



From Jefferson to Brandeis: The First Amendment, the Declaration, and the Constitution

Remarks at the National Constitution Center's
First Amendment Tablet Dedication Ceremony

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Thank you, Judge Luttig for your gift to America in bringing the First Amendment Tablet to Philadelphia. It's fitting that the 45 words of the First Amendment will shine forever over Independence Hall, where the Declaration of Independence and the Constitution were drafted. As we prepare to dedicate the Tablet, let's gaze together at Independence Hall and then turn our attention back to the words of the Tablet that are shining before us. Holding these two images in our minds is illuminating, because the First Amendment shows us the connection between the Declaration and the Constitution. It protects freedom of conscience, which the Founders considered first among the unalienable rights enshrined in the Preamble to the Declaration and first among the blessings of liberty enshrined in the Preamble to the Constitution.

How do we know that the rights of conscience, as the Founders called them, were first among the unalienable rights and the blessings of liberty recognized by the Declaration and the Constitution? We know that from two other sacred texts I'd like to talk to you about now, as we dedicate the First Amendment Tablet together. Those texts are Thomas Jefferson's Bill for Establishing Religious Freedom in Virginia, drafted in 1777, and Justice Brandeis's opinion in *Whitney v. California*, drafted in 1927.

Jefferson drafted his bill in Virginia months after he returned Philadelphia, where he had just completed the Declaration of Independence. He considered his Religious Freedom Bill among the three accomplishments of his life important enough to be inscribed on his tombstone, along with his having drafted the Declaration and founded the University of Virginia.

Under Virginia's colonial religious code, all dissenters were required to support and attend the Established Anglican church. Presbyterians and Baptists could be arrested for practicing their faith or preaching the gospel. Quakers, Jews, and other dissenters could be denied the freedom to marry or to have custody of their children. Jefferson proposed not only to disestablish the Anglican Church and remove all criminal punishments for dissent, but also to prohibit all compelled support for religion of any kind. He concluded that because freedom of conscience is a fundamental right, government can regulate "overt acts against peace and good order," but it lacks all power to "intrude into the field of opinion."

Jefferson's Bill sets out four reasons why government can make no law that constrains our freedom of speech, conscience, or opinion. Those four reasons were summed up by Justice Brandeis in *Whitney*, and they have been further developed by the Supreme Court since then:

- 1. Freedom of conscience is an unalienable right because people can only think for themselves;**
 - 2. Free speech makes representatives accountable to We the People;**
 - 3. Free speech is necessary for the discovery of truth and the rejection of falsehood;**
 - 4. Free speech allows the public discussion necessary for democratic self government.**
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Let's review each of Jefferson's four reasons.

1. Freedom of conscience is an unalienable right

"Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds," Jefferson wrote in the first sentence of his draft, *"God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint."* In other words, Jefferson argued, freedom of conscience is, by definition, an unalienable right — one that can't be alienated or surrendered to government — because our opinions are the involuntary result of the evidence contemplated by our reasoning minds. We can't give presidents, priests, teachers, or fellow citizens the power to think for us, even if we wanted to, because we are endowed as human beings with the capacity to reason and therefore can't help thinking for ourselves. We know that Madison, the drafter of the First Amendment, shared Jefferson's views because he echoed them in his Memorial and Remonstrance in 1785, which persuaded the Virginia legislature to pass Jefferson's bill. The rights of conscience are "unalienable," Madison wrote, "because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men."

2. Free speech makes representatives accountable to We the People.

In his Religious Freedom Bill, Jefferson emphasized that it's crucial in a democracy for citizens to be able to criticize public officials because legislators and religious leaders, "being themselves fallible and uninspired," will always try to impose "their own opinions and modes of thinking" on others. His prediction came to a head in the controversy of the Alien and Sedition Acts of 1798, where the Federalist Congress made it a crime to criticize the Federalist President, John Adams, but not the Republican Vice President, Thomas Jefferson. And Madison, once again, echoed Jefferson's views in his Virginia Resolution, which said the Sedition Act "ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures" which is "the only effectual guardian of every other right."

3. Free speech is necessary for the discovery and spread of political truth.

Jefferson concludes his Religious Freedom Bill with words expressing his unshakeable faith in the power of reasoned deliberation to distinguish truth from error, words that are inscribed in marble on the Jefferson Memorial in Washington: “truth is great and will prevail if left to herself; she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate.”

4. Free speech allows the public discussion necessary for democratic self government.

Jefferson believed that in a democracy, all citizens have an equal right and responsibility to exercise their rights of conscience. As Jefferson put it in his Virginia Bill, “proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right.”

On the Supreme Court, in the greatest free speech opinion of the twentieth century, Justice Louis Brandeis distilled Jefferson’s four reasons for protecting free speech into a few inspiring paragraphs. In the case, *Whitney v. California*, we see the first Jewish justice insisting on the right of Anita Whitney, a white woman, to make a speech defending anti-lynching laws, which were designed to protect the life and liberty of African Americans. Whitney made her speech at a Communist Party meeting, and she was convicted under a California law that made it a crime to associate with organizations that advocated doctrines that might lead to people to break the law. In 1926, Brandeis had read Jefferson’s original draft of the Virginia Bill for Establishing Religious Freedom. In his *Whitney* opinion in 1927, Brandeis adopted and refined Jefferson’s standard for ensuring that government could only punish overt acts of lawbreaking, not the expression of dangerous opinions.

As Brandeis put it in *Whitney*, “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. [And] There must be reasonable ground to believe that the danger apprehended is imminent.”

Brandeis’s inspiring test—government can ban speech only if it’s intended to and likely to cause imminent and serious injury—was based on his Jeffersonian faith in the power of what he called “free and fearless reasoning” to expose falsehood through public discussion. As Brandeis put it, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.” Brandeis’s test was finally adopted by the Supreme Court in 1969. As a result, the United States Supreme Court now protects free speech more vigorously than any other judiciary in the world.

Brandeis went on to summarize Jefferson’s four reasons for why government cannot make laws designed to restrict what Jefferson called “the illimitable freedom of the human mind.” And in the process he achieved a kind of constitutional poetry. I will now read Brandeis’s central passage—listen closely for each of Jefferson’s four reasons: freedom of conscience, democratic accountability, discovery of truth, and democratic self-government.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. [That's a quotation from Pericles funeral oration]. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

But as this paragraph shows, all four of Jefferson and Brandeis's reasons for protecting free speech are based on an Enlightenment faith in reason itself. The First Amendment is based on a faith that people will take the time to develop their faculties of reason, through education and public discussion; that public deliberation will check arbitrary and partisan demagogues rather than enable them; that more speech will lead to the spread of more truth rather than more falsehood; and that people will, in fact, take time for discussion and deliberation, rather than make impulsive decisions.

This founding faith in reason is being questioned in our polarized age of social media. Twitter, Facebook, and other platforms are based on a business model that's now being called "enrage to engage." They have accelerated public discourse to warp speed, creating virtual versions of the mob. Inflammatory posts based on passion travel farther and faster than arguments based on reason. Rather than encouraging deliberation, mass media undermine it by creating bubbles and echo chambers in which citizens see only those opinions they already embrace. For these reasons, some are calling for America's free speech tradition to be reconsidered or abandoned.

Here at the National Constitution Center, by contrast, we are proud to reaffirm the faith in reasoned deliberation by consecrating the 45 words that will shine forever in this hallowed space. As a vital platform for non partisan education and debate, we bring together Americans of different perspectives to cultivate their faculties of reason. Only by listening to the best arguments on all sides of the constitutional questions at the center of American life can all of us exercise our right and duty to make up our own minds. Like Jefferson and Brandeis and Frederick Douglass and Ruth Bader Ginsburg and all of the great free speech heroes of America history, we are dedicated to preserving, protecting, and defending what Jefferson called "the illimitable freedom of the human mind." May the shining words of the First Amendment Tablet inspire future generations with this self-evident truth: reason will always combat error as long as individuals are free to follow the dictates of conscience wherever it boldly leads. On behalf of all of us at the National Constitution Center, thanks again to Jan Neuharth and Judge Luttig for making this memorable ceremony possible, and thanks to all of you for joining us.

On May 2, 2022, the National Constitution Center dedicated the iconic 50-ton marble First Amendment tablet, donated to the Center by the Freedom Forum. Its design and installation was made possible through the generosity of Judge J. Michael Luttig and Elizabeth Luttig.

