Receptiveness is an essential attribute of a great leader. A great leader must not shield herself from outside opinions or blind herself with certainty. The active willingness to be receptive to the opinions and ideas of others creates effective and lasting leadership, and adds freshness to stale decision-making. Additionally, receptiveness potentially validates the opinions of subordinates, thus making that leader more credible.

The relationship that Supreme Court Justice Oliver Wendell Holmes and Justice Learned Hand shared during the years from 1918 to 1921 demonstrated Holmes’ receptive attitude. This article will focus on two foundational Supreme Court decisions written by Holmes over the course of the year 1919. It will discuss the correspondence Holmes shared with New York District Court Judge Learned Hand and how this interaction affected Holmes’ jurisprudence. Holmes’ willingness to listen to Hand’s advice, and his subsequent ability to incorporate key portions of Hand’s philosophy into his own thoughts, display Holmes’ embodiment of this leadership quality.

Oliver Wendell Holmes was born in 1841 into a prominent Boston family; his father was a doctor and an essayist. Holmes attended Harvard College but left before graduating to serve the Union in the Civil War. He was wounded in battle on three separate occasions. Following his legal practice of over 40 years, President Theodore

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1 Irons, Peter H  The People’s History of the Supreme Court Penguin 1999
Roosevelt appointed Holmes to the Supreme Court in 1902. As a Justice, he adopted the view of judicial deference to elected lawmakers, especially in matters of economic regulation. He believed that judges should look to the “felt necessities of the time” when deciding cases and that the electorate has the right to reveal these felt necessities through their choice of lawmakers. Holmes also believed that the Constitution was not intended to embody any “particular economic theory,” but rather that it had been designed for “people of fundamentally differing views.” However, his belief in adjudicating to the “felt necessities of the time” came into conflict with his admiration for a Constitution designed for varying ideologies when deciding the applicability of the Espionage Act of 1917. In that case, the nation’s necessities and popular views were met with dissent by a minority.

In 1917, after the nation entered World War I, Congress passed the Espionage Act aimed at the nearly 300,000 draft evaders and opponents of the war led by the Socialist Party. The Act made obstruction of military recruiting a federal crime. The Justice Department brought 2,000 prosecutions under the Espionage Act. The first test case of the Act, Schenck v. United States 249 U.S. 47 (1919), reached the Court in the spring of 1919 when Charles Schenck, the secretary of the Socialist Party, appealed his conviction under the Act for preparing leaflets denouncing American participation in the war and the draft. One side of the leaflets quoted the Thirteenth Amendment’s protection from

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2 Id.
3 Id.
4 Id.
5 Id.
6 Irons, Peter H The People’s History of the Supreme Court
7 Schenck v. United States 249 U.S. 47 (1919)
involuntary servitude imposed by the government and the other side asked for signatures to petition Congress to repeal the draft law.

The Supreme Court unanimously upheld Schenck’s conviction. Holmes wrote the opinion on the Court’s behalf, and through his writing we see his initial interpretation of Congress’s ability to restrict speech as one of the felt necessities of the war. Holmes wrote that “in ordinary times” the First Amendment would have protected the leaflets.\(^8\) However, he felt that wartime created exceptional circumstances, and speech that is a “hindrance” to the war effort was not protected.\(^9\) Further, he held that speech could be punished if it created “a clear and present danger” and if it risked bad consequences. He used one of his most famous illustrations of a clear and present danger in his example of “shouting fire in a theater.” Under this decision a legal test evolved that would restrict speech if the “words used [were] used in such circumstances and are of such nature as to create a clear and present danger that they will bring about…substantive evils…[and] it is a question of proximity and degree.”\(^{10}\)

This test was far too broad for District Court Judge Learned Hand, who was one of the first judges to interpret the statute less than six weeks after the Act was enacted\(^{11}\). In a case decided two years before Schenck, Judge Hand argued that it was more appropriate to establish an “absolute and objective test” that focused on “language” and a “qualitative formula, [that was] hard, conventional, and difficult to evade.”\(^{12}\) This was essentially a “test based upon the nature of the utterance itself.” If the words were used

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\(^8\) *Id.*
\(^9\) *Id.*
\(^10\) 249 U.S. at 51-52.
\(^11\) Letter from Learned Hand to Oliver Wendell Holmes, (late Mar.) 1919, on file in the Holmes Papers, Box 43, Folder 30, Harvard Law Library, Treasure Room.
\(^12\) *Masses Publishing Co. v. Patten*, 245 F. 102 (2d Cir. 1917).
solely to promote a violation of the law, they could be forbidden; if they were not, then the speech was permitted. Further, Hand stated that “if one stops short of urging upon others that it their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.”¹³ In short, Judge Hand would not restrict speech because it could cause others to violate the law, rather he would only restrict speech that unambiguously promoted a violation of the law. For Hand, there needed to be an element of immediacy; for Holmes, the importance was the “causal sequence of the speech.”¹⁴

Comparing Hand’s philosophy with that of Holmes’ ‘clear and present danger’ test adopted in Schenck, demonstrates that Holmes looked to the possible effect of the speech while Hand looked to the utterance itself, rather than its possible outcome. These two cases illustrate that at the time their correspondence began, a year after Hand’s decision and months before to Holmes’ decision in Schenck, the two Justices had differing opinions on when speech could be restricted by law.

The two legal thinkers began their legal theory correspondence during a chance meeting in the summer of 1918, one year after Justice Hand’s Espionage Act case and months before Schenck.¹⁵ The two justices happened to ride the same train from New York to Boston and began a philosophical exchange that would last over two years.¹⁶ This debate, one that I think exemplifies Holmes’ receptiveness, centered on the ability of America’s majority to restrict speech of the minority. Hand believed in the protection of

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¹³ Id. at 110
¹⁴ Letter from Learned Hand to Oliver Wendell Holmes, (late March) 1919, on file in the Holmes Papers, Box 103, Folder 24, Harvard
¹⁵ Letter from Learned Hand to Oliver Wendell Holmes, June 22, 1918, on file in the Holmes Papers, Box 43, Folder 30, Harvard Law Library, Treasure Room, printed in full in 1 HOLMES-LASKI LETTERS,
¹⁶ Irons, Peter H, A People’s History of the Supreme Court Penguin 1999
those (usually in the minority) who dissent. Holmes did not. Holmes viewed “truth” as “the majority vote” of the nation, and therefore the majority could restrict speech if they chose to through elections\(^\text{17}\). Three days after this debate on the train, Hand wrote Holmes a letter that may have began to influence Holmes and to slowly alter his opinion about the importance of protecting unpopular speech. Hand stated, “[o]pinions are at best provisional hypotheses, incompletely tested[therefore]… we must be tolerant of opposite [or varying] opinions by the very fact of our incredulity of our own.”\(^\text{18}\) This statement stands for the idea that as a society we learn from our ideas and the free expression of those ideas, and to restrict them simply because they may be unpopular is improper. While the effect of this letter is not supported by the opinion in Schenck, Holmes’ receptivity would eventually influence him to adopt it in spirit in the last of four cases spawned by the Espionage Act during the year 1919.

One week after the decision in Schenck was decided, two more unanimous decisions were handed down affirming convictions under the Espionage act of 1917. The cases of Frohwerk v. United States and Debs v. United States, applying the clear and present danger test, added that the founding fathers would not have found that suppressing speech that “counsel[ed] …murder” was an abridgment on free speech.\(^\text{19}\) These two cases show that the Court, including as Justice Holmes, remained unanimous in its belief that the justices remain blind to any justification for reining in majority suppression of speech. However, by the end of the year, when the fourth Espionage Act

\(^\text{17}\) Id.

\(^\text{18}\) Letter from Learned Hand to Oliver Wendell Holmes, June 22, 1918,

\(^\text{19}\) Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).
case reached the Court, Justice Holmes would find himself in the minority dissent against upholding ostensibly similar convictions.

The case Abrams v. United States involved five Russian anarchist immigrants who were opposed to President Wilson’s decision to intervene in the Russian civil war against the Bolsheviks. They were arrested for dropping leaflets from rooftops and windows of buildings in the Lower East Side of Manhattan. The leaflets called for a “general strike” by the workers at munitions factories. The anarchists were convicted and sentenced to a twenty-year prison term. The Supreme Court upheld the convictions by a margin of seven to two. Holmes wrote the dissenting opinion and by doing so displayed his receptive quality and the influence of Judge Hand.

Justice Holmes stated, “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.” Holmes essentially conceded that the majority’s vote might not always be the “truth.” Further, Holmes seems to have adopted Hand’s support of the need to appreciate the values of free speech and the legal protection of unpopular speech. He emphasized that the “theory of our Constitution” is to uphold the “free trade in ideas.” This statement is very similar to Hand’s assertion in his first letter to Holmes, which argued for protecting opinions as hypotheses and tolerating unpopular ideas and opinions. Comparing Judge Hand’s statement in his first letter to Holmes with Holmes’ dissenting opinion in Abrams, it is clear that Holmes’s decision in Abrams was a product of his receptiveness to Hand’s correspondences.

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20 Abrams v. United States, 250 U.S. 616, 624 (1919) (dissenting opinion)
21 Id. at 629
Judge Hand, 1918: “Opinions are at best provisional hypotheses, incompletely tested…So we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own…[while] silencing the other fellow when he disagrees [is indeed] a natural right,” it was not a right that law or society could condone.\textsuperscript{22}

Justice Holmes, Abrams 1919: “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… But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe even more than they believe the very foundations of their own conduct that the ultimate goal desired is better reached by a free trade in ideas- that the best test of truth is the power of the though 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…is the theory of our Constitution.”\textsuperscript{23}

These two statements are very similar in their spirit and philosophy. Notice that Learned Hand’s statement states essentially the same argument as Holmes’-- that there are times when government may restrict speech, e.g. when its goal is to incite aggression directly. However, the law needs to allow for alternative ideas and disagreements to occur and to be protected. While the statements are similar, the two Justices still did not agree entirely. Where Holmes continued to believed in a somewhat altered ‘clear and present danger’ requirement in order to restrict speech, Hand still argued for an incitement test based on the nature of the speech itself. While Hand was encouraged by the fact that Holmes accepted his position of Constitutionally protecting unpopular speech, he was not entirely satisfied. While this may have been a defeat for Judge Hand

\textsuperscript{22} Letter from Learned Hand to Oliver Wendell Holmes, June 22, 1918, See also, 27 STNLR 719 LEARNED HAND AND THE ORIGINS OF MODERN FIRST AMENDMENT DOCTRINE: SOME FRAGMENTS OF HISTORY

\textsuperscript{23} 250 U.S. at 630 See also, 27 STNLR 719.
and his philosophy, Holmes’ adoption of that constitutional protection for speech does manifest Holmes’ receptivity and openness-- whether conscious or not -- to another’s ideas or beliefs.

The quality of receptiveness is not entirely about agreement between the parties. A receptive leader does not incorporate all that is posed; the leader selects and makes decisions based on her ideas and beliefs. A successful leader must be receptive and responsive to conflicting opinions. The leader must avoid being headstrong or stubborn and create a balance in order to avoid becoming overly influenced by alternative theories, yet also avoiding uncritical acquiescence.

Another important notion is the difference in experience and age between Judge Hand and Justice Holmes. At the time of their interaction Learned Hand was forty-six years old and a district level judge with only nine years of judicial experience. Holmes was three decades older and had almost three decades of experience on the bench.

Holmes did not have to listen to this young, inexperienced, district judge. He did not need to respond to his correspondence, nor did he have to be swayed by his argument. But, consciously or not, Holmes made the choice to be receptive. Holmes’ actions demonstrate that great ideas and philosophies can be obtained from people of any age and from any level of experience.

Receptivity does not need to be conscious. It does not have to undermine decisiveness, standards, or beliefs. Receptivity just needs to be actuated by a leader being open to other’s opinions and ideas. A successful leader will know that everyone,

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24 27 STNLR 719.
25 Id.
regardless of experience or age, will have valuable ideas to offer. Leaders can learn this lesson from Justice Holmes’ example.