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# Symposium: Free Speech Under Fire: The Future of the First Amendment

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# FREE SPEECH UNDER FIRE: THE FUTURE OF THE FIRST AMENDMENT

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I gave up bragging for lent . . . well I am trying. It's hard. Put yourself in my shoes. Imagine coming to work every day with extraordinary people at our great law school, such as Professor Joel Gora and distinguished visiting Professor of Law, Judge Andrew Napolitano. Many months ago, Joel and Andrew conceived and, since then, assembled and worried to perfection today's incredible program about the state of free speech in America and the future of the First Amendment.[1]

The thunderous and often sharply divisive crescendo of public discourse over beliefs, values, and rights currently reverberating through communities, campuses, campaigns, and all communications channels demonstrates the challenge facing the participants in this symposium. Led by our world-class faculty including professors Beryl Jones-Woodin, Sabeel Rahman Kahn, Miriam Baer, Nelson Tebbe, and our incomparable vice dean Bill Araiza, the learned and wise speakers you will hear from are more than up to the task—they are, simply put, giants in their fields. Some I have known and had the privilege of working with in the past, others I have long admired and I have followed their work with intense interest for many years.

Today's program offers us an extraordinary example demonstrating why it is that what law schools do matters—law schools are centers for learning how to use the power of law in the service of people and society at home and abroad. And that is a

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*These remarks were given to open the proceedings of the esteemed scholarship presented as part of Brooklyn Law School's Symposium, *Free Speech Under Fire: The Future of the First Amendment* on February 26, 2016.

[1] U.S. CONST. amend. I.

worthy mission. It is why I deeply believe that, notwithstanding the critics and persistent pessimism about the state of legal education, and despite the hypnotic obsessive fixation pseudo-scientific rankings have in many quarters to the exclusion of almost anything else about law schools and the profession, we all can be justifiably proud of what we do to prepare new lawyers for the noble profession.

In this vein, it is appropriate to ask each of you to reflect for just a moment upon what prompted you to become a lawyer, and especially I ask our many students present, think about why you entered law school.

This is on my mind because last week's news of Harper Lee's death transported me back, in a Proustian flash of childhood memory, to a summer night long ago. I remember looking up at the big movie screen at the Route 110 drive-in in Melville, New York, and sitting between my parents in my pajamas in the front seat, with my siblings asleep in the back, when I heard the unforgettable words: "Jean Louise, stand up, your father is passing." For me, and for many others, Reverend Sykes' gentle admonishment to Scout in *To Kill a Mockingbird*,[2] that she should show respect to her father who had just defended a black man wrongly accused of rape, provided a spark that ignited a lifelong passion for law. Of course, we have moved on from a time when the story of social and racial justice was told in stylized terms of a noble white savior of helpless blacks. Even my fictional Atticus Finch has evolved, and to put it mildly, is now portrayed in the sequel as more complex.[3] But the point is—and it is poignantly apt as we approach the end of black history month which our students, faculty, and especially our Black Law Students Association have so effectively observed—the point is that each of us had inspirations and worthy purposes leading us to legal careers, whether the motivation came from real-life legal heroes like Thurgood Marshall or Nelson Mandela; suffragette lawyers, such as Rosalie Gardner Jones, Brooklyn Law School class

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[2] HARPER LEE, TO KILL A MOCKINGBIRD (1960).

[3] In the sequel, or what many regard as a first draft of *To Kill A Mockingbird*, the adult Jean Louise returns to her fictional childhood home in Alabama. It is a story of disillusionment with the racism she discovers in the community, including her once revered father, Atticus. *See* HARPER LEE, GO SET A WATCHMAN (2015).

of 1906, a courageous Brooklyn lawyer Jim Donovan, portrayed by Tom Hanks in the movie *Bridge of Spies*; our parents and other family members; or fictional heroes like my Atticus Finch or Perry Mason, who Justice Sotomayor wrote in her autobiography inspired her.[4] Justice Sotomayor will be here in April to meet with our students, and they may ask her about her heroes.

But today we wrestle with the paradox of freedom. Freedom is not truly achievable by any single person on their own, and counterintuitively, in order to enjoy the fruits and blessings of freedom, self-restraint and tolerance are necessary. Even the ancient hermit, the lonely castaway on an uncharted island, or the isolated mountain man of our western lore were not truly free because they were prisoners of their onerous daily routine that they needed to survive on their own. By communing with the society of others the possibilities for life and for freedom proliferate.

Yet, being fully engaged with others demands self-control, patience, restraint, and tolerance because we are each in the end very different. Without such discipline, chaos ensues and all freedom can be lost—especially when confusion, fear, and dysfunction open the door for government-imposed order and ultimately tyranny.

Which brings us to the subject of freedom of speech. Speech, and indeed all communication, is meaningless, indeed impossible, without involving other people. For free speech to thrive there must be restraint and tolerance. It is a question of balance. And where that line should be, and how it is adjudged and enforced is what I expect we will consider thoroughly through this promising day-long symposium.

It is my hope that our work today will be the start of more formal ongoing efforts for us to have some continuing leadership in this field of critical importance to our democratic republic.

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[4] SONIA SOTOMAYOR, MY BELOVED WORLD 80–81 (2013).

# FREE SPEECH UNDER FIRE: THE FUTURE OF THE FIRST AMENDMENT

## KEYNOTE REMARKS BY FLOYD ABRAMS

**MODERATOR, PROFESSOR JOEL GORA**

I can think of no better way to be in serious consideration of the future of the First Amendment[1] than to hear keynote remarks from perhaps the country's most well-known and highly-regarded First Amendment lawyer, Floyd Abrams, a long-time partner at Cahill Gordon & Reindel, the author of numerous books and articles about the First Amendment, counsel in many of the most important First Amendment landmark cases of the past forty-five years—from the Pentagon Papers case in 1971[2] to the *Citizens United* decision[3] in our time—and a professor of First Amendment and media law at Yale and Columbia law schools.

Few people have thought about the meaning and purpose of the First Amendment as carefully as he has and few people have helped implement the guarantees of the First Amendment as effectively as he has. It is also my great fortune to have worked with him on many of those cases and issues over the years. Ladies and gentlemen, Mr. Floyd Abrams.

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[1] U.S. CONST. amend. I.

[2] *See* New York Times Co. v. United States, 403 U.S. 713 (1971); David W. Dunlap, *Supreme Court Allows Publication of Pentagon Papers*, N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/06/30/insider/1971-supreme-court-allows-publication-of-pentagon-papers.html.

[3] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (2010), http://www.yalelawjournal.org/forum/citizens-united-and-its-critics.

**FLOYD ABRAMS**

Good morning everyone. You all are honored by Joel's presence today and the work that he has done and contributions he has made as a teacher, scholar, and advocate. He is a First Amendment giant. I am especially glad to be here in light of the extraordinary assemblage of First Amendment scholars and practitioners. One might even say, to coin a phrase, that this may well be the most extraordinary collection of First Amendment talent and knowledge that has ever been gathered in one time and place, except, if you recall the phrase, "when Thomas Jefferson dined alone."[4]

We meet, of course, shortly after the death of Justice Scalia and I thought I'd talk a little bit about him. On a personal level, I knew him well, but no better than a few drinks together, a few dinners, and a few letters exchanged might suggest. I do recall talking with him at Kennedy Airport once when both of us were about to fly to California to participate in some sort of panel. He checked in. I checked in after him. I was told my reservation had been cancelled. There was no seat. I said, "It can't have been cancelled. I didn't cancel it. I have a seat. I have to go. I have to be there," and I went on and on. They finally let me stay on the plane. Justice Scalia came up behind me and said, "You want to change your position on capital punishment?"

Some years later, Nadine Strossen, who will be participating a little later today in one of your panels, and I were in London at the same time and she invited me to join her and Justice Scalia for a few drinks after he had appeared before a panel there in which he told the mostly English participants that there really was no such thing as international law and certainly no such thing that America had to follow; something he very much enjoyed saying and that his audience very much hated to hear.

We started talking about First Amendment cases, in particular a case called *Hill v. Colorado*, a 1990 case at the Supreme Court which had affirmed, over Justice Scalia's dissent, significant

[4] President John F. Kennedy, Remarks at a Dinner Honoring Nobel Prize Winners of the Western Hemisphere (Apr. 29, 1962), *in* PUB. PAPERS PRESIDENTS, Apr. 1962, at 347, 347.

limitations on speech in areas around abortion clinics.[5] All three of us—Nadine, myself, and Justice Scalia—agreed how terrible Justice Stevens' majority opinion was and how terrific Justice Scalia's dissenting opinion had been. He enjoyed the conversation. He sat with a cigar in one hand, a drink in the other and he said, "You know, I'm really not so bad about the First Amendment." And he wasn't. I didn't agree with most of his views on other topics and some of his views on the First Amendment, but that is not exactly a standard that binds anyone else.

I'll tell you this. When Justice Scalia was on your side in an argument you were making, or an opinion he wrote, you would be forever grateful. Often, even in areas of law that you thought you knew well, and certainly in areas that you knew you did not, he had much to teach you.

I want to cite one example which hardly involved the most momentous moment of his career, but which had a good deal to do with the changing of my own views in a significant area. The case was the Court's 1990 ruling in *Austin v. Michigan Chamber of Commerce*, in which a six-person majority of the Court joined an opinion of Justice Marshall sustaining the constitutionality of a Michigan law which barred corporations from using its corporate treasury funds for independent expenditures in support of candidates or in opposition to candidates.[6] Justice Scalia's dissent in that case, from its first extraordinary words to the last, seemed to me then and now a thing of beauty, passionate and persuasive.

I thought I'd read to you a few paragraphs from it. The opinion began with three words that make the opinion stand out in the history of the Court: "Attention all citizens."[7] He then followed with this: "To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate."[8] Then, there was a blank that he left for you to fill in the

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[5] Hill v. Colorado, 530 U.S. 703 (2000).

[6] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

[7] *Id.* at 679 (Scalia, J., dissenting).

[8] *Id.*

names of the entities which would no longer be able to speak about this subject.[9]

He then went on to say this:

> In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the "fairness" of political debate.[10]

A later paragraph read this way:

> The Court does not try to defend the proposition that independent advocacy poses a substantial risk of political "corruption," as English speakers understand that term. Rather, it asserts that that concept (which it defines as "'financial *quid pro quo*' corruption") is really just a narrow subspecies of a hitherto unrecognized genus of political corruption. "Michigan's regulation,"—*quoting from Justice Marshall's opinion*—"aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[11]

Continuing with Justice Scalia:

> Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically "corrosive," which is close enough to "corruptive" to qualify. It is sad to think

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[9] *Id.*

[10] *Id.* at 679–80.

[11] *Id.* at 684.

> that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.[12]

The opinion concluded with this:

> The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff. As conceded in Lincoln's aphorism about fooling "all of the people some of the time," that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise the Court today embraces: that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak and who may not. Because today's decision is inconsistent with unrepudiated legal judgments of our Court, but even more because it is incompatible with the unrepealable political wisdom of our First Amendment, I dissent.[13]

I think that it's about as good as it gets in terms of judicial rhetoric and more importantly, in encapsulating the First Amendment. In fact, it's such a pleasure to read, I'll read a little bit more from a much more recent case, *Brown v. EMA*, a case involving California limitations on juveniles buying or renting violent video games.[14] Justice Scalia wrote the opinion for the Court striking down the California statute.[15] Justice Alito, in his concurring opinion, had described at great length the extraordinary excesses of some of the violent video games available for purchase.[16]

Here's how Justice Scalia dealt with that:

> Justice Alito has done considerable independent research—*a very neat way to put Justice Alito down for doing and relying on his own research*—to identify video games in which "the violence is

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[12] *Id.*

[13] *Id.* at 695.

[14] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

[15] *See id.* at 805.

[16] *See id.* at 818 (Alito, J., concurring).

> astounding." "Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces . . . . Blood gushes, splatters and pools." Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito's description of those video games he has discovered that have a racial or ethnic motive for their violence—"'ethnic cleansing' [of] . . . African-Americans, Latinos, or Jews." To what end does he relate this? Does it somehow increase the "aggressiveness" that California wishes to suppress? Who knows? But it does arouse the reader's ire, and the reader's desire to put an end to this horrible message. Thus, ironically, Justice Alito's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not of objective effects, may be the real reason for governmental proscription.[17]

I'll put aside the beauty of that writing, the lawyer skill reflected, the advocate's power revealed. Just think how powerful it is to deal with the horror show set forth in Justice Alito's opinion by pointing out persuasively that what it amounts to is concern about the ideas that stem from video games' awful excesses. We will miss someone who can write and think like this and who could defend the First Amendment so effectively.

In Justice Scalia's honor, I thought I'd engage in a little bit of my own originalism for you today about the Bill of Rights,[18] in general, and the First Amendment, in particular, which bear, I think, on the various topics that will be considered today. I begin with two decisions made at the time of the drafting of the Constitution itself in Philadelphia in 1787.

The first was one of tone, and the writers of the Constitution—Madison and his colleagues—understood full well the difference between writing a Declaration of Independence and a Constitution

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[17] *Id.* at 798–99 (citations omitted).

[18] U.S. CONST. amends. I–X.

that would succeed the Articles of Confederation that had created an alliance of entities freed from British rule, but did not really function as a national government.

In drafting the Constitution, the founders made no effort to match the grace or passion of Jefferson's glowing revolutionary rhetoric in the Declaration of Independence of the previous decade. No inalienable rights were referred to in the new document, no pans to human rights offered. The Constitution's language, as Clinton Rossiter has observed, was "[p]lain to the point of severity, frugal to the point of austerity, laconic to the point of aphorism."[19] It was, in short, not a poem, but a blueprint; one devoted to establishing a new government and setting forth how it would work, and it had been agreed upon after what John Adams described as "the greatest single effort of national deliberation that the world has ever seen."[20]

Madison's understandable satisfaction at the result is reflected in a letter he wrote to Jefferson, his friend, mentor, and then U.S. ambassador to France, which observed that it is "impossible to consider the degree of concord which ultimately prevailed as less than a miracle."[21]

One of the topics as to which there had been nearly complete accord was not to include a bill of rights in or with the Constitution.[22] This was the second decision to which I referred, and to say the least, a major one of substance, although discussed by the framers much less than many other topics, including the power of the President, how to set up electoral districts, how to deal with slavery, and a wide range of other topics.

But there was a vote on whether to have a bill of rights or not, and when the vote was taken ten states voted against it, and none voted for it. The record of the Constitutional Convention reads this way: "On the question for a Come to prepare a Bill of Rights N.H. no. Mas. abst. Ct no. N— J— no. Pa. no. Del— no. Md no. Va no. N— C. no. S— C— no— Geo— no."[23]

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[19] CLINTON ROSSITER, 1787: THE GRAND CONVENTION 258 (1966).

[20] *Id.* at 11.

[21] CARL J. RICHARD, THE FOUNDERS AND THE BIBLE 161 (2016).

[22] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 588 (Max Farrand ed., 1911).

[23] *Id.*

When two delegates after that vote proposed a declaration stating, "that the liberty of the Press shall be inviolably observed," Roger Sherman from Connecticut responded that since "the power of Congress does not extend to the [p]ress," it was unnecessary to say that the press was protected against the government. The Convention rejected that motion by a seven-to-four vote.[24]

What may have seemed obvious enough to the delegates was far less so to others. Jefferson was personally appalled that the newly empowered national government would not be explicitly limited in its authority by specific prescriptions. "It astonishes me," Jefferson wrote to William Stephens Smith, "to find . . . our countrymen . . . should be contented to live under a system which leaves to the governors the power of taking from them the trial by jury in civil cases, freedom of religion, freedom of the press" and other rights.[25] "[A] bill of rights," Jefferson wrote to Madison, "is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."[26]

Another of Jefferson's letters stated that he had disapproved from the first moment the want of a bill of rights to guard against the legislative, as well as the executive branches of the government.[27]

So, when the states had to decide whether to adopt the Constitution, critics of the newly drafted Constitution focused their fire on the absence of a bill of rights in addressing the issue of ratification. Patrick Henry, opposing ratification before the Virginia legislature, said, "A bill of rights may be summed up in a few words."[28] Why not use them? "[O]therwise," Henry said, "[t]he officers of Congress may come upon you now, fortified with all the terrors of [a] paramount federal authority."[29]

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[24] JEFFERY A. SMITH, WAR & PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER 29 (1999).

[25] THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 116 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

[26] *Id*. at 659.

[27] *Id*. at 116.

[28] *Id*. at 100.

[29] *Id.*

In South Carolina, James Lincoln complained that he would, "be glad to know why, in this Constitution, there is a total silence with regard to the liberty of the press. Was it forgotten? Impossible! Then it must have been purposely omitted; and with what design, good or bad, he left the world to judge. The liberty of the press," he said, "was the tyrant's scourge—it was the true friend and firmest supporter of civil liberty; therefore why pass it by in silence?"[30]

In Cincinnatus, one of a number of anonymous critics of the newly drafted Constitution said that, "not only some power is given in the constitution to restrain, and even to subject the press, but that it is a power totally unlimited; and may certainly annihilate the freedom of the press."[31]

Responses from opponents of including a bill of rights offered views similar to Sherman's. Why, Alexander Hamilton, not yet a musical comedy star, responded in much quoted questions he posed in Federalist Paper #84:

> why [should the charter of the newly-reorganized government] declare that things shall not be done which there is no power to do? Why for instance should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

In fact, Hamilton argued, "[T]he constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[32]

Similar themes were articulated by other supporters of the new Constitution. "Where," as Governor Randolph of Virginia asked, "is the page [in the Constitution] where [freedom of the press] is restrained? If there had been any regulation about it, leaving it insecure, then there might have been reason for clamors. But this is not the case." As he said, "I again ask for the particular clause which gives liberty to destroy the freedom of the press."[33]

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[30] *Id.* at 98.

[31] *Id.* at 106.

[32] ALEXANDER HAMILTON ET AL., THE FEDERALIST (Jacob E. Cooke ed., 1961), *reprinted in Alexander Hamilton, Federalist, no. 84, 575—81*, THE FOUNDERS CONSTITUTION: BILL OF RIGHTS (May 28, 1788), http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss7.html.

[33] THE COMPLETE BILL OF RIGHTS, *supra* note 25, at 100.

Others mocked the very notion of a bill of rights. Roger Sherman said, "No bill of rights has ever yet bound the supreme power longer than the honeymoon of a new married couple."[34] Noah Webster, tongue deeply in cheek, suggested that if it was a list of inalienable rights that was necessary, the Constitution should include a clause saying that, "everybody shall, in good weather, hunt on his own land, and catch fish in rivers that are public property . . . and that Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter's night."[35]

Madison had initially opposed the inclusion of a bill of rights, referring to it as a useless "parchment barrier[ ]"[36] which "will never be regarded when opposed to the decided sense of the public."[37] But confronted with political threats to his own election to the House of Representatives, in which his opponent and later successor as President, James Monroe, supported the inclusion of a bill of rights, Madison shifted his position from opponent to sponsor. Madison wrote the first draft of a bill of rights and introduced it in the first Congress with the tepid assertion that, given public concern about its absence, its inclusion offered "something to gain and, if we proceed with caution, nothing to lose."[38]

As initially proposed in June, 1789, the equivalent of what became the First Amendment's language about freedom of speech and of the press reads remarkably similar to what we have today—except in one respect. Madison's first proposal relating to freedom of expression submitted to the House was phrased this way: "The people shall not be deprived or abridged of their right to speak, to

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[34] Daryl J. Levinson, *Rights and Votes*, 121 YALE L. J. 1286, 1363 n.20 (2012) (quoting Roger Sherman, *A Countryman, II.*, NEW HAVEN GAZETTE, Nov. 22, 1787, *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 218, 219 (photo. reprint 2003) (Paul Leicester Ford ed., Brooklyn, Historical Printing Club 1892)).

[35] JOSEPH H. BOYETT, PH.D, GETTING THINGS DONE IN WASHINGTON: LESSONS FOR PROGRESSIVES FROM LANDMARK LEGISLATION 31 (2011); Noah Webster, *America Essay*, TEACHINGAMERICANHISTORY.ORG (Dec. 31, 1787), http://teachingamericanhistory.org/library/document/america/.

[36] JOSEPH J. ELLIS, THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION 1783-1789, at 203 (2015).

[37] *Id.* at 204.

[38] O. John Rogge, *Unenumerated Rights*, 47 CAL. L. REV. 787, 791 (1959).

write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[39]

By September 25, 1789, the Senate had weighed in, and the two houses had agreed on what became the First Amendment, couched as we now know it in an indelibly negative way. "Congress shall make no law,"[40] was chosen to introduce the First Amendment, a decision in turn that has led the Supreme Court through American history to rule that the First Amendment barred only governmental, not private, suppression of speech.[41]

What seems to be most striking today in reading those debates about the adoption of a bill of rights is that while there was fiery disagreement about whether to adopt such a document at all, little of it was about what those rights were. The debates all focused on whether it was necessary, or even useful, to have separate amendments or to include in the Constitution itself, a list of rights, rather than fleshing out the meaning of what those rights were.

Inevitably, the language chosen has been subject to multiple, sometimes conflicting interpretations, and the passage of time has, of course, led to disputes that I think Justice Scalia would have agreed would have been inconceivable in the eighteenth century. Who, after all, can speak with confidence today about what the framers would have thought about net neutrality, video games, or algorithms?

One view of the framers, however, could hardly be clearer. "[T]he great object" of a bill of rights, Madison observed when he first introduced it, was "to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode."[42]

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[39] James Madison, Speech in the House of Representatives (1780) (transcript available at *Creating the Bill of Rights*, LIBRARY OF CONGRESS, https://www.loc.gov/exhibits/creating-the-united-states/interactives/bill-of-rights/speech/enlarge3-transcribe.html).

[40] U.S. CONST. amend. I.

[41] *See, e.g.*, Hurley v. Irish-American Gay, 515 U.S. 557, 566 (1995) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)) ("[T]he guarantees of free speech . . . guard only against encroachment by the government and 'erect no shield against merely private conduct.'").

[42] THE COMPLETE BILL OF RIGHTS, *supra* note 25, at 54.

Later in the debate about the adoption of the Bill of Rights, Madison went farther. With its adoption, he said, "[t]he right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach"—*the control*—"of this government."[43] The imposition of strict limits on governmental authority over religion, speech, and press was the First Amendment's central purpose. It is what the First Amendment is about.

In recent years, however, we have a new debate about what the First Amendment is about. Justice Breyer, in particular, has offered interpretations of the First Amendment that appear to me to be closer to those adopted in European nations in interpreting their more limited free speech protections under the European Convention on Human Rights.

His opinions often conclude that First Amendment interests lie on both sides of a case—the side challenging government action and the side supporting it—thus neutralizing the First Amendment.[44] They repeatedly seek to apply the concept of proportionality, whether, "the statute works speech-related harm that is out of proportion to its justifications,"[45] thus minimizing the First Amendment.

In his book, *Active Liberty*, Justice Breyer maintained that the primary purpose of the First Amendment goes beyond protecting the individual from government restraints. As he wrote, the "First Amendment seeks first and foremost to facilitate democratic self-government."[46] Correctly viewed, he argued, one must "understand the First Amendment as seeking primarily to encourage the exchange of information and ideas necessary for citizens themselves to shape that 'public opinion which is the final source of government in a democratic state.'"[47]

Then, in his dissenting opinion in the *McCutcheon* case dealing with limitations on contributions to candidates—an opinion in

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[43] *Id.* at 150.

[44] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1466 (2014) (Breyer, J., dissenting).

[45] United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring).

[46] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 53 (1st ed. 2005).

[47] *Id.* at 47.

which he was joined by Justices Ginsberg, Sotomayor, and Kagan—Justice Breyer said, "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*."[48] The First Amendment, he argued, must be understood as promoting a "government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects."[49]

In my view, all these articulations offer inversions of what the First Amendment is about. "[F]irst and foremost,"[50] to use Justice Breyer's words, the First Amendment seeks to protect against the dangers of governmental overreaching.[51] It is not about protecting or promoting collective speech, but avoiding the imposition of just that sort of speech by the government.[52]

One of the benefits of the First Amendment is surely that it generally leads to a better-informed public and therefore, a more representative government. But we surely would not allow speech to be suppressed because the government decided it led the public to become badly informed or less enamored of representative government. That sort of censorship is precisely the opposite of what the First Amendment is about.

The notion that First Amendment interests are served whenever laws genuinely reflect what the public determines it favors also ignores the reality that the public, too often, seeks to suppress speech of which it disapproves. Speech is sometimes ugly, outrageous, even dangerous, and the public's reaction and response to such speech is often one of disgust, revulsion, even anger.

Who would doubt that the collective speech of the public would likely result in the banning of virtual child pornography on the Internet, lifelike depictions of children—not of real children—but of virtual children, that as a federal statute provided, appeared to be of minors engaged in sexual conduct. The Supreme Court ultimately

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[48] *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

[49] *Id.* at 1468.

[50] BREYER, *supra* note 46, at 31.

[51] *See McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

[52] *See id.* at 1467–68 (arguing that large monetary donations have the ability to generate governmental imposition of collective speech, which would in turn silence the general public).

held the statute was unconstitutional under the First Amendment because it dealt with *virtual* pornography, not films of real children.[53]

Or who would doubt that there were, and are, substantial majorities of the public that supported, and would still support, legislation held unconstitutional by the Supreme Court, with, among others, the vote of Justice Scalia, that banned the burning of the American flag.[54] Or that the public, inconsistently with the First Amendment as interpreted by the Supreme Court, would overwhelmingly support punishing, or at least silencing, members of the Westboro Baptist Church, whose contemptible practice is to voice their fury at the nation's supposedly too tolerant treatment of homosexuals by coarsely denouncing American soldiers who have died in the defense of their country on the days of their funeral in a place as close to the churches in which they were being mourned as the police would allow.[55]

Chief Justice Roberts' response to Breyer's opinion in *McCutcheon* seems to me cogent. He wrote:

> the dissent's "collective speech" reflected in laws is of course the will of the majority, and plainly can include laws that restrict free speech. The whole point of the First Amendment is to afford individuals protection against such infringements. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting "collective speech."[56]

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[53] Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002).

[54] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that the defendant protester's conviction was inconsistent with the First Amendment because his burning of the flag was the expressive culmination of a political demonstration and therefore deemed communication implicating the First Amendment).

[55] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451–52, 54 (2011) (holding that, because "[s]peech on matters of public concern is at the heart of the First Amendment's protection" and that the defendant protester's signs "related to broad issues of interest to society at large, rather than matters of purely private concern," they were entitled to First Amendment protection).

[56] *McCutcheon*, 134 S. Ct. at 1449.

Finally, the First Amendment was obviously not the only liberty-protecting provision of the Bill of Rights. If it were, we would not need the other nine amendments of the Bill of Rights, or the post-Civil War amendments that ended slavery, required states to provide due process, and effectively subjected state governments to most of the same limitations on liberty that apply to the federal government.

Unreasonable searches and seizures by federal and state governments are banned.[57] Trials in both government entities must be fair.[58] Cruel and unusual punishments in each are barred.[59] What all of these limitations have in mind is not that they are about speech, but that they are all about limiting governmental abuse of power.

When we consider each of the topics today, ranging from hate speech to money and speech, from surveillance, and to speech with respect to the future, I urge you to bear in mind this history. It does not answer every question, and to many, it may not provide any answers at all, but it does offer a starting point, a sort of take-off point from which we may proceed. Thank you all very much.

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[57] *See* U.S. CONST. amend. IV.

[58] *See* U.S. CONST. amend. VI.

[59] *See* U.S. CONST. amend. VIII.