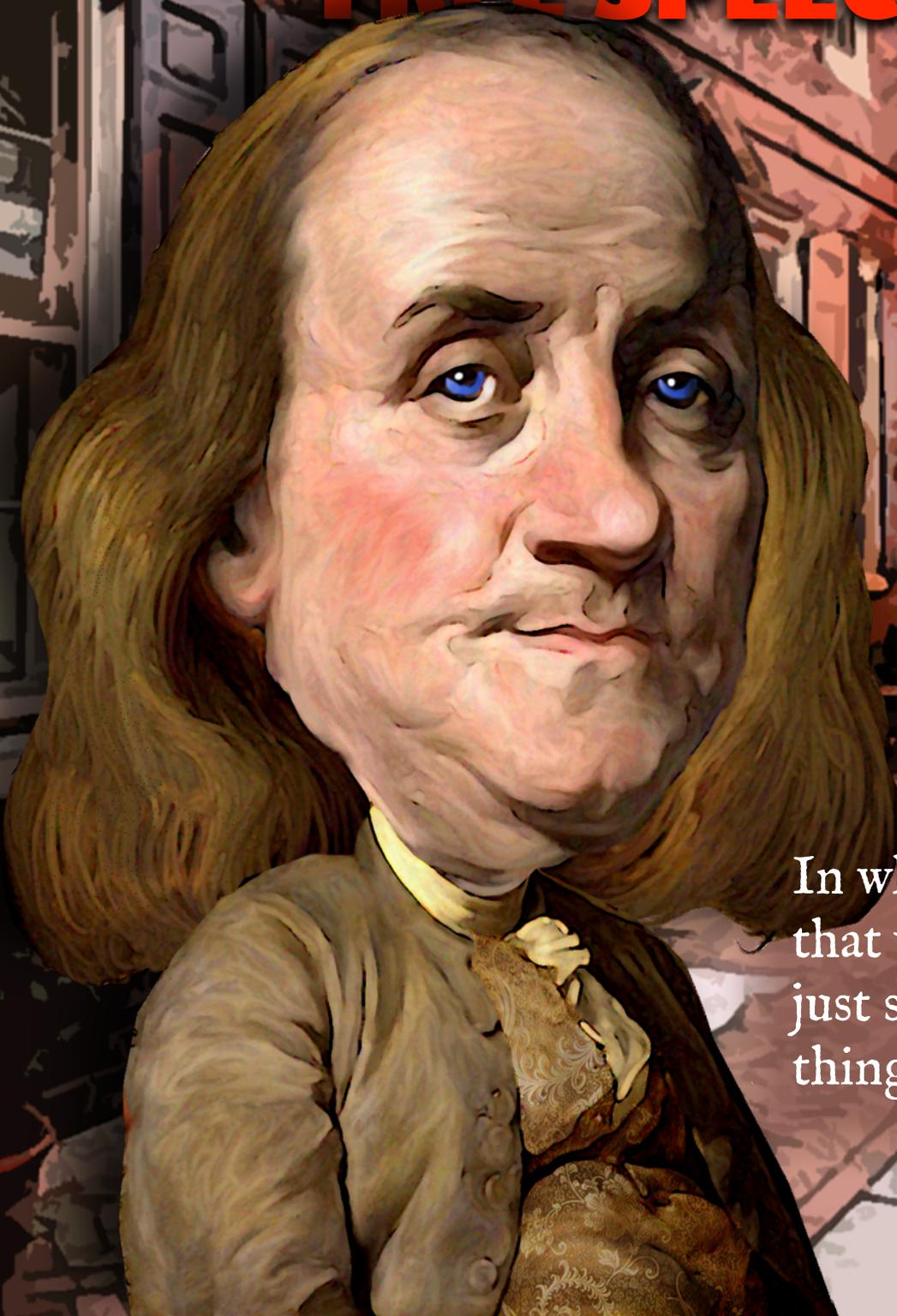


the story of **ETHICS**

How the media got moral, or not

FREE SPEECH



In which we learn
that you really can't
just say any stupid
thing you want.

The First Amendment & Free Speech

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE ENGLISH COLONISTS HAD A STRONG TRADITION OF INDIVIDUAL RIGHTS THAT THE ENGLISH PEOPLE HAD WON OVER TIME

King John (made famous by Robin Hood movies) signs the Magna Carta (Latin for "Great Charter") granting rights to rich land barons to at least partially control their own destinies. Of course, the peasants (most everybody else) were left to their own devices. Hence, the importance of Robin Hood to history in general, even if he was made up by Hollywood.



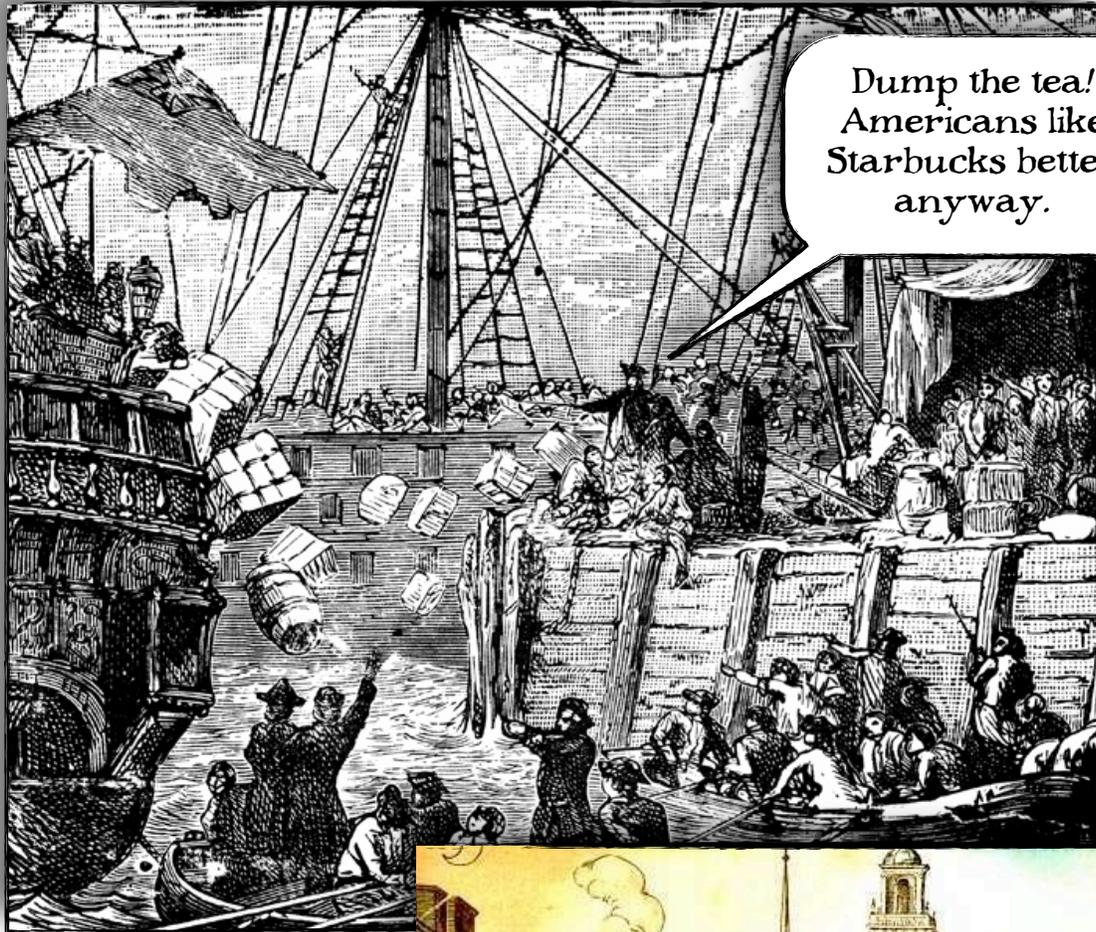
Just sign here, Sire.

Remind me how to spell "John."

Here we see Robin Hood paying off a peasant so he doesn't tell King John where Robin and his "Merry" Men live.

[HINT: Sherwood Forest, but don't tell King John.]

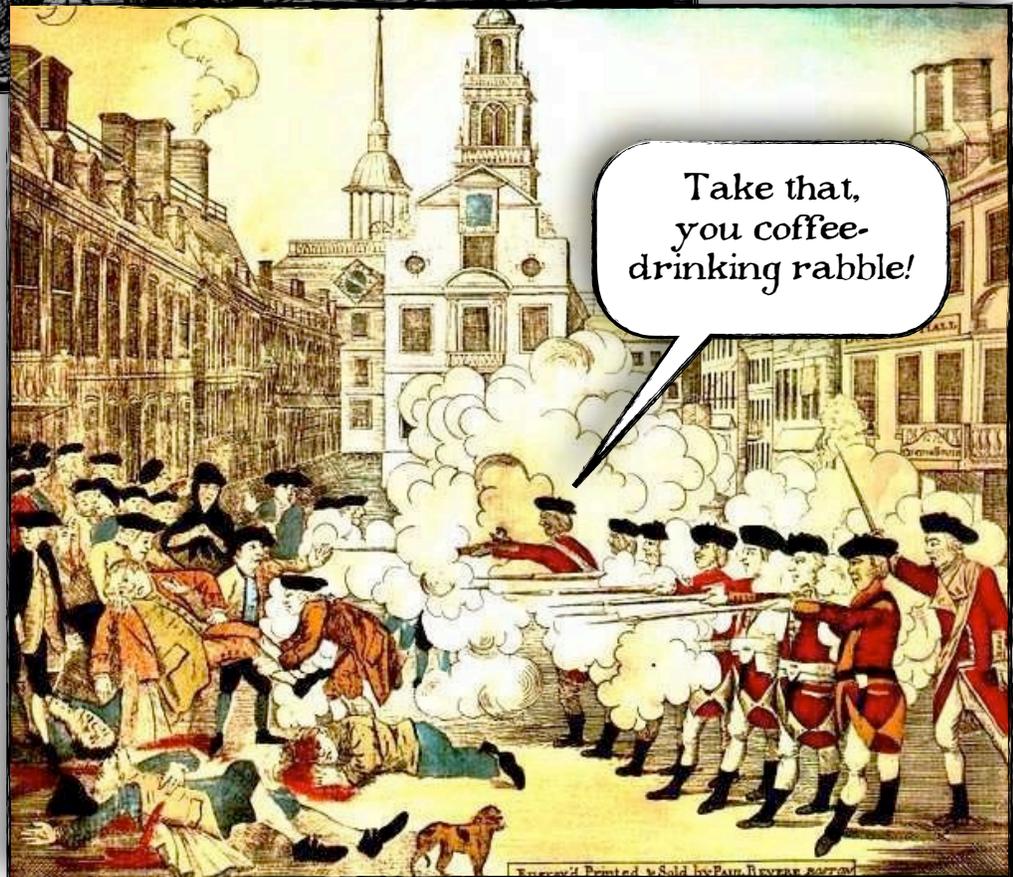
The American colonists tried to exercise those rights...



Dump the tea!
Americans like
Starbucks better
anyway.

Despite some
resistance from
the British...

This is a famous recreation of
events done by Paul Revere
for the local paper. Yes, that
Paul Revere. And you thought
he only made silver teapots
and rode fast horses.



Take that,
you coffee-
drinking rabble!

Approved, Printed & Sold by PAUL REVERE, BOSTON

then fought to preserve and expand them through the Revolutionary War



After all the fighting was over, the new country needed a constitution (a piece of paper outlining how everything was going to work), without a king, that is.

THE ARTICLES OF CONFEDERATION IN 1781 (THE FIRST FORM OF THE CONSTITUTION) CONTAINED NO GUARANTEE OF FREEDOM OF EXPRESSION

Also, the Federal government was given very little power

That's because of a lot of infighting over state's rights versus federal government rights (sound familiar).

A HUGE DEBATE AROSE BETWEEN THOMAS JEFFERSON AND ALEXANDER HAMILTON OVER THE ROLE OF GOVERNMENT.

THE NEW CONSTITUTION, IN 1787, GAVE VAST POWERS TO CENTRAL GOVERNMENT

But, the battle over the ratification of the Constitution lasted two years. Eventually, the strong government coalition won, even though Alexander Hamilton, it's strongest supporter, didn't.

I have you in my sights.

Big deal My gun is actually loaded.



Hamilton was killed in a duel with his political rival Aaron Burr. The duel followed some nasty remarks Hamilton made about Burr. He should have apologized.

So, even though Hamilton beat out Jefferson on currency value, Jefferson lived a bit longer.

BANG



THE CONSTITUTION, ORIGINALLY HAD NO BILL OF RIGHTS. IT SIMPLY STATED HOW GOVERNMENT WAS TO BE RUN.

- Many states would only ratify the Constitution if a Bill of Rights was added to it (what a surprise -- who cares how the government is run.)
- The Bill of Rights -- the first ten amendments to the Constitution -- was added on December 15, 1791, and the Constitution was finally ratified.
- James Madison wrote the original First Amendment... and influenced others.

Americans have the right and advantage of being armed -- unlike the citizens of other countries whose governments are afraid to trust the people with arms.



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Thanks a lot Jim...

Alexander Hamilton

I took 'em yesterday. It's your turn.

Your turn to take the kids to school.



And, ever since, we've used the Bill of Rights to settle disputes.

BUT, LET'S GET BACK TO FREE SPEECH...

WHAT DID FIRST AMENDMENT MEAN ORIGINALLY?

- At least the right to be free from prior restraint or licensing
- No punishment for people after publication of information criticizing the government
- But did it imply a Right to know? or a Right to speak?

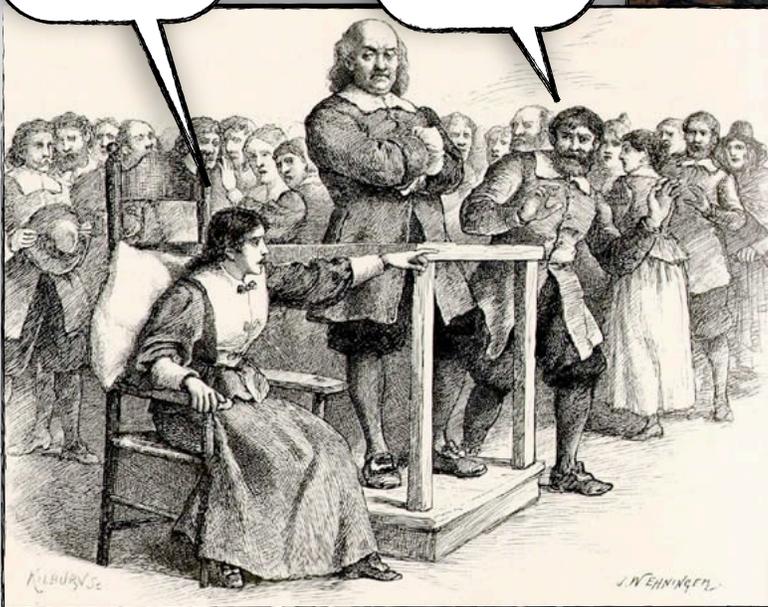
THE RIGHTS ARE RELATIVE, NOT ABSOLUTE

- meaning everyone has individual rights, but not at the expense of other peoples rights.
- You have the right to free speech—but not if that speech damages or endangers another person.
- You have the right to freedom of religious expression—but not if it endangers another person or interferes with their right to freedom of religious expression.

This last was especially important given what had gone on in Europe... and in the colonies, for that matter.

That woman's a witch!

Great! Let's hang her!



You have the right to agree with me... or else.

FOR THE MOST PART, THE FREEDOM REGULAR CITIZENS HAVE EXTENDS TO THE PRESS/MEDIA

FREEDOM TO CRITICIZE THE GOVERNMENT IS SUPPOSED TO BE GUARANTEED BY THE FIRST AMENDMENT... BUT IS IT?

HISTORICALLY, THERE HAS BEEN AN ONGOING STRUGGLE FOR BALANCE BETWEEN GOVERNMENT CONTROL AND FREE SPEECH.

OVER THE YEARS, THE GOVERNMENT HAS USED SEVERAL METHODS TO CONTROL SPEECH.

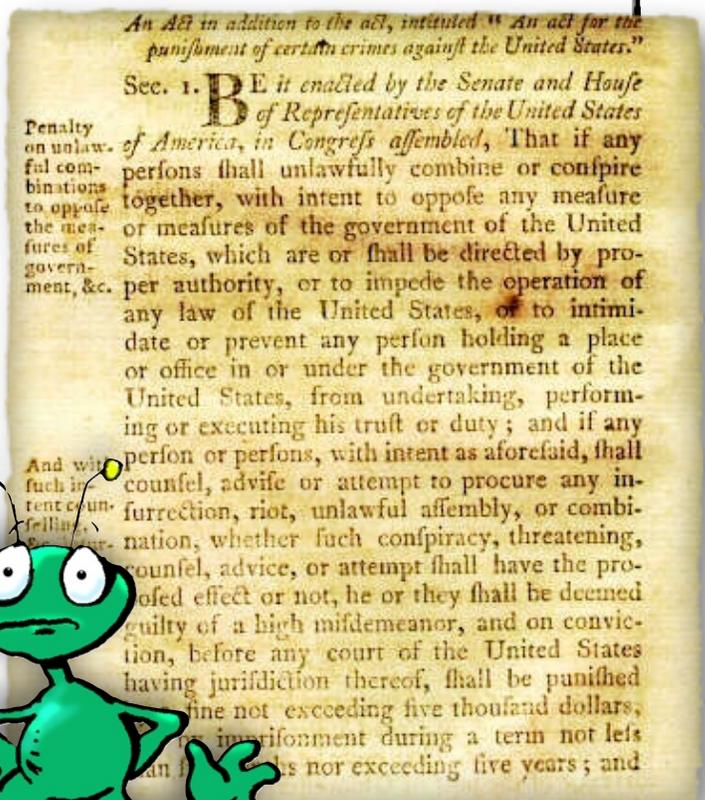
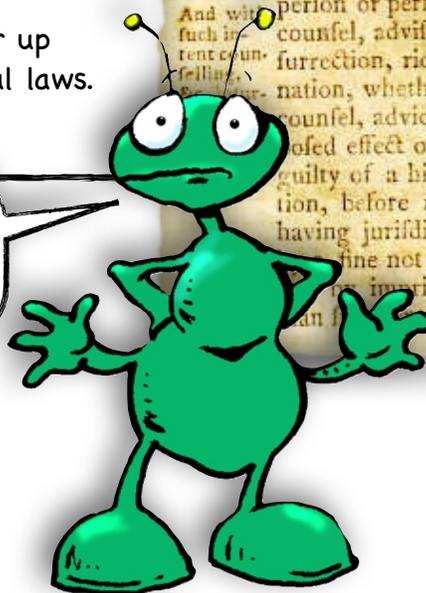
- The power of the state to limit criticism or published attacks on the government
- The power of the state to use taxation to censor the press
- The power of the government to forbid publication of ideas or information it believes to be harmful

THIS TYPE OF ATTEMPTED INTERFERENCE WITH FREE SPEECH HAS A LONG AND TROUBLED HISTORY IN THE U.S. -- BEGINNING WITH...

THE ALIEN AND SEDITION ACTS OF 1798

- The Sedition Law prohibited false, scandalous and malicious publications against the U.S. government, Congress, and the president.
- It punished people who sought to stir up sedition or urged resistance to federal laws. (Remember the Whiskey Rebellion?)

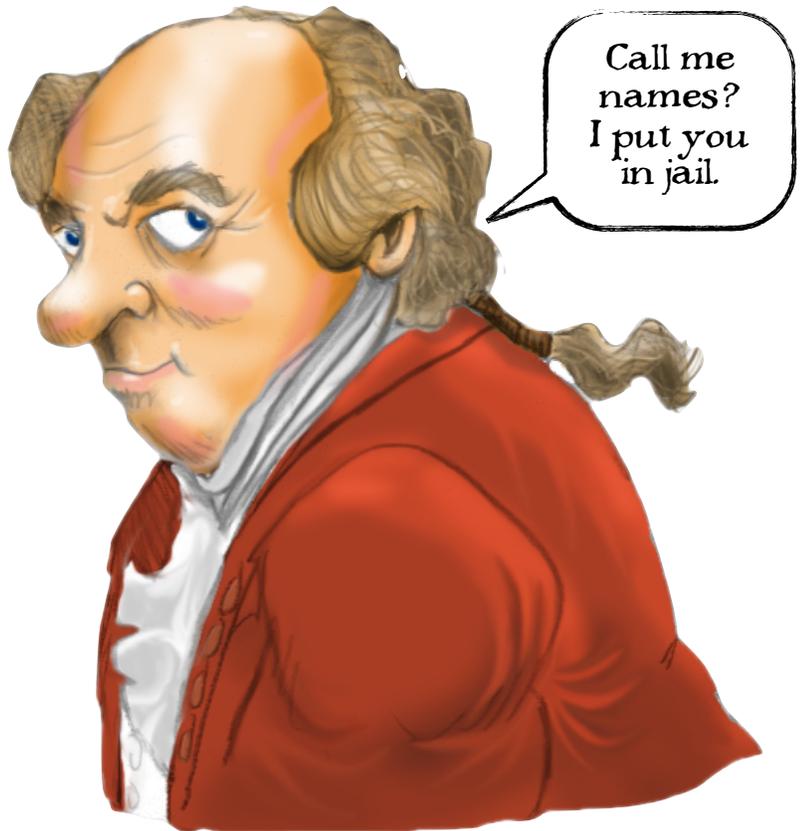
Aliens?
What did I
do?



PRESIDENT JOHN ADAMS AND THEN NEWSPAPER EDITOR THOMAS JEFFERSON HOTLY DEBATED THIS LAW

- There were 15 prosecutions under this law
- Adams was worried about keeping the new country under control.
- His paranoia may have lost him re-election.
- The Sedition Act expired in 1801, and newly elected President Jefferson pardoned all persons convicted under it.

BUT, IT DIDN'T STOP THERE.

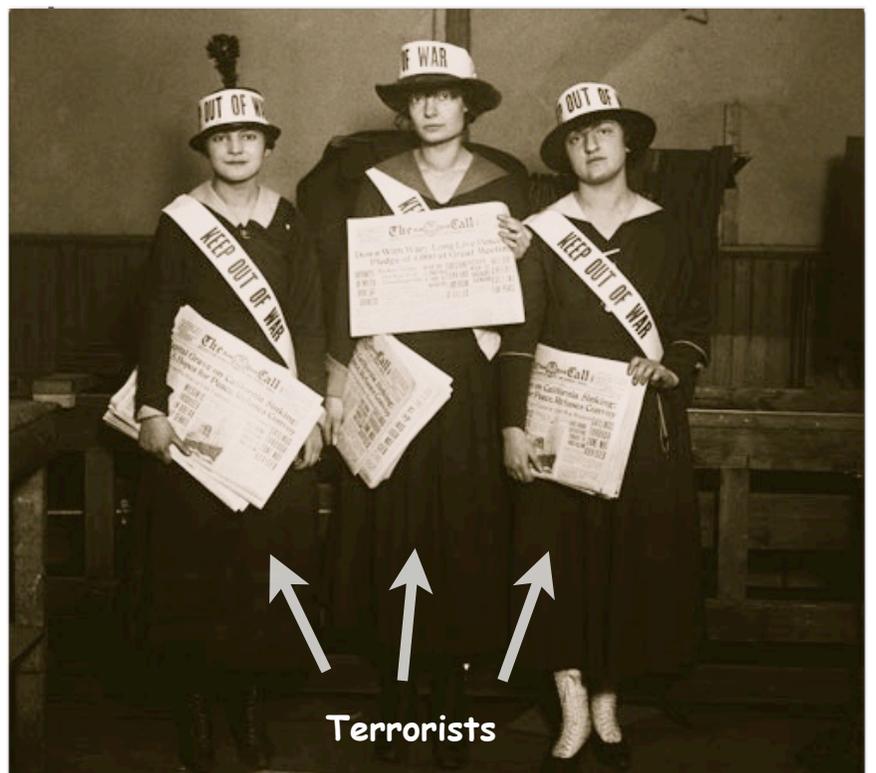


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SEDITION IN WORLD WAR I

THIS WAS A VERY UNPOPULAR WAR; WHICH LED TO MORE SUPPRESSION OF FREEDOM OF EXPRESSION THAN AT ANY OTHER TIME IN OUR HISTORY.

- The 1917 Espionage Act was approved by Congress and signed by President **Woodrow Wilson**.
- It became a crime to:
 - willfully convey a false report with the intent to interfere with the war effort.
 - cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the armed forces.
 - willfully obstruct the recruiting or enlistment service of the United States (like these ladies are doing).



Terrorists

AN AMENDMENT OF THE ESPIONAGE ACT, THE SEDITION ACT, WAS PASSED IN 1918

- It was a crime to attempt to obstruct the recruiting service.
- A crime to utter or print or write or publish disloyal or profane language intended to cause contempt of, or scorn for, the federal government, the Constitution, the flag or the uniform of the armed forces.
- 2,000 people were prosecuted, 900 convicted under Espionage and Sedition Acts.
- Political repression continued after the war against labor leaders and aliens (the rise of the "RED SCARE.")

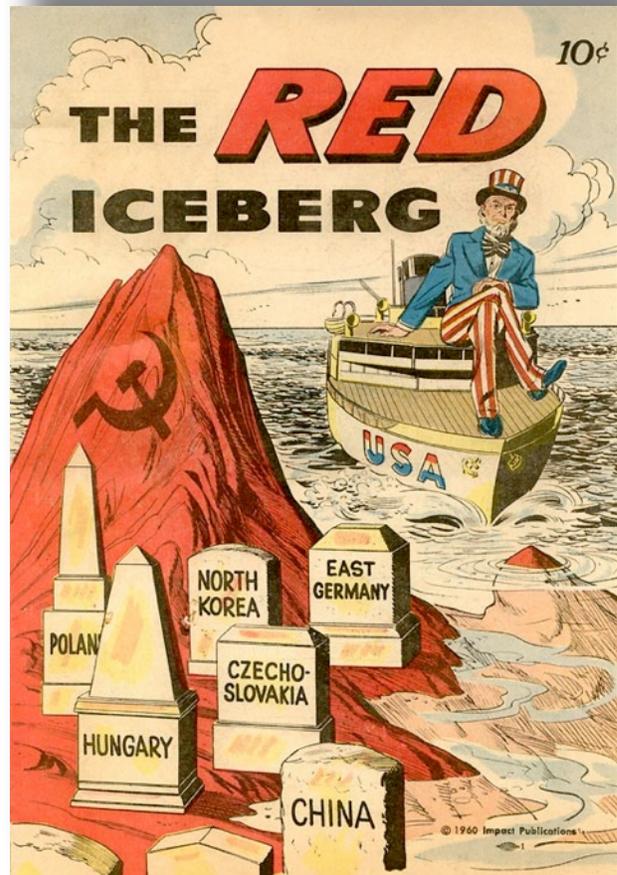


I didn't think women should vote either.

IT WAS THIS GUY'S FAULT
(WOODROW WILSON)

THE SMITH ACT: 1940, SECOND PEACETIME SEDITION LAW

- It was a crime to advocate the violent overthrow of the government, to conspire to advocate the violent overthrow of the government, to organize a group that advocated the violent overthrow of the government or to be a member of a group that advocated the violent overthrow of the government. Wow! That's a lot of "violent overthrows."
- Here's a hint: it was aimed primarily at the **Communist Party** of United States.
- Although it was ruled constitutional in 1951 (the height of the "RED SCARE,") it's scope was greatly narrowed in 1957
 - It had to be actual action aimed at the forcible overthrow of the government.



Joseph McCarthy was an American politician who served as a Republican U.S. Senator from the state of Wisconsin from 1947 until his death in 1957. Beginning in 1950, McCarthy became the most visible public face of a period in which Cold War tensions fueled fears of widespread Communist subversion. He was noted for making claims that there were large numbers of Communists and Soviet spies and sympathizers inside the United States federal government and elsewhere. Ultimately, McCarthy's tactics and his inability to substantiate his claims led him to be censured by the United States Senate.



But, I like red.



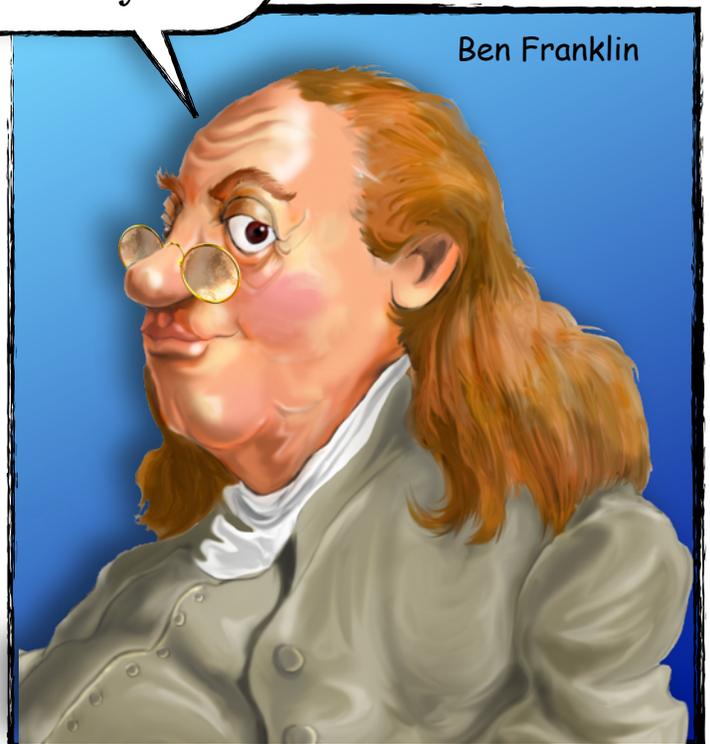
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"They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."

JUST IN CASE YOU THINK THAT WAS THE END OF IT... THE USA PATRIOT ACT

- Passed as part of the 2001 anti-terrorism bill.
- Defines terrorism as "any attempt to intimidate or coerce a civilian population" or to change "the policy of the government by intimidation or coercion."
- One section makes it a crime to provide "expert advice or assistance" to terrorists.

These restrictions seem to always happen when the government feels the country is threatened. But, maybe Franklin was right...



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THE QUESTION IS, HOW DO WE RECONCILE THE GOVERNMENT'S WORRY OVER SEDITION WITH THE FIRST AMENDMENT, WHICH IS SUPPOSED TO PREVENT GOVERNMENT FROM CURTAILING OUR FREE SPEECH?



CLEAR AND PRESENT DANGER TEST

- Articulated by Justice Oliver Wendell Holmes (1919).
- Congress has the right to outlaw certain kinds of conduct that might be harmful to nation.
- This was in response to the Socialist party authorizing the publication of 15,000 leaflets protesting U.S. involvement in World War I.

CLEAR AND IMMINENT DANGER TEST

- Justice Louis Brandeis articulated this one in 1927.
- Must be **clear and imminent danger of a substantive evil** that the state has a right to prevent before an interference with speech can be allowed.

This is starting to get confusing.

CLEAR AND PROBABLE DANGER TEST

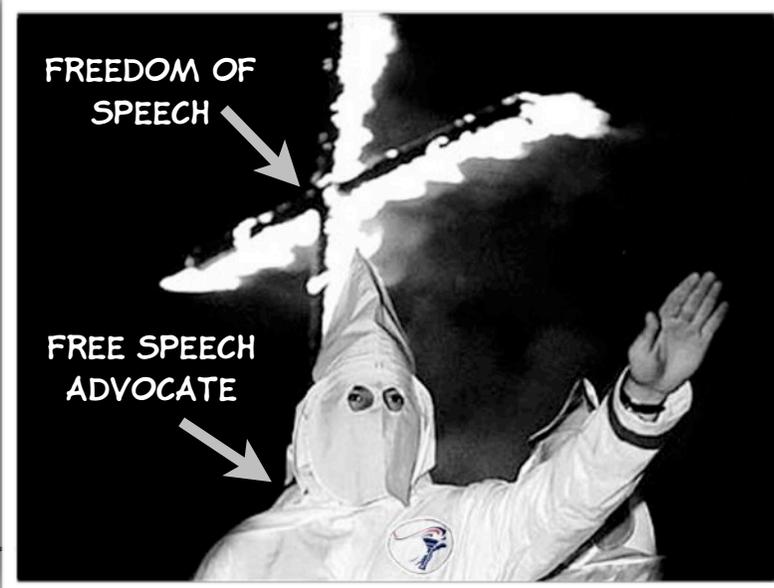
- Justice Marshall Harlan wrote that it was **necessary to distinguish between abstract advocacy and incitement of unlawful conduct** such as the forcible overthrow of the government.
- "The essential distinction is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely believe in something."



IMMINENT LAWLESS ACTION

- Ku Klux Klan case
- Close to clear and imminent danger test
- "The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation **except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions.**"

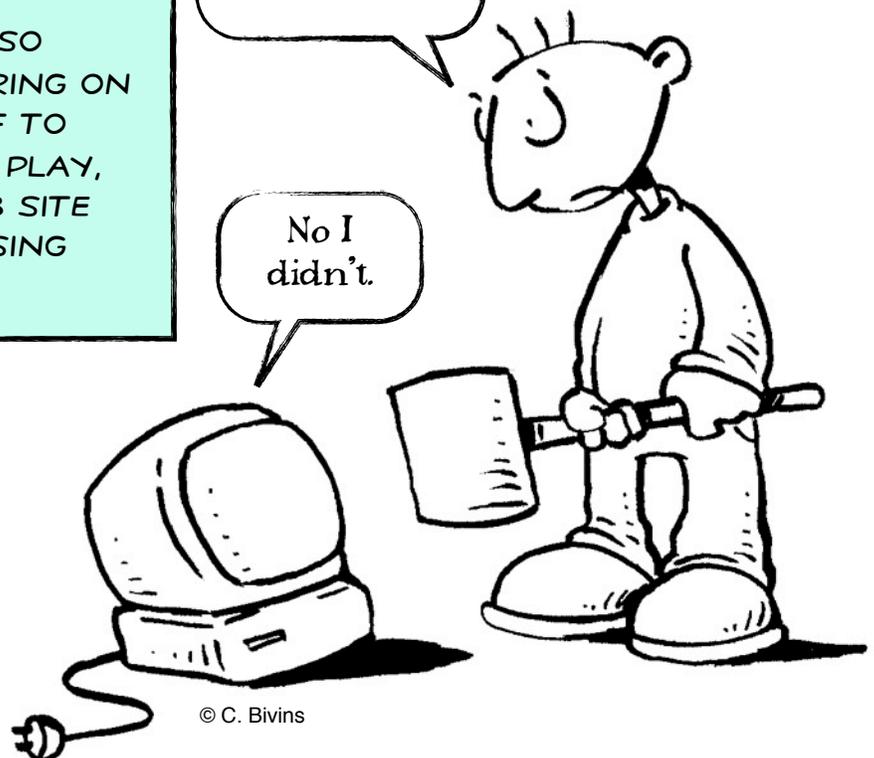
AND IN 1969, THE **SEDITION TEST** IN BRANDENBURG V. OHIO SUBSTANTIALLY CURBED SEDITION PROSECUTIONS BY RULING THAT "ABSTRACT" THREATS DON'T COUNT



THE BRANDENBURG TEST ALSO MAKES IT DIFFICULT, BORDERING ON IMPOSSIBLE, FOR A PLAINTIFF TO WIN A SUIT THAT ALLEGES A PLAY, BOOK, SONG, MOVIE OR WEB SITE WAS RESPONSIBLE FOR CAUSING SOMEONE'S ILLEGAL ACTS.

The Internet made me violent.

No I didn't.



SO, FREE SPEECH, VARIOUSLY RESTRICTED IN TIMES OF "DANGER," IS STILL AROUND, AS IS THE RIGHT TO CRITICISE THE GOVERNMENT.

A high school junior in Dearborn, Michigan, Bretton Barber, was asked to remove his anti-George W. Bush T-shirt in the lead up to the Iraq War. It featured a picture of Bush with the words "International Terrorist." He was asked to remove it, because it supported terrorism. The student sued his school district and his principal in Federal District Court in Detroit, Michigan. In a 25-page published opinion, Barber won the lawsuit, and his high school was ordered to allow him to wear the shirt.



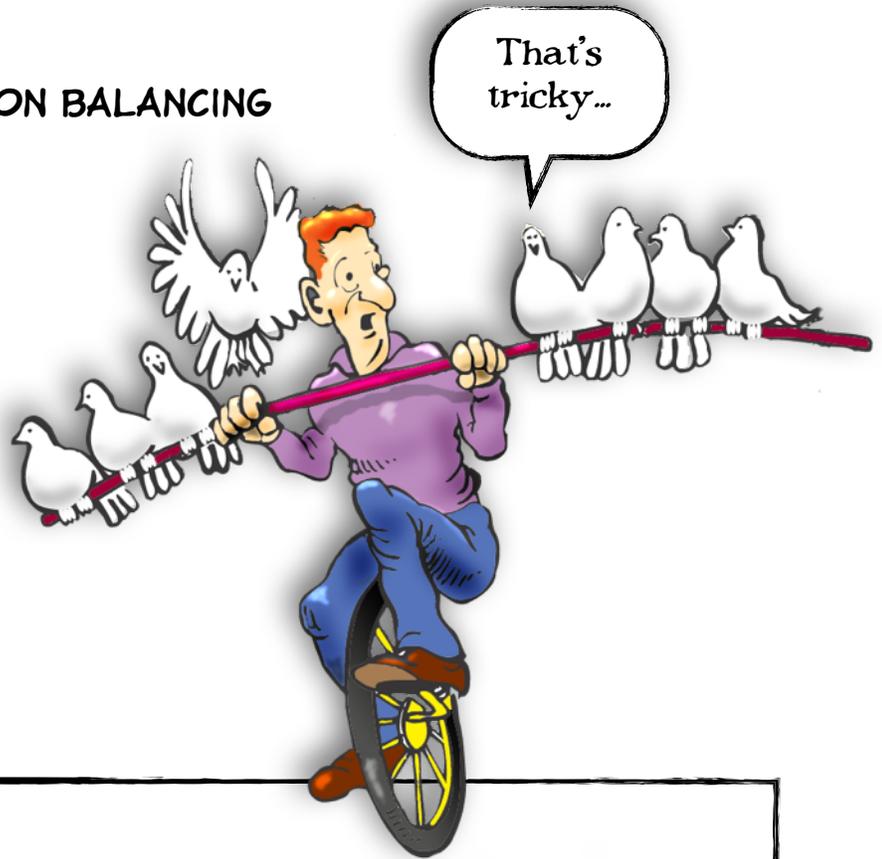
BUT, HOW DOES THE SUPREME COURT WORK ALL THIS OUT? GUESS WHAT?



FIRST AMENDMENT THEORIES

WEIGHTED OR PREFERRED-POSITION BALANCING

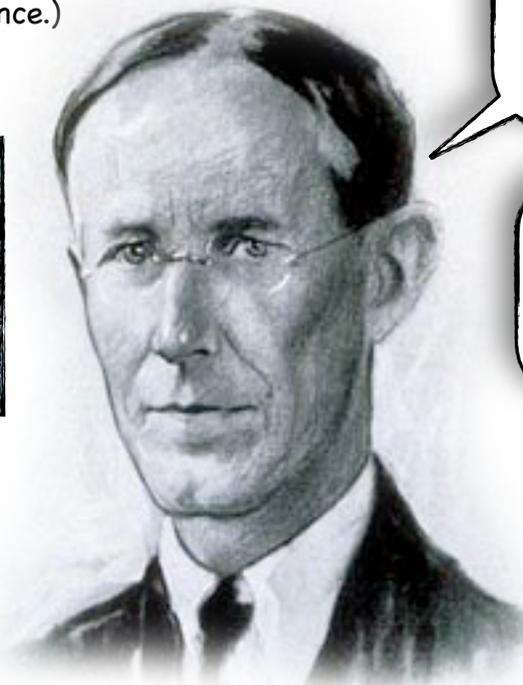
- Instead of a case-by-case approach, the scales are weighted in favor of free expression.
- Presumes that government action limiting speech is unconstitutional, therefore government has burden of proof to show that censorship is justified because of other important values or constitutional protections.



MEIKLEJOHNIAN THEORY

- Free speech is protected not as an end in itself but as a means to self-government, to the functioning of our democracy.
- Such speech is absolutely protected, while other expression not related to self-governing is not absolute. (Like advertising, for instance.)

Alexander Meiklejohn was a philosopher, university president, free-speech advocate, and early member of the American Civil Liberties Union.



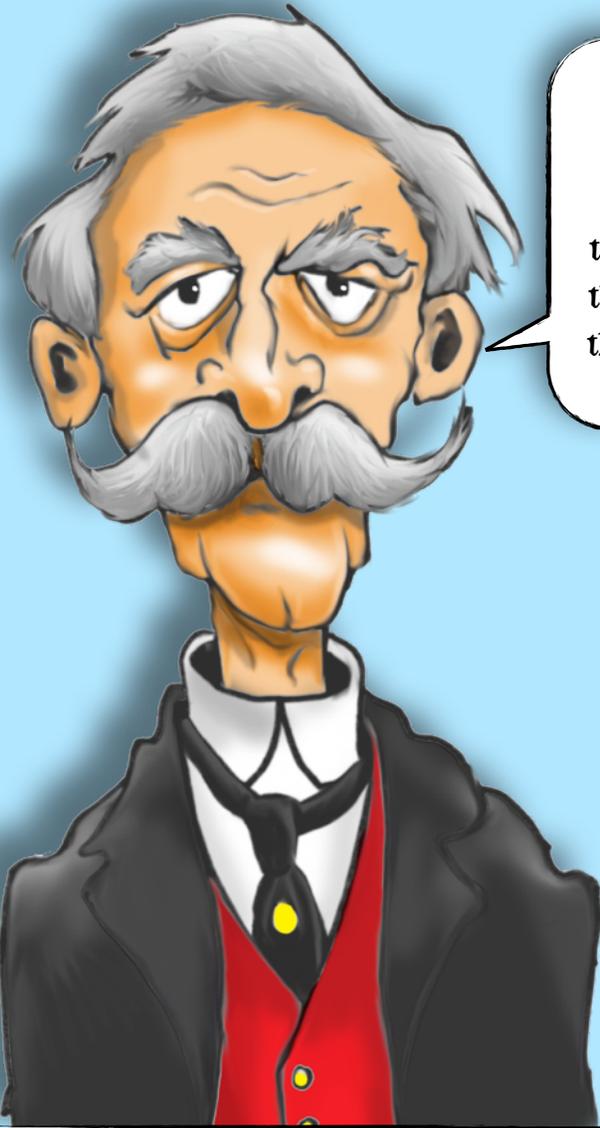
Give me free speech or make me a university president. Whichever.

Give me free beer AND make me a university student.

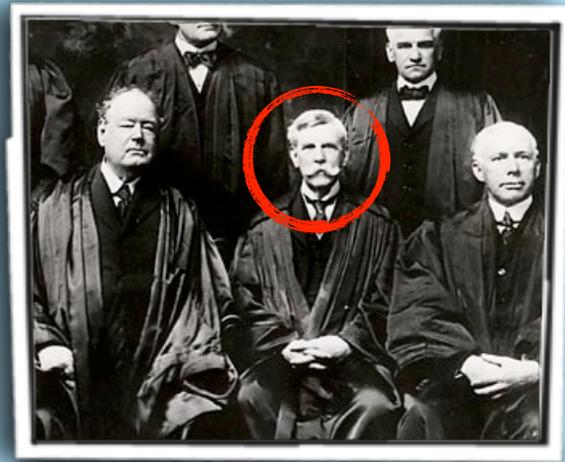


MARKETPLACE OF IDEAS

- This metaphor was introduced into Supreme Court doctrine by **Justice Oliver Wendell Holmes** in 1919 when he said...



[T]he 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...

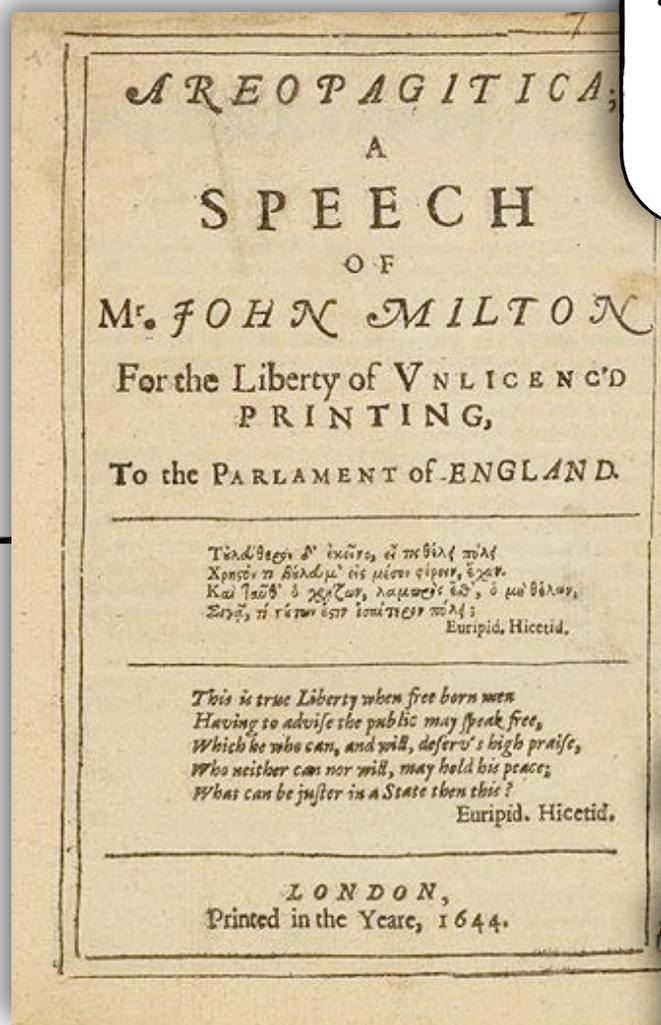


Oliver Wendell Holmes, Jr. was an American jurist who served as an Associate Justice of the Supreme Court of the United States from 1902 to 1932. He is one of the most widely cited United States Supreme Court justices in history, particularly for his "clear and present danger" majority opinion in 1919 (more on that one later).

THIS METAPHOR IS THE MODEL MOST CALLED UPON BY THE SUPREME COURT IN THE RESOLUTION OF FREE-EXPRESSION CASES.

The idea of truth winning out in the “marketplace” came from the writings of John Milton, the 17th century scholar and poet (he wrote *Paradise Lost*). However, for free speech advocates, especially journalists, Milton is probably best known for his prose polemic against licensing and censorship, *Areopagitica*. It is among history's most influential and impassioned philosophical defences of the principle of a right to freedom of speech and expression, and is regarded as one of the most eloquent defences of press freedom ever written.

“[T]hough all the winds of doctrine were let loose to play on the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”



If Milton's hair and clothing look familiar, take a peek at Thomas Hobbes in the Social Contract comic. They both lived during the English Civil War, but were on different sides. Although, they probably shopped at the same stores.

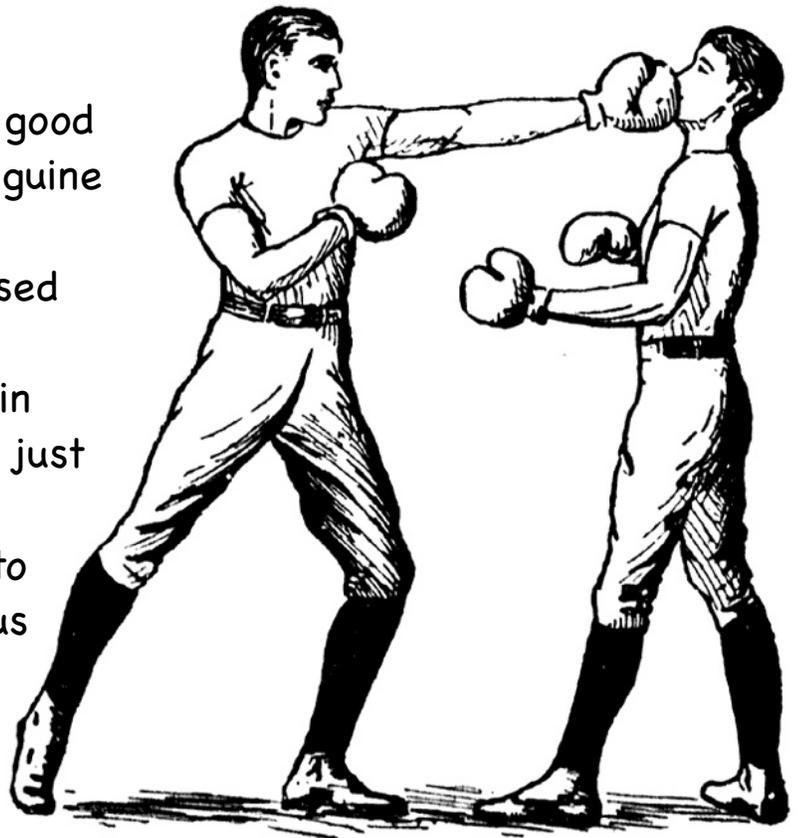


- Justices have used the marketplace of ideas theory to bolster free expression in virtually every area of First Amendment jurisprudence: prior restraint, libel, invasion of privacy, pornography, access, advertising, picketing, expressive conduct, broadcasting, and cable regulation. The usage has increased dramatically since the 1970s.
- The Court has repeatedly said the primary purpose of the FA is to protect an uninhibited marketplace where differing ideas can clash.

WHAT'S WRONG WITH THIS ARGUMENT?

FIRST AMENDMENT SCHOLAR FREDERICK SCHAUER SAYS, GOOD ARGUMENTS DO NOT ALWAYS DEFEAT BAD ONES.

"While it would be excessively skeptical to think... that bad arguments invariably drive out good ones, it may be excessively sanguine to suppose that we live in the deliberative environment supposed by the rationalists of the Enlightenment, an environment in which sound arguments prevail just because of their inherent soundness. Rather, we appear to exist in a world in which various superficially appealing but deeply flawed arguments all too often carry the day in public debate."

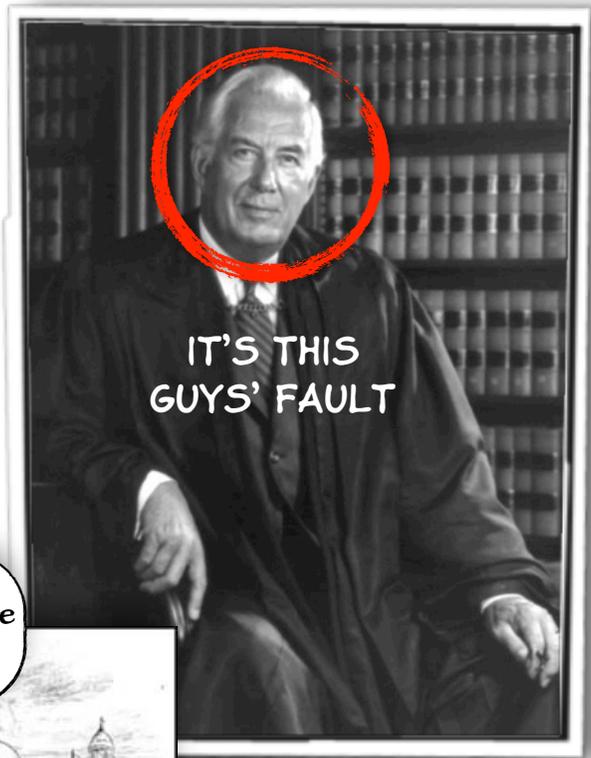


SUPERFICIAL ARGUMENT

THE TRUTH

ACCESS THEORY

- Jerome Barron at Georgetown argued in mid-60s that under 1st Amendment, people have right of access to mass media, particularly as media became more concentrated in the hands of conglomerates and wealthy broadcasters and publishers.
- This idea was shot down by Supreme Court in 1974 case, *Miami Herald v. Tornillo*, in which **Chief Justice Burger** held that under 1st Amendment, government had no right to force newspaper to publish views or ideas of citizens.
- In other words, newspapers are private entities and don't have to serve the public interest if they don't want to.



IF THEY'RE NOT SERVING OUR INTERESTS, WHOSE INTERESTS ARE THEY SERVING?

SELF-REALIZATION/SELF-FULFILLMENT THEORY (LIBERTY THEORY)

- Speech is important to an individual regardless of its impact on politics or its benefit to society at large
- Individual realization of character and potential as a human being means the right to form your own beliefs/opinions and the right to express those belief/opinions.
- The purpose of society is to promote welfare of individual (Aristotle, John Locke).

I'm just trying to find myself.



SO, ARE WE GETTING BACK TO THIS OR NOT?

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

As an active privilege, free speech ranks with the privilege of committing murder; we may exercise it if we are willing to take the consequences.

Mark Twain

