

# ONE HUNDRED AND ONE YEARS OF INCITEMENT: STAGING JUSTICE HOLMES

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Professor Benjamin Kaplan, an inspiring teacher of Civil Procedure in the first year at Harvard Law School, essayed “Some Encounters with Justice Holmes” in celebrating one hundred years of Holmes’s great book *The Common Law*. Following Professor Kaplan, I propose we encounter Justice Holmes “live and in person” in his living room, 1720 I. Street, Washington, D.C., with Justice Brandeis at his side, one hundred years after Holmes’s immortal dissent in *Abrams v. United States*.

A recent book *The Great Dissent* by Seton Hall law professor Thomas Healy makes the case that Holmes changed his mind from *Schenk*, *Frower*, and *Debs*—where Holmes rejected free speech as a defense to indictments under the Espionage Act—to his *Abrams* dissent where Holmes spoke eloquently in favor of publication of “[T]wo leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.”

My tentative thesis differs from those who claim Holmes changed his mind over freedom of speech in *Abrams*. A careful reading of these Centennial encounters shows Holmes the same old soldier of the law moved by *nuance of record*—applying *Schenk*’s clear and present danger test.

“*Abrams* is not *Schenk*!” Holmes would exclaim.

“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. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have an appreciable tendency to do so.”

Holmes’s *Abrams* dissent stages defendants as “pure and puny anonymities” avowing “a creed that I believe to be the creed of ignorance and immaturity,” a creed that “no one has the right even to consider when dealing with the charges before the Court.”

All of which I have staged myself in Act III of “Father Chief Justice”: E.D. White and the Constitution. You can sit on the front row of the Boston production by way of a clicking the AALS website of 2019 speakers’ materials here: <https://aalsweb.wufoo.com/forms/mlx0jopz0tp4121/> (click dedicated page).

I join four members of the Massachusetts Supreme Judicial Court on the stage of the Social Law Library where Holmes and Brandeis confer on Constitution Day, September 17, 1919, when freedom of speech was at risk. You will hear Holmes reciting his *Abrams* dissent in the Campaign of the Constitution!—; the Joust of the First Amendment! “And we’ve got to fight like hell to win the banner back—never mind C.J. White and MRS. Holmes want me to shut up!”

And what of the *Toledo News-Bee* cartoon representing the Toledo Railway as a moribund man in bed with one of his bedside friends saying, "Guess we better call Doc. Killits." Federal District Court Judge Killits held the *News-Bee* in contempt. Chief Justice White a hundred and one years ago affirmed the contempt conviction (*Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918)). Mr. Justice Holmes dissented. He differed from his chief Edward Douglass White over both the freedom in question and the facts of record.