

LEARNED HAND'S *MASSES* DECISION: Vindication and Influence

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I. INTRODUCTION

On July 24, 1917, Learned Hand, then a young judge on the United States District Court for the Southern District of New York, enjoined the New York City Postmaster from refusing to mail the August issue of a self-proclaimed “revolutionary” magazine¹ called *The Masses*.² The Postmaster had deemed the issue nonmailable because in his view material condemning America’s involvement in World War I tended to cause “insubordination, disloyalty, mutiny [and] refusal of duty” and “obstruct[ed] the recruitment or enlistment service of the United States” in violation of the Espionage Act of 1917.³ Judge Hand began his opinion by construing the Espionage Act against a background of “that right to criticize either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon free expression as the ultimate source of authority.”⁴ In light of this basic democratic precept, Hand distinguished between “direct incitement to violent resistance,” which could be properly punished, and “political agitation,” which is “a safeguard of free government.”⁵ He emphasized that this distinction “is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom.”⁶ Applying this “direct advocacy” test to the four cartoons and four textual items particularly impugned by the Postmaster, Hand found that none of the

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1. See *ECHOES OF REVOLT: THE MASSES 1911–1917*, at 27 (William L. O’Neill ed., 1966).
2. *Masses Publ’g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917).
3. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (1917); see *Masses Publ’g Co.*, 244 F. at 539–40.
4. *Masses Publ’g Co.*, 244 F. at 539.
5. *Id.* at 540.
6. *Id.*

expression could “be thought directly to counsel or advise insubordination or mutiny”⁷ or to “directly advocate[]” draft resistance.⁸ He therefore concluded that the challenged issue of the magazine did not violate the Espionage Act or thus did come within the nonmailability section of that law.⁹

Hand’s decision was swiftly repudiated: the injunction was stayed the same day it issued by a judge of the United States Court of Appeals for the Second Circuit.¹⁰ Three months later the Court of Appeals reversed the decision on the merits, specifically denouncing Hand’s direct advocacy test: “If the natural and reasonable effect of what is said,” the court wrote, “is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance,” it is immaterial that there has been no direct advocacy of law violation.¹¹ The appellate court readily found that with the exception of one item in the magazine, which “taken by itself” was not objectionable,¹² all of the challenged portions of the August issue of *The Masses* met this standard.¹³ For instance, because the voice of a cartoon entitled *Conscription* “[was] not the voice of patriotism, and its language suggests disloyalty,”¹⁴ the Postmaster was justified in finding that “it would interfere, and was intended to interfere” with enlistment.¹⁵

In Hand’s own assessment, his *Masses* decision “seemed to meet with practically no professional approval whatever.”¹⁶ At the time Hand wrote these words, it indeed seemed that this decision would indeed end up in the dustbin of legal history. It is true that the precise test that Hand proposed has never become law. But as I shall discuss in Part II of this Article, the ideas and concerns that motivated Hand to formulate this test are today among the most important themes in American free speech doctrine. I will then in Part III suggest several ways in which this decision has influenced contemporary doctrine.

7. *Id.* at 540–41.

8. *Id.* at 542.

9. *Id.* at 538, 543.

10. *Masses Publ’g Co. v. Patten*, 245 F. 102, 106 (2d Cir. 1917).

11. *Masses Publ’g Co. v. Patten*, 246 F. 24, 38 (2d Cir. 1917).

12. *Id.* at 36.

13. *Id.* at 37.

14. *Id.*

15. *Id.*

16. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 729 (1975) (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Dec. 3, 1920)).

II. VINDICATION

A. *By Brandenburg v. Ohio*

In an influential article,¹⁷ Hand biographer Gerald Gunther claims that Hand's approach in *Masses* was vindicated more than fifty years later by the Supreme Court's decision in *Brandenburg v. Ohio*.¹⁸ *Brandenburg* announced a test that narrowly confined the circumstances under which government may constitutionally punish advocacy of illegal activity. This test, which forms a cornerstone of modern free speech doctrine, provides that government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁹

Gunther makes two related assertions. First, he argues that the "incitement emphasis is Hand's; the reference to 'imminent' reflects a limited influence of Holmes"²⁰ In addition, Gunther states that under *Brandenburg* "the major consideration" no longer is the probability of harm but rather the "inciting language of the speaker—the Hand focus on 'objective' words."²¹ And so, Gunther concludes, "the language-oriented incitement criterion, so persistently urged by Hand in *Masses*" and in letters that he wrote for years afterwards, "has become central to the operative law of the land."²² Gunther's view, or significant portions thereof, has been endorsed by other commentators.²³ *Brandenburg*'s vindication of Hand's approach in *Masses*, however, is not as straightforward as Gunther claims.

17. *Id.* at 750–55.

18. 395 U.S. 444 (1969).

19. *Id.* at 447.

20. Gunther, *supra* note 16, at 755.

21. *Id.*

22. *Id.*

23. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 848–49 (2d ed. 1988) (stating that *Brandenburg* "combin[es] the best of Hand's views with the best of Holmes' and Brandeis' . . . embrac[ing] Hand's insistence on treating only words of incitement as unprotected"); Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of "Definitional Balancing" as a Methodology for Determining the "Visible Boundaries of the First Amendment,"* 39 AKRON L. REV. 483, 505 (2006) ("[T]he *Brandenburg* rule is based on the speech values at stake as articulated in the classic opinions of Judge Hand and Justices Holmes and Brandeis."); Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century,* 34 WM. MITCHELL L. REV. 773, 999 (2008) (explaining that the *Brandenburg* test synthesized prior rulings, including *Masses*, and restated the principles in a single formula); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning,* 2003 SUP. CT. REV. 197, 218 (noting that the *Brandenburg* test built on Hand's *Masses* opinion in requiring a consideration

1. Incitement

Gunther is off base in claiming the “incitement emphasis is Hand’s.” *Brandenburg’s* crucial distinction between “mere advocacy” of law violation and “incitement to imminent lawless action” is not found in *Masses*. Hand uses the word “incitement” only once in his opinion, in contrasting “direct incitement to violent resistance” with political “agitation,”²⁴ and does so synonymously with “direct advocacy”²⁵ or “directly to counsel or advise” law violation,²⁶ the terms he otherwise uses to describe speech which in his view may legitimately be suppressed. Furthermore, Hand specifies that to “counsel or advise” someone to engage in an act is “to urge upon him either that it is his interest or his duty to do it.”²⁷ Accordingly, so long as the advocacy at issue is sufficiently explicit in counseling law violation, Hand’s “direct advocacy” would seem to include “mere advocacy.”

A more accurate attribution would be that the “incitement emphasis is Harlan’s.” In *Noto v. United States*, Justice John Marshall Harlan construed the Smith Act as requiring “advocacy ‘not of . . . mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to . . . action’ immediately or in the future.”²⁸ *Brandenburg* quotes *Noto* for the proposition that “‘the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.’”²⁹

of the “literal or explicit meaning of the words of incitement”). See also Ronald Dworkin, *Mr. Liberty*, N.Y. REV. BOOKS, Aug. 11, 1994, at 17, 18 (1994) (reviewing GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994)) (stating that “the law has now settled, in recent years, into a view closer to Hand’s [*Masses*] opinion” than to Holmes’s clear and present danger test).

24. *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917).

25. *Id.* at 541.

26. *Id.* at 540–41.

27. *Id.* at 540.

28. *Noto v. United States*, 367 U.S. 290, 297 (1961) (citing *Yates v. United States*, 354 U.S. 298, 316 (1957)).

29. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (quoting *Noto*, 367 U.S. at 297–98). This distinction was first introduced into a Supreme Court decision by Justice Louis Brandeis in his famous concurring opinion in *Whitney v. California*, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring). As is discussed below, this concurrence was in several crucial respects likely influenced by *Masses*. See *infra* text accompanying notes 115–122. For the reason discussed *supra* text accompanying notes 24 to 27, however, it is extremely doubtful that Hand’s *Masses* opinion directly contributed to this distinction.

2. Focus on the Objective Meaning of the Challenged Speech

More significantly, there is uncertainty about the extent to which *Brandenburg* adopts what Gunther correctly observes is the most important and arguably the most speech-protective element of *Masses*: the “objective” focus on the actual words used by the speaker. In *Masses*, Hand explained that while “words are to be taken, not literally, but according to their full import, the literal meaning is the starting point for interpretation.”³⁰ As he explained a year later in *United States v. Nearing*, another Espionage Act case, the import of these words was to be determined “objectively” according to how in the particular context the audience would understand the words, not according to speculation about the speaker’s “subjective intent” in uttering them.³¹ In contrast, key language in the *Brandenburg* test—“directed to inciting or producing imminent lawless action”³²—seems to focus on the subjective intent of the speaker,³³ an inquiry that Hand thought “dangerous.”³⁴

Still, although Gunther may have exaggerated the similarities of the *Brandenburg* and *Masses* tests, he is right that *Brandenburg* nonetheless in large part vindicates Hand’s preference for a “a test based upon the nature of the utterance itself.”³⁵ This focus on the actual words used by the speaker is due primarily to a rarely noted threshold inquiry in the *Brandenburg* decision, namely, that to be eligible for proscription under *Brandenburg*, the

30. 244 F. at 542.

31. *United States v. Nearing*, 252 F. 223, 227 (S.D.N.Y. 1918).

32. *Brandenburg*, 395 U. S. at 447.

33. In *Hess v. Indiana*, 414 U.S. 105 (1973), decided shortly after *Brandenburg*, the Court equated “directed to” with intent. In reversing the defendant’s conviction for inciting fellow protestors to again illegally occupy a street from which they had just been cleared by the police, the Court observed that “there was no evidence or rational inference from the import of the language, that his words *were intended to produce*, and likely to produce, imminent disorder.” *Id.* at 109 (emphasis added). (The *Hess* case is discussed in more detail at text accompanying notes 39 to 43, *infra*.) And a plurality opinion in a recent Supreme Court case described the speech punishable under *Brandenburg* “advocacy intended, and likely, to incite imminent lawless action.” *United States v. Alvarez*, 567 U.S. 709, 717 (2012). Lower court decisions have similarly equated “directed to” with intent. *See, e.g.*, *James v. Meow Media*, 300 F.3d 683, 698 (6th Cir. 2002); *United States v. Dellinger*, 472 F.2d 340, 360 (7th Cir. 1972); *People v. Upshaw*, 741 N.Y.S.2d 664, 666 (2002).

34. “[S]ince the cases actually occur when men are excited and since juries are especially clannish groups, . . . it is very questionable whether the test of motive is not a dangerous test.” Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Mar. 1919), in Gunther, *supra* note 16, at 758, 759.

35. Gunther, *supra* note 16, at 725 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 8, 1920)).

speech in question must constitute “advocacy . . . of force or . . . law violation.” This implies that expression devoid of such advocacy, such as criticism of existing laws or works of art such as cartoons or films depicting social injustice that might move an audience to violate the law, may not be punished as incitement under the *Brandenburg* test.³⁶ The part of the *Brandenburg* test bringing the speaker’s intent into the analysis—“directed to inciting or producing imminent lawless action”—comes *after* the inquiry whether the expression at issue constitutes advocacy of law violation. Accordingly, the better view is that this threshold inquiry should, consistent with Hand’s *Masses* analysis, focus entirely on the “objective” meaning of the language at issue, eschewing any inquiry into speaker’s intent.

Assume that a filmmaker is criminally charged with inciting violence for making a movie depicting graphic scenes of lynching of African Americans. Although there is no express advocacy of violence or other lawless activity in the film, assume further that the graphic depictions of the lynching is so powerful that it is likely to move (and in some cases has already impelled) some members of the audience to riot. Consistent with Hand’s approach in *Masses*, if objectively viewed the “full import” of the film was to urge the audience to acts of imminent lawless conduct, then *Brandenburg* would allow the prosecution.³⁷ But if its “full import” could not objectively be found to urge such conduct, *Brandenburg* should prohibit the holding a filmmaker criminally liable even if it could be shown that the filmmaker may have

36. See *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018) (stating that the *Brandenburg* test requires: “(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech” (quoting *Bible Believers v. Wayne County*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc))); Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action*, 1994 SUP. CT. REV. 209, 240 (“*Brandenburg* requires three things: (1) express advocacy of law violation; (2) the advocacy must call for *immediate* law violation; and (3) the immediate law violation must be likely to occur.”).

37. See *Nearing*, 252 F. at 228 (“That there may be language, as, for instance, Mark Antony’s funeral oration, which can in fact counsel violence while it even expressly discountenances it is true enough; but that raises only the situation . . . of the actual meaning of words to their hearers.”). In contrast, some commentators argue that to be eligible for punishment under *Brandenburg* the expression in question must constitute “express advocacy” of lawless conduct. See e.g., Schwartz, *supra* note 36, at 240; 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.15(e) (5th ed. 2013) (“Should the Court confront a situation where a speaker advocates violence through the use of speech that does not literally advocate action, such as Marc Antony’s funeral oration for Caesar, the Court should protect the speaker.”) Other commentators take the view that “indirect advocacy” is eligible for punishment under *Brandenburg*. See, e.g., Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Danger*, 70 CALIF. L. REV. 1159, 1176–77 (1982).

subjectively intended that the film stir the audience to illegal conduct. Particularly when highly ideological expression is at issue, a speaker's subjective motivation is too uncertain a criterion on which to rest liability.³⁸ In contrast, an objective assessment of the meaning of language, though not immune from manipulation and abuse, is a safer touchstone in free speech cases.

The view that this threshold inquiry requires an objective assessment of whether the language constitutes advocacy of law violation, unaffected by the speaker's subjective motivation, is supported by *Hess v. Indiana*.³⁹ In this case, decided just a few years after *Brandenburg*, law enforcement officials had moved a large crowd of anti-war demonstrators who had blocked a public street to the side of the road. Hess then yelled, "'We'll take the fucking street later' or 'We'll take the fucking streets again.'"⁴⁰ The Supreme Court of Indiana affirmed Hess's conviction for disorderly conduct, finding that Hess's statement "was intended to incite further lawless action on the part of the crowd . . . and was likely to produce such action."⁴¹ The United States Supreme Court held that the lower court had misapplied the *Brandenburg* test. Relying on the threshold requirement that to be punishable under *Brandenburg* speech must at least constitute "advocacy of force or law violation," the Court explained: "Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action."⁴² This suggests that because Hess's speech could not under the circumstance be reasonably construed as advocacy of law violation, this expression was not eligible for punishment under the *Brandenburg* test, regardless of any subjective intent that Hess may have had that his remarks would lead to further lawless action. For it is only after applying this threshold test that the Court made the further observation that there was no evidence "or rational inference from the import of the language" that his words "were intended to produce, and likely to produce, imminent disorder."⁴³

38. See *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) ("Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of [a law regulating campaign advertising], on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue."); see also *infra* text accompanying note 82.

39. *Hess v. Indiana*, 414 U.S. 105 (1973).

40. *Id.* at 107.

41. *Id.* at 108 (quoting *Hess v. State*, 297 N.E.2d 413, 415 (1973)).

42. *Id.* at 108–09.

43. *Id.* at 109. In accord with this view, the court in *Nwanguma v. Trump* held that "*Hess* teaches that the speaker's intent to encourage violence . . . and the tendency of his statement to

Other cases, including ones on which *Brandenburg* relied in formulating its standard, similarly suggest that the speaker's intent is irrelevant to determining whether the speech in question even constitutes advocacy of law violation, let alone advocacy "directed to or producing imminent lawless action."⁴⁴ For instance, in *Bond v. Floyd*, civil rights activist Julian Bond had endorsed the statement "[w]e are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft" and had himself declared, "I admire people who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face"⁴⁵ In assessing the meaning of these statements and holding them protected by the First Amendment, the Court did not, as it notoriously had done in the World War I Espionage Act cases,⁴⁶ rely on innuendo⁴⁷ or the likely effects of the speech to divine the speaker's subjective intent in making these statements.⁴⁸ Rather, it relied exclusively on the objective meaning of the language at issue, finding that it "cannot be interpreted as a call to unlawful refusal to be drafted."⁴⁹

Admittedly, neither *Hess* nor *Bond* expressly states that the speaker's intent is irrelevant to determining whether the expression in question even constitutes advocacy of law violation eligible for punishment. But even if the

result in violence . . . are not enough to forfeit First Amendment protection unless the words used specifically advocated the use of violence, whether explicitly or implicitly" 903 F.3d 604, 611 (6th Cir. 2018). See also 5 ROTUNDA & NOWAK, *supra* note 37, § 20.15(d) (stating that *Brandenburg* requires that "the words used by the speaker *objectively encouraged* and urged and provoked imminent action," and that this "focus on the objective words used by the speaker is derived from *Hess v. Indiana*").

44. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

45. *Bond v. Floyd*, 385 U.S. 116, 120, 124 (1966).

46. See *infra* note 51.

47. See *Frohwerk v. United States*, 249 U.S. 204, 207 (1919).

48. See *Schenck v. United States*, 249 U.S. 47, 51 (1919). In holding in *Bond* that the expression of admiration for a draft resister does not constitute counselling draft resistance, the Court vindicated Hand's reasoning in *Masses* on this very point. See *Masses Publ'g Co. v. Patten*, 244 F. 535, 542 (S.D.N.Y. 1917) ("Now, there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation, I cannot see how the passages can be said to fall within [the prohibition of the Espionage Act].").

49. *Bond*, 385 U.S. at 133. For another pre-*Brandenburg* case focusing on the words used by the defendant charged with inciting illegal activity, see *Yates v. United States*, 354 U.S. 298, 318 (1957). See also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987). In rejecting a claim that a magazine article describing practice of autoerotic asphyxia constituted incitement to illegal activity under *Brandenburg*, the court in this case stated: "Even if the article paints in glowing terms the pleasures supposedly achieved by the practice it describes . . . no fair reading of it can make its content advocacy, let alone incitement to engage in the practice." *Id.* at 1022–23.

speaker's intent is relevant to this threshold inquiry,⁵⁰ these cases demonstrate objective meaning of the language should nevertheless still be the focus of the analysis.⁵¹ The same is true even with respect to the part of the test that does focus on the speaker's intent—whether “such advocacy” is “directed to inciting or producing imminent lawless action.” Since the government must show that the speaker specifically intended to incite listeners to violate the law *imminently*, this inquiry will necessitate consideration on how the actual words used by the speaker would likely have been understood by the audience, precisely the type of “objective” analysis that Hand urged.⁵² In sum, Gunther minimized significant differences between the *Brandenburg* and *Masses* tests as formulated, particularly as regards the role that the speaker's intent plays in these tests. Nonetheless, if properly applied, the *Brandenburg* test will, in accordance with Hand's preference and Gunther's assessment,

50. This is Professor Redish's position. See Redish, *supra* note 37, at 1176–77.

51. Without such an objective focus on the meaning of the words there would, as in the World War I cases, be insufficient protection against juries hostile to a defendant's political point of view construing ambiguous statements as proof of intent to advocate lawless activity. See, e.g., *Schenck v. United States* 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919). These cases are discussed in more detail in James Weinstein, *The Story of Masses Publishing Co. v. Patten: Judge Learned Hand, First Amendment Prophet*, in *FIRST AMENDMENT STORIES 75* (Richard W. Garnett and Andrew Koppelman eds., 2011).

52. Although courts and commentators occasionally have referred to *Brandenburg* as requiring an objective determination of the meaning of the words used by the speaker, it is not all clear that they mean the same as did Hand. For instance, the court in *Bible Believers v. Wayne County* observes that “in the view of some constitutional scholars” *Brandenburg* requires “that ‘the words used by the speaker *objectively encouraged* and urged and provoked imminent action,’” 805 F.3d 228, 246 n.11 (quoting 5 ROTUNDA & NOWAK, *supra* note 37, § 20.15(d)). However, neither the court nor the treatise explains what it means by “objectively.” In discussing this reference in *Bible Believers*, a subsequent Sixth Circuit decision explains that “objectively” evaluating speech means that “[i]t is the words used by the speaker that must be the focus of the incitement inquiry, not how they are heard by a listener.” *Nwanguma v. Trump*, 903 F.3d 604, 613 (6th Cir. 2018) (emphasis added). (The reference to “a listener” is significant because earlier in the opinion the court had stated that such an objective inquiry would rule out consideration of “the subjective reaction of any particular listener.” *Id.* at 613.) So it seems that the court in this case may have a somewhat different view than did Hand of what constitutes “objectively” evaluating the meaning of the speaker's words. Hand would agree, of course, that the focus must be on “the words used by the speaker” and not on some idiosyncratic understanding of “any particular listener.” For Hand, however, an objective analysis ultimately turns on how audience as a whole would understand the words in question. In contrast, it is not at all certain that consideration of audience understanding has any role in what the *Nwanguma* court meant by an objective evaluation of the speech in question. More in accord with Hand's view, the defendants in this case argued that the meaning of the speech at issue issued should be determined by “an objective inquiry to determine how a reasonable person would understand the words.” Reply Brief of Appellants at 7, *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018) (No. 17-6290), 2018 WL 581308.

predominately be an objective inquiry focusing “upon the nature of the utterance itself.”⁵³

B. By Several Key Features of Contemporary Free Speech Doctrine

If we expand our focus from the *Brandenburg* test to First Amendment doctrine as a whole, we discover something truly phenomenal: writing a century ago and several decades before the Court began to develop speech-protective doctrine, the *Masses* opinion and the letters Hand wrote defending that decision expounded ideas that are now considered central themes in contemporary free speech doctrine.

1. Democracy as Core Free Speech Value

An idea central to *Masses* vindicated by later decisions is the essential relationship between free speech and democracy.⁵⁴ As Justice Louis Brandeis would belatedly recognize: “To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.”⁵⁵ Because Hand in *Masses* recognized that “public opinion” is “the final source of government in a democratic state;”⁵⁶ and that the “right to criticize either by temperate reasoning, or by immoderate and indecent invective” is “normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority,”⁵⁷ he reached a “sound conclusion[]”⁵⁸ in ordering the postmaster to mail the magazine. In contrast, because Justice Holmes (and the rest of the Court,

53. Gunther, *supra* note 16, at 725 (quoting Letter from Learned Hand to Zechariah Chafee, Jr., *supra* note 35).

54. See *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Roth v. United States*, 354 U.S. 476, 484 (1957). It is significant that *Stromberg*, one of the first Supreme Court cases to protect the right of free speech, was also the first majority opinion to explicate the connection between free speech and democracy.

55. *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

56. *Masses Publ'g Co.*, 244 F. at 540.

57. *Id.* at 539.

58. *Whitney*, 274 U.S. at 374.

including Brandeis) did not in *Schenck*, *Frohwerk*, and *Debs*⁵⁹ see the vital connection between free speech and democracy, they reached wrong conclusions in those cases. Indeed, because Holmes viewed even the *Debs* case, which involved the prosecution of the socialist candidate for President for criticizing America's involvement in World War I, as a "routine criminal appeal," Holmes, unlike Hand in *Masses*, did not make an effort "to suggest the parameters of improper criticism of the war."⁶⁰

2. The Right to Use Inflammatory Words and Symbols in Public Discourse

Had the government prosecuted the editor of a mainstream newspaper for an editorial calmly and rationally arguing against the wisdom of American involvement in the war, Holmes and Brandeis, and perhaps most or even all of the rest of the Court, would surely have found the prosecutions impermissible either as a matter of statutory construction or constitutional law. Where these two eminent justices went wrong, at least at first, was in failing to recognize that the highly vituperative speech employed by defendants in *Schenck*, *Frohwerk*, and *Debs* in criticizing America's involvement in the war was not a legitimate reason to deprive this speech of protection.⁶¹ In contrast, Hand presciently recognized that the right to criticize government policy or institutions does not depend upon "the decency and propriety of its temper."⁶² His understanding that it was the right of citizens to criticize their government or its policies by "immoderate and indecent invective"⁶³ anticipated cases such as *Cohen v. California*⁶⁴ and *Texas v. Johnson*,⁶⁵ which upheld, respectively, the right of anti-war protestors to use profanity and to burn the American flag.

3. Protection of Harmful Speech

Much of the speech involved in the World War I Espionage Act cases decided by the Supreme Court was not only intemperate; precisely because

59. See *supra* note 51.

60. Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition—Professor Ernst Freund and Debs v. United States*, 40 U. CHI. L. REV. 235, 237–38 (1973).

61. See *supra* note 51.

62. *Masses Publ'g Co.*, 244 F. at 540.

63. *Id.* at 539.

64. 403 U.S. 15 (1971).

65. 491 U.S. 397 (1989).

of its power to inflame audiences, it was also dangerous. Like virtually all other judges in the country, when Holmes and Brandeis first encountered the Espionage Act cases, it simply did not occur to them that these inflammatory and thus potentially harmful screeds could possibly be part of the legitimate debate on public issues essential to a democracy.⁶⁶ Indeed, their failure to comprehend that such potentially harmful speech could nonetheless be legitimate protest in a democracy is inherent in *Schenck*'s formulation of the clear and present danger test. Two years earlier, Hand had taken a very different tack in his *Masses* decision.

In *Masses*, the government argued that “the cartoons and text of the magazine, constituting, as they certainly do, a virulent attack upon the war and those laws which have been enacted to assist its prosecution, may interfere with the success of the military forces of the United States.”⁶⁷ Hand readily accepted the government's contention:

That such utterances may have the effect so ascribed to them is unhappily true; publications of this kind enervate public feeling at home which is their chief purpose, and encourage the success of the enemies of the United States abroad, to which they are generally indifferent. Dissension within a country is a high source of comfort and assistance to its enemies; the least intimation of it they seize upon with jubilation. There cannot be the slightest question of the mischievous effects of such agitation upon the success of the national project, or of the correctness of the [government's] position.⁶⁸

Nonetheless, in what Professor Vincent Blasi aptly calls the “possibly most important” of all Hand's insights in *Masses*,⁶⁹ Hand recognized that even the prevention of harm as grievous as impairment of our nation's war effort does not justify suppressing speech critical of government or its policies. To this day, this crucial lesson has not been fully learned: those who would suppress speech commonly argue that a showing of harm is sufficient for suppression, while defenders of free speech too often minimize the harm that speech can cause. Fortunately, contemporary doctrine, though it does not

66. Years later Brandeis would admit that at the time of these decisions, “I had not then thought the issues of freedom of speech out—I thought at the subject, not through it.” Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 323–24.

67. *Masses Publ'g Co.*, 244 F. at 539.

68. *Id.* Hand similarly credited the government's assertion that “to arouse discontent and dissatisfaction among the people with the prosecution of the war and with the draft tends to promote a mutinous and insubordinate temper among the troops.” *Id.*

69. Vincent Blasi, *Teacher's Manual to IDEAS OF THE FIRST AMENDMENT* 172 (Vincent Blasi ed., 2006).

always do so explicitly, reflects Hand's crucial insight by protecting various forms of harmful speech.⁷⁰

4. The Rule Against Viewpoint Discrimination

Blasi notes yet another of Hand's ideas that uncannily anticipates a basic theme of contemporary free speech doctrine:⁷¹ the prohibition against viewpoint discrimination.⁷² In a letter to Harvard Law Professor Zechariah Chafee defending his approach in *Masses*, Hand explained that

any State, which professes to be controlled by public opinion, cannot take sides against any opinion On the contrary, it must regard all . . . expression of opinion as tolerable, if not good. As soon as it does not, it inevitably assumes that one opinion may control in spite of what might become an opposite opinion.⁷³

5. Doctrinal Rules Susceptible of "Practical Administration"

Finally, Hand was keenly aware that to prevent such viewpoint discrimination, doctrinal rules would have to be carefully and thoughtfully formulated. In a letter defending the test he proposed in *Masses*, Hand wrote Chafee that he would have no quarrel with the Supreme Court's clear and present danger test "if one were sure of the result in practical

70. See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011) (reversing on First Amendment grounds lower court judgment awarding father damages for intentional infliction of emotional distress caused by speech near son's funeral); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (invalidating on First Amendment grounds federal law banning virtual child pornography that could be used by pedophiles to seduce children); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (finding unconstitutional a "gag" order prohibiting the press from printing material that could prejudice right of a criminal defendant to a fair trial); *Am. Bookseller Ass'n, Inc. v. Hudnut*, 771 F. 2d 323 (7th Cir. 1985) (holding that ban on non-obscene, sexually explicit material is unconstitutional even on the assumption that such material causes harm to women), *summarily aff'd*, 475 U.S. 1001 (1986).

71. See Blasi, *supra* note 69, at 172.

72. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (quoting *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394, (1993)); *id.* at 1765 (Kennedy, J., concurring) ("[V]iewpoint discrimination [is] a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

73. Letter from Learned Hand to Zechariah Chafee, Jr., *supra* note 35, in *Gunther*, *supra* note 16, at 764, 765.

administration.”⁷⁴ In an earlier letter to Holmes, Hand had observed that allowing liability to turn upon a jury’s assessment of the speaker’s intent will “serve to intimidate,—throw a scare into,—many a man who might moderate the storms of popular feeling. I know it did in 1918. . . . [It] certainly terrorized some of the press whose voices were much needed.”⁷⁵ For similar reasons, Hand was concerned with the ability even of judges to fairly assess the risk of the danger, even under the test as reformulated by Holmes in his *Abrams* dissent.⁷⁶ “Once you admit the matter is one of degree,” Hand explained to Chafee, “you give to Tomdickandharry, D.J., [District Judge] so much latitude that the jig is at once up.”⁷⁷ For that reason, Hand declared that he would prefer “a qualitative formula, hard, conventional, difficult to evade.”⁷⁸ If such a test “could become sacred by the incrustations of time and precedent it might be made to serve just a little to withhold the torrents of passion” to which democracies are prone.⁷⁹

Brandenburg, it is true, requires both determination of the speaker’s intent and the assessment of danger, the very features that Hand decried.⁸⁰ Nonetheless, as discussed in Part II.A.2, this crucial test has other characteristics that make the protection it provides to speech criticizing existing law and policy “difficult to evade.” More significantly, if we look at free speech doctrine more generally, we discover that Hand’s pragmatic insights have been largely vindicated. His concern that vague standards can “throw a scare into” a would-be speaker has become a familiar theme in contemporary doctrine under the rubric of avoiding the “chilling effect” of speech regulation.⁸¹ And although *Brandenburg* looks to the speaker’s intent, in other areas of free speech law the Court has eschewed such an inquiry, and for precisely the reasons that Hand noted.⁸²

74. *Id.* at 766.

75. Letter from Learned Hand, to Oliver Wendell Holmes, Jr., *supra* note 34, in Gunther, *supra* note 16, at 758, 759.

76. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

77. Letter from Learned Hand Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 2, 1921), in Gunther, *supra* note 16, at 769, 770. He added that even the Justices of the United States Supreme Court “have not shown themselves wholly immune from the ‘herd instinct’ and what seems ‘immediate and direct’ to-day may seem very remote next year even though circumstances surrounding the utterance be unchanged.” *Id.*

78. *Id.*

79. *Id.*

80. See *supra* note 34 and accompanying text, and *infra* text accompanying notes 76–77.

81. Gunther, *supra* note 16, at 740. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (“The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.”).

82. See *supra* note 38 and accompanying text.

As important a fixture of contemporary doctrine as *Brandenburg* may be, even more central is the rule against content discrimination. In defending the rigidity of rule, Justice Sandra Day O'Connor observed that "[i]t is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests [that] are particularly susceptible to being used by the government to distort public debate."⁸³ In other words, a rule that is "hard, conventional, difficult to evade."

In sum, many of the ideas advanced by Hand in *Masses* or in letters defending that decision have been *vindicated* by modern free speech doctrine. But to what extent did *Masses* or these letters actually *influence* these developments?

III. MASSES INFLUENCE ON CONTEMPORARY FREE SPEECH DOCTRINE

While such influence is most likely significant, it is difficult to quantify or in many cases even to identify with certainty. This is because the influence of *Masses* and Hand's letters on contemporary doctrine, including *Brandenburg*, is indirect, mediated primarily through Holmes's famous dissenting opinions in *Abrams v. United States*⁸⁴ and *Gitlow v. New York*⁸⁵ and Brandeis's concurring opinion in *Whitney v. California*.⁸⁶ Neither *Brandenburg* nor any other of the Court's key modern free speech decision cites *Masses*. In formulating the contemporary incitement standard, however, *Brandenburg* avowedly drew upon these classic Holmes/Brandeis opinions, on which Hand, in turn, undoubtedly had some influence.

A. Influence on Holmes

As Gunther has shown, Hand's efforts to make Holmes more sensitive to the importance of free speech began in summer of 1918 with a chance meeting on a train and continuing in correspondence for the next nine months.⁸⁷ This meeting and the ensuing letters, and perhaps the *Masses* decision itself, contributed to Holmes change of attitude about free speech expressed in his famous *Abrams* dissent.

On July 19, 1918, nearly a year after Hand's *Masses* decision, and eight months before the Court decided *Schenck*, Hand and Holmes met on a train

83. *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

84. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

85. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

86. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

87. Gunther, *supra* note 16, at 732–35.

from New York to Boston as they were traveling to their respective summer homes.⁸⁸ The two jurists spoke about free speech, a conversation that almost certainly involved the Espionage Act prosecutions, with Holmes insisting that the majority had a “natural right” to suppress dissenting views of the minority.⁸⁹ Three days later Hand wrote Holmes, offering a justification for protection of dissent, based not in a precept to democracy as he had in *Masses*, but rather on a rationale calculated to appeal to Holmes’s deep skepticism. “Opinions,” Hand wrote, “are at best provisional hypotheses, incompletely tested. The more they are tested, after the tests are well scrutinized, the more assurance we may assume, but they are never absolutes. So we must be tolerant of opposite opinions or varying opinions by the very fact of incredulity of our own.”⁹⁰

Two days later Holmes responded, saying he agreed with it “throughout,” his “only qualification, if any” being that in his view “free speech stands no differently than freedom from vaccination.”⁹¹ Holmes continued: “The occasions would be rarer when you cared enough to stop it but if for any reason you did care enough you wouldn’t care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong.”⁹² So although Holmes seems to agree with Hand as a philosophical matter about the value of free speech, he does not yet seem persuaded that this activity is entitled to any special constitutional immunity.⁹³

88. *Id.* at 732.

89. *Id.* at 734 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (June 22, 1918)).

90. Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 89, in Gunther, *supra* note 16, at 755, 755.

91. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (June 24, 1918), in Gunther, *supra* note 16, at 756, 756–57. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), Holmes joined the majority opinion rejecting a claim that an individual has a right under the Fourteenth Amendment to refuse small pox vaccination. *See also* *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting) (disapproving of the Court’s invalidating a maximum hours law under the Due Process Clause of the Fourteenth Amendment); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908) (same).

92. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, Judge, *supra* note 91, at 757.

93. The rationale Hand employed in *Masses* based on a key precept of popular sovereignty would have provided a much stronger basis for constitutional protection for free speech than the one he offered Holmes, and it certainly would have provided grounds for distinguishing a purported constitutional right to be free from mandatory vaccination. But Hand likely believed that any such democratically based justification would be a non-starter with Holmes. *Accord*, Thomas Healy, *Anxiety and Influence: Learned Hand and the Making of Free Speech Dissent*, 50 ARIZ. ST. L.J. 803, 825–29 (2018). As discussed below, however, Hand may have miscalculated in this assessment, for it is possible that Hand’s *Masses* decision persuaded Holmes about the

And there, so far as extant documents show, matters stood for another eight months, when Holmes wrote Hand a brief note stating that “I read your *Masses* decision—I haven’t the details in mind and will assume for present purposes that I should come to a different result.”⁹⁴ He added: “I thought few judges indeed could have put their view with such force or in such admirable form.”⁹⁵ Holmes may have admired the force and form of *Masses*, but as he had signaled, he was not yet persuaded by it or by Hand’s more personal attempts to make him see the special constitutional value of free speech. This was made clear five days later, when the Supreme Court decided *Schenck*,⁹⁶ followed a week later by *Frohwerk*⁹⁷ and *Debs*,⁹⁸ each affirming, in an opinion by Holmes, Espionage Act convictions of antiwar protestors.

In response to *Debs*, Hand again wrote to Holmes, not to argue with the result, with which he claimed to have agreed, but to urge that the focus on the objective meaning of the words used by the speaker that he proposed in *Masses* was preferable to the inquiry into the speaker’s motive as required under the clear and present danger test.⁹⁹ He promised Holmes that this was “positively my last appearance in the role of liberator” and referring to the test he proposed in *Masses* concluded: “I bid a long farewell to my little toy ship which set out quite bravely in the shortest voyage ever made.”¹⁰⁰

Holmes responded, that he didn’t “quite get” Hand’s point, stating that “I don’t see how you differ from the test as stated by me in *Schenck v. U.S.*”¹⁰¹ After quoting that test verbatim, Holmes said that although he did not then have time to re-read *Masses*, he didn’t know “what the matter is” or “how we differ so far as your letter goes.”¹⁰² True to his word, Hand did not respond explaining the difference between the two tests or otherwise to defend his “little toy ship.” And so ended Hand’s attempt to persuade Holmes about the

connection between free speech and self-government. See *infra* text accompanying notes 110–114.

94. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Feb. 25, 1919), in Gunther, *supra* note 16, at 758, 758.

95. *Id.*

96. *Schenck v. United States*, 249 U.S. 47 (1919).

97. *Frohwerk v. United States*, 249 U.S. 204 (1919).

98. *Debs v. United States*, 249 U.S. 211 (1919).

99. See Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 34, in Gunther, *supra* note 16, at 758–59.

100. *Id.*

101. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Apr. 3, 1919), in Gunther, *supra* note 16, at 759, 759–60.

102. *Id.* at 760.

need for special constitutional protection of free speech. And it might well have seemed to Hand at that the time that Holmes would never be so persuaded.

Yet, eight months later, though Holmes did not expressly admit that he had changed his mind, his dissent in *Abrams v. United States*¹⁰³ revealed that Holmes's attitude toward free speech had undergone a metamorphosis. In a preface marked by personal pronouns suggesting an autobiographical confession, Holmes first describes the position he had taken in his discussions with Hand about the natural right of the majority to suppress views with which it disagrees: "Persecution for the expression of opinions," he writes, "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."¹⁰⁴ Then echoing Hand's response to him, Holmes begins perhaps the most eloquent defense of freedom of expression ever written:

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.¹⁰⁵

Holmes continues:

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. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the

103. 250 U.S. 616 (1919) (Holmes, J., dissenting).

104. *Id.* at 630.

105. *Id.* Thomas Healy astutely notices another voice here—that of John Stuart Mill:

‘Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action,’ Mill wrote. ‘The beliefs which we have most warrant for have no *safeguard* to rest on but a standing invitation to the whole world to prove them unfounded.’

Healy, *supra* note 93, at 823 (emphasis added) (quoting JOHN STUART MILL, ON LIBERTY 78 (Penguin Books 1985) (1859)). Holmes had re-read *On Liberty* in February of 1919. *Id.* In Healy's view, when Holmes writes that the truth that emerges from the "competition of the market" is the only way that "their wishes safely can be carried out," he is "channeling Mill directly." *Id.* at 824–25.

expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.¹⁰⁶

In this second passage, Holmes emphasizes the imminence of the danger that must be shown to suppress speech, and elsewhere in the opinion expressly reformulates the clear and present danger test that he had first propounded in *Schenck*, thereby bringing it a long way towards the *Brandenburg* test.¹⁰⁷ Six years later, in his *Gitlow* dissent, on which *Brandenburg* also builds, Holmes again emphasized imminence.¹⁰⁸ This reformulation is no doubt due to Holmes's belated recognition of the vital importance of free speech, an awareness for which Hand, among others,¹⁰⁹ was responsible. Crucially, this passage also reveals that Holmes now believed free speech should be rigorously protected by the Constitution. What

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

107. As reformulated, the government must show that the speech “produces or is intended to produce a clear and *imminent* danger that it will bring about *forthwith* certain substantive evils that the United States constitutionally may seek to prevent.” *Id.* at 627 (emphasis added); *see also id.* at 628 (“It is only the present danger of *immediate* evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.” (emphasis added)).

108. *See Gitlow v. United States*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (stating the publication of the document in question might have been punishable if it “had been laid as an attempt to induce an uprising against government *at once* and not at some indefinite time in the future” (emphasis added)).

109. Among other correspondents who were pressing Holmes to recognize the importance of free speech were Harold Laski, Zechariah Chafee, Ernst Freund, and Herbert Croly. *See* THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 57–60, 134–38, 154–59 (2013). It is therefore difficult to assess with certainty how large a role Hand played in Holmes's marked change of attitude towards the importance of free speech and, hence, the consequent effect this change had on free speech doctrine. What is certain, though, is that Holmes very much liked and respected Hand. In response to a letter that Hand wrote Holmes saying that he was “greatly pleased” with his dissent in *Abrams*, Holmes replied: “Sympathy and agreement always are pleasant but they are much more than that when they come from one that I have learned to think of as I do of you.” Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Nov. 25, 1919), *in* Gunther, *supra* note 16, at 760, 760; Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Nov. 26, 1919), *in* Gunther, *supra* note 16, at 761, 761. So, as suggested by probable references in the dissent to Holmes's conversations with the younger jurist, the influence was likely substantial. In addition, as Thomas Healy persuasively argues in his contribution to this Symposium, “Hand appears to have made Holmes sensitive to the dangers of allowing juries too much latitude in free speech cases, particularly on the question of intent.” Healy, *supra* note 93, at 809. As Healy documents, this “newfound willingness to second-guess juries” is reflected not only in *Abrams* but in other dissents as well. *Id.* at 813.

is not clear, however, is what led Holmes to change his mind about the constitutional status of this interest.

Vincent Blasi suggests that Hand's *Masses* opinion might have had a role. In his view, Holmes's "free trade in ideas" rationale can "be traced to the premise of self-government."¹¹⁰ The reference to "fighting faiths," to people having "their wishes safely . . . carried out,"¹¹¹ and to the statement earlier in the dissent that "Congress certainly cannot forbid all effort to change the mind of the country,"¹¹² support Blasi's view.¹¹³ In light of the connection between democracy and free speech emphasized by Hand in *Masses*, an opinion that Holmes had read, it is possible that the democracy theme in this dissent may have been influenced by *Masses*.¹¹⁴ The influence of *Masses*' emphasis on the democratic value of free speech can, however, be more definitely discerned in Brandeis's famous *Whitney* concurrence.

B. Influence on Brandeis

Although technically a concurrence, Brandeis's opinion in *Whitney*, which Holmes joined, was in essence a dissent¹¹⁵ to the Court's failure even to apply the clear and present danger test to a prosecution under a law outlawing the advocacy of the unlawful use of force or violence to effectuate political

110. See Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1, 22 (1990).

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

112. *Id.* at 628.

113. Holmes's firm rejection of the government's argument "that the First Amendment left the common law of seditious libel in force," *id.* at 630, also demonstrates a concern with the democratic value of free speech.

114. Healy, in contrast, rejects the view that Holmes was influenced by what he calls the "democratic legitimacy" basis of Hand's *Masses* opinion. Healy, *supra* note 93, at 826–27. Rather, he believes that Holmes saw free speech as a source of "democratic efficacy." *Id.* at 827. As such, it is in Healy's view a "notoriously weak" explanation of why "the majority must accept his view that free speech is the best way to achieve its wishes." *Id.* at 827. Healy argues that the key to understanding the constitutional basis for Holmes's theory of free speech lies in his repeated reference to the Constitution as an "experiment," which "can be read as an argument about the proper way to interpret it." *Id.* at 827–28. Since Holmes, whose worldview was profoundly influenced by the Civil War, understandably thought that the Constitution is an experiment in national survival, then "the survival of the nation becomes a paramount consideration" in interpreting that document, *Id.* at 826. Because "[d]issent, discussion, and debate ensure that institutions remain flexible and capable of evolution, whereas an insistence on orthodoxy leads to rigidity and stasis[,] free speech promotes national survival, while censorship threatens it." *Id.* at 829. But if Healy is correct, as I think he is, in his reading of Holmes's explanation for the constitutional basis of his free speech theory, then while the explanation may be cryptic and undeveloped, condemning it as "notoriously weak" seems too harsh.

115. *Whitney v. California*, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

change. This criminal syndicalism statute at issue in that case was quite similar to the law that the Supreme Court would eventually invalidate in *Brandenburg*. In discussing the clear and present danger test, Brandeis, in addition to emphasizing the imminence standard added by the *Abrams* dissent six years earlier,¹¹⁶ introduced another idea that would be adopted in *Brandenburg*—the distinction between mere advocacy of law violation and incitement to such conduct. In the formulating this distinction Brandeis wrote:

Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. [Here Brandeis appends a footnote reading, “Compare Judge Learned Hand in *Masses Publication Co. vs. Patten*”].¹¹⁷ Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.¹¹⁸

In *Masses* Hand had written:

Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom¹¹⁹

116. *See id.* at 377 (“[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that that it may befall before there is opportunity for full discussion.”).

117. In this footnote, Brandeis also cites the portion of Chafee’s treatise discussing *Masses*.

118. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

119. *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917). Although Brandeis and Holmes both use the word “incitement” in these quotations, they mean different things by the term. As discussed above, see *supra* text accompanying notes 24–27, Hand uses “incitement” synonymously with “direct advocacy” of law violation without reference to any temporal dimension, while Brandeis uses term “incitement” to mean advocacy of “immediate” violence or law violation. *See Whitney*, 274 U.S. at 376.

Brandeis's homage to Hand is so evident that, as Vincent Blasi has observed, we would recognize the influence of *Masses* in his *Whitney* concurrence even in the absence of the citation.¹²⁰ The influence transcends the precise formulation of the test proposed by Brandeis in *Whitney*, which was significantly different than the test that Hand had urged in *Masses*.¹²¹ Brandeis cites *Masses* for the crucial proposition, which had been lost on him and Holmes in *Schenck, Frohwerk*, and *Debs*, that preventing harm to even important government interests is not a justification for suppressing speech that, as Brandeis put it later in his opinion, is part of "the process[] of popular government" and thus "essential to effective democracy."¹²²

Brandeis may have continued to differ from Hand as to precisely what type of speech is legitimately part of "the process of popular government" and may not have yet shared Hand's understanding of the pragmatic considerations protecting that expression. But the *Whitney* concurrence shows that at last Brandeis fully understood the two of the most important lessons from *Masses*: to reach "sound conclusions" in formulating free speech doctrine, judges must pay close attention the essential democratic function of free speech. And then with this value in mind, they will be able to identify and protect expression so vitally connected with democratic self-governance that even serious harm likely to flow from such speech is not sufficient grounds for its suppression.

C. Influence from Chafee's Treatise

In addition to its contribution to these two seminal dissents, *Masses*, together with Hand's defense of that decision, likely had an enormous influence on generations of lawyers thanks to Harvard Law Professor Chafee's widely-read treatise *Freedom of Speech*.¹²³ Published in 1920, it bore the following dedication: "To Learned Hand . . . who during the turmoil of the war courageously maintained the tradition of English-speaking freedom and gave it a new clearness and strength for the wiser years to come."¹²⁴ Chafee devoted ten pages of his book to a favorable discussion of *Masses*,¹²⁵ writing that looking back with a "post-armistice mind" it is "clear

120. Blasi, *supra* note 110, at 26.

121. *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring) (explaining that speech may be punished only if it "would produce, or is intended to produce, a clear and imminent danger" of destruction of the state or some other "serious injury, political, economic or moral").

122. *Id.* at 377.

123. ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920).

124. *Id.* at iii.

125. *Id.* at 46–56.

that Judge Hand was right.”¹²⁶ In addition to this detailed discussion of the case, Chafee mentions *Masses*, Hand, or his ideas more than twenty times elsewhere in his book.¹²⁷ A revised and expanded version of this book, published in 1941,¹²⁸ similarly devoted a large amount of attention to *Masses* and its author.

The influence of Hand as channeled through Chafee may be greater than has been appreciated. In a section of his 1920 book entitled *The Human Machinery of the Espionage Act*,¹²⁹ which is included without relevant modification in the 1941 revision,¹³⁰ Chafee incorporates without attribution ideas and even verbatim language from Hand’s letters to him criticizing the practical shortcomings of the clear and present danger test.¹³¹ In this way it is likely that many of those who read this highly influential treatise, including those who were to become the judges who made American free speech doctrine “hard, conventional, difficult to evade,” were influenced by Hand’s defense of his *Masses* opinion without even knowing it.¹³²

126. *Id.* at 51.

127. *Id. passim.*

128. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941).

129. CHAFEE, *supra* note 123, at 66–87.

130. *See* CHAFEE, *supra* note 128, at 60–79.

131. For instance, Chafee begins the section by writing that “a vital objection” to the bad tendency test used by the district courts in the Espionage Act cases was “its unfitness for practical administration.” CHAFEE, *supra* note 128, at 60. *Compare id.*, with Letter from Learned Hand to Zechariah Chafee, Jr., *supra* note 35, in Gunther, *supra* note 16, at 764, 766 (“There could be no objection to [the clear and present danger test] if one were sure of the result in practical administration.”). *See also* CHAFEE, *supra* note 123, at 76: “It is only in time of popular panic and indignation that freedom of speech becomes important as an institution, and it is precisely in those times that the protection of the jury proves illusory.” *Compare id.*, with Letter from Learned Hand to Zechariah Chafee, Jr., *supra* note 35 (“I think it is precisely at those times when alone the freedom of speech becomes important as an institution, that the protection of a jury on such an issue [the speaker’s intent becomes] illusory.”).

132. With respect to influence of *The Masses*—not Hand’s decision but the magazine—on modern American political culture, consider this assessment by cultural historian Michael Denning:

[Bob] Dylan’s ‘politics’ . . . might best be understood as the politics of the benefit concert. This may be an American form, a product of U.S. mass culture: the first classic benefit concert was . . . the famous Patterson Pageant of 1913, when John Reed and the artists and intellectuals of the *Masses* brought together the Greenwich Village arts community and the New Jersey textile mill strikers of the Industrial Workers of the World (IWW).

Michael Denning, *Bob Dylan and Rolling Thunder*, in *THE CAMBRIDGE COMPANION TO BOB DYLAN* 28, 32 (Kevin J.H. Dettmar ed. 2009).

CONCLUSION

Early in 1921, Hand wrote to Chafee telling him that he had just finished reading his treatise.¹³³ He acknowledged the “very great honor”¹³⁴ of the book dedication but with characteristic self-doubt added:

I can't help wondering whether a good many years from now when you are old and I am dead, you may not pick up the book and reading the [dedication], smile with some amusement and some regret. . . . [I]f I were there then . . . I should feel as though I have passed off on you some false coin.¹³⁵

But Hand needn't have worried: A century after he issued his *Masses* decision, it is rightly celebrated for its prophetic understanding of the value of free speech in a free and democratic society.

133. Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., *supra* note 77, in Gunther, *supra* note 16, at 769, 769.

134. *Id.* at 772.

135. *Id.* And as a fitting conclusion for an Article dealing with influence and homage, compare Hand's “[W]hen you are old and I am dead, you may not pick up the book,” *id.*, with William Butler Yeats's “When you are old and grey and full of sleep, And nodding by the fire, take down this book.” WILLIAM BUTLER YEATS, *When You Are Old*, in THE COLLECTED POEMS OF W.B. YEATS 32 (Wordsworth ed. 2000) (1892).