



Free Speech Throughout World History

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[00:00:00] Jeffrey Rosen: 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, non-profit, chartered by Congress to increase awareness and understanding of the constitution among the American people. Friends, you know that we are doing a deep dive on the First Amendment to celebrate the unveiling of the First Amendment tablet, as well as this cornerstone of our freedom. And I'm thrilled and honored to convene this week, Two of America's greatest free speech thinkers to discuss the history and current debates over free speech. JJacob Mchangama is founder and executive director of Justitia, a judicial think tank based in Denmark. He's the author of the pathbreaking new book, Free Speech: A History from Socrates to Social Media. Jacob, it is an honor to welcome you to We The People.

[00:01:06] Jacob Mchangama: Jeff, it's an honor to be, to be on. Uh, I was, I was delighted to, uh, when, when the email, uh, invitation, uh, popped into my inbox and, uh, to have this conversation also with David is a, is a great honor and a privilege. So thank you.

[00:01:19] Jeffrey Rosen: It's a privilege for me to convene. And David Cole is national legal director for the ACLU. He's argued landmark First Amendment cases before the Supreme Court, including the Masterpiece Cakeshop case, flag burning cases, and the Mahanoy Area School District, B.L. case in 2021. David, it is a great honor to welcome you to We The People.

[00:01:44] David Cole: Great to be here. Thanks for having me.

[00:01:46] Jeffrey Rosen: Jacob, I learned so much from your book, I read it with such excitement. And you begin with the fundamental disagreement about free speech among Democrats today, which you trace back to a clash between two perspectives on speech that originated in the difference between Athenian democracy and Roman republicanism. Tell us about the difference between the Athenian and Roman conceptions of free speech and its relevance for today.

[00:02:14] Jacob Mchangama: Yeah, so the Athenian democracy goes back some 2,500 years ago, and by the standards of its day, not by our standard, it was quite radically egalitarian in that all freeborn male citizens had a direct voice in political affairs. So it was a direct democracy, everyone, even if you were poor, uneducated, you could speak, discuss and, and vote on the law. So that was, uh, the concept, uh, called [inaudible 00:02:37] or equality of speech. But they also

had a broader, uh, concept of free speech called [inaudible 00:02:43], which means something like uninhibited speech, which was a broad tolerance of social dissent and which allowed Socrates until he was executed [laughs] to, uh, to accurse people in the Agora, in the marketplace.

[00:02:55] Uh, so, so in that sense, it was an egalitarian democratic ideal of free speech, whereas the Romans had a much more narrow, uh, I would say top down elitist conception of free speech, one in which educated, wealthy elites were the, were the institutional gatekeepers, and one that kept sort of the unwashed mob, the plebs, out of political, uh, decision making. Um, and I argue in the book that we see this, uh, these two concepts contesting, uh, over and over again throughout history when you have new technological developments in communications technology, and when you try to expand the public sphere to previously marginalized, uh, groups, whether, you know, it's, it's women, racial minorities, riches, minorities and so on.

[00:03:41] But so, yeah, I, I, I basically say that, that, you know, we have to go all the way back to, to antiquity, to, to fully understand that the, the roots of free speech. Of course, many additional layers of our conception of free speech have been added since the Athenian democracy, they didn't have a, a constitution, they didn't have a, a conception of individual rights, they didn't have, uh, separation of powers, uh, uh, and the like, uh, which was one of the reasons Socrates was found guilty and, and, and executed.

[00:04:10] Jeffrey Rosen: Yes, it's so fascinating. You discussed the debate about whether Socrates was executed for religious or political impiety and say there's a disagreement on the question, but emphasize the central Athenian roots of our current debates. David, you wrote a really important piece in New York review books in 2017, why we must still defend free speech. And you defended the classical liberal conception of speech, both against egalitarian claims that the protection of racist, uh, speech, uh, can't be tolerated and against efforts to have top down control of the internet. Both can be traced back as Jacob suggests to this Athenian-Roman distinction. But tell us why you think that the classical defense of free speech is still relevant despite these challenges from both sides?

[00:05:00] David Cole: Um, thanks. Well, really interesting that the difference between the Greek and the Roman approach here, and, and I do agree that, um, you know, it continues, you know, uh, the way I think about it, this notion of the marketplace of ideas leading towards truth, and, you know, sometimes when we talk about that, the idea is just everybody gets in there and engages on a free, uh, and equal footing and somehow the truth emerges. You know, that's a model, uh, I'm not sure it's a very persuasive model. I mean, you know, the, uh, I think the social media today is an example of that, where almost anybody can get on there and say anything. Uh, and there, I think's a real question, does it actually lead towards truth?

[00:05:45] Uh, I think another model, um, which is the more elitist model is the classroom, right, where you are engaged in a conversation that is attempting to, you know, identify some kinds of truths. Um, but it is a moderated one. It is a supervised one. It is one in which there is a hierarchy. Um, you know, and I often ask my students, you know, which, which do you think, you know, you would learn more from, a classroom in which, you know, I kind of try to

discipline the conversation, or one in which anybody can say whatever they want whenever they want, uh, on whatever topic they want? [laughs] Uh, and I think, you know, the most people, uh, the reason they pay to go to law school other than get a law degree, uh, is because they actually think, you know, we're actually gonna learn more if we have this kind of, um, uh, some kind of, um, uh, exercise of, of, of editorial control. And that's what we've had in the media, uh, uh, for a long time. Uh, that's what I think is challenged by social media.

[00:06:45] Now, that is not really... That's more responsive to what Jacob just said than it is to what you asked me, Jeff, about my piece, um, uh, about, uh, why I think equality and free speech are not at odds. I'm happy to talk about that as well. But I just think this, this, this, uh, the social media moment brings to the fore the very debate that, that Jacob starts his fantastic book with, um, which is, you know, what is the best way, um, to organize conversation in a polity.

[00:07:16] Jeffrey Rosen: It really does in just the way that you say, and, and Jacob closes his great book with some brilliant reflections on social media. I- I'd love Jacob to take us up through history so that We The People listeners, first of all, read the book, I really know that you'll learn much from it, but also have a sense of some of its core insights. And, and Jacob, in between your discussion of ancient beginnings, you have two chapters, the not so dark ages, uh, inquiry and inquisition in medieval Islam in Europe, and then the great disruption Luther, Gutenberg, and the viral reformation.

[00:07:50] And in the Luther chapter, you just talk about how the critic press transformed the free speech debate from Luther, uh, both translating the Bible and pinning up his thesis, and then you introduce this fascinating example of the Milton effect, where someone like Milton first defense free speech, and then like so many other great free speech heroes afterward comes to suppress it when it becomes inconvenient. A lot to cover there, but, but give us a sense of the transition from the Greek and Roman debates up through the technological revolution introduced by Luther and the printing press.

[00:08:22] Jacob Mchangama: Yeah. For a long time, many, uh, historians presented the, the middle ages as, as sort of the dark ages, which I think is, is a bit unfair. Now, I think it's true to say that, that nothing like the concept of free speech that we saw in, in, in Athens or, or the Roman Republic really survived because you, in general, you didn't have representative governments, you would have these, um, mon- monotheistic empires basically, uh, that were not specifically welcoming to, uh, to dissent whether religious or political. But we do see that in the Abbasid Caliphate and it's adjacent territories, so, so the most powerful Islamic polity, uh, that arises the caliphs there, um, basically translated most Greek, uh, philosophy and science, and they also had sort of very sketchy control over their territories. And this, um, sort of fostered a, uh, a culture of inquiry and led to some of the most radical free thinkers.

[00:09:21] Now, these were not mainstream thinkers, but they were free thinkers that, that openly questioned, um, reveal, religion, prophecy, holy books, uh, which, which, which was quite a big step at the time, um, and, and, and were much more radical free thinkers than you had in, in contemporary Christendom at the time. Uh, and, and, and I think the Islamic, uh, the Abbasid Caliphate, also contributed to, um, pagan philosophy, Aristotle, uh, being remitted into

the west, um, and where universities became absolutely essential to sort of, uh, uh, connecting the neural circuitry in, in Europe's collective brain, if you like. Um, and, and, you know, even though these were [inaudible 00:10:03] Christian scholars, um, who, who, who, who tried to use reason and, and pagan philosophy to, to understand the eternal truths of God, they sort of pushed the limits of reason and inquiry, uh, constantly, uh, and constantly clashed with, with sort of, uh, with both the Catholic church and, and universities that tried to impose what, what we might call medieval speech code, sort of trying and say, oh, no, you can't teach Aristotle.

[00:10:27] And then, you know, you see academic freedom more or less becoming a competitive advantage for, for universities. You basically, you know, scholars will leave if you don't allow them to push, uh, the boundaries of the permissible. And I think that, you know, so even though you don't have free speech or, or academic freedom in, in anything like the sense that we understand it today, I think it plays an incredibly important role towards later developments. Of course, at the same time, you also have the medieval inquisition. So this is, again an example of where you can have some tolerance of, of, of heterodoxy among elites who speak Latin at, uh, universities, but you, you can't have heretical ideas running roaming freely around among the population though that's where you need to, to step down, uh, authority and, and the Catholic church and, and, and rules will do that.

[00:11:17] Um, and of course the authority of the Catholic church is then very much, uh, undermined by, by Martin Luther. It's, it's interesting that initially the Catholic church is very welcoming of the printing press, because it allows them more efficiently to communicate orthodoxy in these ideas, you don't have to rely on ill educated priests who, who will sort of mess up the, the, the core contents of Catholic orthodoxy. Uh, but then, you know, an ornery constipated German monk comes along and, and spoils the party with his [laughs] with his ideas. And, and Luther, you know, if he was on Twitter today would probably be the most followed, uh, have the most followers of all, because he, he just generates, uh, you know, he- he's an expert in religious populism.

[00:11:59] So instead of writing these dry theological treatises in Latin, he writes in the vernacular, uh, German, he writes short, punchy. He, you know, he, he, he, he uses cartoons and memes. Uh, and so he, he, he basically appeals to the ordinary citizen and he places a lot of emphasis on literacy. So you see a huge difference in literacy in, in Protestant and, and Catholic countries. But it's... I think it's really important to stress that Martin Luther is not a champion of principled, of, of free universal freedom of conscience, of free speech. In many ways, I think the unintended consequences of the reformation for, for freedom of conscience and freedom of expression are, are much more significant than, than what Luther intended.

[00:12:42] Luther saw or argued that, you know, the, the Catholic church had corrupted Christianity, he had the truth. And so he wanted everyone to partake of that truth. But stray from Martin Luther's truth, and he was not so tolerant. So he, so he ends up advocating the death penalty for blasphemous and, and, you know, ends up with these rapidly antisemitic tracks, um, that, you know, were used by the Nazis for propaganda. But the genie was out of the bottle, there was no sort of putting things together. So when you allow ordinary people literacy, when you allow them to peer into the Bible for themselves, they will generate their own ideas that won't be

in accordance with, with Luther's or any other ideas. So you have pluralism and that over time generates a movement towards, uh, heterodoxy, towards, uh, tolerance and so on, even though the path would be extremely bloody and disruptive.

[00:13:31] Uh, uh, and I hope our current sort of, uh, digital age won't be as disruptive and bloody as, as, as, as, as what followed from after the reformation and the printing press

[00:13:42] Jeffrey Rosen: Such a fascinating history, so distressing to learn about Luther's antisemitic tracks and also his own, uh, version of the Milton effect. And yet, as you note, uh, today populations in Lutheran states like Denmark, Sweden, and Norway are among the most secular and liberal in a, in a world in a way that, uh, Luther would not have, uh, anticipated. David, um, Jacob's, uh, thesis that Gutenberg and Luther Transformed Speech is powerful, and others have noted the connection between new printing technologies and revolutions in speech, including Akhil Amar in *The Words that Made Us*, where he talks about the invention of the broadside press as being central to free speech at the time of the founding. As you look at the history of American free speech, and we, we think of landmarks like the debates over the Alien and Sedition Acts in 1798, and the Sedition Acts of 1917, as well as the cases you argued, what do you think is the relation between new technology and advances in our understanding of free speech?

[00:14:43] David Cole: So I think it plays a critical, uh, role. I love the idea of Luther on Twitter. Um, uh, and, and, uh, if only, um, Luther could get more followers than, uh, Donald Trump, uh, that would be, uh, I think that would be a good thing, I'm not sure. Um, but, uh, you know, so, so, so I think absolutely, look, technology and the way in which we speak, the way in which we exchange ideas, where we exchange ideas, how we do it, how accessible that is to ordinary folks, that obviously very much affects the facts on the ground, which then free speech theory has to, and, and, and practice has to deal with. And so, you know, the introduction of, uh, radio and television, uh, raised a whole set of, uh, questions. Uh, cable television raised a whole set of questions.

[00:15:32] Social media is now raising a whole set of questions that, um, technology sort of changes some of the critical facts in ways that cause us to have to kind of rethink where should authority lie, how should authority be exercised, what's the relationship between private power and, uh, and, and government power? Uh, and those are super hard and difficult questions. I will say though, that I think, um, you know, that- that's obviously just one part of the dynamic, and I think when you look at the history of American free speech, the other part of the dynamic is the use of free speech to push for free speech, right? The, the, the, the sense in which, um, movements, political organizations, and, um, causes really used what the First Amendment promises them to demand what they were seeking. And in doing so we're often faced with repression, uh, by the government, which then caused them to argue for those, um, First Amendment values so that they could continue engaging in what they were doing.

[00:16:43] And so, you know, I think if you look at what drove the development of First Amendment law in the United States, in particular, you would, you would point to the Union Movement, the Labor Movement, uh, which was an effort by people to, you know, come

together in, uh, search of certain kinds of, uh, values to use their association, and their protest, and, uh, their collective, uh, uh, power, uh, then, you know, companies and, and the state sought to repress them. And that led to a whole series of, uh, constitutional confrontations and decisions and the same thing, um, with respect, uh, to the Communist Party. The communist party sought to use, uh, uh, free speech to spread its, uh, its ideas. Um, we saw ourselves as in a, uh, a grave battle with, uh, communism for, for so much of our, um, of the period when the First Amendment was developing. Uh, the state, uh, sought to suppress those particular ideas.

[00:17:43] And it was through the lessons of, um, what goes wrong when the government seeks to suppress, you know, labor organizing, or communism, or socialism, uh, the kinds of excesses that that leads to that we ultimately developed in this country, uh, fairly stringent, um, protections, uh, for free speech. So yes, technology complicates the issue and presents, uh, lots of different, uh, sort of facts that the doctrine and the theory have to deal with, but also people's engagement and use of their First Amendment rights, um, has been equally critical, I think, in the, in the way, uh, free speech doctrine has developed in the United States.

[00:18:28] Jeffrey Rosen: Thank you for that central reminder that as you say, fights of particular groups, union organizers, communists, uh, wig dissenters and religious dissenters has been just as important as technology in our free speech debates. Jacob, we now approach the seeds of the enlightenment as you put it in, uh, chapter four. And you discuss how battles over religious freedom, in particular efforts to protect Protestant dissenters in countries like Holland and England was central in free speech. Uh, you identify Spinoza as one of the great defenders of what he called this end and aim of liberty, which is, uh, in a free state as Spinoza put it, according to you, "Everyone is at liberty to think as he pleases and to say what he thinks."

[00:19:23] I have to say that phrase leapt out at me because Jefferson used a version of it in a 1799 letter. And Jefferson seems to have borrowed the phrase without attribution from Cato's Letters where the wig polemicists talk about the right to think what he will and to act as he thinks, um, they must have gotten it from Spinoza, uh, which you, um, so powerfully quote. What I'd love you to share with We The People listeners is how those battles over religious freedom of conscience in the 17th century shaped our modern understandings of speech, both in England and in Holland? And, and, and give us a sense of the, the major thinkers, uh, Spinoza, Milton, Cato's Letters, and so forth. Another, another huge topic, but you tell such a rich story, give us a flavor of it.

[00:20:11] Jacob Mchangama: Yeah, no, uh, it's true, the 16th century is, is, is very important. Free speech is, is sort of bubbling up. Uh, it hasn't become sort of fashionable as to the extent that it will in the 18th century. But I think, you know, I might want to start in, in England with, uh, with the so-called Levelers, because I think there's a, uh, a more direct link with the First Amendment, uh, with the Levelers than there is with, with Spinoza in, in many ways. I think Madison's sort of draft of, uh, of, of the First Amendment and his ideas that he sets out in, in his report, uh, of 1800 criticizing this Sedition Act unacknowledged, but, but to, to a very large extent sort of uses Leveler ideology. So the Levelers are, are these... The small group of, of English radicals who argue for universal toleration, press freedom, and incredibly important,

universal male suffrage, uh, during, uh, the, the turbulent 1640s where you had, uh, an English, uh, civil war.

[00:21:13] And, you know, they're much more radical in the defense of free speech than Milton as you, as you mentioned. I, I, I sort of used the term Milton's curse in the book to... Because Milton is someone who writes, uh, [inaudible 00:21:23] in, in 1644 to decry licensing, the reintroduction of pre-publication censorship. But if you read him more carefully, despite his eloquence, uh, he really is not in favor of protecting Catholics, he comes to support blasphemy law and he ends up serving as a censor under the Cromwell. Whereas the, the Levelers are, you know, they are much more principled, not perfect, but, but, you know, they defend both, you know, they both, they're both critical of pre publication, censorship, and post publication consequences. So, so, um, and, and, and really sort of linked the idea of early types democracy with, with free speech and also the idea that free speech is essential for, for Liberty.

[00:22:05] And they also crucial, I think, argue, um, that you have to def-, in order for free speech to thrive, you have to defend your ideological enemies, uh, and be principled. And this is of course where, where Milton fails. And their ideas, um, don't survive because they're basically, uh, put in, in, in prison. Um, but, but then later on, you have, as you mentioned, Cato's Letter, and Cato's Letters, especially Cato's Letter number 15, which has this great meme, the great ball work of Liberty, uh, which goes viral in the colonies. And really, I think is essential to, to the, to the culture of free speech, uh, in, in the American colonies that will help, uh, defeat, I think, British efforts to, to resist the revolution.

[00:22:44] You know, a contrast that, you know, this is a quote in, in 1671 from Virginia's governor William Berkeley. He says, "I thank God there are no free schools, nor printing, and I hope we shall not have these for 100 years. For learning has brought disobedience, and heresy, and sex into the world, and printing has developed them and libels against the best government. Got keep us from both." So there's a huge difference between 16, uh, 71 and, and 1776 when you have Virginia's, uh, uh, Bill of Rights, uh, and, and, and Virginia sort of becomes a, a hard bet for, for free speech ideology.

[00:23:16] Um, uh, so, so that's sort of the connection between England, uh, uh, 17th century, England and America. But as you, you are also right that the Dutch Republic becomes sort of the printing house of Europe I would say in the 17th century. Now, it's not due to any legal protection or constitutional protection of free speech, it's more to do with the fact that the Dutch Republic has revolted against the Spanish Habsburgs, and so at least on paper, religious freedom becomes really important. But, but more importantly, sort of autonomous rules. So the provinces are very jealous of, of, of their, their abilities rule themselves. So you don't have any centralized command and control of information, and the Dutch are also very much into commerce, so they... You have what I call the Dutch dark web and that Dutch printers will print things, uh, that can be printed nowhere else in Europe, and then they'll export it, you know, uh, across lines of censorship.

[00:24:07] And, and someone like Spinoza thrives in that, uh, also cosmopolitan atmosphere and write his very consequential book, which by the way becomes one of the most censored books in,

in all history. But it's also, you know, [inaudible 00:24:19] becomes, uh, moves to the Dutch Republic, uh, Pierre Bail and John Locke. So it, it really becomes sort of a, um, a haven, if you like, even though there are... It's certainly not, uh, free speech absolutism or, or, or religious freedom, uh, for all comparatively the, the free speech and, and, and religious freedom is, um, you know, thrives in the Dutch Republic and really sows the seeds for, for the radical enlightenment in, in, in places like France. So, so, so in that sense, I, I think the Dutch Republic plays an out sized role, uh, for, for the development, both of the, the practice and principle of, of free speech, uh, in, uh, especially in Europe.

[00:24:59] Jeffrey Rosen: Yes. So powerful of you to resurrect the role of the Dutch Republic, where as you say, Locke and his patron, the Earl of Shaftesbury took refuge. And also you resurrect the role of the most prominent Levelers, Richard Overton, William Walwyn, and Freeborn John Lilburne, the Puritan who was [inaudible 00:25:20] in 1638. I always taught Lilburne in criminal procedure as an example of the fifth amendment, right against self-incrimination nemo tenetur, no man is bound to accuse himself, he said in refusing to answer questions before the Star Chamber, but you resurrect him as a central free speech hero.

[00:25:36] David, um, Jacob's history here was unfamiliar to me when, when I think of the paradigm cases at the heart of American free speech. I think of course of the battles over the Alien and Sedition Acts of 1798, and perhaps the Zenger trial as well, what episodes, uh, would use single out? And if, if, if you think Zenger and the Sedition Act controversy is relevant, tell We The People listeners those stories and their relevance for our understanding of free speech.

[00:26:03] David Cole: There's so many stories that are, um, critical to our understanding of free speech. And, but I, I actually think that the modern First Amendment really comes out of the battles that started in the early part of the 20th century. And we, we, we go back to when we, you know, when the court ultimately, uh, starts announcing robust First Amendment protections, it points us back to, uh, the Zenger trial and it points us back to the Alien and Sedition Acts. But of course at the time the Sedition Acts were, were not, uh, uh, declared unconstitutional. Um, people did go to jail for, uh, engaging in Sedition, the Alien Act, uh, I, I think is actually still on the books essentially as the enemy Alien Act today, uh, which allows the government to lock people up simply because of their nationality during a, during a, uh, a war.

[00:27:01] But it's really the World War I, uh, and folks who are opposed to, uh, the war being, uh, singled out and prosecuted, um, that led to the first real constitutional decisions in the Supreme Court on free speech. And they were all losers. The, the, you know, if you spoke out against the war, you went to jail and you went to jail for, uh, in, in, in some instances for, uh, for 20 years. Um, and it was, uh, you know, it was really the, the lone dissenters of, uh, justice Holmes and justice Brandis who spoke out against that, but they were, you know, they were very much in dissent. And so, um, so I think, you know, although there were obviously free speech de- disputes in this country and, uh, before that period, and David Raban has written quite a lot about that, um, the real sort of doctrine and the modern First Amendment was born in the struggles around, uh, around World War I, which turned into the struggles around anarchism and, uh, communism, and World War II, and the civil rights era and the like, you know, up to, up to the current day.

[00:28:12] So, so in our country, I think the concepts of free speech while they have lots of parallels to the, to the history that, uh, Jacob's book so fascinatingly details, we really have kind of 100 year history of, uh, of free speech in terms of enforceable protections backed by courts that people could rely on. And it's, uh, so it's a much more recent history.

[00:28:39] **Jeffrey Rosen:** Jacob, uh, David is surely, right, that in practice, uh, free speech in America was not meaningfully articulated by the Supreme Court un- until the dissent of Holmes and Brandis of the 20th century and of those battles over free speech. But tell us more about what the chapter you call constructing the bull work of liberty, where you quote both the revolutionary era state constitutions, which, uh, quoting Cato's Letters in the Virginia Declaration of Rights, say, "That the freedom of the press is one of the great bull works of liberty and can never be restrained." And then Madison's Virginia resolutions criticizing the Sedition Acts by emphasizing that the right to criticize public officials is central to democratic government. To what degree was... Did... Was America an innovator in free speech during the founding era, and to what degree was it simply codifying ideas that had arisen earlier?

[00:29:34] **Jacob Mchangama:** So I think obviously there's a, a great heritage, uh, especially to Cato's, uh, Letters. But I think obviously the Sedition Act is a low point, you know, it's the First Amendment is ratified in 1791, and then in seven years later, you have, you have this Sedition Act enacted by people who would passing themselves as defenders of free speech when rebelling against the British. However, I think that throughout the 18th century, a culture of free speech develops in, in, uh, in the colonies that... Which means that the backlash against free speech, uh, after the French revolution that you see in Europe is much less, uh, violent and brutal in the US than elsewhere.

[00:30:17] So, you know, of course the, the... In France, you know, the, the French Revolution, uh, degenerates into sort of a hunt for political heritage. In, in Britain prime minister pit, uh, initiates this campaign against Sedition, uh, Tom Pain is, is lucky to escape out of the country. Uh, he's, you know, Habeas Corpus is suspended and several hundreds of people are prosecuted for their ideas. And, and in continental Europe, uh, especially, you know, after the dangers of the French revolution are avoided, you know, it's back to, to, to alter and throne very different picture, uh, in the US. And I think part of that is because, you know, after the Zenger case, it becomes impossible to have someone convicted for Seditious libel through jury trials. Uh, you, you, you can't even get grand jury to indict someone, um, because there's this idea that free speech is the, the, the ball work of liberty. You still have, um, parliamentary privilege and, and, and other, such things.

[00:31:14] But I think the genius of Madison is he basically takes the idea, you know, Cato's Letters is mostly concerned with protecting free speech against the executive branch, so... And not so much about, about popular sovereignty. So basically Madison marries those two ideal sort of egalitarian free speech, uh, and protection against, uh, executive, uh, arbitrary power. And I think that's, that's, that's the real innovation there on the part of Madison and, and on the First Amendment. And of course the first draft of the... Of what will become the First Amendment includes language from, uh, from Cato's Letter number 15, uh, number 15, doesn't survive.

[00:31:57] Uh, and also I think Madison is very, uh, farsighted in that he actually tries to have a, uh, a protection, uh, against state, uh, state encroachments on, on free speech. That doesn't survive either. And, and I think he was absolutely right to sort of stress that the greatest danger against free speech would not necessarily come from the federal government, but from state governments. And, and we would see that, of course, in the 19th century in Virginia, where, you know, in the 1830s, you have draconian laws enacted against abolitionist ideas, you have them all over the south, and in, in some southern states, you'd even have the death penalty formally for, for spreading abolitionist ideas. You'd have president Andrew Jackson who tried to enact a federal, uh, law to sort of prohibit the postal service from distributing abolitionist materials to, to southern states.

[00:32:48] But in that sense, I think there was some real genius on the, on the part of, of Madison, and, and I think, you know, he, he makes the case very in, in the resolutions and the, the report of 1800, uh, why the American model of free speech is very different from the British model, which is a very elitist one. And George Hay makes it, uh, another Virginia lawyer, makes it probably a bit, bit more polemical, but he basically says, you know, you know, yes, Sedition laws are, are necessary, may be necessary in, in, in Britain to protect the power and privilege, but in the US, it's a disgrace.

[00:33:20] I completely agree with David, tho- those, those ideals would not be realized, uh, until much later. In fact, you could say Madison's idea, his, his criticism of, of Sedition laws will... That always pop up, like, like some bees won't be sort of decapitated until New York Times versus Sullivan in, in, I guess in 1964. But the idea is there, and, and that is a, a novelty and goes much further than almost anywhere in Europe, on the continent.

[00:33:48] **Jeffrey Rosen:** So many fascinating points. Uh, you've just shared, including the idea that Madison merged the Federalist idea of, uh, top down restrictions on executive power with the, uh, anti-federalists idea of more egalitarian speech. And he expressed it in that report of 1800, which was, uh, unfamiliar to me as well as, uh, the words of George Hay. And then your central point that the difference between the US and France was that the US developed a free speech culture and Americans had become more accustomed as you put it to a more vibrant public sphere, and that was more significant than the difference of the wording between the First Amendment and the equivocal nature of article 11 of the French declaration of rights. Um, David, do you agree or not with Jacob's interpretation of the importance of a culture of free speech as being central to the American experience, and how would that have explained the fact that it was around the time of World War I, that Holmes and Brandis began to enshrine this understanding of free speech into law?

[00:34:55] **David Cole:** So, yeah, I mean, I think culture is so critical when it comes to free speech. It's, you know, do you have a culture of tolerance or do you not have a culture of tolerance? And do you have a culture in which the rights of ordinary folk to get together to, um, advocate for what they believe, even if it is, uh, uh, disapproved of by the authorities is so, uh, so central. Um, but you know, I, I, and I think it's really, um, it, it is really powerful in the United States today. Um, it has... It wasn't always that way. I, I, I think Jacob's right there, where sort of the- these ideas were there, but there was also the counter, uh, idea.

[00:35:39] And I think, you know, the times when it's sort of most tested are when the nation is most on, you know, in crisis or feels most threatened. Um, uh, so, you know, World War I, uh, World War II, uh, you know, 911, um, you know, these are moments where the nation feels threatened and tolerance is most tested. And we weren't, uh, uh, particularly tolerant in World War I at all, uh, and, you know, yes Holmes and Brandis argued for, uh, for tolerance, but, uh, their, again, their views were, were only in dissent. We weren't particularly tolerant in the between war periods, and we obviously were not tolerant in, uh, in World War II. Um, and we weren't particularly tolerant after 911 either. Um, uh, so, you know, those are the, those are the periods where this culture of tolerance is tested.

[00:36:36] But I think what is, uh, important about the First Amendment story in the United States is that we have tended to learn from those moments of intolerance and to recognize after the fact, uh, sadly, it's almost always after the fact, uh, that the intolerance was unjustified, that the intolerance was counterproductive, that the intolerance was a mistake. And in response to that, we have generally strengthened the protections for speech with an eye towards the risk that intolerance will rise at particular moments, and we need, uh, strong bull works of liberty, to borrow the term.

[00:37:29] And, you know, I think we actually have them now, not only on paper in the sense of judicial decisions like Brandenburg and, and, uh, which says that you can't, you know, be thrown in jail for advocating criminal activity unless your speech is intended and likely to produce imminent criminal activity, which is a very, very high standard, or Scales versus the United States, which says you can't be punished for being associated with a group that advocates and, uh, or engages in illegal activity, unless you specifically intend to further it's illegal activity, so guilt by association is not sufficient.

[00:37:58] Those are really important bull works on paper, but I think more to the point more important, they're pretty broadly accepted in our culture. Uh, and you know, I think they're, they're under test today, uh, in, in ways that have, uh, that we haven't seen in, in the last couple of decades. Um, but they're still pretty strongly instantiated as compared to many, many other countries. And so, you know, I think you look around the world almost everybody's constitution has some free speech protection in it, but very few countries have the kind of strong civil society enabled by the First Amendment exercising First Amendment rights to check government efforts in times of crisis to crack down on those with whom it disagrees.

[00:38:44] So culture is absolutely critical, without it, uh, it's just words on paper. I'm fairly optimistic about our culture today, uh, and I think if I'm worried, um, it is, um, you know, this concern that social media is actually really cha-, the dynamics of social media is changing our culture, um, in ways that are, um, quite disturbing and I think lead towards far less understanding of the need for tolerance, uh, than we, um, have had, uh, you know, in recent years.

[00:39:17] Jeffrey Rosen: Well, let's talk now about the central question of the culture of free speech today. Jacob, you wrote a peace and foreign affairs called The War On Free Speech Censorships Global Rise, where you note that despite the fact that free speech continues to have formal protection in America and the legal protections afforded by the First Amendment remain

strong, for many Americans, the underlying idea of what some First Amendment scholars have called free speech exceptionalism has lost its appeal. And you talk about the combination of a consensus among elites that free speech on the internet can harm democracy rather than help it to growing calls from minority groups and on campus, uh, that say that, uh, minorities need, uh, protections against the harmful effect of speech, all of which are challenging a culture of free speech protection. Disaggregate those different challenges to free speech exceptionalism and talk about how they're playing out in the age of the internet.

[00:40:20] Jacob Mchangama: Yeah, so I think a good example is in 2006, as a junior Senator, uh, Barack Obama posted a blog or a podcast where he sort of said that, "The internet, uh, is, uh, it's great, it basically allows me to say whatever I want without censorship." Uh, and of course he won the, the so-called Facebook generation in 2008 and 2012, and, and really used social media to great effect connecting with, with voters groups that, that were perhaps previously turned off by, by politic. But then in an interview with the Atlantic in 2020, he calls, you know, online disinformation, the greatest threat against democracy, and that I think shows how institutional attitudes towards, um, social media and online free expression has changed including in the US.

[00:41:03] So even though I agree with David, that the US is ranked among the, the, the countries with the strongest culture of free speech, you know, we, we actually have a... My organization did a survey of global attitudes toward free speech in, in 33 countries, and, and I think the US came in, you know, number three or four on attitudes toward, uh, free speech. Um, I, I, I think there is this, this sense that, that a lot of people are alarmed by social media, and some of those are, are valid reasons. I don't think you could have the, the January 6th attack on Capitol without social media, uh, that would not probably have been possible. Um, but on the other hand, I think there's also, uh, sort of an alarmist, uh, tendency in the sense that the harms and costs are real, but sometimes also, uh, exaggerated.

[00:41:49] And un- unfortunately I think sometimes traditional media, just because the, the role of, uh, as the traditional gatekeepers is no longer the same as in the analog world, have a skewed incentive to also sort of exaggerate some of the harms of social media. And I think these conflicting attitudes, I think, uh, are, are speci- specifically disturbing in a time with so much tribalism and political polarization in the US. So, you know, in, in 2017, there was this poll, uh, in The Economist, I think, and, and a plurality of Republican voters agreed that, you know, court should be able to shut down newspapers that came with inaccurate statements or something to that effect. So that was basically the echoing Donald Trump sort of, uh, wish to, uh, to reintroduce libel laws or crackdown on the so-called enemies of the people.

[00:42:38] And then in 2021, uh, a majority of Democrats now wanted the government to do something about online disinformation, even though... Even if it, it might have consequences for the freedom of information. I think that shows that, you know, your attitudes toward free speech is, is content driven rather than principle driven. And so... And a Trump or a Biden administration's definition and enforcement of, of laws against dis- disinformation and the targets they would have in mind would, would likely be very, very different. And then you have the whole, um, um, um, about minorities.

[00:43:18] Um, and I think, you know, I saw some research that said that every generation coming after the so-called boomer generation has become less tolerant towards racist speech. And I think one of the reasons of that is, is that the boomer generation saw how free speech, how the expansion of First Amendment was critical in the race, in, in the fight for racial justice and, and, uh, for the civil rights movement to, to ultimately triumph, uh, and also saw that the fight for free speech culturally just expanded what you could say, um, uh, and, and so it was free speech was seen as emancipatory, but generations that did not experience the same thing now see free speech as a threat to minorities, also just because, and is a bit paradoxical. So at a time where, where tolerance for minorities and acceptance of minorities has never been higher, probably, uh, those who are the most tolerant of minorities have also become the most intolerant of racist speech.

[00:44:13] So they don't see... They see basically free speech or at least extreme speech and equality as mutually exclusive, where I would argue that free speech inequality are mutually reinforcing, uh, and that the history of the First Amendment, especially sort of in the 50s and 60s, I think bears this out because you basically have this huge expansion of First Amendment, uh, freedoms to protest peacefully, uh, New York Times versus Sullivan and so on, that, that are won by, uh, the, by, by, by the civil rights movement. Uh, and, but that doesn't really resonate today along, uh, many who are, uh, well... Who well intentioned are worried about free speech. But I, but, but I think if their worries concerns were turned into speech [inaudible 00:45:01] policies could very end... Well end up hurting the minorities that they want to protect.

[00:45:08] **Jeffrey Rosen:** David, what do you think of Jacob's argument that examples of free speech advancing equality are key in shaping the views of the boomers and that the current younger generation lacks such examples, and therefore it's less likely culturally to attach to free speech? I'm looking now at your marvelous book *Engines Of Liberty: How Citizens' Movement Succeed*. You give examples of the marriage equality movement, the right to bear arms and human rights in the age of terror as three movements that both mobilize the power of the courts, and also that of public opinion to achieve their goals. You begin with an introduction from *Learned Hands* emphasis on the importance of liberty lying in the hearts of the people, which Jacob often cites. If that's right, um, what would you advise free speech advocates to do to win the hearts and minds of the younger generation so that young people believe that it's actually important to defend the classical vision of free speech?

[00:46:03] **David Cole:** So, um, yeah, I definitely agree that we learn from history, but we also forget history very quickly. And so, you know, in the same way that, uh, there was a period where women would say, well, I'm not a feminist, um, but you know, they were, uh, they were, they were relying for their standing in society and for their comfort in society, on the struggles that feminists and women's rights, uh, advocates have had engaged in for, um, for many decades earlier. You know, if you look at the history of the sort of core battles about the protection of speech with which we, the majority, disagree, um, they, they really sort of go up to the civil rights movement in the '70s. And by, by that time, the court decides *Brandenburg versus Ohio*, uh, which I mentioned before, it decides scales, it decides, uh, the, the, the case about guilt

by association. It decides New York Times versus Sullivan, 1964. Those are the high water marks of, uh, kind of the, the, the, um, First Amendment protections.

[00:47:13] You know, since then we've sort of been fairly steady state. And, uh, those are... Those mean that a lot of disputes about government abilities to suppress speech are just, you know, we don't even have to engage in them because we spent, you know, half a century fighting over what the rules should be. We adopted a set of rules, they're very protective, uh, and they greatly limit what the government can do. Now, kids, you know, growing up today, uh, they didn't live through any of that. They didn't fight for, they didn't see, you know, the themselves or their fore bearers really fighting for free speech, they take... They, they, I think take free speech for granted.

[00:47:55] Um, and then I do think that there's a, a sense often in the universities where, where sort of kids develop their, um, their ideas and their politics in a, you know, for the first time in a self conscious way. And many universities, many elite universities are dominated by, um, liberal and progressive, uh, scholars for the most part. And so they get comfortable with the idea of let's suppress views with which we disagree because they trust that the people in power in those, uh, institutions will suppress the right speech and not suppress the, you know, the speech that they like. Um, but that is not the way the world operates. Uh, that is a very cloistered, uh, uh, view.

[00:48:34] And when you come out into the world, you know, the, the notion that, uh, we should empower, uh, authorities to decide whose speech is too hateful, or too offensive, or too racist, uh, is a very, very dangerous, very, very dangerous idea. And I think will, um, you know, if accepted be, be turned against the very people who are, you know, most, uh, open to it, uh, today. How do we change that? That is the, you know, \$64 million question. I mean, we at the ACLU have, uh, undertaken an effort to try to go into universities and colleges and work with students and try to sort of do workshops to try to, um, get them to understand the importance of tolerating speech with which we... With which they disagree, to get them to understand how counterproductive it is to their own interests to try to censor, uh, you know, those with whom they disagree, because in many ways they just make them martyrs and give them more attention.

[00:49:36] Um, uh, but it's, you know, that's very tough work. We, we also have a, uh, ACLU is a summer institute where we bring thousands of young people into Washington and sort of train them in, in, in the principles of civil liberties and civil rights, and specifically in, in, in this principle, the importance of toleration and the importance of free speech to all struggles for justice. We try to, you know, highlight when we are using the First Amendment to protect, uh, the rights of those who are demanding justice, uh, such as when we sue for, uh, efforts to suppress, uh, Black Lives Matter protests and the like. But we also try to highlight, uh, the importance of defending free speech, even for those, with whom we disagree, um, Trump supporters, um, you know, students who make racist comments on the internet, the Americans for Prosperity, Koch brothers, uh, Foundation.

[00:50:32] We think it's critically important to, to both demonstrate why speech is so critical to the efforts for justice that we support, and to underscore that for these rights to be meaningful, they have to be universal. And that means that we have to extend them to those with whom we

disagree, uh, as well as using them to empower those with whom we agree. Uh, but this is, you know, uh, this struggle, I don't think will ever be over. Uh, I am concerned, uh, with sort of the, the, the way the left has, uh, has turned on the First Amendment, um, to a significant degree. Um, but I think we can, uh, we can push back on that. We have to push back on that, and from the standpoint of both principle and practice. It's the... It's right in principle and it's critical to the practice of, of, of struggling for justice, whether it be racial justice, or gender justice, or LGBT justice, to, um, make sure that you can do it, uh, through the exercise of First Amendment rights.

[00:51:38] Jeffrey Rosen: Well, it's time for closing thoughts in this inspiring discussion. Jacob, you end your book with a galvanizing call for continuing to embrace free speech values in what you call the digital city. And you say, "Liberal democracies must come to term with the fact that in the digital city, citizens and institutions cannot be shielded from hostile propaganda, hateful content, or disinformation without compromising their egalitarian and liberal values." If you could, in, in just a few sentences, please remind We The People listeners, why it is so urgently important to protect free speech in the age of the internet?

[00:52:20] Jacob Mchangama: I think in many ways, you know, you cannot have a democracy, you cannot have individual freedom, you cannot have, uh, autonomy without free speech. And I think that, you know, Frederick Douglas said it, uh, the best he said, "The right of free speech is, uh, especially precious to the oppressed." But he also gave, uh, a powerful, uh, account of, of why free speech had to be universal, as David said, and not depend on the, on the color of your skin or, or the size of your wallet. And really, I think all the ideals and ideas that we hold dear, that critical masses in, in democracies hold dear, have been one through the exercise of the practice and, and principle of free speech.

[00:52:59] And I don't think we can just say, oh, now we've reached a perfect equilibrium, let's pull up the ladder and ensure that those who don't agree with us don't have a right, uh, to, to, to, to speak out, uh, their minds. Uh, and also just because my, uh, when I read the history of free speech, most attempts to try and crack down on voices that were seen as, as truly dangerous, the, you know, has been a, a cure worse than the disease. Uh, so I think, uh, there are very strong reasons to, uh, to keep, um, the culture of free speech, uh, alive, uh, even though the harms and costs have been amplified in the digital world, uh, and that they will be with us, uh, going forward.

[00:53:40] Jeffrey Rosen: David, last word in this superb discussion is to you, why is it urgently important to continue to protect free speech in the age of the internet?

[00:53:51] David Cole: First of all, thanks so much for, for having me again, um, really fascinating conversation and, um, really appreciate all you've done in, uh, serving to educate and, and spread the word about how important these, uh, these freedoms are. Uh, you know, I, I think the, the, the greatest challenges that we face as a nation are intolerance and authoritarianism. Um, and you've seen it, you know, not just in the United States in recent years, but around the world, the rise in intolerance and the rise in authoritarianism. And the First Amendment is a antidote to both. Um, it teaches us the value of tolerance, and tolerance is absolutely critical, uh, for a democracy, particularly a heterogeneous democracy like ours, uh, to succeed. We need to

recognize some humility, we need to recognize that we don't necessarily have the truth, we need to recognize that others who disagree with us profoundly have the right to articulate their points of view. And that's, that is sort of the central teaching of the First Amendment. So that's... It's important for that.

[00:54:57] The second threat is authoritarianism. Around the world, we're seeing the rise in sort of populist authoritarians, and what do they do when they come to power? Uh, they target those institutions that are empowered by, in our country, the First Amendment, the press, uh, the universities, the nonprofit sector, critics, uh, and in some places, religious groups that, uh, that... With which, uh, they disagree. That is, uh, civil society. That is what the First Amendment protects. It protects the right of people to speak out, to associate, to protest, uh, to... It protects the press, it protects religion. This is the core of civil society, which is at the end of the day, the most important protection against the rise of authoritarianism. That's why authoritarian focus on it, on those institutions, uh, when they come to power.

[00:55:56] So, um, you know, for both reasons, I think it has, it has never been more important to kind of reinforce the principled commitment to free speech, uh, that has marked this country, uh, at its best, and that when we have strayed from, um, uh, you know, has been this country at its worst.

[00:56:16] Jeffrey Rosen: Intolerance and authoritarianism are the enemies and humility and pluralism the goal. So many quotations on which to end. Uh, Jacob you quote, "Mill, we can never be sure that the opinion we are endeavoring to stifle is a falsified opinion, and if it were sure stifling it would be an evil still." I'm so grateful to you both for having taught and inspired We The People listeners. And dear We The People listeners, one way that you can learn more is to read Jacob and David's wonderful books. And Jacob Mchangama's *Free Speech: A History from Socrates to Social Media* is, is just a definitive and, and, and galvanizing account of the struggles over free speech from the ancient world to today. Jacob Mchangama, David Cole, for all you're doing to protect free speech in America and around the world, and to educate, uh, people around the world, thank you so much.

[00:57:24] David Cole: Thank you.

[00:57:25] Jacob Mchangama: Thank you. It was, uh, was a real privilege. Thank you to both of you.

[00:57:31] Jeffrey Rosen: Today's show was produced by melody route and engineered by Dave Stocks. Research was provided by Colin [inaudible 00:57:38], Sam Desai, and Lana Orrick. Please rate, review, and subscribe to We The People on Apple Podcasts, and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional illumination and debate. Friends, your homework this week is obvious, please, if you wanna treat yourself to learning in life, read Jacob Mchangama's *Free Speech: A History from Socrates to Social Media*. I learned so much, and I know you will too.

[00:58:09] And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion, the lifelong learning, and

the eagerness to be a full member of the republic of reason, uh, that's manifested by all of you listening to this great show. Uh, support the mission by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support our work, including this podcast, constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen. [music]