MLRC Media Law Resource Center
BULLETIN
2010 Issue No. 3 | ISSN– 0737-8130 October 2010

SUPREME COURT ROUNDTABLE 2010
THE ROBERTS COURT AND THE FIRST AMENDMENT

FLOYD ABRAMS, PROFESSOR JOEL GORA, PAUL SMITH

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MLRC'S SUPREME COURT ROUNDTABLE 2010
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FLOYD ABRAMS, PROFESSOR JOEL GORA AND PAUL SMITH

To mark the start of the Supreme Court's 2010-2011 Term, we asked three First Amendment experts to answer a series of questions about the Court's notable decisions of the past year and the Court's First Amendment docket for the new Term.

1. Competing Views of the First Amendment – Citizens United v. FEC

MLRC: *Does the Citizens United case pose an irreconcilable clash between competing views of the First Amendment? (e.g., liberty vs. equality; principled vs. consequentialist views of the First Amendment)*

Paul Smith: While those tensions are certainly reflected in the decision, I don't really think it's fair to view the five-vote conservative majority that carried the day as more "principled" than the dissenting four Justices or as Justices who interpret the First Amendment to achieve equality rather than liberty. The case dealt with a particular problem — how the First Amendment applies to corporations when they are participating directly in campaigns for federal office. The Justices had to decide how much deference to accord Congress when it decided that a particular form of corporate participation in elections — direct advocacy during the final weeks of a campaign using general treasury funds rather than PAC funds — would distort the marketplace of ideas and/or create too much risk of corruption.

Floyd Abrams: First Amendment rulings routinely arise out of clashes between free speech claims and other social interests — i.e., personal reputation, privacy, national security or the like. What's most troubling to me about much of the criticism of *Citizens United* is not that many observers view the need for "reform" in this area as so important that the First Amendment must fall before it. I strongly disagree with that approach but, as I've said, it's commonplace in First Amendment cases for competing interests to be assessed. What's more troublesome still to me is the position of many critics of *Citizens United* that the true competing interest is the preservation of "American democracy" or the like. To say that speech, let along speech about who to vote for, should be suppressed in the name of democracy seems to me to be especially dangerous.

Professor Joel Gora: On the day that *Citizens United* was decided, I found myself saying, in a New York Times blog column, that it was "a great day for the First Amendment." What made it great was that the Court was willing to use broad strokes to strike down a law which restricted speech in broad terms. Under the challenged law, all corporations and all labor unions were banned, under threat of criminal sanctions, from using their funds to speak out about government and politics in any way that even mentioned a politician or an incumbent officeholder running for election. What could be more quintessentially at the core of the First Amendment than such speech and what more important role could the Court play than striking

down a law which restrained such speech. The First Amendment has always been based on the idea that the more speech we have, the better off we are, as individuals and as a people. The *Citizens United* case eloquently reaffirmed and reinforced that overarching principle. So, the clash between liberty and equality is a false clash. Protecting the right of everyone and every entity to speak – liberty – will enhance the ability of everyone to participate more fully in the political process – equality. On the other hand, seeking to restrict liberty to achieve equality is a fool's errand: it will neither protect liberty nor achieve equality. In squarely recognizing that critical connection, the Court's opinion was a historic and heroic affirmation of the central meaning of the First Amendment. All individuals and groups are equally entitled to exercise their freedom of speech. Now, that is the proper way to level the playing field.

MLRC: *Is Justice Kennedy correct that the First Amendment does not permit Congress to make categorical distinctions based on the corporate identity of the speaker?*

Paul Smith: I think Justice Stevens is persuasive in arguing in dissent that the long tradition of treating corporations differently for purposes of their participation in campaigns is neither surprising nor particularly in tension with the rest of First Amendment jurisprudence. As he points out, there are all sorts of categorical distinctions drawn in the regulation of speech consistent with the First Amendment. His examples were students, prisoners, members of the Armed Forces, foreigners seeking to participate in American political campaigns, and government employees. All are treated differently as a categories of speakers by the law.

Floyd Abrams: Generally, yes. Of course cases treat students differently when they speak in (but not out of) school, prisoners, when their speech threatens order in the prisons where they're incarcerated, etc. There are exceptions to any generalization but that does not mean that the generalization is incorrect in its articulation of the principle. Even the First Amendment's "no law" language has been held to be non-absolute, but the core precepts of that Amendment have still generally been judicially vindicated. To say that corporations, as a group, may be categorically prevented from speaking out on the sort of matters at issue in *Citizens United* would be at odds with the core of the First Amendment.

Professor Joel Gora: Our incredibly complex system of campaign finance rules and regulations — about who can speak and what can be said and when it can be said — presided over by the government bureaucrats at the Federal Election Commission, and backed up by criminal and civil penalties, has created, in effect, a de facto system of prior restraint which causes a chilling effect on political speech all over the country. The chilling effect on speech that system caused, with people and organizations fearful that their ad in the newspaper criticizing the President of the United States might somehow be deemed illegal, was anathema to First Amendment values. Now the Court has swept all of those restraints away and allowed any group taking any form to speak out on the core political issues of the day on behalf of its members, contributors, shareholders, employees and the like. The Court dismantled the First Amendment "caste system" whereby whether someone or some group could speak depended on who or what they were. Before the decision, the right to speak depended on who was doing the speaking: business corporations, no, unless they were media corporations; non-profit corporations maybe, depending on where they got their funding; labor unions no. At the state level there was also a crazy-quilt system, with half the states allowing corporations and unions to speak out about politics and the other half not. The Court has swept those distinctions all

aside: the right to speak cannot depend on the identity of the speaker. Under the First Amendment, there can be no second-class speech or second-class speakers.

MLRC: *What are the consequences of allowing such distinctions? Would media corporations be exempt from regulation only by the grace of Congress?*

Paul Smith: Obviously courts need to be vigilant when lawmakers disparately regulate speech rights by categories of speakers. There has to be a strong, content-neutral justification and the law cannot be a covert way of favoring some viewpoints over others. The fact that some categorical distinctions may be permissible does not mean that all are. Clearly, if *Citizens United* had come out the other way, media corporations (and all other corporations) would still have enjoyed constitutional protection from nearly all other forms of government censorship. The hard question is whether it would have been permissible to apply the ban on electioneering communications paid for with general treasury funds on the eve of elections to media corporations. I tend to think that the exemption for media corporations in the law would have been constitutionally required even if the law had been upheld as applied to other corporations. But I recognize that drawing such a line is becoming increasingly difficult in a time when anyone can have a website.

Floyd Abrams: Who knows? Certainly there is a risk of that result. Just as important, if the Court were to say that Time Warner could prepare, distribute and show on television its own version of "Hillary; The Movie" but that Citizens United would act criminally if it did so, it would have acted in a wholly unprincipled — not to say unconstitutional — manner.

Professor Joel Gora: In this regard, the Court explicitly and emphatically reaffirmed the First Amendment protections of the institutional press. In fact, the Court said that if the government could, indeed, restrict the First Amendment rights of corporations, that would include the power to limit media corporations as well – a clearly unacceptable and unprecedented result. By recognizing full First Amendment rights of corporations, including media corporations, the Court avoided that outcome. Nonetheless, most of the press, however, has not expressed appreciation for the protection the Court reaffirmed for them, and many have excoriated the Court for handing down that decision. The Court's ruling reconnected with the classic First Amendment tradition established by the great 20th century Justices like Holmes, Brandeis, Black, Douglas and Warren who understood that the protection of free speech went hand in glove with the enhancement of democracy. The latter three Justices, among the most liberal ever to serve on the Court, could not have been plainer in their commitment to a uniform and universal view of free speech as the indispensable precondition for democracy. In a 1957 opinion on the rights of labor unions to speak out about politics they said: "Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesman. The people determine through their votes the destiny of the nation. It is therefore important – vitally important – that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." Deeming a particular group "too powerful" to be allowed to speak was not a "justificatio[n[for withholding First Amendment rights from any group – labor or corporate."

MLRC: *Does Citizens United provide a basis to overrule FCC v. Pacifica Foundation and the scarcity rationale for regulating broadcast radio and television?*

Paul Smith: I suppose it does if you take seriously the notion that the law can't draw categorical distinctions among speakers. But in my view, the reasons why it is constitutionally questionable to continue to single out broadcasters for greater regulation have more to do with the fact that the scarcity rationale is no longer persuasive, given the diversification of electronic media.

Floyd Abrams: Probably not. I don't believe Justice Kennedy and the majority of the Court meant to do so by anything in the opinion although there are other routes to that result.

Professor Joel Gora: As to the impact of *Citizens United* on the *Pacifica* scarcity rationale for regulating offensive broadcast speech, I think the real undermining of that rationale happened well before Citizens United, with the arrival first of cable and then of the Internet, not to mention the technologies on the horizon that would permit multiple uses of individual broadcast channels. Its critics can try to blame *Citizens United* for many baleful things, but making television safe for "Seven Dirty Words" is not one of them.

2. Anonymity in the Political Process; Anonymity Online Doe v. Reed

MLRC: *Do political petition signers have a right to shield their identity under the First Amendment?*

Paul Smith: I'm with Justice Scalia on this one. Signing a petition seeking to put an initiative on the ballot is a form of expression but it is also a public act, playing a role in the eventual passage of legislation. We choose, for lots of good reasons, to have a secret ballot on election day, but I don't see that as analogous. Especially given the clear need for public scrutiny of petitions to assure there has not been fraud and abuse, I would say that a person signing a petition to put an issue on the ballot should know this will not be an anonymous action. Of course, people should be protected from tortious and criminal retribution. But that does not mean they should be protected from criticism in the marketplace of ideas.

Floyd Abrams: No. I agree with Paul Smith that Justice Scalia was correct on this issue.

Professor Gora: The undisclosed First Amendment story of this past Supreme Court Term, I am saddened to report, is that the Court, save for the stalwart Justice Thomas, has thrown associational privacy and political anonymity under the bus. There was a time in the midst of the liberal Warren Court when the First Amendment was interpreted as giving extremely strong protection to the right to associate with controversial groups without unnecessary government surveillance and disclosure – a right established in a number of cases involving the NAACP trying to protect its members against the harassment that would follow if their association were disclosed – as well as the right to hand out political literature without putting your name on it, just like the Framers did who authored the Federalist Papers anonymously.

But the current Court is much less sensitive to those protections and much more enamored of disclosure as either the government's right to impose or a less drastic alternative to limits on speech. So, you understandably may not have noticed in the din of disapproval that has

accompanied the *Citizens United* case, that the Court did, in fact, uphold relatively intrusive disclaimer and disclosure of the messages and sponsors of the speech that it just freed from prohibition. And the disclosures upheld went well beyond what groups like the ACLU thought were justified. The Court's 1976 landmark campaign finance decision in *Buckley v. Valeo* clearly held that the only independent speech that could be subject to ANY forms of registration or disclosure was that which Expressly Advocated the election or defeat of a federal candidate. Too narrow, said 8 of the 9 Justices in *Citizens United,* any person or group that even mentions a politician in an election season broadcast advertisement, regardless of the context or thrust of the ad, is subject to the statute's disclosure regime. Indeed, Justice Kennedy was quite explicit that one of the reasons why it would not be dangerous to democracy to let corporations and unions have full speech rights concerning candidates and politics was that, for the first time, there would be disclosure as well: "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today….The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." Gone was any significant appreciation of the chilling effect that disclosure can have, even apart from those groups that can show specific threats of harassment of their members and supporters.

That same embrace of disclosure and transparency also led to the result in *Doe v. Reed*, where the widespread public disclosure of the identities — names and addresses — of people who signed petitions to put what was perceived to be an anti-gay referendum on the ballot was approved by the Court, with only Justice Thomas dissenting in favor of political privacy, though Justice Alito did suggest that a door should be kept open for as-applied harassment challenges. But the overwhelming majority of the Court supported public disclosure and denigrated the privacy concerns. While there were a number of arguably sound legal grounds for the result – signing the petition is a public act; many referenda are not particularly controversial and don't require protection of privacy; electoral fraud needs to be discouraged – what was arguably really going on was a campaign to expose and intimidate people who politically opposed same sex marriage. Though not extremely widespread, there had been enough incidents in different parts of the country to raise a concern about the effects of disclosure, but the majority brushed it aside. Well, at least we still have the secret ballot.

MLRC: *Will the Court's decision in Doe v. Reed impact the First Amendment right of anonymity in other contexts such as defamation claims over speech on the Internet?*

Paul Smith: The petition context is pretty distinct. I don't see the decision as having a significant impact on the right to speak anonymously in other contexts.

Floyd Abrams: Not directly although I think the general "right" to anonymity on the internet is likely to face rough sledding in the context of libel or other recognized claims.

Professor Joel Gora: The implications for privacy on the internet, to my mind, are troubling. In *Citizens United* the Court extolled the virtues of the internet in facilitating disclosure about who is supporting what political messages, and in *Doe v. Reed* the Court minimized the threat

of viral internet assaults on individuals for their support of certain political positions. In that legal milieu, proponents of internet privacy may have an uphill piece of business.

3. Categorical Exceptions To The First Amendment – U.S. v. Stevens

MLRC: *In U.S. v. Stevens, the government argued that "Whether a given category of speech enjoys First Amendment protection depends upon a balancing of the value of the speech against its societal costs." The Court rejected this argument, with Chief Justice Roberts describing it as "startling and dangerous." Is this the most important takeaway point from the decision?*

Paul Smith: The government's argument for a new exception to strict scrutiny, based on a balancing of the value of speech against its social costs, was a remarkably anti-First Amendment position that the Court rightly rejected. Indeed, the Solicitor General's office seemed to have backed away by the time the Government filed its reply brief and at oral argument. It was obviously important for the Court reject such an approach emphatically. But I thought it was also important that the Court took seriously its duty of determining the full potential breadth of the statute and applying strict scrutiny to assess the statute in its full breadth, rather than papering over that problem in order to find a way to uphold a law aimed at an odious form of expression (so-called "crush videos").

Floyd Abrams: Yes. In fact, the *Stevens* opinion should (and I think ultimately will) be celebrated as a memorable one precisely because of that part of the Court's analysis.

Professor Joel Gora: Yes, as with *Citizens United*, in *Stevens*, the Court was also striving to put the First Amendment first, and not have it balanced against other competing interests in an ad hoc and subjective way. In both cases there was a clear impatience with paternalistic "government knows best" justifications for limiting speech either by lumping it into "unprotected" categories or buckets or attempting to balance speech away in an ad hoc fashion. In this respect, the two decisions are reminiscent of the approach taken by Justices Black and Douglas in an earlier era, railing against "balancing away" First Amendment rights on the altar of various assorted government interests. What is surprising is that the more liberal Justices would have joined the Stevens opinion, given that they tend to eschew the more "absolute" approach and opt for a supposedly more modest case-by-case approach. Perhaps this can be explained by the fact that the decision was essentially an overbreadth ruling, based on the determination that most of the Act's applications were invalid, but inviting Congress to redraft the statute in a way that focused more on the purported concerns with horrible, sexually-fetished animal cruelty, rather than videos of hunters stalking deer.

4. Content-based Restrictions on Speech and the First Amendment – Holder v. Humanitarian Law Project

MLRC: *In Holder, the Supreme Court rejected a First Amendment challenge to a federal statute barring "material support" to designated foreign terrorist groups, including "coordinated" speech and advocacy on behalf of such groups. Is the Court's decision important to free speech issues outside of the war on terror?*

Paul Smith: *Holder* is interesting because the Court seemed to acknowledge that it was dealing with the kind of content-based restriction on speech that warrants strict scrutiny but it

was willing to uphold the law, giving great deference to Congress. That's very rare. My sense is that it will not lead to a general loosening of First Amendment standards but will instead be cabined to the terrorism context.

Floyd Abrams: I think the *Holder* case was a very difficult and close one — far more so than *Citizens United*. That said, I think the impact of the case on other areas will be minimal.

Professor Joel Gora: That's hard to tell. Of course, some analysts have pointed out a real tension between the *Holder* case, which upheld a statute restricting "material support" for protected speech, and *Citizens United* which struck down a statute restricting "material support" so to speak for political speech by corporations and unions. I tell my students, only half jokingly, that the moral of the story is (1) that the conservatives will protect speech for corporations, but not for terrorists, (2) the liberals will protect speech for terrorists, but not for corporations and (3) Justice Stevens will protect speech for nobody, since he was the only Justice to reject the First Amendment claims in *both* cases. I then tell my students that maybe Al Qaeda should incorporate and gain protection in the Supreme Court by a vote of 8-1. Of course, the cases are more "nuanced" than that, but I am a bit appalled by the self-contradictory inconsistencies in approaches, especially, inter alia, on the question of "deference" to Congress and the President. The liberals give Congress the benefit of the doubt on regulating campaign speech, but not regulating terrorists, and the conservatives do vice versa. Were I the Tenth Justice, I would say that deference is no more appropriate – and just as pernicious – in the Pentagon Papers case as in *Buckley v. Valeo*, in *Holder* as in *Citizens United*. The one constant is the government's self-interest in protecting themselves or their secrets, and the courts should be willing to call them on it. I haven't the slightest doubt that Justices Black and Douglas would have easily invalidated both statutes. Instead, you have the specter of Justice Breyer dissenting in *Holder* saying the activities at issue "involve the communication and advocacy of political ideas and means of achieving political ends" and continuing, that "this speech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection." If that doesn't also describe *Citizens United*, in which he rejected the First Amendment claim, I don't know what does. My hope is, however, that *Holder* will be distinguished in the future as a national security case, without a spillover effect on First Amendment claims and issues more generally. But, in all honesty, there is an underlying tension between the two cases that may erupt in the future.

5. Regulating the Sale of Video Games to Minors – Schwarzenegger v. Entertainment Merchants Association, et al.

MLRC: *In light of U.S. v. Stevens, and the unanimity among lower courts in striking down laws restricting sales of video games to minors, why did the Supreme Court agree to hear this case?*

Paul Smith: My own view on that is that the Court saw that nine different state or local laws had been struck down by federal courts and decided it was time for it to make sure this degree of friction between state policymakers and federal judges was appropriate. They had not been asked to grant review since the very first case a decade ago. I don't believe they granted review with a firm conviction that the Ninth Circuit's decision needed to be reversed — though I guess I can always be proved wrong!

Floyd Abrams: Lots of state laws, lots of support for them by state Attorneys General, lots of rulings offering somewhat different justifications for striking those laws down. It's always conceivable that the Court will reverse a ruling it's agreed to review but it's unlikely in light of *Stevens*.

Professor Joel Gora: There is a good deal of worried speculation in the First Amendment community about why the Court took this case since lower courts had been virtually unanimous in striking down statutes like California's. And, like *Stevens*, it does require consideration of whether a category of speech should be deemed as so consistently of little value in comparison to the harms that it supposedly generates as to justify putting it in the non-speech category.

MLRC: *Would a decision in favor of California reopen the question of regulating the Internet to protect children?*

Paul Smith: Not necessarily, if the Court were convinced that sale of video games to minors can be regulated without affecting adults' access to protected expression (although we will argue there will be such an effect). Ironically, distribution of video games is now shifting to the Internet where age restrictions will raise the same problems litigated in *Reno v. ACLU* and the COPA line of cases.

Floyd Abrams: Probably not. The same problems of vagueness, overbreath and the like that led to the Court's rulings would still exist.

Professor Joel Gora: The Court has generally refused to do so since *New York v. Ferber* upheld a ban on "child pornography" in considerable degree to protect the harm of exploiting young people to produce such content. So, that case was explainable as a child abuse case as much as a free speech ruling. Here the relationship between speech and harm is less direct and more attenuated. It implicates the classic debate about how much of a link between speech and harmful conduct resulting from the speech has to be shown before the speech can be punished. But cutting in the opposite direction is that, at least where sexual content is concerned, "obscenity for minors" has been a recognized category of "non-speech" or lesser protected speech for 45 years. The Court has generally resisted the blandishments of the save the children crowd to try to justify broad prohibition of sexual content on the internet, but has not denied government the right to engage in more focused regulation. Here the harm is the long-term instigation of violence, not sexual behavior, and the Court may feel that speech which assertedly stimulates violence by youth is more of a valid governmental concern. A decision upholding the statute would undermine First Amendment rights across the board and allow a variety of proscriptions of speech where the speech/harm nexus is not all that clear. I hope there are not five votes to uphold this statute, but a weird, strange bedfellows coalition on the Court might produce such a majority.

6. Hustler v. Falwell and Private Figures – Snyder v. Phelps

MLRC: *Will the Court limit Hustler v. Falwell to claims involving public figures?*

Paul Smith: I'm afraid I'm not confident in my ability to predict what the Court will do with this case. The First Amendment claims seem strong but the speaker and the speech at issue are so unattractive.

Floyd Abrams: There's a real chance of that but not, I think, in the *Snyder* case.

Professor Joel Gora: Many civil libertarians and many media lawyers are worried, and rightly so, about the Court's grant of certiorari in this case. One of the greatest adages in First Amendment lore is the famous line by Justice Oliver Wendell Homes: "… if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate." That principle is what has animated our constitutional tolerance for flag burning, hate speech, the Nazis marching in Skokie and other things that most of us would find intolerable and unacceptable, but which we must tolerate and accept because we all have different ideas of what ideas should not be free. Does this case, with its intolerable speech, endanger that principle?

MLRC: *Is the amicus brief filed by 48 state attorneys generals on behalf of plaintiffs correct in arguing that the question of public concern should not be based on the topic of the speech, but on plaintiff's connection to the speech at issue?*

Paul Smith: That's a pretty scary proposition. It seems to open up lots of potential for making core political speech into an actionable tort.

Floyd Abrams: I hope not. That would be a substantial setback for First Amendment interests.

Professor Joel Gora: There are three threat points for freedom of speech and press in this case. First, that the Court might find that some speech is so "outrageous" that it can, indeed, be civilly punished through damages for the intentional infliction of emotional distress – which was once called "the tort of outrage." I always viewed the *Falwell* case as the Court's saying, unanimously, that the concept is too subjective and open-ended and treacherous ever to be defined with sufficient precision to satisfy First Amendment concerns. I hope the Court wills stick to those guns.

Second is the "public/private" distinction. The Reverend Jerry Falwell was a quintessential public figure, about whom harsh commentary was fair game. The law of defamation draws a distinction between the greater leeway given to attack public figures or officials without fear of libel suit and the lesser leeway afforded when the subject of the story is a private person who did not seek limelight or power. That is a very strong argument here and could conceivably prompt the Court to declare that the Falwell protections do not apply where the target of the vicious speech is a private person. The problem is that this dividing line is not all that clear and at the margin between the two there will be an awful lot of chilling effect.

MLRC: *What are the First Amendment consequences of a ruling in favor of plaintiffs?*

Paul Smith: It depends on how it's written. It might be pretty limited (though still scary as just noted). Or it might open up new avenues for cutting back on First Amendment rights. Hard to say.

Floyd Abrams: Hard to tell. The Court could analogize the protection of funerals to the "home is a castle" approach it's taken previously but even so it would open doors to regulation just about all had thought closed.

Professor Joel Gora: The Court might carve out an exception for the location of the protest, funerals, or maybe even military funerals, on the ground that such regulation of the "time, place or manner" of speech is more permissible. Indeed, an amicus brief has been filed by 40 Senators, headed by Senators Harry Reid and Mitch McConnell, who have probably not agreed on anything else in the last six months, urging the Court to punish the speakers for invading the sanctity of a military funeral and pointing to a federal statute that protects such hallowed situations. The Court has upheld speech restrictions within the areas surrounding the entrances to hospital facilities, for example, But so much of the impetus to penalize the speech in this case is the hatefulness of the ideas, not just the seclusion of the location, and the Court normally does not allow time, place or manner rules to vary with the content of the speech at issue. Hopefully a majority of the Court will find that these three grounds are sufficiently troubling from a First Amendment perspective and protect the speech in question, however intolerable we may feel it to be.

7. The First Amendment Legacy of Justice Stevens

MLRC: *From majority opinions in FCC v. Pacifica, Reno v. ACLU, Bartnicki v. Vopper, to dissents in Citizens United and Texas v. Johnson, Justice Stevens has participated in some of the most important First Amendment cases of our era. What is his First Amendment legacy?*

Paul Smith: With regard to "adult" material, I think he moved over time, becoming a more stalwart protector of the First Amendment than when he started out. He began as a proponent of the view that sexually explicit material (*Young. v American Mini Theatres*) and dirty words (*Pacifica*), while not unprotected, constitute low-value speech subject to greater regulation. The tenor is much different by the time of his dissents in *Ashcroft v. American Library Ass'n* and *Ashcroft v ACLU*.

Floyd Abrams: Justice Stevens was hardly a rigorous protector of the First Amendment. While his First Amendment protective ruling in *Bartnicki* and his dissents in *Ashcroft* v. *ACLU* and *Ashcroft* v. *American Library Ass'n* are important, they seem to me to be greatly outweighed by his far from protective rulings in cases ranging from *Hill* v. *Colorado* to *Pacifica* and *American Mini-Theatres*, his dissents in *Eichman*, *Johnson* — and, not least, his dissent in *Citizens United* itself.

Professor Joel Gora: In my view, Justice Stevens' First Amendment legacy is a decidedly mixed one. I give him a great deal of credit for writing important opinions protecting free speech in cases like *Reno v. ACLU*, which was a bit of a magna carta for protecting speech on the internet, and *McIntyre v. Ohio Elections Commission*, which was a surprisingly strong recognition of the right of political anonymity and struck down a law which required people to put their names on election literature – a ruling which has been seriously undercut by some of the more recent pro-disclosure decisions. He seemed to have the romantic notion that the First Amendment primarily was designed to protect "the soapbox orator and the lonely pamphleteer." While that was once a noble and necessary vision of the First Amendment, in the modern age, people have to join together with others to make their voices heard and, certainly in the campaign finance area, he resisted that vociferously. Not only did he write the harsh dissent in *Citizens United* accusing the Court of selling out democracy to corporate interests, but he had long considered the regulation of campaign funding as the regulation of

money and property, not of speech, and subject to much greater government controls accordingly. Justice Stevens rarely met a campaign finance limitation that he didn't like. It is ironic that he succeeded Justice William O. Douglas, who was the Court's greatest free speech champion – for people and the institutions they comprise – and who was thought to have been preparing an opinion in the *Buckley* case striking down all restrictions on campaign funding, before he was forced by illness to retire from the Court.

Lastly, Justice Stevens authored two of the most questionable rulings on controlling the content of speech. One was the *Pacifica* plurality opinion which upheld penalizing, as offensive, the broadcasting of George Carlin's brilliant and satirical monologue called "Seven Dirty Words." The other was a similar decision, perhaps his initial First Amendment opinion on the Court, upholding zoning restrictions on sexually-oriented movies and bookstores because the material was of lesser value than the Federalist Papers. Or, as Justice Stevens memorably put it: "…few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice." That few, however, included Justices like Black and Douglas who did not think there should be second class speech under the First Amendment.

8. Supreme Court Justice Elena Kagan and the First Amendment

MLRC: *Do Elena Kagan's academic writings reveal a discernable First Amendment philosophy*? *See, e.g.,* "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 Chicago L. Rev. 413-517 (Spring, 1996).

Paul Smith: I think I'll let others comment on the new Justice!

Floyd Abrams: The questioner obviously doesn't argue before the Supreme Court. Let's wait and see.

Professor Joel Gora: I think it is difficult on the basis of her academic writings to make such an assessment. She had a reputation as Harvard Law School's Dean of reaching out and listening to people from all points on the political spectrum, and one would hope that if she brings that same open minded quality to her responsibilities as a Justice she may occasionally surprise us with the reasoning and outcomes she supports.

9. Future of the First Amendment: Global Influences and the New Media Marketplace

MLRC: *There has been considerable debate about the role of foreign law in the Supreme Court's constitutional decision making process. Will the balancing tests applied by the European Court of Human Rights, and national courts in Europe, in areas such as libel, privacy and "hate speech," have influence on any Justice's First Amendment jurisprudence?*

Paul Smith: I don't see foreign law affecting the Court's First Amendment jurisprudence. The First Amendment is such a uniquely American constitutional provision that it is somewhat insulated from the kinds of influence that is exerted by foreign law in the application of other constitutional provisions like the Eighth Amendment and the liberty clause of the Fourteenth Amendment.

Floyd Abrams: No, but I wish the court would read and learn from the rulings abroad protecting confidential sources.

Professor Joel Gora: I hope not. I think American "exceptionalism" on strong protection for First Amendment freedoms is to be cherished. We are definitely outliers where protecting provocative speech is concerned, and, to my mind, that is all to the good. The slippery slope to greater government control of speech should be resisted as much as possible. Some of the current Justices seem all too willing, like their European counterparts, to "balance" free speech against the needs and concerns of society. Happily the current majority of our Supreme Court is generally quite impatient, if not hostile, to that perspective, and therefore, quite supportive of strong and categorical protections of First Amendment rights.

MLRC: *Will the economic challenges faced by traditional media directly or indirectly influence the Supreme Court's First Amendment jurisprudence?*

Paul Smith: I don't see that happening in particular. Of course, the emergence of web-based outlets of various stripes likely will affect the Court's jurisprudence in the sense that it makes it even tougher to think of the "press" as a separate entity and the press clause of the First Amendment as providing special protection to that entity.

Floyd Abrams: No, but the "every person is a publisher" reality of the Internet may well result in less First Amendment protection for the press than might otherwise have been the case.

Professor Joel Gora: Probably not, though those challenges will clearly have an impact on the traditional media themselves, and the Court might ultimately be influenced by the real-life blurring of lines between who is considered part of the traditional media and who is not. Hopefully, from my perspective, the effect will be more First Amendment protection across the board, as was evident in the Citizens United case.

MLRC: *Is the Court's traditional prior restraint jurisprudence sustainable in the world of Wikileaks?*

Paul Smith: That is an interesting question. It does seem that there might be a move to relax the doctrine. It is one thing to shield the New York Times from an injunction when it decides to print some classified information. It is quite another if there is less of an assurance that professional journalists have weighed the question and determined that the information is both newsworthy and not unduly threatening of the public interest.

Floyd Abrams: If Wikileaks had published the Pentagon Papers, don't ask what the result would have been! Let's hope that a few years pass before the next prior restraint case reaches the Court.

Professor Joel Gora: I think the Court majority has put a good deal of emphasis on the internet as the First Amendment facilitator for the future, as a 21st century poor person's printing press or soapbox, as the way to enhance disclosure in campaign financing as a less drastic alternative to prohibitions and restrictions. Of course those very qualities make it extremely difficult to restrict the dissemination of classified or confidential information as well. But people once

feared the printing press as the devil's tool, yet that worked out pretty well. Hopefully, the internet will work out well also for First Amendment values.

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About the participants:

Floyd Abrams is a partner at Cahill Gordon & Reindel LLP in New York City. He has a national trial and appellate practice and extensive experience in high-visibility matters, often involving First Amendment, intellectual property, insurance, public policy and regulatory issues. He has argued frequently in the Supreme Court in cases raising issues as diverse as the scope of the First Amendment, the interpretation of ERISA, the nature of broadcast regulation, the impact of copyright law and the continuing viability of the Miranda rule. Most recently, Floyd prevailed in his argument before the Supreme Court on behalf of Senator Mitch McConnell as *amicus curiae*, defending the rights of corporations and unions to speak publicly about politics and elections in *Citizens United v. Federal Election Commission*. Floyd's clients have also included The McGraw-Hill Companies, *The New York Times* in the Pentagon Papers case and others, ABC, NBC, CBS, CNN, Time Magazine, Business Week, The Nation, Reader's Digest, Hearst, AIG, and others in trials, appeals and investigations.

Joel Gora is a professor at Brooklyn Law School and a nationally known expert in the area of campaign finance law. He has been a member of the faculty since 1978, teaching constitutional law, civil procedure and a number of other related courses. He also formerly served as Associate Dean for Academic Affairs from 1993-1997 and again from 2002 through 2006. He is the author of a number of books and articles dealing with First Amendment and other constitutional law issues. His most recent book is *Better Parties, Better Government*, which he co-authored with financial market expert Peter J. Wallison. Professor Gora continues to be active in working on campaign finance policy issues, including filing briefs in the Supreme Court of the United States, advising various organizations and publishing articles in the news media. Following law school, he served for two years as the pro se law clerk for the U.S. Court of Appeals for the Second Circuit. He also was a full-time lawyer for the ACLU, first as national staff counsel, then acting legal director and associate legal director. During his ACLU career, he worked on dozens of U.S. Supreme Court cases, including many landmark rulings. Chief among them was the case of *Buckley v. Valeo*, the Court's historic 1976 decision on the relationship between campaign finance restrictions and First Amendment rights. He has worked, on behalf of the ACLU, on almost every one of the important campaign finance cases to come before the high court.

Paul M. Smith is a partner at Jenner & Block LLP in Washington, D.C. He is Chair of the Appellate and Supreme Court Practice and a Co-Chair of the Creative Content, Media and First Amendment, and Election Law and Redistricting Practices. Mr. Smith has had an active Supreme Court practice for two decades, including oral arguments in thirteen Supreme Court cases. These arguments have included *Crawford v. Marion County Election Board (2008),* the Indiana Voter ID case; *LULAC v. Perry* (2006), and *Vieth v. Jubelirer (2003),* two congressional redistricting cases; *Lawrence v. Texas (2003)*, involving the constitutionality of the Texas sodomy statute; *United States v. American Library Ass'n* (2003), involving a First Amendment challenge to the Children's Internet Protection Act and *Mathias v. WorldCom*

(2001), dealing with the Eleventh Amendment immunity of state commissions. His first argument was in *Celotex Corp. v. Catrett* in 1986. Mr. Smith also worked extensively on several other First Amendment cases in the Supreme Court, involving issues ranging from commercial speech to defamation to "adult" speech on the Internet. Mr. Smith also represents various clients in trial and appellate cases involving commercial and telecommunications issues, the First Amendment, intellectual property, antitrust, and redistricting and voting rights, among other areas. His recent trial work has included several cases involving congressional redistricting as well as challenges to state video game restrictions under the First Amendment. In November, he will argue for the respondents in *Schwarzenegger v. Entertainment Merchants Association* before the Supreme Court.