Today you’ll have the pleasure of hearing from Professor Ron Collins who is serving at the School of Law as the Harold Shefelman Scholar. Also you’ll have the pleasure of hearing from an expert panel all talking about the wonderful Oliver Wendell Holmes. As Professor Collins describes him, “the father of the modern First Amendment”. This panel that’s been...was put together by Professor Collins and it’s a collaboration of several leaders in the Seattle legal community and I want to personally thank Ron for his commitment to the School of Law and also for his work in scheduling this terrific gathering that brings into the Law School members of the bench and bar.

Before I introduce the panelists and turn this over to our moderator, I want to take just a moment to celebrate the endowed lectureship and its namesake Harold Shefelman. This lectureship was created in recognition of Mr. Shefelman’s extraordinary record of service in the legal profession and also to the University. He was a lecturer in the University, was also a regent and at the time of his death in 1984 he was 86 years old and the Seattle Times heralded him as, “a behind the scenes mover in the city’s downtown awakening, the University of Washington’s emergence as a top flight educational institution and the birth of the Seattle Center as the home of the 1962 Seattle World’s Fair.” I believe Professor Collins will have a few other things to share about Harold Shefelman but we are certainly fortunate to have this lectureship that was created in his honor. It was established just after his death to bring distinguished judges, scholars and practitioners to the University of Washington School of Law and the idea with that of course is to, by connecting people, to enrich the relationship between the school of law and leaders in the bench and bar and to further our academic excellence and contributions to society through those collaborations and we certainly have a wonderful panel of those leaders with us today.

I want to personally thank and just note who we have with us and then our moderator, Professor Clark Lombardi, will take the program from here and so let me begin with him. Clark I want to thank you very much for serving as a moderator today. A very fitting moderator giving his expertise in American constitutional law also his expertise in Islamic law and the comparative constitutional work that he is so well known for throughout the country and indeed the world.

I also want to specifically say thank you to Judge Robert Lasnik, Chief Judge of the US District Court for the Western District of Washington. Judge Lasnik you are always such a great friend of the Law School and supporter in so many ways and I really appreciate you being with us today.

And then we also have with us Bruce Johnson a panelist and a partner at Davis Wright Tremain and very pleased that you can join us here today. I’ve heard so many wonderful things about you. I’m really glad that you can be here with us for this event.

Of course Ron I also welcome you and I’m really happy that you’re with us here.

So with that let me introduce Professor Lombardi and again thank you for being with us today.
Professor Clark Lombardi

Thank you Dean Testy and it’s really my honor to be here it should be an extraordinarily interesting presentation and, I hope, discussion.

Let me first set the frame and introduce Ron Collins who is the Howard Shefelman visiting Scholar here at the Law School. Today’s panel is going to focus on his latest work, and it’s really the latest, and there are more coming which I’ll mention. This is a book called The Fundamental Holmes: A Free Speech Chronicle and Reader which was published recently by Cambridge University Press.

He’s hard at work now on another volume about free speech which is going to be published by Oxford this February and then, he claims, next Fall Cambridge will publish a book titled On Dissent of which he’s co-author with David Skover. And if he actually does this then I think we’ll all be fully shamed in our inability to publish at the same break-neck speed. But not only that, on top of his writing significant articles from in a range of publications over the last few years from the Harvard Law Review to The Nation Magazine he has also debuted as a fiction writer and has just finished being a Norman Mailer Fellow and finishing a novel over the last year. Ron was a law clerk to Justice Hunt Lindy on the Oregon Supreme Court and then served as a Supreme Court Fellow under Justice Warren Burger. So, he’s an extraordinarily accomplished scholar and we’re very lucky to have him as the Howard Shefelman visiting scholar here and we look forward to hearing what he has to say.

Commenting on his work is a group of people who are superbly well qualified to do so and their...they do real pride to the University of Washington community. And in some ways I think this is exactly what Howard Shefelman would have wanted to see which is to bring people into Seattle and then also have them engage with these experts that we have here and the people who want to engage with them.

The first, you’ve already heard, is Judge Robert Lasnik. He was appointed to the Federal District Court here in Seattle by President Clinton in 1998 but prior to that he had served with distinction on the King County Superior Court and he had been the Chief of Staff in the King County Prosecutor's Office. And he has been recognized by his own peers in the judiciary recently being elected by the district judges of the 9th circuit to represent them on the Judicial Conference and he will be the first commentator on Professor Collins' work.

The next commentator is going to be Bruce Johnson as you have heard is a partner at Davis Wright Tremain. Bruce also...it's sort of awful to introduce people who embarrass you with their accomplishments. I often wondered if many of you know that academics write, you know, write CVs that are twelve or thirteen pages long because we just put in everything we did. Walk, had a thought on the way to the bus stop, you know, spoke to my wife this morning about interesting thing, put a date, and, you know, to be published soon. I always wondered what it would look like if one found a CV in which it was twelve pages long but full of substance and accomplishments and that was what I stumbled upon when I looked up his CV. He is a veteran litigator as his page on the Davis Wright Tremain website says. But he's more well know in the area of free speech specifically on the area of commercial speech he's litigated every major free speech case in the state of Washington and he's also had a major role in actually putting his money where his mouth is in drafting laws that other people can litigate including Washington's anti-slap law which was just enacted in March this year. So one couldn't ask for a more qualified person to comment on issues of free speech in the Seattle area. And I look very forward to hearing his comments as well.

Let's begin with Professor Collins and then we'll move to Judge Lasnik and then to Mr. Johnson.
Well, thank you Clark. I very much appreciate those kind words and if On Dissent is not on time by the end of next year, you can talk to Professor Skover, my co-author, who is kind enough to join us here today.

And I am honored as well, I'd like to echo what has been said to be, and Judge Lasnik is kindly agreed to be here and Bruce Johnson two people who are as it has been noted giants in their field. And certainly in their field first and then law and so it's a special treat for me to have these two friends and two luminaries in their field to join us here today for this program. And also I'd like to thank my fellow colleagues who are here. I'm the new kid on the block and it's wonderful to meet you and I'm pleased and honored that you took your time to join us here today for this program. I'd like to thank also all of the staff that made this event possible a lot of work goes into this and I really appreciate their effort. Of course, students, many of you I will yet to come to know when I teach Constitutional Law in the Spring but some of them I've already had an opportunity to meet you and I look forward to meeting more of you and working with you. I'm also pleased to see here that the Seattle Preparatory School students from there have joined us today and Andy McCarthy has joined us with them so, a shout out to those students. I hope this lives up to your expectations and finally a special and sincere thanks to our alumni who graced us with their presence here today and took the time off to come here we really appreciate it. And in days ahead I look forward to meeting more of you and working with you on a variety of projects the law school is involved. Of course I could not proceed without thanking our Dean and my friend Kellye Testy.

But before I do that permit me a few brief words about the man whose name graces today's event I refer to Professor Harold Shefelman. I say professor, he taught here as a lecturer for almost four decades that's a remarkable amount of time. And when I heard that I had this opportunity I said, "who is he?" And so, we did some research and that...a little bit of that is presented on this pamphlet that I asked to prepared and shared with you. I think we serve ourselves best when we remember those who have gone before us and I am most honored to be here and have his name associated with mine.

As I've...so which brings me back to Dean Testy if you value community, that is people sharing caring and of course remembering, if you value the bonds that come with getting to know those in your law school community and helping them, if you value vibrant interaction between alumni and students, and in short, if you value things that make the law school experience a rich one and a personal one then you will certainly come to value the stewardship that Dean Testy is, and will continue to be doing, in this Law School. And Kellye it is my honor to be a part of that and I hope I can live up to your expectations which are certainly high.

Well that said, let us now turn to the man of the moment the man with the winged mustache. I refer of course to Oliver Wendell Holmes from Boston, Massachusetts. I've spent the past decade thinking about Holmes and his life. I believe I've read just about everything there is to read about the man and having done so I've come to this conclusion: nothing had more profound and lasting impact on Holmes than his involvement in the Civil War. So, today I'd like to just say briefly a few things, remarks about Holmes and his incredible service to our country in the Civil War between 1861 and 1864.

I think more than anything else that service in the Civil War shaped his jurisprudence, shaped his philosophy, shaped his entire outlook on life. He was a different man after he served between 1861 and 1864. So, let me say a few things about that. We start off, if you will, the year is 1861 and we get to this the young Holmes. Notice he hasn't donned a mustache yet and but slightly before that, several months before that. The year is 1861, it's January and he's in Boston and he's at a rally. There's going to be a big rally and the man named Wendell Phillips is to speak there.
Wendel Phillips as you may know is a fiery abolitionist and he went out of his way to enrage those who supported the peculiar institution of slavery. And wherever Wendel Phillips went there was always a likelihood, if you will, a clear and present danger that there would be a riot.

He packed a pistol, he had bodyguards. They were armed with rifles, pistols, and clubs. And so on January 24, as the Boston newspapers point out, he was there for, if you will, a fight. And he was ready to speak and there were hundreds of people, some pro, some con-hecklers and what have you. And there were men standing next to him, armed men, one of those men was about six foot four tall young man bearing a club in his hand was none other than Oliver Wendell Holmes Jr..

Why? He believed that the abolitionists cause was the right cause. He believed that slavery was wrong. He believed in the principles of the Declaration of Independence. He believed in the cause of the North and soon, very soon he would leave Harvard right on the verge of graduating having yet three months left. And he leaves Harvard and he joins and he signs up ultimately with the Massachusetts Twentieth. And here you see him in that garb and that the hat, his cap would...said...had a 20 at the top and he enlists. And it would have made his abolitionist mother, Amelia Lee Jackson very proud when her son did this. She believed in the cause of abolition she believed in the cause of the North and she was very proud of her son for taking arms and fighting the good fight.

The father, Oliver Wendell Holmes Sr., the noted physician and poet and literary figure, he would come to the cause in time. He was a centrist at the time and wasn't particularly thrilled about young Holmes leaving college.

Between April 25th, 1861 and July 17th, 1864, thirty-nine months, Oliver Wendell Holmes serves on behalf of the Union Forces in the Civil War. We first see him in October of 1861 at Ball’s Bluff. If you can just imagine this is Ball’s Bluff and he is along with his whole cavalry of soldiers and soldiers from other regiments. They are proceeding up a bluff and what they don't know is at the top of the bluff: Confederate soldiers. And as they get about three-quarters up, all hell breaks loose. And bullets start firing. And as was the custom these soldiers, including Oliver Wendell Holmes, continued up that bluff. Holmes takes a shot in the stomach and in the chest. He is carried back and as he is carried back remember all this shower of bullets is coming down and he's got to cross a river to get back to the infirmary on the other side. And of course there's this hail of bullets and somehow miraculously not only does he get back to the infirmary but, he lives.

Well, then we see him in Fredericksburg. Twelve-thousand men died there within two days. Twelve-thousand men. Some of his best friends he sees cut down. And we see him there at least in the second battle of Fredericksburg which is in 1863 in May. Here he is wounded yet again and this wound is...excuse me, ladies and gentlemen. Forgive me I miss-spoke, my eyes went to the wrong page so if we could just move back, if you will, move back in time.

So we left him in Ball’s Bluff and he is good, alright, and from there he survives and he comes back and he fights in the battle of Fair Oaks. This is in June of 1862 and he survives that.

And then he comes to Antietam and this is in September of 1862. A really bloody battle there in at Antietam Creek in Maryland. Thousands of Confederate and Union forces die. And he takes a bullet in the back of the neck that comes out through his throat. Through the...this side of his neck. And somehow miraculously, although it took a long time, he survives that too.

Then we see him at Fredericksburg both in the first battle and the second battle and there he is wounded a fourth time this time in the heel. So by 1864 he's decided...they tell him that there is a group of quote-unquote colored soldiers that they're putting together these Massachusetts
Harvard men. And they ask him to join that. He's dodged the bullets four times he's dodged death three times. He thought, "This is enough". Had he joined that brigade they suffered enormous casualties but Holmes stopped there.

So there you have it that's his service. I think in order to understand the impact it had on him you have to have a little bit of idea of what, if you will, the gravity of the tragedy of the Civil War and a lot has been said about that so let me just say a few things.

The number of soldiers who died between 1861 and 1865 was an estimated six hundred, twenty-thousand, which is approximately equal to the total fatalities in the Revolution, the War of 1812, World War I, World War II, and the Korean Wars combined. The Civil War's rate of death, that is, its incidence in comparison with the size of the American population was six times that of World War II. A similar rate about 2% would be casualties in the area of six million lives-enormous. It's hard for us as moderns to even begin to comprehend this.

This horrifying spectacle of death is what Holmes lived through between 1861 and 1864. As I've said many of his closest friends died in this harvest of death. Canon shrapnel tore into their flesh. And not infrequently you would see physicians literally cutting off limbs and piling them up as they attempted to heal the wounded and the ill. It was an horrendous sight and it produced what has been called the crisis of meaning that is: what grand principle philisophical, religious, political could begin to justify this carnage of war? This...begin to justify the staggering cost of the war.

Well, many people begin to return to religion; turned and personalized God that when they died, afterwards they would go to Heaven and they would be with their family. Holmes went in absolutely the opposite direction. Not only did he not personalize God, not only did he not turn to a divine authority, Holmes actually left the Civil War never ever again believed in any grand principle. The very things that prompted him into the Civil War, after the Civil War he completely changed.

When this man broke bread during lulls in the battle with Confederate troops. Literally when he spoke to them when he exchanged newspapers and candy with them and bread with them it had an enormous impact on him. The only reason at the end of the Civil War he thought that the only reason that the North was better than the South wasn't that the institution of slavery was wrong, that it was morally wrong, that it was humanly wrong. The only reason we were better than the South, Holmes believed, is cause we licked them.

And this takes us into this whole Darwinian, if you will, mindset: that life at its fullest is that struggle, is that clash. It is that incredible experience when one goes into the battlefield and fights the good fight the glorious fight and faith willing, not God, faith willing one will survive. And that, for Holmes, that was the great rush. That was the great principle. That kind of Darwinian struggle: the survival fittest. And it is that principle that we see tracing into his jurisprudence in cases like Abrams vs. United States where he says, "Life like law is an experiment." Ladies and gentlemen, true, but experiments fail, democracies fall.

We have in our own lifetime or some of our lifetimes, I should say, witnessed what happened in Nazi Germany. You know it's all well and fine to say take the ideas into the marketplace and may the strongest idea prevail. And Holmes was fine with that, he said in his Gitlow Dissent if at the end of time, you know, if the end of the day a proletarian dictatorship prevails in the marketplace, so be it. So be it. And so this was that commitment, if you will, to not so much a commitment to truth, if you will. In fact Holmes thought that the only certainty was uncertainty. In this sense he was very Socratic.
But the marketplace of ideas, which by the way was the phrase that he talked about competition in the market. Marketplace of ideas not many people know the phrase comes from Justice William O. Douglas it comes in the 1940's. But that idea, the marketplace of ideas, that competition, if you will. It was, if you will, civil society's way of reenacting the Civil War. And this more than anything else informed Holmes' jurisprudence about free speech about his view of the common law and about his jurisprudence, generally. And I think it helps really explain so much of his thinking.

I will leave you with this, in the interest of time, more can be said, but I'd like my colleagues here to join in and have their say in this dialogue as well. But I think it's fascinating the front piece to this book is something taken from Holmes' study. And if you went to his study, Penny you'll probably enjoy this here, there were tens of thousands of books and they were stacked from the floor to the ceiling. Really quite an incredible...at 1720 I street in Washington D.C. where there now is a place called Cafe Asian. Nobody has any idea there was once a man named Holmes that lived at that address. Anyway, if you go into the study and there was a fireplace and above the fireplace were photographs of family and what have you. But above those photographs hanging were sabres and so you have the sabres and the books. And I thought what a wonderful metaphor. Nothing explains Holmes better than that: words and war.

Ladies and gentlemen I thank you. I look forward to my dialogue with my colleagues and I say to them as I do to you for the purpose of questions and answers, gentlemen you need not limit yourselves to the Civil War so anything is fair game. Thank you.

[applause]

Robert S. Lasnik

Thank you very much. Well I'm going to pick up that theme and note what William Faulkner said, "The past is never dead. It isn't even past." And I think that that's what happened to Oliver William Holmes to a certain extent.

Now, we can say entered the war, how old was he when he signed up? 20. And then when he came out he was 24 and he was a changed person. Everybody changes between the ages of 20 and 24 no matter what they're doing. But his experience was so dramatic and so profound that it left him with this belief that anything that happens in a war that suspends civil liberties is sort of presumptively okay.

Don't forget Abraham Lincoln at this same time is suspending the writ of habeas corpus, unilaterally. He's closing down newspapers, unilaterally. He's declaring martial law and not just in places where you might say it was necessary, but everywhere. And I mean in the North and the South. And he is violating everyone’s civil liberties as it suits the cause. And I'm sure Oliver Wendell Holmes approved of those things. He was not a great fan of Abraham Lincoln but he was a great fan of the fact that when you're fighting a war, the government has to do everything within its power to win that war. And I think that when you look at the free speech cases that come during World War I, you see that his first reaction is still to take that mindset.

And it has been observed that World War I was called the war to make the world safe for democracy but it triggered one of the worst invasions of civil liberties ever seen in the United States. Selective Service Act of 1917 is passed which is basically if you criticize the draft or say anything negative about the draft you're committing a crime. The Trading With The Enemy Act, the 1918 Sedition Act. I mean how could anybody come up with a sedition act after the Alien and Sedition Acts were so discredited. Well, in that climate anyone who criticized the United States or supported the concept of Socialism, my goodness. Obama wasn't the first person to be slandered with this. And then the Immigration Act of 1918. Some of these acts were used to say
the postmaster didn't have to deliver anything that he thought was subversive. And Holmes was very willing to go along with a lot of these things early on because of that experience. “The past is never dead it isn't even past.”

So looking at his free speech jurisprudence you really do need to view it through the prism of his Civil War experience. Now, I'm not a huge Oliver Wendell Holmes fan. For those of you out there who come from Social Justice, my Seattle Prep colleagues out there, or just a more liberal mindset, a more progressive mindset you don't like to always say that, presumptively, the government's going to win and that social justice is irrelevant-it's all about power.

So what is it that changed Oliver Wendell Holmes from this kind of knee-jerk, rubber stamp what the government does, it's okay to somebody who is perceived as being a great champion of an expanded view of the First Amendment and freedom of speech? Well I would suggest it was two things at least, and this is really getting it down to oversimplification. But I would suggest it's Learned Hand and it's Louis Brandeis.

In those days Judges talked to one another about their cases. There were no record of what they said most of the time in the sense of bloggers and cable news. But you know, Hand and Holmes are riding the train together North. And Learned Hand had written a very expansive opinion striking down a conviction of a magazine called Masses under this...one of these sedition acts and he was of the belief that criticizing the government by itself did not establish a crime. That there needed to be an absolute fact that it was going to lead to something terrible for the government. And he took great exception to some of Holmes' opinions. But they all admired Oliver Wendell Holmes, Hand did, Brandeis did. And so they had to treat him with a certain amount of deference but at the same time try to influence him in some way. And I think that, to Holmes' credit, he was open to the idea that some of these brilliant young people who he was talking to: Learned Hand, Felix Frankfurter, Louis Brandeis and others. He heard what they said and I think that he was affected by it and you see a resolution over time.

Let me digress for a second to say Holmes went on the court appointed by Teddy Roosevelt and it was not until 1916, two years later that Woodrow Wilson appointed Brandeis. So you have this gap in between, but Brandeis joined some of those early Holmes opinions even though later on he was starting to have some regrets about it. But just to point out why lifetime appointments are so cool, between Brandeis in 1916 and John Paul Stevens stepping down in 2009, was it? Three people occupied that seat: Louis Brandeis, William O. Douglas and John Paul Stevens. In that same time frame, there were nineteen different presidents of the United States. So, which job has better job security, well you see that for itself.

But Brandeis really had a profound impact on Holmes and I think...I'm showing my bias here. Not just that I went to Brandeis University for undergraduate but Brandeis was a trial lawyer and Brandeis cared about facts. Learned Hand was a trial judge and he cared about giving opinions and laws that trial judges could utilize to determine what the law really is. With all due respect to Oliver Wendell Holmes for fifty years he was an appellate judge. He sat on the highest court of the state of Massachusetts and then the highest court in the United States. But I don't think he every really tried cases from beginning to end the way Louis Brandeis did or try court cases in a courtroom the way Learned Hand did. And I think both Hand and Brandeis put a tremendous emphasis on, rather than do broad sweeping clear and present danger and other kinds of rules that are ridiculously nebulous for an actual fact pattern. Let's look at what was said in each case. And you can see that sometimes it would come down to the prosecution misinterpreted a German word and gave it a very sinister interpretation that was not the right interpretation in the German newspaper or whatever. So, what looked like for calling for riots was actually something very different so these kinds of things I think also helped to change Holmes' point of view.
But, look at us now in the last decade with the war on terror. What have we learned? What has changed? Is civil liberties, is freedom of speech something that comes and goes based on whether we're at war?

And I had the privilege of having the Hamdan case start in my court room in 2004 which was quite a kick for a US district court judge here in Seattle. And it didn't stay long, but while it was there I did get a chance to issue one order granting the motion to hold the petition in abeyance but I put in there that it was fitting that we started this case in the United States Courthouse that's now the Nakamura Courthouse even though we were going to be moving to the new US courthouse for the next hearing, we never got there.

But I noted that the President Nakamura Courthouse had been the venue for many important cases and at sixty-five years of use including the trial of Gordon Hirabayashi in October of 1942 for violating a military curfew and failing to report for internment. And how those cases which occurred in the aftermath of the Japanese attack of Pearl Harbor serve as constant reminders of how our country and our courts must always remain to the core principles embodies in our US Constitution. Even in the aftermath of devastating attacks on our people and even in times of war. And that the hearing to vacate the conviction of Mr. Hirabayashi forty-four years later was held in that same court house.

So I didn't fight in Vietnam I had a number that kept me out. Would I have had a different point of view than Justice Holmes had I gone through that? I don't think so. It's a difference of 100 years of American history. But it is fair to point out that the Civil War was different than any other war in the sense of you really didn't have a clear idea of who your enemy was. They didn't speak a different language. They didn't wear a different set of culture's clothes and the like. Sometimes you could say he's wearing blue and he's wearing grey. But there was a lot of spies a lot of things going on within American communities-cousin versus cousin, brother versus brother. So there were unique aspects of the Civil War that lent some credence to why Lincoln needed to take the steps that he did.

But the conviction of Eugene Debs, who was the Socialist Candidate for President, and sending him to prison for 20 years for basically giving the same kind of speech that George McGovern gave when he ran for President in 1972 criticizing the Vietnam War. I think this is a pretty extraordinary result that happened in the twentieth century. And when I was talking about a hundred years ago in our country.

So we have a come a tremendous way from Oliver Wendell Holmes and the court in the World War I years blessing of opinions that sent people to prison for doing things that we would say nowadays, "My God you couldn't possibly convict people of these kinds of things." But you know torture, suspension of treaties that we signed are being justified under the same general premise that in time of war everything is different. I don't think that's right and I don't think it's going to get any traction. But watching the development of Oliver Wendell Holmes' jurisprudence to go from look at freedom of speech as basically a common law right to eventually people seeing it as a constitutional right was a tremendous step forward for civil liberties in our country. And I think it's a good segue for me to turn it over to Bruce Johnson since I think that's part of what he's talking about. Is that right?

Bruce Collins

I think so.

Justice Robert Lasnik

Great. Thank you very much.
After reading Ron's book I came up with a few generalizations distilled from that book. And these are generalizations and I think to understand how Holmes would approach these generalizations I should tell you that he once said that, "the chief end of man is to form general ideas." But he also, "no general proposition is worth a damn." Also said, "too broadly generalized conceptions are a constant source of fallacy." So I have five very generalized points to make in line with that introduction.

First a personal story and I think this is actually ties into what both Judge Lasnik and Ron Collins have said. When I was in college I met a lawyer in a large Cleveland law firm named Chapman Rose as he was know Chappy Rose. Chapman Rose was one of the last or maybe the last of Holmes' clerks. I don't know if it was Chappy or Alger Hiss but he had a number of clerks towards the end of his life coming directly out of Harvard Law School. And Chapman Rose talked to me when I was in college about Justice Holmes talking to him. And Holmes recounted to him his Grandmother recounting to Holmes about living at the Holmes' parsonage in Cambridge, Massachusetts now the sight of Harvard Law School, incidentally. And Holmes' Mother in 1775-Grandmother-waking and hearing the noise of the Battle at Bunker Hill in the distance. So, here I was talking to somebody who had talked to somebody who had talked to somebody who had actually been in the Revolution.

Another anecdote and this one may be apocryphal. But after Holmes was injured and essentially put to Washington DC to sort of man the fort in what was behind the line service. He was sent to Fort Stevens named, incidentally, after Isaac Stevens the First Territorial Governor of Washington State. And Fort Stevens is north of Washington DC. In the Summer of 1864 General Jubal Early a Confederate Cavalry General decided to invade the North. He went up through Maryland and then turned South and headed straight for the Capitol. A number of troops were rushed to Fort Stevens which was at the northern periphery of Washington DC and Holmes was one of them. On the parapet watching the Confederate Forces approach Fort Stevens was a civilian and several officers. A Confederate volley went forth to Fort Stevens. And one of the officers, it was a general, died of a gunshot wound. Holmes, apparently, then yelled to the civilian standing to this officer, "Get down you old fool!" At which point Abraham Lincoln ducked.

Now, what's the point of all this? The point I think is that Holmes had a thorough grounding almost a familial grounding in American history and how it affected American law. I'll give you an example of that and it's a very legally significant example. In the Abrams v. United States dissent in 1919, Holmes, basically, adopted for the first time a very broad pro-First Amendment view of a government regulation of speech. He said, "I wholly disagree with the argument of the government that the First Amendment left the common law as to seditious libelant force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that had been posed." This is 1919 here's a guy talking about the Sedition Act of 1798 but it's a fairly interesting nugget. It's later picked up by Justice Brennan in New York Times v. Sullivan in 1964. Brennan basically shapes it as a way to understand how we need to approach the common law of libel and recognize that the decision in the 1798 Sedition law and Holmes' position in Abrams has something to say about how we should sue one another and how much speech we should allow one another before fining somebody liable.

Second point. Holmes is asking very fundamental questions about America. At bottom what Holmes and other justices were dealing with in World War I was a basic issue: Did the American Revolution stand for anything other than home rule? Would American constitutional law
basically declare its independence? Many justices, and I include by that the Holmes acolyte Felix Frankfurter, believe that the First Amendment was a meaningless addition to the Constitution. Because it simply froze the English common law as it then existed i.e., prohibitions on seditious libel, for example. Our free speech rights therefore would be determined largely by reference to what the English crown permitted in 1776. Holmes and the Abrams decision and that reference to the 1798 law essentially broke from this prevailing consensus and he viewed the first Amendment in establishing American, American democracy as simply a common law that basically replicates what existed in England. This achieves further fruition in 1940 with Bridges v. California several years after Holmes dies where the court basically breaks from the English common law of contempt and for the first time says you should be able to comment about what happens in open court.

Third point. This may be related to point two is a very, very interesting dialogue, a trans-Atlantic dialogue which Holmes had. As Ron Collins' book suggests, his free speech views may have been influenced by the Civil War but they may have also been influenced by John Stewart Mill whom he visited in 1866 after the Civil War. He had extensive correspondence with Sir Frederick Pollock, a famous English judge, and later Harold Laski who was a famous English Socialist at the London School of Economics. These judges would discuss recent court decisions and the US and UK courts clearly influenced one another in this process.

Fourth Point. As Ron's book shows throughout Holmes' lifetime, there was an extensive legal and constitutional dialogue between state court and federal court judges. Now, I'm going to go to a lawyer point so I apologize to the non-lawyers but I hope you appreciate it none the less.

This was the pre-Erie Railroad v. Tompkins state of the law. And Erie Railroad v. Tompkins basically federal courts were taken out of business of adopting federal common law and state law, accordingly. As a consequence of this decision which I believe dated after Holmes' departure from the court this dialogue between federal and state judges ceased. This was a dialogue with sort of a...very significant nuances. We can't really grasp it today. When you read these decisions and you ask why a federal judge is dealing with a state law issue or vice versa, it's like listening to or reading Shakespeare-we understand the words, we don't often understand the nuances.

What's interesting today of course as we're gone from that dialogue between state courts and federal courts and we've got a US Supreme Court now that consists of no judges who served on the state court bench. The last two judges who had that kind of experience were Justices Souter from New Hampshire and justice O’Connor from Arizona. So we're really starting to have a federal judiciary which is no longer influenced by state judicial decision making.

I think a fundamental point in this book is that Holmes' First Amendment decision making was influenced by this dialogue. His early writings focused on the common law as did his experience on the Massachusetts Supreme Judicial Court. And when he came to the US Supreme Court he brought this intellectual baggage with him. So when the court began to confront these First Amendment issues in World War I, Holmes wove his First Amendment protections from the cloth of the common law.

The notion of intent crimes of intent specific in general and of foreseeability: the shouting fire in the crowded theater-falsely shouting fire in the crowded theater. And the clear-and-present-danger doctrine a doctrine which persists today. I had occasion to handle a case back in 1994 that went from the South Dakota Trial Court to the US Supreme Court in two days. It was a prior restraint case. And in doing that I researched the prior restraint law and discovered that embedded in the Nebraska Press decision of the mid 1970's, which we were relying on, was a citation to Dennis v. United States from the 1950's. And Dennis adopted the clear-and-present-danger doctrine, so it exists today. It's a core First Amendment doctrine and it's legal test for free
speech was based, I think, on Holmes' experience as a common law judge. The result is our current free speech doctrine is embedded with common law concepts and is very different from other types of Constitutional Case Law.

Fourth Amendment cases or Sixth Amendment cases, even supremacy clause cases you look at McCulloch v. Maryland. Chief Justice Marshall says well this is a US law this is a Maryland Law, this is bigger than Maryland, therefore you win US-fairly simple dialogue. What Holmes devised instead was basically a dialogue dealing with common law concepts of actual malice, of intent, of foreseeability, and the like, and grafted it onto our First Amendment protections. In many ways modern libel law carries on that old dialogue thanks to Holmes. And in this regard it's worth noting that in 1964 in New York Times v. Sullivan there was another former state court judge, Justice Brennan, who adopted several state supreme court cases in which he basically developed the concept of libel privilege and developed the notion of constitutional malice doctrine as a matter of First Amendment law. This doctrine was premised on the notion of the specific intent that Holmes had written about and that he basically discovered during the course of his first World War decisions.

The final point. This is a point about war and the marketplace. Modern First Amendment free speech law is built on both. And it is basically Holmes that brought war and the marketplace to the First Amendment.

First, the accident of war. Obviously his Civil War experience was there but World War I was the first time actually since 1978 that the Supreme court or any court was forced to grapple with the issue of when the federal government can exceed its powers and potentially impact speech. These are what Holmes would have called "great cases": "Great cases are hard cases they make bad law", he said in the Northern Securities Case, "leaving uncertain protections in its wake". In recent years the Bush administrations proposed to plying the same Espionage Act that Holmes was dealing with, to media leaks made to the New York Times and the Washington Post.

As to the marketplace metaphor you all think about the marketplace of ideas. Ron mentioned this comes from Justice Douglas. Well in fact, Holmes talked about the best truth, the best test of truth is the power of the thought to get itself adopted in the competition of the market. Market is the model for freedom of speech. Why not allow corporations to participate in courts? And this market metaphor, I think, is also one of the foundations of the Citizens United case that was decided by the US supreme court earlier in the year.

In short, Holmes is very much with us and what he's created is a First Amendment which is endowed with a lot of significant common law aspects.

I want to close with a quote from Grenada Television which did a TV adaptation of Arthur Conan Doyle's Sherlock Holmes. Sherlock Holmes is quoted as having said,"The law is what we live with, justice is sometimes harder to achieve." That actually sounds a lot like Oliver Wendell Holmes.

[applause]

Professor Clark Lombardi

Okay, we have a few minutes for questions and then Dean Testy will close. We do have a...after she does I don't know if you're aware of this Dean Testy but there is a short clip that we're going to play which is from Oliver Wendell Holmes’ address to the nation on the occasion of his ninetieth birthday and it will be a parting thought for all of us. We do have time for questions so I'll open the floor, only a little bit of time.
I'd like to start with the first question which is to ask you this: I was trained as an intellectual historian and so it was wonderful for me to see a work that is fundamental, a work of intellectual history be produced and be so thought provoking. It's a very uncommon mode of intellectual discourse in constitutional law, right now. I mean fundamentally we go back and do...well there was a special issue of the New York University Law Review which talked about judicial biography and why there's so little of it and actually most scholars suggest there's very little of it because it's fundamentally misleading and it's a terrible thing and they propose a New Criticism approach to looking at law. And actually many of the comments of the commenters were looking at the way in which Holmes' doctrines are still with us and are actually looking at the words of the text and they way they're applied in contemporary courts and not asking and not really addressing why it's important that these ideas were formed in the crucible of the war why they were formed by a person who was moving from being a privileged twenty-year old to a hardened twenty-four year old. What was it, I just want to ask you, that makes you think that it's important to understand not only what these ideas are in context but why they were formed the way they were and what lessons are there?

Professor Ron Collins

here's a lot there. Let me just begin. When I asked Steven Shiffrin, noted First Amendment scholar, for a blurb, he said, "Ron I don't like Oliver Wendell Holmes." I said, Well, Steve let me send the book to you and you decide thereafter. And you decide you don't want to do a blurb that's fine." And here's what he wrote, he says, "Ron has (in some adjectives-you know) brings the real Holmes to life the good, the bad, the liberal, the conservative, the hero and the villain." And I think you know when you're writing this kind of book if you respect the integrity of your work, you have to be careful not to get too close to the person you're writing about and the guy who before this was Lenny Bruce that was a book that I did with David Skover. You really have to...and in doing this you know there is a lot of awful things about Justice Holmes, Buck v. Bell "three generations of imbeciles is enough", but...those were his words, by the way.

I think the thing is you have to have...first it is a process. You have to have a certain attachment you have to have almost a hound dog approach. You have to go everywhere, we went to Massachusetts, went to the records, what have you. And you have to kind of put it all together and at the end of the day you have to do the most faithful job you can with the understanding that the next guy may do a better job. But, so, and the question, I guess, is why? And I think that the answer is that people don't live and the law doesn't develop in a vacuum, you know it is the soil and what I've tried to do with this book both with the biographical essays and Holmes' own words is show that soil in which he was rooted and I think it is when you get a sense of that you can't just look at those 1919 cases in the abstract. You can't just say, you know, as the case books, I think, sometimes do they just kind of present them and move on, black letter, next case, clear-and-present-danger, you know eminent threat etcetera, etcetera. So, for me in order to understand the man you had to understand the context and in order to understand the law you had to understand the soil in which, you had to have some sense of the soil in which he was rooted.

Professor Clark Lombardi

Thank you. Are there any questions from the floor? Sir.

audience member

So Holmes was appointed by Teddy Roosevelt and I sense that he would feel that corporate speech and corporate rights were equivalent to the rights that I have somehow strikes false and I'm just curious about whether he actually spent any time talking about the rights of corporations free speech?
Professor Ron Collins

Holmes?

audience member

Yeah.

Professor Ron Collins

First of all, about Theodore Roosevelt. Roosevelt had read some labor opinions that Holmes had written and thought that Holmes was very pro labor. Holmes was... he didn't believe in union. He was the penultimate capitalist, I mean, you know, he was a capitalist with a capital C. He just happened to write in favor of the labor unions in a picketing case because it was struggle, it was conflict, you know, and he just thought it deserved the place on the battlefield, but that impressed Theodore Roosevelt. Roosevelt had also read some Memorial Day addresses and was very taken by those but so, a little bit about Holmes and the President.

It turns... I happen to agree if Bruce suggested it, I echo it and if he didn't suggest it he should have, but I do think Holmes would be very much at home with the majority opinion of Citizens United. I think he would have gone, commercial speech would have been natural for him. By the way, the Judge had mentioned several names that influenced him one other name is Zachariah Chafey who had an enormous impact on him and we see his thought evolve...

audience member

I'm sorry who?

Professor Ron Collins

Zachariah Chafey a professor at Harvard who had a enormous impact on the judge.

Judge Robert Lasnik

And who was almost run out of town at Harvard for being a socialist or anti he survived by one vote in his tenure.

Bruce Johnson

His Grandson was just elected governor of Rhode Island actually, and namesake.

Judge Robert Lasnik

But President Roosevelt was quite disappointed by Justice Holmes in a lot of ways too and when Justice Holmes decided that labor case and he was getting all this praise suddenly from labor groups he said, you know, "stick around you'll hate me like hell in the future".

Bruce Johnson

And to echo both points when Justice Holmes decided the Northern Securities case, Teddy Roosevelt was livid. This was the case that he had brought, that his justice department had brought against the trusts and Holmes decided in favor of the trusts. And Teddy Roosevelt was quoted a saying he had put a judge on the Supreme Court with a back bone of Jello, or something like that, it was a jellyfish for a backbone. He wasn't very impressed with Holmes' view of the law on that regard.
Professor Clark Lombardi

Well unfortunately we're going to have to wrap up but I hope that this is just further grist for more conversations down the line. It does strike me, and this is something that I've found in Holmes was lionized certainly when I was at law school. It strikes me that my experience seems to be the same as Judge Lasnik's, perhaps Professor Collins', Mr. Johnson's and now, I've learned, Teddy Roosevelt. The more you learn about Holmes the less you like him, I mean he wasn't a very nice guy. And he was horrible to Justice Harlan, the elder, I mean enough so that he would come back and write in his diary that, you know, he couldn't live with himself if he had to live next to Justice Holmes any longer.

Professor Ron Collins

Just for a tail on that kite, the next time students read his Glorious Dissent in Abrams v. United States right after he wrote that he went to his chambers and wrote to one of his colleagues, "Today I defended the right of donkeys to drool."

Professor Clark Lombardi

With that in mind you don't have to be a nice person to change the law so if you're feeling bad...and with that I leave you to Dean Testy's good hands and then after that you will hear a clip from Justice Holmes.

[applause]

Dean Testy

Well I just want to let you all know that this great conversation does not have to close at this point because we have a reception in room 115 immediately following this event and so you can continue that conversation and ask more questions. And I also want to note that at that reception we'll have copies of Professor Collins' book, The Fundamental Holmes, there I'm sure he'd be happy to sign for those for those of you who decide that you'd like to buy one. I also want to just take a minute to thank the panel and have you join me in thanking them once again as we move to the clip.

Professor Ron Collins

What you're about to hear is something I tracked down-it's really precious. It's the only recording of the voice of Oliver Wendell Holmes. It has a British flavor to it it's on the occasion of his ninetieth birth in 1931 when there is a national program on national radio to honor him and at the end of that program, Oliver Wendell Holmes makes the following remarks, about 90 seconds, from his home. and here they are we'll share them with you.

I think, I think I'm sharing them with you.

Bruce Johnson

Ron illegally downloaded this.

recording: Professor Ron Collins

Oliver Wendell Holmes Radio Address March 7th 1931

recording: Oliver Wendell Holmes
In this symposium my part is only to sit in silence. To express one's feelings as the end draws near is too intimate a task but I may mention one thought that comes to me as a listener-in. The riders in the race do not stop short when they reach the goal. There is a little finishing cantor before coming to a standstill there is time to hear the kind voice of friends and say to oneself the work is done. But, just as one says that the answer comes, “The race isn't over but the work never is done while the power to work remains.” The cantor that brings you to a standstill need not only coming to rest it cannot be while you still live but to live is to function that is all there is in living and so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago, 'death, death plucked my ear and says, "live I am coming."

Professor Ron Collins

What an incredible line, "Death plucked my ear and said, ‘live, i am coming’." That will be my title on my book on Holmes. I have been asked, it's shameless, but bear with me, we do have books available for here in the back as well and so if anybody would like to help subsidize my son's college education I'd gladly appreciate it.

[applause]