

Panel II: Free Speech as a Suicide Pact

Genevieve Lakier

I plan to focus my remarks on Justice Holmes's remarkable statement in his *Gitlow* dissent that "if in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." The statement is a remarkable one not only because of the challenge it appears to pose to the view of the First Amendment as a safeguard of liberal democracy but also because of its provocativeness. In his earlier dissent in *Abrams*, Holmes did all he could to underplay the danger of the speech that the defendants in that case were convicted of disseminating. "Puny anonymities," Holmes described the defendants in the prior case, who were responsible for "the surreptitious publishing of a silly leaflet"—these were hardly the kinds of people, he insisted then, that posed the kind of serious danger to the war effort that might justify the repression of their speech. In *Gitlow*, Holmes took the opposite tack: Gitlow's speech and writing did not, of course, pose any serious threat to the survival of democratic government in the United States. But Holmes's dissent insists that *even if it did*, the only meaning of freedom of speech—the only meaning of the First Amendment—was that the government had to tolerate that threat, even knowing it to be real.

I will explore why Holmes might have thought it necessary to emphasize, rather than minimize, the dangers a proper reading of the First Amendment would unleash. As a rhetorical strategy, made by a minority dissenter, it is a strange choice to make. And it certainly makes the *Gitlow* dissent more radical in its vision of freedom of speech than virtually any other major First Amendment opinion written to date. It is far more radical in its vision of the scope and bounds of freedom of speech, for example, than Justice Douglas's heroic dissent in *Dennis*, which, like Holmes's *Abrams* dissent, does all it can to minimize the threat that the speech in that case posed to the democratic security of the state. I will argue that Holmes's claim that the First Amendment could not be interpreted in any other way but the highly speech protective way he argued for both in *Abrams* and in *Gitlow*, even if the result was the establishment of a proletarian dictatorship in the United States, does not reflect his abandonment of the idea of the First Amendment as an instrument and precondition of pluralist democracy. Instead, it reflects Holmes's embrace of a kind of constitutionalized virtue ethics for democracy, and one that works to inoculate the system of free expression from political claims of necessity. I will argue that in fact First Amendment doctrine has never fully vindicated this idea of free speech at (almost) all costs, but that it would be better if it had, notwithstanding the risks.