



## How Free Speech Under the First Amendment Developed

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**[00:00:00] Jeffrey Rosen:** Hello, friends. In honor of the 234th anniversary of the ratification of the constitution, The National Constitution Center has launched an exciting crowdfunding campaign. We are now up to 499 donations from all 50 states. I'm thrilled to share that Wyoming generously came through and we've now received support from all 50 states in the union, uh, uh, including, uh, the Northern Mariana Islands, Canada, China, Israel, and Switzerland for a total of \$72,551. Let's keep it going. If you haven't donated yet, show your commitment to lifelong constitutional education. Think about how much learning together on We the People means to you and signal your support with a donation of any size, \$5 or \$10. If everyone contributes even a small amount, we will reach our goal. And thanks to those of you who are signing up for recurring monthly donations of \$5 or \$10 a month, that makes a huge difference as well.

**[00:01:04]** Please go to [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople), that's all one word, all lower case, and donate what you can to show your commitment to lifelong learning and light, and you're gonna hear a lot of it on today's episode, here it is.

**[00:01:23]** Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people. The National Constitution Center is launching an initiative to explore the history and meaning of the First Amendment and its current relevance anchored by the inspiring 50 ton First Amendment tablet which we've just installed at the Constitution Center overlooking Independence Mall.

**[00:02:02]** Today on We the People, I'm so excited to convene two of America's greatest First Amendment scholars to teach us about some of the most important Supreme Court cases involving the First Amendment. Each of them has recommended, uh, four cases. I had the pleasure of reading them as, as homework for the conversation and you can too after the show. And it's so meaningful to learn about the principles and applications of the First Amendment from these two great scholars. Robert Post is Sterling Professor of Law at Yale law school and author of *Citizens Divided*, a constitutional theory of campaign finance reform. Robert, thank you so much for honoring us by joining We the People.

**[00:02:49] Robert Post:** It's a pleasure to be here, Jeff.

**[00:02:51] Jeffrey Rosen:** And Keith Whittington is the Wilson Nelson Cromwell Professor of Politics at Princeton and author of *Speak Freely: Why Universities Must Defend Free Speech*. Keith, it's an honor to have you and welcome back to *We the People*.

**[00:03:06] Keith Whittington:** Thank you. Happy to be here.

**[00:03:08] Jeffrey Rosen:** Robert, let's begin with you. The first decision that you've suggested that we read is Justice Holmes' immortal dissent in *Abrams versus United States*, 1919.

**[00:03:18] Robert Post:** So the importance of this dissent is that it is the first time that you see a justice of the Supreme court, um, actually contend that the First Amendment was enforceable by courts, that the First Amendment created a right in the sense in which we now understand rights, which is to say, um, immunities from government prosecution and from government sanction which are protected by courts. Before that, uh, the First Amendment was understood to be, uh, aspirational.

**[00:03:50]** So until actually the 1930s, the Supreme court never protected a First Amendment right. And until the *Abrams* dissent in November of 1919, the First Amendment was generally thought to incorporate Blackstone's idea of freedom of speech. The First Amendment protects the freedom of speech, so what is the freedom of speech? And, uh, uh, uh, commentators almost from the beginning understood the freedom of speech to refer to freedom of speech in Blackstone, who was the great English commentator and talked about the freedom of the press which English persons had, you had as a common law right. And this was a freedom from prior restraints, which means the state couldn't make you get a license before you could publish a book, but not from subsequent punishments, which means that the state could punish you for seditious libel, or for criminal libel, or for breaking a law which prohibited, for example, obscenity.

**[00:04:52]** And as late as 1907, Oliver Wendell Holmes, who writes the dissent in *Abrams*, publishes an opinion for the court in a case called *Patterson versus Colorado*, which says, "The First Amendment simply prohibits prior restraints, but it allows the state to punish you for staying true statements as well as false statements." That's 1907. And the story of how Holmes came to change his mind and the country came to change their mind to understand the First Amendment as a judicially enforceable right by 1919 is a really fascinating one.

**[00:05:27] Jeffrey Rosen:** Thank you so much for that, Robert. Uh, I'm now going to read a selection from the decision. This is Justice Holmes, here we go, "Persecution for the expression of opinion seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. But when men have realized that time has upset many fighting faiths, they may come to believe, even more than they believe the very foundations of their own conduct, that the ultimate good desired 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, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our constitution." Keith, our next opinion is *West Virginia Board of Education versus Barnette*, 1943.

**[00:06:31] Keith Whittington:** Yeah, I think this is a, uh, really interesting case that also is breaking new ground in how we think about, um, the First Amendment. Um, it's also a striking case because it required the justices to, uh, change their minds, um, about how they had already decided a very similar case, uh, just a few years, uh, before. Barnette involved, um, a case involving Jehovah's Witnesses, um, uh, Walter Barnett, um, had several children, uh, in public schools in West Virginia. He was a, uh, Jehovah's Witness. Among the, uh, commitments of the Jehovah's Witness was not to say the pledge of allegiance among other things.

**[00:07:06]** Um, the public schools of West Virginia, um, has, uh, do many schools, um, required students at the beginning of the day to face the flag and recite, uh, the pledge of allegiance. Um, when his, uh, children refused to do so, they were disciplined by the school.

**[00:07:22]** The court had, um, decided a case in 1940 called *Minersville School District versus Gobitis*, um, and remarkably decided 8-1, um, in favor of the public schools in that case, um, saying that public schools could require, um, uh, children to recite the ledge of allegiance, uh, beside ... because they thought that the pledge was so extraordinarily important to the requirements of American citizenship, um, and maintaining a patriotic country, um, as we were entering into, uh, World War II that they thought this was an overwhelming need on the part of the government.

**[00:07:54]** There was a huge backlash, uh, at least in elite circles, um, against, uh, that opinion. At the same time, there was also, um, uh, attacks on Jehovah's Witnesses, um, partially as a consequence, um, of that, um, decision. And so the Justices pretty quickly changed their minds about whether or not they'd gotten that one right. Um, and so when the West Virginia case came up in 1943, then, uh, the court, um, flipped, uh, narrowly, but on a 6-3 opinion, uh, written by, uh, Justice Jackson, um, in which it, one, emphasized that school children in schools, uh, public schools, have First Amendment rights.

**[00:08:29]** Uh, this later becomes very important to think about what, uh, rights people have in the school setting, uh, in particular. Um, and moreover, it establishes a very important principle about, uh, what becomes known as compelled speech. Um, that is, um, a lot of, uh, First Amendment cases and a lot of free speech controversies we think about, um, involve people saying things, um, that the government then wants to suppress.

**[00:08:50]** Um, the Barnette case is very interesting because it raises the question of, can you refuse to say things, um, the government wants you to say? The court winds up very firmly coming down and saying, "That right to remain silent, to refuse to, um, go along with, um, something the government wants you to believe in and speak about, um, is also an important thing that needs to be protected by the First Amendment right." And the court offers, um, and Jackson in particular, offers a very rousing defense of the importance of, of the intellectual freedom to be free from the state imposition of orthodoxy, which compelled speech can lead to.

**[00:09:24] Jeffrey Rosen:** This is Justice Jackson in *Barnette*, "To sustain the compulsory flag salute, we're required to say that a Bill of Rights, which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

prescribe what shall be Orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith there in." Robert, next, *Whitney versus California*, 1927.

**[00:10:08] Robert Post:** So, uh, this is a, uh, a prosecution for, uh, violating a statute which prohibits, uh, speech which, uh, uh, advocates the overthrow of the government. Uh, and, and notice, uh, that the opinion here is by, uh, Brandeis, it's a concurring opinion, but actually it's a dissent because the court upholds the conviction. So we're in the world like we were in *Abrams*, where the court as a whole is still, uh, applying laws which suppress speech which is critical of the government.

**[00:10:39]** In *Abrams*, uh, Holmes, uh, in the passage that you read, that you read to us, that eloquent passage, Holmes, uh, gave an account of freedom of speech which stressed truth. He says that, uh, freedom in the marketplace of ideas is the only way and only ground on which we can know what the truth is. And that is typically in First Amendment terms known as the marketplace of ideas theory of the First Amendment, we need to be able to speak freely in order to be able to know what's true and not true.

**[00:11:09]** Uh, that's actually very controversial as a theory of, uh, truth, uh, because, uh, in most instances where we as a society get at truth, we, uh, we don't do that. So when we think about, uh, professional journals, they don't function according to a marketplace of ideas. When we tenure, uh, faculty members, we don't do it according to a marketplace of ideas. We tolerate, but we also judge. And Holmes is saying, "You can't judge, whether it's better or worse", and in fact, we do all the time.

**[00:11:39]** Um, so Brandeis offered a different theory of why we want to protect freedom of speech. He didn't offer an epistemological theory, a theory sounding and how we get at truth, instead, he offered a theory that went to politics. He says, in his concurrence in *Whitney*, "We have freedom of speech because without it we couldn't govern ourselves." He says that to govern ourselves, every one of us has to be actively involved in political discussion, um, to the end that the state can be responsive to the will of the people. If we don't talk, we don't know what the will of the people is.

**[00:12:18]** "And therefore", says Brandeis, "the engagement in political discussion is a political duty which every citizen has to have and the state must respect that duty by not censoring the speech of its citizens." And, uh, that is a new theory of freedom of speech which is developed by Brandeis as opposed to Holmes, Holmes always spoke in this register of truth. He was, uh, uh, an American pragmatist, he was good friends, he grew up with William James, and when you spoke to that language about the marketplace, it's very much allied to how William James used to talk about the cash value of truth. So he's thinking in terms of William James or Charles Peirce, and Brandeis is thinking politics, and he's saying, "You can't have a democracy without freedom of speech. And therefore we have to reinterpret the First Amendment to be what later decisions will call the Guardian of American Democracy."

**[00:13:23] Jeffrey Rosen:** This is Justice Brandeis in *Whitney versus California*, "Those who won our independence 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 believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed the 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 public discussion is a political duty and that this should be a fundamental principle of the American government." Keith, our next decision is Terminiello versus city of Chicago, 1949.

**[00:14:26] Keith Whittington:** Yeah, Terminiello is a, uh, interesting case occurs, um, right there in the post war period in 1949. Um, Arthur Terminiello was a, a very controversial figure in the 1930s and 19, uh, 40s. He was a critic of the New Deal, a harsh critic of the New Deal, um, in the 1930s, um, uh, he opposed American entry, uh, into world war II in the early 1940s. Um, but he was also conspiracy theorist and antisemite who encouraged antisemitic conspiracy theories in particular, [laughing] as well as a range of others. Um, he was an advocate of American Christian Nationalism and a aggressive and provocative, uh, public speaker.

**[00:15:08]** Um, so in 1946, um, he went on a speaking tour across the country espousing, uh, these kinds of arguments, um, attacking, uh, Jews in particular as, um, sources of communism, um, in the United States and a threat, um, to the United States. Um, he was giving a, uh, public talk, uh, in an auditorium, uh, in, uh, Chicago, um, and, uh, as was often true of his speeches, um, this attracted a, uh, significant anti-pro- ... uh, anti- ... uh, counter-protest, um, uh, outside the auditorium. Uh, police were called in to try to keep the peace and try to keep, um, the protestors out of the auditorium. Uh, the situation turned, uh, rather violent, uh, with people, uh, throwing things and attacking, uh, the auditorium and eventually the police arrested Terminiello for disorderly conduct as a consequence of, uh, spurring this, uh, reaction from the crowd.

**[00:16:05]** Um, part of what's interesting about the Terminiello case is that it's, again, not an effort of by the government to, uh, suppress speech they necessarily disliked. Justice Jackson, who in this case winds up in the dissent, um, he was of course writing the majority opinion in Barnette, um, that I talked about just a minute ago. Um, in this case he doesn't think, uh, the First Amendment rights, um, are really at stake here, um, in a significant way. In part because he emphasizes the government is not really concerned with suppressing the content, um, of Terminiello's, uh, speech. Um, what the government is concerned with, from Jackson's perspective, is keeping the peace, um, and they're concerned that riots breaking out as a consequence of, uh, Terminiello's, uh, speech.

**[00:16:46]** Justice Douglas, um, writes the majority opinion for the court. Douglas becomes a very prominent, uh, First Amendment voice on the court, um, uh, during these years. Um, and Douglas really emphasizes in a very short opinion for the court the fact that controversial speech can spark outrage in an audience, um, itself, uh, is a real concern and the state shouldn't play a role in helping the audience shut down speech, um, as a consequence of that, uh, public hostility. Um, this is a problem that gets characterized as a heckler's veto problem, uh, within, uh, the scholarly literature that's emerging around these, uh, problems at the time. Um, the concern is that an angry audience members can shut down, uh, speeches that are too, uh, controversial.

**[00:17:30]** Um, all through American history, um, the police often facilitated that. And so when the audience, uh, would get, uh, too unruly, um, in the context of controversial speeches, police were often quick to want to rush in and usher the speaker, um, off the platform, uh, in order to, uh, prevent, uh, violence from breaking out. Um, and so while the government may have not been the first actor, uh, trying to suppress speech, um, they were the instrument of suppressing speech and instrument, um, of the mob. And Douglas really wants to emphasize, the government shouldn't be playing that role. Um, the police's responsibility in that context is to maintain the peace, uh, by dealing with those who are getting unruly and violent, uh, not by punishing, uh, the speaker who is saying controversial things that the crowd doesn't like.

**[00:18:12] Jeffrey Rosen:** Here is Justice Douglas in Terminiello, "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote, "It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is affected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes, accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Next is Stromberg versus People of California, 1931.

**[00:19:05] Robert Post:** So I recommended this case because it's actually the first case in which the Supreme court sets aside a subsequent punishment in the name of the First Amendment. And, uh, when you just heard, uh, Justice Douglas quote Chief Justice Hughes, it is this case to which he's referring. And what we had here was a statute by California which prohibited the display of any sign in this case. The flag, which would be an invitation to anarchism or opposition to organize government, so somebody was waving the red flag of anarchism and was convicted of sedition. And, uh, the theory here is that the people get to tell the government what to do, the government doesn't get to tell the people what to believe.

**[00:19:52]** This is a huge revolution in our theory of government. Before this case, seditious libel was commonly prosecuted. In 1918, for example, um, the Federal government passed the Espionage Act of 1918 called the, the sedition act because it said you could be put in to jail if you said anything which brought disrespect upon the government of the United States. It is in fact the passages of statutes like that which led, uh, Brandeis and Holmes in the teens and the twenties to develop this theory of the First Amendment. And here you see, in this case, it coming to fruition.

**[00:20:30]** Seditious libel is still a crime in most countries in the world. In most countries in the world, people like you and I are considered subjects of the government. If you lived in Great Britain, you were a subject ... you are a subject of the Queen, but we are not a subject, we are a citizen. "We control the government, the government is our servant", says Madison, right in the 18th century, "we are not the servants of the government." The First Amendment is the place in the constitution that enshrines that thought, but it doesn't begin to do that until the third decade of the 20th century, and this is the opinion in which Hughes for the first time sets forward that theory.

**[00:21:12]** Now it's important to keep this in mind because we see that the First Amendment develops out of a theory of political democracy. And in very recent times, the Supreme Court has begun to think about the First Amendment as a free floating theory, a freedom of speech, not political speech, not democracy, but speech itself. And of course, everything you do is through speech. As Aristotle says, "We are a speaking animal [laughing], we couldn't be human if we didn't speak." And it is v- very difficult, uh, to find a path where the present court has gone which is to say, speech as such, that's the language of Justice Souter, speech as such is protected. That's not the theory in Stromberg, Stromberg is saying the speech which allows us to govern ourselves is what's protected, and that's coming right out of Brandeis.

**[00:22:05] Jeffrey Rosen:** Chief Justice Hughes in Stromberg says that the law in question might be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people, and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system. A statute which upon its face is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the 14th amendment. Keith, next is Sweezy versus State of New Hampshire, 1947.

**[00:22:55] Keith Whittington:** Yeah, Sweezy versus New Hampshire is, uh, not generally, uh, mentioned as I'd say one of the top 10 of, uh, free, uh, First Amendment free speech, uh, type of cases in part, uh, because the court, um, self-consciously avoids putting this, uh, straightforwardly in a, uh, First Amendment context, um, as is true of a lot of subversive activity cases that the court, uh, winds up grappling with in the 1940s, um, and 1950s, um, the court is often trying to deal with those cases a little indirectly rather than, uh, taking them, um, head on, and that's true of Sweezy as well.

**[00:23:30]** But part of what's really intriguing about the Sweezy case is what happens to it later, um, that the court is planning ideas, um, in Sweezy that become quite important for, uh, later cases and might well [laughing] become quite important for, uh, future cases, uh, that we'll be deciding, uh, down the road. Uh, because Sweezy plants the idea that there's academic freedom, um, that has First Amendment, um, implications and there are limits, um, as to what the government can do, uh, relative to what happens in university, uh, classrooms, uh, in general.

**[00:23:58]** Paul Sweezy, uh, was, um, or became, um, sort of the leading Marxist economist in the mid part of the 20th century. He was already publishing some, uh, quite significant work, uh, along those lines, uh, by the time this case in society publishes additional, uh, important work later. Um, he was a lecturer at Harvard, uh, University, uh, before World War II, but then during world war II he served in military, uh, intelligence, uh, doing economic analysis. And when the war was over, uh, rather than returning to an academic career, um, he founded, uh, the Monthly Review which became a very prominent and important, um, left wing journal of opinion in the mid, uh, 20th century and spent the rest of his career, uh, really as a writer and editor, um, a public speaker on these kinds, um, of issues.

[00:24:46] The State of New Hampshire legislature directed, uh, as many, uh, state legislatures did at the period, um, directed investigations into subversive activities that were occurring in the state. New Hampshire was doing it a little differently than some other states did in that it directed, uh, the state attorney general, um, specifically to go out and investigate, um, subversive persons and subversive activities in the state, and if necessary, bring prosecutions of those persons. As following that charge, the attorney general, um, then subpoenaed, uh, Sweezy, um, uh, to answer questions on a host of issues.

[00:25:19] Um, Sweezy an- ... cooperated, answered some of the questions, but refused to answer, um, questions relating to his involvement in Progressive Party, uh, in particular, um, and also, um, uh, refused to answer questions about a lecture he had made as a guest speaker in a classroom, uh, at the University of New Hampshire in a class. Um, this then, uh, led the court, uh, to think about, well, what was the, uh, constitutional authority for, uh, the attorney general to ask these kinds of questions? And what's the limits on his authority?

[00:25:51] Chief Justice Warren in writing, uh, for the court, um, as a whole highlighted the First Amendment issues, um, but then ultimately grounded the opinion on a due process claim that legislature hadn't given clear enough instructions, uh, to the attorney general to guide his investigation, um, and so as a consequence, the attorney general was a little too free floating, uh, in what kinds of questions he'd asked. And given the First Amendment considerations, Warren thought that was going to be inadequate to justify, uh, the governmental intrusion of asking these kinds of questions.

[00:26:21] Uh, Felix Frankfurter, uh, wrote a notable concurring opinion as well. Felix Frankfurter, before he became a Justice was a Harvard Law School professor. There's a paragraph in Warren's a majority opinion, um, on the academic freedom issues and the importance of, uh, the state not intruding in the university classrooms, um, in situations, uh, like this.

[00:26:41] Frankfurter has a much longer passage, um, talking about the importance of academic freedom and the importance of universities being spaces, um, in which even, uh, very dissenting, uh, minority opinions can be freely expressed and thought through, um, and that it would be, uh, deeply problematic, uh, for the future of intellectual life in the United States if, uh, the state could intrude into these class context, um, and insist, again, that people only articulate orthodoxies that the state approves of, um, in those classrooms rather than articulating theories, uh, that the state, uh, disapproves of.

[00:27:13] **Jeffrey Rosen:** Here is Chief Justice Warren on academic freedom, "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that's played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities, would imperil the future of our nation." And here is Justice Frankfurter's concurrence, uh, quoting a South Africa statement of academic freedom, "In a university, knowledge is its own end and not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of church or state or any sectional interest. A university is characterized by the



spirit of free ... free inquiry, its ideal being the ideal of Socrates, to follow the argument where it leads. This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypotheses are incompatible, and the concept of an imitable doctrine is repugnant to the spirit of a university." Our next opinion is *Thornhill versus Alabama*, 1940.

**[00:28:29] Robert Post:** So, *Thornhill versus Alabama* is a full decade after *Stromberg*. And *Stromberg* puts on the table the fact that we're protecting freedom of speech in order to protect the forms of communication necessary for our Republic. And the question is, well, what sort of communications are necessary for it? What's the relationship between talking and having a Republic? And *Thornhill versus Alabama*, written in 1940 by that great civil libertarian in whom we don't remember so much today, Frank Murphy, um, offers the first fully developed theory of what is the connection between freedom of speech and having a democracy. It prepares the ground for the wonderful opinions which, uh, Keith has put on the table and has, um, expounded. But those opinions would've been inconceivable, um, without the analytic work that's done in the *Thornhill* case.

**[00:29:22]** So *Thornhill* says, "Ask the question, what is the relationship between my speaking and a democracy?" There's some theories of that which go to, uh, in order to have a democracy I need the necessary information to make decisions. when I vote. That's a theory we associate with a theorist named Alexander Meiklejohn. That's not the theory in *Thornhill versus Alabama*. In *Thornhill*, um, coming right out of *Brandeis*, it says, "Having a democracy is having a form of government in which you believe the government is responsive to you. It requires your active participation. It's not a matter of getting any information and it's not merely a matter of voting, it's a matter of talking to your peers, talking to other people and forming public opinion." So what *Thornhill* says is the forms of communication which are constitutionally protected are those which are necessary to help form, and this is the language which you see in *Thornhill*, public opinion.

**[00:30:26]** And of course, uh, participation in media, in books and magazines, and movies are necessary for the formation of public opinion, art is necessary for the formation of public opinion. And in *Thornhill* itself, labor picketing, because you're saying to the community at large, to the public at large, um, this is a controversy with your attention and you should have an opinion about it.

**[00:30:49]** So what *Thornhill* puts on the table is the following, um, equation, in a democracy we are free to form public opinion. And in a democracy, the state is responsive to public opinion. Not responsive necessarily only to voting, which is a one time decision that you make in private which no one knows what you're doing, but to public opinion, which is an ongoing process which you can continuously and always get engaged with, and the state has to be responsive to that. And if it's open to you, then we can have a democracy in which you can feel legitimately that the state is responsive to you.

**[00:31:27]** Now, in public opinion there's an adjective, public, and the question is, what do we mean by public opinion? And thinking about the public-private distinction and when you have speech that is about a matter of public concern or speech that is about a public figure or speech

that is about a public official, this is the fundamental access on which modern First Amendment doctrine is constructed, and it comes right out of this opinion by Murphy in Thornhill.

**[00:31:56] Jeffrey Rosen:** Here is Murphy in Thornhill, "The freedom of speech and of the press guaranteed by the constitution embraces, at the least, the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration, developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the time. The Continental Congress in its letter sent to the inhabitants of Quebec, in 1774, referred to the five great rights and said, 'The last right we shall mention regards the freedom of the press. The importance of this consists beside the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.'" That's from the Journal of the Continental Congress.

**[00:33:13]** "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

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**[00:34:28]** Our last opinion is Texas versus Johnson, 1989.

**[00:34:36] Keith Whittington:** So Texas versus Johnson, uh, comes much later than most of the other opinions, uh, we're talking about, um, comes in 1989. It's, it's, uh, in some ways not breaking, uh, new ground in a way that a lot of the other, um, cases we're talking about, um, did. It's applying a lot of principles that the court had articulated, um, in earlier cases and earlier context, but applies it in a, uh, context the court had largely avoided, um, up to then and was ... uh, and proved to be an extraordinarily controversial, uh, context of actually applying these principles, um, in a particular situation.

**[00:35:11]** Uh, Gregory Johnson burned an American flag, uh, during a protest, uh, outside the Republican Party's, uh, national convention, um, in 1984 in Dallas, Texas. Um, he was arrested, uh, for doing so. Texas had on the books, um, a state law, as did, uh, every other state, um, at the time, um, that prohibited, in Texas's case, uh, desecrating, um, a state or national, uh, flag. And Johnson was fined and sentenced to a year in prison for violating this statute. The Texas, uh,

court heard a First Amendment challenge, um, to this and upheld, uh, the validity of this kind of restriction, um, on speech activities. Um, and the US Supreme Court, um, was narrowly divided. So it was a 5-4 decision in favor of Johnson in this case.

**[00:35:58]** Uh, the majority, uh, was written by, uh, William Brennan, who was a stalwart of the Warren court, uh, an extraordinarily important figure on the left in the 19, uh, 60s. This was near the end of his career, um, on the court, writing in 1989, Brennan wrote, um, a lot of important decisions on the First Amendment during those, uh, Warren court, uh, years. And here, Brennan comes out defending, uh, Johnson's, uh, right to burn a flag, um, even in this very controversial and emotional context.

**[00:36:27]** Part of what's significant though about this case, besides the fact that flag burning was so widely reviled, um, and, uh, illegal across the country, um, is, uh, it, it takes on a real challenge, one, of similar to what we saw in Terminiello of this heckler veto problem, um, of worrying about how a crowd is going to react to what, um, a speaker is doing and the kind of provocative acts, um, a speaker is engaging in. And part of the concern, um, that the government has in these situations is that, uh, crowds might be come unruly, um, if people are burning, uh, the American flag, and so to what degree should the state be worried about, uh, hostile crowd reactions, um, uh, to, uh, controversial, uh, speakers? So it raises this heckler's veto problem.

**[00:37:10]** It raises an interesting issue about, uh, whether burning a flag should even count as speech, um, at all. Um, so it's what the court has characterized as an expressive activity. Um, so, uh, Johnson was not giving a speech, um, he was not writing an article or a book, um, he was, uh, simply burning a flag. Um, and then the question is, was that kind of activity, um, that has symbolic significance, um, but it's not a speech, it's not a book, it's not writing, um, is that still, um, protected, uh, by the First Amendment?

**[00:37:41]** Um, and the court emphatically said, um, that it was. Um, that kind of symbolic activity is still expressing an idea. Um, it's precisely because it's expressing the idea that the crowd is getting so riled up, it's exactly because it's expressing an idea, um, that the state wants to suppress it, um, because they dislike the idea, uh, being laid out, uh, by Johnson in this case. And so as a consequence, um, that kind of symbolic action, uh, needs, uh, constitutional protection.

**[00:38:06]** Notably, the reaction at the time was extraordinarily hostile. Uh, there were, uh, threats of passing a constitutional amendment, uh, to carve out flag burning, uh, from First Amendment, uh, protection, um, partially in order to fend off, uh, this demand for a constitutional amendment. Uh, Congress instead passes its own federal statute banning flag burning. Um, and then you get a subsequent case by the US Supreme court saying, "Well, Congress can't do this either", um, and reaffirms, uh, the core, uh, First Amendment, um, claims that the court laid out in Texas v. Johnson.

**[00:38:38]** Um, even though the court recognizes that, uh, the government has a genuine in- ... an important interest in maintaining national unity and trying to encourage people to be good patriotic citizens, um, and you might think that, uh, burning flags are very inconsistent with that, uh, the court nonetheless, um, emphasize, uh, that the nature of our particular patriotic citizenry,

um, is they have to be free, uh, to disagree even with, uh, national, uh, sentiments and national activities, um, and they can express that, um, in ways that many people regard as unpatriotic.

**[00:39:10] Jeffrey Rosen:** Here is Justice Brennan in *Texas V Johnson*, "We're tempted to say that the flag's deservedly cherished place in our community will be strengthened, not weakened by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects and the conviction that our toleration of criticism, such as Johnson's, is a sign and source of our strength. Precisely because it's our flag that's involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no sure means of preserving the dignity even of the flag that burned than by, as one witness here did, according its remains a respectful burial."

**[00:40:00] Robert Post and Keith Whittington,** thank you so much on behalf of We the People for inspiring us by suggesting that we read these eight celestially meaningful cases. And We the People listeners, we'll put all them up on the resource page. Because we have just a few moments left and convening both of you is such a privilege, I'm going to ask for some further reading. We've talked about several philosophical sources that inspired the opinions discussed today, Brandeis and Whitney, for example, cites Jefferson's first inaugural and Pericles funeral oration, uh, we heard about the Continental Congress and its letter to the, uh, inhabitants of Quebec that was inspired by wig Civic Republican literature, like Cato's Letters or Milton's *Areopagitica* or Locke's essay concerning toleration. Uh, Robert Post, if you had to pick one or two of the philosophical sources that inspired the founders who wrote the First Amendment, what would it be and why?

**[00:41:00] Robert Post:** Um, in terms of the philosophical, uh, sources that, uh, inspired the founders, they come out of a wig tradition. And so they would've been inspired by reformation writers like Milton in the *Areopagitica*. Uh, you know, John Stewart Mill, uh, is yet to come. If you actually look at the ho- ... history of the First Amendment, it arises out of a combination between on the one hand freedom of the press, which was traditional because, uh, starting with, uh, the, uh, Tudor Kings, they had imposed licenses to have a printing press, it was like the internet of the day. And on the other hand, freedom of conscience, which was a religious right and which comes out of the reformation. The First Amendment combines these two things. And so the religious sources of freedom of conscience, of Locke, people like that, very important for the framers.

**[00:41:50] Jeffrey Rosen:** Thank you so much for that. Keith, which philosophical sources that inspired that founders would you suggest for We the People listeners?

**[00:41:58] Keith Whittington:** Well, I think that's absolutely right. I mean, one thing that's quite notable about the time in which they are starting to think about these, uh, free speech issues is that religious dissent and political dissent are very closely connected, um, in how it's being theorized and talked about and what the politics surrounding, uh, the development of these, uh, rights are. And so the ability, um, of dissenters in the community, uh, to not have to go along

with a majority opinion communal orthodoxy, uh, but be able to believe different things, be able to express those different things is initially at least, um, often a kind of controversy that's playing out in the religious sphere, um, in the question of, of religious dissenters, um, and then gets carried over, uh, from there and applied to, um, the specific, um, uh, political context.

[00:42:43] So there's a nice symmetry in the fact that the First Amendment, uh, brings these, uh, different freedoms together in a single, uh, piece of text, um, because of the historical, um, connection between the two. Um, what is striking about the philosophical development of these ideas over time is the extent to which, um, there's a lot more, uh, thinking about these issues that occurs after the founding. And so, uh, the founders, uh, recognized that these free speech principles are incredibly important. Um, they're incredibly important out of that English inheritance and they, um, uh, recognize they need to be embodied in state constitutions in the United States and in the federal constitution as well.

[00:43:19] Uh, but the real thinking through of what are the implications of those commitments, um, is something that's occurring over the next two centuries, both certainly outside the courts, um, but then also, uh, as we've seen inside the courts as well.

[00:43:31] **Jeffrey Rosen:** Thanks so much for that. Robert, might we take a beat on a deep dive into *Areopagitica* by Milton? It's so meaningful to read from the primary text and we'll put them online. And Milton in *Areopagitica* worries about the consequences of regulating printing. "If we think to regulate printing thereby to rectify manners, we must regulate all recreations and pass times. All that is delightful to man, no music must be heard, no song be set or sung, but what is grave and Doric. There must be licensing dancers, that no gesture, motion, or deportment be taught our youth and by what their allowance shall be thought honest; for such Plato was provided of. It will ask more then the work of 20 licensers to examine all the lutes, the violins, and the guitars in every a house, they must not be suffered to prattle as they do, but they must be licensed in what they say." The pros is just so spectacular.

[00:44:23] What is Milton concerned about in this imagining of licensing censors planted in houses and regulating music and conversations between men and women? And, and what was the context of, of this great, uh, piece, uh, that made it so significant?

[00:44:37] **Robert Post:** You have to understand, if we speak about, what ... who is the public? uh, in ancient times in Greece and Rome, the public were the people who could assemble within the sound of the human voice. You know, in the Agora, in the Square, in the Public Square, that was the public. The invention of the printing press changes this entirely, and it produces a notion of a public of people who are strangers to each other, who don't know each other, haven't heard the same ... haven't spoken to the same people, but they read the same printing press. So the printing press has enormous implications, um, with the reformation. You know, the first book printed is the Bible. And the Catholic church had said, "You can't read the Bible, only the priest can read the Bible." And the reformation lies, uh, it is rooted in the sense that everybody should be able to get at the truth for themselves.

[00:45:26] The idea of religious dissent, as Keith said, was very much, uh, connected to the idea of sedition because a lot of the, of the legitimacy of the state was, uh, thought to rest in the

endorsement of God. So if you believed in a different kind of God or a different dogma of God, um, you were in effect, uh, questioning the legitimation of the state. And so the state licensed printing presses. If you were a printer, you had to have a bond. Each printing press, um, uh, was under the control of a censor, and, uh, the printer had to submit what they did.

**[00:46:01]** So what Milton is objecting to is the licensing scheme. And this was very much associated with the oppression of the Stewart Kings, the Stewarts tended to enforce the licensing schemes through the Star Chamber, which is one reason the star chamber got such a bad name. Milton did not say, and this is of course the foundation for the later Blackstone distinction between subsequent punishment and prior restraint, Milton did not say you shouldn't punish people for blasphemy, he thought you should punish people for blasphemy. If you said the wrong things, if you said things which were criminal, you should be punished, but what you shouldn't have is the ... you shouldn't be able to, uh, prevent the speech in the first place by requiring a license. That's what's going on in the passages that you read, that's later gets enshrined in Blackstone, and that is what our First Amendment is thought to mean until 1931.

**[00:46:55] Jeffrey Rosen:** Keith, can I ask you about Francis Hutchison and James Madison? I was struck recently by the similarity in language between Madison's Memorial and Remonstrance Against Religious Assessments in 1785, and Hutchison's definition of an unalienable right. Here's, here's Francis Hutchison, he says, "The rights of conscience are unalienable for two reasons. First, it's not in our power to transfer our freedom of thought to others. The right of private judgment of our inward sentiments is unalienable", Hutchison writes, "since we cannot command ourself to think what either we ourself or any other person pleases. Second, it cannot serve any valuable purpose to make people worship God in any way that seems to them displeasing."

**[00:47:37]** And Madison invokes exactly the same two reasons when he defines the right to free exercise of religion as an unalienable right in 1785. Here's Madison's language, "This right is in its nature, an unalienable right because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men. It is unalienable also because it is the duty of every man to render to the creator such homage and such only as he believes to be acceptable to him." Is, is that, uh, similarity of text significant? Uh, did Madison get his definition of unalienable rights from Hutchison? And what is the importance of that for the First Amendment?

**[00:48:17] Keith Whittington:** Oh, yeah, I certainly think there's a, a lot of connection there, and of course they go back to some common sources as well in thinking about the importance of liberty of conscience, uh, broadly. There are many arguments that are being offered and developed as to why should you protect these kinds of religious dissenters, uh, in being able to express themselves. There's a lot of interest on the part of both the state, uh, and religious authorities to suppress, uh, religious dissenters, um, in various ways. And so trying to develop out, well, what's the case for, what's the argument for, um, allowing people who have these fundamental religious disagreements, uh, to be free, to, uh, continue to express and develop these, uh, religious disagreements?

[00:48:52] And one kind of argument that's being offered, um, is the one that's really highlighted here, uh, which is each individual, uh, owns their own personal duties to God, uh, and, um, ultimately that's between God and that individual. And so, as a consequence, those individuals need to really believe what those commitments are, um, and they need the freedom to, um, uh, make up their own mind about that. And so while the state, uh, might be able to control their external activities, um, can suppress their speech, um, on these questions, uh, the state really can't ultimately get into people's minds and convert them to a set of ideas and you then need to allow people to have the freedom to think these things through and come to their own conclusions, um, ultimately. And so it was seen as a real religious obligation, um, the individuals had to be able to think these things through, to make up their own mind, come to the right kinds of conclusions, um, and have their, um, thoughts, um, in the right place, um, on these, uh, religious issues.

[00:49:47] It takes a bit of a leap to get from that kind of notion to then the kind of importance of speech, uh, to democracy and political activities, um, that we, uh, get, um, uh, later. Uh, but you certainly see a resonance of that kind of argument, for example, on the kind of concern that's at stake in Barnette, um, of thinking, to what degree can the state, um, impose orthodoxy, um, on people, compel people, uh, to say things they don't actually believe? And this very early set of arguments about the importance of liberty of conscience is precisely about, um, the ability of people, uh, not to have to say things they don't actually believe?

[00:50:22] **Jeffrey Rosen:** Wonderful. I think we have time for one last round in this superb conversation. Robert, you mentioned Mill, tell us about Mill's significance to the philosophy of why free speech matters. And, and on what sources was Mill drawing, uh, that, uh, fit him into the classical liberal tradition that also influenced the founders?

[00:50:43] **Robert Post:** Well, when we think about, you know, combining this with religion, uh, um, you know, the great earth source here is Locke's letter on toleration, that's where much of this argument is coming from. And you know, Locke is a very religious thinker, how- however much we appropriate him for secular purposes. By the time we get to John Stewart Mill, we're thinking almost entirely in secular terms, and Mill is saying, "What does it mean to validate an opinion?" It means you can be think it through for yourself, and you have to think it through for yourself without the pressure of state censorship.

[00:51:17] And Mill was also very, uh, impressed with the need to insulate persons from social pressure, you know, from the, the fact that the people around you are gonna shun you unless you believe a certain thing. He thought that, that kind of social pressure leads to deadness in the soul. Mill is a very interesting character. He, he comes out of the Benthamit utilitarian tradition, but he himself is very attracted to Coleridge and to German romanticism, he has an idea of the self as a personality that ... I mean, a very eccentric personality [laughing] himself. But the personality has to find its own organic unity, it has to discover itself, this is not something you find in Bentham at all or in the utilitarian tradition, but Mill fuses these two traditions and they come together in his sense of what it is to form an opinion for yourself, that you have to be free to do it.

[00:52:08] Now, the free to do it is the roots of it are in the conscience arguments we've been, uh, talking about, but now it's secular, it's not tied to an organ in the self, the conscience which has direct connection to natural law or to the nature of the universe. It's just rather that, uh, you have to be free to believe what you believe or you wouldn't be a full person. So the ultimate roots in that are the notion of what it is to be a person, and that a lot of our roots come fro- ... out of German egalitarian romanticism not, uh ... and, uh, you know, measured by the reformation as understood in Germany. That's, um, that's where Mill is coming out of.

[00:52:44] And of course his great Treatise on Liberty, um, i- i- influences Holmes, influences every subsequent thinker about the need to be able to dissent in order to validate the true, because unless you're free to dissent, you don't know whether what you're saying is true or not. And you need to test it. And it has to survive the tests of critical thought. That was Mill's basic insight.

[00:53:08] And Mill has another insight, which it becomes very important to the kinds of cases that Keith was talking about, which is, the truth is often causes distress. You know, it, it hurts to know the truth, it's not a calming serene experience. It's not that you enter ... enter the euphoric rose of Dante's Paradiso, no. When you get the truth, it often hurts and, uh, you don't want it, and you fight it, and Mill knew that. And, um, it's that insight which is behind the toleration of the outrageous speech in the decisions that, um, Keith was talking about earlier.

[00:53:47] **Jeffrey Rosen:** Keith, the last word in this, in this wonderful discussion is to you, are there any classical sources that you would like to recommend for our readers? Brandeis quoted Pericles' Funeral Orations, they believed liberty to be the secret of happiness and courage to be the secret of liberty, is a, is a quotation from Pericles as translated by Alfred Zimmern. And yet, of course, the, the Greeks were not fans of freedom of expression, as Milton said citing Plato. To what degree was classical commitment to the duty to exercise our faculties of reason in order to discover the truth central to the framers? And are there any particular classical texts you want to call out?

[00:54:25] **Keith Whittington:** Yeah, I think the, the classical sources you say are not, uh, necessarily very strong on this, uh, very directly, they're being, uh, leveraged, um, by later thinkers who were drawing out, uh, themes, uh, that start par- ... becoming particularly significant to the kinds of political and religious debates, um, that they are having, uh, much later. So strikingly, uh, you start looking at these kinds of examples of, uh, speakers, uh, in earlier day, uh, and the significance of those speakers, um, to how, uh, things work.

[00:54:55] Notably, part of the classical tradition as is being inherited by the founders is some nervousness about speakers. So one of the sort of persistent themes that they draw out of, uh, classical thinking is a worry about demagoguery, um, the possibility of, uh, leaders with bad intentions riling up a mob, um, that leads them to some fear of democracy in it's, uh, purest forms, um, as precisely, uh, as, uh, Robert points to sort of people in an arena, um, uh, listening to a speaker that's going to excite passions, um, and might lead them in a dangerous, uh, directions. And so, uh, it's very much [laughing] a double edged sword as is emerging out these, um, early traditions is to think about, um, the significance of, of speech.



[00:55:38] Um, but later, more later really than what the founders are particularly focused on, uh, we wind up turning back to these examples of people like Socrates, um, and the significance of philosophical discussion as being discomfoting, um, of putting individual reason against, um, social pressure, um, against a conventional, uh, wisdom. Um, and, uh, Socrates, um, paid the ultimate price, uh, for antagonizing, uh, his fellow citizens with unpopular thoughts.

[00:56:08] Um, this eventually gets, uh, celebrated as a critical, um, uh, example of, uh, what [laughing] states should not be doing, uh, of, of suppressing, uh, speech and punishing people for having unpopular thoughts. Um, and, uh, Socrates to extent he gets, um, uh, put on a pedestal as sort of the founder of Western philosophy then, um, becomes critical to later thinking about, uh, that's the model we ought to be following. A lone individual with dissenting views, um, ought to have the freedom to express those dissenting views, he ought to have the freedom to annoy, uh, his fellow citizens, um, by challenging, uh, what they think is, uh, conventional wisdom.

[00:56:47] Um, and a free society, a society, a society that's prepared to develop and improve, um, is going to be a society, uh, that can hear out those criticisms, um, and those dissenting views, can tolerate them, and think about them, and take them seriously, uh, rather than punishing people for having them.

[00:57:03] **Jeffrey Rosen:** Thank you so much, Robert Post and Keith Whittington for a wonderful discussion of eight totemic Supreme Court decisions and several of the most important texts that inspired the founders. You've given us a model of learning and growing in wisdom. And dear We the People listeners, please treat yourself to the pleasure of reading the primary text that Robert and Keith recommended, both the eight opinions, all of which we'll post online, as well as these extraordinarily inspiring texts from Milton to Mill. On behalf of the National Constitution Center, Robert Post, Keith Whittington, thank you for teaching us about the history, philosophy and meaning of the First Amendment.

[00:57:47] **Robert Post:** Thank you.

[00:57:48] **Keith Whittington:** Thanks. Appreciate it.

[00:57:58] **Jeffrey Rosen:** Today's show was produced by Melody Rowell and engineered by Greg Sheckler. Research was provided by our great interns, Kevin Closs and Ruben Aguirre, as well as Sam Desai. Homework of the week, go to the resource page and read those eight First Amendment opinions. Friends, it's so worthwhile to actually read the primary texts, and you'll be inspired by the pros and experience all sorts of enlightenment, and you'll find them on the resource page. And please also rate, review and subscribe to We the People on Apple podcast, it's very meaningful, if you go to the Apple podcast page and leave us a review about how much you enjoy the show, because it inspires others to find us as well.

[00:58:41] And remember, that the National Constitution Center is a private nonprofit, we're in the middle of our crowd funding campaign, and with donations from all 50 states we are really looking to expand participation. So if you can pitch in \$5, \$10 or more, that would be so wonderful. And if you'd like to sign up for recurring monthly donations, that would be so much appreciated as well. Every donation is doubled by the John Templeton Foundation, which means

we can continue bringing you this meaningful learning light and constitutional debate. Thanks to all for learning together. And on behalf of the National Constitution Center, I'm Jeffrey Rosen.