

Why the First Amendment Matters Today

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. I'm so excited to share today's episode with you on both of our podcasts, We the People, and Live at the National Constitution Center. On May 2nd, the National Constitution Center dedicated the first amendment tablet, 45 sacred words of the first amendment inscribed in 50 tons of marble. The tablet was installed at the museum in Washington DC, and has now been transported to the NCC, where it will shine forever in our hallowed space, overlooking Independence Hall.

[00:00:41] The dedication ceremony began with a panel of free speech heroes on why the first amendment matters today. You'll hear from Randall Kennedy, of Harvard law school, N-Nadine Strossen, the former president of the ACLU, and Greg Lukianoff, of the Foundation for Individual Rights and Education. And you'll then hear the dedication ceremony itself, with remarks from Jan Neuharth, the chair and CEO of the Freedom Forum, and Judge J. Michael Luttig, uh, a former judge on the US Court of Appeals for the fourth circuit. Both Judge Luttig and Jan Neuharth made possible the installation of the tablet at the NCC. And we end with my thoughts on the connection between the first amendment, the declaration of independence, and the constitution. Friends, it was such a meaningful day of constitutional concentration, and I'm thrilled to share it with you now.

[00:01:41] Ladies and gentleman, welcome to the National Constitution Center. Horah. And welcome to the dedication of the First Amendment tablet. Friends, this is a day of constitutional consecration. And you could say that that is the National Constitution Center's mission statement. And in fact, you could say that that is the mission statement for the United States of America, along with the words that are inscribed on the outside of this building, "We, the people." And today we're going to talk about the connection between those words and those words, and we're going to talk about the connection between the first amendment, which was drafted in New York in 1789, and the words drafted there in independence hall, the declaration and the constitution.

[00:02:49] And I'm going to ask you to do this again during the second half of our ceremony, but I really want to begin, before we recite the mission statement, by inspiring ourselves by looking to your right at independence hall, and now looking above you, to the tablet. And throughout our dedication ceremonies, hold those two images in your mind, because we're going to explore the deep connections between the words of the first amendment, the declaration and the constitution.

[00:03:21] Um, I want to... I'm so excited about our ceremony, and, um, am so grateful to our friends at the Freedom Forum, led by president and CEO, Jan Neuharth for donating the first amendment tablet to the National Constitution Center. And I'm also grateful beyond words to Judge Michael Luttig and Elizabeth Luttig for making it possible to transport the tablet and enshrine it forever at Philadelphia. We will be hearing from both Jan and Judge, uh, Jan Neuharth and Judge Luttig later, um, in the ceremony.

[00:04:13] Uh, but we're going to begin by jumping right in to the first amendment discussions at the heart of American life. And it is such an honor, friends, to have convened three free speech heroes, three of America's leading defenders of free speech, to convene together on this significant occasion and to talk about why the first amendment matters, and how it is being challenged, and how each of us can preserve, protect and defend it. Let me start by introducing them.

[00:04:43] Randall Kennedy is Michael R. Klein professor at Harvard law school. Uh, he clerked for Justice Thurgood Marshall, and his most recent work is *Say It Loud! On Race, Law, History and Culture*. Greg Lukianoff is the president and CEO of FIRE, the Foundation for Individual Rights and Education, a nonpartisan organization, who's heroic mission is to defend the individual rights of students and faculty members at America's colleges and universities. He has coauthored most recently with Jonathan Haidt, of the New York Times best selling book, *The Coddling of the American Mind*. And Nadine Strossen is the John Marshall the second professor of law emerita at New York law school. She served as national president of the American Civil Liberties Union, from 1991 to 2008. Her most recent book is *HATE: Why We Should Resist it With Free Speech, Not Censorship*. Ladies and gentlemen, please join me in welcoming, uh, Greg Lukianoff, Randy Kennedy and Nadine Strossen.

[00:05:56] Greg, I'm going to jump in by starting with you. So just this morning, I wrote a piece in The Atlantic saying, "Elon Musk is right about the first amendment and Twitter." Uh, and it argued that, uh, all four of the reasons the Supreme Court has given for protecting free speech apply online as well as in the public square, and even though Twitter isn't required to respect the first amendment, because those words say, "Congress shall make no law", they don't say, "Elon might- Musk shall make no law", I said he was correct to say that Twitter should essentially follow first amendment standards. You've argued something similar in an open letter to Elon Musk. Tell our friends why you agree that Elon Musk should essentially follow the first amendment?

[00:06:39] **Greg Lukianoff:** [laughs]. Uh, thank you, Jeffrey. Uh, this is wonderful. I- there- there's no person and no institution that I can imagine, um, that- that- that des-deserves this more. The- this- uh, the old museum used to be right by my house, and I'm so glad that this, uh, that this is being used properly and will continue to exist. So, congratulations.

[00:06:58] Um, I am the rude American, um, who shows up in other countries and doesn't do the whole, "Well, you know, European system has its thing about freedom of speech, and we have our weird little thing, and of course you guys are better." I actually show up and very rudely

explain that the American first amendment is the longest, cleverest meditation on how you have freedom of speech in the real world. The jurisprudence is- in- includes truly some of the brightest people, um, in- in American history [laughs], if- if- if I could be so bold.

[00:07:27] Thinking about how you actually do it. So when people are trying to figure out how to regulate it, it's not that Elon Musk must, um, uh, abide by the first amendment, but if you want to, uh, actually see how you maximize freedom of opinion, while actually get- taking care of things like in- incitement and, um, uh, uh, harassment, et cetera, um, that's where you should look, because it is- it is a font of wisdom of how you actually make sure that- that opinion could be maximized, while not falling into the trap of viewpoint discrimination.

[00:07:57] And I actually took it one level further. Um, my coauthor, Johnathan Haidt and I both believe that social media is this major disruptive force. Like we were underestimating how big of a force it is, and it- and it's effecting every facet of- of our lives, globally. But so was the printing press. Um, and we're dealing with something where, that brought millions of people talking to each other, we now have added billions of people talking directly to each other. It's going to be disruptive. But I don't think we should give up on the idea that social media, when you have billions of people talking to each other, that it could be much more productive to furthering human knowledge, potentially.

[00:08:32] Um, so I think we've become too modest in our hopes for what social media could be. We're too focused, uh, on the negative side, and I- I would like to see, you know, Musk draw from the wisdom of the first amendment, but also think about a way that it could be a force for good.

[00:08:46] **Jeffrey Rosen:** Wonderful. Thanks so much for that. Uh, Nadine, I haven't asked you whether or not you agree, and it's time to acknowledge, this is, uh, you could even call it a radical position. I- I wouldn't say that it's shared by, uh, I wouldn't assume it's shared by most of our audience, or by most Americans. Do you agree with it or not?

[00:09:03] **Nadine Strossen:** I absolutely agree with the position. And let me say that I support not the first amendment, because the first amendment coexisted with massive censorship for the vast majority of its history. I support the Supreme Court's modern interpretation of the first amendment, not because it came from the Supreme Court, but because it accords with fundamental principles that maximize not only individual liberty and truth seeking, as Greg was elucidating, but is absolutely essential for promoting equality and human rights, especially for those who have traditionally been oppressed and marginalized. And Randy has written beautifully about this. None of our movements for equal rights could have gotten off the ground without a robust interpretation of the first amendment.

[00:10:06] And going to the connection that Jeff kept signaling, between, "We, the people" and the first amendment, as the Supreme Court has said, speech about public affairs, public issues, is more than a matter of individual self expression, important as that is. It is the essence of self government. As as the Supreme Court itself recognized, the most important platform now, as a

practical matter, not only for individual self expression, but also for self government, is online, social media in particular. And so, I would defend Musk's right to go a different direction. That is his first amendment right. But I join Greg's really powerful letter in urging him, for the sake of liberty, equality, human rights and democracy, please adhere to these now time-tested standards that the Supreme Court has worked out since the mid 20th century.

[00:11:18] Jeffrey Rosen: Thank you very much for that. All right, Randy, in the interest of viewpoint diversity, I'm just going to ask you to put on the table the argument on the other side, which of course begins with a claim that, uh, far from being a vehicle for political expression and thoughtful deliberation, then that can be, uh, a font of, uh, misinformation, of doxxing, and of harassment, and that, uh, values like equality and dignity are important online and should be respected. Say- say more about the argument on the other side, and then tell us what you think.

[00:11:53] Randall Kennedy: Thank you very much. It's wonderful to be here with, uh, colleagues and- and friends. And I'm going to answer your question- I'm going to answer the question, but before I do, I do want to have a- a salutation. I, um, you mentioned that I clerked for Justice Marshall. When I clerked for Justice Marshall, uh, Judge Luttig clerked for, uh, Chief Justice Burger. And back in those days, and now we're going back several decades, uh, I- I- I recall meeting a very gracious, young attorney. And, um, it's wonderful to, over time, see a gracious, young attorney, uh, hang on to that virtue and become a more mature but still very gracious, uh, mature jurist. And so it's really wonderful to see Judge Luttig here with us.

[00:13:07] Now, on this question about, uh, about Twitter, I'm going to say two things. And I- I- I think, uh, there may be something of a difference between my colleagues up here and me, and not a- not a faint difference, but a real difference. I would really underline what Nadine just said, but take it a step further. Uh, because there- there are some people who, in order to protect freedom of expression, want to actually impose obligations upon private institutions. So for instance, there are various states that have made- that have passed laws requiring private colleges and universities to adhere by first amendment precepts. There are some people that want to do the same thing with institutions like Twitter. I'm against that.

[00:14:13] Uh, it seems to me that for- in- in order to protect pluralism, we ought to respect private institutions as opposed to public institutions. It's a good thing to have a public sector governed by the first amendment, and a private sector. And the private sector can go, you know, one of two ways. Uh, private institutions could decide that they want to be more open than the first amendment, uh, would- would- would, uh, would- would require. Fine. On the other hand, it may be that a private institution wants to be more restrictive. In my view, fine. Again, for purposes of pluralism.

[00:15:03] Now, your- your second question had to do with, well, you know, what about the people who are saying, you know, there's disinformation, what about the horrible so-called hate speech. My view, and- and- and by the way, and that's real. That's real. Uh, that has costs. No question that that has costs. Um, I think, however, that on this one, I guess I would link up with my colleagues here and say, of course there's costs. Um, all good things in life cost something.

Um, but the protection of f- liberty, the protection of freedom is worth the cost of, and then, you know, you know, worth the cost of hurt feelings, worth the- worth the cost of people having to dig a little bit deeper to come up with, you know, the truth-truthful information as opposed to disinformation.

[00:16:12] There are real costs, but those costs are costs worth paying for liberty, for, um, the, uh, the- the freedom to- the freedom that we have become used to because of the past, you know, 75 years of the opening up of the American constitutional mind.

[00:16:39] Jeffrey Rosen: Beautifully put. There are costs, but those costs are worth paying for- for- paying for the freedom of the constitutional mind. So the four of us happen to agree that more or less, a first amendment standard online would serve first amendment values. And it's important to recognize that this is not a universally held view. But I want to turn now to the costs that Randy just identified.

[00:17:03] So Greg, your colleague, Johnathan Haidt just wrote a widely discussed piece in The Atlantic, talking about how the online world has become a version of Madison's Nightmare, virtual mobs convene quickly, and fake news travels further and faster than real news, and the vision of thoughtful deliberation, that is at the core of the documents that were drafted in that building, um, is not happening here. This is also relevant, Haidt argues for cancel culture, because when you have online mobs pressuring people to take the side that their ideological team takes, people are going to be chilled and cowered and not speak their minds.

[00:17:44] And Haidt says the solutions are very complicated, but online he identifies two. He says, uh, real name identification, so you can't post anonymously. And, um, not making it so easy to share. So Facebook has an algorithm that would discourage people from sharing immediately, you have to kind of cut and paste rather than share. And he doesn't say much more. You are, um, FIRE, you and FIRE are America's leading opponents of can-cancel culture, and you see how the online mobs can mobile it. Wh- and you also have written about Mill-

[00:18:20] Greg Lukianoff: Mm-hmm [affirmative].

[00:18:20] Jeffrey Rosen: Who recognized that the greatest threats to free speech may come not from the government, not from Congress, but from social sanctions, from the overwhelming homogeneity of- of public opinion.

[00:18:30] Greg Lukianoff: Yep.

[00:18:30] Jeffrey Rosen: So what to do about that side of the equation?

[00:18:34] Greg Lukianoff: I would like to practice the epistemic humility, um, that I always preach, and say that it's- it's a giant question. Um, in terms of what John is saying, one of the things that we found in our research, um, was, uh, in Coddling the American Mind, uh, was this

very strong connection between social media use and depression, particularly for young women. Um, and we think that's, the current way social media, uh, um, exists is very harmful, um, to mental health overall.

[00:19:02] Now, I'm a constitutional lawyer, I'm a first amendment person, so I tend to want the culture to change. I want top- I want bottom-up change for the most part. And John has a little bit more comfortable with the- with the top-down approach. Um, you probably, to a degree, need both. Um, but if, you know, I have a four and a six year old, both boys, if I had girls, I would do my best to make sure they weren't on Instagram, uh, for example. I- I do think that that creates FOMO, it creates, um, unrealistic body image, so all the problems that John is talking about.

[00:19:31] And- and it's a- it's a great piece. He- he talks about how, um, we've created the- the situation like the tower of Babel, that essentially we now live in a universe in which different generations, different groups, do not speak this same moral language, and we'd better get used to it, because we're never going to understand each other again [laughs]. A little scary. Um, I- and I- and I- I would like to say that I think he's completely wrong, and unfortunately I don't.

[00:19:57] Um, but I do think that when it comes to his ideas about anonymity, um, I like that he had some real nuance in there. He- he basically wants to make sure that there aren't bots and- and a lot of the fake accounts. Um, he- the- the- the verification system he's talking about, would- like you'd have to prove to someone at the company that you're a real person, but then after that you could have, uh, you could have anonymity. So it- it was a thoughtful way of doing it.

[00:20:20] But I think- I call it the anonymity see-saw. Um, that if you have a society that has such a good free speech culture, that you don't really have to worry about expressing your opinion, it won't ruin your life, then the argument for, uh, for against anonymity is actually pretty strong. But the more you live in a world in which you can get your career ruined, you can go to jail, um, you could be arrested, uh, which is a very- very real, uh, problem in so many other countries, particularly Turkey and Russia, um, that the more the argument for anonymity becomes strong.

[00:20:49] And at the moment, I think that the argument for anonymity is quite strong, because I have never seen a situation as bleak for freedom of speech since I've seen since 2020. Um, it was- when I first started this job in 2001, it was already worse on campus than I- than I expected. Um, it was unheard of, and I thought impossible for a tenured professor to get- to get fired for what they said, what they published, what they taught. We- I- I- we're now approaching about three dozen tenured professors fired just in the last, since about 2015. We have about 600 professors, uh, we're just about near the 600 mark, where there have been attempts to get them canceled since 2015. Two thirds of them, just since 2020, about two thirds of those are- they- they result in some kind of sanction. About one fifth of the time, the professors are getting fired.

[00:21:38] I've never seen anything even vaguely like the current situation we have, so what I'm afraid of is that if people will- will take my friend John's suggestions, look for a top-down solution that will work in the interest of greater conformity, as it so often does.

[00:21:54] Jeffrey Rosen: Uh, fascinating. Nadine, so- so what- what- what's your view about the connection between cancel culture and the online world? Do you agree with Greg, that it's as bad as you've ever seen? And you, uh, you think you've noted that, in your experience, some younger people are less willing to buy into the conformity. What can be done to prevent people from enforcing ideological homogeneity and dogma online and off the, uh, chills free expression?

[00:22:27] Nadine Strossen: Well, along with Randy and Greg and John Haidt, I defend freedom of speech not at all, because I think that speech can do no harm. That's a canard that is often put out there, um, as if I believed in punishable defamation, I would say a defamatory comment [laughs]-

[00:22:49] Jeffrey Rosen: [laughs].

[00:22:49] Nadine Strossen: ... about, uh, those of us who defend free speech, uh, including the Supreme Court. We recognize that speech can do great harm, and some speech is subject to punishment, by the way. I think a lot of the rhetoric about, uh, against Elon Musk adopting a first amendment type approach, is wrongly suggesting that that means that literally anything goes. I heard something on national public radio, I still defend its free speech rights-

[00:23:21] Jeffrey Rosen: [laughs].

[00:23:21] Nadine Strossen: ... but they had a commentator who said, "Well, you know, child pornography would be allowed." Child pornography is not protected under the first amendment, nor is targeted bullying or harassment, or for that matter, much defamation. Uh, uh, intentional incitement, threats. So the speech that does the greatest harm is already subject to censorship. If we have a first amendment standard, that would be true on social media as it is in the larger community.

[00:23:57] On the other hand, the first amendment also outlaws the most dangerous censorship, mainly viewpoint-based discrimination against ideas. And nobody's really talking about that when it comes to social media and the problems with how they have enforced their inherently vague and subjective so-called content moderation standards. Again, those who detract from Musk's proposal to follow first amendment norms, are putting forth these, uh, caricatures when they say, "Oh, you're defending harassment and bullying, and, you know, even child pornography", they never talk about or- or disinformation. These are all inherently vague and subjective concepts.

[00:24:53] We may- uh, and I can quote the most famous line from, uh, about obscenity, one of these, uh, subjective, uh, uh, concepts, everybody knows it, just- just as Potter Stewart famously said, "I cannot define it, but I know it when I see it." So everybody sees a different it. And that's true for misinformation, disinformation as well. And we have seen that, you know, one person's cherished scientific truth is considered disinformation by somebody else. And in a democracy, I

think the harm that is done by handing over to a powerful central gatekeeper, whether it be the government or whether it be Elon Musk, the danger of empowering that person to make these subjective decisions, uh, is- does more harm than the speech that would be protected under the first amendment.

[00:25:56] Jeffrey Rosen: Thank you so much for emphasizing the legal definitions that are at stake here, and for helping us understand that the first amendment does allow the banning of narrowly defined, uh, uh, false statements, targeted harassment. It was, uh, and now I'll just put on the table, the central first amendment standard, which says that speech can be banned if it's intended to and likely to cause imminent, serious injury. That comes from the Brandenburg case, and it means that Twitter's definition of incitement, which is speech that might lead to bad results, doesn't meet that standard, but you could, uh, ban, uh, imminent and intentional threats. And similarly, Twitter's definition of misinformation, which is speech that lacks context, doesn't meet first amendment standards, but you- you can ban, uh, defamation, defined as proven false, a deed that causes injury. So those are crucially important.

[00:26:54] Randy, just in an effort to tease out some, uh, uh, daylight between three great first amendment heroes, I- I understand that you may have a difference with your colleagues when it comes to dis invitations, and I want you to talk about that, and- and your thoughts about cancel culture online and to the degree that it is real-

[00:27:16] Randall Kennedy: Yeah.

[00:27:16] Jeffrey Rosen: ... what- what can be done about it?

[00:27:18] Randall Kennedy: Well, um, the- the mobilization of, um, the mobilization of private power is very important. Private power can, uh, you know, swash for freedom of expression. Governmental power can do that, but certainly private power can- can do that too, and we have to be careful about that. At the same time, we have to be careful that we don't, um, fail to recognize that what we may be describing as censorious bullying, that's one way of putting it. Another way of putting it is, well, you're just talking about people who are expressing themselves and saying things that you don't want to h-hear.

[00:28:14] So for instance, again, in order to bring out some difference, and again, I have just the greatest respect for my colleagues, and have joined with them in many campaigns, and look forward to joining with them in others, but to pick out a difference, FIRE has as one of its most important and most cited programs, a program on dis invitations. So FIRE very conscientiously notes every time, uh, there is a, you know, s-somebody is invited to a school, and in-invitation is issued. And then some other, some part of the school, some sector, some student group, maybe some faculty group says, "We don't want this person to come to our school. So we want you to dis-invite the person."

[00:29:16] Now, if you go to FIRE's website, FIRE views this unequivocally as a bad thing. Something bad in principal. I don't see it that way. Uh, why is an invitation irrevocable? Imagine the following. Imagine that you had a, um, a- a school that was devoted to... a- a film school. And let's suppose that the film school decided that they were going to have a lecture series, let's call it the Scorsese lecture series. And they wanted to have somebody who was, um, had a- had- had shown that they really knew a lot about producing films, and good films. And had written about it and spoke about it. And they wanted this person to inaugurate the lecture series. And they- they invited Harvey Weinstein.

[00:30:16] Jeffrey Rosen: [laughs].

[00:30:18] Randall Kennedy: And then some people say, no. And- and- and the invitation is- is- is delivered, by the way.

[00:30:24] Jeffrey Rosen: Yeah.

[00:30:24] Randall Kennedy: The invitation is delivered. The invitation is accepted.

[00:30:27] Jeffrey Rosen: Yep.

[00:30:29] Randall Kennedy: And then a group says, "No, you know, what- what were you thinking? We don't want Harvey Weinstein here for a variety of reasons."

[00:30:36] Jeffrey Rosen: Mm-hmm [affirmative].

[00:30:38] Randall Kennedy: In my view, w- that's not a matter of principal. I mean, there's- we have a political fight going on.

[00:30:45] Jeffrey Rosen: Yep.

[00:30:45] Randall Kennedy: Uh, you have somebody who expressed themselves, issuing the invitation. And then you have somebody else who expressed themselves by saying, "No, we- we don't want this person. We want- we want you to dis-invite the person."

[00:31:01] Jeffrey Rosen: Mm-hmm [affirmative].

[00:31:01] Randall Kennedy: I don't see that as a problem. And- and one, and I'll just end by saying, so this word censorious bullying, again, we need to be, it seems to me, more careful in distinguishing, um, true censorship, let me call it- **[00:31:20] Jeffrey Rosen:** Mm-hmm [affirmative].

[00:31:21] **Randall Kennedy:** ... from people expressing themselves and maybe giving voice to views that we don't like, and then we call that bullying.

[00:31:32] **Jeffrey Rosen:** Mm-hmm [affirmative]. Wonderful. A debate.

[00:31:35] **Randall Kennedy:** Sure, sure, yeah.

[00:31:35] **Jeffrey Rosen:** So, and- and- but- and- but- and in asking you to respond to it, of course, I want you to distinguish between what you think is true censorship and illegitimate, uh, uh, and- and, uh, a-appropriate expression of opinion. And then, Greg, you wrote a really powerful open letter recently, denouncing, uh, censorship efforts on the left and the right, from cancel culture on the left, to book banning on the right.

[00:32:01] **Greg Lukianoff:** Yes.

[00:32:01] **Jeffrey Rosen:** And you called out both sides for it, not having the courage of first amendment convictions. Tell us more about that.

[00:32:08] **Greg Lukianoff:** Oh, uh, should I talk about the dis invitation stuff first?

[00:32:10] **Jeffrey Rosen:** First the dis invitation-

[00:32:11] **Greg Lukianoff:** Okay, great.

[00:32:11] **Jeffrey Rosen:** ... stuff, and then you can broaden it out.

[00:32:12] **Greg Lukianoff:** Yeah. Um, so the dis invitation stuff, uh, there are- there are basically three different brands of it, and two I don't think Randy would disagree with me on. One is shout downs, um, when students show up and they shout down the lecture, they prevent people from getting in. Um, that's not okay. That has certainly no place at the university, and those- those have gone up by a lot. So that- that's that sort of-

[00:32:32] **Jeffrey Rosen:** Right.

[00:32:32] **Greg Lukianoff:** ... colloquial meaning of heckler, as we know.

[00:32:34] **Jeffrey Rosen:** Mm-hmm [affirmative].

[00:32:35] **Greg Lukianoff:** Um, it's not really, you know, people point out, not t-technical legal definition, but it's what people mean. The, um, the second one is where the school, partially because there is backlash, tells a group that really wants to invite somebody, and they haven't changed their mind on having, you know, this journalist, for example, come to school, that they

can n- they- they have to resend that dis- that invitation, and they make someone actually, make-make a group re-resend. And I- I- I don't think you disagree on that.

[00:33:00] I shared your opinion for years, and we would kind of laugh about dis invitation seasons, you know, the, uh, students deciding that they don't want this, um, you know, speaker on their campus, and they- they would protest and demand. Uh, and for most of my career, w- the response to it was they'd protest outside, they would let their displeasure know, but it wasn't a real push to don't let this person set foot on my campus. That happened a lot less often. And when it started to happen more and more often, when you already have a campus, you know, like Harvard is like 3% conservative, you know, where- where there's already relatively low viewpoint diversity.

[00:33:34] And then people really started to take notice when they focused on people like Condoleezza Rice in 2014, Christine Lagarde from the IMF, that really puzzled people. RRichard Birgen- uh, Robert Birgeneau, the head of- the head of Berkeley. And we started to realize that something really, that- that had- that ch- that isn't appropriate at a university. Like if you're saying that there's going to be some per- person who represents a perspective that's not, uh, that does represent well on my- on campus, so we have to bring this person from off campus. And if every time, um, students, uh, say something about this, they end up going, "no, no, no", uh, they end up giving in, that's not healthy for an academic environment.

[00:34:08] The attitude I think about controversial voices, and- and this is, and to be clear, we're not saying the students don't have a right to pro- to protest, they don't have a right to say dis invitation, but I do think that if every time, uh, this happens an administrator says, um, you know... that- that essentially when they're saying this person, like this speaker cannot come to my campus, um, I think that they should at least tell the students, it's like, well, then maybe we should- we've utterly failed you, um, as an institution. We have utterly failed you to have the- the curiosity about what people think. Because it's always valuable to know what people really think. And a lot of these people that you're demonizing, that- that might be on campus, they might actually have a surprisingly, you know, valid argument to make.

[00:34:49] So I think- I think it's partially the fact that- that it shows the wrong attitude for a university. And I- and I think, again, students should not be punished. They should be punished for- for blocking doors and- and- and shouting people down, but I do think it's unhealthy when you have an environment where, you know, no- no controversial speakers can come, um, if they're opposed by students. So that- that's my attitude of dis invitation. I think it's bad for the academic environment overall. And I think- I think they should be teaching students from day one that they should be curious... they- if that- if- if that per-person you hate is going to be on campus, go and listen and find out where they're coming from. Um, and it might deepen your hatred for them, or you might actually realize that, okay, at least I know- know a little bit more, um, of- of a view that's not usually represented on my campus. So that- that's why I'm concerned about dis invitations.

[00:35:34] Nadine Strossen: Could I push back against Randy's example-

[00:35:36] **Jeffrey Rosen:** Of course.

[00:35:36] **Nadine Strossen:** ... just very briefly before Greg goes to the other topic. Uh, Randy, the example that you gave, I think is fairly unusual against FIRE's database, in- in a- in a very factually significant way. Context is important. You're talking about something that, to me, is much more analogous to, uh, a commencement address. You know, you are- that- that it signals endorsement, that, you know, institution's endorsement of that person and that person's views, in a way that I think the standard variety of student group inviting or department inviting for purposes of engaging in an intellectual exchange. And I see that as involving more legitimacy in de platforming than if you're dis inviting just because the person has a controversial message, es- or especially if the person has ever said something controversial in a completely different context.

[00:36:33] **Jeffrey Rosen:** Yeah. Randy, your response?

[00:36:35] **Randall Kennedy:** Okay. So I would agree with your point about shouting down or blockades.

[00:36:44] **Jeffrey Rosen:** Mm-hmm [affirmative].

[00:36:45] **Randall Kennedy:** Um, and I would also agree, Nadine, with your point about, well, don't we have to be attentive to the context in which somebody is being invited.

[00:36:54] **Jeffrey Rosen:** Mm-hmm [affirmative].

[00:36:55] **Randall Kennedy:** In a lot of these cases, in a lot of these cases, it is an honorific sort of thing. And again, I would simply say that, you know, why is it that we are not asking any questions of the people making the invitations? They're sort of off the- off the radar screen.

[00:37:18] **Jeffrey Rosen:** Mm-hmm [affirmative].

[00:37:19] **Randall Kennedy:** Uh, in my, you know, they- they may be completely negligent, they may be stupid.

[00:37:24] **Jeffrey Rosen:** Mm-hmm [affirmative].

[00:37:26] **Randall Kennedy:** Uh, why- why aren't we questioning them? I think the students, uh, some of them in the event, some- some of the- some of the dis, you know, invitation- dis invitation campaigns, I think are bad. But it seems to me that, uh, some of them are not. Some of them are thoughtful. And ultimately though, for our purposes, again, the issue is, you know, is this... you conceited, it's not a matter of rights, it seems to me it's a- it's a political- it's a political matter, and we need to, again, sort of, you know, you call something censorious, you, you know,

s- you- it- on your website you talk about people engaged in dis invitations shaming people.
Greg.

[00:38:26] **Greg Lukianoff:** Yep.

[00:38:27] **Randall Kennedy:** FIRE-

[00:38:27] **Greg Lukianoff:** Oh, they can shame people.

[00:38:28] **Randall Kennedy:** ... that I support.

[00:38:29] **Greg Lukianoff:** Yeah.

[00:38:30] **Randall Kennedy:** Shames people.

[00:38:31] **Greg Lukianoff:** Uh-huh.

[00:38:32] **Nadine Strossen:** Yeah. Yeah.

[00:38:32] **Randall Kennedy:** FIRE shames my university.

[00:38:36] **Greg Lukianoff:** They have complete right to shame people, but-

[00:38:37] **Randall Kennedy:** And- and-

[00:38:37] **Greg Lukianoff:** ... but it- [00:38:38]

Randall Kennedy: ... by the way-

[00:38:38] **Greg Lukianoff:** Yeah?

[00:38:38] **Randall Kennedy:** ... isn't- isn't shame sometimes good?

[00:38:41] **Nadine Strossen:** Yeah.

[00:38:41] **Greg Lukianoff:** Oh, abso-absolutely.

[00:38:43] **Randall Kennedy:** Okay.

[00:38:43] **Greg Lukianoff:** But what I'm saying is, I think it's unhealthy for the academic environment to just- to- to- and the problem is, in a lot of cases, the administrators are

encouraging them the- to, uh, dis invite people. That's what happened with the Condoleezza Rice thing. That- that started with administrators actually being kind of like, "This person should be speaking on our campus." So I think sometimes we look at this a little bit too critically, and I think a healthier campus environment, the attitude would not be, "Don't come to my campus", it's show up and ask hard question.

[00:39:08] Randall Kennedy: Yeah.

[00:39:09] Jeffrey Rosen: Okay.

[00:39:09] Randall Kennedy: One- one- one-

[00:39:11] Jeffrey Rosen: Please, Randall, this is great.

[00:39:12] Randall Kennedy: ... because I don't want- I don't want people to get the wrong...

[00:39:14] Nadine Strossen: [laughs].

[00:39:15] Randall Kennedy: When you were talking about your change of mind.

[00:39:19] Greg Lukianoff: Mm-hmm [affirmative].

[00:39:21] Randall Kennedy: I mean, I've had a change of mind too.

[00:39:22] Greg Lukianoff: Mm-hmm [affirmative].

[00:39:23] Randall Kennedy: So- because for a number of years, I'd say until about the last... there was a long span of time-

[00:39:30] Greg Lukianoff: Mm-hmm [affirmative]

[00:39:30] Randall Kennedy: ... where, frankly, I mean, you know, I- I- I know a whole bunch of folks with- with FIRE and ACLU too-

[00:39:38] Greg Lukianoff: Mm-hmm [affirmative].

[00:39:39] Randall Kennedy: ... and I thought, oh, you know, there are a lot of universities and colleges in the United States.

[00:39:44] Greg Lukianoff: Mm-hmm [affirmative].

[00:39:45] **Randall Kennedy:** There are a lot of students. Things are going to happen.

[00:39:48] **Greg Lukianoff:** Mm-hmm [affirmative].

[00:39:48] **Randall Kennedy:** These folks were making a mountain out of a molehill.

[00:39:51] **Nadine Strossen:** Yeah.

[00:39:52] **Randall Kennedy:** I- really, I did, I thought that. I'd say, until about- about four or five years ago. And then the episodes started mounting so- so much.

[00:40:07] **Greg Lukianoff:** Mm-hmm [affirmative].

[00:40:07] **Randall Kennedy:** And started involving institutions with which I was more familiar. I think that a while ago, frankly, I think there was a certain snobbery on my part.

[00:40:17] **Greg Lukianoff:** [laughs].

[00:40:17] **Randall Kennedy:** No, I'm serious.

[00:40:18] **Greg Lukianoff:** All right.

[00:40:18] **Randall Kennedy:** I mean, you know, it was a certain sort of snobbery. I'd read something in the Chronical of Higher Education about something happening, and I'd say, "Well, what do you expect?"

[00:40:26] **Greg Lukianoff:** [laughs].

[00:40:26] **Nadine Strossen:** [laughs].

[00:40:27] **Randall Kennedy:** You know, those- those people are hicks.

[00:40:29] **Nadine Strossen:** [laughs].

[00:40:30] **Randall Kennedy:** But then...

[00:40:31] **Greg Lukianoff:** [laughs].

[00:40:32] **Randall Kennedy:** ... take a look now.

[00:40:33] **Greg Lukianoff:** Yeah.

[00:40:34] Randall Kennedy: And, you know, the leading institutions-

[00:40:38] Greg Lukianoff: Yeah.

[00:40:39] Randall Kennedy: ... uh, have this problem, and it is a big problem, of, uh, you know, sort of, uh, ideological, uh, conformity. Uh, people really wanting to stay away from certain sorts of boundaries, not even asking questions when they have questions.

[00:41:03] Greg Lukianoff: Mm-hmm [affirmative].

[00:41:04] Randall Kennedy: And so, you know, I've- I've- I've changed.

[00:41:08] Greg Lukianoff: Yeah. And- but it- and it's only because it's gotten so much worse. I mean, like the- if you could look at FIRE in 2012, we- we were finally going to see the table for reforms to speech codes, we were helping things. We- we were- we were pushing for a reform of the department of education. And like there were all these things that- that we've achieved. The- decreased the number of speech codes. There used to be 75% of schools had ludicrously, uh, by- by a first amendment standard on constitutional speech codes. We've gotten that down to like 19%. Like we've really have great success. What we didn't see coming as strongly as we did, was that the students themselves would go from being the most reliable constituency for free speech on campus, to the ones who are sometimes doing the shouting down-

[00:41:46] Nadine Strossen: But-

[00:41:46] Greg Lukianoff: ... which- which is greatly concerning.

[00:41:47] Nadine Strossen: ... that's why this wonderful first amendment, for it's- despite it's being essential for protecting meaningful freedom of speech, is necessary but not sufficient.

[00:42:00] Greg Lukianoff: Mm-hmm [affirmative].

[00:42:01] Randall Kennedy: Mm-hmm [affirmative]. Free speech culture.

[00:42:01] Nadine Strossen: And that's why we have to go beyond it. In the private sector, going back to where we started with social media, but creating a culture on campus, where we recognize, every time one of us says something, it might deter somebody else from saying something, but we want to create a robust culture where people are encouraged to participate fully and freely and equally, no matter who they are and no matter what they believe. And we can only do that through education. I- FIRE's going to continue to win the first amendment lawsuits, but that's not going to be enough.

[00:42:38] **Greg Lukianoff:** Not enough. Do you want me to talk about the law- the laws really quick?

[00:42:41] **Jeffrey Rosen:** You know, I'd love to, but we have three- [00:42:42]

Greg Lukianoff: Yeah.

[00:42:42] **Jeffrey Rosen:** ... and a half minutes for closing thoughts.

[00:42:44] **Greg Lukianoff:** Sure.

[00:42:44] **Jeffrey Rosen:** So this is what I'm going to-

[00:42:45] **Greg Lukianoff:** [laughs].

[00:42:45] **Nadine Strossen:** [laughs].

[00:42:46] **Jeffrey Rosen:** And here we do, we- we end on- on time. Let me ask each of you to reflect on Nadine's, um, central point, how to create a culture of free speech, given the incredible gap between the majestic, inspiring words behind us. Between the Supreme Court and the court's nearly unanimous embrace of our classical first amendment tradition, and a totally different culture on the right and the left, which rejects this tradition.

[00:43:22] And Nadine talks about education, and Madison insisted that instructing people not only in the substance of principals of free speech and why it's important, but the habits of civil dialogue, of learning how to listen to arguments with whom you disagree, was crucial. And that's what we're trying to do here at the center, and that's why it's so incredibly appropriate and neat that the tablet should be here, but each of you are on the front lines of this, how would you create a culture that respects free speech? Greg?

[00:43:54] **Greg Lukianoff:** I- I think metaphors matter, um, and marketplace of ideas is a good metaphor. Um, I- but I don't think it goes quite- that it really captures one of the key values of freedom of speech. And I don't see this enough in the scholarship. Um, a lot of times people get into the platonic mindset, and they think that de- the debate and discussion is only valuable if you can figure out the platonic form of the truth, and that's a silly, very academic way of looking at it.

[00:44:17] The most important value of freedom of speech, and my- my preferred term sounds fancy, the lab and the looking glass, kind of a humanist point of view, but it's also very simple. It is, and it's this. It is always important to know what people really think, period. And not even, uh, not, uh, not even if, but especially if it's troubling, especially if it's strange. It's better to know. You are not safer for knowing less about what people really think. That's false. That's-

that's- that's ostrich thinking. So I do think that thinking about the way we talk about freedom of speech, and just remembering that knowing, know- knowing what's in the minds of your fellow citizens by itself is a great value, even if you're going to learn some stuff that scares you.

[00:44:58] Jeffrey Rosen: Mm-hmm [affirmative]. Hear, hear. Uh, Nadine?

[00:45:01] Nadine Strossen: Well, too many people believe in freedom of speech for me, but not for thee.

[00:45:07] Jeffrey Rosen: [laughs]. [crosstalk 00:45:08]

[00:45:08] Nadine Strossen: What we have to convince people of, is you're not going to have freedom of speech for me, unless there's also freedom of speech for thee. This is very oversimplified, but in general we have too many liberals and progressives and democrats, who are supporting cancel culture on campus. We have too many conservatives and republicans, who are supporting book banning and laws restricting what can be taught in schools and even on campus, in terms of the most important topics, race and gender.

[00:45:43] Jeffrey Rosen: [crosstalk 00:45:44]

[00:45:44] Nadine Strossen: I wish that, and we don't see enough cross fertilization, right? Each side will critique what the other one is doing, but there is not enough self critique. I wish there would be [laughs] a detente, where people recognize, if we are going to have the kind of freedom of speech for the kind of people and ideas that we support, then we're going to have to let those other people have exactly the same amount of freedom.

[00:46:09] Jeffrey Rosen: Wahoo. Amen [laughs]. Uh, last word in this great discussion, to you, Randy.

[00:46:21] Randall Kennedy: I'll be quick. Number one, I hope that we'll remember Nadine's comment, first amendment, essential as it is, necessary but not sufficient. Not enough. It's, uh, it's- it's absolutely essential, but we need even more. That's number one. Number two, on the question of how do we inculcate, um, a more vital, uh, appreciation for freedom of expression and just, you know, freedom of thought, I think we need to show it. We need to see it. And one of the great things that you are doing-

[00:47:08] Jeffrey Rosen: Mm-hmm [affirmative].

[00:47:09] Randall Kennedy: ... is having meetings like this, where people actually debate, and you can see it.

[00:47:19] Nadine Strossen: Wahoo.

[00:47:19] Randall Kennedy: Thank you.

[00:47:20] Jeffrey Rosen: Well, thank- thanks to each of you for providing a model of civilized, engaged, thoughtful and mind expanding debate. In a moment, we're going to hear from Jan Neuharth and Judge Luttig, and- and we're going to dedicate the tablet. But for now, please join me in thanking our free speech heroes.

[00:47:39] Nadine Strossen: [laughs]. Thank you.

[00:47:40] Jeffrey Rosen: And now it's time to dedicate the first amendment tablet. On behalf of my colleagues at the National Constitution Center, friends, it's so meaningful to welcome you to convene for this significant ceremony. And to begin our dedication, it's my greatest pleasure to introduce Jan Neuharth, the chair and CEO of the Freedom Forum, and member of the National Constitution Center's board of trustees. It was Jan's vision that led the Freedom Forum to donate the first amendment tablet, uh, to the NCC, and transport it from its original home in Washington DC, to this magnificent space, overlooking independence hall.

[00:48:49] Jan, you've been an invaluable partner, a friend, and a fellow cheerleader for the first amendment, and it's so meaningful that you've made this possible, and I'm so looking forward to all of the incredible work we're going to do together to create a first amendment gallery, to adorn this tablet and to inspire visitors for generations to come. Ladies and gentlemen, please join me in welcoming Jan Neuharth.

[00:49:22] Jan Neuharth: Thank you, Jeff, and good afternoon. It is truly an honor to stand here before you today at the National Constitution Center in Philadelphia, the birth place of democracy. I'm Jan Neuharth, chair and chief executive officer of the Freedom Forum, and what a thrill it is to see those 45 words of the first amendment being displayed once again. And in such grand fashion, here in the heart of the city, just steps from independence hall, where the declaration of independence and constitution were created and signed, where the liberty bell is displayed, and where the bill of rights was first amendment imagined.

[00:49:59] The tablet was erected in 2007 on the façade of the Newseum in Washington DC, where it stood for over 13 years. Nearly 10 million visitors experienced the Newseum, and through our exhibits and programs they gained valuable insight into how the core freedoms of the first amendment, religion, speech, press, assembly and petition, applied to their every day lives.

[00:50:24] When the museum closed, the question my colleagues and I heard repeatedly was, what will happen to the first amendment tablet? And that was no surprise, since this 50 ton, 74 foot tall tablet made of pink Tennessee marble loomed large in the nation's capital, and over the years became one of the more iconic sights in the city. Situated on Pennsylvania avenue, between the White House and the US capital, the tablet was a daily reminder to all who passed by it, including our nation's lawmakers, of the first amendment freedoms guaranteed to all Americans.

[00:51:02] The tablet served as a backdrop to three presidential inauguration parades, and countless marches and demonstrations, and it was the setting for numerous programs and rallies. Powerful and evocative images of freedom were often projected onto its façade, and it provided a grand platform for those speaking out and exercising their first amendment rights of speech and assembly.

[00:51:27] So when faced with a question of what would happen to the tablet, where it would go, it was important for us to find a home where it would be on public display, and where millions of Americans could continue to expand their understanding and appreciation of their first amendment freedoms. And we could not have found a better spot than right here at the National Constitution Center, whose mission is to increase American's awareness and understanding of the constitution. See, now- now you know [inaudible 00:51:57].

[00:51:59] It's a fitting home, where millions of Americans will continue to increase their appreciation of our first amendment freedoms, and it's a major step for the Freedom Forum, as we reach beyond Washington DC to further our mission. The work of the Freedom Forum continues with our goal of fostering first amendment freedoms for all, and raising awareness of those freedoms through education, advocacy and action, sharing the stories of Americans who have exercised their rights to ignite change.

[00:52:30] We were encouraged by a recent survey commissioned by the Freedom Forum, which revealed that overall awareness of the first amendment and the five freedoms it protects is growing. But in today's politically polarized and social media connected world, America's first amendment values are being tested. So the work of the National Constitution Center and the Freedom Forum continues, as we inform citizens about how the constitution and the first amendment unite us all.

[00:52:59] I want to thank Jeff Rosen and his team here at the National Constitution Center, who have been committed and engaged partners, and we look forward to future collaborations as we continue vital and impactful conversations like this one here tonight, about the role of the first amendment and the constitution in today's society. Whether displayed on Pennsylvania avenue, or in Philadelphia, Pennsylvania, the 45 words engraved on this tablet are more important and vital than ever, and I'm so honored to be here with you today to officially welcome the tablet to its new home.

[00:53:47] Jeffrey Rosen: Thank you, Jan, for those heartfelt remarks, and for making this happy and meaningful day possible. It's now my greatest honor to introduce Judge J. Michael Luttig. Judge Luttig served on the US Court of Appeals, for the fourth circuit, for 15 years, where he became one of the most respected appellate judges in America. I came to know him many years ago, as a journalist, where I wrote about his principled commitment to follow the constitution wherever it may lead. He has demonstrated that commitment since leaving the bench, where his principled constitutional advice has preserved, protected and defended our constitutional structures during a time when they have been severely tested.

[00:54:47] Future historians will record how fortunate we were that Judge Luttig summoned the better angels of our constitutional nature, and helped us preserve the constitution and the rule of law at a pivotal time for our country. And now he, and his wonderful wife, Elizabeth, have given a great gift to the American people, by helping us bring this magnificent tablet to Philadelphia, where it will inspire visitors for generations to come. Ladies and gen- gentlemen, please join me in thanking and welcoming Judge Luttig.

[00:55:26] Judge Luttig: Thank you, Jeff. You know, um, I'm the judge because I'm supposed to be wiser than the rest of you. Um, right now you're probably wondering, if I'm so wise, why is it that I am following Jeffrey Rosen, Jan Neuharth, and three of the most distinguished first amendment scholars, uh, in the United States of America. Before you draw the wrong conclusion, uh, let me tell you that I tried to speak first, and Jeff refused. He knew what was going to happen as well as I did. Jeff Rosen, a heartfelt thanks to you and to the National Constitution Center for that wonderfully over exaggerated, and thus all the more appreciated [laughs] introduction.

[00:56:42] Elizabeth and I never thought this day would come for us, that we've wanted for this day our entire lives, when we might be able to make at least a very small difference in this very big world of ours. For Elizabeth and me, the journey to today began almost a half century ago, when I first walked into the Supreme Court to intern with Warren E. Burger, the 15th Chief Justice of the United States. Over the succeeding years, and until he passed in 1995, Elizabeth and I were to have the privilege of being close friends with the former Chief Justice. He, as you would suspect, liking Elizabeth far more than he liked me, the chief adored Elizabeth.

[00:57:35] As we know, Warren Burger stepped down from his high office to assume what to him was an even higher office, chairman of the bicentennial of the constitution. If the chief were here today, he might well say that the chairmanship of the bicentennial was his dream job. But he would say that this National Constitution Center was his lifetime dream. He would marvel at this resplendent epitaphs that holds in sacred trust the history, but also the future, of our constitution. This center, who's inviolable mission is to educate Americans and the world about the constitution of the United States. As all of us are today, Warren Burger would be utterly captivated by this heroic scale monument in tribute to the first amendment.

[00:58:43] From the Constitution Center's grand hall, this tablet will now majestically overlook independence hall, the birthplace of America itself, where both the constitution and the declaration of independence were civilly debated and then signed in 1787 and 1776 respectfully. This tablet will forever pay homage to the framers of our constitution, who wrote the charter for American governance, the blueprint of our United States. From this place, the first amendment tablet will grace the National Constitution Center in perpetuity, inspiring all who cherish freedom.

[00:59:37] The 45 sacred words of the first amendment arrayed before us in this iconic tablet, enshrine five of our nation's most precious freedoms. Freedom of religion, freedom of speech, freedom of the press, freedom of assembly, the freedom to petition our government. And Jeffrey

Rosen may soon tell us, freedom on conscience, without which all other freedoms would amount to little. There are no words adequate to describe this stone engraved tablet, into which these 45 sacred words are permanently inscribed. Nor will we attempt today to conjure adequate words. For today, we will let these at once prosaic and poetic words speak for themselves, without attempted embroidery. But we will make two observations.

[01:00:42] The first, gazing upon this this tablet, it is entirely appropriate to suppose it the secular equivalent from our forefathers, of the tablets of law given to Moses on Mount Sinai. Tablets that the book of Exodus tells us were inscribed by the finger of God. It is especially appropriate to suppose the tablet thusly, because we may take judicial notice, these prophetic words were in fact divinely inspired. This is undoubtedly why Jeffrey Rosen first anxiously ascended the grand staircase to view the tablet, while purposely listening to the glorious Ninth Symphony, Beethoven's choral finally for the triumph of peace over war, union over separation and division. Profound imagery, this.

[01:02:02] The second observation. We will observe that there is no more constitutionally inspiring and awe inspiring landscaped in all of America than this splendorous panoramic of independence mall, with independence hall and the nation's Constitution Center standing vigil at either end. And now, overlooking it all, this majestic monument to the first amendment to the United States constitution, finally displayed in its full constitutionally context. Now, listen to what I say next, please. This is the vision of the Nation Constitution Center's inspiring visionary, Jeffrey Rosen, for this hallowed birthplace of America and her free people. And today, Jeffrey's vision becomes reality for the National Constitution Center and for our country.

[01:03:23] Elizabeth and I are honored beyond words to have been asked by the Constitution Center to make possible the relocation of this iconic 50-ton marble engraved, 50-ton marble engraved first amendment tablet, to its permanent and rightful home, here in the Constitution Center's grand hall overlook. We deem it a privilege to be a footnote to this monumental labor of love of our constitution, by the National Constitution Center.

[01:04:00] Elizabeth and I have always tried to give of ourselves to others. So many have given so much more of themselves to us. For most of our lives, it was harder to give much to others from our means, and we regret that. For as to both self and means, it is so much more blessed to give than to receive. Or as Winston Churchill put it, slightly less biblically, "We make a living by what we get. We make a life by what we give." Elizabeth and I are blessed by this gift. Not by the capacity for this gift, blessed by this gift itself. Beyond our family, we expect this to be one of, if not the most gratifying and fulfilling commitments of our lives, just as we expect today to be one of the most gratifying and fulfilling days of our lives.

[01:05:12] But we think of our modest gift toward this iconic tablet of law, not as a gift from us, but rather as a gift from the American people, a gift on their behalf, if you will, of which we are but the gifting agents. We think of ours as a gift to our country, as much as a gift to the National Constitution Center. And this is how we hope our small contribution to this historic monument, to our constitution's first amendment will be remembered.

[01:05:53] Jeffrey Rosen, I have waited almost 30 years for this moment, when I could turn the tables on you finally. In return for your lamentably accurate first amendment protected press coverage of me for over these many years, it is for this reason that I will end where I begin. It is Elizabeth and I who thank you, Jeffrey, and the National Constitution Center, for affording us this honor and this privilege. It is we who are grateful to you for the opportunity to bring home to Philadelphia and the National Constitution Center this exulting monument and memorial to the first amendment, from which place this tablet will inspire all who aspire to freedom, America and Americans and the people of the world, for generations and generations to come. Please accept our heartfelt thanks, Jeffrey, and the National Constitution Center.

[01:07:35] Jeffrey Rosen: Judge, it was so meaningful to be thanking you and watching you accept the gratitude of the- all of us who have convened here, framed by independence hall. And as you say, this will inspire all who aspire to freedom, and it is appropriate that it be here, in this space, providing this context. And what I want to do now, at the end of this meaningful ceremony, is to talk about that context. At the beginning of our convention, I asked you to look to your right and look at independence hall, and then to the words of the tablet. And I- what I want to do, because I think I have the responsibility to, is to talk about the connection between the first amendment, the declaration and the constitution.

[01:08:32] What is the connection between the first amendment and the declaration and the constitution? The connection is freedom of conscience, as the judge said, which the founders considered first among the unalienable rights that were enshrined in the preamble to the declaration, and first among the blessings of liberty that were enshrined in the preamble to the constitution. Now, how do we know that the rights of conscience, as the founders called them, were first among the unalienable rights and first among the blessings of liberty? We know that from two sacred texts, that I want to talk to you about now, as we dedicate the first amendment tablet. And those texts are Thomas Jefferson's Bill For Establishing Religious Freedom in Virginia, which he drafted in 1777, and Justice Brandeis' opinion in *Whitney versus California*, which he drafted in 1927.

[01:09:29] So Jefferson drafted his Virginia bill months after he returned to Philadelphia after drafting the declaration. He considered the religious freedom bill among the three accomplishments of his life significant 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 at the time, 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 and Jews and other dissenters could be denied the freedom to marry or have custody of their children.

[01:10:17] Jefferson proposed not only to disestablish the Anglican church and remove all criminal punishments for decent, 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 order, but it lacks all power to intrude into the field of

opinion. And Jefferson's bill set out four reasons why government can make no law that constrains our freedom of speech, conscience, of opinion.

[01:10:56] I learned, after reading Jefferson and reading Brandeis, that those four reasons that Jefferson identified were summed up by Justice Brandeis in the Whitney case, because he'd read Jefferson's draft bill in the summer of 1926, before writing Whitney in 1927. And these four reasons are the four principal reasons that the Supreme Court has developed since then for why free speech matters. And here are the four reasons that are in Jefferson's bill, and in Brandeis' opinion.

[01:11:27] One, freedom of conscience is an unalienable right, because people can only think for themselves. Two, free speech makes representatives accountable to we, the people. Three, free speech is necessary for the discovery of truth and rejection of falsehood. And four, free speech allows the public discussion necessary for democratic self government. So let's review each of Jefferson's four reasons. And it's just remarkable, they're right there. It's a short document, and he lays them all out with exquisite clarity.

[01:12:03] One, freedom of conscience is an unalienable right. Here are Jefferson's words in the first sentence of his draft, "Well aware that the opinions and beliefs of men depend not on their own will, but follow involuntarily the evidence proposed to their minds", Jefferson wrote, "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 is arguing that freedom of conscience is, by definition, an unalienable right, a right that we can't alienate or surrender or give up to government, because our opinions are the involuntary result of the evidence contemplated by our reasoning minds. We can't give presidents or priests or teachers or fellow citizens the power to think for us, even if we wanted to, because we're endowed as human beings, by our creator, with the capacity to reason. And therefore, we can't help thinking for ourselves.

[01:13:23] Now, we know that Madison, the drafter of the first amendment, shared Jefferson's views on this point, because he echoed them exactly in his memorial and remonstrance against religious assessments in 1785, which was what persuaded the Virginia legislature to pass Jefferson's bill. And this is Madison's language, he's saying the same thing in slightly fewer words, "The rights of conscience are alienable", Madison wrote, "Because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men."

[01:13:59] Reason two. 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 deemed themselves fallible and uninspired, as Jefferson put it, will always try to impose their opinions and modes of thinking on others. And Jefferson's prediction came true, in the controversy over the alien and sedition act 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, so we know that as the drafter of the first amendment he agreed with him in his Virginia resolution, criticizing the sedition act, which said that the sedition act "Out to produce universal alarm, because it is leveled against that right of freely examining public charac-characters and measures", which Madison said is the only effectual guardian of every other right.

[01:15:12] Three. 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 reason, deliberation, to distinguish truth from error. In words that are inscribed in marble on the Jefferson memorial in Washington, "Truth is great", Jefferson said. "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."

[01:15:55] Reason four. Free speech allows the public discussion necessary for democratic selfgovernment. Jefferson believed that in a democracy, all citizens have an equal right and responsibility to exercise their rights of conscience. As he put it in his Virginia bill, proscribing any citizen as unworthy of the public confidence, by layering upon him an incapacity of being called to offices of trust, unless he professed or renounced 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.

[01:16:38] Now, on the Supreme Court, in the greatest free speech opinion of the 20th century, Justice Louis Brandeis distilled Jefferson's four reasons for protecting free speech into a few paragraphs of constitutional poetry. And in the Whitney case, 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. And 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 people to break the law.

[01:17:23] And Brandeis, having read Jefferson the previous summer, adopted and refined Jefferson's standard for ensuring that government could only punish overt acts of law breaking, not the expression of dangerous opinion. And this is the crucial test that Jefferson, uh, inspired Brandeis to adopt. 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 free speech to free men from a bondage of irrational fears. To justify suppression of speech, there must be reasonable ground to fear that serious evil will result if a free speech is practiced, and there must be reasonable ground to believe that the danger apprehended is imminent."

[01:18:14] Brandeis' inspiring test was based on his Jeffersonian faith in the power of what he called free and fearless reasoning to expose falsehood through public discussion. If there be time to expose through discussion the falsehoods and fallacies, to overt the evil by the process of

education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

[01:18:42] Brandeis' test is finally adopted by the Supreme Court in the Brandenburg case in 1969, which held, as we were discussing earlier, that government can ban speech only if it's intended to and likely to cause imminent serious injury. And as a result- and as a result of these inspiring words, the US Supreme Court now protects free speech more vigorously than any other judiciary in the world.

[01:19:08] And then Jeff- then Brandeis summarized Jefferson's four reasons, um, in this crystalline paragraph. I've now done it enough times as a party trick, that I think I can recite the paragraph from memory of- met- several- many of you have heard me do it. But it's important, as an act of consecration at this moment, to recite Brandeis' words. And now that I do it, I want you to listen closely to every word, and you'll hear the four reasons that I just identified, from Jefferson, about why free speech is important. Conscience is an unalienable right. It is necessary for political accountability. It's necessary for the discovery and spread of political truth, and it's necessary to allow truth to vanquish error.

[01:19:53] So here's Brandeis. And now you see the importance of the place. Brandeis begins by talking not about Madison and the constitution makers of 1787, but about Jefferson and the declaration writers of 1776. And I'm going to inspire myself, if I may, by, as I recite this, looking not at you but at independence hall, with the words behind me, because this is significant.

[01:20:22] Those who won our revolution believe 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 believe liberty to be the secret of happiness, and courage to be the secret of liberty. That's from Pericles funeral oration. They believe that liberty 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 threat to freedom is in inert people, that public discussion is a political duty, and that this should be a fundamental principal of the American government.

[01:21:30] You see the connection. I hadn't seen it before, between the first amendment, the Virginia bill, the constitution and the declaration. And that's why it is right and appropriate that these words are here. Now, just a few final thoughts, and then we will close.

[01:21:47] This paragraph shows that all four of Jefferson and Brandeis' reasons for protecting free speech are based on an enlightenment faith in reason itself. The first amendment is based on the faith that people will take time to cultivate their faculties of reason, through education and public discussion, of the kind of convening that we're doing now. It's based on a faith 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

fair- fact take time for discussion and deliberation, rather than making impulsive decisions based on passion, rather than reason.

[01:22:32] As we all know, and as we all have been discussing, this founding faith in reason is being questioned in our polarized age of social media. Twitter, Facebook and other platforms are being based on a business model that's now being called enrage to engage. They've accelerated public discourse to warp speed, creating virtual versions of a mob. Inflammatory posts based on passion travel further and faster than arguments based on reason. And rather than encouraging deliberation, mass media at times undermines it by creating filter 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.

[01:23:25] But as you've heard, from my inspiring colleagues, here at the National Constitution Center, by contrast, we're proud to reaffirm the faith and reason deliberation by consecrating these 45 words that will shine forever in this hallowed space. As a vital platform for non partisan constitutional educational and debate, as judge Luttig said. 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 of the center of American life can all of us exercise our right and duty to make up our own minds.

[01:24:13] And so, like Jefferson and Brandeis, like Frederick Douglas and Ruth Bader Ginsberg, like all of the great free speech heroes of American history, and like Jan Neuharth and Judge Michael Luttig, we are dedicated to preserving, protecting and defending what Jefferson called the illimitable freedom of the human mind. And now, let me consecrate this tablet by expressing this hope. 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.

[01:25:07] On behalf of all of us at the National Constitution Center, thank you again, Jan Neuharth, Judge Luttig, all my superb colleagues who made this spectacular, meaningful and permanent installation possible, thank you for this gift to the American people, and thanks all of you for joining us. Thank you.

[01:25:35] Today's show was produced by Tanaya tauber, John Guerra, Melody Rowell, Lana Ulrich, and engineered by David Stotz. Research was provided by Kevin Closs, Sam Desai, and Lana Ulrich. Please rate, review and subscribe to both We the People and Live at the NCC on Apple podcasts, and check out the resource page for this wonderful first amendment dedication ceremony. It spreads so much learning and light. On behalf of the National Constitution Center, I'm Jeffrey Rosen.