵ letters from Learned Hand;¹²⁶ a *New Republic* article by Ernst Freund criticizing the *Debs* decision;¹²⁷ and Professor Chafee’s “Freedom of Speech in War Time,” published in the *Harvard Law Review*.¹²⁸ What is crucial for our purposes, however, is not so much why Holmes revised himself, but that he did it, that he could not admit that he did it, and that it had such far-ranging consequences. With *Abrams*, the undercurrent of agonistic struggle within a single man surfaces in a dissent, and that dissent soon gains more precedential power than the three unanimous opinions that preceded it. The *Abrams* dissent not only breaks from and misreads the authority of precedent, it ultimately becomes the authoritative precedent itself. Under conventional doctrine, the precedential value of dissent is minimal at best; here, however, the successful agonistic struggle supersedes pure doctrine.

Holmes is celebrated as a preeminent contributor to modern First Amendment jurisprudence almost entirely on the strength of his dissents. His authorship of the now-embarrassing, unanimous *Frohwerk* and *Debs* opinions is largely forgotten, while his “free trade in ideas” metaphor lives on as a theoretical foundation for freedom of speech. If Holmes had been content to command a unanimous Court in the suppression of speech, he would not have the First Amendment stature he holds today. That stature was won by breaking from the majority, breaking from tradition, and even breaking from his own previous statements. The break transformed Holmes from the leader of a majority to a voice in dissent, where he remained for the rest of his tenure. Yet, despite the rules of precedent, and despite the weight of tradition, it is Holmes’ dissents that guide us to this day.

C. Democratizing an Ideal—Brandeis’ Misreading

Justice Brandeis’ contributions to the development of free speech jurisprudence are distilled in his concurrence in *Whitney v. California*.¹²⁹ Al-

125. See Chaffe, *supra* note 67.

126. Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *STAN. L. REV.* 719, 720 (1975).

127. Kalven, *Professor Ernst Freund and Debs v. United States*, 40 *U. CHI. L. REV.* 235 (1973).

128. Rabban, *supra* note 84, at 586–94; see also Rogat & O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 *STAN. L. REV.* 1349, 1376–78 (1984) (discussing and critiquing several of above explanations).

129. 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

though concurring in the result, Brandeis' opinion dissented sharply on the law.¹³⁰ As Holmes had done in *Abrams*, Brandeis retained the outline of the *Schenck* clear and present danger test, but filled it with new meaning, substituting an essentially political justification for Holmes' quasi-economic reliance on the discovery of truth through free trade in ideas.¹³¹ Brandeis, who never used Holmes' market metaphor, shifted the focus of the First Amendment from the pursuit of transcendent truth to subjective individual freedom and intersubjective political deliberation. Brandeis' misreading eventually proved as influential as Holmes' own misreading. And like Holmes, Brandeis introduced his alternative vision in a separate opinion, without precedential weight, which went on to become a cornerstone in First Amendment theory.

The *Whitney* case involved a conviction for "assisting in organizing, in the year 1919, the Communist Labor Party of California, [for] being a member of it, and [for] assembling with it."¹³² Whitney challenged her conviction on the ground that the criminal syndicalism statute, as applied, deprived her of the Fourteenth Amendment guarantees of liberty, due process and equal protection. The majority disposed of her free speech argument, subsumed in the Fourteenth Amendment liberty claim, with two sentences and a cite to *Gitlow v. New York*,¹³³ in which the Court had previously adopted a reasonableness test for legislation directly criminalizing speech.

In his concurrence, Brandeis gave the free speech issue his undivided attention. He began by rejecting the majority's reliance on *Gitlow*—"the enactment of the statute cannot alone establish the facts which are essential to its validity."¹³⁴ Brandeis then applied the clear and present danger test, and in doing so, offered his misreading of its underlying philosophy—that political deliberation of public issues must be free from suppression in a representative democracy.

In his reformulation of the philosophy of the First Amendment, Brandeis generalized the specific source of Holmes' market theory by attributing it to the Founding Fathers, and subsumed it within his own political model of a self-governing citizenry. According to Brandeis, the Founding Fathers:

believed that freedom to think as you will and to speak as you think

130. The *Whitney* concurrence was originally written as a dissent to *Ruthenberg v. Michigan*, 273 U.S. 782 (1927), a case which was mooted when Ruthenberg died. See Cover, *supra* note 105, at 384-85.

131. 274 U.S. at 372-80.

132. *Id.* at 372.

133. 268 U.S. 652 (1925).

134. 274 U.S. at 374.

are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.¹³⁵

The reference to the Founding Fathers both clears the way for a misreading of Holmes, Brandeis' immediate precursor, and eases judicial acceptance of the new formulation, suggesting that it is nothing more than a faithful account of the Framers' views. Like Holmes before him, Brandeis cloaked a revisionary misreading of more immediate precedent in the legitimacy of constitutional origins.

Brandeis saw freedom of expression as both a means and an end. Minimizing the importance of the search for objective truth, he emphasized the development of the individual, the protection of minority voices, and the maintenance of a reasoned political order. He stated that the "final end of the state was to make men free to develop their faculties . . ."¹³⁶ He allied freedom of speech with minority rights: "Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."¹³⁷ Most importantly, he allied order, freedom of expression, and reason against force, repression, and fear, and asserted that law falls in with the latter elements when it restricts free speech:

[The Founding Fathers] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.¹³⁸

Like Holmes' dissent in *Abrams*, the rhetoric of Brandeis' concurrence works on several levels at once. Its explicit distinction between reasoned discourse and silent force implicitly criticizes the majority's two-sentence dismissal of Whitney's First Amendment claim. By equating law and

135. *Id.* at 375.

136. *Id.*

137. *Id.* at 376.

138. *Id.* at 375–76.

politics with rational dialogue, the concurrence privileges its own position, as a voice relying solely upon the "power of reason," over that of the majority, which carries the institutional threat of "fear through punishment." Thus, the subject matter of free speech offers reflective rhetorical support for Brandeis' dissenting point of view.

Elaborating on the distinction between reason and fear, Brandeis offers a succinct and potent fragment of history: "Men feared witches and burnt women."¹³⁹ He suggests further that "the function of speech [is] to free men from the bondage of irrational fears."¹⁴⁰ It follows logically that any restriction of speech based on fear will have domino-like repercussions: The fear will only be exacerbated. Reason is the only justifiable basis for suppression of speech—a reasoned judgment that serious violence is imminent. Thus, the clear and present danger test as redefined by Brandeis:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.¹⁴¹

Brandeis concluded that "free and fearless reasoning," the goal of free speech, must provide the basis for any restriction of speech. As such, his test seems somewhat circular; in fact, Brandeis' dynamic of speech, reason, and fear may more closely resemble a spiral, establishing freedom of expression as absolutely prior. Once expression is restricted, free and fearless reasoning is endangered. Only if the restriction is itself based on reason can the downward spiral be avoided. This leads one to wonder whether reason and freedom of expression can ever be torn asunder, i.e., whether one can ever reasonably suppress speech. Brandeis encouraged that doubt. He would allow suppression only where an emergency poses the threat of "serious injury to the State."¹⁴² Any lesser evil, such as "[t]he fact that speech is likely to result in some violence or in destruction of property, is not enough to justify its suppression."¹⁴³

Brandeis' concurrence exemplifies the First Amendment values of free

139. *Id.* at 376.

140. *Id.*

141. *Id.* at 377.

142. *Id.* at 378.

143. *Id.*

and fearless reasoning that it extolls, and links those values, and thus derivatively its own voice, to the preservation of a democratic state. The argument proceeds from fundamental premises to general conclusions with clarity and brilliance. Reason and logic seem to break down in the opinion only when Brandeis approaches the moment of suppression, but that is Brandeis' very point. The reconciliation of authority and freedom demands a rule of reason, and reason demands freedom of expression. Unless reason can exist independently of free speech—and Brandeis strongly suggested that it cannot—suppression has no rational place.

The final foundation for Brandeis' theory of freedom of speech, however, is not reason itself, but the necessity for reason if deliberative democracy is to prevail over arbitrary force. It is this political rationale for the protection of speech that constitutes Brandeis' ultimate misreading of Holmes. For Holmes, the foundation was truth, best approached through the competition of free trade in ideas. Brandeis' substitution of rational self-governance appears merely to develop the implications of Holmes' recognition of uncertainty and his suggestion of a standard of popular acceptance. If we can know the truth only by popular approximation, perhaps our concern in protecting speech should not be with truth itself but with the process and results of popular deliberation, i.e., democracy. Brandeis' revision grounds First Amendment theory in a democratic society, where Holmes had posited an idealized social mechanism designed to reach an objective ideal. Holmes' truth stood above mankind; Brandeis' democracy is our invention.

These two theories of the First Amendment, one introduced in dissent, the other in a concurrence that dissented in theory, still provide the two major strains of First Amendment philosophy. Holmes' free trade in ideas, through Brennan's misreading in *Lamont v. Postmaster General*,¹⁴⁴ becomes the marketplace of ideas and ultimately justifies affirmative intervention by the government in order to save not the state, but the marketplace itself. Brandeis' deliberative democracy was rediscovered some twenty years later by Professor Alexander Meiklejohn, who in his own agonistic effort to do battle with Holmes, gave Brandeis only three and a half pages—though admittedly some credit—in his *Free Speech and Its Relation to Self-Government*.¹⁴⁵ Brandeis' theory, via Meiklejohn, finally found its way into a majority opinion in 1964, with *New York Times v. Sullivan*,¹⁴⁶ another Brennan misreading.

Both Holmes and Brandeis made their mark on the First Amendment tradition precisely by standing apart from the tradition as it then existed.

144. 381 U.S. 301, 307 (1965) (Brennan, J., concurring).

145. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

146. 376 U.S. 254 (1964).

Rather than respecting precedent, they spoke strongly for principles that they felt required radical revisions of prevailing law. At the same time, they sought support for their principles in the authority of the Constitution, and justified their own revisionary stances in the First Amendment's concern for the dissenter. Their misreadings were "strong" ones; they have withstood the test of history and gained acceptance "in the competition of the market." That their opinions, essentially voiced in dissent, now carry the weight of precedent is itself a tribute to the First Amendment theories that Holmes and Brandeis expounded. The agonistic struggle is, after all, another form of Holmes' "free trade in ideas." Its interaction with, and here, victory over precedential incorporation exemplifies the room for greatness in the law.

IV. TO THE MARKETPLACE—A MAP OF MISREADING

This Section will focus on Justice Brennan's "marketplace of ideas" metaphor, a misreading which may warrant placing Brennan alongside Holmes and Brandeis as a third antithetical "father" in the First Amendment tradition. The direction taken from here must be somewhat arbitrary; the influence of Holmes' dissent and Brandeis' concurrence is such that nearly every free speech case since 1927 involves either an explicit or implicit misreading of their theories. That a dissent and concurrence should have such significance demonstrates at once the influence of the strong break from tradition and the ability of tradition to adapt; the antithetical undercurrents that surfaced so strongly in *Abrams* and *Whitney* have since been fully incorporated into the precedential mainstream.

In order to demonstrate the simultaneous operation of antithetical struggle and precedential incorporation, this Section will follow a line of cases that culminates, in 1981, in the incorporation of the Holmes, Brandeis, and Brennan approaches into a majority opinion upholding a right of access to the broadcast media for political candidates.¹⁴⁷ This necessarily selective map of misreading identifies four stops along the way: *Martin v. City of Struthers*,¹⁴⁸ *Lamont v. Postmaster General*,¹⁴⁹ *Red Lion Broadcasting Co. v. FCC*,¹⁵⁰ and *CBS v. DNC*.¹⁵¹ Formally, the line includes a sentence of dicta, a concurrence, a dissent, and two majority opinions. By analyzing majority as well as separate opinions, this Section intends to explore the ongoing dynamic between agonistic struggles and the pull of the precedential mainstream.

147. *CBS v. FCC*, 453 U.S. 367 (1981).

148. 319 U.S. 141 (1943).

149. 381 U.S. 301, 307 (1965) (Brennan, J., concurring).

150. 395 U.S. 367 (1969).

151. 412 U.S. 94, 170 (1973) (Brennan, J., dissenting).

A. *Origins Again—The Right to Receive and the Marketplace of Ideas*

In *Martin v. City of Struthers*, Justice Black swerved momentarily from tradition in a seemingly throwaway phrase. Writing for a majority that invalidated a municipal ordinance forbidding door-to-door canvassing because it infringed the First Amendment right to *distribute* literature, Black nonchalantly asserted a corollary right to *receive* information. “This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.”¹⁵² The right to receive follows so logically from the market metaphor and the right to distribute that it is surprising both that Black was the first to mention it and that Black’s comment, dicta in *Martin*, failed to surface again for some twenty-two years.

The resurrection of Black’s comment came at the hands of Justice Brennan, concurring in *Lamont v. Postmaster General*.¹⁵³ *Lamont* concerned the constitutionality of a federal statute that required the Postmaster General to detain, and deliver only upon the addressee’s written request, unsealed foreign mailings of “communist political propaganda.”¹⁵⁴ Justice Douglas, writing for the majority, held the statute unconstitutional as “a limitation on the unfettered exercise of the addressee’s First Amendment rights,”¹⁵⁵ thereby implicitly incorporating Black’s dicta. The majority opinion, however, did not further develop the right to receive, focusing instead on the government’s obstructionist role in the free market of ideas.

Brennan, concurring, made explicit Douglas’ reasoning. He began his opinion by suggesting that “[t]hese might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders.”¹⁵⁶ The senders were by and large foreign citizens who may not have had constitutional rights or standing to sue. Brennan briefly discussed the potential problems of standing and of foreign propaganda, concluding:

However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment “necessarily protects the right to receive it.” Since the decisions today uphold this contention, I join the Court’s opinion.¹⁵⁷

Rhetorically, Brennan’s first paragraph glides effortlessly over the twenty-

152. 319 U.S. at 143.

153. 381 U.S. 301, 307 (1965) (Brennan, J., concurring).

154. *Id.* at 305.

155. *Id.*

156. *Id.* at 307 (1965) (Brennan, J., concurring).

157. *Id.* at 308 (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)).

two year gap; he makes his rationale look easy by suggesting the difficulties of an approach not taken.

Consolidating his gains, Brennan elaborated on the meaning of a right to receive. He admitted that no specific guarantee of such a right exists in the First Amendment, but insisted that the right to receive is nevertheless a fundamental right, in that it is "necessary to make the express guarantees fully meaningful."¹⁵⁸ At this point, Brennan introduced an important misreading of Holmes' free trade in ideas:

The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.¹⁵⁹

The "marketplace of ideas" soon became a well-worn phrase. Its prevalence in judicial opinions and law journal articles is attributable in part to its obvious bow to Holmes, but Brennan's revision is significant.¹⁶⁰ Brennan localized the metaphor; he gave the market a sense of place. Brought down from the Holmesian skies, the marketplace of ideas grounds "free trade" in a specific locale and context. Though it is often made to do so, Brennan's metaphor need not carry the baggage of economic theory that Holmes expressly adopted. The marketplace of ideas, in Brennan's figuration, conjures up the Greek "agora," the central meeting place for exchange. These ancient Greek marketplaces were much more than models of market efficiency. Located at the center of town, they functioned as public assemblies as well as markets; all hawkers, criers, buyers, and sellers were admitted. The marketplace of ideas connotes diversity and pluralism at ground level without resting on theories of abstract, truth-generating invisible hands. The marketplace metaphor thus avoids some of the conceptual weaknesses of Holmes' economic model, while focusing attention on the process of exchange in a particular context or medium. In this localized form, the metaphor has been applied to state fairs,¹⁶¹ public forums,¹⁶² shopping centers,¹⁶³ academic settings,¹⁶⁴ and the broadcast media.¹⁶⁵

158. 381 U.S. at 308.

159. *Id.*

160. Holmes' "free trade in ideas" occurs in only fourteen Supreme Court cases since 1925; Brennan's "marketplace of ideas" is explicitly mentioned in 33 Supreme Court cases since its birth in 1965.

161. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 658 n.2 (1981) (Brennan, J., concurring).

162. See *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

163. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 97 (1980) (Powell, J., concurring).

164. See *Healy v. James*, 408 U.S. 169, 180 (1972).

165. See *CBS v. DNC*, 412 U.S. 94, 195 (1973) (Brennan, J., & Marshall, J., dissenting).

B. Red Lion—*Incorporating the Marketplace*

In *Red Lion Broadcasting Co. v. FCC*,¹⁶⁶ the marketplace of ideas and the right to receive—with echoes of both Brennan and Holmes—were incorporated into a unanimous opinion. The centrality of these concepts to the *Red Lion* result demonstrates at once the antithetical strength of Holmes' and Brennan's misreadings and the ability of the precedential mainstream to subsume such agonistic victors. Through a strong collective misreading, authored by Justice White, the two concepts coalesce, justifying affirmative government intervention in the broadcast media to protect the rights of viewers and listeners to receive balanced information.

At issue in *Red Lion* was the constitutionality of the Federal Communication Commission's fairness doctrine,¹⁶⁷ as well as its regulations concerning personal attacks and political editorials. Each of these provisions involved the FCC in oversight of the *content* of certain programs; broadcasters challenged the rules on traditional First Amendment grounds, arguing that this oversight violated the principle of government content neutrality.¹⁶⁸ A unanimous Court upheld the challenged rules, justifying them as protective of the collective rights of viewers and listeners "to have the medium function consistently with the ends and purposes of the First Amendment."¹⁶⁹ The Court's revision retained the language and metaphors of past authority—the marketplace of ideas and the right to receive—but extended them significantly to justify affirmative content-based intrusion by government in an area previously defined by *laissez-faire*, content-neutral principles. In doing so, the Court forged a new misreading by bringing together the metaphors of Brennan and Holmes, generalizing the uniqueness of each, as it specified that

the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.¹⁷⁰

The Court's misreading re-introduces Holmes' economic notions of truth-generation to Brennan's marketplace, but also recognizes that government

166. 395 U.S. 367 (1969).

167. The fairness doctrine required broadcasters to present a politically balanced viewing schedule. If a program presented only one side of an issue, the network was required to broadcast another program presenting the other side.

168. The First Amendment requires the government to maintain content neutrality in many contexts. This means that the government may not punish or deny a benefit on the basis of the political content of a person's speech or ideas. *Mosley*, 408 U.S. at 96.

169. 395 U.S. at 390.

170. *Id.*

might need to play a preservationist role in a medium of ideas where the free market has given way to monopoly capital.

The string cite that follows the passage quoted above indicates the extent and direction of the Court's revision of prior authority. *Associated Press v. United States*¹⁷¹ leads the string; in that case, a 1944 antitrust decision by Justice Black, the Court held only that application of the Sherman Antitrust Act to the Associated Press was not barred by the First Amendment. The *Red Lion* Court's misreading effectively turns this limitation on the freedom of speech into an affirmation of the government's responsibility to maintain First Amendment values by controlling speech in a monopoly setting. In support of this revisionary reading of *Associated Press*, the Court appended cites to *New York Times v. Sullivan*,¹⁷² the 1964 Brennan opinion that resurrected Brandeis' self-government theory; the *Abrams* dissent; *Garrison v. Louisiana*,¹⁷³ another 1964 Brennan opinion that characterized speech as "the essence of self-government,"¹⁷⁴ and finally a Harvard Law Review article entitled "The Supreme Court and the Meiklejohn Interpretation of the First Amendment,"¹⁷⁵ also by Justice Brennan. The specter of Justice Brennan's "uninhibited marketplace of ideas" looms large throughout the string cite and the rest of the majority opinion, and behind Brennan stand Meiklejohn, Brandeis and Holmes. The string cite serves as a quick reference to the map of misreading that guides the opinion.

In *Red Lion*, government interference in the broadcast media was justified not by any clear and present danger to the state itself, but by the threat of distortion in the marketplace of ideas. Because of scarcity, economic barriers, and state-created advantages, the Court noted, the broadcast media is not naturally an "uninhibited marketplace of ideas," and therefore limited content control is legitimate in order to ensure a robust exchange of ideas. Although it is probable that neither Holmes nor Brandeis would have countenanced such an intrusion,¹⁷⁶ it is certain that Holmes' metaphor provided the groundwork for the justification. Holmesian economics lent rhetorical support to the notion of federal oversight of speech, for intervention in the economic realm to offset monopoly power had long been accepted. It was Holmes' "free trade in ideas," localized in

171. 326 U.S. 1 (1945).

172. 376 U.S. 254 (1964).

173. 379 U.S. 64 (1964).

174. 395 U.S. at 390.

175. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

176. Both Holmes and Brandeis specifically restricted government interference to situations where the state itself was seriously and immediately threatened. See *supra* text accompanying notes 120, 141.

the broadcast marketplace, which the government sought to preserve through affirmative intervention. The Court in *Red Lion* thus turned Brennan and contemporary economics on Holmes to reach a result radically opposed to that suggested by Holmes' original conception. A metaphor born in laissez-faire, after a series of misreadings, became the groundwork for protectionism, as government intrusion was found justified to maintain the conditions for a twice-misread metaphor.

C. CBS v. DNC—*A Retreat and Further Revision*

Four years after the *Red Lion* decision, the Supreme Court retreated somewhat in *CBS v. DNC*¹⁷⁷ when a 6-3 majority held that the First Amendment did not require broadcasters to accept editorial advertisements. Judicial declaration of an affirmative obligation in this case would have required an extension of *Red Lion*. Where *Red Lion* stated that the First Amendment did not forbid necessary government interferences, a different result in *DNC* would have required a holding that the First Amendment mandated intervention to ensure access. Chief Justice Burger, joined by Stewart and Rehnquist, found first that the broadcasters' actions did not constitute state action, and that therefore there was no First Amendment violation. Because this position did not command a majority, Burger went on to discuss whether affirmative editorial access was required by either the "public interest" standard of the Communications Act, or, assuming state action, by the First Amendment. Burger concluded that the fairness doctrine upheld in *Red Lion* was sufficient to protect the First Amendment rights of viewers and listeners, and that broadcasters were therefore not required by the Constitution or the "public interest" to accept editorial advertisements. In support of his conclusion, Burger speculated that mandatory editorial access would be biased in favor of the rich, and that the administrative difficulties of implementation would be prohibitive.¹⁷⁸

The case elicited five opinions; Justice Brennan offered the strongest, in dissent.¹⁷⁹ Standing apart, Brennan presented an antithetical misreading that extended the implications of his earlier majority opinions—*New York Times v. Sullivan*¹⁸⁰ and *Garrison v. Louisiana*¹⁸¹—and expanded upon his concurrence in *Lamont* and his Harvard Law Review article. Like Holmes before him, Brennan misread himself. If the self-revision here is not quite so abrupt as *Abrams*, it may be because Brennan had at this

177. 412 U.S. 94 (1973).

178. *Id.* at 123.

179. *Id.* at 170 (Brennan, J., dissenting). Justice Marshall joined Brennan's dissent.

180. 376 U.S. 254 (1964).

181. 379 U.S. 64 (1964).

point succeeded, in *Red Lion*, in incorporating his previous strong misreadings into the mainstream. With *CBS v. DNC*, however, he broke from the majority once again.

Read in the light of *Lamont*, *New York Times*, and *Garrison*, the *CBS v. DNC* dissent firmly establishes Brennan as a rebellious son to the two strong fathers of the First Amendment tradition. In dissent, Brennan drew upon the strength of his precursors in a seemingly legitimate act of straightforward incorporation, but swerved substantially at the last moment, finding a constitutionally mandated right of individual access far beyond the fairness doctrine guarantees upheld in *Red Lion*.

Brennan disposed of his opponents on the primary level of discourse—the particular case—with a couple of pages and a footnote.¹⁸² The real struggle begins in Section II of his dissent: Here Brennan looked past the immediate opposition to his strong precursors. Section II opens with a four-page discussion of the First Amendment tradition. The discussion incorporates and misreads developments in the tradition since 1919, and concludes as it begins, by citing *Red Lion*, an opinion that rested squarely on Brennan's own marketplace metaphor. The Section's opening invocation is thus framed by references to the strongest immediate precursor (in both the antithetical and precedential senses). Its relation to that precursor is strongly revisionary, however, as Brennan draws upon and significantly extends the *Red Lion* holding.

Brennan's introductory discussion opens with a concession that broadcasters have First Amendment rights, but at the same time reiterates the countervailing collective right of "the people as a whole."¹⁸³ At the outset, however, Brennan makes no claim for which way the balance between the broadcasters and the public should tip, even though that question had been decided in favor of the public in *Red Lion*. Brennan's apparently objective opening stance serves two purposes: It lends his opinion the illusion of impartiality, and allows him to incorporate a long line of First Amendment theory into the *Red Lion* holding that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."¹⁸⁴

182. Brennan's opening paragraph manipulates the split in the majority opinion to undercut its substantive holding. Remarking that three of the seven Justices found insufficient government involvement in broadcast decisions to raise any First Amendment interest, he concluded that the opinion of those three on the substance of the First Amendment claim reduced to "mere dictum." 412 U.S. at 171 (Brennan, J., dissenting). Later, he dismissed Stewart's slippery slope concurrence—which warned that a finding of state action here means that "private broadcasters are Government," *id.* at 133 (Stewart, J., concurring)—as a "complete misunderstanding," and corrected Stewart's mistakes in a footnote. *Id.* at 181–82 n.12. Finally, Brennan argued that there was sufficient government involvement in the broadcast media to raise First Amendment implications. *Id.* at 173.

183. *Id.* at 183.

184. *Id.* at 184 (citing *Red Lion*, 376 U.S. at 390).

Brennan arrives at the *Red Lion* holding through his own revisionary string cite. A comparison of his string cite with that in *Red Lion*¹⁸⁵ suggests the degree of Brennan's misreading. The string cite begins with Holmes' market metaphor from the *Abrams* dissent, followed by a "see also" to *Whitney* and *Gitlow*. Brandeis, who was conspicuously absent from the *Red Lion* string, is thus sandwiched here between the two Holmes dissents. Brennan's next cite, however, a quote from *New York Times v. Sullivan*, invokes Brandeis' notion of self-government with a reference to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁸⁶ This Brandeisian notion is buttressed by citations to six more opinions, in particular those of Justice Douglas in *Terminiello v. Chicago*¹⁸⁷ and of Justice Cardozo in *Palko v. Connecticut*.¹⁸⁸ These additional authorities, none of which is found in *Red Lion*, underscore the Court's long-standing concern for societal or public First Amendment interests, and lead directly and smoothly into a quotation of the *Red Lion* conclusion that the public right is paramount.¹⁸⁹ Brennan's string cite thus subtly increases the weight on the public side of the balance, primarily by invoking Brandeis' "political" justification for protecting speech.

Following the string cite, Brennan implicitly invoked his marketplace metaphor, tying it at the same time to Holmes' own metaphor:

it has traditionally been thought that the most effective way to insure this "uninhibited, robust, and wide-open" debate is by fostering a "free trade in ideas" by making our forums of communication readily available to all persons wishing to express their views.¹⁹⁰

The marketplace of ideas, with its suggestion of an unconstricted plurality of buyers and sellers, provides the unstated foundation for Brennan's revision of *Red Lion*. Brennan focused first on the characteristics of the broadcast marketplace, and specifically reevaluated the sufficiency of the fairness doctrine in guaranteeing a robust exchange of ideas. He sharply criticized the fairness doctrine, noting that it mandates only the presentation of "representative community views."¹⁹¹ Brennan pointed out that

185. See *supra* text accompanying notes 171-75.

186. 412 U.S. at 183 (citing *New York Times v. Sullivan*, 376 U.S. at 270).

187. 337 U.S. 1 (1949).

188. 302 U.S. 319, 327 (1937) ("[Freedom of Speech] is the matrix, the indispensable condition, of nearly every other form of freedom.")

189. The only citation from the *Red Lion* string cite which is missing here is one of Brennan's own, from *Garrison v. Louisiana*. Far from an oversight, its absence at this point allows its use in a later, crucial turn in the opinion. See *infra* text accompanying notes 193-96.

190. 412 U.S. at 184.

191. *Id.* at 190.

broadcasters retain virtually complete discretion under the doctrine, and that together with the commercial reality that "angry customers are not good customers," the doctrine often induces only bland, conventional coverage of public issues.¹⁹² If the marketplace is to avoid monopolistic control, Brennan suggested, something further is required.

In search of a constitutional supplement or substitute for the inadequate fairness doctrine, Brennan looked to the model of the legal system for guidance: "Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates."¹⁹³ Shifting the focus away from the editorial rights of broadcasters, he argued that a limited scheme of *mandated* editorial advertising would restore editorial control to *speakers*. Insofar as the majorities in *Red Lion* and *CBS v. DNC* had concentrated on the fairness doctrine, they had neglected speakers' interests in favor of listeners' rights. Brennan re-introduced the speaker to the balance in his dissent with another revisionary string cite. The cite begins with Professor Emerson's identification of the private First Amendment interest in self-expression.¹⁹⁴ The public implications of this private interest are suggested by the next reference, to *Garrison v. Louisiana*: "Speech concerning public affairs is more than self-expression; it is the essence of self-government."¹⁹⁵ Following Emerson, speech here connotes the *act* of speaking, not solely the information conveyed. Freedom of speech, Brennan asserted, guarantees *participatory* rights, citing *Thomas v. Collins*,¹⁹⁶ a 1945 case that extended First Amendment rights not only to academic discussions but to advocacy of action. A quote from *Police Dept. of Chicago v. Mosley*¹⁹⁷ prepares the way for Brennan's conclusion:

For our citizens may now find greater than ever the need to express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies.¹⁹⁸

Truth has dropped out of the First Amendment equation by the string cite's end; Brennan's reformulation offers more limited, realistic, and concrete hopes, and in so doing shifts the focus to individual speakers. The market's test of truth gives way to the everyday exchange of the marketplace. Value lies not so much in the final result as in the process of ex-

192. *Id.* at 185-88.

193. *Id.* at 189.

194. *Id.* at 192-93.

195. 379 U.S. 64, 74-75 (1964).

196. 323 U.S. 516, 537 (1945).

197. 408 U.S. 92 (1972).

198. 412 U.S. at 193.

change. In Brennan's revision, foreshadowed by Brandeis, the act of exchange furthers important First Amendment interests, and therefore the process itself deserves protection.

As noted above, Brennan's marketplace misreading localized the Holmesian metaphor.¹⁹⁹ In his *CBS v. DNC* dissent, Brennan justified that revision:

[F]reedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency.²⁰⁰

Brennan's list of effective forums is conspicuously public; his allusion earlier in the opinion to public forums begins to surface here.²⁰¹ Localized in the broadcast media, the marketplace of ideas itself becomes a public forum: "[W]ith the assistance of the Federal Government, the broadcast industry has become what is potentially the most efficient and effective 'marketplace of ideas' ever devised."²⁰² It is "most efficient and effective" not because of its generation of truth and good, but simply because, as Brennan states in a footnote, "approximately 95% of American homes contain at least one television set, and that set is turned on for an average of more than five and one-half hours per day."²⁰³ In the realm of communication at least, television *is* America's agora, our marketplace of ideas.

Establishing television's function as a public forum strengthens considerably the logic of Brennan's position; public forums, in First Amendment doctrine, must be administered on a content-neutral, equal access basis, and a restriction on political editorials appears to transgress this rule. In this light, the ban on editorial access upheld by the majority begins to look like content control, while Brennan's alternative of mandated access seems to walk the line of content neutrality. Brennan's marketplace metaphor, allied here with the public forum doctrine, effects a reversal of the majority position. Where the majority characterized its decision as avoiding government interference, Brennan's recasting of the issue suggests that governmental action is inevitable, and therefore should be content-neutral—providing for editorial access—rather than content-based—upholding a prohibition on access for political speech. Just as Holmes and Brandeis had done before him, Brennan justified a revision-

199. See *supra* text accompanying notes 166–76.

200. 412 U.S. at 193.

201. See *supra* note 186.

202. 412 U.S. at 195.

203. *Id.* at 195, n.36.

ary extension of law by invoking a metaphor and misreading an established rule.

The marketplace metaphor also set the stage for Brennan's conclusion, in which he argued that the majority decision favored "commercial" over "controversial" speech. Brennan noted that the policies upheld by the majority granted greater access to big business' commercial advertisements than to discussions of public issues. From Brennan's perspective, the majority had lost sight of the metaphorical nature of Holmesian economics. Capitalism triumphs over politics in this marketplace, Brennan asserted:

Thus, as the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal, and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects, and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak.²⁰⁴

Brennan rested his *CBS v. DNC* dissent on three foundations: *Red Lion*, the marketplace, and the public forum. Logically, the opinion proceeds in small steps: *Red Lion* values collective social rights of listeners over private rights of broadcasters; the fairness doctrine fails to meet the demands of that collectivity; the marketplace suggests a reciprocal approach, emphasizing the rights of speakers and listeners over middlemen in a world where not truth but exchange is crucial; and therefore television, America's premier marketplace, should be treated as a quasi-public forum, to which individual speakers should have content-neutral access through editorial advertising. Brandeis' concurrence in *Whitney*—transforming the objectivity of Holmes' truth into subjective individual freedom and intersubjective democracy—speaks strongly through Brennan's misreading. But at the center of Brennan's opinion lies the marketplace, a forum defined by the intersection of public issues and self-expression.

The rhetorical strength of Brennan's dissent is clear; it remains to be seen whether that strength will be incorporated into the precedential mainstream. The marketplace metaphor in itself has already achieved prominence, and to a large extent has framed the terms of the debate. Read as agora rather than as a free market funnel for truth, it carries with it the underpinnings of Brennan's conceptual revision, evoking a strong concern for *access* to effective communication—both listening and speaking, buying and selling—on public issues.

204. *Id.* at 200.

D. *CBS v. FCC—Partial Incorporation*

In *CBS v. FCC*²⁰⁵ the majority took its first tentative steps towards incorporating Brennan's misreading. In that case, the Court upheld a statute granting individual access to the broadcast media for federal election candidates. The decision, and the dispute between the majority and the dissent, focused primarily on the statutory interpretation of § 312(a)(7) of the Communications Act, but our concern is with the constitutional subtext. Considering the First Amendment claim, the majority's decision applied the spirit of Brennan's *CBS v. DNC* dissent to the sphere of federal elections. Emphasizing the "enforceable public obligations" that a licensed broadcaster must accept, the Court found that these obligations carry increased constitutional weight in the realm of politics. Burger, writing for the majority, quoted *Buckley v. Valeo*,²⁰⁶ Brennan's now-familiar phrase from *Garrison*, and a line from *Monitor Patriot Co. v. Roy*: "The First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office."²⁰⁷ It is not enough to offer independent news coverage of elections, the Court stated; candidates must be allowed to speak *for themselves*. Thus, Brennan's concern for access triumphed in a quintessentially Brandeisian setting. The marketplace metaphor is particularly fitting in the context of political campaigns; truth largely drops out of the picture, as candidates promise, voters choose, and popular acceptance carries the day. The underlying notion of self-government through deliberative democracy, a Brandeis-Meiklejohn-Brennan justification for free speech, finds its most immediate application in the campaign context, and in *CBS v. FCC* that reading was incorporated to mandate individual access.

Brennan's misreading, partially adopted in *Red Lion* and *CBS v. FCC*, but never fully endorsed by the majority, would extend the marketplace concept to "social, political, esthetic, moral and other ideas and experiences."²⁰⁸ His marketplace offers a strong revision of both Holmes and Brandeis, even as it echoes them both. He localized Holmes' abstract metaphor, giving it a sense of place, freeing it of its economic baggage, and focusing attention on participation, or access. He substituted Brandeis' goals of self-definition and self-government through active participation for Holmes' notion of objective truth, and his metaphor extended Brandeis' concerns beyond political speech. Brennan's revisionary relationships to his two precursors are slightly different. Brennan clarified and rede-

205. 101 S.Ct. 2813 (1981).

206. 424 U.S. 1, 52-53 (1976).

207. 401 U.S. 265, 274-75 (1971).

208. See *Red Lion*, 395 U.S. at 390.

finer Holmes' abstraction, and argued for government intrusion far beyond Holmes' conception. Toward Brandeis, Brennan took a less aggressive stance, extending Brandeis' self-government revision beyond the political sphere by giving it a concrete manifestation in the marketplace.

In the marketplace, or agora, choice and meaning for the individual and society trump the destiny of overarching truth. Brennan's metaphor emphasizes communication and participation; it is process- rather than result-oriented. With regard to truth and falsehood, it is content-neutral. With respect to access, it is radically affirmative. Despite Brennan's apparent dissatisfaction with the extent to which his vision has not yet been adopted, it is clear that the marketplace of ideas has played an important revisionary role in the development of First Amendment jurisprudence.

CONCLUSION

An antithetical reading of case law suggests that the development of legal doctrine cannot be accounted for solely by rules of precedent. As we have seen, a dissent or concurrence may prove far more influential than a unanimous opinion. Influence appears to derive not only from the momentum of the mainstream, but also from the radical misreading of an individual agonistic victor. Bloom's emphasis on revisionary relations provides an interpretive tool for identifying the misreadings of strong Justices. This antithetical theory suggests, moreover, that legal analysis can at least as profitably focus on dissents as on majority opinions.

Bloom's theory of hostile agonistic struggle claims to be the sole explanation for the creative poetic process; he seeks to replace the traditional account of a friendlier, incorporationist mode of creative revision with his antithetical model. The law, however, largely because it involves the imposition of force, must be based explicitly on the model that Bloom rejects. This article does not argue that the incorporationist model is a ruse. My revision of the conventional story might therefore be characterized as a swerve; I do not deny outright the authority of precedent, but hope to reveal it to be an incomplete account. At a minimum, I suggest that there is a contradiction between what we identify as great and what we, at least overtly, ask of a judge. We confer legitimacy on precedential fidelity but reserve greatness for the radical break.

The contradiction is revealed most clearly at the moment of misreading. There the Justice insists that he is legitimately following the law as precedent requires, while he is actually altering the meaning of the authority cited by his own interpretation. The moment of misreading reflects our fundamentally ambivalent attitude towards authority. On the one hand, we grant authority to those whom we regard as legitimate, because they faithfully adhere to society's traditions, mores, and laws. On the other

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hand, we also assign authority to those who stand out as great, and who in doing so simultaneously violate and redefine our traditions, mores, and laws.

The specific character of legal misreading suggests that as a matter of ideology, we assign more importance to legitimacy than to greatness, even as legal structure and language leave room for both. Unlike the poet, the judicial misreader can never admit that he misreads; the attempt to be great must be shrouded in the language of precedential legitimacy. We have made a choice, like the brothers in Freud's parable, to privilege social cohesion and order over individual initiative. But our choice, like theirs, is fraught with ambivalence; we respect legitimacy, but celebrate greatness. In the end, one cannot exist without the other. Our traditions are born from breaks with past tradition, and are given new life from the continuing redefinitions that strong misreadings confer. As long as the agonistic hand remains hidden in the undercurrents our descriptive and normative accounts of adjudication will fall short of their critical task. Anti-theoretical analysis attempts to unveil this hidden hand.