DEBATE ON CITIZENS UNITED V. FEDERAL ELECTION COMMISSION

Floyd Abrams*
Alan B. Morrison**
Moderator: Ronald K.L. Collins***

MR. RONALD COLLINS: One of the joys of getting older is the experiencing of the gracious words of the young, however exaggerated.

That said, Benjamin, I very sincerely appreciate those kind words, and I only wish my mother were here to hear them.

It is a great pleasure, indeed it is an honor, to be at Robert Jackson’s Law School, and I want to especially thank Dean Andrews, the faculty here, and most of all, I see the Editor-in-Chief over there in the corner, of the Albany Law Review, for making this event possible. And it’s really quite a program, and I’m delighted and honored to be a part of it.

I have already had the pleasure of meeting some of the faculty, and I look forward to meeting more, including people outside of my field. Just yesterday I had the opportunity to chat with some people from Tax—from Tax Law and Trust and Estates, and I welcome the opportunity to meet people who work outside of my field. Who knows, I may actually learn something. I’m always looking forward to doing that.

Before I begin, at least say a few things about the exchange that will take place today.

I have a noted nod of recognition to at least three members of this faculty, whose works over the years I have been the beneficiary of.

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*** Ronald Collins, Harold S. Shefelman Scholar, University of Washington School of Law. Professor Collins served as the moderator for the debate portion of the symposium, and then as a panelist during the afternoon discussion.
Of course, there’d be more, but three came to mind.

Paul Finkelman, who I gather is not here today, for his incredible work in legal history and Constitutional Law. I have read, and continue to read his works.

Vince Bonventre, vehemently an expert on State Constitutional Law, and many years ago, we tilled those fields together, and it’s so wonderful to be back at this law school, here with Vince, who I haven’t seen in a long time.

And Professor Stephen Gottlieb, whose works in Constitutional Law and jurisprudence I have learned much from over the years.

So I’d like to just recognize that, and say it’s just an honor to be here with them today.

And, of course, Benjamin, what this young man has done is remarkable. I did not plan to come to this conference, I just had too much to do, but he wowed me in more ways than one. And if a genuine passion for the law, combined with a divining commitment to excellence is the measure, then he is the man, and I know I speak for all of us in extending a sincere—our sincere appreciation for all the work that Benjamin has done, so Benjamin . . .

(Applause)

MR. COLLINS: I am honored and humbled to be the middleman, literally and figuratively, between two legal giants in our profession: Floyd Abrams and Alan Morrison, both of whom I have known for many years.

One of them is the leading authority on First Amendment law. If you ask anyone in our profession to name a First Amendment lawyer, they would name Floyd Abrams. Without a doubt. If you asked them to name two, they’re hard pressed. Such has life come to be, Floyd.

In the area of Public Interest Law, there are few names, if any, to rival the achievements of Alan Morrison. Just last night I discovered that on the D.C. Court of Appeals Historical Society’s website, there was this incredible profile, replete with interviews of the work that Alan Morrison has done over the years, and I’ll tell you, anybody who remembers the name Louis Brandeis, it is without exaggeration to say that he is the embodiment of that man in our own time. So it’s a great pleasure to be here with Floyd and everyone today.

The occasion for this exchange between these two distinguished
lawyers is, of course, the U.S. Supreme Court’s controversial ruling in *Citizens United v. Federal Election Commission.*

With that case, the First Amendment once again became the center of controversy in the cultural wars that define this nation.

Not since the flag desecration cases of the late 1980s and early 1990s and the proposed constitutional amendments following them, have we seen anything in the First Amendment area quite as divisive as the Court’s 2010 campaign finance ruling.

On the one hand, many liberals, people who typically are thought of as supporting the First Amendment, led the charge to either overrule *Citizens United,* or amend the Constitution to do so. For example, Professor Geoffrey Stone, one of the leading constitutional scholars, excelling in the area of First Amendment work, has flirted with the idea of moving for constitutional amendments to replace *Citizens United.*

Many liberals see *Citizens United* as a modern day campaign to revitalize what is known as “Lochnerism,” a way to capitalize on the Constitution as a tool for the privileged few. For them, *Citizens United*—like *Lochner v. New York* in 1905—is a pernicious example of judicial activism in support of a bold attempt to write laissez-faire principles into the Constitution of the United States.

On the other hand, many conservatives, who are not infrequently hesitant to defend the First Amendment, argue that *Citizens United* is nothing more than a classic example of protecting political speech.

As for extending constitutional protection to corporations, conservatives delight in reminding their liberal counterparts that many landmark First Amendment cases involve—yes, involve—corporations. Cases such as *Near v. Minnesota,* *NAACP v. Alabama,* *New York Times v. Sullivan,* *Bigelow v. Virginia,* *Hustler Magazine v. Falwell.* One could go on and on. All of those cases involve corporations—some for profit, some for non-profit,
some involving the press, some not.

And conservatives point to the oral arguments in *Citizens United* when Malcolm Stewart, the lawyer for the Solicitor General’s Office, conceded that the McCain-Feingold Act would apply to certain types of political advocacy offered in books. In other words, that the government could restrict some expression in books, at least so was the concession made during the oral arguments.

So *Citizens United*: it an example of defending a cherished First Amendment right? Or is it rather an example perpetuating a horrific First Amendment law?

To help us answer these questions, Floyd Abrams and Alan Morrison have kindly agreed to debate the point. You have their bios in front of you, so I will not take any further time to sing their praises.

Before we begin, just let me say a few things about the format.

Each gentleman will begin with a seven-minute statement of his views—just a summary of them. But thereafter, five questions will be posed to them. Before today’s exchange, I asked each gentleman if they would submit five questions for me to ask the other, and they did it. And just a few moments ago, I gave them the questions. So prior to five minutes ago, they haven’t seen them.

So what I will do is, first ask them to speak for about seven minutes, and then when they’re done, I will ask Mr. Morrison a question that Mr. Abrams posed. And then if Mr. Abrams cares, he can respond. And thereafter, I will ask Mr. Abrams a question that Mr. Morrison had posed, then we’ll go back and forth. And when that’s done, we invite your questions and commentaries at the end of the exchange.

So, with that said, let me now turn it over to Mr. Floyd Abrams.

(Appause)

MR. FLOYD ABRAMS: Thank you, Ron.

I won’t repeat all the thanks to all the people that were involved in creating this wonderful event, but I must say, that the work that Benjamin has done to do this is really unequaled. In my years of doing panels, I want to tell you, it’s hard to put together a panel like this, and then all of us have reasons to say we’re busy, it’s even true. He lured us all to Albany today, and we’re all very glad to be here.

Given the limited amount of time that we have for our
introductory statements, I was tempted to show you, as half of my statement, the film that was involved in the *Citizens United* case. The sort of hit job on Hillary Clinton, prepared by very conservative people, who belong to an organization, which is in corporate form, and that receives some of their money from corporations. It was prepared at the time that she was running for president, running for the Democratic nomination, and, at a time, was the frontrunner over then-Senator Obama, who seemed unlikely to be the Democratic nominee. The theme of it was that she was unfit to be president. And I will say no more about the film, other than that Ann Coulter was the most moderate person on it.

So I’m tempted to start by saying that what surprised me most about the *Citizens United* opinion, is that there were four dissenters. Four people that thought that film could be a crime: a criminal act, if shown on television, within sixty days of an election. Of that election. Or thirty days of the Democratic Convention, etc. That’s what the McCain-Feingold Law said. And that was one of the main features of it, but ultimately doomed it in the Supreme Court.

As to two days ago, President Obama spoke at the United Nations, and he made a point of saying that in America our Constitution protects the right to engage in free speech, even, he said, we do not ban blasphemy against our most sacred beliefs. He might have cited the cases that show that even when we do not love others’ speech, we do not ban or punish it, or limit it, as well.

We don’t impose liability. We don’t allow a jury to impose liability against a group of individuals just out of sight, but not out of mind, of a church in which a funeral was being held for an American soldier. People holding up signs saying, “Thank God for Dead Soldiers,” “You’re going to Hell.,” and “Fag Dooms Nations.” That was all protected by the U.S. Supreme Court.

We don’t permit statutes to make criminal the creation of films that depict the intentional torture and killing of helpless, small animals; cats and dogs, by women wearing high-heeled shoes who slowly crush the animals to death. Making the film of that—not killing the animals, but making the film of that was held by the Supreme Court, protected—in the context the case came up,

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protected by the First Amendment.\textsuperscript{11} We protect the speech of Nazis\textsuperscript{12} and pornographers.\textsuperscript{13} We protect the speech that reveals secret documents that relate to national security. We protect speech that exposes highly private, even intimate, activities of our citizens.

While there’s been some dispute about all of these matters, for the most part, the public has accepted them all, because that is our way. That is our choice. That is what the First Amendment has been held in one circumstance after another, to mean. Americans, President Obama observed, have fought and died around the globe to protect the right of all people to express their views.

And one of the things we often say about speech is that the most important speech of all is political speech. And the most important political speech of all is speech about who to vote for, and who against. That is why I was surprised at the nature of the torrent of criticism of the \textit{Citizens United} case, which concluded that corporations and unions could spend their money endorsing candidates.

I’m not going to get into the total logical issue of whether money is speech or speech is money, except to say that in a political campaign you can’t put ads on television unless you pay for them. And you can’t get out a message unless there is at least a significant level of dissemination of the views of the candidates, apart from their simply speaking.

And as I’ve said, the movie at issue in this case was an attack on a candidate for President of the United States. And in my view, most of the criticism of it is simply ill founded. Corporations have again and again received First Amendment protection. I’ve represented them, in a lot of cases, mostly involving the press. Every press case the Supreme Court has had involved—as Ron

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\textsuperscript{11} See United States v. Stevens, 130 S. Ct. 1577, 1592 (2010).
\textsuperscript{12} See, e.g., Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), \textit{cert. denied}, 439 U.S. 916 (1978) (holding that an Illinois community with a predominantly Jewish population could not ban a peaceful parade by neo-Nazis simply because many residents of the village would likely be offended by the display of the swastika and the anti-Semitic message of the Nazi marchers).
\textsuperscript{13} See, e.g., \textit{Am. Booksellers Ass’n v. Hudnut}, 771 F.2d 323 (7th Cir. 1985), \textit{aff’d}, 475 U.S. 1001 (1986) (striking down an Indianapolis anti-pornography statute on the grounds of its strict content restrictions). \textit{But see also} Miller v. California, 413 U.S. 15, 24 (1973) (holding that laws proscribing “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value” do not violate the First Amendment protections of free speech and free expression).
pointed out—a corporation. And there are other cases as well, involving a gas company, or real estate company, or a bank, in which there's been held First Amendment protection for what they have to say.

So the notion, widely disseminated by opponents of the case, that suddenly we have a new body of law saying corporations are protected, is simply not so. They've been protected for a long time.

The notion that because of *Citizens United*, we don't know who's giving money is also not true. The case was upheld by an eight-to-one vote, only Justice Thomas dissenting. Provisions of the law, which require a dissemination, the public filing, about information of the people who were giving money to these so-called “super PACs.” That's why we know the name of people like Sheldon Adelson,\(^\text{14}\) who are spending vast amounts of money in this campaign. And there are other statutes, which do not require the disclosure of names. I wish they did, but it is certainly constitutional to require it, and nothing in *Citizens United* prevents it. Indeed, everything in *Citizens United* would, on the face of it, allow it.

And there's nothing new in big-time money being spent on campaigns. When George Soros spent $24 million of his own money in the 1988 campaign to get the Democratic and Progressive candidates elected, I didn't hear any complaint about that from my friends, and I am not a conservative, but my friends on the liberal side of the line. Or from the *New York Times*, or from the Democratic Party. They were all just delighted.

One of the things I think that concerns them is simply who's more likely to profit, who will likely do better in campaigns? And it's true, that Republicans are more likely, more often, to profit from the case. Surely we can't decide issues as important as this, based upon political considerations.

So—a final note or two:

What's happened as a result of *Citizens United*? That's in controversy, too, but I think you would see in the papers in the last week, a number of articles, the *Washington Post*, the *Wall Street Journal*, and elsewhere, saying that certainly the money and expenses being spent by the so-called “super PACs,” while important, appear not to be determinative of the election, or to be

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\(^{14}\) Sheldon Adelson is an American business magnate with a reported net worth of $21.8 billion; recognized as a major recent contributor to the Republican National Committee.
changing the direction of the presidential election. At least as many people had either feared or asserted that it would.

There’s one problem with all of this that I want to acknowledge. We have an equality problem in America. Too few people control too much. There’s too big a difference between people at the top financially; and therefore, in power, and people who aren’t. And therefore, people, and corporations, and unions that give large amounts of money can possibly have a disproportionate impact, less than many people think, but nonetheless, a much more great impact than people without money, or corporations without money.

My view on that is a view which goes back to another standard First Amendment principle. If there’s any way to deal with a social problem other than through limited speech, that’s the way we should do it. If we conclude as a people, that the inequality in our country is so great that we have to deal with that, let’s deal with it. Let’s deal with an economic view. Let’s deal with it by legislation. We can have tax law changes of a far more redistributive in nature, if we want it enough, or if Congress is willing to do it. They’re not now, of course, but it is all constitutional; it is all possible.

We can change the antitrust laws. We don’t even have to have corporations, if we really think that corporations do such bad things. The First Amendment doesn’t require corporations, as such, to be allowed.

My point is only this: we shouldn’t be limiting speech. We shouldn’t be limiting speech to the extent that we did before Citizens United. We ought to understand and accept that an opinion like the Citizens United Fund—for all the criticism of it—is simply an extension of First Amendment rights, and First Amendment protections, in a direction which allows more political speech, which can sometimes—here in New York, we’re safe from all the ads because we have no elections. But elsewhere, in states not far from here, in far-off Ohio, for example, there are lots, and lots, and lots, maybe interminable amounts of ads on television. The folks there may like it or not, it’s good First Amendment stuff. It gives the public more information, more advocacy, including negative ads, which are fully protected under the Constitution. And I think we should accept the fact that Citizens United is making a contribution, not doing harm, to our nation.

Thank you.

(Applause)
MR. COLLINS: Alan Morrison will now have his opening statement.

MR. ALAN MORRISON: Thank you, Ron.

Thank you, Benjamin. Benjamin’s very smart. He knows how to get me here. He flattered me. He said, “I know who you are.” “I’ve read all your bios,” this and that. I said, “Okay, Ben. All right, I’ll come.”

But, Benjamin, I have to—I promise I have to disappoint you about one thing. If you think you’re going to get me to say a general theory of the First Amendment, it’s going to be possible to associate with everything that the First Amendment has done and will do in the future, please, I can’t possibly do that, and neither can anybody else, although Ron is going to try this afternoon, actually.

All right. So let’s talk about Citizens United. Which I will begin with a general opening by saying it’s a naked and unjustified power grab by the Supreme Court. Fine. And why do I say that?

Well, the first thing is, it has three alternative grounds. The Court had three alternative, non-constitutional grounds who could have decided the case.

First, it could have said “We do not interpret a statute which was written to deal with political advertising—that goes on the air for 20 or 30, or maybe 60 seconds—to cover a feature-length movie.” It doesn’t—we just don’t interpret it that way. And therefore, I’ve gotten rid of the case. These are arguments, by the way, that the Citizens United made.

Second is, it’s not really an advertisement, because the only way you could watch this movie, unlike ads, which you can’t avoid unless you click the mute button, is by agreeing, it was shown on HBO, and you had to actually pay for it. And that’s very different, not entirely part of it; and therefore, there wasn’t an expenditure, which is what the key ingredient is; you actually had to pay for something.

And the third, they could have said was, yes, it’s true, that this non-profit organization got some corporate money. They had already held that if a non-profit organization doesn’t take any corporate or union money, that their independent expenditures like this, no matter how much they advocate for or against a candidate, are not subject to the Campaign Finance Laws, they’re protected by the First Amendment.

There have been cases saying, well, the *de minimis* would have
applied. And surely in this case, where the amount of money for use for this was something like two percent of the money, the Court could have said *de minimis* and avoided it.

Not only did they not decide it on those grounds, but the case had been argued below as a non-profit case. There was nothing in the record that dealt with for-profit corporations, and one of the issues in for-profit corporations is, what about the shareholders, do they have a say in all of this? There was not a single thing in the record of this case, or in the McCain-Feingold case, the *McConnell* case, which Mr. Abrams argued, which dealt with for-profit corporations.

The trial lawyers in this case knowingly waived their right to make a broad-based attack on the statute. Said it was an as-applied attack of the statute. The Supreme Court said, never mind, we don’t care whether there’s any record or not, we don’t care whether you waive the argument below. We want to hear this argument, to strike down, not simply the law as applied to pre-election suits, but the law as applied to any kind of independent expenditures, by any corporation, at any time.

So this was plainly an effort by the Court to do what they wanted to do. They had heard argument the first time. They didn’t like what they heard and they decided they would go for a broader ruling. They had essentially made up their mind by the time they set it down for re-argument. The only good thing they did was, they allowed us, rather like a petition for rehearing in a court case that you’ve already lost, to file your brief, and to argue again, but they clearly had made up their mind in that case.

Now the underlying premise of Justice Kennedy’s opinion, for the majority, was that the First Amendment does not allow the government to distinguish among categories of speakers. But as Justice Stevens pointed out in his dissent, that’s simply not what the Court has held in multiple cases.

So for example, prisoners don’t have unprotected First Amendment rights, not simply to speak, but they are limited, in many places, to what they can actually receive. If there could be anything more of a First Amendment than the right to read a book, you would think prisoners would be protected by that. It’s perfectly clear that there are all kinds of books, and I don’t mean just pornography, or how-to-make-a-bomb-in-prison books. They wouldn’t even let newspapers be read by the people in jail in
Pennsylvania. The Supreme Court, without much difficulty, said that rule’s perfectly okay.\textsuperscript{15}

Anybody been in the Armed Forces? Got a lot of free speech rights there?

How about if you work for the government? Just a few years ago, a person in the District Attorney’s Office in Los Angeles complained publically, actually very gently in the public, about what he thought was a misuse of the office, and he was fired for doing that, even though it raised an important public purpose. The Supreme Court said, perfectly okay, you don’t have those kinds of First Amendment rights when you are a prosecutor.\textsuperscript{16}

Foreigners. We have a law, which by the way, the Supreme Court unanimously upheld last year, didn’t even want to hear argument, that forbids individuals who are not U.S. citizens and not permanent resident aliens from making a dollar’s worth of contributions in connection with a federal or state election, and also forbids them from making independent expenditures.\textsuperscript{17} Under that law, a foreigner could not go down to the mall in front of the Capital in Washington and put up a sign that says, “Vote for Obama.” If they spent money for that, it would be an independent expenditure, and they could go to jail for it. The Supreme Court had no difficulty in not even hearing oral argument before striking down the challenge to that law.\textsuperscript{18}

And last, students. Anyone ever try to write—run a newspaper when they were an undergrad student? Do you think the school’s going to let you say anything you want in that, even if you’re a public school? The answer is, of course not.

So we distinguish between categories of speakers all the time—some of them even on the basis of what they were actually going to say, although here there was no viewpoint discrimination whatsoever.

Other laws are justified by the circumstances. And I say, why is it the fact that this is an election, and it is money being spent by corporations? Why aren’t those circumstances that at least can be taken into account, instead of taking the total absolutist view that the majority held? It simply seems to me to be wrong, and Justice

\textsuperscript{17} See 2 U.S.C. § 441e (a) (2006).
Stevens was absolutely right.

The second point I want to make is, the Court said that this was a ban on speech. Well, technically, it is correct that the corporation itself could not make speeches. But the Congress has carefully, as have all the states that have dealt with this, allowed corporations to establish political action committees. They must, under federal law, use the name of the corporation. They can be funded by—the solicitation and the administration of these funds are out of the corporate treasury funds. They can solicit from officers, directors, and shareholders of the company. And while it’s true that it’s as GE Patent, as opposed to GE, is there anybody in the world who’s confused as to where that’s coming from? And so technically, the Court is right that the company is not making speeches, and technically, it’s true, they are different legal entities. But in the real world, is that what we banter about? And at least the Court should have been able to not treat this as a ban. Maybe to say it’s not the same thing, but for me, it’s a pretty close to the same thing.

Third, the Court said, independent expenditures, and I leave aside the whole question of how independent expenditures are these days, but even assuming that these are independent expenditures, not coordinated with any candidate, which is probably the case here, the Court says they cannot possibly have any influence of the kind that direct contributions can have.

Now, it’s a little hard for me to see how Justice Kennedy came to that conclusion, since just the year before, in a case out of West Virginia, he said that a judge, for whom a donor had made contributions, plus mainly independent expenditures in support of that judge’s campaign for the West Virginia Supreme Court, that that judge could not sit, constitutionally, because of due process on the case involving that support of it.\(^\text{19}\) Well, the only rationale for that is that the independent expenditures had some effect on the election, and had some effect as to the appearance of corruption. If it’s true in that context, why isn’t it true in this context?

Now to be sure, there were four dissenters in that case, one of them being Chief Justice Roberts, who interestingly did not dissent on the grounds that he didn’t think it was improper for that judge to sit on the case, he said we couldn’t draw any lines.\(^\text{20}\) Well, if we couldn’t draw any—if you draw lines there, we surely can draw

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\(^{20}\) See id. at 902 (Roberts, C.J., dissenting).
lines here. And so, the notion that this didn’t have any impact seems to be to be quite silly, itself.

Of course, this is a First Amendment case. But in my copy of the Constitution, it’s only the First Amendment, not the only amendment. And it’s also not the only part of the Constitution.

The basic body of our Constitution set up a framework for democratic governance, so that we could run our affairs ourselves. And the First Amendment does not, in my view, trump every other value in our Constitution.

As Justice Brandeis said in another context, the Constitution is not a suicide pact. And while it may not be suicide here to place the First Amendment above everything else, it surely raises some serious doubts as to whether we can continue to have a democracy of the kind that we’ve had in the past.

Mr. Abrams is surely right that in the presidential election, this time at least where we have an incumbent, it’s not going to matter very much as to the fact that his opponent is able to raise more money and have more money spent on him by independent expenditures. Of course, we also have to understand, *Citizens United* is not responsible for independent expenditures made by individuals. That problem actually reverts back to *Buckley*, in 1976, where the Court held that individuals can make independent expenditures. Of course, in 1976, no one was spending ten million, or a hundred million dollars on independent expenditures. If you spent ten thousand dollars, you were a big spender in those days.

I was struck reading a column in *New York Times* earlier this week, I think by Joe Nocera, who was talking about how the Forbes 400 has radically changed in recent years. That to be one of the four hundred richest people in the United States thirty years ago, you had to have $75 million. It now costs—you now have to have $1.1 billion to fall into that category. So it’s hardly surprising, if somebody’s got $1.1 billion, or something close to it, they could afford to spend a lot more money than they could spend back then.

So it’s not just *Citizens United*. It’s *Buckley*. It’s the *Arizona Free Enterprise* case. They are undermining our democracy in ways that we hadn’t recognized before.

As I say, it’s not just presidential elections I’m worried about. I’m much more worried about congressional elections, and most

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important of all, for those of you in this room, you ought to think about judicial elections, particularly for state supreme courts, where large amounts of money are undermining our very notion of an independent judiciary. And despite that fact, the U.S. Supreme Court says it’s all okay.

I see my time is up, Ron is standing here poised to leap upon me, so I have a few more things to say after that, but let me just say one other thing. And I’m very reluctant to say this. But I think the time has come to have a constitutional amendment.

I don’t like amending the Constitution. The amendment that I’m going to read for you is far from perfect. It surely would not allow incumbent protection laws; it would not allow viewpoint discrimination. You couldn’t ban all contributions or expenditures. But you can treat different things differently. It is a measured response, indeed, more measured than abolishing corporations, which Mr. Abrams suggested we might have to do. There would still be the full protection of the Equal Protection Clause, and the values—but not the literalness—of the First Amendment. So here it is.

Congress and the States shall have the power to make all laws reasonably necessary to regulate the financing of elections, and no Court shall overturn any such law on the grounds that the law violates the First Amendment.

Let the debate begin. Thank you.

(Applause)

MR. COLLINS: The plan had been to—right after these opening statements, to go to questions to each of the gentlemen, and we will hold to that. But if the two debaters would like a few, and the operative word is brief, moments to respond, then in the name of the First Amendment, we can allow it.

So let me ask you, Mr. Abrams, would you care to say anything about comp cards, suicide pacts, and amending the Constitution?

MR. ABRAMS: Only 20 minutes.

MR. COLLINS: Briefly.

MR. ABRAMS: All right; just a few minutes.

First, Mr. Morrison’s quite right that the Court took an
aggressive role in taking this case.

And if I may personalize it—knowing full well that I have truly nothing to do with their decision to do that—my argument in the Court was only part of that matter. I said in New York Times v. Sullivan, the Court had a choice. They could have said, in that great libel case, which rewrote the American libel law, by limiting the scope of it in matters involving public officials, and public figures, at least. I think, you know, the Court could have said, the New York Times didn’t do business in Alabama. That was one of the arguments the Times made: that they sold too few newspapers; that they shouldn’t be subject to the jurisdiction of the Court.

They could have said, punitive damages, the extra add on, shouldn’t be allowed in libel cases. Or in libel cases involving public officials. Or they could have said any one of a number of other things, a lot less sweeping, than they did in New York Times v. Sullivan, which said even if you get the story wrong about a public official, unless you knew it was wrong, or suspected it was wrong, that there can’t be liability for it.

And I said in substance, in a situation in which the First Amendment is so directly involved, and in which the Court is present, that the First Amendment harm is great enough, you ought to take the broader, rather than the narrower, look at it.

Mr. Morrison cites cases which are all the exceptions to First Amendment rules. Not the rules. We treat prisoners differently, yes. We treat younger people differently, students, yes, the people in the Army differently. But to say that because we do that, we can say that in terms of who we are going to vote for President of the United States, that the speech that we will have available to us, on television and elsewhere, may be limited, I don’t think the second follows from the first.

The real issue here, the real issue in lots of First Amendment cases is: What’s the rule and what’s the exception? To call this, to call banning any expenditures by corporations or unions, any, a crime, and that’s what it was, until the Supreme Court acted. That seems to me very much an attack on the rule, not the First Amendment; it’s a broad protector of free expression. And the constitutional amendment that Mr. Morrison wants—imagine, for the first time in American history, first time, amending the First Amendment.

The First Amendment characterized, as was read to you earlier by Benjamin, Congress shall make no law abridging the freedom of
speech. Now we’re importing reasonableness into it.

Every case I’ve cited to you earlier probably would have come out differently if a Court could have said, what’s reasonable? Is it really reasonable to make these poor parents of that dead soldier have to endure these people with their signs? Is it really reasonable to say that, in the case of the people making money as a living, making a living off the torture and death of animals? You know, you could go through one First Amendment case after another, and if we had language like reasonableness in there, we would have truly an entirely different society.

Finally, I must say that the sort of denunciation of the case by Mr. Morrison really does recall for me a former Deputy Director of the CIA, who was to, forgive me—who was testifying in front of Congress once in the 1970s, when he said, “You know, we really have to remember the First Amendment is just an amendment. “

It really isn’t “just an amendment.” And while, sure, it’s part of the Constitution, it—the “firstness” of the First Amendment has been held to have a special power to it, and a special resonance to it, and a special importance to it. Which leads us to say, sure, we still have libel law, but we make it very hard for a plaintiff to win. We still have privacy law, but we make it really hard for someone to win in a case in which you’ve told the truth about someone else.

There are national security situations in which the First Amendment does not carry the day. But what we’re talking about here, is limiting speech about who to vote for in an election—and an election, no less, for who should be the president of the United States. In my view, that is about as absolute an area as any in the First Amendment.

Alan?

MR. MORRISON: As to the question of whether this opinion should be broad or narrow, obviously the Court can decide what it wants to decide, and nobody can say anything about it, but the fact that it has written ill-advisedly broad opinions in some other cases doesn’t mean they were justified in doing it in this case.

By contrast, several of the cases Mr. Abrams points out—the crush video case involving the animals, even the funeral demonstration cases—if you read the cases carefully, you got to look at the facts, which I tell my students we really do have to look at to find out what the actual holding is, those cases all seem to me to allow more narrowly drawn statutes to prevail. Even the Stolen
Valor Act case last year suggests that in some situations the Supreme Court would uphold somebody who got pecuniary advantage from having lied about it and gotten the Medal of Honor. So far from being broad in those cases, they are actually narrower.

Second, these are about the right to vote in our political system. The last time I looked, corporations don’t have the right to vote. That seems to me to be irrelevant, but not necessarily dispositive of consideration.

Second, they can spend money; they spend it on their PACs. They can spend it in other ways, as well. The question is if they should be allowed to spend this kind of money. So saying that they’re completely banned seems to me to be not correct.

Let me say a word about unions.

I know Mr. Abrams isn’t responsible for this line of cases, but unions are very much restricted, the amount of money that they can spend because they are able to require people to pay dues, or in some cases, agency fees, and therefore, the notion that unions and corporations are just alike for these purposes is rather like Anatole France’s famous statement, the rich and poor alike are equally forbidden from begging for bread in the streets and sleeping under the bridges of Paris. It just doesn’t equate.

As far as this being the first time, well, there has to be a first time for everything. But is it really the first time? Because after all, in libel laws, it doesn’t say there is no such a thing as a libel. It says, if you beat—if you are really unreasonable, which is a little bit different from being just reasonable, in my proposed amendment—then if you’re really unreasonable, then you don’t get the protection of the First Amendment.

So it’s not really the first time, it’s not the first time that reasonableness, or some first cousin, has been introduced. It’s just a different version with a different set of values, and the question is, what is the label? Okay. Thanks.

MR. COLLINS: All right. And gentlemen, we’ll start with a question that Alan Morrison had posed to Mr. Abrams, and that question is as follows, and as I said, each of the gentlemen had the question. So the question from Alan Morrison to Floyd Abrams, quote:

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“Do you think that the First Amendment value of free speech always trumps all other values in our society? Even the value of assuring a fair and robust political process, on which we depend for so much in our society?”

MR. ABRAMS: No, I don't think the First Amendment always trumps all other values in our society. Indeed, as I just said, I think that there's room, and we have a private law—a privacy law and all that, there's a lot of other bodies of law, which certainly affect speech, and to some extent, limit it.

I would say though, that we have cases, which are some of our greatest cases, which are very, very careful about allowing free speech to be compromised in the name of greater fairness, or purity in elections.

One of my favorites—it's called Mills v. Alabama.24 Okay. So it came out of Alabama at time when about the only source of information about public issues, and the like, were local newspapers. And which almost all local newspapers, there was only one in a community. So there was no television at all, and you could find, but you'd really have to look, for places to—for the public en masse to gather information about what was going on.

So Alabama passed a law. The law said, on Election Day—just Election Day, that one day—a newspaper can't add some new issue not before raised as a basis for voting against or for someone for president. The theory being, it's just not fair. The other guy's not going to get a chance to answer, and whoever the newspaper is for will have such an overriding likelihood of being able to carry the day, that it was unacceptable as a societal matter, and as a matter of assuring a fair and robust political process, as Mr. Morrison cites. And the Supreme Court, by a nine-to-nothing vote, held that was unconstitutional. They basically said, look, it's just alien, alien to our society to tell a newspaper what to print or what not to print. You can't tell them they can't editorialize on Election Day. You can't tell them what to say, or not to say, on Election Day. And in effect—my language now—the Court said, “This is the price tag of living in a society with free speech protected by a First Amendment.” Sometimes it'll be abused. And sometimes, powerful people will have more power to persuade, or trick, or deceive people

as to who to vote for.

That’s the sort of case that I think embodies First Amendment Law at its best. So, no. There are other interests, and there are very important interests, but this interest, in anything like this way, seems to be unacceptable, and I think the Court made that right and rather brave decision, that they really did understand that lots of you people wouldn’t like it.

MR. COLLINS: Alan, would you care to offer a brief response?

MR. MORRISON: Well, I was waiting with bated breath to see whether the answer was “yes” or “no.” And I thought I heard a no, but I wasn’t sure that I heard the circumstances in which something other than the First Amendment triumphs.

I agree with Mills. It’s a perfectly proper decision. But it doesn’t reflect the opposite side of the question. And it seems to me that I would be very upset if most of my students couldn’t at least make a colorable argument that spending unlimited amounts of money on a political election is different from banning a newspaper from publishing a story on Election Day, when hopefully people are at least looking at the newspaper before they vote.

MR. COLLINS: All right. We have a question for you, so we’ll need to move on. This is a question from Mr. Abrams to Mr. Morrison:

“Would you have joined the four dissenters in affirming the ruling against Citizens United?”

MR. MORRISON: I think if I haven’t made the point already that I did that, either you haven’t been listening, or I’m not a very good communicator.

MR. ABRAMS: I’m sorry; I really don’t get the answer. Why don’t you try?

MR. MORRISON: The answer is, would I have joined every word of it? No. Would I have at least concurred with it? Absolutely.

MR. COLLINS: Mr. Abrams, you care to respond?

MR. ABRAMS: What we’re saying is that he agrees that Citizens United itself, not just the opinion, but on the facts of the case of
Citizens United, this political group that wants to do a movie attacking a candidate for president of the United States, and to show it on video on demand, in their case, within sixty days of an election, that that can be a crime. I think it can’t be. And I think the First Amendment has got to be interpreted to protect that movie.

MR. MORRISON: Can I say a word about this crime business? It’s technically true that it was a crime. But no one—the Federal Election Commission can barely get together to bring a civil injunction proceeding or get civil penalties against anybody—so the notion that they’re actually going to prosecute anybody for something like this is just not in the real world today. It is technical privacy; we have to take it at that.

I also want it to be clear that if you read the very, very long dissent that goes along with the very long majority, you will see the dissent also said they wouldn’t—they didn’t actually decide it, and I would have decided it. I would have probably said that the movie itself was protected, not for the First Amendment reasons as given, but for another set of reasons that I outlined earlier, without reaching the constitutional question. But if I had to reach the constitutional question, I would have decided it the way the dissenters decided.

MR. COLLINS: All right. And let me just ask you a question from Mr. Abrams to you, Mr. Morrison:

“Do you believe it was constitutional for Congress to have adopted legislation that would have permitted HBO to create and broadcast a program entitled Hillary while making it a crime for Citizens United to have done so?”

MR. MORRISON: Well, unlike Mr. Abrams, I have a somewhat different view of the First Amendment. And I think that we could distinguish between full-length documentary features, slanted as they may be, books, slanted as they may be, and advertisements. If you could get anybody to read through the whole book of Hillary, I consider that positive value in our society. We don’t get enough people reading anything, as living proof in the whole length of the movie.

Second, I should point out that, and this is perfectly clear under FEC law, if the movie were shown in a movie house, and you went
and paid your ticket—probably ten dollars now—to go to see the movie, that would not be subject to the election laws, because it’s an exchange of things for value. So if you buy an Obama T-shirt, as long as you pay the fair market value for the T-shirt, it’s not considered a contribution. That’s how most books are sold, that’s how most movies are watched.

They could easily have said, as far as HBO is concerned, that you are paying for it indirectly by the advertising, and the problem with this case was that the producer had to put the money up front, instead of having somebody else pay for it to go out on HBO, and that’s why it became subject to the law. And that, to me, could be another set of circumstances.

But I suppose if I were going to answer the question, can you treat a full-length movie and a book the same way, or treat it differently based upon who does it, then I would say no, you can’t treat it differently, if that’s what we’re talking about as a book or a movie. Advertisements, which is after all what was really at stake in this case, I view them differently from full-length books and movies, and if I can’t give you a unified theory of the First Amendment to explain it, I’m sorry.

MR. COLLINS: Mr. Abrams.

MR. ABRAMS: The problem identified by Justice Kennedy that my question was focusing on is that there is, in the statute, a so-called media exemption. The statute applies to corporations putting programs, either advertisements or a lengthy movie, on television, which would be criminal, as opposed to a media entity putting it on television.

So as my question suggested, HBO would have been free to run this movie. But if it had been on video-on-demand, from Citizens United, it would be criminal. And that was on purpose. That wasn’t a drafting error. That was in there, in good part, to get the support of media entities for the statute. Because they might have viewed it very differently if it limited them, since they are corporations, and therefore would have been subject to the act.

So we had a statute on the books, which distinguished, on the basis of, in effect, who the speaker was, of the same film. My question wasn’t about that, and I don’t mean to—Mr. Morrison acted as if it was, but just to be clear—the question wasn’t to be suggesting a different movie. I’m saying, that movie by this
political group was criminal if shown on television, and that same movie, if put on by HBO, was not criminal. And that is yet another ground that the Court relied upon for saying that this statute simply went too far and cut too deep into the First Amendment.

MR. MORRISON: If the only thing that was decided in this case was whether feature-length films that were strongly advocacy-based were protected by the First Amendment, regardless of who sponsored them and paid for them, it would be one thing. But it's perfectly clear from this decision that this ruling applies to any expenditure, even for direct advertisements—“Vote for Romney,” “Vote for Obama”—put on by corporations. So whatever difficulties there may be in the movie context, and I would think that maybe something like freedom of the press might be able to create some additional rights, although the Court has never said there's a difference between freedom of the press and freedom of speech under the First Amendment, the issue has never had to be squarely faced.

I mean, the heart of the case is, the New York Times endorses a candidate, writes an editorial, and General Electric likes the editorial so much, they spend the money to put the exact same thing up there and then, that’s a harder case. I agree. And maybe that’s—you can’t distinguish between the two of them, but not being able to distinguish between a feature-length film and a political advertisement, seems to me to be not the hard question.

MR. COLLINS: Question from Mr. Morrison to Mr. Abrams:
“The Court declines to decide whether the ban on corporate contributions is constitutional. Do you have any doubt that the Court will strike that down also? Isn’t the Court also heading toward eliminating contribution limits?”

MR. ABRAMS: It’s less clear to me, just for those of you who don’t spend all your time in this area.
Let me say that since the decision in the case from the 1970s, Buckley v. Valeo, that which reference was made earlier, the Supreme Court has distinguished between contributions, money given to political parties, or candidates, and expenditures, which is spending your money to buy an ad on your own, but not giving it directly to the candidate. It was always a very close and debatable call. Whether that distinction really works or not, I think the
theory may have been certainly what the Court indicated the theory was, was that a contribution is closer.

You're giving it to the candidate, as opposed to you're just sort of speaking out on your own.

I'm not sure if the Court is ultimately going to say that the ban on contributions is unconstitutional, because they could say, that's just not the same sort of speech we're talking about when you—when a corporation, or a union, or, in the Buckley case, yourself—spend your own money to buy an ad, or get together with other people and spend money to buy an ad.

I will say that my own view is coming around to saying that it doesn't make sense to have almost any of these distinctions anymore. That we really ought to say the money can be given, and money can be spent, and there shouldn't be limits on it, and it should be same-day disclosure, of all the money, so the public knows who it's coming from, and who might be benefiting from the speech. That is ultimately where the law is driving me, because I think a lot of these distinctions just don't work anymore.

One of the results of campaign finance law has been the denigration of the power of political parties. I don't think that's a good thing. I think it's better to have people give money to political parties and candidates rather than having outsiders, who I think ought to be free to do it, free to speak out on their own, but if they want to give money to the party, or if they want to give money to the candidate, I think they should be allowed to do so.

MR. MORRISON: I agree with Mr. Abrams that all in all, the distinctions between making contributions and making expenditures are very hard to defend in the real world.

How can it be that a corporation cannot give more than $2,500, which is the amount that you and I, if we had the money, could give to a political candidate in federal election? They can't give a dollar, let alone up to $2,500, but they can spend $25 million on the independent expenditures. Try explaining that to somebody who's just come to the United States, or to your twelve-year-old child, or grandchild, or niece or nephew, and ask them to try to explain how that makes any sense in our system of democracy, and it doesn't make any sense.

So I think that the ban on corporate contributions is doomed. It's only a question of when. But the good thing about that is it's only $2,500; it's not $25 million. And that gets to the second question,
which is whether the distinction between contributions on the one hand and expenditures on the other hand will continue to be held.

I know there are at least three, and maybe four or five, votes on the Court to wipe that out as well. And so if that goes, then we’re going to see the money going directly to the candidates in many of these cases. We are not going to see any rules that are going to encourage people to give money to political parties. First place, because the way you would encourage them is by giving them tax breaks or something like that, and we haven’t got any money to be able to afford to do that. We can’t limit the amount of money that’s given to individuals, as opposed to parties, because the First Amendment doesn’t allow us to make any of those distinctions.

So none of the things we would like to do, we can do, because the First Amendment is an absolute bar to monkeying around with anything to do with speech, and since money facilitates speech, we can’t touch it at all. That’s where we’re going. I don’t think that’s the best direction for the country, but if the majority opinion in *Citizens United* and the other cases related to it continues to be upheld, that’s where we’re going to be—unless, of course, we have an amendment to the Constitution, which we could use to protect political parties that way.