

Panel IV: Free Speech, Incitement, and Ideas

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The aim of this Essay is to argue that Holmes' dissent in *Gitlow*, brief as it is, provides a surprisingly comprehensive guide to some of the most important and consistent themes in his thought, and thus to the development of free speech law and American legal thought more broadly. That map emerges from careful parsing of the opinion's text—not only the famous-if-obscure declaration that “[e]very idea is an incitement,” but the phrases that surround it. The goal is not to wring a complete and coherent account of free speech law or theory out of Holmes' dissent, which consists of just 500 words spread out across a few paragraphs. The hope instead is to weave the *Gitlow* dissent into the broader tapestry of scholarship on Holmes and free speech law—to show that despite its brevity the opinion illustrates some of the fundamental intellectual and doctrinal currents at work in the early development of American free speech law.

Holmes' words provide the necessary threads, and the Essay is organized around them into three main themes—some of which are standard fare in Holmesian scholarship (albeit not typically connected to *Gitlow*) and others of which are somewhat more speculative. The first is Holmes' much-debated relationship to pragmatism and its distinct conceptualization of beliefs and acts, which illuminates and is illuminated by his statement in *Gitlow* that every idea “offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.” The second, which has received far less attention, is the relationship in Holmes' thought—and in legal thought at the time—between rhetoric, reason, and realism. The essential metaphor here (which was much more fundamental to Holmes than that of the marketplace) is that of fire, and the key line in *Gitlow* is “Eloquence may set fire to reason.” The third is how to understand speech harms—and, in particular, whether only harmless speech is entitled to protection (“[W]hatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration”) and whether such harms are best assessed through broad legislative classifications or instead by judges in particular cases (“... before us ...”). Finally, and admitting a parochial interest, the conclusion addresses how Holmes understood the roles of persuasion and change at the individual and social level (“If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community”) as well as the reality and role—ever present for Holmes—of violence.