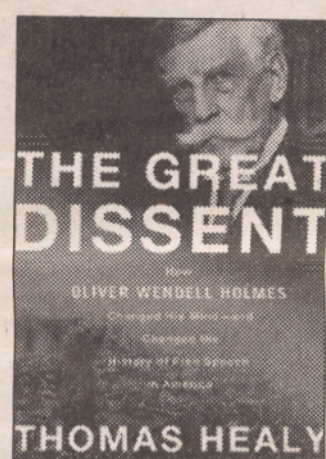


Fire in the court

*Oliver Wendell Holmes,
the First Amendment
and the dissent that
resonates today*

BY JIM DOUGLAS
CONTRIBUTING COLUMNIST

The controversy involving the First Amendment these days concerns the Supreme Court's 2010 decision in *Citizens United v. Federal Elections Commission*, in which the court ruled that freedom of speech prohibits governmental restrictions on independent political expenditures by corporations, associations or labor unions. The result has been a tsunami of cash aimed at influencing elections.

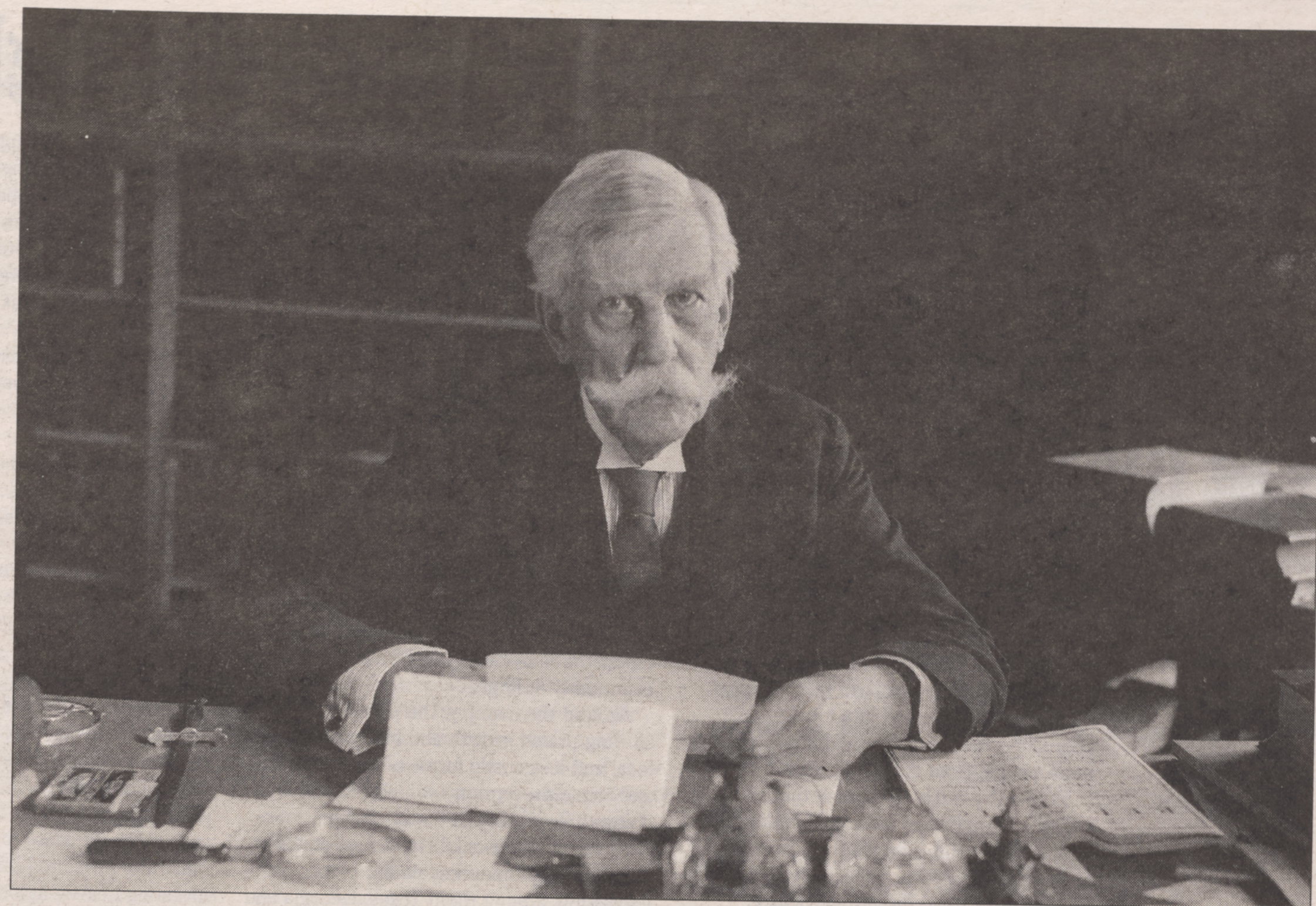


**The Great
Dissent** by
Thomas Healy.

A hundred years ago, the controversies over the First Amendment were just as intense, but very different. Thomas Healy, author of "The Great Dissent," explains that courts then read the amendment to prohibit only "prior restraint," that is, censoring the expression of an opinion before it is expressed.

Healy writes, "The Supreme Court itself had never ruled in favor of a free speech claim, and lower courts had approved all manner of speech restrictions, including the censorship of books and films, the prohibition of street corner speeches, and assorted bans on labor protests, profanity, and commercial advertising. Even criticism of government officials could be punished ... if it threatened public order and morality."

But this would change with one short dissenting opinion in 1919, when one Supreme Court justice changed his thinking. His name appears in the book's subtitle: "How Oliver Wendell Holmes Changed His Mind — and Changed the History of Free Speech in America." In view of the significance of Holmes' role in the development of the modern interpretation of freedom of speech, it is a fascinating tale. Healy examines this important



Justice Oliver Wendell Holmes at his desk.

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development by scrutinizing the influences on Holmes' thinking during the 18 months before the key 1919 decision. He does this by mining Holmes' personal letters and other records, along with those of his intellectual friends and correspondents; he looks at articles in both law journals and progressive magazines. Although the author is a law professor, he writes in a very straightforward and accessible style.

The first 10 amendments to the U.S. Constitution, known as the Bill of Rights, were ratified in 1791. At the top of the list, the First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

For many reasons, Holmes was an unlikely founder of a body of law that would protect the rights of radicals and agitators. He was a Boston Brahmin, the son of the poet (and doctor) of the same name, born with a silver spoon in his mouth. Before serving on the Supreme Court for 30 years, he practiced law in Boston, taught at Harvard Law School and served on the Massachusetts State Supreme Court for 20 years. He was also one of the few justices highly regarded as a legal scholar.

He wrote on an impressive variety of legal subjects and, according to one source, is one of the three most cited legal scholars in history. Holmes was an intellectual who read widely and, although not liberally inclined himself, he engaged in frequent intellectual jousts with other well-known thinkers, including prominent progressives.

Even though Holmes ruled in favor of free speech in 1919, his previous judicial decisions and writing gave little indication

that he would eventually turn First Amendment law on its head. For example, in 1907, he followed the court's prevailing view and permitted a fine against a Denver newspaper that criticized the Colorado State Supreme Court.

First Amendment challenges heated up in the 1910s, which was a tumultuous decade featuring labor unrest, free speech fights and radicals resisting the war effort and criticizing public officials. In 1919, Holmes wrote three unanimous decisions touching upon the prior restraint of free speech, which would seem ludicrous now, given the current view of our rights under the First Amendment. One of Holmes' decisions affirmed the conviction and 10-year sentence of Socialist Party candidate Eugene Debs for a stump speech that included his admiration for those who resisted the draft.

Notwithstanding the fact that these decisions restricted individual rights by upholding criminal convictions for purely political speech, the theoretical building blocks had been created for a much more expansive reading of the freedom of speech. Even though he seemed to ignore the principle in deciding those three cases, Holmes had introduced the concept of "clear and present danger." And in support of the idea that the First Amendment did not create an "absolute right," he introduced the famous example of a person "falsely shouting fire in a theater and causing a panic."

Nine months later Holmes turned the legal world upside down taking the next step and dissenting in *Abrams v. United States*. At the time, the Wilson administration was zealously prosecuting people sympathetic to the Russian revolution. The defendants were recent

Russian immigrants, socialists and anarchists who had passed out leaflets calling for a "general strike" to protest U.S. intervention in the Russian civil war. They were charged under the Espionage and Sedition Acts, which made criticism of the government and the war effort a crime.

The court upheld the convictions, but Holmes' dissenting opinion has reverberated for almost a century. He referred to the Constitution as "an experiment, as all life is an experiment." He stated that "ultimate good ... is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Even the most loathsome speech should be protected, unless it "so imminently threaten[s] immediate interference with the lawful and pressing purposes of the laws that an immediate check is required to save the country."

Before the decision, Holmes "had done as much as any judge to render the First Amendment toothless." However, with respect to his opinion in *Abrams*, Healy says it best: "It is no exaggeration to say that Holmes' dissent — the most important minority opinion in American legal history — gave birth to the modern era of the First Amendment, in which the freedom to express oneself is our preeminent constitutional value and a defining national trait. Nor can it be disputed that, nearly a century later, his dissent continues to influence our thinking about free speech more than any other single document."

And all because Holmes was intellectually honest enough to change his mind.

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