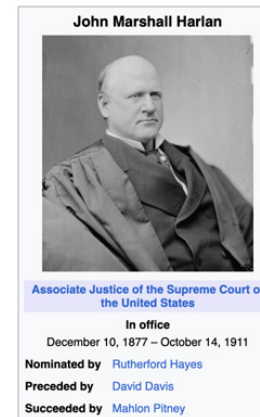
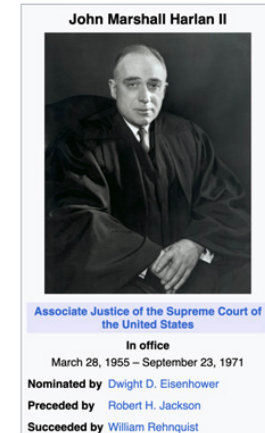


24.150 Liberalism, Toleration, and Freedom of Speech, Fall 2023

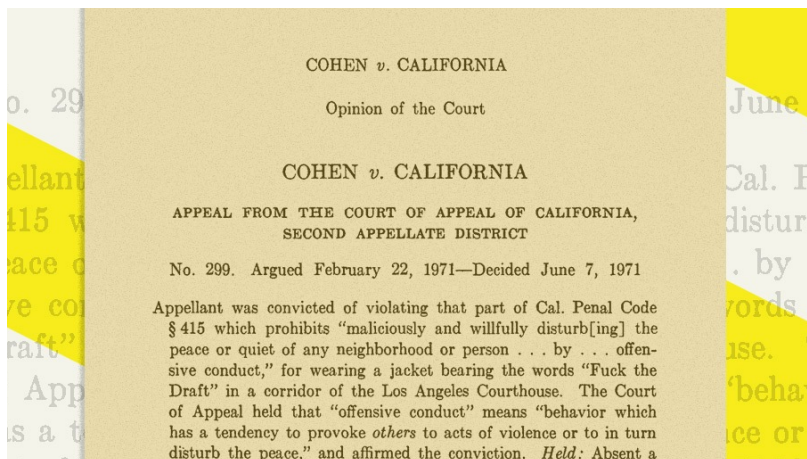
This image is in the public domain. Source: [Wikimedia Commons](#).



From "John Marshall Harlan" on Wikipedia. © The Wikimedia Foundation, Inc. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.



From "John Marshall Harlan II" on Wikipedia. © The Wikimedia Foundation, Inc. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.



Hudson, David. From "Paul Robert Cohen and "His" Famous Free Speech Case." Freedom Forum. © Freedom Forum. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

Harlan's Holmesian moment in *Cohen*:

'To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.'

From "Paul Robert Cohen, Appellant, v. State of California (1971)." This text is in the public domain.

but what if wealthy corporations fill the air with verbal cacophony?

A warm-up hypothetical case

City Council is considering a law banning 41+ hour work weeks.

Worker Willie supports it, Daddy Warbucks opposes.

Warbucks, being rich, pays for 10,000 pamphlets explaining the dangers of the law. Willie, being poor, can only explain the benefits to people he sees on the T.

As a result, the law fails.

Would a law limiting how many pamphlets Warbucks can distribute be okay?

5

Public Law 107–155 107th Congress

An Act

To amend the Federal Election Campaign Act of 1971 to provide bipartisan campaign reform.

Mar. 27, 2002
[H.R. 2356]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Bipartisan Campaign Reform Act of 2002”.

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

Bipartisan
Campaign
Reform Act of
2002.
2 USC 431 note.

SEC. 203. PROHIBITION OF CORPORATE AND LABOR DISBURSEMENTS FOR ELECTIONEERING COMMUNICATIONS.

(a) **IN GENERAL.**—Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441b(b)(2)) is amended by inserting “or for any applicable electioneering communication” before “, but shall not include”.

From “Public Law 107–155–MAR. 27, 2002.” This text is in the public domain.

6

DEDICATED TO RESTORING OUR GOVERNMENT TO CITIZENS' CONTROL

CITIZENS UNITED
Since 1989

HOME ABOUT US NEWS VIDEOS FILM LIBRARY SUPPORT US

Citizens United

Citizens United is dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, we seek to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Our goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.

[LEARN MORE](#)

© Citizens United. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

7

CITIZENS UNITED PRODUCTIONS

Browse Movies

[SEE MORE](#)

- Rigged: The Zuckerberg Funded Plot to Defeat Donald Trump
- Ronald Reagan: Rendezvous With Destiny
- Torchbearer
- Perfect Valor
- Hillary The Movie
- Rediscovering God in America
- Nine Days That Changed The World
- A City Upon A Hill

© Citizens United. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

8



Hillary the Movie Trailer
Citizens United
© YouTube. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

<https://www.youtube.com/watch?v=BOYcM1z5fTs>

1a. Why does Stevens say that 'restrictions on [corporate] electioneering are less likely to encroach upon First Amendment freedoms'?

Former President Barack Obama on the ruling:

'We don't need to give any more voice to the powerful interests that already drown out the voices of everyday Americans.'

Opinion of STEVENS, J.

1. *Antidistortion*

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." 494 U. S., at 658–659. Unlike voters in U. S. elections, corporations may be foreign controlled.⁷⁰ Unlike other interest groups, business corporations have been "effectively delegated responsibility for ensuring society's economic welfare";⁷¹ they inescapably structure the life of every citizen. "[T]he resources in the treasury of a business corporation," furthermore, "are not an indication of popular support for the corporation's political ideas." *Id.*, at 659 (quoting *MCFL*, 479 U. S., at 258). "They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may

From "Opinion of Stevens, J.: *Citizens United, Appellant, v. Federal Election Commission* (2010)." This text is in the public domain.

make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.” 494 U. S., at 659 (quoting *MCFL*, 479 U. S., at 258).⁷²

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. One fundamental concern of the First Amendment is to “protec[t] the individual’s interest in self-expression.” *Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 530, 534, n. 2 (1980); see also *Bellotti*, 435 U. S., at 777, n. 12. Freedom of speech helps “make men free to develop their faculties,” *Whitney v. California*, 274 U. S. 357, 375 (1927) (Brandeis,

From “Opinion of Stevens, J.: *Citizens United, Appellant, v. Federal Election Commission* (2010).” This text is in the public domain.

13

It is an interesting question “who” is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation’s electoral message will *conflict* with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one’s autonomy, dignity, or political equality has been impinged upon in the least.

From “Opinion of Stevens, J.: *Citizens United, Appellant, v. Federal Election Commission* (2010).” This text is in the public domain.

15

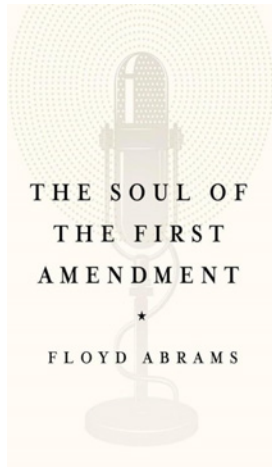
J., concurring), it respects their “dignity and choice,” *Cohen v. California*, 403 U. S. 15, 24 (1971), and it facilitates the value of “individual self-realization,” Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 594 (1982). Corporate speech, however, is derivative speech, speech by proxy. A regulation such as BCRA §203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice. “Within the realm of [campaign spending] generally,” corporate spending is “furthest from the core of political expression.” *Beaumont*, 539 U. S., at 161, n. 8.

From “Opinion of Stevens, J.: *Citizens United, Appellant, v. Federal Election Commission* (2010).” This text is in the public domain.

14

1b. Is there an important difference here between media corporations (e.g. the *New York Times*) and others? What does Abrams think?

16



Floyd Abrams (born in July 9, 1936) is an American lawyer. A member of Cahill Gordon & Reindel, he has argued in 13 cases before the Supreme Court of the United States. Abrams represented *The New York Times* in 1972 during the Pentagon Papers case, Judith Miller in the CIA leak grand jury investigation, Standard & Poor's and Lorillard Tobacco Company. He also argued for Citizens United during the 2010 Supreme Court case.^[1]

From "Floyd Abrams" on Wikipedia. © The Wikimedia Foundation, Inc. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

Abrams, Floyd. *The Soul of the First Amendment*. Yale University Press, 2018. © Yale University Press. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

17

In another press-freedom case, *Miami Herald Publishing Co. v. Tornillo*, decided in 1974, the Court, again unanimously, determined that a Florida law that required newspapers that had criticized political candidates to provide equal space for responses was facially inconsistent with the First Amendment.

Abrams, Floyd. From Chapter 5 in *The Soul of the First Amendment*. Yale University Press, 2018. © Yale University Press. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

19

In *Mills v. Alabama*, SC “held unconstitutional a state statute that...had applied to the press a law that barred on election day only ‘any electioneering’”;

the Court held ‘that no statute could limit, even for a day, what the press printed about an election, however unfair its coverage or how great the impact of its publication.’

Abrams, Floyd. From Chapter 5 in *The Soul of the First Amendment*. Yale University Press, 2018. © Yale University Press. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

18

In both cases, the Court rejected out-of-hand the argument that freedom of expression could be limited in the name of democracy. In both, it seemed so obvious to the Court—both rulings were unanimous—that either legislatively limiting what the press could say or requiring it to say things it chose not to was so inherently *undemocratic* that doing so could not possibly be deemed consistent with the First Amendment.

Abrams, Floyd. From Chapter 5 in *The Soul of the First Amendment*. Yale University Press, 2018. © Yale University Press. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

20

[Summarizing one thread]:

- 1A forbids regulating *who* may speak; no law could make it harder for blue-eyed people to express their views.
- 1A requires allowing some corporations to speak (close to elections etc), e.g. newspapers.
- So 1A requires allowing all to.

my story. meet lorie.

background

For over a decade, I've had the privileged of working in a variety of environments providing marketing, advertising, graphic design, branding, strategy, and social media consultation services to businesses and organizations large and small. The opportunity to do so in the private, public, and small business world has allowed me to learn and gain insight. My specialties are many and large scale because I truly love what I do.



I love all things creative - crafting, visual arts, and anything involving a glue gun. I am a native to colorful Colorado, hence the name for her company, .303 being the local area code for the Denver Metro area.

why I create

As a Christian who believes that God gave me the creative gifts that are expressed through this business, I have always strived to honor Him in how I operate it. My primary objective is to design and create expressive content—script, graphics, websites, and other creative content—to convey the most compelling and effective message I can to promote my client's purposes, goals, services, products, events, causes, or values. Because of my faith, however, I am selective about the messages that I create or promote - while I will serve anyone I am always careful to avoid communicating ideas or messages, or promoting events, products, services, or organizations, that are inconsistent with my religious beliefs.

an earlier case



Jack Phillips creates a masterpiece. Custom designs are his specialty: if you can think it up, Jack can make it into a cake!

Take a look at our Cakeshop Galleries to see for yourself.

Masterpiece Cakes are perfect for special occasions, and they taste incredible. Choose from any of our many [flavors, frostings, and fillings](#).

It's not just a cake ... It's a Masterpiece!



Masterpiece Cakeshop v. Colorado Civil Rights Commission

Supreme Court of the United States
Argued December 5, 2017
Decided June 4, 2018

Full case name Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission, et al.

Docket no. 16-111 [i](#)

Citations 584 U.S. ____ (2018) [\(more\)](#)
138 S. Ct. 1719; 201 L. Ed. 2d 35

Decision [Opinion](#) [i](#)

Case history

Prior Judgment for plaintiff, *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, 370 P.3d 272 (2015); cert. granted, 137 S. Ct. 2290 (2017).

Holding

By failing to act in a manner neutral to religion the Colorado Civil Rights Commission violated the First Amendment to the United States Constitution.

From "Masterpiece Cakeshop v. Colorado Civil Rights Commission" on Wikipedia. © The Wikimedia Foundation, Inc. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

The First Amendment

'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.'

Note: now interpreted to mean **no government agent** (President as well as Congress; state and local as well as federal) may act so as to 'abridge the freedom' etc.

303 Creative LLC v. Elenis



Supreme Court of the United States

Argued December 5, 2022
Decided June 30, 2023

Full case name 303 Creative LLC, et al. v. Aubrey Elenis, et al.

Docket no. 21-476 [?]

Citations 600 U.S. ____ (more)

Argument Oral argument [?]

Case history

Prior 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147 (D. Colo. 2019), aff'd, 6 F.4th 1160 (10th Cir. 2021)

Questions presented

Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

Holding

The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees. *United States Court of Appeals for the Tenth Circuit reversed.*

From "303 Creative LLC v. Elenis" on Wikipedia. © The Wikimedia Foundation, Inc. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.



Everything you loved about GayWeddings.com—and so much more—is right here on WeddingWire! We're here to help with everything from the venue to the guest list.

We're excited to help you plan your big day. You'll find what you need to get started planning your same-sex wedding below. Discover inspiration, information and answers to your important questions about how to plan a gay wedding or lesbian wedding. We're happy to be on your team.

Inspiration & advice

- The same-sex wedding planning guide
- Selecting gay wedding ceremony readings
- Choosing the right wedding venue
- Creating a wedding budget
- Keeping your wedding party happy
- Gay wedding attire ideas
- Lesbian wedding attire ideas
- Coming out to wedding vendors

© The Knot Worldwide Inc. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

25

Tenth Circuit

The court acknowledged that Ms. Smith’s planned wedding websites qualify as ‘pure speech’ protected by the First Amendment...As a result, the court reasoned, Colorado had to satisfy strict scrutiny before compelling speech from her that she did not wish to create...Under that standard, the court continued, the State had to show both that forcing Ms. Smith to create speech would serve a compelling governmental interest and that no less restrictive alternative exists to secure that interest...As the majority saw it, Colorado has a compelling interest in ensuring equal access to publicly available goods and services, and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer unique services’ that are, by definition, unavailable elsewhere.’

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

27

2. What, according to the 303 majority opinion, is the difference between the Tenth Circuit’s legal reasoning and the argument Colorado presented to the Supreme Court?

Colorado

Now, the State seems to acknowledge that the First Amendment *does* forbid it from coercing Ms. Smith to create websites endorsing same-sex marriage or expressing any other message with which she disagree...Instead, Colorado devotes most of its efforts to advancing an alternative theory for affirmance.

The State’s alternative theory runs this way. To comply with Colorado law, the State says, all Ms. Smith must do is repurpose websites she will create to celebrate marriages she *does* endorse for marriages she *does not*.

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

26

28

She sells a product to some, the State reasons, so she must sell the same product to all...At bottom, Colorado's theory rests on a belief that the Tenth Circuit erred at the outset when it said this case implicates pure speech...Instead, Colorado says, this case involves only the sale of an ordinary commercial product and any burden on Ms. Smith's speech is purely 'incidental.' ...On the State's telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny. In places, the dissent seems to advance the same line of argument. *Post*, at 29 (opinion of SOTOMAYOR, J.).

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

29

The screenshot shows the Harvard Political Review website. At the top left is the Cambridge logo with '75-3'. To the right is the Harvard Political Review logo and the date 'Sunday, September 17, 2023'. Below the logo is a navigation menu with links for HOME, US, WORLD, LOCAL, CULTURE, INTERVIEWS, and SCI-TE. The main content area features a 'UNITED STATES' tag and the article title 'From Precedent to Prejudice: The Supreme Court's Misstep in 303 Creative v. Elenis'. Below the title is a short paragraph of text and a link to the full article.

30

Gorsuch Ruling

But where is this dignity found today for gay Americans? Where is this dignity found in the Supreme Court's **303 Creative LLC v. Elenis** case? It is utterly absent in the majority opinion. The opinion found that Lorie Smith, owner of 303 Creative, a Colorado website design company, has the right to deny some of her services to gay couples. In other words, the First Amendment can be a shielding blanket for discrimination -- but only discrimination toward gay Americans. The Court does not explicitly strike down the law central to this case, the **Colorado Anti-Discrimination Act**, but rather prohibits the state from justly enforcing it. Practically, this opinion claims that states may have laws prohibiting discrimination; they just may not, in certain circumstances, utilize them to protect gay people. No such dignity can be found here.

Layne, Joshua. From "From Precedent to Prejudice: The Supreme Court's Misstep in 303 Creative v. Elenis." *Harvard Political Review*, September 17, 2023. © Harvard Political Review. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

31

CADA prohibits all “public accommodations” from denying “the full and equal enjoyment” of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. Colo. Rev. Stat. §24–34–601(2)(a).

Held: The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees. Pp. 6–26.

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

32

Compelled Speech precedents

In *Barnette*...the Court faced an effort by the State of West Virginia to force schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance. ... Some families objected on the ground that the State sought to compel their children to express views at odds with their faith as Jehovah's Witnesses.

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

(This was ruled unconstitutional under 1A.)

33

Compelled Speech precedents

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*...veterans organizing a St. Patrick's Day parade in Boston refused to include a group of gay, lesbian, and bisexual individuals in their event. The group argued that Massachusetts's public accommodations statute entitled it to participate in the parade.

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

34

Compelled Speech precedents

[But under 1A] the parade was constitutionally protected speech and requiring the veterans to include voices they wished to exclude would impermissibly require them to 'alter the expressive content of their parade.'

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

35

Sotomayor, dissenting

The law applies only to status-based refusals to provide the full and equal enjoyment of whatever services petitioners choose to sell to the public.

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

36

Colorado does not require the company to 'speak [the State's] preferred message.'...Nor does it prohibit the company from speaking the company's preferred message. The company could, for example, offer only wedding websites with biblical quotations describing marriage as between one man and one woman....All the company has to do is offer its services without regard to customers' protected characteristics. ...Any effect on the company's speech is therefore 'incidental' to the State's content-neutral regulation of conduct.

From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

Once these features of the law are understood, it becomes clear that petitioners' freedom of speech is not abridged in any meaningful sense, factual or legal.

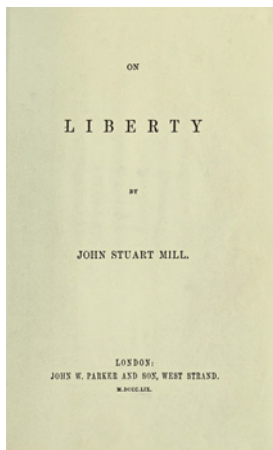
From "303 Creative LLC et al. v. Elenis et al. (2022)." This text is in the public domain.

What do you think?

37

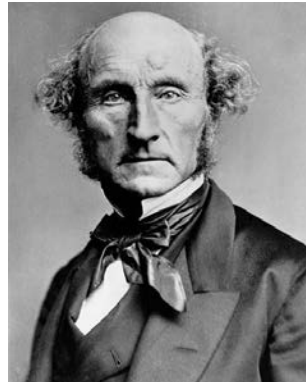
38

next time



This image is in the public domain. Source: [Wikimedia Commons](#).

This image is in the public domain. Source: [Wikimedia Commons](#).



1806-1873

39

MIT OpenCourseWare
<https://ocw.mit.edu>

24.150J / 17.043J / CMS.125J Liberalism, Toleration, and Freedom of Speech
Fall 2023

For information about citing these materials or our Terms of Use, visit: <https://ocw.mit.edu/terms>.