Book Reviews

CLARENCE DARROW: ATTORNEY FOR THE DAMNED

BY JOHN A. FARRELL

Doubleday, New York, NY, 2011. 561 pages, $32.50 (cloth), $17.95 (paper).

Reviewed by Nicholas J. Patterson

In *Clarence Darrow: Attorney for the Damned*, John A. Farrell paints a brilliant portrait of the famous lawyer's life. Going beyond the popular image of Darrow shaped by Spencer Tracy's 1960 portrayal of a rumpled, free-thinking trial lawyer in "Inherit the Wind"—a fictionalized account of Darrow's defense of John T. Scopes for teaching evolution—Farrell reveals a highly intelligent, compassionate, yet deeply flawed and difficult man. A preeminent litigator and a fervent defender of the underdog, Darrow was also not above stooping to unscrupulous means to win cases. He was, according to Farrell, willing to "employ any trick to save a client," and he was twice tried for bribing jurors. Darrow's personal life was no less complicated. Although long married to his second wife, Darrow was "a notorious rake," according to Farrell—"a professed sensualist who took much pleasure from the chase, seduction, and act of love."

Farrell, a journalist and author of *Tip O'Neill and the Democratic Century*, skillfully draws on numerous primary sources, including only recently available correspondence, to seamlessly weave the legal, political, and social events and movements of Darrow's time into a rich tapestry that renders the fullness of Darrow's life.

Farrell identifies the "great theme" of Darrow's life as the "defense of individual liberty from modernity's relentless, crushing, impersonal forces." He traces Darrow's evolution in what may be viewed as three acts: Darrow's beginning as a young Chicago lawyer and politician on the make, his bare knuckle litigation as a leading labor lawyer that ended with him on the ropes in grief and disgrace, and his resurrection as an immensely successful libertarian defense attorney and household name. Although Farrell makes all three acts compelling, the first two are particularly so because they show that the qualities that made Darrow memorable were forged through a hard-fought and gritty early career filled with both successful trials and devastating errors.

Act I

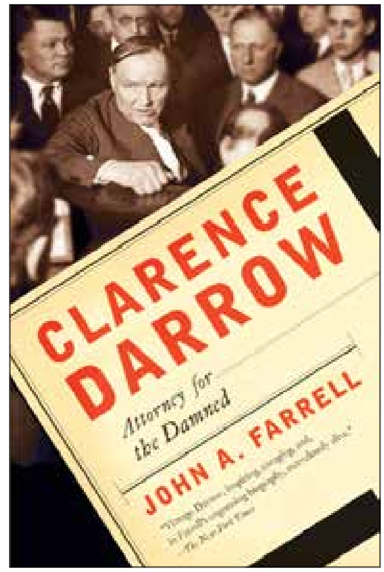
The first act of Darrow's career saw him become a successful lawyer, pursue a career in politics, and get involved in radical causes.

Darrow attended Allegheny College and the University of Michigan Law School, but graduated from neither and claimed to have taken the bar examination in a tavern. He began his legal career in Ohio, but it took off in 1887, when, at age 30, he moved to Chicago with his first wife and their young son. Initially unsuccessful as a solo practitioner, Darrow's fortunes soon improved due, in large part, to his cultivation of John Peter Altgeld as a mentor. Altgeld was a rich local judge on the rise in Illinois politics. After Altgeld helped a new mayor get elected, Darrow joined the city legal staff and was soon in charge of all the city's legal affairs. In 1892, he worked on Altgeld's successful gubernatorial campaign and Altgeld subsequently helped Darrow get a position in the law offices of the Chicago & North Western Railway Company.

Darrow adopted Altgeld's combination of passion and calculation. Admiringly, Darrow said that Altgeld was "absolutely honest in his ends and equally as unscrupulous in the means he used to attain them. He would do whatever would serve his purpose when he was right. He'd use all the tools of the other side—stop at nothing."

By 1893, at age 36, Darrow had a successful career working for the railroad company, but he decided to take an unconventional path. Eschewing a stable, lucrative corporate career, he started a private practice focusing on criminal and labor law.

In his first major criminal case, Darrow defended Patrick Prendergast, an insane newspaper deliveryman, who had killed Chicago Mayor Carter Harrison. Although Darrow's defense was unsuccessful and Prendergast was executed, Darrow went on to successfully defend numerous others people facing capital punishment. Darrow also began his transformation into a leading labor lawyer by defending Eugene V. Debs, the leader of the American Railway Union, in two



federal proceedings arising from a boycott organized by the union that halted freight and passenger travel across the country.

Farrell also reveals a side of Darrow that has been obscured by his later success as a litigator—his heavy involvement in Chicago and Illinois politics. In addition to having a close relationship with Governor Altgeldt and other politicians, Darrow unsuccessfully ran for Congress, blaming his loss, in part, on being tied to William Jennings Bryan's unsuccessful presidential campaign. This experience stoked a longstanding dislike of Bryan, his future opposing counsel in the Scopes trial. Darrow was, however, elected to the Illinois state legislature. He resisted a movement to elect him mayor of Chicago, in part because he did not want to give up his political independence. Although Farrell briefly touches on the effect Darrow's political experience had on his courtroom manner, it would not seem a stretch to think that his two decades of political experience helped teach him how to connect with and handle jurors, witnesses, opposing counsel, and judges.

Farrell also shows how Darrow's combination of intellectual curiosity and an empathetic personality led him to explore many progressive and radical political and social movements. His innate skepticism, contrarianism, and desire for independence, however, led him to remain a lone wolf, generally neither fully embracing nor being embraced by these movements' adherents.

One movement, however, that Darrow consistently supported was "the free love movement, which called for relationships based on sexual and emotional compatibility, not repressive statutes." After attaining financial success, Darrow divorced his first wife, led an active bachelor life, married his second wife, and philandered for much of the rest of his life. According to Farrell, Darrow "was often lonely, haunted by death, and prey to melancholy." One of his lovers said that he relied on "physical nearness" to escape the "emptiness" and the "spiritual isolation" of his life.

Act II

The second act of Darrow's life was his involvement from 1906 to 1913 in two sets of highly publicized trials of union men charged with "wide-scale, bloody campaigns of terror." Darrow became nationally famous for this defense work, but went through the most difficult time of his life, including being prosecuted for bribing jurors.

The first set of trials centered on the prosecution of the Western Federation of Miners President Charles Moyer, Secretary-Treasurer William "Big Bill" Haywood, and an explosives expert named George Pettibone, for their alleged involvement in a conspiracy to, among other things, kill former Idaho Governor Frank Steunenberg.

Farrell explains that the bloody conflict between capital and labor in industrial-age America reached its apex in the west and that miners there were the "spearhead of resistance to the new order." Both sides employed violent means in this conflict, and both prosecutors and defense lawyers used hard-ball tactics, including the abduction in Colorado of the three defendants by Pinkerton detectives for trial in Idaho, the alleged paying of a "staggering bribe" to a witness by the defense, and the acceptance of donations from mining companies by the state to subsidize the prosecution. Darrow ultimately secured acquittals for Haywood and Pettibone, and the state dropped the charges against Moyer. Darrow's success derived in part from exposing the unreliability of the state's primary witness, Steunenberg's killer, whom Darrow described as an "inhuman monster, a murderer, bigamist, perjurer, gambler, thief and incendiary."

Darrow's second set of trials, which stemmed from his defense of two brothers accused of participating in the 1910 bombing of the *Los Angeles Times* that left 21 people dead, was less successful, both for his clients and himself. Farrell explains that the *Times* was targeted because it "had been leading the Los Angeles business community in a fierce, violent struggle against labor that summer." Samuel Gompers, head of the American Federation of Labor, hired Darrow to defend James McNamara, an unemployed printer accused of planting the bomb, and his brother John McNamara, the treasurer of an iron workers union, accused of helping to orchestrate the bombing.

Farrell reports that Darrow made a painful decision to seek a plea deal after he determined that the case for James McNamara was hopeless. Darrow was in a difficult position because the prosecution would not likely strike a deal for James unless John also pleaded guilty, and a confession by John, as an important labor figure, would humiliate the unions and end Darrow's career as a labor lawyer. But Darrow felt that he had to seek a deal because, even though the unions were paying him, his job was to save the McNamaras' lives.

Circumstances soon became immeasurably more difficult for Darrow when, in the midst of plea bargaining, Bert Franklin, Darrow's top jury investigator, was arrested on a street corner in the act of bribing a juror—"as Darrow stood there, watching it go down." Darrow denied any role in the bribery and pushed forward with the plea negotiations. The state agreed to accept James McNamara's plea and ask the judge for clemency, if John pleaded guilty to the lesser charge of ordering a different bombing.

Farrell asserts that a factor in the state's acceptance of a plea bargain was that political and business operatives associated with the prosecution saw guilty pleas as a way to derail the candidacy of Job Harriman, a candidate for mayor of Los Angeles who was closely tied to the unions. On election day, James McNamara was sentenced to life imprisonment, John McNamara was sentenced to 15 years, and Harriman lost the mayoral race.

Soon after the plea agreement was reached, Darrow was indicted on two counts of bribery, which were tried separately. Darrow hired Earl Rogers, an attorney for an anti-union lobby, to represent him. In the first trial, even though Rogers had "prepped for the [case] by going on a bender," he mounted a showy and successful defense, arguing that Darrow had no motive for corrupting the juror because he had already begun to negotiate the McNamara plea.

The second trial did not go as well, although Darrow got off. Difficulties arose because this time Franklin had bribed the juror *before* the plea negotiations had begun, and because Rogers was "in awful shape, pale and shaking in court" from his alcoholism, forcing Darrow to take the laboring oar in his own defense. Darrow severely hurt his own cause in his closing argument by defending the McNamaras: "I want to say to this jury, even if it costs me my liberty, that the placing of dynamite in the *Times* alley was not a 'crime of the century.' It was not even a crime." Instead, Darrow argued, the responsibility was that of the "paralyzing hand of wealth which has reached out and destroyed all the opportunities of the poor."

Farrell makes little editorial comment about this very troubling statement, stating only that Darrow was attempting to make amends with the unions; throughout the book, Farrell allows readers to draw their own conclusions. The jury deadlocked with eight of the 12 jurors pushing for a guilty verdict, in part because Darrow's closing statement convinced them that his radical philosophy could have led to his engaging in bribery, and the judge declared a mistrial.

Farrell believes that Darrow "[a]lmost assuredly" participated in the bribery scheme, either directly or indirectly. Farrell weighs Darrow's correspondence with his family, in which he did not assert his innocence, as well as the statements of colleagues and friends of Darrow who believed he was involved. Interestingly, in almost a throwaway line that Farrell uses in his description of the first trial but not in his later discussion of whether Darrow bribed the McNamara jurors, Farrell mentions that, after his acquittal in the first trial, Darrow had his son pay a juror who had been a thorn in the prosecution's side "$4,500—some $55,000 in today's currency—or more."

Act III

In the third act, Farrell shows how the two-year ordeal of his bribery trials made Darrow a better lawyer and a more compassionate person. "Darrow was fifty-five when the second trial ended, broke and disgraced. But for the rest of his life he would make amends, score his greatest triumphs, and die an American hero." As Darrow explained, that "sad, hard experience made me kindlier and more understanding and less critical."

Having suffered, he tried to ease the suffering of others.

Farrell also shows Darrow's empathy and support for a wide range of individuals against whom "the good people" of society were prejudiced. For example, Darrow defended black men accused of raping white women and killing white men, saved the life of a young psychiatric patient who killed a woman because he wanted money to buy a bicycle, and defended a chronic petty criminal whom the Chicago police arrested on what they called "general principles." But Darrow was not adverse to helping wealthier clients; he saved the architect Frank Lloyd Wright from prosecution for violating the Mann Act, which was the federal law that made it a crime for unmarried couples to travel across state lines.

Darrow also threw himself into high profile and seemingly hopeless cases—and won. By 1925, he had bested William Jennings Bryan in the Scopes trial, had saved the lives of the teenage thrill killers Richard Loeb and Nathan Leopold (chillingly winning Leopold's appreciation as a fellow Nietzschean "Superman"), and had won trials involving corrupt Chicago politicos. From these victories, Darrow "emerged as an American archetype: the legal sorcerer who won hopeless cases."

Farrell also shows the uglier sides of Darrow's efforts, including his rough treatment of Bryan on the stand in the Scopes trial and his defense of gangsters. When asked how he could represent such reprobates, Darrow responded, "for the money, and because I hated jails and the good people." Farrell slyly notes that despite this jaunty rejoinder, Darrow did not include this chapter of his life in his memoirs.

Litigation Tactics

Farrell's book is shot through with insights into Darrow's litigation methods. Some of these methods, such as bribing jurors, are inarguably unethical, and others, such as closing arguments lasting days, have become outdated. Some of his tactics, however, remain instructive for modern litigation.

These tactics ranged from the sublime to the visceral. On the sublime end of the spectrum, Darrow could seduce a jury, both emotionally and intellectually. A great storyteller, Darrow explained that he would "try to throw around the case a feeling of pity, of love, if possible, for the fellow who is on trial." If the jurors can be made to identify with the defendant and his "pain and position," they will act "to satisfy themselves," and the case is won. Juries will furnish their own rationalization. "If a man wants to do something, and he is intelligent, he can give a reason for it," said Darrow. "You've got to get him to want to do it. ... That is how the mind acts."

Darrow also appealed to the intellect of his audience. Farrell explains that Darrow "had the audacity to treat judges and juries to original sermons on an intellectual plane far higher than the usual courtroom wrangling, and to do so in a captivating way. People listened to his reasoning, despite its strangeness, its theory, its difficult demand for mercy."

On a more visceral plane, Darrow mixed empathy with cunning. For example, he dressed and acted in ways that endeared himself to juries. As Chicago newsman and author Ben Hecht, whom Darrow defended from censors, explained, Darrow "artfully" dressed in "baggy pants, frayed linen, and string tie, and 'play[ed] dumb' for a jury as if he were no lawyer at all, but a cracker-barrel philosopher groping for a bit of human truth." Darrow explained that he never addressed juries. He talked to them.

Darrow employed similar finesse in cross-examining witnesses. A contemporary journalist noted that Darrow had "a capacity for getting inside the skin of a witness. ... He never strikes an attitude. He never explodes. He stands before a witness and just bores into his mind, gently, shrewdly with every appearance of wanting merely to know just the truth and nothing more. ... He knows how to browbeat, too. ... [H]e adapts his method to the man and seldom makes a mistake."

On a more devious note, Darrow was guided by the dictum that the jury needs a villain. He would undermine his opposing counsel, alienate him from the jury, and deflect juror animus from his own client by selecting a "goat" on the other side—often an attorney or opposition witness—a "foe Darrow chose for needling and vilification."

Finally, Darrow cultivated a close relationship with the press that helped him influence potential and actual jurors. Darrow used this skill and, later, his celebrity, to shape public opinion, "knowing that jurors reflect communities" and that cases are not won in the courtroom alone. In the opening weeks of one trial, Darrow went so far as to write daily stories on the case for the *New York Times*.

Conclusion

Although the term "definitive biography" has become shopworn through overuse, it aptly applies to *Clarence Darrow: Attorney for the Damned*. Farrell has crafted an intelligent, insightful, and entertaining portrait of a difficult man of whom, to quote Shakespeare, we "shall not look upon his like again." (*Hamlet*, Act I, Scene 2). ⊙

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IRON CURTAIN: THE CRUSHING OF EASTERN EUROPE, 1944-1956

BY ANNE APPLEBAUM

Doubleday, New York, NY, 2012. 566 pages, $35.00 (cloth), $17.95 (paper).

Reviewed by George W. Gowen

For many Americans, the Soviet Union's crushing of Poland, East Germany, Czechoslovakia, Austria, Hungary, Rumania, Bulgaria, and Yugoslavia is irrelevant—ancient history made more so by the subsequent collapse of the Soviet Union and our present fixation on totalitarian regimes in the Middle East. But our concern with today's totalitarian regimes actually adds relevance to Anne Applebaum's review of the Soviet takeover of the Iron Curtain countries.

Applebaum's *Gulag* won the 2004 Pulitzer Prize for General Non-Fiction, and now her retelling in *Iron Curtain* of the story of Eastern Europe from 1944 to 1956 is a rebuttal of the revisionist historians "who argued that the Cold War had been caused not by communist expansion but by the American drive for open international markets ... [and] that the division of Germany was caused not by the Soviet pursuit of totalitarian policies in Eastern Germany after 1945 but by the Western powers' failure to take advantage of Stalin's peaceful overtures." She adds, "Any close examination of what was happening on the ground across the region between 1944 and 1947 reveals the deep flaws of these arguments—and, thanks to the availability of Soviet as well as Eastern European archives, a close examination is now possible." Having made these comments in her introduction, Applebaum then proceeds, in exhausting detail, to examine what was happening on the ground.

The phrase "iron curtain" traces to

Winston Churchill's 1946 speech at Westminster College in Fulton, Mo., where he was introduced by President Harry Truman and said: "From Stettin in the Baltic to Trieste in the Adriatic, an iron curtain has descended across the Continent. Behind that line lie all of the capitals of the ancient states of Central and Eastern Europe. Warsaw, Berlin, Prague, Vienna, Budapest, Belgrade, Bucharest and Sofia. ..."

Applebaum divides her time, the jacket cover tells us, between Britain and Poland, where her husband, Radoslaw Sikorski, is the Polish minister of foreign affairs. The subject of the Soviet Union's oppression of the Eastern Europe nations deserves a book such as hers, but, despite the fact that she focuses on East Germany, Hungary, and Poland, the breadth of her coverage can make the details difficult to digest at times. Such breadth was intended to demonstrate how each totalitarian regime operated similarly. Each received direction from Moscow and maintained control with police-enforced political loyalty, acts of violence, control of radio and newspapers, indoctrination of youth, ethnic cleansing, and, overall, an emphasis on the state over the individual.

Russia's expansionist dreams trace to the czars and their historic longing for a warm-water port. But it was Stalin who made these dreams realities beyond the wildest hopes of the czars. On Aug. 23, 1939, the Soviet Union and Nazi Germany signed a Treaty of Non-Aggression (the Molotov-Ribbentrop Pact) that contained a secret protocol dividing Eastern Europe into spheres of influence. On Sept. 1, Germany invaded western Poland. On Sept. 17, the Soviets invaded eastern Poland and simultaneously occupied Lithuania, Estonia, and Latvia, whose existence as separate nations would be prevented by the Soviets for the next half century. In the spring of 1940, the Soviets conducted a mass execution in the Katyn Forest of more than 21,000 Polish prisoners. Although most of the victims were captured army officers, others were doctors, lawyers, and professors.

On June 22, 1941, in Operation Barbarossa, the largest military operation in history, in terms of both manpower and casualties, Germany invaded Russia. Four million Axis troops, along with 600,000 motor vehicles and 750,000 horses, invaded, causing Russian civilian and military casualties in the millions. Germany's inability to capture Stalingrad and Leningrad led to its ultimate defeat in 1945. Stalin justifiably claimed that the sacrifices of the Soviet Union in World War II far exceeded those of France, England, and the United States combined.

At conferences in Teheran in 1943 and Yalta in 1945, Roosevelt, Churchill, and Stalin "decided the fate of whole swathes of Europe with amazing insouciance." These three leaders agreed to spheres of influence, especially as to Poland, that often paralleled the 1939 pact between Stalin and Hitler. Although the Soviets promised free elections, the future of the Iron Curtain nations was determined largely by Soviet military force, as it occupied Warsaw, Berlin, Vienna, Budapest, Belgrade, Bucharest, and Sofia.

Early in her book, Applebaum describes the totalitarian state as one with "one political party, one educational system, one artistic creed, one centrally planned economy, one unified media, and one moral code. In a totalitarian state there are no independent schools, no private businesses, no grassroots organizations, and no critical thought." Nazi Germany, the Soviet Union, and the Iron Curtain countries are swept up by this definition, and I wonder which of today's nations might be too: Syria, Iran, Cuba, North Korea, Zimbabwe, and to varying degrees China, Vietnam, as well as others?

Applebaum quotes Alexis de Tocqueville's enthusiasm for "associations" that "Americans of all ages, all conditions, and all dispositions constantly form. ... If men are to remain civilized or to become so, the art of associating together must grow and improve." She contrasts America's encouragement of associations to totalitarian states' bans on independent associations, trade unions, and guilds of all kinds.

Although *Iron Curtain* stops at 1956, it offers a brief commentary on what happens after a totalitarian regime collapses: "As a result of this civilizational damage [caused by a totalitarian regime], post-communist countries required far more than the bare institutions of 'democracy'—elections, political campaigns, and political parties—to become functioning liberal societies again. They also had to create or re-create independent media, private enterprise and a legal system to support it, an educational system free of propaganda, and a civil service where promotions are given for talent, not for ideological correctness."

Although Applebaum writes solely of the difficulties that the Iron Curtain countries experienced after throwing off the yoke of oppression, she implicitly provides lessons as to the even greater difficulties that nations devoid of any traditions of a liberal society, such as Egypt and Libya, may experience after breaking their chains of bondage. ⊙

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FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT

BY FLOYD ABRAMS

Yale University Press, New Haven, CT, 2013. 471 pages, $32.50.

NUANCED ABSOLUTISM: FLOYD ABRAMS AND THE FIRST AMENDMENT

BY RONALD K. L. COLLINS

Carolina Academic Press, Durham, NC, 2013. 240 pages, $27.00.

Reviewed by Louis Fisher

Floyd Abrams has built a remarkable career in litigating First Amendment issues. His involvement at the trial and appellate levels includes the Pentagon Papers case in 1971 (*New York Times Co. v. United States*), a 1978 case involving a newspaper that reported on a state judicial fitness panel (*Landmark Communications v. Virginia*), a dispute the following year about a newspaper story concerning a student brought before a juvenile court (*Smith v. Daily Mail Publishing Co.*), a libel action by singer Wayne Newton against NBC, a libel action initiated by a resident of Istanbul against *Newsday*, and many other cases Abrams described in his excellent book, *Speaking Freely* (2005).

This earlier book provides helpful background in evaluating Abrams' *Friend of the Court*, in large part because the new work consists essentially of articles, speeches, interviews, and testimony, without an effort to identify and closely analyze their principal themes. With such a large amount of reprinted material, written or spoken from 1978 to 2012, there are bound to be some inconsistencies, and the reader may not know which position Abrams takes today. I will focus largely on the controversial decision issued by the Supreme Court in *Citizens United v. Federal Election Commission* (2010), which ruled that corporations have a First Amendment right to spend unlimited amounts in political campaigns. Abrams devotes considerable space to defending this decision.

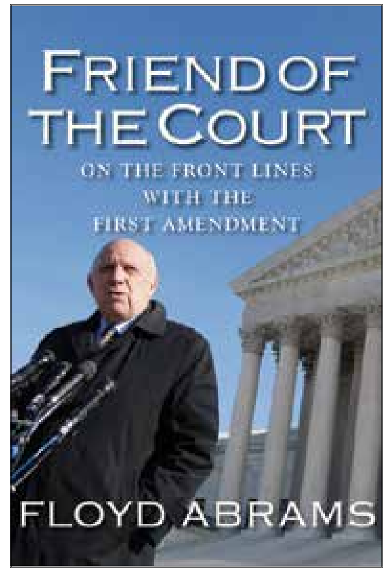
Toward the end of *Speaking Freely*, Abrams discussed his work in the field of campaign finance reform. He recognized that "there was obviously a problem with large corporations and unions giving millions of dollars to political parties," leaving the impression "that favored treatment might follow." He asked whether government could ban all corporate and union contributions. It was his position that parties engaged in political campaigns "had First Amendment rights, too" and suggested ways of dealing with the problem of unlimited corporate and union spending. One proposal: more stringent reporting standards to require immediate Internet disclosure of every contribution a party received. Second: placing caps on the amount of corporate or union contributions. Third: increasing public funding of campaigns to make it easier for less well-funded candidates to run.

In *Speaking Freely*, Abrams turned for support to *Mills v. Alabama* (1966). A unanimous Supreme Court held that a newspaper could not be punished for publishing on election day an editorial urging adoption of the mayor-council form of government. State law prohibited electioneering or soliciting votes on election day for or against any proposition or candidate. The Court considered the law a flagrant violation of the First Amendment. This decision, however, protected *media* corporations that had clear protection under the Press Clause of the First Amendment. It had nothing to do with the right of non-media corporations to spend unlimited amounts in political campaigns.

Why do non-media corporations have First Amendment rights? In *Speaking Freely*, Abrams refers to *Buckley v. Valeo* (1976), which he describes as "one of the most controversial rulings of the twentieth century." The Supreme Court concluded that Congress could limit the amount of financial contributions to candidates but lacked authority to limit expenditures by donors to promote their political objectives. Abrams decided that "everything I knew about the First Amendment impelled me to defend such speech" and that for liberals to "abandon their historic defense of it seemed to me a desecration." Sen. Mitch McConnell called to ask if he would be one of two lawyers (the other being Kenneth Starr) to challenge the McCain-Feingold statute (the Bipartisan Campaign Reform Act). Abrams agreed to do so. In *McConnell v. Federal Election Commission* (2003), the Supreme Court upheld the main elements of McCain-Feingold. To Abrams, the Court had rewritten *Buckley* to be "totally speech-destructive."

Friend of the Court consists of 10 chapters. Each chapter begins with a page or page-and-a-half preface outlining a general theme, followed by reprints of Abrams' articles, speeches, congressional testimony, book reviews, letters to the editor, excerpts from affidavits, and interviews. There is no concluding chapter to express Abrams' contemporary views. The titles of the chapters reflect the breadth of his activity on First Amendment issues: "The Vice of Censorship," "The United States and the World," "The First Amendment and National Security," "Presidents vs. the First Amendment," "On Libel and Privacy," "Copyright Woes," "Confidential Sources," "*Citizens United*," "Assessing the Press," and "Reflections." The last chapter may appear to constitute a concluding chapter, but it merely consists of seven documents dated, in order, 1988, 1993, 2000, three from 1997, and 2009.

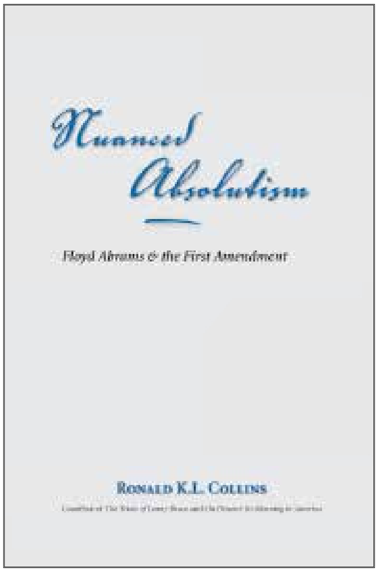
In a 15-page introduction, Abrams explains that his book "is not one of legal scholarship." He says, understandably, that the First Amendment "is too important" to be left solely to scholars. A subhead promises three propositions. The first: "*the First Amendment is not left or right, liberal or conservative*." Abrams never identifies the second and third propositions, but makes a number of other observations, such as "*the central concern of the First Amendment is the danger of government control over what is thought and what is said.*" Moreover: "It is commonplace to say that the First Amendment is not absolute. That is true—perjury remains a crime in America and libel law still exists—but it is not true to the extent or with the impact that many believe." Abrams refers to the Supreme Court's decision in *Citizens United* as "what may well be the most maligned First Amendment ruling protecting freedom of expression in the Supreme Court's history."



He wonders if he has "devoted an inordinate amount of time to publicly defending *Citizens United.*"

To Abrams, *Citizens United* emphasized that "[p]olitical speech … receives the highest protection under the First Amendment." Does that include not only political speech by natural persons but also political speech by corporations? That is the issue that Abrams defends as he devotes chapter 8 to *Citizens United*. He argues that the Court's decision "is rooted in the First Amendment." Certainly individuals are protected by that amendment. Why does it also protect artificial persons, including corporations? Abrams refers to Justice Kennedy's opinion for the Court in *Citizens United*, saying that Kennedy cited "twenty-five cases" (actually 23) giving corporations "full First Amendment protection." As Abrams notes, many of them "involved powerful newspapers owned by large corporations; others involved nonpress entities such as a bank, a real estate company, and a public utility company."

Here is Kennedy's language: "The Court has recognized that First Amendment protection extends to corporations." Most of the cases he cites involved media corporations protected by the Press Clause of the First Amendment. This constitutional safeguard protects not merely newspapers but the need of citizens to be informed. The cases he cited involved, among others, Time, Inc., Southeastern Promotions, Ltd. (involved in theatrical productions), Cox Broadcasting Corp., Miami Herald Publishing Co., New York Times Co., Kingsley International Pictures Corp., Turner Broadcasting System, Denver Area Educational Telecommunications Consortium, Simon & Schuster, Sable



Communications of California, The Florida Star, Philadelphia Newspapers, Landmark Communications, American Mini Theatres, Robert Welch, Inc. (which ran a monthly magazine), and Greenbelt Cooperative Publishing Association, Inc.

In *Friend of the Court*, Abrams acknowledges the difference between media and non-media corporations. He refers to Justice Stevens' dissent in *Citizens United* that McCain-Feingold "contained a media exemption." Congress knew that media corporations required protection under the First Amendment. Stevens added: "The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case." He remarked that the framers, unlike the majority in *Citizens United*, "had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind."

It is surprising that someone of Abrams' sophistication would repeatedly misrepresent the Supreme Court's free speech decision in *United States v. Stevens* (2010). He states that the Court "held unconstitutional under the First Amendment a federal statute that criminalized the commercial creation, sale and possession of disturbing graphic depictions of the torturing and killing certain animals." Legislation in 1999 provided criminal penalties for whomever "knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain." The statute defines "depiction of animal cruelty" as any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct "in which a living animal is intentionally maimed, mutilated, tortured, or killed."

Legislative debate focused primarily on criminalizing "crush videos" portraying women in high heels stepping on small animals. However, the bill was poorly drawn and could have led to prosecution of those who publish hunting and fishing magazines. Instead of vetoing the bill and asking Congress to avoid overbreadth, President Clinton signed the bill and directed the Justice Department to prosecute only those who market crush videos. The George W. Bush administration decided to prosecute someone involved with dogfighting videos. In *Stevens*, the Supreme Court properly found the statute to be overbroad and invalid under the First Amendment. After the decision, Congress rewrote the statute to focus exclusively on crush videos. If someone were prosecuted for creating or distributing such videos, the constitutionality of that action might be litigated, but crush videos were not at issue in *Stevens*. The Court expressly stated that it did "not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional."

In a debate with Burt Neuborne in 2011, Abrams said that some individuals will defend "distributors of videos of animals being tortured or killed." *Stevens* did not decide that issue. When interviewed by Richard Heffner in 2012, Abrams spoke about the support that exists for "people who film the torture of animals." In an article for the *Yale Law Journal Online*, Abrams claimed that *Stevens* supported the "appalling" right to sell crush videos. While debating Alan Morrison at Albany Law School in 2012, Abrams stated: "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." This allusion to *Stevens* misleadingly failed to note that, after *Stevens*, Congress rewrote the statute to make the creation or distribution of such videos a crime. These mistaken references to *Stevens* may serve a purpose. If Abrams can convince an audience that the First Amendment protects crush videos (it does not), then understanding free speech in such broad terms may imply that corporations are entitled to broad First Amendment rights.

Additional insights into Abrams' constitutional positions come from *Nuanced Absolutism: Floyd Abrams and the First Amendment*, by Ronald K. L. Collins, whose six previous books explore a number of First Amendment issues. Collins serves as a fellow at the First Amendment Center at the Newseum in Washington, D.C., and he is the Harold S. Shefelman Scholar at the University of Washington School of Law.

Nuanced Absolutism advances an interest that Collins has long pursued: studying not just judge-made law but the contribution of lawyers who help shape legal doctrines, particularly on constitutional issues. As Collins explains: "Law is not only what lawmakers create and judges interpret, it is also what lawyers do with it." To Collins, "the cult of the judge dominates much legal thinking, especially in the world of legal education." Given the prominence of Floyd Abrams on First Amendment law, he is a natural choice.

In pushing back against the prevailing Court-centric orientation, Collins looks at the "clear and present danger" test supposedly created by Justice Oliver Wendell Holmes. A judicial discovery? Not quite. Collins explains that lawyer Benjamin W. Shaw coined the phrase before Holmes made it famous. Perhaps we might consider charges of plagiarism against justices who pretend to create out of whole cloth majestic phrases they borrow without attribution.

In the prologue to *Nuanced Absolutism*, Collins develops his principal thesis: "By juxtaposing jurisprudence with biography, we are reminded of how much the former is dependent on the latter. For law does not come to life in the abstract, free of the mark of mortal minds." Collins then highlights a central issue in the work Abrams has done in First Amendment law. As Collins notes, Abrams "has devoted much of his career to defending everything from the right of newspapers to publish sensitive materials concerning national security to the right of for-profit corporations to contribute colossal amounts of money to political campaigns." The jump here is substantial: from *The New York Times* publishing the Pentagon Papers (supported by the Free Press Clause of the First Amendment) to such for-profit corporations as Coca Cola, Exxon, General Electric, and Philip Morris. The constitutional need to protect media corporations is plain. Much less clear is a constitutional requirement to grant all corporations First Amendment rights to spend unlimited amounts in political campaigns.

Collins provides interesting background on Abrams. Born in the Bronx on July 9, 1936, he attended public school and served as president of the Forest Hills youth branch of the Liberal Party, a third-party group in New York. He applied to Cornell University when he was 15 and entered just as he turned 16. Abrams studied constitutional law under Professor Robert E. Cushman, a political scientist who wrote widely on constitutional law and civil liberties. Justice Ruth Bader Ginsburg, who attended Cornell a few years before Abrams, was a student and research assistant for Cushman. After graduating from Cornell, Abrams studied law at Yale Law School, and there worked under professors Alexander Bickel, Thomas Emerson (a First Amendment scholar), and Fred Rodell.

Following Yale, Abrams served for a brief time as a research associate to Alpheus T. Mason, a political scientist and constitutionalist who taught at Princeton. He accepted a two-year clerkship with a federal district judge, Paul C. Leahy of the district of Delaware, and then joined the law firm of Cahill Gordon & Reindel, where he has remained ever since. Over the years, Abrams served as visiting lecturer at Yale Law School and Columbia Law School. For 15 years, he taught First Amendment law at the Columbia Graduate School of Journalism.

In national security cases, such as *Schenck*, *Debs*, and *Abrams*, decided by the Supreme Court after World War I, Floyd Abrams found the rulings against antiwar plaintiffs to be based on unacceptable constitutional doctrines. It is difficult, he said, "not to be stunned by the pathetic inadequacy of any proof of any threat of any sort by the speech in question that we would recognize today as constituting anything near to an emergency—or, indeed that could properly be said to meet any First Amendment test at all." To Abrams, another "instructive example of the perils of unsubstantiated fears of danger" is the Pentagon Papers case, where the executive branch warned that publication of the top-secret documents would lead to great harm and even deaths. Yet, 10 years after publication, Abrams contacted every government witness who testified about the dangers and not one could cite a single published passage that compromised national security.

As for *Citizens United*, Collins notes that Justice Kennedy, writing for the majority, "couched his words in nearly absolutist terms" by observing that political speech "must prevail against laws that would suppress it, whether by design or inadvertence." As the title of Collins' book makes clear, Abrams is not an absolutist. He recognizes limits to the First Amendment, including defamation, obscenity, child pornography, and copyright claims. Still, in a letter to the *New York Times* on Jan. 17, 2012, Abrams explained: "The reason I became involved in the *Citizens United* case ... was because I thought it was contrary to the First Amendment at its deepest and most important level to limit political speech. ... And so to be told, well, because it's a corporation they shouldn't get protection and they can ... have that speech criminalized simply isn't the First Amendment that I think we have." The argument is strong for First Amendment protection for media corporations. It is far weaker for all other corporations.

Collins underscores this point when he refers to Abrams' efforts to come to "the defense of the free speech principle in controversial cases such as those involving corporate election contributions or advertising by tobacco companies." In those cases, Collins says, "it is all too easy to paint a First Amendment lawyer with a scornful relativist brush." Abrams' work for the Greensboro, N.C.-based Lorillard company involved a rule by the Food and Drug Administration requiring tobacco companies to display nine new textual warnings, including graphic images of diseased lungs and a cadaver bearing chest staples on an autopsy table on every cigarette package manufactured and distributed in the United States.

To Abrams, the "real issue is whether the government can require an entity that makes a lawful product to emblazon on its package a message which screams out not to buy it." He conceded that government "has the power to require warnings, which it has done for many years," such as the Surgeon General's warning on cigarette packages that smoking is dangerous to your health. Subsequent warnings were more specific: smoking causes lung cancer, heart disease, emphysema, and may complicate pregnancy. Does Abrams find First Amendment violations with those warnings?

Apparently, he does. He argues: "If you want to ban cigarettes, ban them. If you want to punish people for fraud, punish them. But don't go after speech which is not deceptive and not fraudulent by its nature just because it comes from corporations." But the record is clear that tobacco companies for years withheld from the public facts about demonstrable health hazards of smoking. They never informed smokers of what smoking would do to their health.

Collins offers some principal values that guide constitutional government. One is that "what is ultimately at stake here is the right of the people to self-rule in a democratic society." That principle cannot allow all corporations free rein to spend as much as they like under the theory that the First Amendment applies equally to them as it does to natural individuals. Collins suggests: "Some might argue that such a commitment to democratic government is undermined by Mr. Abrams's support of *Citizens United.*" In that sense, Collins highlights the central value of the U.S. Constitution. It is not the First Amendment, interpreted in an absolutist or nuanced absolutist manner. It is the capacity of the national government to remain accountable to the public, and to assure the citzenry that public policy has not been transferred to wealthy corporate powers. ⊙

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