STATE OF THE FIRST AMENDMENT

BY DONNA DEMAC

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Foreword

by John Seigenthaler

This study, aptly entitled *State of the First Amendment*, is a timely and important report on the popular standing and legal status of the values embodied in the First Amendment. As we move toward a new century, those values—embraced 206 years ago by an informed and fearful citizenry—are, as the title suggests, under attack. Scholars, lawyers, journalists, ethicists and other professionals close to the struggle to protect citizen rights against government regulation, will find this an extremely valuable resource.

State of the First Amendment may be even more valuable as a learning document for those who know little or nothing of First Amendment rights but who naively assert their support of it. Inevitably, when asked if they support the First Amendment, they embrace the 45 words and express opposition to any changes. Then, confronted by the reality of community conflicts such as school prayer, anti-abortion protests, flag-burning, news media criticism or the public display of offensive art, they are quick to defect. They are, to use Tom Paine's words, the potential "summer soldiers and sunshine patriots" of the coming millennium.

The author of the report, Donna Demac, a lawyer, author and First Amendment advocate, has written a thoughtful narrative that brings into focus all of the present challenges and controversies threatening these vital citizen rights—religious liberty, freedoms of speech and press and the rights of peaceable assembly and petition. Her text will serve to update and broaden the perspective of experts and hopefully will also educate and enlighten those who have little or no understanding of the unfriendly shots repeatedly aimed at the amendment.

A significant aspect of the study is the excellent poll in Chapter 6. The thrust of the questions and the depth of the sample provide more than ample background to capture a sense of

As we move toward a new century, First Amendment values are under attack.

Mr. Seigenthaler is founder of the First Amendment Center at Vanderbilt University.

the public attitudes about First Amendment rights. However, activists who are involved in the daily battle to keep these rights secure will have some difficulty reconciling the findings of Professor Ken Dautrich of the Roper Center for Survey Research and Analysis at the University of Connecticut with the actual detailed answers of respondents.

Professor Dautrich writes that "... on the whole the First Amendment is alive and well—at least from the perspective of the American public." He relies on the fact that 93% of the respondents assert that they would ratify the amendment (which was read to them) if that were a current consideration. He also is persuaded by majorities of respondents, some of them large, which expressed support for the several freedoms when specific questions were put to them.

The scholars, lawyers, journalists and others who wage war routinely against encroaching government actions on many fronts are likely to see it another way. They will be concerned to read that *only 2% of the general public knew all five of the freedoms listed in the amendment.* It seems fair to ask whether those who said they would ratify the amendment today had any real idea what they would be supporting.

Less than half of them responded that freedom of speech was protected; only 21% of them said that religious liberty was one of the freedoms; only 11% identified press freedom as a First Amendment right; only one of ten identified rights of assembly and petition as part of the amendment.

As the alcoholic sees the brandy glass half-empty, the prohibitionist sees it half-full.

There are many other polling responses that will concern those who support the amendment. Here is a selective sampling:

•47% of those surveyed disagree with the idea that musicians should be allowed to sing songs with words that others find offensive;

•29% think newspapers should not be allowed to criticize political candidates;

•52% are against student newspapers reporting on controversy without approval of school officials;

•44% are against the televising of courtroom trials;

•75% would not allow people to utter words that might be offensive to racial groups;

•53% have reservations about allowing art to be shown in a public place if its content offends others;

•57% believe that public school teachers should be allowed to lead school prayer;

•49% would support a flag-burning amendment;

•38% would ban from school libraries novels that include descriptions of explicit sex acts.

In light of these responses, it is likely that those who believe in and work for protection of First Amendment rights would take more seriously what Demac has to say about press freedom and apply it to all First Amendment rights: "In the last half of the 1990's," she concludes, "freedom of the press remains alive but can hardly be said to be thriving." She praises the courage of judicial officers whose orders in the face of public opposition have kept the amendment alive.

The Freedom Forum has been committed, over a long period, to monitoring and reporting on governmental and public attitudes on First Amendment rights. This ambitious project is in furtherance of that commitment. Donna Demac deserves great thanks for the talent, integrity and enterprise she brought to the enterprise. Paul McMasters, The Freedom Forum's creative First Amendment ombudsman who oversaw and tracked the progress of *State of the First Amendment* over many months, is to be congratulated for his substantive role. And, as stated

above, the Roper Center's work deserves commendation in developing and executing the poll.

Hopefully, ***State of the First Amendment*** will get wide distribution, not only among First Amendment experts but among the public, especially at every level of the system of education. In the final analysis, freedom in the next century will depend upon the knowledge, understanding and commitment to freedom by an oncoming generation.

Introduction

By Paul McMasters

Each day of this nation's life, in meetings of school boards, library boards, city councils, state legislatures, and Congress itself, figures of respect and renown rise on behalf of a supportive public and proclaim, "I believe in the First Amendment, but—" Each such announcement precedes a proposal to regulate our speech in order to elevate our lives.

And so we have one of the more equisite ironies of a freedom-loving society: Americans truly believe they believe in free speech. Still, there is always that "but," that qualification of their commitment to the rights and values embedded in those 45 words of the First Amendment. In survey after survey, Americans stand steadfast in support of the general notion of free speech. In the particulars, however, we waver. When asked to countenance the very speech the First Amendment was drawn to protect—the speech of the radical, the rascal, even the revolting—we become unsure. We do believe in free speech for ourselves, but for the most part we are not so sure about others, especially those whose words offend our taste, threaten our children, or challenge our convictions.

Since it was ratified as a part of the Bill of Rights in 1791, the First Amendment has served this democracy and its citizens well. Yet in more than two centuries, the lesson of the First Amendment has not taken with most Americans, or their leaders. Too many of this democracy's citizens, it seems, do not believe it is strong enough to survive words uttered by those who mistake liberty for license.

Even the First Amendment's most fervid advocates experience misgivings in times of crisis or confusion. There is some speech that troubles each of us. Whether it is indecency, violence, extremism, flag-burning, New Age religion, rap lyrics, coarseness, racism, sexism, whatever—it is for some of us beyond protection. Surely, the First Amendment was not meant for this, we say. So, First

In more than two centuries, the lesson of the First Amendment has not taken with most Americans, or their leaders.

Paul McMasters is First Amendment Ombudsman at The Freedom Forum.

Amendment freedoms endure attacks from the left, the right, and the middle of the political spectrum.

In the academic world, Catherine MacKinnon, Stanley Fish, Cass Sunstein, Mari Matsuda, Richard Delgado, and a host of other esteemed scholars are articulating a vision of our future where the First Amendment remains important, but not all-important, certainly not more important than other rights. Political leaders regularly put forth proposals that would amend the First Amendment, or would censor the Internet, or decide what television programs we should watch.

There is, of course, a popular torrent feeding all these streams. Among ordinary citizens, there is an unease about speech that is too free. There is a feeling that society is best served by protecting First Amendment freedoms only when they are put in the service of higher social, political, or religious interests.

To their credit, the courts generally attenuate the more intemperate attacks on the First Amendment and protect it from the power of government, the will of the majority, or the whim of the moment. Indeed, some authorities say that Supreme Court decisions have pushed us toward a more libertarian outlook on free expression, that we live in a time where the idea of free speech is so internalized that it is essentially unthreatened.

Others warn, however, that the First Amendment compact between a government and its people is all the more threatened as the idea that free expression is a good unto itself is subsumed into the notion that individual rights must bow to the needs of the larger society. They worry that in a chaotic world we will prefer order and orthodoxy to the democratic din that free speech engenders. They warn that the public is distancing itself from the dictum that no one has free speech unless everyone has it.

Whose worries and warnings come nearer to reality? Are these dire days for the First Amendment? Or has it ever been thus? What are the prospects for the First Amendment as we approach the 21st century and a new millineum? How dear do scholars, political leaders, and the people hold these rights and values? Have two centuries eroded our confidence in and support for them? Do we so little trust our fellow citizens and the strength of democracy itself that we are willing to trade a precious piece of freedom for a precious peace of mind?

Those are vital questions that evoke vital issues. They are but a few that Freedom Forum Fellow Donna Demac set out to explore during her year-long research culminating in this report. In her research, Demac focused on events, issues, and trends in scholarly thought and legal jurisprudence. To complement those findings, The Freedom Forum commissioned a national public opinion survey. Those elements of this report were designed to form an instrument to help the public, the press, policy-makers, scholars and others to properly evaluate the state of the First Amendment.

The Freedom Forum poll found that the First Amendment, at least in the abstract, is alive and well. But it also found that among Americans there is a disturbing willingness to restrict specific kinds of speech, a distressing polarization among respondents on some issues, and a disappointing level of education about constitutional rights. Demac's research found substantial evidence of constant and continuing attempts to limit First Amendment freedoms in a wide variety of venues.

The findings resulting from this effort are in some ways not surprising. But they document in a useful way the current battles in the continuing struggle as well as the emergence of new battlefields and new weapons. The occasional individual or small group challenging expression is joined in contemporary discourse by much larger, well-fi-

nanced organizations. Where the former tests and tempers freedom, the latter threatens to subject it to an agenda or cause. There also are new voices of uncommon eloquence that advance the idea that not all restrictions on speech are bad.

Equally eloquent are those who believe that those who advocate restrictions on some speech advance a false and flawed notion of good social order. Indeed, they say, to insist that some ideas are forbidden, some images are criminal, that some words are taboo is to rob both society and the individual of their vigor and ultimately their future. To exile some ideas, to imprison some images, to banish some words is anathema to the thoughtful individual and the careful society. There are, indeed, some words, images and ideas that are evil, even perverse, but none so much as the idea that government, the majority, or a politically astute elite can impose its list of restrictions on the rest of us.

To defend First Amendment principles, of course, is not to defend pornography, perversity, or perfidy. Instead, it is to defend the tradition that each act of expression will live or die on the strength of its appeal and utility, and that society will have been the stronger for the process of evaluation and acceptance or rejection.

That, perhaps, is the enduring promise of the First Amendment: A democratic society is not jeopardized by evil ideas, save one: That the government or the majority should dictate what is and what is not allowed in belief, thought, or expression. Those who garner praise for legal and learned treatises to the contrary run the risk of dashing the dream of democracy before it is fully realized. ●

Overview

One of the pillars of the United States' remarkable freedom is the First Amendment to the Constitution, with its powerful affirmation of freedom of speech, the press, religion, petition and assembly. These five freedoms are part of the essence of American democracy.

For the most part, threats to First Amendment rights and values have been defeated, whether through public criticism or action by the courts. Yet those threats continue to appear. In the summer of 1997, Oklahoma City police rounded up copies of the Academy Award-winning film *The Tin Drum* from video stores and even from the homes of people who had rented a copy, acting in response to a judge's decision that the work was obscene under state law. That local judge's action undoubtedly will face tough going before a higher court, but the point is that First Amendment freedoms must be won over and over again. And not only in the courts. The strength of the First Amendment also depends on the support of the people and their outspoken defense of these rights.

This report seeks to contribute to this process by reviewing the state of each of the five freedoms and noting areas where they have been threatened. It also highlights attempts by people all over the country to push back assaults on their First Amendment rights.

A project such as this must inevitably describe contradictory impulses. The story of the First Amendment in recent years is a matter both of disturbing challenges to First Amendment freedoms and of strong affirmations of those freedoms.

In the case of free speech, there has been considerable excitement about new online media yet also widespread concern about the transmission of "indecent" material. Thus we've seen both pandering to these fears by Congress and the Clinton administration and resounding rejections of cyberspace censorship by the federal judiciary, including the U.S. Supreme Court.

In the area of commercial speech, we've seen a series

First Amendment freedoms must be won over and over again.

of contradictory Supreme Court rulings that parallel a wider ambivalence in society about the First Amendment rights of corporations. On the one hand, Americans believe businesses should be able to say what they please, yet when it comes to harmful products such as cigarettes, most people endorse government restrictions on advertising and marketing.

Regarding freedom of the press, the federal government does not try to shut down newspapers that publish exposés about high-level officials. This is not to say, however, that all is well with press freedom. Journalists have had to contend with judges who want to restrict their coverage of matters before the courts, hostile legislators, and growing criticism from the public. There are also threats — above all, libel suits — from private parties using the courts to intimidate. Other threats stem from the quest of private information vendors to digitize and exercise exclusive control over the distribution of government information. There are also regular assaults, often sanctioned by the courts, on the rights of student journalists.

Freedom of religion is another area of ambiguity. Part of the problem is that religious freedom has two distinct, sometimes contradictory, meanings in this country. It can mean the prohibition of government recognition of religion in any form. Or it can mean the freedom of people to exercise their religious beliefs as they see fit. Some groups want to weaken the separation of church and state (by encouraging prayer in public schools or channeling public funds to religious education) in the name of strengthening the free-exercise principle. Some worry that the intrusion of religion in public life will erode the rights of those who practice minority religions or none at all.

Concerning the rights of petition and assembly, U.S. citizens do not usually get arrested for gathering in peaceful public demonstrations, nor do they get prosecuted for attempting to influence government policy. The rights to participate in the political process and to assemble large groups of people to make a point are for the most part alive and well in this country. There are, however, some troubling trends. One comes in the form of lawsuits aimed at intimidating people from engaging in certain kinds of political activity. Another stems from the over-reaching anti-terrorism legislation passed by Congress at the urging of the Clinton administration.

Given the high degree of uncertainty about these five freedoms, this report puts special emphasis on the need for more education about the First Amendment. The American experiment in self-government depends foremost on each person's participating as a citizen — and not just periodically in a voting booth. To nurture well-informed people, schools must help students understand and exercise constitutional freedoms, particularly those in the First Amendment.

Unfortunately, there are troubling indications that people of different ages have become detached from civic matters. Young people are growing up with less than an impressive understanding of the core values of American democracy, and problems have been found among the adult population, too. Yet there are also positive trends in this area. A significant number of local and national organizations and public libraries are promoting First Amendment educational efforts in the schools and among adults. They are making use of the Internet to build online networks — a significant step in furthering effective advocacy through group association in the era of electronic information.

The conclusion of this report is that we have many reasons to be concerned about the vitality of the First Amendment as the United States approaches the 21st century. Policymakers too frequently act

on the basis of political expediency rather than principle in such matters as flag desecration, the rights of immigrants, public funding of the arts and access by young people to online expression. Private groups continue to promote their versions of truth and morality, even when they trample the rights of others with different views. Too much of the population simply opts out of civic matters and public involvement entirely.

The challenge for the future is to help all Americans—not simply professional civil libertarians and Supreme Court justices—recognize that a strong First Amendment is indispensable to our way of life.

1

Freedom of Speech

The right to speak one's mind, whether privately or publicly, without fear of government restriction or retribution, is one of the cornerstones of American democracy. The quest for freedom of speech was one of the main desires, along with religious liberty, that brought European refugees from tyranny to the New World in the first place.

After the Revolutionary War, several states provided for freedom of speech in their constitutions, and the principle was incorporated into the First Amendment to the national Constitution. Yet it was not long before the sentiment for free speech was sacrificed to political expedience. The Sedition Act of 1798 was used by President John Adams and his Federalist allies to undermine their Democratic-Republican opponents. The unpopular law was allowed to expire during the Jefferson administration, and free speech was not so explicitly challenged for the remainder of the 19th century, with the exception of various state restrictions on criticism of slavery.

The 20th century saw a series of battles over the free-speech rights of labor activists and political dissidents. The attack on radicalism intensified with the advent of World War I. The Espionage Act of 1917 criminalized disloyal statements, and then the Smith Act of 1940 paved the way for the prosecution of those deemed "un-American." That pattern was played out again with government attacks on radicals in the 1960s and the subsequent wave of surveillance of dissidents in the COINTELPRO program.

This century, however, also has experienced a strengthening of free-speech rights. In the 1925 case of *Gitlow v. New York*, the U.S. Supreme Court ruled that freedom of speech applied to the states as well as the federal government. In *Thornhill v. Alabama* (1940), the court found that peaceful picketing, even though it was an action rather than simply spoken words, was protected by the First Amendment. Later the court even found that burning an American flag was a protected form of symbolic speech.

The current decade has seen both a series of attempts to turn back the clock on First Amendment protections and some resounding affirmations of the free-speech tradition.

The Supreme Court, of course, did permit limits on certain kinds of speech. One of the most significant of these was obscenity, where the court found that such speech was outside the scope of the First Amendment. In the Miller case, the court set certain standards to apply in deciding whether to brand any form of expression obscene (as opposed to merely indecent).[1] The court also upheld the right to possess obscene materials for private viewing in one's own home in *Stanley v. Georgia*.[2]

This mixed tradition of free-speech restrictions and tolerance needs to be kept in mind when evaluating the state of freedom of speech in the 1990s. The current decade has seen both a series of attempts to turn back the clock on First Amendment protections and some resounding affirmations of the free-speech tradition.

Perhaps the most significant challenge to free speech in recent years has come about in a movement to reverse what is seen by some as a troubling decline in American morality. According to this school of thought, much of modern culture—from books and magazines to films, TV programs, record albums and even new media—is undermining traditional moral values, particularly those relating to sexuality and parental authority. Faced with what they see as an onslaught of licentious and permissive material, social conservatives have been campaigning for various kinds of restrictions on free expression.

Most would-be book-banners act with what they consider to be the highest motives—protecting their families and communities.

Banning books

One key target has been the range of books made available to children with government funds. Public schools and public-school libraries are supposed to be bastions of the values embodied in the First Amendment. They are meant to be places where any and all ideas can be explored, where facts take precedence over doctrine and dogma. Yet it is in these institutions that some of the most significant challenges to free expression are taking place. For more than a decade, groups of citizens have attempted to have certain books and other materials they considered objectionable removed from libraries or barred from classrooms.

Most would-be book-banners act with what they consider to be the highest motives—protecting their families and communities from perceived evil and preserving the values and ideals they would have the entire society embrace. Yet by attempting to foster their own moral principles, they undermine the rights of others—both the right of students to read a variety of materials and the right of teachers to educate students free of outside interference.

It could be said that most book-banning is not technically a violation of the First Amendment, given that the practice is most often instigated by private individuals and groups rather than the government. Yet when book-banners succeed, most often it is public school officials who carry out their agenda. Consider these episodes:

- Penny Culliton, a teacher in Ipswich, N.H., was suspended and then fired in 1995 after she assigned her 11th- and 12th-grade students three works of literature in which homosexuality was a principal theme: *Maurice* by E.M. Forster, *The Education of Harriet Hatfield* by May Sarton, and *The Drowning of*

Steven Jones by Bette Greene. A local newspaper had reported that Culliton was working with a gay and lesbian support group. This stirred up much local controversy and caused the school to ban the titles as "unsuitable," whereupon the books were actually taken from the hands of students as they were reading the novels in class. On Aug. 23, 1996, the State Public Employee Labor Relations Board upheld an arbitrator's decision recommending immediate reinstatement. But the school board would not allow it and barred Culliton from the first day of teachers' meetings while it considered a legal challenge to the ruling. Meanwhile, Culliton and the teachers union (which had backed her and supplied her attorney) prepared to go to court to force compliance. Then, suddenly, it was over. Culliton was e-mailed a message stating that the other side had given up the fight and she would be able to teach that fall.

• Alfred Wilder, a high school teacher in Denver, was suspended for showing a portion of Bernardo Bertolucci's film *1900* to his senior class on logic and debate. Wilder was subsequently fired, despite a hearing officer's opinion that the film was a legitimate part of his teaching. In February 1997, the Colorado Court of Appeals ordered him reinstated.

• In spring 1997 Dan Brooks, an eighth-grade teacher in Peru, Ill., was directed by the school principal to stop teaching John Steinbeck's *Of Mice and Men* after three anonymous complaints. The ban was lifted when the school began the process of adopting a formal book-selection policy. Brooks was told that a final determination would be made on whether he could use the book once the new policy was in place.

• Cissy Lacks, a high school teacher in St. Louis with 25 years of experience, was fired by the suburban school district for allowing her 11th-grade students to write as they speak in an assignment for her creative-writing class. Lacks took the matter to court; a federal judge eventually ordered the school district to reinstate her, and she was awarded $750,000.[3]

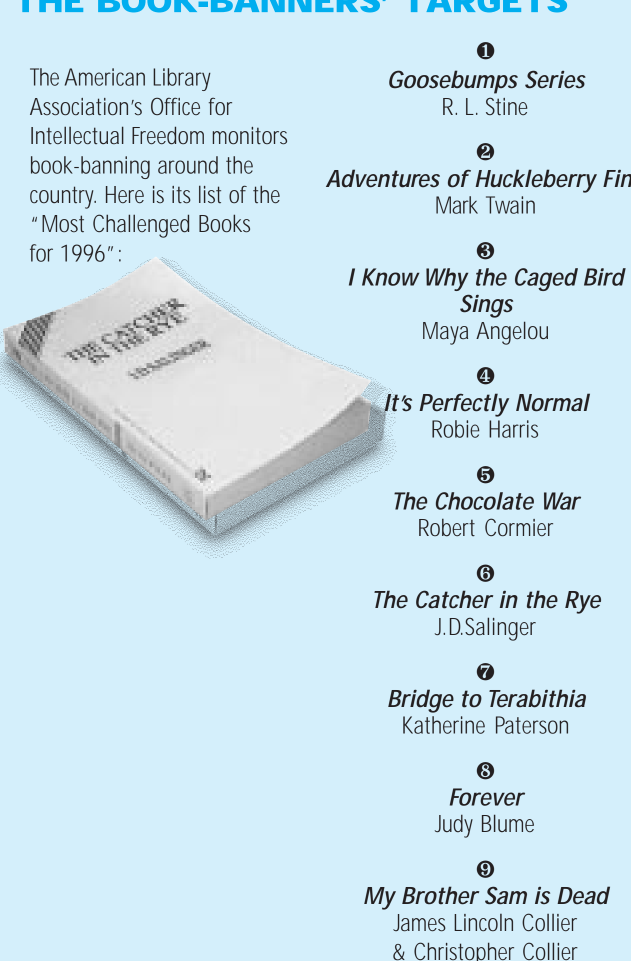
Such attacks on the rights of teachers and students have been aided by a change in the legal climate over the past 25 years. In the 1960s, the trend was in the opposite direction. A 1967 Supreme Court ruling said: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[4] And two years later, in a resounding affirmation of freedom of expression, the court nullified the suspension of high school students who mounted an anti-war protest by wearing black armbands to school, stating that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[5] However, Supreme Court decisions since then have limited the First Amendment rights of teachers and students by putting them on the same level as other values and interests. In one case, the court upheld the suspension of a student for giving a speech laced with sexual innuendo and poking fun at the effectiveness of a candidate for school office. It ruled that the school board's desire to regulate a student's manner of speech did not violate the First Amendment rights of students.[6]

Even when a court upholds the teacher's right to

Freedom of expression is not dead in the public schools, but neither is it thriving.

THE BOOK-BANNERS' TARGETS

The American Library Association's Office for Intellectual Freedom monitors book-banning around the country. Here is its list of the "Most Challenged Books for 1996":



1. *Goosebumps Series*
R. L. Stine
2. *Adventures of Huckleberry Finn*
Mark Twain
3. *I Know Why the Caged Bird Sings*
Maya Angelou
4. *It's Perfectly Normal*
Robie Harris
5. *The Chocolate War*
Robert Cormier
6. *The Catcher in the Rye*
J.D.Salinger
7. *Bridge to Terabithia*
Katherine Paterson
8. *Forever*
Judy Blume
9. *My Brother Sam is Dead*
James Lincoln Collier
& Christopher Collier

teach—as happened in Cissy Lack's case—it does not tell the school to back off.

Decisions about the content of student publications and the selection of school library books are similarly at odds with earlier rulings about the transcendence of academic freedom. A 1982 case held that school administrators may regulate library content on any rational basis as long as they aren't trying to suppress ideas or produce political orthodoxy.[7] In 1988, the deletion of stories in a student newspaper about teen pregnancy and parental divorce was deemed acceptable by the Court in *Hazelwood v. Kuhlmeier*, as long as it was done for legitimate pedagogical concerns.[8] This decision underlined the dramatic slide away from the court's earlier decisions and said that the power of school officials to oversee educational activities took precedence over the rights of students.

At one time it was possible to locate the origins of the book-banning impulse among Christian fundamentalists who feared books that seemed to contradict the literal language of the Bible. But book-banning has become more complicated than that. Progressive-minded parents have attempted to bar *Adventures of Huckleberry Finn* because the book uses the word "nigger" and portrays blacks in a way these parents find demeaning. Parents who don't want children exposed to stories about gay men and lesbians have insisted that books such as *Heather Has Two Mommies* and *It's Perfectly Normal* be dropped from the class reading list. Parents and citizens groups also have complained about books that deal with New Age religion or witchcraft.

The threat to the First Amendment is that a substantial number of Americans—often in well-organized groups—are willing to put aside diversity and openness in order to protect their own notions of morality or political correctness. Freedom of expression is not dead in the public schools, but neither is it thriving.

Judith Krug of the American Library Association notes, "The list of most-banned books is changing. Earlier in the 1990s, titles focused almost solely on homosexuality, witchcraft, the supernatural and related things. [In contrast with this], not one title on the list for 1996 deals with homosexuality. We're dealing with quality literature, which needs to be defended, as it says a great deal about what is being taught in the schools and about our national culture in general."[9]

Government funding of the arts

The book-banning movement generally operates at the local level, but a similar impulse has been seen in the controversy over certain works of art funded through the National Endowment for the Arts. The dispute began in the late 1980s when Sen. Jesse Helms (R-N.C.) and other conservative politicians raised an uproar about NEA funding of an exhibit of photographs by Robert Mapplethorpe containing homoerotic elements and a work by Andres Serrano depicting a crucifix submerged in the artist's urine. Helms and other members of Congress cited these controversial works, which were hardly typical of NEA-funded art, to get Congress in 1990 to pass legislation requiring the endowment to take into account "general standards of decency" in making grant awards.

The law was challenged by four artists—Karen Finley, Tim Miller, John Fleck and Hollie Hughes—and ended up in the Ninth Circuit Court of Appeals, which finally heard arguments in the case in 1995 and found it unconstitutional. David Cole, one of the lawyers for the artists, said the ruling meant that "from now on, the NEA must concern itself with art, not politics or [with government funders' definition of] decency."

Although the First Amendment prevailed in court, the conservative challenge to the NEA has had a profound impact on federal financing of the arts. The endowment's budget has been reduced substantially, from $162 million in fiscal year 1995 to $99.5 million the following year—almost a 40% cut. Under the threat of possible elimination, the NEA has become noticeably more cautious about what it funds.

Nevertheless, opponents of the NEA still find reasons to complain. In spring 1997, Rep. Peter Hoekstra (R-Mich.) complained publicly about an NEA-funded film because it included a brief lesbian love scene. Many voices continue to criticize government funding of artists, and many members of Congress remain willing to try to enact constitutionally questionable laws to strip away fundamental guarantees of free expression in the arts.

The movement against government funding of the arts also has appeared at the local level. For example, local productions of two widely acclaimed plays with gay themes—*Angels in America* and *La Cage Aux Folles*—brought strong homophobic sentiment to the surface in Charlotte, N.C., in 1997. County commissioners passed a resolution to cut off $2.5 million of county money for the Arts & Science Council. According to the resolution, money is to be denied projects that "promote, advocate or endorse behaviors and values that seek to undermine and deviate from the value and societal role of the traditional American family."

> Many members of Congress remain willing to try to enact constitutionally questionable laws to strip away fundamental guarantees of free expression in the arts.

In the name of the children

The conservative campaign against indecency is not limited to material receiving government funding. In the 1980s the Reagan administration formed an unlikely alliance with some feminist groups and launched a crusade against pornography under the auspices of the Meese Commission, appointed by then-U.S. Attorney General Edwin Meese. As an official attempt to establish a cause-and-effect re-

lationship between pornographic media and violence, the Meese Commission was a failure, but it did encourage prosecutions of distributors of pornographic material, particularly what is known as "kiddie porn."

First Amendment proponents generally accept the legitimacy of government regulation of child pornography. Efforts to strengthen laws in this area are ongoing. In 1982 the Supreme Court flatly denied constitutional protection to portrayals of sexual acts by children under the age of 16. As a result, the producers of erotic films have been required to document the age of the actors they employ.

Congress, concerned that pornographers were creating child porn without the actual use of minors, passed the Child Pornography Prevention Act of 1996, which banned computer-generated depictions of children engaging in sexual conduct. The law was quickly attacked by free-speech advocates who said it undermined First Amendment protections. A group of constitutional law professors sent a letter to Sen. Orrin Hatch (R-Utah), pointing out that film producers, librarians, publishers and museum directors would be forced to self-censor protected expression, for fear that the material would be found to "appear" to depict minors. Daniel Katz, legislative counsel for the American Civil Liberties Union in Washington, D.C., said the law expanded the historical intent of laws against exploitation of children, which traditionally focused on punishing those who lured children into sexual activity. In place of this, the law shifted emphasis from the actual abuse of children to concern about images and fantasies. This, he said, had "extraordinary" ramifications for artists and filmmakers. On Aug. 12, 1997, San Francisco Federal Judge Samuel Conti ruled in *Free Speech Coalition v. Reno* that the law does not violate the First Amendment.

Another example of excessive zeal in combatting supposed child pornography occurred in Oklahoma. At the instigation of Bob Anderson, executive director of a conservative group called Oklahomans for Children and Family, the city police department took a copy of the Academy Award-winning film *The Tin Drum* to a judge who said a portion of the movie was obscene under state law. The ruling was based on a single scene that appeared to depict oral sex between a boy and a girl. Oklahoma City police rounded up copies of the film from video stores and even from the homes of people who had rented copies. The action is being challenged in court.

As an official attempt to establish a cause-and-effect relationship between pornographic media and violence, the Meese Commission was a failure.

Attempts to criminalize 'indecent' speech online

The crusade against indecency has used popular sentiment for shielding children from pornography to launch what was probably the most serious threat to freedom of expression of the past decade: the attempt to ban "indecent" material from online communications.

Purveyors of "adult" material are among the first to try out new technologies to distribute their wares. Soon the indecency crusaders turn their attention to these new media as well. This process has been played out dramatically in the case of online communications.

Since the beginning of the 1990s, millions of Americans have purchased computers with modems in

order to gain access to the Internet and World Wide Web. Although these electronic networks are touted as revolutionizing education, culture and commerce, they also provide a new way for people to look at "dirty" pictures. The existence of "indecent" material online soon came to the attention of members of Congress, some of whom decided that this was a threat to the moral fiber of the country. Pandering to the panic this new medium had generated, Congress in 1996 adopted, as part of the Telecommunications Act, a broad-brush prohibition against the transmission and display of online speech and other material that was somehow "indecent" or "patently offensive."

Although the Communications Decency Act supposedly was aimed at protecting minors, it was written in such a way that it criminalized online transmission of a substantial amount of literary, scientific and medical material, as well as non-obscene expression. Thus the stage was set for a landmark court test of whether online speech should be given the highest level of First Amendment protection, which is accorded print media, or the lesser protection of the broadcast media.

With the ACLU and the American Library Association doing much of the legal work and coordination, more than 40 groups immediately challenged the CDA in court, seeking to have it overturned as unconstitutional. The list of challengers included print and broadcast journalists, booksellers, writers, students, online service providers, and many others.

A special panel of judges in the federal District Court for the Eastern District of Pennsylvania in Philadelphia responded quickly. In June 1996, the three-judge panel, which had spent a great deal of court time actually learning about how the Internet and World Wide Web operated, resoundingly rejected the CDA on constitutional grounds. This law would have a disastrous impact on the diversity of online communication, the judges said. The resulting decrease in the number of speakers and permissible topics would diminish the worldwide dialogue that is the strength and signal achievement of the online medium. "At the heart of the First Amendment," the opinion stated, "lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal. These restrictions raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."

A year later, in June 1997, the Supreme Court issued its judgment of the CDA.[10] It found the law's goal of protecting children from indecent material to be legitimate and important, yet the 7-2 majority stated that the "wholly unprecedented" breadth of the law threatened to suppress speech even between parents and children. On this basis, the CDA was declared unconstitutional in an historic endorsement of freedom of speech in the online world.

State online indecency laws

Before the Supreme Court's CDA ruling, the concern over sexually explicit online text and images prompted legislation in more than a dozen states. In the first such cases to come down, two federal courts ruled simultaneously in June 1997 that a New York law resembling the CDA and a Georgia law that criminalized online anonymous speech were unconstitutional and blocked state officials from enforcing them.

In the Georgia decision,[11] Judge Marvin Shoob in Atlanta agreed with the ACLU, Electronic Frontiers Georgia and other plaintiffs that the statute violated free-speech and free-association rights

EXAMPLES OF STATE ONLINE INDECENCY LAWS

	BILL	SPONSOR	DESCRIPTION
California	Assembly Bill 295 enacted 9/96	Rep. Baldwin	Expands obscenity and child pornography statutes to prohibit transmission of images by computer
Connecticut	House Bill 6883 enacted 6/95	House Committee on Judiciary	Creates criminal liability for sending an online message "with intent to harass, annoy or alarm another person"
Florida	Senate Bill 156 enacted 5/96	Sen. Burt	Amends existing child pornography law to hold owners or operators of computer online services explicitly liable for permitting subscribers to violate the law
Georgia	House Bill 1630 enacted 4/96	Rep. Parsons	Criminalizes the use of pseudonyms on the Net, and prohibits unauthorized links to Web sites with trade names or logos
	House Bill 76 enacted 3/95	Rep. Wall	Prohibits online transmission of fighting words, obscene or vulgar speech to minors, and information related to terrorist acts and certain dangerous weapons
Illinois	Senate Bill 747 enacted 7/95	Sen. Dudycz	Prohibits sexual solicitation of a minor by computer
Kansas	House Bill 2223 enacted 5/95		Expands child pornography statute to include computer-generated images
Maryland	House Bill 305 Senate Bill 133 enacted 5/96	Rep. Murphy	Amends child pornography law to include online communication
Montana	House Bill 0161 enacted 3/95		Expands child pornography statute to prohibit transmission by computer and possession of computer-generated child pornographic images
New York	Senate Bill 210E passed 7/96	Sen. Sears Rep. DeStito	Criminalizes the transmission of "indecent" material to minors
North Carolina	House Bill 207 enacted 6/96	Rep. Bowie	Expands existing law to prohibit sexual solicitation of a minor by computer
Oklahoma	House Bill 1048 enacted 4/95	Rep. Perry	Prohibits online transmission of material deemed "harmful to minors"
	House Concurrent Resolution 1097 passed 5/96	Rep. Paulk	Directs all state agencies, including educational institutions, to remove all illegal obscene material from their computer systems
Virginia	House Bill 7 enacted 3/96	Rep. Marshall	Makes it illegal for any government employee, including professors at state universities, to use state-owned computer systems to access sexually explicit material
	Senate Bill 1067 enacted 5/95	Sen. Calhoun	Expands existing statute to criminalize electronic transmissions of child pornography

and was unconstitutionally vague and overly broad because it barred online users from using pseudonyms or communicating anonymously over the Internet. Shoob said that such a law afforded prosecutors and police officers substantial room for selective prosecution of people who expressed minority viewpoints. Without anonymity, victims of domestic violence, persons in Alcoholics Anonymous, people with AIDS and many others would fear using the Internet to seek information and support, the court stated.

In the New York case,[12] Judge Loretta Preska of Manhattan's federal district court struck down a 1996 law restricting material that might be "harmful to minors," ruling that one state could not pass laws applying to the entire Internet. "Only Congress can legislate in this area," Preska wrote. She further warned of the extreme danger that state regulation would pose to the Internet, rejecting the state's argument that the statute would be effective in preventing so-called indecency from reaching minors. The state already could protect children through vigorous enforcement of existing criminal laws, the judge said.

The state laws against online indecency also have been challenged as a threat to academic freedom. Vir-

ginia passed a law that barred state employees from viewing "sexually explicit" communications online. The law made it illegal to use the state's "information infrastructure" to access or download materials with "sexually explicit content." In addition, the law prohibited storage of sexually oriented communication on state-owned computers, and barred employees from using e-mail, chat rooms and listservs, if the exchange involved sexually explicit words or images.

In a complaint filed on behalf of six professors from different schools,[13] the ACLU said the law unconstitutionally curbed the free-speech rights of state university professors and others and could even be the basis for punishing a professor for accessing a Web site with poetry by Algernon Charles Swinburne. One professor, in fact, had been compelled by a school to remove from his Web site sexually explicit images he had posted as examples as part of an analysis of censorship.

Regulating television programming

One of the key arguments made by some opponents of the Communications Decency Act was that it is the responsibility of parents to monitor material their children view online. If they can't do so directly, the argument goes, then parents should make use of software programs that automatically block access to objectionable sites. The same general approach has been adopted with regard to television. Some of those concerned about sexual and violent content on TV have settled on a scheme called a v-chip—a computer chip installed in television sets that would make possible a ratings system formulated by the private sector yet mandated by the federal government—so parents could program television sets to keep children from viewing certain shows.

A leading advocate of the device was President Clinton, who stressed the idea in his 1996 State of the Union address. Less than a month later, Congress heeded the President's call and included a provision titled "Parental Choice in Television Programming" (known as the v-chip law) when it passed the 1996 Telecommunications Act. Interestingly, the bill omitted mention of the content to be rated and who was to do the rating. The idea was that public pressure would prompt broadcasters to rate their programs voluntarily. If broadcasters did not take that step within a year of the passage of the law, the Federal Communications Commission was empowered to establish ratings guidelines based on recommendations of a citizens' ad-

ORIGINAL TELEVISION RATINGS

The TV industry began using these symbols in January of 1997.

Suitable for all children

Designed for children age 7 and above

Suitable for the entire audience; parents may let children watch this unattended

Parental guidance suggested, as program may contain material that some parents may find unsuitable for younger children

Parents strongly cautioned as "program may contain infrequent coarse language, limited violence, some suggestive sexual dialogue and situations"

Designed for mature audiences and may be unsuitable for children under 17

EXPANDED TELEVISION RATINGS

Five of the six networks began using these symbols in October of 1997. NBC refused.

Sexual Depictions

Violence

Coarse Language

Suggestive Dialogue

Fantasy Violence
(Used only with TV-Y7 rating)

visory commission.

Under this pressure, the television industry introduced its own rating system in early 1997. The system consisted of six broad categories.

For many months, these age-based ratings were denounced as meaningless by officials and leaders of a number of parents' organizations. Rep. Edward Markey (D-Mass.), a co-author of the underlying legislation, argued that the suggested categories would not give parents usable information. In July 1997 television programmers, with NBC refusing to participate, succumbed to pressure to add more symbols to the ratings scheme. Beginning in October, cable and broadcast networks began displaying the new symbols at the start of programs. (*See chart on page 9*.)

As explained by Nat Hentoff in *The Washington Post*, NBC did not agree to add the new ratings because network officials believed that "as a matter of principle, there is no place for government involvement in what people watch on television."[14]

Some members of Congress, including Rep. Markey, Sens. John McCain (R-Ariz.) and Ernest Hollings (D-S.C.), have proposed more targeted restrictions on television content. At a press conference held the day the new symbols were introduced, McCain said a letter signed by nine senators promising no other ratings legislation for several years would not apply to NBC or other programmers who did not agree to use them.[15] Such pressure by lawmakers shows that although the v-chip law does not mandate government regulation of program content, it does raise significant First Amendment questions. As this fear by NBC that Congress will impose further content regulation suggests, it remains to be seen whether the v-chip would pass constitutional scrutiny by the courts.

Although the v-chip law does not mandate government regulation of program content, it does raise significant First Amendment questions.

Scrambling 'adult' programming on TV

Section 505 of the Telecommunications Act of 1996 imposes a scrambling requirement on video networks dedicated to sexually explicit programming. It mandates that such channels must be fully scrambled, even if a customer has not requested it. Until a cable operator complies, it must cease transmitting such channels during hours when a significant number of children are likely to be watching, as determined by the Federal Communications Commission. The provision, added to the act as a last-minute amendment by Sen. Diane Feinstein (D-Calif.), was prompted by the fact that in some instances adult programming is only partly scrambled, so that, for instance, the audio portion is transmitted intact—a phenomenon known as "signal bleed."

This requirement was challenged in court by Playboy Entertainment Group,[16] which operates two adult cable channels. The district court in Delaware initially issued a temporary restraining order preventing the FCC from enforcing this part of the law, but later refused to grant a preliminary injunction because it decided Playboy had not shown it was likely to succeed on the merits. The Supreme Court summarily affirmed this preliminary ruling, and the matter was returned to the district court for proceedings on a permanent injunction. The FCC implemented Section 505 in May 1997.

In the wake of the Supreme Court's decision in *Reno v. ACLU*, which invalidated the definition of "indecency" in the Communications Decency Act, Playboy decided to seek summary judgment from the district court on the vagueness of Section 505's indecency standard, according to Robert Corn-Revere, Playboy's attorney in the case.

Commercial speech

For the first century and a half of U.S. history, the question of free-speech rights for commercial entities was not much of an issue. Government had no interest in regulating the content of claims made by companies, and as a result the world of advertising was a free-for-all. Purveyors of patent medicines, for example, were able to promise "miracle cures" without worrying that they would be challenged to back up their claims.

The issue of commercial speech did not come before the Supreme Court until 1942. In *Valentine v. Christensen,*[17] the court ruled that New York City officials could regulate the distribution of advertising handbills (under sanitary laws) because advertising was not entitled to First Amendment protection. That principle remained in place for 30 years. It was only in a series of mid-1970s rulings that the court extended free-speech protections to commercial advertising. The most decisive of these was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[18] in which the court struck down a state law barring pharmacists from advertising the prices of prescription drugs.

In succeeding years the Supreme Court—maintaining the idea that commercial speech was entitled to protection but not to the same extent as political and other forms of speech—tried to balance the rights of advertisers with legitimate government objectives. In *Central Hudson Gas & Electric Corp. v. Public Service Commission,*[19] for example, the court affirmed the right of government to regulate commercial speech that was misleading. That 1980 ruling also established a test for determining when regulation of commercial speech was permitted, but the Supreme Court itself has not been entirely consistent in applying the test. In 1986 the court, moving against the deregulatory thrust of the Reagan Administration, upheld the right of authorities in Puerto Rico to ban advertising of legal casino gambling. In the Posadas[20] case, the majority argued that government could bar advertising of any activity that could itself theoretically be barred. The Posadas case was viewed as a disaster by proponents of commercial speech.

The court's new inclination to reject restrictions on commercial speech posed a serious challenge to the Clinton administration.

In recent years, however, the Supreme Court has been more favorable to commercial-speech rights. A Cincinnati ordinance that selectively banned newsracks containing marketing publications was struck down in 1993.[21] Three years later, in *44 Liquormart Inc. v. Rhode Island,*[22] the court repudiated the Posadas doctrine and struck down a state law that prohibited advertising of liquor prices as a way of discouraging alcohol consumption.

The court's new inclination to reject restrictions on commercial speech[23] when alternative means exist for reaching government objectives posed a serious challenge to the Clinton administration's plan for re-

stricting tobacco advertising. That issue may have become moot as a result of the settlement between the tobacco industry and a number of states' attorneys general. In that settlement, which remains tentative because of demands for changes posed by the Clinton administration, the industry agreed to eliminate billboards and outdoor signs, to remove cartoon figures from ads, and to accept other restrictions on advertising and marketing.

In the meantime, more than 50 radio and TV stations have carried ads for distilled spirits since Seagram's aired a commercial in June 1996. That rekindled the controversy that prompted the liquor industry voluntarily to end television advertising of hard liquor 48 years ago. In July 1997, the Federal Communications Commission decided not to take action in this matter after extensive internal debate, while Congress was still considering what steps to take.

Commercial-speech advocates are not sure how the Supreme Court would rule on this and other restrictions on commercial speech. There have been signs—such as the court's refusal in April 1997 to hear two Baltimore cases involving bans on alcohol and tobacco billboards—that the *44 Liquormart* decision, in which commercial speech was accorded significant First Amendment protection, may be applied narrowly. Also troubling to proponents of commercial speech was the court's ruling in June 1997 (in *Glickman v. Wileman Bros. & Elliott Inc.*[24]) rejecting an industry challenge to a government program that forced California fruit growers to pay for a generic advertising campaign.

The Supreme Court has looked favorably upon another form of compelled speech by a commercial entity: the must-carry rule, under which cable television systems have been required to carry the signals of local over-the-air broadcast stations. In March 1997 the court rejected the free-speech claims of the cable operators and upheld the objective of Congress to maintain a competitive communications marketplace.

Society should punish those who misuse dangerous information—not the source of the information.

In many of the commercial-speech rulings of the past decade, the court has been seriously split—often into more than two groups. This is a reflection of the difficulty of resolving the free-speech claims of advertisers and owners of the electronic media with the efforts of government to control the harmful side effects of certain consumer products and ensure wide access to the media by advertisers. Since neither form of absolutism—denying all First Amendment claims of advertisers and the media, or totally deregulating commercial speech—seems to be viable, the Supreme Court is likely to continue its high degree of vacillation in this area.

Other recent free-speech controversies

Manuals for murder and mayhem

Another kind of expression that some people consider beyond the pale is published material that seems to be meant to teach people how to commit violent criminal acts. This is the issue in the controversy over the publications of a company called Paladin Press, publisher of such unconventional titles as *Be Your Own Undertaker: How to Dispose of a Dead Body* and *The Ancient Art of Strangulation*.

In 1995 Paladin Press was sued by relatives of the victims in a triple homicide in Maryland. They claimed that the killer was "aided and abetted" by one of the publisher's titles—*Hit Man: A Technical Manual for Independent Contractors*. That volume offers advice such as the following:

> When using a small caliber weapon like the .22, it is best to shoot from a distance of three to six feet. You will not want to be at point blank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired to insure quick and sure death. Aim for the head—preferably the eye sockets if you are a sharpshooter.

James Perry, the convicted contract killer in the case, closely followed the instructions outlined in *Hit Man* when planning and carrying out the murders. Perry was hired by former Motown Records executive Lawrence Horn to murder Horn's ex-wife, Mildred, his paralyzed and mentally retarded son, Trevor, and Trevor's nurse, Janice Saunders. Horn planned the murders in order to collect a $2 million medical malpractice settlement held in trust for Trevor. Perry was sentenced to death and Horn received a life sentence.

The lawyers for the victims' families call the $10, 130-page manual a "blueprint for murder." Paladin, they argue, should be held responsible for promoting *Hit Man* as an instruction manual for commission of a crime. At first glance, this claim may not seem to carry much force, given that the First Amendment has been found to protect such publications. But some First Amendment scholars have argued that *Hit Man* is not the type of material the First Amendment was intended to protect.

Though Paladin publishes "fringe" materials, mainstream publishers and First Amendment organizations have joined in its defense. These organizations maintain that establishing liability for publishing explicit details of crimes could have a devastating effect on "mainstream" literary works. They argue that information, in and of itself, is not dangerous. Society should punish those who misuse dangerous information—not the source of the information. Punishing Paladin in this case could lead courts down a slippery slope of speech-restricting lawsuits. Entire genres of literature could be subject to legal attack based on an adverse precedent. As the lawyers for Paladin point out in their briefs, many textual similarities exist between *Hit Man* and other "mainstream" publications, such as a Tom Clancy novel.

In August of 1996, U.S. District Judge Alexander Williams Jr. in Greenbelt, Md., ruled that the free-speech guarantee of the First Amendment "bars liability for dissemination" of material such as that in the Paladin book. A three-judge panel in Richmond, Va., reversed Judge Williams' decision on Nov. 10, 1997.

Street art

The First Amendment protects not only political speech, but also a wide variety of other forms of cultural and artistic expression. Nevertheless, the recent past has seen numerous clashes between government officials and artists. Sometimes the tension concerns the location where art is displayed.

In New York City, a policy aimed at cleaning up the streets enveloped street artists who did not have a vendor's license (and, in reality, would not have been able to get one if they had tried). The policy, part of the Giuliani administration's campaign against what are said to be "quality of life" offenses, resulted in the arrest of more than 400 artists between 1993 and 1996 for displaying or selling original paintings, photographs and sculptures on the sidewalk.

Robert Lederman, the president of a group called A.R.T.I.S.T (Artists' Response To Illegal State Tactics), said

city officials confiscated and destroyed thousands of works in the course of the crackdown on street sales. In 1994 Lederman's group filed suit in federal court challenging the city's licensing requirements on First Amendment grounds.[25] The following year, U.S. District Judge Miriam Goldman Cedarbaum issued one of the more controversial First Amendment decisions in recent federal court history. She refused to grant the artists a restraining order and ruled that art does not have "core" First Amendment protection.[26]

The artists then appealed to the Second Circuit Court of Appeals, where the ruling was overturned in a decision that declared that "visual art is as wide-ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to First Amendment protection."

The Giuliani administration sought review by the Supreme Court with a brief arguing that artists' constitutional interest was minimal in comparison with literature and political speech. In June 1997 the Supreme Court refused to hear the city's appeal, thus allowing the earlier appellate decision confirming the First Amendment rights of street artists to stand. "The important question now is what effect the New York decision will have in other jurisdictions across the country," says Amy Schwartzman, executive director of Volunteer Lawyers for the Arts in New York City.

Hate speech

One of the thorniest First Amendment issues of recent years has been the matter of "hate speech." What makes this matter so difficult is that it involves a conflict between free speech and the protection of the rights of women and minorities. To what extent is there a constitutional right to say things that are demeaning and insulting to certain categories of people?

The Supreme Court has tended to come down on the side of unfettered free speech. It has ruled, for instance, that a display of racist sentiments, such as the act of burning a cross on a black family's lawn, is worthy of First Amendment protection.[27] Nonetheless, institutions such as universities have sought to regulate offensive speech. According to Reginald Wilson, senior scholar with the American Council on Education, 147 public and private colleges have implemented rules regulating student and faculty speech.

This trend is fueled by the fact that racial tensions in higher education have increased with the growing presence of minorities on campus. White students resentful of affirmative-action policies have distributed racist materials and in some instances have physically assaulted minority students. Along with these crude forms of prejudice have come more "respectable" varieties of racism. All have helped justify attempts to punish "hate speech," such as speech codes at colleges and universities.

Proponents of hate-speech regulation say speech codes are consistent with the values of the First Amendment. They argue that in order to promote open dialogue—an undisputed First Amendment value—racist or sexist speech needs to be regulated to ensure that it does not chase people from the marketplace of ideas. As critical race theorist Mari Matsuda states, "Tolerance of hate speech is not tolerance borne by the community at large. Rather it is a psychic

> One of the thorniest First Amendment issues of recent years has been the matter of "hate speech."

tax imposed on those least able to pay." Scholars like Matsuda contend that the silencing effects of hate speech result in a net loss for the First Amendment.

Opponents of speech codes point to the nature and purposes of colleges for their arguments. They maintain that no social organization is better suited to fight bigotry than the university. Tolerance can be encouraged in courses, and perhaps most important, through the way learning institutions operate as a community.

Free speech and protests near abortion clinics

The abortion controversy is another instance in which free speech has ended up in conflict with another right—the freedom of women to decide when to terminate a pregnancy. Those opposed to abortion say their First Amendment rights are violated when they are restricted in their efforts to protest or speak out against what they consider to be murder. Passions over the issue run high.

Since abortion was legalized in the 1973 *Roe v. Wade* decision,[28] more than 2,000 acts of violence against abortion clinics have been documented. These have included everything from the use of chains to block access to clinic entrances to bombings and arson. A number of abortion doctors have been murdered. Pro-choice forces regard such assaults as terrorism.

The federal government has taken steps to ensure that abortion providers can operate without interference and harassment. In 1994 the Supreme Court ruled that abortion clinics could sue violent anti-abortion groups under the federal anti-racketeering law. That same year, Congress passed the Freedom of Access to Clinic Entrances Act, which prohibits the use of force, intimidation or physical interference with those seeking to receive or provide abortions or reproductive health services.

The Supreme Court also has upheld certain regulations on peaceful protests outside clinics. It has endorsed the use of a 15-foot "fixed buffer" zone between protesters and the clinics but rejected a "floating buffer zone" that prohibited demonstrating within 15 feet of any person or vehicle going to or leaving such facilities.[30]

Anti-abortion groups have complained that these laws and regulations impinge on their free-speech rights. Legislators and the courts, however, have had the difficult task of sorting out these conflicting sets of rights. In *Schenck v. Pro-choice Network of Western New York*, the Supreme Court seems to have struck a reasonable, if uneasy, balance between the First Amendment rights of protesters and the right of women to obtain abortions free from harassment and intimidation. The decision leaves demonstrators free to picket, chant, pray and carry signs in full view of people entering and leaving the clinics, as long as women seeking abortions are not blocked from entering clinics.

The Supreme Court seems to have struck a reasonable, if uneasy, balance between the First Amendment rights of protesters and the right of women to obtain abortions.

The court's latest decision did not make new law. Instead, it reiterated a series of well-established constitutional principles:

•People have a right to express their views on the public streets. However, the right to demonstrate in support of a cause does not include the right to break the law or to harass others seeking to exercise their rights.

•Demonstrators who engage in repeated acts of harassment, intimidation and

trespass may be required to demonstrate outside a reasonable buffer zone.

•Any restrictions on the right to demonstrate must be narrowly drawn and restrict no more speech than necessary.

Homosexuals and First Amendment freedoms

One of the groups in American society most targeted for discriminatory treatment in recent years has been the homosexual community. Many social conservatives see gay life as an unacceptable threat to their ideas of morality and propriety. Most complaints about discrimination against homosexuals that concern the workplace, denial of housing and parental-custody disputes involve the 14th Amendment or the 1964 Civil Rights Act. However, in many places, lesbians and gay men are often prevented from exercising their First Amendment rights of free speech and association in a variety of institutions and venues.

In education, lesbians and gay men are vulnerable to lawsuits by parents who are concerned about homosexual teachers, coaches and guidance counselors. Some parents have become unhappy when their children are exposed to information in the classroom about gay and lesbian lives.[31] Should these disputes wind up in court, the arguments on both sides assume constitutional dimensions.

When a school removes lesbian and gay material from its curriculum, those who favor its inclusion argue that rights of free expression have been violated. If the material is not removed, those upset about its inclusion may say their First Amendment rights were infringed by mandated subject matter and that the school has violated the family's religious beliefs.

In 1997, a federal court of appeals struck down an Alabama law banning funding for gay and lesbian student organizations at public universities. The law, passed in 1992, denied use of public facilities and public funding to organizations that "foster" or "promote" activities made illegal by Alabama's sodomy and sexual misconduct laws. The court said that the law reflected "naked viewpoint discrimination" and was "an open effort by the state legislature to limit the sexuality discussion in institutions of higher learning to only one viewpoint: that of heterosexual people."

In recent years, referendums have been placed on the ballot in different states in efforts to repeal laws, regulations and policies protecting homosexuals from discrimination. In 1992 voters in Colorado enacted such a law—Proposition 2. This galvanized a group of civil liberties and homosexual organizations in a fight to have the law overturned, and, at the same time, rallied some religious and secular groups in favor of proscribing homosexual rights. The law eventually was reviewed by the Supreme Court, which found it unconstitutional, stating:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end, but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.

In 1992 then-presidential candidate Bill Clinton made a campaign promise to lift the ban on homosexuals in the military. Once elected, however, Clinton backed away from his promise of an outright lifting of the ban. Congress passed new legislation regarding the treatment of homosexuals that reiterated the military's ban. A Department of Defense directive implementing the law prohibits the government from asking service members about their sexual orientation but provides for subsequent discharge of anyone found out to be gay.

In the face of fierce opposition from military and political leaders, the Clinton administration developed the "don't ask,

don't tell" policy. Implemented by executive order, the policy stopped short of lifting the ban on homosexuals, but was supposed to make it more difficult for the military to investigate the sexual orientation of service members.

After the Navy put the new policy into effect in March 1994, Lt. Paul G. Thomasson tested the law by sending letters to four admirals for whom he worked stating: "I am gay." The Navy subsequently convened a board of inquiry. Thomasson refused to present evidence to disprove the statement and was subsequently discharged. He challenged that action, but the Supreme Court refused to hear his case.[31]

In March of 1994, LAMBDA and the ACLU filed the first constitutional challenge to both the conduct and speech sections of the law on behalf of six lesbian and gay service members in the U.S. District Court for the Eastern District of New York. Over the next three years, the case moved ahead haltingly: Federal District Judge Eugene Nickerson granted the plaintiffs' request for a preliminary injunction; this ruling was upheld by a three-judge panel of the U.S. Court of Appeals. After a four-day trial, Judge Nickerson imposed a final injunction in March of 1995, striking down the ban as a violation of both the First and Fifth amendments. The government appealed, and a reconstituted appellate court asked Judge Nickerson to review the policy to determine if different rules of behavior could be applied to gay and non-gay services members. In July of 1997, Judge Nickerson struck down the entire law as unconstitutional.[32]

There have been other legal challenges to the "don't ask, don't tell" policy. It has been denounced by more than one federal court but has generally been upheld at the appellate level. The U.S. Supreme Court has declined challenges to the ban, most recently on October 5, 1997, when it refused to revive a lawsuit by Richard Richenberg Jr., formerly a captain in the Air Force, who received an honorable discharge in 1995 after he had disclosed his homosexuality to his commanding officer.[33]

According to *The Washington Post,* after several years, the military's policy was causing more expulsions and intrusive investigations of those suspected of homosexual behavior.[34] One particularly disturbing incident occurred when, after arson had burned down Army officer Steve Loomis's home, a marshal investigating the ruins discovered a video of men having sex and reported it to Army officials. A board of inquiry subsequently found Loomis guilty of engaging in unbecoming conduct and he was discharged, after 20 years of honorable service during which his homosexuality was never an issue.

While the utterance of three simple words—"I am gay"—may be grounds for discharge, courts have given First Amendment protection to other expressions of a sexual nature in the military context. A law banning the sale or rental of sexy magazines and videos on military bases was struck down, even though government officials argued that the law promoted "core military values" and improved the military's image in the public's eye. Paradoxically, the same arguments unsuccessfully used to justify a ban on sexual magazines and videos are relied on to keep homosexuals out of military service. The "don't ask, don't tell" policy allows homosexuals to stay in the service as long as they choose not to exercise a basic First Amendment right—the right to say who they are.

Conclusion

It is difficult to summarize the condition of free speech in the United States. In many ways, the recent past has been troubling. For many people, belief in the First Amendment has been

superseded by a desire to regulate morality, to protect children, to fight racism, to enforce heterosexual norms or to reach any number of other goals. Well-organized groups have pressured government to ban books or otherwise suppress the expression of those whose speech is considered undesirable. In numerous cases, government officials have been willing to embrace censorship—the most depressing example being the effort by Congress to criminalize "indecency" on the Internet.

At the same time, it is difficult not to be exhilarated by the willingness of the judiciary to resist popular and political pressures and affirm First Amendment principles. The appellate court rejection of "decency" standards for NEA grants, the rulings in opposition to the anti-gay "don't ask, don't tell" policy, and most of all, the resounding rejection of the Communications Decency Act provide hope that free speech will survive. ●

[1] Miller v. California, 413 U.S. 15 (1973).

[2] Stanley v. Georgia, 394 U.S. 557 (1969).

[3] These four examples were reported in *Censorship News*, a newsletter of the National Coalition Against Censorship.

[4] Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[5] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[6] Bethel School District v. Fraser, 478 U.S. 675 (1986).

[7] Board of Education v. Pico, 457 U.S. 853, 871 (1982).

[8] Hazelwood v. Kuhlmeier, 108 S.Ct. 562 (1988).

[9] Judith Krug, Office of Intellectual Freedom, American Library Association, Interview, July 30, 1997.

[10] Reno et al v. American Civil Liberties Union, docket no. 96-511, Supreme Court, June 26, 1997.

[11] ACLU v. Miller, Georgia, June 20, 1997.

[12] ACLU v. Pataki, New York, June 20, 1997.

[13] The universities involved included: Virginia Commonwealth, George Mason, Blue Ridge Community College, Old Dominion and the College of William and Mary.

[14] "NBC's Lonely Defense of the First Amendment," Nat Hentoff, *The Washington Post* Op-Ed, July 16, 1997.

[15] "TV Ratings Agreement Reached," Paul Farhi, *The Washington Post*, July 10, 1997.

[16] Playboy Entertainment Group, Inc., v. United States, 117 S.Ct. 1309, 137 L.Ed.2d 473 (1997)

[17] 316 U.S. 52, (1942)

[18] 475 U.S. 748 (1976)

[19] 447 U.S. 557 (1980)

[20] Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)

[21] City of Cincinatti v. Discovery Network Inc., 507 U.S. 410 (1993).

[22] 116 S. Ct. 1495 (1996)

[23] Kaplar, Richard, "Alcohol Advertising Revolves Around TV Liquor Ads, Baltimore Billboard Ban," in *The First Amendment and the Media*, The Media Institute, 1997

[24] 117 S.Ct.2130 (1997)

[25] Lederman et al v. City of New York, 95-9089.

[26] Bery v. City of New York, 97 F. 3rd 689, 2d Cir. 1996; cert. denied, 1997 WestLaw 10692, June 2, 1997.

[27] R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992).

[28] Roe v. Wade, 410 U.S. 113 (1973).

[29] Schenck v. Pro-choice Network of Western New York, Supreme Court, docket no. 95-1065, February 19 1997.

[30] Robson, Ruthann, *Gay Men, Lesbians and the Law*, Chelsea House, 1994, p. 51.

[31] Paul G. Thomasson v. William T. Perry, Secretary of Defense, 895 F. Supp 820 (E.D. Va. 1995); aff'd 80 F 3rd 915 (4th Cir. 1996), cert. denied 117 S. Ct. 358, 1996.

[32] Able v. United States, 968 F. Supp. 850 (E.D.N.Y. June 1997).

[33] Richenberg v. Cohen, 96-1648.

[34] "Gay Officer's Removal Fuels Charges of Bias," Bradley Graham, *The Washington Post*, July 26, 1997.

Free Speech Roundtable

Eight of the nation's leading authorities on the First Amendment were invited to a roundtable discussion on First Amendment trends and thought. On Feb. 28, 1997, they gathered at The Freedom Forum World Center in Arlington, Va., for a two-hour conversation. Here are excerpts.

Participants:

Ann Beeson
attorney
American Civil Liberties Union

Lee C. Bollinger
president
University of Michigan

Ronald K.L. Collins
visiting professor of law
Seattle University

Robert Corn-Revere
First Amendment attorney

Stanley Fish
arts and sciences professor of English
Duke University

Judith F. Krug
director
Office for Intellectual Freedom,
American Library Association

Robert S. Peck
First Amendment attorney

Arthur Tsuchiya
Office of Policy Planning and Research
National Endowment for the Arts

Moderator

Paul K. McMasters
First Amendment Ombudsman
The Freedom Forum

PAUL McMASTERS Is the rationale for free speech changing, and if so, how?

STANLEY FISH The rationale for free speech has changed since the '40s and '50s. Free-speech values were seen as competing with other values, and various forms of balancing tests were employed. Since the '50s, and especially since *The New York Times v. Sullivan*, a stronger sense of the First Amendment has emerged and become a pre-eminent value—and often in a libertarian direction. Now there are beginning to be some signs that that movement is being challenged, and perhaps some of the challenges might be successful.

ROBERT PECK Right now we have a Supreme Court that is probably more libertarian in its approach to the First Amendment than we have had at any time. You certainly find that in the free-speech area. As a result of that, you find that those who are concerned about establishment issues and free-exercise issues often try to frame them as religious-expression issues to take advantage of the free-speech precedents. You have that happening at the Supreme Court level and filtering down to the lower courts. At the same time, among politicians and the public, there is probably less support for the libertarian approach to First Amendment issues. As a result, there is a constant questioning. "Well, that's not speech," is the frequent refrain you hear, or "That's really not as important as …" and you can fill in the blank with a number of different things. That's the direction that a lot of politicians are going, and certainly a lot of public support. There is a lot of legal theory in that direction as well. As a result, you see laws being passed that are easily struck down by the courts, because they have no basis in our First Amendment jurisprudence.

RONALD COLLINS I'm inclined to agree with Stanley and Bob that we're getting closer to a libertarian paradigm. I don't think by any

stretch of the imagination we are there, but I think we are moving in that direction. To the extent that there might be anything labeled as a First Amendment "rationale," it might be best summarized in one word, "overbreadth." That is, with the advent of the electronic medium (the Internet and the Web), problems of overbreadth as evidenced by *ACLU v. Reno* and *Shea v. Reno* become increasingly gray. As those problems become increasingly gray, the ability to regulate becomes increasingly difficult. Because of that, it seems we might move closer to some sort of absolute or libertarian paradigm.

Ann Beeson

ANN BEESON Has the rationale for regulations on free speech changed? That is definitely the case. We see that in particular with respect to the advent of electronic communications. Those who would regulate speech have really been worried—one of the judges in *ACLU v. Reno* discusses [this]—because this new technology allows for too much speech, if you will. The fact is, your average person now will have the ability to communicate to very wide audiences in ways that just weren't possible before. Is that going to be the rationale for new restrictions in a different way, theoretically, than was the case before, when we were talking about much larger media being the only ones with that kind of access?

LEE BOLLINGER The rationale has not changed, or is not changing. People have been talking for the past 25 years in terms of the First Amendment and democracy. If you just look at "the rationale" at that level, it is exactly the same. This seems to be the dominant approach for thinking about free speech. If you go to what I might call the second level-type of rationale, I would identify one thing where there really has been a dramatic change over the past 10 years. That is with thinking about the First Amendment as allowing the government some affirmative role, or even the First Amendment as demanding an affirmative role, in terms of equalizing opportunities for participation in democratic decision-making. There, of course, I am particularly struck by the fact that regulation of electronic media in the public interest—like the Fairness Doctrine and equal-time provisions—that all seems to be vanishing. The idea that the First Amendment would allow, encourage, maybe even demand [regulation] is just out of the picture, it seems to me, at this point. So if you start with that fundamental rationale—"What does free speech do?"—I think most people still talk in terms of democracy. If you look in terms of "What does that mean on an affirmative side for the First Amendment?" that is gone. It doesn't appear to be coming back. We live in a time when free speech is so internalized into the culture, and so unthreatened, that it is quite easy to accept a general, very strong free-speech rationale. I don't mean to say that I think that will stand up; indeed quite the opposite. I think that it would be a mistake to think that the rationale is secure. Of course, we can be concerned about the issues at the margin, but my belief is that there is going to be a period of rabid intolerance again.

PECK When people talked about the rationale for free speech, particularly the Supreme Court, they used to recite a laundry list of rationales that included that it was a good unto itself. It is that rationale that seems to have completely disappeared from the discussion. Even though it had very little gravitational pull in the past, it has disappeared entirely. That, I think, is an interesting phenomenon.

FISH But I would say that in fact that's the rationale that has won. It has disappeared just like something now part of the fabric of everyone's life has disappeared. There has been a demise of an old question: "What is the First Amendment for?" If you answer this question in any way, you are logically committed to censorship, because if the First Amendment is for something, it means that there must be forms of speech that are subversive of what you think the First Amendment is for. The only way to avoid that is, in fact, to think that the First Amendment is a good in and of itself. I think that that notion has won the day by not having to be proclaimed.

ROBERT CORN-REVERE It may be winning, but it remains to be seen whether or not it is actually going to win. Once you start defining those limits, what you are left with is imposing some kind of literacy test for the First Amendment. Do you have to rise to a certain level before your speech

has sufficient dignity that it will be recognized by the Constitution? I would agree actually with Lee that we really aren't seeing a repeat of the issues that happened and were present in the '40s and '50s. We are seeing a repeat of the issues that were around in 1910 and 1920 during the [Anthony] Comstock era—or actually shortly after he died, but his legacy lived on; it still does. That's what we see in the Communications Decency Act. That is what we see on a whole range of issues like TV ratings and tobacco advertising regulation that are haunting us now. While they might not be the same issues, it's still the same question of whether or not the government can exert control over speech. It is sort of a cultural McCarthyism, where you are not debating whether or not we have a Red under every bed, but whether or not the government ought to act as our parents. The outcome of that remains to be seen.

JUDITH KRUG I have to agree with you. The First Amendment reached the pinnacle—at least one pinnacle—about 20 years ago, and we have been going the other way since then. We are finding more and more in the real world that people are saying the First Amendment is not The Good. There are higher goods. When you start pushing them and saying, "What are the higher goods?" it's, "Well, we have to protect our children." This is all that we have been hearing recently in education or in libraries: "We have to protect the children." They want the government to step in. You say, "Well, it is the responsibility of parents to guide their children in what they read." Then they say, "We can't guide them when it's print. How are we going to deal with the Internet?" So they are pushing the government to get involved in an area that the government had really begun to move substantially away from. I don't find this at all heartening as we move into the 21st century.

COLLINS There is a free-speech culture out there. It's what people do with it. In many respects the culture of the First Amendment is far broader than the narrow doctrine, particularly the commercial culture and the entertainment culture. Whatever we may say, and whatever objections we might make (and appropriately so against various attempts by the states and Congress to regulate), the fact is we have an unprecedented level of freedom of expression, from the Internet to our clothing, that is reflected in the culture itself. The culture has moved very close, or much closer, to some absolute paradigm than legal doctrine has. In several respects, legal doctrine has become almost irrelevant. When is the last time we saw any significant prosecutions for print pornography?

BEESON I have to disagree with that, because again, returning to the real world, the fact is we really do see these efforts every day. They are out there in the real world. They are not in Washington. They are not in New York. They are in places like Metairie, La., outside of New Orleans, where the sheriff walks into a Barnes & Noble bookstore and says that he is going to shut down the bookstore if they do not put up huge signs that say that minors are not allowed anywhere near the gay and lesbian section of the bookstore—not the sexual section, the gay and lesbian section. There is one book in that section that even has pictures in it. The rest of it is pure text.

PECK Certain issues have replaced sexuality as the concern of those censors. Gay and lesbian literature clearly rises to the top of that list. That's why schools face more issues over school libraries that happen to have materials like that. So there has just been a refocus. That also points out, because a lot of it takes place at the public-school level, that one of the great rationales that has always been present but seems to be resurgent is: "We have to protect the children." So that becomes a justification across the board for a wide variety of things. It is when those kinds of issues come up, it becomes easier to think about either changing the First Amendment or giving it less weight.

COLLINS If I can just qualify my point. I didn't want to suggest that we don't have all types of government censorship going on. I don't doubt that we will always have renegade sheriffs in Louisiana or elsewhere. Generally speaking, my point is that the mood has moved away from print to image, away from image to the electronic.

PECK What I'm trying to suggest is that there is a duality in the public mind. The same duality that we have seen in poll-taking that goes back 90

Ronald K.L. Collins

Robert Corn-Revere

Arthur Tsuchiya

years, that shows that the public generally believes in free speech. They believe in freedom of religion. They believe in separation of church and state. But when you give them specifics, they say, "Oh, well, that's where I draw the line."

FISH Right. Now I see I've fallen in, not among thieves, but among First Amendment ideologues; perhaps Lee Bollinger might be excepted. He will let me know. Of course, there is a duality here. It is a duality that was nicely captured in the title of Nat Hentoff's second book on free speech, *Free Speech for Me—But Not for Thee*. That seems to me to be absolutely right, and not only because it is my position, but because it is everyone's position. One of the standard tropes, especially in introductions to First Amendment books, is to rehearse the argument of Milton's great oration in favor of free press, the *Areopagitica*, and to link it with [John Stuart] Mill's *On Liberty*. Of course, three-quarters of the way through the *Areopagitica*, Milton says, you must understand that when I speak of toleration, I don't mean Catholics—them we burn, or, as he said, them we extirpate, that is, destroy, pull up by the roots. Everyone has a point at which you will say, "Of course, I didn't mean X." The duality is a reflection of the fact that First Amendment principles are affirmed and embraced at a level of generality which has no contact with the way in which people actually live and think. Once that, in fact, is abandoned, as it will be the first time a real issue is involved, you are going to get a Milton-like qualification every time, because it has been there all the while, hiding up the sleeve of even the purest First Amendment proponent.

CORN-REVERE You have just encapsulated why the First Amendment must exist. Everybody has got a pet thing they would love to censor. All you have to do is look at the statements of Reed Hundt at the FCC about what he describes as his wish list for policies he would impose, and compare that with Cathy Cleaver of the Family Research Council, who also has a wish list, and describes the current situation in almost identical words as Reed Hundt. But they have totally different political agendas. They both describe this as a once-in-a-generation opportunity to get control of this medium, and in this case they are both talking about the Internet. That's why the First Amendment must exist.

FISH Someone is always in control of the First Amendment. To me, the First Amendment is a bunch of words, either wonderfully or lamentably vague, which are then filled with a substantive content of whatever group manages to get its preferred vocabulary into the First Amendment. That is why I never recommend jettisoning the First Amendment, although I write about its incoherences all the time. My advice is always get a hold of it and rewrite it so that it will generate the agendas, inclusions and exclusions you desire, rather than the ones that are now being generated by your enemies.

CORN-REVERE Once you are talking about the First Amendment as an affirmative obligation, as is happening at the FCC now, then I agree with you. If you read the First Amendment that way, that makes the problem much more conceptually difficult, which is why the First Amendment is a negative right, and not a positive right. As a negative right, it is rather easy to understand. It is a separation of press and state. The state can't inhibit nor can it promote particular viewpoints.

FISH It's not a question of press and state; it is a separation of procedure and substance, and since that is an impossible separation, it will never work as its adherents claim it does.

BOLLINGER One of the most intolerant communities within the United States sometimes is the free-speech community. That is, the least willing to engage with arguments on the other side that want to restrict speech and so on. We live in an era or a decade in which the strong free-speech side has won out, at the constitutional level, the legal level, and at the cultural level as well. So yes, those of you who do day-to-day engagement with people who want to censor feel there is a lot to be done. From a scholarly perspective as you look back over the century, you have to say there really is something that is fundamentally different about the situation we are in now.

ARTHUR TSUCHIYA I need to say first, I'm a layperson when it comes to legal matters, and I do not represent the agency that employs me. That

said, I am very, very happy to hear that so many of you feel that the First Amendment is so strong right now, because from my perspective I have seen Congress eliminate the ability of the arts endowment to support individual artists at all. I have seen them fire half of my colleagues, and reduce our budget by 40%, largely tied to controversies that have arisen over the content of various works of art, which allegedly have been supported in part by my agency. It is difficult for me to reconcile those facts with some of the more theoretical comments that I have heard, although I appreciate things have been worse.

McMASTERS We have been speaking generally in terms of political speech. Arthur, you're speaking of artistic speech. That raises the question: Do some kinds of speech deserve more protection than others?

TSUCHIYA That sounds similar to a question that a senator asked of the National Endowment for the Arts chairman last year during her testimony in front of an appropriations subcommittee. He asked her whether the fact that the endowment is using public funds to support various projects, and given that some members of the public disapprove of certain kinds of art works, shouldn't that mean that the criterion for giving federal grants to artists should be at a higher threshhold than other types of speech that are protected by the First Amendment? Her response was that we make our grants on the basis of artistic quality, and that it is up to the courts and it's up to people like you to decide the other issues. I guess I have to echo that.

PECK Certainly the arts endowment issue turns that controversy on its head if those who propose that political speech should receive the apex of constitutional protection prevail. It is the most political of art that receives the attacks. Thus, the same people who often say that political speech is the only speech to be protected are attacking the arts endowment over precisely that kind of speech. It makes for an interesting juxtaposition of their views. Every conflict we have now has seeds in the past. That is one thing that causes those of us who work in the First Amendment vineyards to think that it has great fragility. If you lose one of these debates, which may not seem terribly crucial overall, it may be the crack in the armor that causes it all to fall apart. We see that if you can attack something as simple as the depiction or description of violence, which right now is regarded as perfectly protected speech. (In fact, you are allowed to advocate violence consistent with the First Amendment.) If that falls away, it is hard to see how the damage to something so well protected, so much a part of speech for so long, does not infect all other kinds of speech that you think are also fully protected.

McMASTERS Does violence deserve First Amendment protection, or should it be treated as obscenity—beyond the pale?

FISH In a way, the free-speech lobby has brought this upon itself, because one of the strongest of free-speech arguments, and in fact the entire basis for there being a First Amendment at all, is the distinction between speech and action. Therefore, the assumption that when you are advocating something, either in a philosophy seminar or in a political forum, advocacy is not action. In a sense, therefore, advocacy takes on some aspects of what has always been attributed to art, which is a certain disinterestedness.

COLLINS In many attempts to protect the First Amendment, a number of fine First Amendment defenders have defanged it, or attempted to defang it. They've said, "No, this speech is really not dangerous. It's safe; we really should allow it." I disagree. I want to protect it precisely because it is dangerous. It seems to me that if it weren't dangerous, why would it need to be protected? Tom Paine did pose a clear and present danger. This isn't to say that his words should not have been protected. It seems to me if the First Amendment is to have any real viable force, then sometimes we will have to just bite our lips and say: "This is dangerous. This really is risky. This really is an experiment. This experiment really can fail, but nonetheless we commit ourselves to this experiment for better or worse." And the reality is, it may be for worse.

CORN-REVERE It depends entirely on what you mean by danger and danger to whom. Free speech has always been dangerous to people in authority.

Judith Krug

KRUG All ideas are dangerous.

CORN-REVERE That's why printing presses were licensed. That's exactly why the Internet is under siege, because people in authority see this as a way of getting around them, of challenging their positions of power. That is true culturally as well, which is why there is a culture war going on that is manifesting itself in legislation. The current trend isn't really to look at whether or not images of violence are inciting anything. They are simply saying that images of violence are bad in themselves, and that the policymakers who would make those decisions have a very clear idea in their own minds of which violence is permissible, and which violence isn't. Sure, all ideas and all speech is dangerous to somebody, but whether or not it is dangerous in a way that justifies some kind of social control is a totally different question.

KRUG The other question that always comes up is who is going to make the determination as to what is dangerous to whom? Then you come into the distinction between words and actions. If you take action on that basis, then you are liable for prosecution according to the act that you commit. You keep going back through history and even more recently, [you find] the same question about the difference between words and action. Then, of course, the overriding question is who is going to decide what is violent and what is bad?

Lee C. Bollinger

BOLLINGER The problem as I see it is that there will be so much effort within the First Amendment community in its broadest terms to get this perimeter really secure. There is a focus on this as if it is somehow really the touchstone of what free speech means in the country. More importantly, the First Amendment will lose over time a deeper set of values about what it is that is trying to be accomplished through free speech. By that, I'm really referring to the era of the '60s and '70s in which this affirmative side of the First Amendment seemed to me to be much more promising for a free speech that would have some integrity to it, as striving for equalization of opportunities of speech, democratic participation, values like that, which seem to me to be more consistent with the goals of the society, rather than a determination not to let any regulation occur on anything that might be dangerous. The point I'm trying to make is that free speech must not become its own cliche. It must not become banal.

COLLINS More and more of public expression today is being regulated by the "private sector." By far the greatest restraints on freedom of the press are imposed by advertisers in terms of either direct dictates or indirect self-censorship. Moreover, what we are seeing with the Web and the Internet is almost the demise of the state-action doctrine, the idea that public expression is somehow related to state action. Finally, in light of the Internet and the Web, and in light in some of the brilliant briefs that Ann has written in this area, state constitutions, so far as their free speech provisions are concerned, are virtually dead when it comes to anything having to do with the interstate commerce of online communication. So to come back to the question full circle, if we do have any sort of value, to the extent there are any values, it is the technology that is really dictating or directing or moving us into new paradigms about state constitutions, about federalism, and how we come to accept private censorship. That's where we are: Private censorship is entitled to First Amendment protection. It's ironic.

CORN-REVERE There are all kinds of censorship that are perfectly legitimate. As a parent, I censor my kids all the time; that's my job, but it's not unconstitutional censorship, because we are talking about something entirely different. In the context in which you describe censorship, what we are really talking about is editing. So what the First Amendment is about is whether or not the government has the power—the relationship of government to speakers, and not to others. Now as a cultural phenomenon is it true that certain people have more say about what their facilities are used for than others? Yes, that's true. But by the same token we also have an evolution of a society and a system in which individuals are empowered more and more to engage in speech. That's what the Internet is all about. In fact, rather than concern about corporate censorship, the Communications Decency Act is motivated by a concern that individuals are too free to engage in speech. This notion of affirmative rights being the core principles

that we need to get back to is really where all this began, the whole notion that you could take a medium and treat it as one in which you could use whatever political judgments you use to fashion socially useful policies.

BEESON The better example is the hot topic on the Internet right now about blocking software and how pervasive it is going to become. If you have networks like America Online and CompuServe and Prodigy, who together provide services to over 12 million Internet subscribers in the U.S., and if they as a policy matter decide to impose some sort of mandatory blocking, so that the default is always that the block is on, then you turn on your computer, and all sorts of speech is blocked. The value obviously behind the First Amendment is to promote some sort of true diversity, some sort of true marketplace of ideas. The point that Ron is making is why is that situation any less problematic than one in which the government is involved?

BOLLINGER It is interesting that the ACLU all through the '50s, '60s, '70s was on the side of public regulation of broadcasting and cable for public access purposes. That's the distinction that one would like to aim for: That is, the discussion about what types of government regulations—or involvement with media, in particular—help to advance the kinds of goals we would like to see advanced. We've got to talk about what those goals are, as well as what regulations would advance them; but those goals would have a lot to do with equalization of opportunities for speech and so on. That is a huge debate.

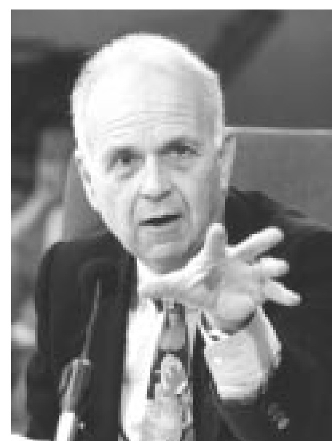
PECK One of the things that I think has gone on here, Paul, is that we have refocused your question. Your question originally seemed to act as if there were conflicts between the First Amendment and other fundamental values. I would submit that those of us who work in the First Amendment community would say that that is a false dichotomy—that there is nothing inconsistent between the First Amendment and many of the other values we most hold dear. The First Amendment has been the most important civil rights act ever passed. It has been the most important political reform ever passed. You can go down the list of other things that we value, and again, we would submit that the First Amendment, first and foremost, has protected those rights.

KRUG It allows for those other debates to take place.

PECK More fundamentally, it is not just instrumental, but it has this function where it enables our creativity.

McMASTERS There is a considerable and very strong body of thought within the academic community that free-speech rights should not prevail in all situations, that there should be, in fact, no protection for speech that is hateful or harmful to individuals or groups—especially on the college campus. Have I mischaracterized that thinking, Stanley?

FISH Not at all, although that body of thought, given the court decisions that have come down in that area, is unlikely to be successful. Notions like diversity and creativity and information are not simple notions, although they are simplemindedly invoked.


Stanley Fish

COLLINS I will name an old-fashioned value. That is the idea that one value—not the sole value—of the free-speech principle is to protect the powerless against the powerful. That principle is echoed time and time and time again throughout history. If we have reached the point at which, in the name of First Amendment freedoms, we protect the powerful almost categorically against the powerless, then there is the question: "Is this First Amendment still worth protecting?" One of the big differences here is that the First Amendment allows the courts to cure the problem you have identified, at least in theory. But with private censorship, court action is not possible precisely because the First Amendment protects private censorship. That is a radical difference.

PECK What you have done is you have restated a problem that one of my old professors, Thomas Emerson, used to talk about as a flaw in the First Amendment. What he used to say is that the problem with freedom of the press is that not everyone can own a press.

COLLINS With the Internet, that's no longer true, of course.

PECK Right. The Net, to some extent, addresses that. The fact is that what really concerns people who are very much in the First Amendment camp is this fear of government action; the authoritative approach that they would take to speech. That fear translates into a fear of how they would deal with private censorship if they had that power. Clearly we know that a government that is concerned about exercising power and maintaining power is going to exercise it in a way that is good for its friends, and not so good for its enemies. Clearly, since the First Amendment paradigm has always been that it is the dissenter, the minority who needs the speech, I would assume that any government that had the power to deal with private censorship would do it in a way that favored exactly the interests that you are most concerned about, and that one of the reasons why we are concerned about that is that there are other approaches.

Robert Peck

BOLLINGER It elides the problem to say that there is no conflict between different values. If Catherine MacKinnon were here, she could make the case very powerfully that there are free-speech issues at stake in the allowance of pornography. There are a lot of people in the hate-speech regulation community who would make exactly the same arguments. That is something we have to recognize is on the table and has to be sorted through. It is a mistake to think just in terms of, "We can't trust the government to draw any lines." It is a risk. But there are also lots of risks in not doing anything about it. The other point is that there is a set of issues ... about a broader notion of democracy and free speech than simply stopping the government from being able to censor. That debate is largely gone today, and I think that is a real pity.

FISH In Catherine MacKinnon's views of the First Amendment, principle will be defined in terms of specific experiences and the particularity of history substantively, rather than abstractly. This new model will notice who is being hurt, and never forget who they are. The state will have as great a role in providing relief from injury to equality of free speech and in giving equal access to speech as it now has in disciplining its power to intervene in that speech that manages to get expressed. This would be, in some sense, expansive and more affirmative. But as someone will immediately point out to her—and they would be correct—this would be at the expense of something.

PECK Let me disagree. The problem that I have with essentially replacing one set of speakers with another is that it assumes that there is a finite amount of speech out there, and the fact is that there is not. We can all be speaking at the same time. We might not hear each other at that moment, but there is nothing to stop us from doing so. There is no limit to the avenues, sentiments, range of ideas that can be spoken.

COLLINS To defend the equality principle is to attack, in many respects, the libertarian First Amendment principle. It seems that a lot of the discussion that we are having is a collision of these two principles. You have the egalitarians on the one hand—maybe represented by Professor MacKinnon and Richard Delgado and others—and then your First Amendment absolutists. So it seems that the question is, Will that continue?

McMASTERS Many of the speech issues you have been raising already are playing out on the Internet and the World Wide Web. Does online speech deserve the highest First Amendment protection?

COLLINS If online speech is entitled to the highest level of protection, why not the same for all other types of expression? Can we really have different standards?

CORN-REVERE But as a matter of history, it has always operated in precisely the opposite way. Censorship is reverse engineered. Once you allow it for a more advanced medium, it tends to end up bleeding over and affecting more traditional media to the extent that they start using electronic tools in their production. There were people seriously advocating applying the Fairness Doctrine, for example, to entities like *The Wall Street Journal* and *USA TODAY* because they used satellite delivery. They were using airwaves, so there was a jurisdictional hook for the exertion of federal authority. You see that as well with the Internet, even

though it has none of the attributes of broadcast, except it is electronic, but there is no government-created scarcity, as there is in the case of broadcast media. There is no unique accessibility by children. To whatever extent it exists, it is more controllable in that form than any other. Yet the government is justifying its regulation both on its historic ability to treat different media differently and its ability to exert special protections for children in the case of the electronic media. That creates anomalous situations when you start treating identical speech in different ways based on its medium, such as in the encryption area, where you have a book with a cryptographic source code being allowed for export, but the disk with identical information being suppressed. So once you allow the regulation in one medium, it tends to endlessly expand.

BEESON I wanted to get back to Lee's suggestion about how we are arguing at the peripheries. It is that precise fact that makes it so important that we do make these arguments. In other words, there are real slips that are occurring. That's why it is important that we always make the argument both at the periphery and at the center. I share everyone's concern that the First Amendment community in part has not dealt with the access issue strongly. I don't know what it is about the current state of the community that is making it harder for us to advocate that way. It is somewhat of the chicken-or-the-egg proposition. I don't think it should be. In other words, we should be fighting both those battles. The point being that if we have a victory that seemingly keeps the government out of regulating the Internet, it is a totally hollow victory if your average person has no access to the technology, thus is privately censored, etc.

KRUG That's why universal service is going to become very important, because the schools are going to be hooked up to the Internet. Access is going to be through the libraries of this country. It is going to be made available across the board, and it is going to cover all forms of electronic communication.

BOLLINGER There is still commercial TV. There is still cable. We still have a mass media. I think what I heard Ann saying is that if we prevent this intrusion by the government in the Internet, it doesn't matter so much if only the top 30% economically have access to this medium.

Paul McMasters

Biographies

ANN BEESON

As an attorney for the American Civil Liberties Union, Ann Beeson is a primary architect of the landmark *ACLU v. Reno* case in which a federal court declared the federal Communications Decency Act (CDA) unconstitutional. She is staff counsel at the ACLU National Headquarters in New York City, where she works as a litigator and online activist to promote and protect civil liberties in cyberspace. In addition to her work on the federal level, Beeson has monitored and opposed state efforts to censor online speech. In September 1996, she filed the first constitutional challenge to a state Internet censorship law in *ACLU v. Miller*, which seeks to overturn a Georgia statute that bans anonymous speech in cyberspace. In January 1997, she filed *American Library Association v. Pataki*, a First Amendment challenge to New York's online indecency statute.

LEE C. BOLLINGER

Lee C. Bollinger is president of the University of Michigan and a member of the faculty of law. After serving as a law clerk to Judge Wilfred Feinberg on the United States Court of Appeals for the Second Circuit and for Chief Justice Warren Burger on the United States Supreme Court, he joined the faculty of the University of Michigan Law School in 1973. In 1987, he was named the dean of the University of Michigan Law School, a position he held for seven years. He was named the 12th president of the University of Michigan in November 1996. Two of his acclaimed scholarly works on First Amendment literature include *Images of a Free Press* (University of Chicago Press, 1991) and *Freedom of Speech and Extremist Speech in America* (Oxford University Press, 1986).

RONALD K.L. COLLINS

Ronald K.L. Collins is a visiting professor of law at Seattle University. He is the co-founder and president of the Center for the Study of Commercialism, a nonprofit public-interest group in Washington, D.C. A former judicial fellow serving under the Chief Justice of the United States, Collins also clerked for Justice Hans Linde of the Oregon Supreme Court. In 1992, he wrote a report called *Dictating Content: How Advertising Pressure Can Corrupt a Free Press*. Last year, Collins published *Death of Discourse* (Westview/Harper Collins), co-authored with Professor David Skover. He will soon complete his next book, *Seeds in the Soil*: *Free Speech Aphorisms* (1997). In addition, he has written 40 scholarly articles in various journals, including the *Harvard Law Review*, *Stanford Law Review* and *Michigan Law Review* and has written for the *Nation* and the *Columbia Journalism Review*. Recently, he published an article on the free-speech rights of the online press appearing in *Intellectual Capital.com*, an online magazine.

ROBERT CORN-REVERE

Robert Corn-Revere is a partner in the Washington, D.C., office of Hogan & Hartson, specializing in First Amendment and communications law. Before joining Hogan & Hartson in 1994, Corn-Revere served as legal adviser to Commissioner James H. Quello of the Federal Communications Commission. In 1993, he was named chief counsel during Quello's tenure as chairman of the FCC. In 1995, he was named adjunct scholar to the Cato Institute in Washington, D.C., and became a member of the board of trustees of the Media Institute, as well as chairman of the Media Institute's First Amendment Advisory Council. In addition, Corn-Revere is a prolific writer on First Amendment issues, teaches a seminar in First Amendment law at Catholic University's Columbus School of Law, and is faculty adviser to *Commlaw Conspectus*, a journal of communications law and policy.

STANLEY FISH

Stanley Fish is an Arts and Sciences Professor of English and a Professor of Law at Duke University and is the executive director of the Duke University Press. In 1994, he published *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford University Press). He has taught First Amendment law, Liberalism and Legal Theory, The Critical Legal Studies Movement, and Literary and Legal Interpretation, among others. His works in progress include *Milton's Aesthetic of Testimony, or It Takes One to Know One*, a study of John Milton's political, religious, and aesthetic

views, and *Self and Community in Early Seventeenth Century Lyric*. Over the past two decades, 75 articles, parts of books, dissertations, and reviews have been devoted to his work. Translations of his writings have been made into French, German, Italian, Japanese, Chinese, Spanish, Portuguese and Hebrew.

JUDITH F. KRUG

Judith F. Krug is a noted speaker and author in the area of intellectual freedom; her articles on this subject have appeared in national library and education journals. She has been the director of the Office for Intellectual Freedom of the American Library Association since 1967 and executive director of the Freedom to Read Foundation since 1969. She has been the editor of the *Newsletter on Intellectual Freedom* since 1970. In addition, Krug is the immediate past president of Phi Beta Kappa of the Chicago Area, and also serves on the board of directors of the Fund for Free Expression and the Council of Literary Magazines and Presses. She served on the board of directors of the Illinois Division of the American Civil Liberties Union, and has just completed a six-year term as a member of the American Bar Association's Commission on Public Understanding About the Law.

PAUL K. McMASTERS

Paul K. McMasters is a 31-year veteran of journalism who came to The Freedom Forum in 1992 to serve as executive director of The Freedom Forum First Amendment Center at Vanderbilt University. Prior to that, he was associate editorial director of *USA TODAY*. On November 1, 1995, he assumed his current role as First Amendment Ombudsman at The Freedom Forum's headquarters in Arlington, Va. As Ombudsman, he works to educate and inform about First Amendment issues that arise in Congress, the courts, the media, and other areas of public life. McMasters speaks and writes frequently on all aspects of First Amendment rights and values, in particular free speech, free press, censorship, and access to government information. McMasters is active in a number of press groups and is the former national president of the Society of Professional Journalists. His most recent publication is "A First Amendment Perspective on Public Journalism" in *Mixed News: The Public/Civic/ Communitarian Journalism Debate*.

ROBERT S. PECK

Robert S. Peck serves as director of Legal Affairs and Policy Research for the Association of Trial Lawyers of America, a voluntary association of 60,000 trial lawyers dedicated to preserving the right to a jury trial and an effective civil justice system. He is also a member of the adjunct faculty of American University's law school, where he teaches legal ethics and a constitutional-law seminar. A noted First Amendment lawyer, Peck serves as vice president (and is past president) of the Freedom to Read Foundation, serves on the Emergency Committee to Protect the First Amendment, and chairs the national Lawyers for Libraries project. Previously, Peck served as the First Amendment counsel in the Washington national office of the American Civil Liberties Union. In addition, he is the author of numerous books, including *The Bill of Rights and the Politics of Interpretation* (West Publishing, 1992) and *We the People: The Constitution in American Life* (Harry Abrams, 1987).

ARTHUR TSUCHIYA

Arthur Tsuchiya is the senior policy adviser in the office of Policy, Research and Technology at the National Endowment for the Arts, where he focuses on the National Information Infrastructure and other technology issues as they relate to the arts. In these areas, Tsuchiya is the agency's primary liaison with the arts community, other federal agencies, foundations, and the private sector. He was instrumental in the creation and development of the endowment's World Wide Web site and a primary architect of Open Studio, a national Internet public access and Web mentoring project. Tsuchiya has been an administrator and educator in the media arts for more than 20 years. As an adviser to numerous state, regional, national, and public broadcasting funders, he was an arts program analyst in the Media Program of the New York State Council on the Arts from 1981-1989. As an educator, he has taught a variety of arts and media subjects at the Minneapolis College of Art and Design, the Visual Studies Workshop in Rochester, N.Y., and Middlebury College in Vermont. Previously, Tsuchiya produced and exhibited photography, audio art, video, mixed-media installations and digital media works at venues in this country and abroad.

2 Freedom of the Press

Freedom of the press is one of the grand themes of American liberty. The ability to report on government behavior and contemporary events without fear of official censorship or retribution is indispensable to democratic self-government. As Thomas Jefferson put it, "The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate a moment to prefer the latter."

Jefferson was drawing on an American tradition that predated the Revolution. It was in 1735 that John Peter Zenger, publisher of the *New York Weekly Journal*, faced trial for criticizing New York's governor, William Cosby. Zenger was tried under the law of the day that treated press criticism of the government as a crime called "seditious libel," a law carrying a possible penalty of death. Even though truth was no defense, Zenger's lawyer, Alexander Hamilton, persuaded a jury to set him free. When the First Amendment to the Constitution was ratified in 1791, it seemed to bar the concept of seditious libel; nevertheless, the Sedition Act of 1798 was enacted as an attempt by the Federalist Party to suppress opposition to its programs. The law made it a crime to publish "false, scandalous, and malicious writing or writings against the United States, or either house of the Congress …or the President."[1] The law was used by the administration of John Adams to jail editors who supported Democratic-Republican Party positions. It expired after several years, but opposition to government policies remained punishable under a succession of congressional statutes, presidential orders and court decisions.

Even Jefferson turned out to be inconsistent on this score. He criticized the law against seditious libel but voiced no objections when it was used against those who criticized him during his presidency. A similar ambivalence was exhibited

Many of the bars to a free press that arose in the '80s are still with us.

The Watergate glamour days of the media were short-lived.

a century later by Justice Oliver Wendell Holmes, who wrote stirring opinions on First Amendment freedoms but rationalized the use of the Sedition Act of 1918—which remains in effect—to imprison socialist Eugene Debs for his speeches advocating resistance to military conscription during World War I. Thus, for nearly two centuries after the founding of the country, state and federal libel laws discouraged blunt criticism of elected officials. The Supreme Court sanctioned these laws, ruling as late as 1942 that libelous statements, along with obscenity and "fighting words," fell outside the protection of the First Amendment.

All this changed in 1964, when the court ruled on a libel complaint brought against *The New York Times* by L.B. Sullivan, the police commissioner in Montgomery, Ala. Sullivan claimed to have been defamed by an advertisement that civil rights leaders had placed in the newspaper. His lawsuit, which was successful in the Alabama courts, was meant to discourage press coverage of the struggle against segregation. In a landmark decision, the Supreme Court overturned the Alabama courts and invalidated the state's libel law. The court ruled that Sullivan could not prevail against the newspaper even if the ad contained inaccuracies (which it apparently did), unless the newspaper itself was shown to have had "reckless disregard" for the accuracy of the statements it published and thereby had acted with "actual malice." A free and robust press, the court said, needed to operate without fear of being prosecuted and incurring heavy legal fees each time an error was made. The Sullivan case was an enormous boost to press freedom; subsequently, the Supreme Court extended the "reckless disregard" standard to public figures as well as public officials.

The media's protection against government interference was greatly strengthened by the Supreme Court's 1971 ruling in the Pentagon Papers controversy. In that case the court resoundingly rejected the federal government's attempt to block the publication of confidential documents in the name of national security.

With such strong affirmations of press freedom from the nation's highest court, the hope was that the media could report the news without being concerned about lawsuits and government interference. Indeed, that seemed to be the case during the 1970s, when major news outlets such as *The Washington Post* and *The New York Times* took an aggressive posture in investigating the Watergate scandal—and thereby helped to bring about the resignation of President Richard Nixon.

The Watergate glamour days of the media were short-lived, however. The shift of the country to the right brought with it a backlash against *Post* Watergate reporters Woodward and Bernstein and their brethren. The reaction was apparent in the courts as well as in public opinion. During the 1980s there was a dramatic rise in libel litigation across the country. *The Philadelphia Inquirer*, an ardent practitioner of investigative reporting, found itself at one point responding to 15 different libel suits. Retired Gen. William Westmoreland brought suit against CBS in response to a documentary that charged

that he had falsified reports to his superiors during the Vietnam War. Israeli Gen. Ariel Sharon sued *Time* magazine for the way it characterized his connection to a massacre of Palestinian civilians.

It was also during the 1980s that the press was subjected to an all-out effort by the Reagan administration to manipulate the way in which events were covered. Some of this was merely aggressive public-relations management, especially the sophisticated staging of presidential appearances. Yet the Reagan administration also resorted to stronger measures to try to control coverage. Secrecy policies were greatly intensified, and agency cooperation with the press was undermined by rules that established criminal penalties for federal employees who disclosed information without authorization.[2] The administration went a step further during the U.S. invasion of Grenada in 1983. Reporters were barred from the island for several days and were later subjected to other restrictions on their activities. The Reagan White House also initiated the practice of using press pools to control the flow of information and restrict the number of reporters engaged in direct information-gathering. The insidious effects of such policies became apparent once again when they were revived by the Bush administration during the Persian Gulf War.

Where, then, does freedom of the press stand in the 1990s? The truth is that many of the bars to a free and robust press that arose during the 1980s, indeed from the very beginning of the republic, are still with us, along with an assortment of new threats.

Libel awards against the press

The rising tide of libel judgments against the press peaked at the beginning of the 1990s and then declined a bit for a couple of years. Since the middle of the decade, however, the trend has been moving up sharply again. On March 20, 1997, in a case that threatened to "wholly rewrite libel law," according to First Amendment lawyer Floyd Abrams, a federal jury in Houston awarded the highest libel verdict in American history—a whopping $222.7 million—against *The Wall Street Journal* and its parent, Dow Jones & Co. In this case, a Houston jury found five statements made in an Oct. 21, 1993, article to be false and defamatory.

The magnitude of *The Wall Street Journal* verdict reflected the uneasy relationship between journalists and the public. The verdict was nearly four times

LARGEST DEFAMATION VERDICTS

Case	Amount	Decision
MMAR Group Inc. v. Dow Jones & Co. (D. Texas 1997)	$222,700,000	Appeal pending after court eliminated $200 million in punitive damages
Feazell v. A.H. Belo Corp. (Texas 1991)	$58,000,000	Settled
Guccione v. Hustler Magazine (Ohio 1980)	$40,300,000	Reversed
Lerman v. Flynt Distributing Co. (2d Cir. 1983)	$40,000,000	Reversed
Sprague v. Philadelphia Newspapers (Pa. 1990)	$34,000,000	Settled following reduction to $24 million
Srivastava v. Hart Hanks (Texas 1990)	$29,000,000	Settled
Pring v. Penthouse International (10th Cir. 1981)	$26,535,000	Reversed
Newton v. NBC (D. Nevada. 1986)	$19,200,000	Reversed
Prozeralik v. Capital Cities/ABC (New York 1991)	$18,487,000	Remanded; $11.5 million award at second trial; subsequently settled after appellate court reversed punitive but affirmed compensatory damages, reducing award to $11 million
Nguyen v. Nguyen (California 1991)	$16,080,000	$5.08 million judgment neither appealed nor satisfied by bankrupt defendant
Newcomb v. Plain Dealer (Ohio 1990)	$13,500,000	Settled

Source: Libel Defense Resource Center

higher than the previous record for a libel verdict, $58 million in a 1991 case against a Dallas television station. Not surprisingly, when *The Wall Street Journal* appealed the amount of the verdict two months later, Judge Ewing Werlein in New York eliminated the $200 million in punitive damages, letting stand the almost $23 million in actual damages. Dow Jones appealed, but on Nov. 6, 1997, a federal judge in Houston upheld the $22.7 million award.

The Wall Street Journal award is part of a trend: Punitive damages are playing a larger role in libel verdicts. Punitive awards against the press in 1996 averaged $2.8 million, a dramatic increase over the average of $1.6 million for the 1994-95 period, according to a study by the Libel Defense Resource Center, although there were fewer libel trials in 1996 than during the 1980s. The LDRC data also suggested that juries levied significantly higher damages against defendants in libel cases than they did against defendants in product liability and medical malpractice suits.[3]

Punitive awards against the press in 1996 averaged $2.8 million, a dramatic increase over the average of $1.6 million for the 1994-95 period.

The roar of Food Lion

While the judgment in *The Wall Street Journal* case is troubling to the press in quantitative terms, a verdict in a case brought by the Food Lion supermarket chain represents a serious qualitative threat. Food Lion Inc. sued ABC News in response to a 1992 "PrimeTime Live" story on allegedly unsanitary practices in the meat departments of the nation's fastest-growing supermarket chain. The story was based on hidden-camera documentation gathered by ABC producers who got themselves hired at Food Lion by falsifying their résumés and without disclosing their journalistic affiliations.

Food Lion did not bring a libel suit against ABC. Instead, the company charged the television network with trespass and fraud for the way in which the producers gained access to the supermarkets. This move allowed Food Lion to sidestep First Amendment considerations and the issue of whether the reporting was accurate. Instead, the company made ABC's reporting practices the issue. A jury in Greensboro, N.C., was persuaded that the network had acted improperly, and awarded punitive damages of $5.5 million to Food Lion in January 1997. In arguing ABC's appeal of the judgment before U.S. District Judge Carlton Tilley on June 24, attorney Nat Lewin said that they were unconstitutional and were justified only if bodily harm were involved. "This opens the door to permit these kind of lawsuits and threatens future investigative reports like this," said Lewin.[4] The award was reduced later to $315,000

Jane Kirtley, executive director of the Reporters Committe for Freedom of the Press, maintains that the Food Lion case "is not the poster child of what's wrong with journalism today." Surely, the public had seen it before: a hard-hitting, hidden-camera investigation by journalists, revealing the dangerous practices of an industry leader.

The Food Lion case, along with other high-profile legal attacks on the media, signaled the advent of a new type of litigation technique aimed at avoiding tra-

ditional free-press jurisprudence. These lawsuits, dubbed "trash torts" by *Chicago Tribune* lawyer Dale Cohen, include such claims as invasion of privacy, intrusion upon seclusion, infliction of emotional distress, tortious interference, trespass, fraud and others.

Other incidents involving controversial journalism practices over the last decade include:

- In its quest to expose allegedly faulty gas tanks on General Motors pickup trucks, NBC's "Dateline" investigators rigged an explosion. GM filed suit and forced the network to settle and reveal its deceptive practices. Ironically, months after the program, then-Transportation Secretary Federico Pena declared the trucks unsafe and likely responsible for 150 deaths. GM agreed to spend $51 million on safety and research programs rather than pursue a legal battle with the government.
- To produce a segment on sanitation practices at a meat-packing plant in Rapid City, S.D., CBS's "48 Hours" staff persuaded an employee at the plant to wear a hidden camera during his shift. In an unsuccessful effort to prevent the video from airing, the meat-packing company filed suit alleging trespass, invasion of privacy, breach of duty of loyalty, and violation of the Uniform Trade Secrets Act.
- "60 Minutes" decided not to air a story on practices of the tobacco industry, demonstrating the chilling effect of outside pressure combined with in-house fear of expensive legal action. CBS had interviewed on tape Jeffrey S. Wigand, a former executive of Brown & Williamson, the nation's third largest tobacco company. While still investigating Wigand's allegations, a producer of "60 Minutes" was advised by CBS to drop the story. The reason: CBS lawyers were concerned that, in pursuing Wigand's interview, producers may have interfered with a confidentiality agreement signed by Wigand before he left Brown & Williamson.

Interestingly enough, not all of the public shares the Food Lion jury's disdain for deception in news-gathering. According to a Media Studies Center/Roper Center survey released Feb. 12, 1997, by The Freedom Forum, 59% of those aware of the Food Lion case thought the $5.5 million penalty against ABC News was too severe. Even so, some print journalists and columnists took ABC to task for its reporting techniques. Columnist A.M. Rosenthal of *The New York Times* said that by going undercover at Food Lion, ABC investigators had done what they would "never willingly allow done to themselves."

Rather than dismissing these cases as misguided or mean-spirited, the journalism world appears to be taking quite seriously public complaints about deceptive practices, hidden cameras, and attempts to lift television ratings through misleading coverage. Some worry that overreaction will defang the public's watchdog. Even though aggressive reporting has been responsible for many of the key achievements of modern U.S. journalism, the fear of legal entanglements tends to make reporters and editors seek refuge in safer stories. Bruce Sanford, a veteran First Amendment lawyer, is concerned that in that sort of atmosphere the media "will give us more stories about Dennis Rodman and Madonna instead of more stories that are important to us."[5]

Judges and journalists in conflict

In our democratic system, one of the key roles of the media is to serve as court reporter to the public. We rely on the press to report about the justice system—both because of the vital information that often is revealed during trials and because the public nature of courtroom proceedings is supposed to promote fairness to the parties in them. Those two goals, however, are not

always in harmony. All too often there is a conflict between the First Amendment guarantee of freedom of the press and the Sixth Amendment right to a fair trial. In the past, courts have been circumspect in their rulings, but recently they have leaned more toward fair-trial interests. The results are restraints—often of an undue nature—on media coverage.

Limitations on media coverage of court proceedings have taken several forms. Courts have banned cameras and other electronic coverage from the courtroom, restricted press access to courtroom proceedings, forced journalists to reveal confidential sources of information, sealed records and placed gag orders on trial participants.

Public debate over press coverage of court proceedings reached an all-time high during the 1995 double-murder trial of O.J. Simpson.

Allowing cameras in the courtroom

The right of the accused to a public trial dates to English common law. In the United States, as far back as 1807, the Supreme Court dealt with the problem of selecting an unbiased jury because of newspaper accounts in the highly publicized trial of Aaron Burr for treason. In 1935, after the "circus atmosphere" at the trial of Bruno Hauptmann in the Lindbergh baby kidnapping case, the American Bar Association adopted guidelines against the use of cameras in the courtroom.

Thirty years after the Lindbergh trial, the Supreme Court faced its first evaluation of the effects of televised courtroom proceedings in the 1965 case of *Estes v. Texas.*[6] The defendant, Billie Sol Estes, was an associate of President Lyndon Johnson and was charged with swindling. According to those who participated in the *Estes* trial, the media's presence in the courtroom created a "chaotic" scene. At least 12 cameramen were set up in the courtroom to record the trial. Cables and wires for camera equipment snaked across the courtroom floor, while microphone booms loomed over the jury box, judge's bench and counsel tables. In a 5-4 decision, the Supreme Court held that under such circumstances the defendant's Sixth Amendment rights had been violated, and his conviction was reversed. In agreeing with the majority, however, Justice Harlan cautioned that the decision in *Estes* should not become the bright-line rule for cameras in the courtroom.

Televised coverage of courtroom proceedings has changed dramatically since the chaotic *Estes* case. Technology has made camera coverage less intrusive, enough so that little physical distinction remains between televised coverage and other forms of press coverage. Today, 48 states allow camera coverage of court proceedings, subject to restrictions. In 1996, after abandoning a three-year tryout of cameras in selected federal courtrooms, the Judicial Conference of the United States lifted a ban on camera coverage of appellate cases, leaving the decision to the individual circuit courts of appeals.

Public debate over press coverage of court proceedings reached an all-time high during the 1995 double-murder trial of O.J. Simpson. For months, the country watched the Simpson trial through a single, stationary camera inside the courtroom and viewed proceedings even the jury did not see. Some argued that the outcome of

the case was unfairly influenced by the obvious presence of the media, while others praised the public nature of the trial and the public discussion of the issues it raised. Columnist Nat Hentoff, for instance, wrote: "For weeks, I was astonished—and pleased—to listen to arguments about the constitutional limits to search and seizure in bars, on stoops of buildings on my street and in my house. Many of those involved in the discussions knew nothing about the Fourth Amendment beforehand."[7]

In terms of press freedom, however, the most significant consequence of the Simpson case was that it made many judges increasingly inclined to close their courtrooms to television coverage. Because no absolute First Amendment right exists with regard to televised courtroom proceedings, television coverage usually remains up to the discretion of the presiding judge. Not all judges value the benefits of a televised trial to the same extent. In Simpson's subsequent wrongful-death civil trial, for instance, Judge Hiroshi Fujisaki issued an order forbidding cameras and other electronic recording devices; he also imposed a broad gag order on trial participants.[8]

A federal judge in Denver presiding over the trial of Oklahoma City bomber Timothy McVeigh was required by a special law passed by Congress to loosen up on his restrictions on access to the trial for the bombing victims and their families.

Moreover, the highest court in the land, the U.S. Supreme Court, continues to forbid camera access at its oral arguments. Perhaps Justice Souter best summed up the majority of his colleagues' attitude about cameras in the Supreme Court: "The day you see a camera coming into our courtroom, it's going to roll over my dead body."[9]

Press access to civil-court proceedings

Although the press and public are more attracted to sensational criminal trials, the public is more likely to be directly affected by civil-court cases. This makes restrictions on press access to civil proceedings particularly troubling. The Supreme Court has never decided whether the public has a First Amendment right of access to civil proceedings, yet many federal and state courts have held that civil court cases are assumed to be public.

The rules concerning civil-court documents and discovery materials are much less clear. Civil-procedure rules allow parties to get an order to place documents under seal and permit federal courts to issue protective orders sealing discovery materials to prevent "annoyance, embarrassment, oppression or undue burden or expense" but only after a finding of "good cause." Most states have similar or identical rules of civil procedure. Only three states—Texas, Florida and North Carolina—have adopted rules more protective of the public's interest in discovery material filed in civil cases.

A significant test of these rules is taking place with regard to the current legal maneuvers involving the tobacco industry and its adversaries. In March 1997 one of the smaller cigarette manufacturers, Liggett Group Inc., reached a settlement with the attorneys general of 22 states that had sued tobacco companies to seek compensation for billions of dollars in annual costs for treatment of Medicaid recipients with smoking-related diseases. As part of the settlement, Liggett agreed to turn over thousands of pages of internal papers that dated back to the 1950s and reportedly showed that the tobacco industry had obscured potentially damaging information. Lawyers for the other cigarette makers immediately went to court in Florida to try to block the release of those documents to the public. However, in April, Judge Harold J. Cohen of the Palm Beach County District Court said

that the documents would be sealed for just one week, to give tobacco industry lawyers time to appeal his decision.[10] Subsequently, industry attempts to resist disclosure pressed on, in the face of requests for information from state attorneys general and Congress.[11]

Access to court documents also can be an issue in criminal cases. In 1996 Mike Donoghue, a reporter for *The Burlington* (Vt.) *Free Press,* was denied access to affidavits filed by the U.S. Agriculture Department to support raids of a meatpacking plant in Middlebury, Vt., suspected of violating federal rules covering meat inspection. Donoghue's request for access to this information was first denied, at the urging of the U.S. attorney, who feared release of the information would interfere with the government's criminal investigation. Donoghue then petitioned the court for release of the documents. In February 1997, after reviewing the requested material, the judge decided that only a few paragraphs could not be disclosed.[12]

The trend in many courts is to encourage secret negotiations and settlements in the interest of efficiency and privacy

Out-of-court settlements often inaccessible

In criminal cases, the terms of a sentence or plea are routinely available to the public. By contrast, when civil cases settle out of court, few people witness the results. Although these settlements are often between private parties, they take place in a public-supported venue and their outcomes often affect the public more than we realize. In civil cases involving defective products and medical malpractice, defense attorneys have used the out-of-court settlement as a means of shielding their clients from negative publicity. As Arthur Bryant, executive director of Trial Lawyers for Public Justice, observes, "Few people realize the incredible impact that secret settlements have on the public welfare." Out-of-court settlements, for example, can involve defective products that have caused injury or death to hundreds of people. A few high-profile examples include:

Defective gas tanks. More than 500 people died after Ford Pintos caught fire because of defective gas tanks. It was subsequently revealed that the company was settling death claims under secrecy agreements in order to conceal the vehicle's defect. Similarly, General Motors kept records of unsafe fuel tanks secret for years by entering into confidential settlements, requesting protective orders, or keeping entire lawsuits filed under seal.

Silicone breast implants. Dangers of silicone breast implants were hidden for eight years by a protective order that kept litigation documents confidential. The existence of company records that raised serious doubts about the safety of Dow Corning's implants was first discovered in late 1983 by a lawyer for Maria Stern, who sued Dow Corning for immune system disorders allegedly caused by her silicone implants. Because of the court's protective order, the press could not report to the public the dangers of silicone implants until December 1991, when the FDA first began its investigation into the dangers of implants. Had the public been informed of the dangers of breast implants at the time of Stern's lawsuit, silicone breast implants might have been regulated in 1985 or 1986.

Exploding cigarette lighters. In 1982, a New York City nurse was the victim of an allegedly defective Bic cigarette lighter that exploded in her face, causing permanent disfigurement. Bic had settled numerous similar claims prior to this accident and routinely required the return of all discovery documents as a condition of settlement.

Defective televisions. Three children died in 1983 in a fire blamed on a defective Zenith television set. During subsequent litigation, it was discovered that more than 100 cases had been secretly settled involving fires caused by Zenith sets.

These are just a small portion of countless instances of civil-case information being shielded from public scrutiny. Although there is ample evidence of the potential harm to the public caused by secret settlements, little is being done to correct this problem. The trend in many courts is to encourage secret negotiations and settlements in the interest of efficiency and privacy. However, doing so erects barriers to the press and thereby keeps the people in the dark about cases that could ultimately affect their health, their safety and their lives.

Gag orders and the press

Press coverage of courtroom proceedings is often limited by other court-imposed restrictions. Judges frequently issue gag orders in both criminal and civil proceedings to prevent publicity from interfering with the Sixth Amendment right to a fair trial. Through the years, two forms of gag orders have been used by the courts: orders restricting what the media can print and orders restricting communication between trial participants and the media.

In 1976 the Supreme Court affirmed the media's right to publish information concerning judicial proceedings. In *Nebraska Press Association v. Stuart,*[13] the court effectively prohibited direct judicial suppression of material that the press may publish concerning a trial. Although the court said the press has a presumptive right to report events of a trial, its ruling did not open the courthouse doors completely for the press.

In another case, the Supreme Court refused to lift a gag order barring a news organization from publishing material it had obtained through legal methods. The case concerned taped conversations between deposed Panamanian dictator Manuel Noriega and several people, including his attorneys, while Noriega was in prison awaiting trial. Prison officials had taped the conversations, and Cable News Network obtained them legally. Noriega's attorneys requested a temporary restraining order barring CNN from broadcasting excerpts from the tapes, and the Supreme Court subsequently refused to void that order. While awaiting the results of an appeal of the gag order, CNN aired the tapes. The network's decision to broadcast the tapes resulted in a criminal contempt conviction against CNN four years later. As part of CNN's penalty, the network was forced to broadcast a court-approved apology to the trial judge and reimburse the government $85,000 in legal fees.

Notwithstanding the CNN decision, direct judicial suppression of the press

Direct judicial suppression of the press remains infrequent, but courts have found different ways to limit the media's reporting to the public.

remains infrequent, because orders preventing the publication of court proceedings are usually found unconstitutional on appeal. But courts have found different ways to limit the media's reporting to the public about court proceedings.

Judges also respond to trial publicity by issuing gag orders directed at the extrajudicial speech of trial participants: defendants, defense attorneys, prosecutors, jurors, witnesses and police officers. A typical trial-participant gag order will restrict the right of participants to communicate with the press about the trial. Parties to a proceeding usually request such an order, but judges may also issue a trial-participant gag order on their own initiative.

Gagging the speech of trial participants affects First Amendment rights in two ways. First, and most obvious, the silencing of trial participants is a prior restraint on the right of free speech. But these gag orders also frustrate the media's ability to gather information about a trial. Through such an indirect order, a court may infringe on the rights of a free press. Because press coverage of a highly publicized trial is potentially prejudicial to participants, determining the level of communication between participants and the media requires a delicate balancing of First and Sixth amendment rights. Too often, however, the scales are tipped against the press, and, consequently, the public's right to know.

Court subpoenas of press information

Court-initiated restrictions on freedom of the press can sometimes reach directly into the newsroom. In numerous cases, courts have compelled journalists to reveal confidential sources of information and have issued subpoenas allowing police to search newsrooms for evidence related to the investigation or prosecution of a criminal offense.

The Supreme Court, in the 1972 landmark case of *Branzburg v. Hayes*,[14] ruled that reporters have no First Amendment right to refuse to testify and answer all questions posed by a grand jury. A reporter, therefore, may be compelled to testify by a court through the use of a subpoena. Following *Branzburg*, the Supreme Court held that a warrant may be issued to search newsrooms if evidence of a crime is likely to be found.

Recognizing the damaging effects that these rulings could have on freedom of the press, Congress passed the Privacy Protection Act of 1980, which prevented government officials from searching newsrooms for "work product" or "documentary materials." Moreover, court rulings following *Branzburg* established a three-part balancing test for determining when a journalist could be required to testify. These three parts are: (1) whether a journalist knows the source of the information being sought by a party; (2) whether there is no other source of the information; and (3) whether there is a compelling need for the material. Additional protection for journalists has come from shield laws enacted in more than two dozen states.

Despite the presence of these theoretical protections, a study by the Reporters Committee for Freedom of the Press found that 52.1% of all news organizations surveyed had been subpoenaed during 1993. In addition, newsrooms continue to be searched for evidence of crimes. The power of police to conduct such searches was enhanced by a 1996 amendment to the Privacy Protection Act that allowed government officials to search newsrooms if the search was related to alleged child pornography and child-exploitation offenses.[15]

Often, in important criminal proceedings, courts will find that the public interest is served by compelling a reporter to testify. Reporters are likely to receive qualified constitutional privilege in cases where they are not a party, but in libel cases, reporters often

JOURNALISTS IN JAIL

A list of reporters jailed or fined during the 1990s for refusing to testify; compiled by the Reporters Committee for Freedom of the Press:

1990, Brian Karem, San Antonio, Texas
Subpoenaed by defense and prosecution; refused to reveal names of individuals who arranged jailhouse interview. Jailed for 13 days. Released when sources came forward.

1990, Libby Avery, Corpus Christi, Texas, newspaper
Subpoenaed for information about jailhouse interview. Jailed over weekend; released when judge was convinced she would never reveal her source.

1990, Tim Roche, Stuart, Fla., newspaper
Subpoenaed to reveal source for leaked court order that was supposed to have been sealed. Jailed briefly, released pending appeal. Later sentenced to 30 days for criminal contempt. Served 18 days in 1993 and was released.

1991, Four reporters in South Carolina
Jailed for eight hours; released for appeal, which they lost, but trial was over. Court sought unpublished conversations with state senator on trial for corruption.

1991, Felix Sanchez and James Campbell, Houston, newspaper
Locked in judge's chambers for several hours; had refused to stand in back of courtroom and identify possible eyewitnesses to crime. Appeal successful through *habeas corpus* petition.

1994, Lisa Abraham, Warren, Ohio, newspaper
Jailed from Jan. 19 to Feb. 10, for refusing to testify before a state grand jury about jailhouse interview.

1996, Bruce Anderson, editor of California newspaper
Found in civil contempt, jailed for more than a week for refusing to turn over original letter to editor received from prisoner. After a week, he tried to turn over letter, but judge refused to believe it was original because it was typed. After another week, judge finally accepted the typewritten letter as the original.

1996, David Kidwell, Palm Beach County, Fla., Miami Herald reporter
Found in criminal contempt, sentenced to 70 days for refusing to testify for prosecution about jailhouse interview. Kidwell served 14 days before being released on own recognizance after filing federal *habeas corpus* petition.

Some lengthy imprisonments of previous years included:

1978, Myron Farber, New York City
Served 40 days in jail when he refused to reveal sources in criminal trial.

1972, William Farr, Los Angeles
Jailed for 46 days, for refusing to reveal sources in criminal proceedings.

Fines imposed since 1990 on journalists found in contempt for protecting sources or unpublished information:

1991—$500 (each) against James Campbell of *Houston Chronicle* and Felix Sanchez of *Houston Post* for refusing to identify sources who might attend criminal trial; federal district judge reversed.

1992—$2,000 per day, plus $4,000 in government's legal fees, against Susan Smallheer and *Rutland* (Vt.) *Herald*. Sought interview with prison escapee. State high court ruled prospective contempt fines and attorney fees were improper.

1996—$500 ($250 per day for 2 days) against *Minnesota Daily*, a university newspaper, for refusing to turn over photos.

1996—$500 against David Kidwell of *Miami Herald* for criminal contempt, with 70-day sentence for failing to testify for prosecution about jailhouse interview.

are compelled to reveal sources in order to prove that their reporting was accurate. The Reporters Committee for Freedom of the Press publishes a growing list of reporters recently jailed for refusing to testify in court.

> Efforts by people within the news industry to address simple questions about changes in the relationship between journalism and the public are timely and important

Some lawyers have found ways to do an end-run around these legislative protection, as well. For instance, instead of requesting pictures of evidence of a crime from photojournalists, lawyers will compel them to testify about what they saw. This method can be used to invoke an eyewitness exemption to state shield laws and federal legislation.

Public journalism: Press heeds critics

Since the early days of the nation, journalism has helped shape the way Americans think about community and public life. A sense of Americans' being part of a community is announced in the first word of the Declaration of Independence: "*We* hold these truths to be self-evident." The nature of this community has become clearer through journalism practice and jurisprudence involving the First Amendment over the last 200 years. The print press generally has had great latitude to write, publish and distribute what it pleased. Assembling, speaking and writing are activities on which the press and citizen participation are based.

In the late 1980s, some journalists and academics concluded that the press was contributing to democracy's failing health. They took the lead in developing what is called public journalism, also referred to as civic journalism or community journalism. Pioneers in this movement included Jay Rosen of New York University and Davis "Buzz" Merritt, editor of *The Wichita* (Kan.) *Eagle*. A primary tenet of this movement is that journalists should be more connected to their communities and need to do a better job of responding to the public's concerns and interests in reporting on public life.

Among the questions raised by the advocates of the new public/civic/community journalism is the role of money, especially from non-news sources outside the community, in how fully the local press (print or electronic) takes on its task of informing the public. J. Herbert Altschull, a veteran newsman who has worked in the U.S. and Western Europe, writes: "Community journalism demands putting the public interest ahead of the maximization of profit."[16] Merritt laments what he terms journalists' "congenital defensive crouch," which limits their ability to see their role in public life and to respond to serious criticism.[17]

Many journalists and journalism groups also have launched initiatives to increase public trust in the media by improving the media's accountability and responsibility. Some, like Mike Wallace of CBS's "60 Minutes," have called for a resurrection of a national news council to monitor the press.

Such efforts by people within the news industry to address simple questions about changes in the relationship between journal-

ism and the public are timely and important to preserving the central role of the press. In addition to the widespread public criticisms being heard about the industry, the press is contending with expanding competition from a variety of sources, including the Internet, and shrinking numbers of readers and viewers.

Press activities in 'enemy' countries

In 1961 the U.S. and Cuba severed relations. Since 1969, when The Associated Press was expelled, until 1997, no U.S. press outlet had a permanent base in Cuba. Moreover, because of the U.S. economic embargo, U.S. journalists who wanted to cover stories in Cuba had to do so by visiting the country briefly and then returning to their bases in Miami, Mexico City or elsewhere. This policy enabled the U.S. government to claim that it was not interfering with press freedom, while at the same time preventing news organizations from contributing to the Cuban economy by operating a permanent office in a country that the U.S. government wished to sanction.

In 1996 Congress passed the Helms-Burton Act,[18] which adopted an entirely different approach to newsgathering in Cuba. Section 14 of the law establishes conditions for an exchange of news bureaus between the two countries, but it stipulates that the exchange be "fully reciprocal" and that only "fully accredited journalists regularly employed by news gathering organizations" can travel to Cuba under this subsection. In other words, the law created a system under which the federal government could decide which news organizations would be authorized to open bureaus in Cuba.

Early in 1997, the Clinton administration granted one-year licenses to 10 news organizations to open such bureaus. These included: CNN, ABC, CBS, Univision, *The Miami Herald*, Dow Jones News Services, Cuba Info, the *Chicago Tribune* and the *Fort Lauderdale* (Fla.) *Sun-Sentinel*. So far, only CNN has been allowed by the Cuban government to open an office and begin reporting. Significantly, Louis Boccardi, AP president and chief executive officer, said, "We welcome the American action and continue, as we have been doing for several years, to press the Cubans for their approval."[19]

When interviewed for this report, Clara David, an official in the licensing division of the Office of Foreign Assets Control at the Treasury Department, said that the federal government was not licensing journalists. "We are licensing the right to do business transactions on Cuban soil."[20] This distinction is not reassuring to press advocates. The mere fact that Helms-Burton requires news organizations to apply to the government to carry out an aspect of their work sets a disturbing precedent—especially for the print media, which have traditionally been entirely free from any kind of government regulation. Granting licenses for only one year raises the possibility that government officials would link license-renewal decisions to an evaluation of how news organizations did their reporting from Cuba.

In his landmark book, *Technologies of Freedom*, the late Ithiel de Sola Pool

The mere fact that Helms-Burton requires news organizations to apply to the government to carry out an aspect of their work sets a disturbing precedent.

warned: “Having print as an island of freedom might be assurance enough against total conformity to authority. But the situation is not stable.”[21] The Helms-Burton Act increases that instability by introducing a new form of press regulation linked to ideological and foreign-policy considerations.

Military press pools

During the Vietnam War, reporters had virtually unrestricted access to military operations and were thus able to provide the U.S. public with a candid account of a war that ended with America’s first defeat in a major foreign conflict. In the wake of Vietnam, military and government officials took steps to ensure that this public relations debacle—from their point of view—was not repeated. The determination to avoid a repetition of the Vietnam press problem was demonstrated most clearly during the Reagan and Bush administrations. Strict regulations covering news-media activities were put into effect during the invasion of Grenada in 1983, the Panama military operations in 1989, and the Persian Gulf War, beginning in the summer of 1990. Coverage was controlled most effectively through the use of press pools—small numbers of reporters who were given limited access to military operations and information that they were supposed to share with their colleagues, who were kept even further from the action.

During the Gulf War, pool members were required to remain with escort officers at all times. Additional ground rules listed 10 categories of information designated “not releasable”—a list that included clearly sensitive information, such as the number of troops and aircraft and future operations, as well as less-sensitive material such as the names and hometowns of personnel interviewed, except for the unit commander.[22] Reports subject to review by military officials and relayed by pool journalists were the primary news accounts of the invasion available to the public.

Shortly after the war ended, some of the information that had been provided was found to be inaccurate or misleading by omission. By 1997, the credibility of the Department of Defense could hardly have been more suspect. After two years of denying the exposure of American soldiers to Iraqi chemical weaponry, the Pentagon admitted there had been exposure of soldiers to small quantities of chemical agents. The loss of files and delay in the release of information by the Pentagon, as well as disclosures by the CIA that it had known for years about chemical weapons in Iraq, raised criticisms and accusations of a cover-up.

The possibility of real-time reporting in the future had made the military recognize that it would have to issue new press-pool guidelines for future military conflicts. However, it was unclear how either the press or the public would react. In 1991 nine news organizations and four journalists filed a lawsuit demanding an injunction to prevent the military from enforcing its ground rules, and Agence France-Presse—a French news service with an office in New York—filed another. The two suits maintained that the press had a right to unlimited access to an arena of American military conflict. The Pentagon argued that the First Amendment does not bar the government from restricting access to combat. The issue could not be settled before the war ended. Federal Judge Leonard Sands, who released a decision in the case in April 1991, concluded that because the war was over and the press restrictions were no longer active, “prudence dictates that a final determination of the important Constitutional issues at stake be left for another day when the controversy is more sharply focused.”[23]

To a great extent, it will be up to the public to de-

mand more complete coverage the next time American soldiers engage in military conflict. Much of the public seemed satisfied with controlled news during the Persian Gulf War, yet dissatisfaction with what was *not* disclosed during the war has increased since then. According to Jane Kirtley of the Reporters Committee for Freedom of the Press, "The military has become inexorably committed to a censorship scheme." The clash between the military's penchant for secrecy and the demands of a free press, which is essential to American democracy, was analyzed in depth in *America's Team: The Odd Couple, a Report on the Relationship between the Media and the Military* (published by The Freedom Forum in 1995).

Student journalism

There has long been tension between school officials and students over open and free expression. In 1969, the Supreme Court said students have First Amendment rights everywhere, including in the public schools. They "may not be confined to the expression of sentiments that are officially approved."[24] However, a series of court rulings since have favored school restrictions on disruptive and "indecent" student remarks, campus campaign literature, political demonstrations and student media.

The most significant of these was the 1988 Hazelwood ruling, in which the Supreme Court upheld an action by a Missouri high school principal who deleted articles about teen-age pregnancy and divorce from a student newspaper. This ruling encompassed all "school-sponsored non-forum student activity that involves student expression" and, in essence, put a cap on the First Amendment rights of students.[25] Censorship by the principal was found to be acceptable, so long as it was done in a reasonable manner and served legitimate pedagogical objectives.

Mark Goodman, executive director of the Student Press Law Center, believes that there is a "trickle up" effect of Hazelwood. Political officials who used to handle complaints about unpopular actions by pointing to the Constitution as a guarantor of free expression now find it necessary to concern themselves with popular sentiment concerning school publications. Schools that never had a problem with a student press organization have moved to assert editorial control. Even worse, according to Goodman, "Students develop their idea of how government may interfere with their First Amendment rights while in high school. This may ultimately have an effect on how they view the role of the First Amendment should they later become journalists for commercial publications."

Students have found, in some situations, that state freedom of information and open-records laws can be re-

CENSORSHIP OF STUDENT MEDIA: ONE HIGH SCHOOL'S STORY

In the fall of 1996, a group of students at Montgomery Blair High School in Silver Spring, Md., produced a television show called "Shades of Grey." A taped debate about same-sex marriage, the program consisted of a four-guest panel, equally divided according to point of view. Ordinarily, the program would have aired live on a local government education channel, but a last-minute decision was made by school administrators to drop the live broadcast, reasoning that this topic had no place on a cable channel devoted primarily to broadcasting school board meetings.

The students were advised, nevertheless, to continue with the taping of the show. They did so and submitted the tape to school authorities, who refused to air it because of what they considered its controversial content. The student producers of the show then appealed the school system's action to the Board of Education and argued that they had been censored in violation of state and federal laws governing student expression.

After the students met with a hearing officer in December, the officer issued a report citing reasons why the show should not air. Oddly, the content of the program was not the main focus of his report. Instead, the officer called the programs' technical qualities into question.

In April of 1997, the Montgomery County Board of Education voted to allow the production to air. School officials denied that censorship had occurred, but they had already formed a committee headed by Superintendent Paul Vance to recommend new guidelines for programming that appeared on the channel.

lied on in their journalism projects. In 1997 the Ohio Supreme Court ordered Miami University to release copies of records from its University Disciplinary Board to the student newspaper, *The Miami Student*,[26] after the university had refused, saying that a federal law[27] created an exception to the Ohio Public Records Act. The court disagreed, emphasizing the importance of campus crime information to students and their families and noting that the purpose of the Ohio Public Records law is "to encourage the free flow of information where it is not prohibited by law."[28]

Six states—Arkansas, California, Colorado, Iowa, Kansas and Massachusetts—have enacted laws that protect the free-expression rights of students in different ways. The discrepancies that exist among states point to a need for a federal law protecting the rights of the student press.

Conclusion

In the second half of the 1990s, freedom of the press remains alive in the United States, but it can hardly be said to be thriving. Huge libel awards and other forms of litigation are weakening the inclination of the press to carry out its watchdog function. Courts often consider press coverage to be inimical to the goal of fair trials. The federal government and the Pentagon want to control what journalists report during military conflicts. The country's youngest journalists—those still in school—often are denied the very rights they are taught about in civics classes.

To make matters worse, the American public seems to have developed a suspicion of the press that breeds tolerance of disturbing developments such as the Food Lion case. According to Ed Fouhy, who has 30 years of experience in broadcast journalism, "The deepest wound is the erosion of public support of the First Amendment, which has reached alarming levels." Recent surveys have shown flagging support for press freedoms. A national survey conducted for this report found that only 5% of Americans put freedom of the press on their list of rights important to society. Only 11 percent could name freedom of the press as one of the five rights guaranteed by the First Amendment. Nearly four in 10 believe that the press has too much freedom. (*See Chapter 6.*)

Certainly, the press itself bears some responsibility for these attitudes. A tendency toward sensationalism, a rush to report unsubstantiated statements and other forms of sloppy reporting continue to weaken the relationship between the press and the public. The media should be—and in fact routinely are—taken to task for their shortcomings and lack of accountability. Yet it should be kept in mind that freedom of the press does not require that the press carry out its duties flawlessly. Intimidating reporters and editors with lawsuits and government restrictions will not improve the quality of journalism. Such actions will serve only to make the press more timid—which in the end will work to the detriment of everyone in a democratic society.

Huge libel awards and other forms of litigation are weakening the inclination of the press to carry out its watchdog function.

[1] Alien and Sedition Act, *Encyclopedia Britannica*, Vol. 1, p. 270, 1995.

[2] Donna Demac, *Keeping America Uninformed* (New York: Pilgrim Press, 1984); Susan Tolchin and Martin Tolchin, *Dismantling America: The Rush to Deregulate* (Boston: Houghton Mifflin, 1983).

[3] "Study says libel awards rise in '96," *Editor & Publisher*, March 8, 1997, p. 50.

[4] "ABC appeals $5.5M Food Lion judgment," by Peter Johnson, *USA TODAY*, June 25, 1997.

[5] James Boylan, "Punishing the Press," *Columbia Journalism Review*, March-April, 1997, p. 25.

[6] Estes v. Texas, 381 U.S. 532 (1965).

[7] Nat Hentoff, "The High Court's Selfish Secrecy," *The Washington Post,* March 15, 1997, p. A23.

[8] In an interesting circumvention of the rule banning cameras from Simpson's subsequent wrongful-death civil trial, the "E! Channel," using look-alike actors, broadcast reenactments of the trial based on trial transcripts.

[9] "High Court TV," by Tim O'Brien, *The New York Times*, Jan. 6, 1997, p. A17.

[10] *Fort Lauderdale* (Fla.) *Sun-Sentinel*, April 19, 1997.

[11] Barry Meier, "New Debate in Tobacco Deal: Forcing Disclosure of Secret Files," *The New York Times*, July 20, 1997, p. 13.

[12] Mike Donoghue, "Packing Documents Released: Judge Orders Affidavits in Slaughterhouse Investigations Be Made Public," *The Burlington* (Vt.) *Free Press,* Feb. 9, 1997, p. 1B; Mike Donoghue, "U.S. Judge Sides With Public's Right to Know," *The Burlington* (Vt.) *Free Press,* Feb. 9, 1997, p. 8B.

[13] Nebraska Press Association v. Stuart, 427 U.S. 539 (1979).

[14] Branzburg v. Hayes, 408 U.S. 665 (1972).

[15] Child Pornography Protection Act, 18 USCA Section 2251 nt.

[16] J. Herbert Altschull, "A Crisis of Conscience: Is Community Journalism the Answer?," *Mixed News: The Public/Civic/Communitarian Journalism Debate*, Jay Black, ed. (Mahwah, N.J.: Lawrence Erlbaum Associates, Inc. 1997), p. 151.

[17] Davis "Buzz" Merritt, *Public Journalism & Public Life: Why Telling the News Is Not Enough* (Hillsdale, N.J.: Lawrence Erlbaum Associates, Inc., 1995), p. 24.

[18] Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. Section 6021 et seq.

[19] AP Worldstream (financial pages), Feb. 13, 1997.

[20] Clara David, Office of Foreign Assets Control, Treasury Department, telephone interview, March 14, 1997.

[21] Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, Mass.: Harvard University Press, 1983), p. 233.

[22] This Persian Gulf press pool information was taken from Jane Kirtley, "The Eye of the Sandstorm: The Erosion of First Amendment Principles in Wartime," *Government Information Quarterly*, Vol. 9/No. 4 (1992), p. 43.

[23] The Nation et al. v. the United States, 762 F. Supp. 1558, Southern District of New York (1991).

[24] Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733, 739 (1969).

[25] Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562 (1988).

[26] The Miami Student et al. v. Miami University et al., Mandamus to compel Miami University to provide records of student disciplinary proceedings held before the University Disciplinary Board to the university's student newspaper, Ohio Supreme Court, July 9, 1997.

[27] Family Educational Rights and Privacy Act (Section 1232g(b), Title 20, U.S. Code).

[28] Ohio Public Records Act (R.C. 149.43).

3 Freedom of Religion

The First Amendment guarantee of religious freedom has been a binding force in this country for more than two centuries. It is a key element of the boldest political experiment the world has ever known. Today, however, there are disturbing signs in the United States that religious liberty—the freedom to believe or not to believe and to practice one's faith openly and freely without government interference—is in danger. People undermining religious liberty include both those who seek to establish in law a "Christian America" and those who seek to exclude religion from public life entirely.

Many of this nation's early settlers came to this country to escape laws that compelled them to support government-favored churches. Yet, before the American Revolution, in many parts of the colonies residents were required to support established churches with their tax money, and religious dissenters were punished. These practices generated strong resentment among many of the freedom-loving colonials. Yet it was not until after the Revolution that the principle of religious freedom was firmly established. The turning point was the successful crusade by Thomas Jefferson and James Madison to get Virginia to adopt the Statute of Religious Liberty in 1786. That law prohibited a state tax in support of all Christian churches in Virginia, but it also declared:

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. ...[1]

The Virginia statute helped to create a climate favoring religious freedom that encouraged Madison to include a similar provision in the Bill of Rights. Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a matter of individual conscience beyond the scope of civil power either to restrain

> People undermining religious liberty include both those who seek to establish in law a "Christian America" and those who seek to exclude religion from public life entirely.

or support. Of particular relevance to our time, Madison viewed state aid and taxation as no less obnoxious to the pursuit of religious freedom than other forms of state interference.

Religion has become a source of divisiveness as people spar and sometimes resort to violence over issues of conscience and belief.

Because of Madison, these sentiments found a secure place as the first freedoms written into the First Amendment—as the establishment clause, requiring the government to remain neutral concerning religion, and the free-exercise clause, guaranteeing the right of all citizens to reach, hold, exercise or change beliefs without government interference.

Religion and society in the 1990s

In our time, religion has become a source of divisiveness as people spar and sometimes resort to violence over issues of conscience and belief like abortion, school prayer and public school curricula. On the one side are those who think that religious fundamentalists and organizations such as the Christian Coalition are trying to impose their beliefs on society and thus undermine the secular tradition in institutions such as the public schools. Samuel Rabinove, retired legal director of the American Jewish Committee who has a strict separationist view of the First Amendment's establishment clause, has written that "[there] has been a gradual but persistent pattern of erosion of the separation principle as, in case after case, the Court has upheld various departures from it."[2]

The 1997 Supreme Court decision in *Agostini v. Felton*,[3] which overturned a 1985 ruling in *Aguilar v. Felton*[4] allowing public schools to provide remedial help to parochial school students outside the school, is a further indication that the court's position regarding the establishment clause is changing. By a narrow 5-4 vote, the court held that publicly paid teachers can go into parochial schools to provide instruction without running afoul of the principle of separation of church and state. Justice Sandra Day O'Connor wrote for the majority, "Placing full-time governmental employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination."

On the other side are those who complain that this society allows insufficient attention, and accords no priority, to religious beliefs, especially in instruction and textbooks. Oliver Thomas, a lawyer who works for a number of different church organizations, says that "there is a bias against religion in academia and the media, although it is not a conscious hostility." William Miller of the University of Virginia has observed, "The successive waves of American intelligentsia keep expecting religion to have vanished. They write whole histories of American life and spirit that skimp the religious element in the imagination of the American people."[5]

The situation is made more complicated by the fact that the religious composition of the United States is becoming more diverse than ever. Along with many groups of Christians and Jews, this country is now home to growing numbers of Muslims, Hindus, Buddhists, and other belivers, as well as nonbelievers.

Waco: A test of tolerance

Religious diversity was made possible by the First Amendment. Now, ironically, reli-

gious diversity makes the First Amendment more necessary and urgent than at any time in our history. The showdown between federal authorities and a group called the Branch Davidians in Waco, Texas, in 1993 was a dramatic demonstration of how difficult it can be to meet the challenges of expanding diversity in the nation's religious life and how important it is for the government to have a better understanding of religious belief along the entire spectrum. The Branch Davidians at Waco, led by David Koresh, were a cult-like splinter group of a larger group that had separated from the Seventh-Day Adventist church over biblical interpretations.

Saying that the group was heavily armed and dangerous, the FBI, the Bureau of Alcohol, Tobacco and Firearms and other agencies laid siege to the Branch Davidian compound in February 1993. After 51 days, the authorities, citing reports of child abuse as their justification, attacked the compound. A huge fire ignited and took the lives of 90 children and adults. Federal officials denied responsibility for the deaths, suggesting that the fire may have been set by the Branch Davidians themselves.[6] Subsequent reports, including some from federal agencies, presented government actions in a much less favorable light. The Waco tragedy has been used by militia and other groups to bolster their challenges to the legitimacy of the federal government—and as justification for the bombing of the federal building in Oklahoma City in 1995.

What is significant in this context is what Waco demonstrated about the federal government's attitude toward religion, or at least the religious beliefs of a fringe group. Federal authorities did little or nothing to try to understand the beliefs of the Branch Davidians and Koresh, according to some analyses of Waco. As Nancy Ammerman, who teaches the sociology of religion at the Candler School of Theology, Emory University, noted: "[Federal authorities] should have understood the persuasiveness of religious experimentation in American history and the fundamental right of groups like the Davidians to practice their religion."[7]

The religious battles of the late 20th century and the increasing diversity of religious belief together pose perhaps the greatest challenge ever for the principle of religious freedom in this country.

Religion and the public schools

One of the critical arenas for the issue of religious freedom in this country has been public education. It is in public schools that the conflict between private religious beliefs and the tradition of public secularism plays out with the most fervor, given that this is where the attitudes of the next generation of American adults are being shaped.

The issue of religion in public schools has sparked a variety of controversies throughout our history. In recent decades, two of the more contentious issues have involved whether evolution or creationism should be given precedence in teaching about the origins of the human race and whether there is a place for prayer in public schools. Prayer remains a major controversy. The proponents of creationism, after losing in court,[8] have refocused their campaign to have creation-

> It is in public schools that the conflict between private religious beliefs and the tradition of public secularism plays out with the most fervor.

ism included in school curricula, to have evolution stricken and to make it financially easier for parents to send their children to private religious schools. That effort has given rise to the current debate over school vouchers.

Prayer in public schools: Constant conflict

> Almighty God,
> we acknowledge our
> dependence on Thee and
> beg Thy blessings upon us,
> our parents, out teachers,
> and our country.

The Supreme Court declared in 1962 that this school prayer—which had been endorsed by the New York State Board of Regents—was state-sponsored establishment of religion, in violation of the establishment clause of the First Amendment.[9] The issue of prayer in public schools has been causing political and social brush fires ever since.

After the *Engle v. Vitale* decision, some complained that the Supreme Court had removed God from the classroom and that the ruling was anti-Christian and anti-American. Nevertheless, the court soon upheld two challenges to school prayers in Pennsylvania and Maryland. The first involved review of a Pennsylvania law that required the reading of at least 10 verses of the Bible at the start of each school day; a Maryland law called for Bible reading or the recitation of the Lord's Prayer.

When it became clear that the Supreme Court was not going to budge from its position barring school-sponsored prayer, 25 state legislatures adopted laws providing for a "moment of silence" at the beginning of each school day. These state statutes have led to a succession of Supreme Court decisions striking down laws whose "sole purpose" was to foster prayer in public schools.

The Supreme Court has indicated in several decisions over the last decade that teaching about religion in public schools is constitutional.

Despite its strict stand against state-sponsored prayer in public schools, the Supreme Court has indicated in several decisions over the last decade that teaching about religion in public schools is constitutional. In addition, a number of Supreme Court and lower court decisions have supported a variety of religious liberty rights for students. For example, the Supreme Court has ruled that public schools may display religious symbols in the classroom, as long as they are used as teaching aids on a temporary basis as part of an academic program.[10] The court also has said that schools may not forbid students acting on their own from expressing their personal religious beliefs and must give them the same right to engage in religious activity as students have to engage in other activity. In 1995 President Clinton issued a directive concerning religious liberty and the rights of students, and the importance of religion in the public schools, which was distributed through the U.S. Department of Education to public schools nationwide.

In spite of the growing consensus about the current state of the law, many public school administrators and teachers remain confused about what kinds of religious expression are permissible in school. One egregious case occurred in Virginia in 1989, when a public school principal barred a disabled 10-year-old child, Audrey Pearson, from reading her Bible during a 90-minute bus ride to and from school. When asked about this, Nicolette Rinaldo, the principal of Dumfries Elementary

School, told Audrey's mother that she knew of a rule somewhere that said children couldn't bring Bibles to school. Mrs. Pearson then sought help from the Rutherford Institute, which supports religious speech in several countries. Institute lawyers called the school and, within days, Audrey was able to read her Bible on the bus.[11]

Even more confusion exists in the area of student-initiated prayer at graduation ceremonies. The federal courts have not settled on a definite standard for such activity. The Fifth Circuit, which covers Texas, Mississippi and Louisiana, ruled in 1992 that graduation prayer is constitutional if students vote to do it, and the prayer is student-led, non-sectarian and non-proselytizing. However, in 1996 the Third Circuit, covering New Jersey, Delaware, Pennsylvania and the Virgin Islands, ruled that school prayer at graduation is unconstitutional because the ceremony remains a school-sponsored event. The Supreme Court let the Fifth Circuit ruling stand and has not yet ruled on graduation prayer. The unique facts of graduation prayer cases are likely to bring this issue before the Supreme Court yet again.

Seizing upon the current confusion surrounding school prayer, some members of Congress propose to amend the Constitution and modify the First Amendment's establishment clause. Rep. Ernest Istook Jr. (R-Okla.) has introduced the Religious Freedom Amendment, which he says is intended to address "a systematic campaign to strip religious symbols, references and heritage from the public stage."[12] According to the ACLU, which strongly opposes Istook's measure, the Christian Coalition has pledged $2 million to lobby Congress for passage of the bill.

The amendment's real effect, according to the ACLU, would be to allow government officials to make decisions that favor particular faiths over others. The amendment also would make it easier for public funds to go to religious institutions through school vouchers and other programs. The amendment would thus pit religious groups against each other for public dollars. Religious groups, including the National Council of Churches, the American Jewish Congress and the Joint Baptist Conference, citing such potential negative effects, have voiced their opposition to such an amendment. They and other opponents believe it amounts to no more than religious coercion and that the First Amendment, as is, fully protects student religious liberties.

Many public school administrators and teachers remain confused about what kinds of religious expression are permissible in school.

At the same time, state legislators have continued to introduce school prayer amendments to state constitutions. In West Virginia, State Sen. Randy Schoonover has proposed to amend the state constitution to allow two minutes of daily voluntary prayer in public schools. Opponents of the Schoonover bill are puzzled by the necessity to include voluntary school prayer in the state constitution. Noting that the First Amendment already largely protects voluntary prayer in public schools, Hilary Chiz, executive director of the West Virginia Civil Liberties Union, argues that "Sen. Schoonover's proposal would make voluntary prayer mandatory." Even if they are enacted, these state measures face serious challenges in the courts. In

JUDGE'S ACTIONS TRIED IN COURT

School children are not the only ones caught in the confusion over what the religion clauses in the First Amendment actually mean today. Judge Roy Moore of Gadsden, Ala., who opens court with prayer by a Protestant minister and displays a hand-carved replica of the Ten Commandments in his courtroom, has been ordered to stop the prayers, but has appealed that decision. State District Court Judge John Devine in Houston, Texas, has put pictures of Abraham Lincoln and George Washington kneeling in prayer above his bench and five framed biblical passages over the jury box.

These two situations have clergy, local officials, attorneys and laypeople questioning just how free judges should be to express their religious beliefs in court. In Alabama, the ACLU sued Judge Moore for violating the establishment clause. The Houston case against Judge Devine is being argued by three attorneys who themselves are theologians.

Legal experts have said that the issue raised in these cases is ripe for consideration by the Supreme Court, which has not yet considered the display of religious art, such as the Ten Commandments, in the courtroom.

From "Off the Wall?; Judges Defend Displays, but Critics Reply: Thou Shalt Not," *The Dallas Morning News*, July 5, 1997.

March 1997 federal district Judge Ira DeMent struck down an Alabama law requiring all school-related events to permit "non-sectarian, non-proselytizing, student-initiated voluntary prayer."[13] In the court's view, the law violated the establishment clause by creating "excessive entanglement" between the state and religion, leaving some students with no choice but to sit and "listen to the prayers of their peers."[14] This ruling delivered another blow to supporters of student-initiated prayer and was the second time in just a few months that a federal court had struck down a state statute designed to permit student-initiated prayer. The earlier law was in Mississippi[15] and was almost identical to the Alabama statute.

The actual effect of judicial decisions like these can be difficult to assess because of local and national political developments that run counter to the judgment of the court. Alabama Gov. Fob James, who believes that the First Amendment allows every American to pray "whenever and wherever" he or she wants, declared that he disagreed with the court's ruling and let it be known he would not advise Alabama residents to follow the ruling, nor would he advise them not to follow it.

Religious groups and use of school facilities

Judges have become more tolerant of the use of school facilities for religious activities that are not part of the school's curriculum. At one time, schools concerned with potential establishment-clause violations tended to bar student religious groups from using school facilities. Early court decisions on this issue upheld the schools' actions because allowing access would create an "impermissible appearance of official support of religion."[16] Courts also feared that allowing access would excessively "entangle" schools in religious affairs. As a result of these rulings, religious groups were placed at a distinct disadvantage to secular groups that were allowed to use the same facilities.

Responding to these decisions, Congress passed the Equal Access Act (EAA) of 1984 to ensure that student religious groups would be on equal footing with secular groups. The act has withstood the scrutiny of the Supreme Court, which has ruled that allowing access to religious groups does not violate the establishment clause because there is no government endorsement of religion.[17] Despite the support of Congress and the courts, the EAA has had a limited effect on the firmly entrenched belief of some school officials and teachers that the First Amendment prohibits any form of religious expression on public school grounds. Students are often surprised to learn that they have the right to carry a Bible, wear a religious message on a T-shirt and meet with other students to discuss their faith on school grounds. The Supreme Court also has ruled in ***Rosenberger v. University of Virginia*** that if a public uni-

versity subsidizes other student publications, it cannot exclude a religious magazine.

School vouchers

Many of the proponents of religion-oriented school instruction have turned their attention from influencing public school curricula to helping like-minded parents get their children into private religious schools. This brings the debate to the tricky issue of money. Supporters of private schools argue that they should be able to take the money that would be used to educate their children in public schools and apply it to the tuition charged by religious schools. This would be accomplished by a system of vouchers.

The resulting controversy is not limited to the question of religious education; it is entangled with the larger question of school choice. Some advocates of vouchers believe such a system should allow only parents in neighborhoods with sub-par public schools to send their children to better public schools in other areas. It's not surprising that support for vouchers runs high in minority communities.

The First Amendment comes into play with those voucher plans—including ones that have been tested in several states—that allow parents to use public funds at religious or private schools. Voucher opponents say proposals of this kind could result in large shifts of resources away from public education—so much so that August Steinhilber, general counsel for the National Association of School Boards, has declared that "vouchers could very well mean the dismantling of public education."[18]

There are other problems associated with voucher systems. Test programs in Milwaukee and Cleveland have come under fire not only for violating the establishment clause of the First Amendment, but also for encouraging fraud among private schools competing for tax dollars. In Milwaukee two of the 17 schools initially participating in the state voucher program closed after directors were accused of creating phantom "voucher students" to get more public funding. Entrepreneurs took advantage of the infusion of tax dollars in private education and established schools that failed almost as quickly as they appeared. A director of one failed Wisconsin voucher school is currently charged with criminal fraud for exaggerating enrollment figures. Some of the schools participating in the Wisconsin voucher program closed unexpectedly during the school year, while others were unable to pay staff regularly and lost a large portion of teachers and students.

A Wisconsin state court judge ruled that the inclusion of religious schools in the voucher program violated the state constitution's provisions against taxpayer support of religious institutions. Among Judge Paul Higginbotham's concerns was that "millions of dollars would be directed to religious institutions that are pervasively sectarian with a clear mission to indoctrinate Wisconsin students with their religious beliefs" and that the program "compels Wisconsin citizens to support schools with their tax dollars that proselytize students and attempt to inculcate them with beliefs contrary to their own."[19]

A Carnegie Foundation report on the Milwaukee experiment found that the program had not resulted in higher test scores and had lessened schools' accountability to parents. The Carnegie study found that "while most students and parents participating in the program say they are happy with their chosen schools, an astonishing 40% of students who made the switch to private schools did not return in one year."

Wisconsin's Safe and Affordable Schools Act of 1997 contains a clause that would preempt state constitutional provisions that prohibit taxpayer funds from being diverted to religious institu-

STATES WHERE VOUCHER PROPOSALS ARE FILED OR ANTICIPATED

- Arizona
- California
- Colorado
- Connecticut
- Florida
- Georgia
- Idaho
- Illinois
- Indiana
- Kansas
- Maryland
- Michigan
- Montana
- New Jersey
- New York
- Ohio
- Oregon
- Pennsylvania
- South Carolina
- South Dakota
- Tennessee
- Texas
- Vermont
- Virginia
- Washington

PUBLIC ASSISTANCE, FAITH AND THE CONSTITUTION

"If every church in America just hired one family, the welfare problem would go way down," President Clinton told 130 members of the clergy at an ecumenical prayer breakfast at the White House in February 1997.

"This would mark a sea change not only in how welfare funds are administered but in church-state relations," said Derek Davis, professor at the Baptist-affiliated Baylor University.*

These comments are about a little-noticed section of the welfare legislation signed by President Clinton in 1996. It allows states that receive block grants from the federal government to contract directly with churches and religious organizations for the provision of assistance to the poor. Participating churches are not required to remove religious symbols and are allowed to share church doctrine with the people they are helping.

Many church leaders and other critics have said that the new law will transform the relationship between church and state. In addition to a loss in spiritual vitality, they say, a church could face unwanted state regulation. They argue that it violates the establishment prohibition by uniting church and state. Many church-affiliated groups provide social services for government agencies. Yet these entities are not actually churches, and, until now, it had been assumed that public funds are not to be used for proselytizing.

Stephen Green, a lawyer at Americans United for the Separation of Church and State, believes that the welfare bill "removes safeguards and authorizes religious institutions to use public funds to administer government programs." Critics wary of this blending of religious and public mandates say the church is being turned into a surrogate of the government and that there are inadequate safeguards to prevent government from advancing a particular religion.

At the same time, some religious groups worry that the provisions allowing them to discuss spiritual issues with aid recipients are not unequivocal and that the federal government could turn around and impose strict rules against the practice. The Rev. Craig Localzo, pastor of Immanuel Baptist Church in Lexington, Ky., said in an interview, "Suppose a church received funding to provide welfare recipients with transportation. In such a situation, the state would have every right to ensure that the funds went for buses." But if it tried to prevent church personnel from talking about church matters to riders on the bus, Localzo said, he would refuse the money. When asked about this scenario, Julie Segal, legislative counsel for Americans United for Separation of Church and State, told a reporter that the bus riders "would be a government-created captive audience for a religious institution—in violation of the First Amendment." †

Arguing for a return to the strict division between religious and secular relief are people, such as the Rev. Earl Trent, who think the welfare legislation is likely to open up problems in several directions, including favoritism as to which church will benefit most. "Many in the black community believe the government has never been working with their churches," Trent said. "The most important thing is how people will interpret what people can do under the welfare bill." ‡

* "News Making Welfare Work," Mike Brown, *The Courier-Journal*, Feb. 2, 1997.
† id.
‡ Earl Trent, Interview, Nov. 4, 1996.

tions. The act would set up a five-year voucher demonstration program costing about $250 million. The constitutionality of this bill and of the current voucher programs and proposals is already suspect because in past rulings the Supreme Court has invalidated every significant form of government financial aid to reli-

gious elementary and secondary schools. According to the ACLU's analysis, "The engine driving this legislation is the effort to get federal tax dollars into private religious schools, and the Act crashes into the First Amendment for precisely that reason."[20]

Many of the constitutional issues raised by the Safe and Affordable Schools Act of 1997 were addressed by the Supreme Court in 1973 in *Committee for Public Education and Religious Liberty v. Nyquist.*[21] In that case, the court struck down a tuition reimbursement program that gave unrestricted grants of $50 to $100 per child to low-income parents who sent their children to private schools. This program resembles the voucher plan outlined in the Safe and Affordable Schools Act. The same thinking was seen in the unanimous ruling in 1997 by the Ohio Court of Appeals that the state's voucher program was unconstitutional because its "direct and substantial, non-neutral government aid to sectarian schools" would advance religion and thereby violate the separation of church and state.[22]

In 1996, the National School Boards Association conducted a nationwide survey of school board members on such issues as vouchers and school prayer. Fewer than one-third supported a constitutional amendment allowing prayer in the public schools; only 31% supported voucher plans that permit parents to choose private and religious schools, in addition to public schools. Only 20% said parents who send their children to private and religious schools should receive tuition tax credits from the government.

Religious Freedom Restoration Act

Congress passed the Religious Freedom Restoration Act in 1993, responding to an unprecedented display of unity among diverse religious organizations. These groups wanted a new national standard regarding the obligation of government to accommodate religious practice. Spurring them was a 1990 Supreme Court ruling upholding Oregon's denial of workman's compensation to two employees after they were discharged from their jobs for using peyote, a hallucinogen, in religious exercises.

To many religious leaders, the court's decision in *Employment Division v. Smith,*[23] in which it ruled that a state did not need to show a compelling interest to justify a restriction on religion, was a significant setback for religious freedom in the United States. Court decisions immediately following *Smith* showed a less-protective approach to free-exercise claims, and many felt the only way to protect religious liberty was through legislation. Some 60 religious and civil liberties groups, spanning the political and theological spectrum, worked together

SCHOOL BOARD MEMBERS' TOP 10 CONCERNS

Concern	%
Increasing enrollment	12.1%
Curriculum development	10.2
At-risk kids	7.5
Facilities	7.0
Technology	5.3
State mandates	5.2
Parent involvement	3.9
Management issues	2.2
Collective bargaining	2.2

Source: The American School Board Journal, January 1997

In past rulings the Supreme Court has invalidated every significant form of government financial aid to religious elementary and secondary schools

to support passage of what became known as the Religious Freedom Restoration Act (RFRA). In essence, the Religious Freedom Restoration Act enacted into law the compelling-interest standard that existed prior to the Supreme Court's decision in *Smith*. President Clinton commented on the "majestic quality" of the legislation, and Vice President Al Gore called RFRA "one of the most important steps to reaffirm religious freedom in my lifetime."[24]

RFRA lowered the hurdle for plaintiffs who claimed that a government agency was imposing an excessive limitation on religious activities. Once a court determined that a government action had placed a substantial burden on religion, the state needed to show that it had both a compelling government interest and had used the least restrictive means to further that interest.

Despite the good intentions of those who supported RFRA, the law was criticized by other legal experts as an act of overreaching by Congress, in violation of the separation of powers. The issue of RFRA's constitutionality was presented to a court after the archbishop of San Antonio sought to tear down an old church in Boerne, Texas, in order to build a larger facility. The city wouldn't allow the demolition, claiming that it would violate a local historic-preservation ordinance. The archbishop argued that the ordinance violated free-exercise rights protected under RFRA and took the city to court. This case reached the Supreme Court in the spring of 1997. Marci Hamilton, a law professor who argued *City of Boerne v. Flores* before the Supreme Court, said that there was no crisis justifying the usurpation by Congress of the authority of the Supreme Court to articulate constitutional standards.[25] The court agreed with Hamilton, unconvinced that the stated infringements were as serious or as widespread as Congress believed. The court therefore held that RFRA was unconstitutional because the extensive reach of the legislation was disproportionate to the scope of the claimed injuries.[26]

Charles Haynes, a scholar on religion at The Freedom Forum First Amendment Center in Nashville, Tenn., and one of the leaders in the movement to have RFRA passed by Congress, called the date of the court's decision "a devastating day for religious liberty." A growing number of states are working on "state RFRAs" to keep alive its heightened burden on government in situations involving religious practice. The constitution of Rhode Island states that a compelling government interest must be shown before the free exercise of someone's religion can be infringed. Michigan, Florida and Ohio are drafting similar laws. Ohio Attorney General Betty Montgomery, who is drafting the Ohio Religious Liberty Act, has said that, unlike RFRA, the proposed bill would exclude prisoner complaints and would represent Ohio's particular religious interests.[27]

Reconciliation over matters of faith

As parents, educators and others wrestle with the problems surrounding religion today, America remains a nation deeply committed to the freedom to choose in matters of faith without government interference. The most promising developments of recent years are the attempts to work out differences in religious beliefs through communication rather than confrontation.

As Charles Haynes notes: "There is a strong movement across the nation to recover what it means to be an American citizen. An American is not defined by race or ethnicity, but by a commitment to the democratic first principles in our framing documents. Because of our exploding religious diversity, there is an urgent need for all citizens to rethink our shared commit-

ment to the guiding principles of religious liberty. These principles of the First Amendment provide a civic framework for living with our deepest differences."

The commitment by a number of religious groups to working out their differences has led to a series of public dialogues in a number of communities. These meetings have brought various stakeholders to the table, including conservative and moderate religious organizations, school administrators, teachers and parents, as well as groups such as the Christian Legal Society, People For the American Way, the American Association of School Administrators and the National Education Association.

Jan Vondra, assistant superintendent for curriculum/education services in the Snowline School District in Southern California, has participated in several such meetings. About one meeting, moderated by Haynes in Nashville, Vondra said, "This helped educators like me by showing that specific strategies for dealing with issues like school curriculum can evolve from this sort of thing. An understanding of the First Amendment provisions, which most of the participants had, was extremely important."

There are numerous examples of forums, which have been sponsored by various organizations. The success of such events has been due to the mutual recognition of the serious social damage that could result from prolonged antagonism. Such efforts are part of a series of steps taken in the last decade of the century to advance religious liberty. They show that the principles of the First Amendment can be used to find new solutions to contentious issues surrounding religious liberty.

In June 1988, leaders representing many segments of American life signed the Williamsburg Charter, which addresses the dilemmas and opportunities posed by religious liberty in American public life. The charter calls for a renewed national compact as a foundation for forging agreement by religious and nonreligious organizations. The same month the charter was signed, a coalition of national educational and religious groups published *Religion in the Public School Curriculum,* calling attention to the need for study about religion in public schools. A new curriculum was offered for use in both public and private schools. Soon after this, another pamphlet proposed guidelines for the Equal Access Act. A book, *Finding Common Ground: A First Amendment Guide to Religion and Public Education,* was published by The Freedom Forum First Amendment Center in Nashville in 1994. This book, and *A Parent's Guide to Religion in the Public Schools*, a pamphlet published by the National Congress of Parents and Teachers and The First Amendment Center, provide clear and concise summaries of the issues regarding religious liberty and the inclusion of religion in public education.[28]

Conclusion

Religious freedom is at the heart of this country's experiment with democracy. The continuing controversies are proof of continued passion for liberty of conscience, even as debates rage about whether religion receives sufficient attention from the media, educators and the government. Disputes involving religious liberty reflect America's ambivalence about the limits of individual liberty. At present, the country's internationally recognized commitment to tolerance of all cultures and faiths is being tested and torn. The question to be answered is whether we can sustain this commitment to the religion clauses of the First Amendment into the next century.

[1] Virginia Bill for Religious Liberty, 1786.

[2] Samuel Rabinove, "The Supreme Court and the Establishment Clause," pamphlet from the American Jewish Committee, New York City; Samuel Rabinove, "The Evolving Establishment Clause: Rosenburger v. Rector," in *First Amendment Congress Newsletter*, Denver, Winter 1995-96, pp. 5-7.

[3] Agostini v. Felton, 473 U.S. 402 (1997).

[4] Aguilar v. Felton, 473 U.S. 402 (1985).

[5] William Lee Miller, "The Moral Project of the American Fathers," in *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy*, James Davison Hunter and Os Guinness, eds. (Washington, D.C.: Brookings Institution, 1990), pp. 17-39.

[6] *The Report of the Department of Treasury on the Bureau of Alcohol, Tobacco and Firearms Investigation of Vernon Wayne Howell, also Known as David Koresh*, 1993, Government Printing Office; *Report of the Deputy Attorney General on the Events at Waco, Texas, February 28 to April 19, 1993,* Government Printing Office.

[7] Dean Kelley, "Waco: A Disaster and Its Aftermath," in *The Law of Church and State*, p. 495 (to be published in 1997).

[8] Edwards v. Aguillard, 482 U.S. 578 (1987). An Alabama statute requiring that teaching of evolution must be balanced with teaching of "creation science" was ruled unconstitutional because it did not have a secular purpose.

[9] Engel v. Vitale, 370 U.S. 421 (1962).

[10] Stone v. Graham, 449 U.S. 39 (1980).

[11] Karen Haywood, "Religious Speech Should Also be Protected, Says Institute Chief," Associated Press, Oct. 20, 1988.

[12] A similar bill died in the previous term of Congress because different sides could not agree on wording. Most conservative religious groups supporting the amendment did not want to return state-sponsored religion to public schools and opposed language that might lead school officials to be involved in religion. The amendment's proponents argued that their intent was to protect the right of students to practice their faith (presumably even in front of a captive audience).

[13] Chandler v. James, 958 F. Supp. 1550 (M.D. Ala. 1997).

[14] Ibid.

[15] Ingerbretson v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir. 1996), cert. denied 136 L.Ed.2d 304 (1996).

[16] School District of Grand Rapids v. Ball, 473 U.S. 373 (1985).

[17] Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

[18] August Steinhilber, National Association of School Boards, interview, Feb. 19, 1997.

[19] Warner-Jackson et al. v. John Benson et al.

[20] ACLU memorandum on Safe and Affordable Schools Act, 1997.

[21] Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[22] Simmons-Harris v. Goff, 680 N.E. 2d 1021 (1997). The Ohio Supreme Court issued a stay on July 24, 1997, allowing the Cleveland school choice program to continue for the upcoming year (681 N.E. 2d 938 (1997)).

[23] Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[24] Speech at Religious Freedom Restoration Act signing ceremony, Nov. 16, 1993.

[25] Marci Hamilton, Freedom Forum roundtable on religious liberty, Nashville, Tenn., April 28, 1997.

[26] City of Boerne, Texas v. Flores, 117 S. Ct. 293 (1997).

[27] "AG Wants State Religious Liberty Law," *National Law Journal*, July 14, 1997, p. A8.

[28] Charles Haynes and Oliver Thomas, *Finding Common Ground: A First Amendment Guide to Religion and Public Education* (Nashville, Tenn.: The Freedom Forum First Amendment Center, 1994).

Religious Liberty Roundtable

The Freedom Forum invited a group of First Amendment authorities to participate in a roundtable discussion on the state of religious liberty in the United States. Here are excerpts from the two-hour conversation, held at The Freedom Forum First Amendment Center at Vanderbilt University, Nashville, Tenn., on April 28, 1997.

CHARLES HAYNES Where do you think we are in the United States when it comes to religious liberty for all?

STEVE McFARLAND The interpretation of the First Amendment's ban on the establishment of religion is in chaos. You have prohibitions, according to the courts, on school districts providing busing for parochial students on a field trip but not to and from school. It is an understatement to say there are no bright lines. Only a key swing vote in a 5-4 decision every couple of years provides much guidance, and it provides very little for the real decision-makers, the school boards and the attorneys representing school boards, not to mention the problem in other venues—the workplace, the public square. The interpretation of the establishment clause is problematic, hence the drive toward a constitutional amendment to clarify its proper interpretation. Free exercise already has been rendered toothless as a federal right in 95% of the cases in which it would be invoked. We must rely, instead, upon a federal statute, the Religious Freedom Restoration Act, which may be struck down by the Supreme Court,[1] leaving us with only state law or free-speech claims to defend our first freedom. There is a troubled horizon for religious freedom in this country.

MARY SOSA I see it as a state of uneasiness and confusion for most people, and to some degree, because we are becoming more diverse, even in close quarters communities are not as intact as they used to be. People are more mobile, and all of this causes people to just retreat and become more isolated, rather than offending or questioning what other people do. So we either do not do anything about religion and give the impression that we don't care, or we offend, because we don't know each other well enough, and we are afraid to ask those questions.

Participants

Marci A. Hamilton
Benjamin Cardozo School of Law

Elliot M. Mincberg
People For the American Way

Thomas A. McCoy
Vanderbilt University

Steven T. McFarland
Christian Legal Society

Warren A. Nord
University of North Carolina at Chapel Hill

Mary A. Sosa
National Education Association

Oliver Thomas
National Council of Churches

Moderator

Charles Haynes
The Freedom Forum First Amendment Center

Oliver Thomas

OLIVER THOMAS Some Supreme Court cases on the surface appear contradictory, but I don't think underneath they really are. There are some differences, and some of it appears inconsistent. But my take on it is that there is more consensus right now. There are people who are not happy with the establishment clause, but that is nothing new. There were people who were very unhappy with it when it was adopted. On the other hand, with the free-exercise clause, the Supreme Court has abandoned the field, left it to the rest of us to figure out what we do in the wake of *Employment Division v. Smith*. But there is a strong national consensus, as reflected by the fact that the Religious Freedom Restoration Act, constitutional or not, almost passed unanimously in the Congress—and religious groups across the spectrum supported it. There is a strong consensus that we ought to try to accommodate free exercise when we can.

WARREN NORD My sense is that we have made a lot of progress in the last 30 or 40 years, not just constitutionally—mainly that—but in the broader culture in appreciating religious liberty. Part of that is through pluralism, which forces people to deal with questions and work through them. One thing that has impressed me, working with a lot of teachers and parents, is that even if people are fairly hostile to what they understand the courts to be saying, oftentimes they can come around fairly quickly. My deepest concern is that there seems to be a lack of sophistication on the part of the courts perhaps, educators certainly, on the proper role of religion in education. There seems to be a kind of uncritical secularism which keeps us from appreciating the proper role of religion and religious liberty, in particular, in public schools.

ELLIOT MINCBERG On the fundamental question of what is the state of religious liberty in America, the answer to that is: "Pretty good." Most people in this country feel like they are free to exercise their religion the way they want to. Certainly when you compare the United States today with other countries or, indeed, with other periods in American history, you would have to say that, overall, we are in reasonably good shape. I agree that the Supreme Court's establishment-clause and free-exercise clause jurisprudence is far from perfect, and there are serious problems with it in some respects. With the establishment clause in particular, the basic principles articulated by the court are there and are helpful and useful. The fundamental model of the establishment clause and the free-exercise clause as the twin pillars that support religious liberty, as President Clinton said in his speech in 1995, is an important one, and it is an important image for all of us to keep in mind, because it does a lot toward helping us focus on where the threats are, if any, and how to deal with them. There is an increased threat in the last, say, five to 10 years to minority religions because of what one might call the resurgence of attempts, usually associated with the right, to push the ability to get majority religion recognized in the schools or in other places. Some of the constitutional-amendment proposals are very clearly designed toward allowing the majority view to prevail in particular schools and particular communities in a way that is potentially threatening to those in the religious minority.

TOM McCOY If you think in terms of the national sense of religious freedom, or even maybe a national commitment to religious freedom, I am very encouraged about that. There is probably more of a commitment in the most general terms now than there ever has been in our history. I'm also a little bit worried about some of the proposed constitutional amendments. They suggest maybe less than a complete commitment to religious liberty. Let me say, however, that the devil is in the details, and with respect to the important details, we are not in very good shape. I agree that the court's establishment-clause jurisprudence is essentially chaotic. I do not see any consistent principal themes in there. About the best you can get out of it is a sense of good intention on the part of the variety of opinion-writers, but no coherent doctrinal construct that seems to me to be workable over the long run. With respect to the free-exercise clause, my view, very bluntly, is that the court made a terrible mistake in *Employment Division v. Smith*, that they should never have abandoned the free-exercise clause, which they effectively did. As a result of that bad law, Congress

then felt moved to pass another bad law; that is, the Religious Freedom Restoration Act. It is a fairly common phenomenon. You make one mistake and then you try to compensate for that mistake by making another mistake, and that is what I think Congress did in RFRA, in pursuit of a very good cause.

MARCI HAMILTON The case has not been made yet for federal intervention into religious-liberty issues. The case certainly is not made in the legislative history of RFRA itself. I see the fervor of those who have argued in favor of RFRA, and I am certainly willing to be moved by it, but I have not seen the evidence of danger to religious liberty that would justify this massive incursion of federal government in every law in the United States. I wouldn't say that the court's establishment-clause jurisprudence is in chaos. The Supreme Court justices are moving toward a context-dependent jurisprudence, where they are willing to apply a different test depending on the set of factors in front of them. I don't think they feel like they are in chaos.

HAYNES Let's talk about where the religious-liberty jurisprudence is using one word: "neutrality." What do we mean by "neutrality"?

THOMAS I would say that neutrality means no funding because neutrality as a general purpose means that you neither advantage nor disadvantage religion; that the government does not promote religion and does not inhibit religion. Neutrality means that we do the best we can to keep one's standing in the political order separate from one's standing in a particular religious community. Neutrality is the most unifying concept that you find in the case law. Some of us take the position that no funding is neutrality, and others would take the position that that is not neutral, that you have to make funding available to religious organizations just as you make them to secular ones.

McFARLAND I agree that neutrality is the goal, but I come to a different result than Buzz [Thomas]. As I understand substantive neutrality, it should be that the government action neither penalizes nor promotes a religious choice over a nonreligious choice.

MINCBERG What Steve's and Buzz's comments indicate is the wisdom of what Marci said in terms of the Supreme Court's jurisprudence. It is very context-dependent, because you have a couple of principles; neutrality is one of them, but not the only one that the court looks at. I go back to Justice O'Connor's opinion in *Rosenberger*, for example, which I think is very revealing in that regard. She talks about neutrality as one principle, but as another principle of the establishment clause the notion that the government shouldn't fund religion. Not a farthing from tax money should go to support somebody else's religious point of view.

HAYNES How do you feel about equal treatment from the government when it comes to something like allowing equal access to religious clubs, as well as religious speech?

MINCBERG As the court said in the *Lamb's Chapel* case, it is fine so long as that so-called equal treatment doesn't give rise to a perception of endorsement of a particular religious point of view.

HAYNES And for you, one of the things that is really going to trigger the problem is when religious activity is funded by the government.

McCOY I don't see that the establishment clause ever in its history was designed to prevent perceptions of endorsement. It was designed to prevent endorsement. And I don't think the establishment clause was ever designed to prevent government money going to some religious institution without some assessment of what the government money was being used for and what the objective of the program was.

HAMILTON I actually think that the term "neutrality" has become a problem. It doesn't have any content anymore, and so it now finds itself being championed by various scholars for the proposition that the free-exercise clause ought to be read as narrowly as *Smith*, and that the establishment clause permits just about everything but the state becoming a church. So it seems to me that neutrality needs to be unpacked somewhat, and the question is, what principles would you unpack from it? If you look back in history, the single most troubling issue seems to me to have been the union of power

Tom McCoy

between church and state, so that the resulting union is capable of wielding an overweaning amount of power, to the detriment of the people. The court's doctrine may appear to be ad hoc balancing, but I think it is more accurately identified as context-dependent. One of the most interesting establishment-clause questions we have right now is in Michigan, where you have a very visible Republican governor who decides to cut down on welfare and to then provide funding to churches—to do what it is the state is no longer going to do. He has taken the tack that he can pay money directly to the churches to provide what amounts to largely religious and theological counseling. That has to be unconstitutional.

HAYNES Does that disturb you, Steve, or is that what you are talking about?

McFARLAND I cannot think of anything that the government is less qualified to do than to judge when the Catholic community services has slipped into becoming pervasively sectarian. The issue will be how many beds can you provide, how much soup can you ladle, how many foster children can you place? If you are anything from Salvation Army to a secular agency, your religiosity, or lack of it, will not place you in better stead with the government. That seems to me as a workable neutrality principle, not who is the payee on the check.

Mary Sosa

SOSA What happens if I am a homeless person, and the only option that I have is to go to either one of two religious-based groups, and what I get is not only the bed and the meal, but also a religion that I don't want to be a part of? And my government is paying for it.

McFARLAND In the welfare-reform bill, that is prohibited. There has to be a secular choice for you.

MINCBERG But Steve, your analysis suggests that there does not have to be secular choice. By your analysis, the governor of Michigan should look around and say, "Who's going to do the best job at providing beds? Well, it happens it's the church, and it's only the church, so I'm going to only fund the church," and that puts the homeless person in exactly the situation Mary describes.

McFARLAND If it would violate the conscience of the beneficiary to have to even set foot in a faith-based social service agency or soup kitchen, then the government must provide that person with a secular alternative.

HAYNES It might help us to talk a little bit more about what neutrality means, particularly when it comes to education.

NORD My concern as a philosopher is that we teach students to think about the world uncritically in exclusively secular categories that often stand in tension or confliction with religious categories. This is not so much a conflict over specific beliefs (like evolution); rather it is over the basic philosophical categories that we teach students to use in thinking about all of nature and history and sexuality and morality and economics and everything else. Education conveys the message that to be reasonable one must think in secular terms, and we marginalize religion in the process. The only way to make sense of the concept of neutrality is in terms of fairness, when there are ways of thinking about subjects in the curriculum that are contested on religious grounds, where different people give different kinds of answers and do so in systematic ways, then public education has an obligation to be fair to the contending parties. The courts have not been very thoughtful about this. As I said in my initial comments, I think educators have been utterly naive about it. So the only way it makes sense to talk about neutrality is in the curriculum as a whole. The overall curriculum has to be neutral.

HAYNES Mary, I want you to comment on this. What does the National Education Association think about this trend of dealing more with religion in the curriculum?

SOSA I guess the politicizing of public education is what harms our ability to do what is right in a classroom. There is a real need to include more discourse and more training. What you find when you work with educators is that there is a real welcome on their part to hearing and to learning what needs to take place in those classrooms. Usually, those people will do a better job when they go back. But they still face those school boards and

those administrators who also need to be included in this education process. It is not enough for the teachers to be able to do it. It is not even enough for a principal to be able to do that. The school boards and the superintendents need to know.

MINCBERG I do think that Mary is right, that in schools, in particular, the problem of politicization is really quite serious. The notion that prayer or religion has been excluded from the public schools, and that the effort of proponents of religious freedom is to put it back in public schools, buys into what has been in large measure a political slant that has been put on the issue. It is important to recognize that as one point of view, not as *the* appropriate way of describing these sorts of issues, and to look at it in those terms.

SOSA Even some of the efforts to allow the kids to have the freedom to pray have often seemed as—and rightly so—only the first step toward bringing religion in a more formal way into other areas of a school. There is a movement here. It isn't just a simple issue of having a kid saying, "I want to pray." This kid has been approached by someone else who has got an agenda. So the politicization is everywhere.

McFARLAND I sure think that you need to define what this politicization is. If this means that there is a mastermind in Colorado Springs that is behind every complaint about a textbook, is behind every request for an equal-access Bible club, I cannot imagine anybody at this table believing that. But when a kid, whether put up to it by his parents or her youth pastor or her own conscience, is asking for the opportunity to exercise free-speech rights, whether based on the First Amendment and/or the Equal Access Act, or wants the opportunity to write a research paper on a religious topic, or wants to be able to reference her faith in a graduation speech, this isn't politicization.

SOSA That is not what we are challenging.

MINCBERG No, not at all. I am not suggesting in any way that all of this is politicizing, but there is no question that there is some politicizing that is going on.

SOSA What I want to say, though, is that when there is a lot of ignorance, a little politicizing goes a long way.

HAMILTON It seems to me that if your concern is not neutrality per se and it is not fairness but diversity, you have just created a First Amendment obligation to teach a diversity of views. To teach a diversity of views in an educational curriculum, the problem is that you have to do what is pedagogically appropriate. I am concerned when the discussion goes from quality of education to diversity of views for their own sake. I think we are better off, and we are avoiding establishment-clause concerns, if we can make the move to say that education has to be judged according to its pedagogy and according to what is in the best interests of the children in terms of what they need to learn, and that diversity is going to have to be tempered by reality.

NORD One of the pleasant complementaries for me is that my reading of neutrality in the establishment clause meshes so nicely with my understanding of what a liberal education is. That is to say that one cannot have a good education without understanding a good deal about religion, and that does not just mean religion in history. To be liberally educated, one must understand the major different voices in our culture and try to make sense of the cultural conversation that we are having. We don't do that at all. So I don't see the fairness or diversity—depending on how we put it—argument undermining the educational basics.

McCOY It seems to me that the basic principle behind the establishment clause is that we may not deliberately use either the power or the purse of government to give competitive advantage to religion, and if there is no competitive advantage, the fact that government money ends up in religious hands does not bother me, and it does not seem to bother the current Supreme Court.

HAYNES Tom has put forward a possibility for where the court is going or where the court ought to be going. Steve actually proposes an amendment to make sure the court goes in another direction.

HAMILTON Power is subtle. It is corrosive, and corrupting, and it comes in many forms. The court needs a multiplicity of tests to be able to keep the power of the church and the power of the state suf-

Warren Nord

ficiently distinct so that they are not engaged in the kinds of tyrannies that the framers most feared.

HAYNES Let's talk about the free-exercise clause. How does the government guard this unalienable right, as Madison called it? For many years, the Supreme Court used a compelling-interest test to guard that right. Then that changed with *Employment Division v. Smith*. Tom, you said earlier that you thought *Smith* was wrongly decided. Why?

McCOY As I understand *Smith*, it is simply part of a larger campaign by Justice Scalia to persuade the court that accidental interferences simply do not raise First Amendment problems. I think that view is fundamentally wrong. To state it in the affirmative, I think that interferences with First Amendment freedoms will occur not just in those relatively rare cases where the legislature deliberately set out to interfere with your freedom, as apparently they did in the *Hialeah* case in free exercise, but will more often occur as a result of legislative inadvertence. So it seems to me that you do need a jurisprudence for accidental interferences with First Amendment rights, in this case the free-exercise right. The appropriate jurisprudence is what the court was actually doing, as opposed to what they were saying, prior to *Smith*. They were trying to engage in an ad hoc balancing of the government's regulatory objectives against the extent of the accidental interference with religion.

Marci Hamilton

HAMILTON The one thing that *Smith* does is it reduces the incentives to litigate disputes between local governments and churches. It brings people to the bargaining table faster, rather than more slowly, and I don't think that is necessarily a bad thing. In the communities I have dealt with, the people on the city council were not evil people, and the heads of the churches were not evil people. There are lots of instances where they came to conclusions that were amicable on both sides and that were friendlier because the courts did not become involved. So it seems to me that one of the major problems with RFRA, setting aside constitutionality, is that it is an invitation to litigate early on local community disputes that could be resolved if people would sit down at the table and talk to each other reasonably. And I think that is unfortunate.

MINCBERG First of all, in terms of Tom's point about accidental impact, in some ways it is even worse than that, in a sense, because what we are talking about in terms of what *Smith* removes, if it is taken as far as it can be, is any harm to religion unless intent to harm religion can be proven. One of the reasons for laws like RFRA is that intent is often difficult to prove, and the need for a rule like the one that developed for 30 years prior to *Smith* is to protect against both unintentional and some intentional but well-hidden harm to religion. I also cannot talk about *Smith* without observing what a textbook example it is of what I call conservative judicial activism, because, as Scalia himself admitted, he was trying to change the law, and he did it in a way that is astonishingly inappropriate, as those of us who were there at the time remember. The theory that was articulated by Scalia was never argued by either party in *Smith*, never talked about in briefs, amicus or otherwise, and was unnecessary to the decision. As O'Connor pointed out in her concurrence, you could have produced the same result without completely rewriting free-exercise clause jurisprudence. Even some of my conservative friends agree that is an example of judicial activism to the max.

HAYNES I want to get to the question of what happens if the U.S. Supreme Court declares the Religious Freedom Restoration Act unconstitutional?

McCOY I think the appropriate remedy is to overrule *Employment Division v. Smith*. That is the way you fix the problem.

HAMILTON I would not have any problems seeing *Smith* overturned. I would have more problems seeing that a least-restrictive means test was going to be employed across the board. That is actually an unfair advantage to the churches in dealing with these circumstances, and it is very unfair to expect government officials to understand every religion that is within their boundaries. I pray that the various organized religions that have backed RFRA will come back and tell us what the state of religious liberty in the country is and why we need federal legislation. If they come up with some persuasive reasons why we need it, then I think we ought to do something. But I would like to see them do it. I have heard that if it is ruled unconsti-

tutional, we will have a constitutional amendment, and I don't understand why that would be the next step. It seems to me the next step is try to find out where we are and what, in fact, needs to be done, with due respect for the ability of the states to operate, with federalism principles in mind. I hope that we will not see a rush to a constitutional amendment, which will not be successful and will take up people's efforts, at a time when perhaps religious liberty is in fact being suppressed. If that is in fact going on, we ought to do something about it. As to the fact that RFRA was passed quickly: If you are going to readjust any First Amendment freedom, to do it quickly seems to me an argument to stop in your tracks and rethink what you are doing. If the people are not alerted at all to a major restructuring of the relationship between church and state, I would say that something has been done to them, and it has been very inappropriate. What has happened here is that organized lobbies for various organized religions have tremendous power. It turns out that ours is not a culture of disbelief, it is a culture of deep belief, with deep political power. Churches are very politically powerful entities, and the members of Congress, even though they thought that RFRA was potentially troubling from a constitutional standpoint, voted for it out of fear as much as anything, and so it passed quickly.

MINCBERG One of the big issues is going to be what is going to happen not just to religious liberty but to the whole range of civil rights protections that Congress has enacted, where the Supreme Court has said, wisely or unwisely, that the Constitution alone does not provide that level of protection. I would not jump into a constitutional amendment. Other alternatives do need to be looked at and explored. There are some states that have already ruled that their constitutions provide the kind of protection to religion that the Supreme Court took away from the free-exercise clause in *Oregon v. Smith*. So in those states you clearly don't need RFRA in that respect.

HAYNES What is the impact on public schools if RFRA were overturned? What should be done?

NORD One of the most important things to do is go through the process of developing school policies, bringing the community together to discuss their differences, find common ground and establish trust.

SOSA I think what people have to know is what their rights really are, and I don't know that they have to know the kind of detail about whether it is in RFRA or anywhere else. They do have to know enough to question or to begin asking who can help or what kind of education we might need in a school so that people can enjoy those rights that they haven't been enjoying. Those are the kinds of questions that have to be asked in those schools. Raising the issue, especially if your religion is a minority religion, is not something, even if you have a right to raise it, that people are willing to respond to—without a lot of thinking. What we have to do is create understanding and educate, rather than have people know what their right is and to litigate.

HAYNES One of the broader questions that I would like you to comment on is the free-exercise question in the public-school arena. How much freedom of religion should students have?

McFARLAND It would be a loss for students in American schools to have to solely rely on free speech or the First Amendment or their state constitution religion clauses to obtain or preserve what is undeniably free-exercise-of-religion-type claims. If we don't have a statutory alternative that gives some leverage to the parent and the student, home schooling is not an option for a single-parent family or for a two-earner family. Private school is prohibitively expensive. More often than not, vouchers—if they are even legislatively viable—are ruled unconstitutional. A lot of folks who take their faith seriously see an increasing secularity to the world view that is presented in public education, and they feel impotent to change that. If they don't have a statute on their side, you have a pressure cooker. There are a lot of folks who, no matter what Gallup poll you look at, articulate that religion is real important to them, and yet they are, in their perception—and in mine in a number of cases—second-class citizens in the public-education system. Constitutional amendments may gain much more momentum unless we have things short of an amendment where religious voices in public schools are heard and respected.

Steven T. McFarland

MINCBERG There is something else that provides some important chips on the side of those who are interested in religious liberty, and that is, in fact, the First Amendment as it now exists, in some important contexts. This goes in part to the use of the free-speech clause to argue in favor of religious speech in public schools or other contexts. That option is there and has been used very successfully by some advocates. There is, however, an important limit to it: the establishment clause. A very interesting and often little-noticed exchange on that occurred in the *Lamb's Chapel* decision a few years ago. That was the decision in which the Supreme Court ruled that when a school made its facilities available in the evenings for rental by various organizations, it also had to allow a religious organization to use them. The court in its majority opinion there said yes, that is true, as a matter of the free-speech clause. But it recognized that there may be instances where the establishment clause may be a limit on that, where the reasonable observer would perceive that there is an endorsement of religion that may get in the way of what would otherwise be argued to be free-speech rights.

Charles Haynes

HAYNES And you would say, Steve, that equal treatment means that religious speech ought to be treated equally, and the establishment clause should not be used in that case to keep a student from saying a prayer before a graduation or assembly?

McFARLAND That is right. The last time I checked, your basic student is not the spokesperson for the school district. The First Amendment should not be interpreted to apply to, or confine the free speech of, private citizens. But the reason that free speech is not going to provide a safety valve for release of some of the pressure in this pressure cooker in terms of religion in schools is because there are some times when not just equal treatment but special treatment needs to be afforded to folks on the basis of their religious conscience.

HAMILTON Are you talking about pressure from mainstream believers who are having problems being able to function in the schools, or is this largely a minority religion problem?

McFARLAND I would say evangelical and fundamentalist Christians—I don't know if that would be mainstream or not—but they are not an insignificant number of people.

HAMILTON For a group that has a great deal of political power, how is it that they simply are incapable of getting their reasonable religious requests observed?

McFARLAND Maybe for the exact reason, Marci, that you cited: That, sociologically, the small, highly organized, targeted group is more effective. Whatever sociological-demographic reason, the point is, those kinds of insensitivities are pervasive, and that is the pressure cooker.

HAMILTON Then Justice Scalia is basically wrong in *Smith* when he says that the society is largely respectful of religious liberty? That is just a factual mistake?

McFARLAND In many circumstances, yes.

NORD In education, I think it is. Again, it has to do with our naivete about what it means to think in secular terms about the world, and there is more cognitive dissonance for religious conservatives and various liberals. Steve is right about that. I am not sure that excusal policies and RFRAs solve that problem, but they are a contribution; they take some of the pressure off for people who know about them and are willing to do something, to act on them.

SOSA I believe that the day-to-day conflicts we are experiencing stem from the different ways we see the world and the different role that religion plays in our lives. Most of us, including many educators, live our lives in a secular manner. Even though we may see ourselves as religious people, our religion doesn't shape our world as extensively and dramatically as it does individuals for whom religion is more fundamental. So we may not understand and are often caught off guard by people who find shared experiences or school activities their children experience as offensive on the basis of their religion. These clashes seem to be occurring more often as we become a more diverse and mobile society.

Biographies

MARCI A. HAMILTON

Marci Hamilton is a professor of law at the Benjamin N. Cardozo School of Law, Yeshiva University, where she specializes in constitutional and intellectual property law and serves as the director of the Cardozo Intellectual Property Law Program. Hamilton writes and speaks frequently on First Amendment law. One of her recent articles is *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment* (*Cardozo Law Review*, 1994). In addition, Hamilton is writing a book on the influence of the Presbyterian Church on the formation of the U.S. Constitution, entitled *The Reformation Constitution*. As lead counsel for the city of Boerne, Texas, she argued before the Supreme Court the successful challenge to the constitutionality of the Religious Freedom Restoration Act. During 1997-98, she will be a fellow at the Center of Theological Inquiry and a visiting scholar at the Princeton Theological Seminary.

CHARLES C. HAYNES

Currently a senior scholar for religious freedom at The Freedom Forum First Amendment Center at Vanderbilt University, Charles Haynes was formerly the executive director of the First Liberty Institute at George Mason University in Fairfax, Va. He serves on the board of directors of the Character Education Partnership. Haynes was one of the principal organizers and drafters of a statement of principles sponsored by 21 major educational and religious organizations and co-chaired coalitions that produced guidelines on "Religion in the Public School Curriculum," "Religious Holidays in the Public Schools," and "The Equal Access Act." In addition, Haynes is the author of *Religious Freedom in America: A Teacher's Guide* and *Religion in American History: What to Teach and How*. He co-authored *Living With Our Deepest Differences: Religious Liberty in a Pluralistic Society*, a social studies curriculum. Most recently, Haynes edited the widely acclaimed publication *Finding Common Ground: A First Amendment Guide to Religion and Public Education*.

THOMAS R. McCOY

As a professor at the Vanderbilt University School of Law, Thomas McCoy teaches constitutional law, with a particular focus on the First Amendment and other individual liberties. He has served as consultant to numerous government and private agencies and as a member of the National Governors Association Advisory Committee on Federalism. He serves as a consultant to The Freedom Forum First Amendment Center. McCoy is also a recognized authority in the study of "conflict of laws"—the determination of which law is applicable in the regulation of disputes that cross state or national boundaries. In addition, he is an expert on the range of recently developed dispute-resolution techniques, such as mediation, that are increasingly employed to avoid the costs and unsatisfactory consequences of traditional litigation and arbitration.

STEVEN T. McFARLAND

Steven McFarland has served as the director of the Center for Law & Religious Freedom in Annandale, Va., since 1991. The center, which is funded by the Christian Legal Society, defends the religious liberty of people of all faiths and has advocated for the preservation of and universal respect for religious liberty in courts, legislatures, and government agencies throughout the nation. Before joining the center, McFarland was a partner at the Seattle law firm of Ellis & Li. During his time at the firm, McFarland litigated several appellate religious-liberty cases, including *Garnett, et al. v. Renton School District Number 403*. This Ninth Circuit "Equal Access" case sought to uphold the rights of public high-school students seeking to meet on a public-school campus for Bible study, and is the parallel to the Supreme Court case *Board of Education of Westside Community Schools v. Mergens*.

ELLIOT M. MINCBERG

Elliot Mincberg serves as legal director and general counsel for People For the American Way, a nonprofit organization. Mincberg spearheads a litigation and advocacy strategy targeted on priority issues, including the effort to help parents and schools resist censorship attempts and protect First Amendment rights. Before joining People For the American Way, Mincberg was a partner at Hogan and Hartson, a Washington, D.C., law firm, were he litigated and published extensively on the Equal Access Act, affirmative action, school desegregation, and the First Amendment. Mincberg taught at

the Washington College of Law at American University in the early 1980s and has written extensively on legal issues, including articles in *The Harvard Civil Rights-Civil Liberties Law Review* and the *New York Law School Journal of Human Rights*, among others.

WARREN A. NORD

Warren Nord has been director of the Program in the Humanities and Human Values and a lecturer in the Department of Philosophy at the University of North Carolina at Chapel Hill since 1979. He has taught courses on Philosophy of Religion, Philosophical Issues in Education, and Religion and American Education. He also served on the advisory board of the First Liberty Institute, as vice president and on the board of directors for the National Council on Religion and Public Education, and still serves on the editorial board of *Religion and Education*. Nord's publications include *Religion and American Education: Rethinking a National Dilemma* (1995) and many other articles published in professional and scholarly journals. Nord's most recent work, written with Charles Haynes, is called *Religion and the Public School Curriculum: What to Teach and How*.

MARY A. SOSA

Mary Sosa has worked with the National Education Association for more than 18 years and has been in the education field for two decades. While teaching middle-school English and reading, she joined the Texas State Teachers Association as a field representative. Sosa then moved to Washington, D.C., in 1978 to work with TSTA's national affiliate, the NEA. There, she has designed and delivered programs that promote leadership development and enhance member awareness of a wide range of basic human and civil rights issues. Currently, Sosa and her staff monitor individuals and groups that attack public education and the NEA. They also develop educational materials, conduct presentations and training, and organize local and state affiliate projects to address these attacks and advance quality public education.

OLIVER THOMAS

Oliver Thomas is a Baptist minister and lawyer who has written extensively on the subject of law and religion. He has worked with more than 300 school districts on issues pertaining to religion and public education and has been involved in much of the litigation at the U.S. Supreme Court concerning religion. Thomas has co-authored numerous guidelines used by public schools on such issues as religious holidays, the Equal Access Act, and teaching about religion. He also co-authored *The Right to Religious Liberty*, the American Civil Liberties Union's only book on church-state law. He has represented many Evangelical groups and has lectured at Harvard as well as at Pat Robertson's Regent University. Thomas serves as special counsel to the National Council of Churches and is consultant to The Freedom Forum First Amendment Center at Vanderbilt University. Most recently, Thomas co-authored *Finding Common Ground: A First Amendment Guide to Religion and Public Education*.

[1] On June 25, 1997, the U.S. Supreme Court ruled that the Religious Freedom Restoration Act of 1993 was unconstitutional. City of Boerne v. Flores, 117 S.Ct. 2157 (1997).

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Freedom of Assembly and Petition

The First Amendment language guaranteeing the right to peaceful assembly and to petition government officials and entities affirms the right of people to participate in public life by acting in groups and by holding the government accountable for its actions. It is the bedrock of political liberty. These rights cover a wide variety of civic endeavor—boycotts, protests, marches, and demonstrations; lobbying; freedom of association; access to information—and frequently overlap or are closely related to other First Amendment freedoms, such as speech and the press. Most people living in the United States take these rights for granted, much like the air we breathe. They are considered part of what it means to be an American. After all, this country came into existence as a result of collective action in resistance to arbitrary authority.

During the 20th century, a succession of judicial opinions has affirmed the exercise of these rights in political activity, ranging from civil rights to electoral politics. For example:

•In 1940 the Supreme Court held that orderly union picketing is protected by the freedom of speech and the rights of petition and peaceable assembly.[1]

•In 1958 the freedom of association was first recognized in explicit terms by the Supreme Court when it struck down an Alabama law that required organizations to disclose their membership lists.[2]

•In 1967 the Supreme Court overturned a state loyalty oath requiring school teachers to swear they were not members of the Communist Party or any other subversive organization.[3]

•A 1982 Supreme Court decision found that a voluntary association could be used to further economic interests. In this case, neither the NAACP nor its members could be held responsible for damages resulting from a legal civil rights boycott of white merchants.[4]

There have been some significant exceptions to this line of opinions. In 1997 the Supreme Court upheld a Minnesota regulation

The right to peaceful assembly and to petition the government is the bedrock of political liberty

against the placement of candidates on the same ballot as the nominees of more than one party—“fusion” candidates. It said the regulation does not restrict a political party’s ability “to endorse, support or vote for anyone they like” and does not violate its association rights under the First and Fourteenth amendments.[5]

Nevertheless, the rights of petition, assembly and association (which is implied) are strong today. The government is forbidden to obstruct peaceful assembly and lawful protest based on content. It may, however, make reasonable regulations regarding the time, place and manner of assemblies and demonstrations, so long as they are not used to deny freedom entirely.

In a number of other countries, bans have been imposed on political organizations; membership in those groups is considered a crime. In the U.S., citizens cannot be punished solely for their membership in a party or association. At different times, however, severe infringements have been committed by the government.

The freedom of association includes freedom from compelled orthodoxy, a principle summed up passionately by the Supreme Court:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[6]

Thus, freedom from compelled association is seen as a vital component of the First Amendment, similar to the right *not* to speak, *not* to believe, and *not* to petition.

Government cannot condition employment or other aspects of its largesse on the surrender of First Amendment rights. For example, one state’s denial of bar admission to an applicant who refused to answer questions concerning membership in a radical organization was overturned because the inquiry was not limited.[7]

Registration requirements and the disclosure of membership lists can chill the freedom of association, so the Supreme Court has put more emphasis on the principle of associational privacy. In one notable case, the court struck down the application of a state disclosure requirement regarding campaign contributions to the Socialist Workers Party, since there was evidence that disclosure would subject contributors and recipients to harassment and possibly assault.[8]

People have the right to use public property, such as streets and parks, for political activities. The issues of free expression and equal treatment are relevant here. For instance, a law that banned all demonstrations near schools except in labor disputes was struck down because it regulated the content of assemblies, not only their time, place and manner. Demonstrations on the grounds of a state capitol or public library and even picketing at the Supreme Court have been upheld.

While all this liberty is very impressive, all is not well with the rights of assembly and petition. One serious problem is the proliferation of lawsuits that harass critics of certain public policies. Another threat emerges out of anti-terrorist legislation. Finally, the ability of people to petition government is being undermined by the limitations on

While all this liberty is very impressive, all is not well with the rights of assembly and petition.

access to government information brought about by budget-cutting and privatization.

Teen curfews

Some believe curfews are an effective way to help keep America's streets safe. A 1996 survey of the U.S. Conference of Mayors revealed that at least 270 cities across the country have youth curfews.[9] Moreover, the Supreme Court in 1997 let stand a decision of the California Supreme Court that upheld a court order against young Latinos being seen together on certain streets in San Jose.[10] The court's ruling was lauded by Los Angeles prosecutors who asked a state court to permanently enjoin public gatherings of a group of alleged gang members, known as the 18th Street gang. Law enforcement officials view this ban as an effective way to fight crime. Allan Parachini of the ACLU in Los Angeles regards it as "a cynical, political ploy that has little to do with crime."[11] Adds Woody Moreno, whom police say is a leader of the 18th Street gang, "Just because we have bald heads and we're Latinos, we're all gang members."

Recent court rulings indicate that some judges have taken a serious interest in the constitutional issues involved in teen curfews. In 1996, a judge barred enforcement of a curfew in Washington, D.C., on the grounds that it would prevent students from participating in "harmless" activities. Soon after that, the Washington State Court of Appeals ruled unanimously that Bellingham's 1992 curfew law infringed on minors' fundamental freedoms of movement and expression. Further, it said, the curfew interfered with the rights of parents to supervise their own children.[12] On June 16, 1997, a federal court invalidated San Diego's 50-year-old nighttime curfew for minors, finding that it was unconstitutionally vague and a First Amendment violation that curtailed legitimate conduct. Janice Scanlan, a Bakersfield, Calif., official who led a coalition of 114 California cities supporting the San Diego ordinance, said many cities would have to re-evaluate their own ordinances as a result of the ruling.[13]

Strategic Lawsuits Against Public Participation

One of the most serious assaults on the public's right to petition the government takes the form of Strategic Lawsuits Against Public Participation, otherwise known as SLAPP suits. The acronym SLAPP, first coined by University of Denver professors Penelope Canan and George Pring, authors of *SLAPPS: Getting Sued for Speaking Out*, describes a form of lawsuit aimed at intimidating citizens or groups that communicate concerns to government about corporations, real estate developers, or other private parties. According to Pring and Canan, "Americans by the thousands are being sued, simply for exercising one of our most cherished constitutional rights—speaking out on political issues."[14] SLAPP suits are usually brought by private parties, so that in one sense they are not violations of the First Amendment, which establishes protections vis-à-vis government action. Yet the users of SLAPP suits are asking an arm of government—the courts—to intimidate their critics and, in effect, deny them their right of petition.

The University of Denver's Political Litigation Project, which has studied and reported the incidence of SLAPP suits for more than a decade, found that citizens were being "SLAPPed" for a variety of activities that were normally considered within the scope of First Amendment rights. These include:

- Writing letters to the editor
- Circulating petitions
- Calling public officials

•Reporting police misconduct

•Erecting signs or displays on their property

•Testifying against real estate developers at zoning hearings

•Demonstrating peacefully against government action

•Testifying before Congress or state legislatures

•Filing public interest lawsuits

According to New York Supreme Court Judge J. Nicholas Colabella, "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[15]

Even federal agencies have gotten "SLAPP-happy." In 1994 the Department of Housing and Urban Development (HUD) used the threat of a SLAPP to silence protesters in Berkeley, Calif., concerned about the conversion of a motel into low-income housing for recovering alcoholics and other substance abusers. In a disturbing use of federal authority, agency officials threatened to fine protesters more than $100,000 each and even hinted at possible jail time for violation of the Fair Housing Act. As part of its investigation of the incident, HUD ordered the protesters to turn over all written materials regarding the protest. Officials even offered to settle the case out of court—but only on the condition that the protesters never speak or write regarding the project again. HUD eventually called off its investigation of the protest after it belatedly concluded that the protest was protected free speech under the First Amendment. By this point, HUD had harassed Berkeley protesters for three years.

In 1997, with help from the Center for the Community Interest in Washington, D.C., legislation was introduced in the House of Representatives that was intended to prevent future federal agency attempts to suppress the First Amendment rights of citizens who oppose government programs.[16] According to Roger Conner, head of the center, this type of legislation calls for action on a growing problem. "Even though HUD has backed away, there are still efforts to intimidate dissenters by the Department of Justice and other parts of government. A federal anti-SLAPP law is needed."

Even though the targets of SLAPP suits usually prevail in court, their time and resources are diverted from their original goals. So, many believe that laws are needed to curtail the use of legal action to stifle civic action. According to Robert Richards, director of the Pennsylvania Center for the First Amendment and one of the nation's foremost authorities on SLAPP, these lawsuits have captured the attention of at least 10 states, but only Washington and New York had enacted anti-SLAPP legislation.[17] By the end of 1997, California and Tennessee had passed such laws. Most anti-SLAPP statutes are modeled after California's landmark legislation. That law allows a SLAPP target to file a motion to summarily dismiss the case unless the party filing the SLAPP can prove the case is not frivolous. The motion benefits the SLAPP target by staying all discovery proceedings until the plaintiff can demonstrate the merits of the case. The defendant saves money and time by avoiding a long and expensive discovery battle. Additionally, if the defendant's motion is successful, the plaintiff must pay for all attorneys' fees and costs associated with the lawsuit.

"Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."

Recently, courts have seen the emergence of the "SLAPPback" suit. The SLAPPback is a countersuit aimed at holding plaintiffs accountable for injuries they cause to individuals and the public through a frivolous lawsuit. The irony of the SLAPPback suit, according to Canan and Pring, is that "the cure is a dose of the same disease"—one lawsuit to hold those accountable for another lawsuit. "The key to fighting a SLAPP suit is to move to dismiss on petition-clause grounds," environmental lawyer Mark Chertok told a writer for the American Bar Association Journal.[18] Chertok's comment followed a ruling by the Supreme Court, in a case involving an antitrust suit, holding that petitioning activity is shielded from liability as long as it is genuinely aimed at procuring favorable government action.[19]

States enact laws against product libel

The food and produce industry has adopted a variation of the SLAPP concept, using state laws to hold liable individuals and groups who publicly raise questions about the safety of food products. Instead of relying on existing law, the agriculture and chemical industries are pressing state legislatures to pass bills that explicitly make it illegal to disparage foods unless one has "sound scientific inquiry, facts or data" to support one's claims. These laws are sometimes jokingly referred to as "veggie libel" laws or "banana bills," but their impact on public discourse about food safety is a serious matter. Television talk-show host Oprah Winfrey, target of the first major lawsuit based on these laws, certainly is not laughing.

On an April 16, 1996, show discussing bovine spongiform encephalopathy, commonly known as "mad cow" disease, a guest speaker alleged that the U.S. cattle industry engaged in practices associated with an outbreak of the disease in British beef. Oprah said, "It has just stopped me cold from eating another burger!" Following the show, live-cattle prices at the Chicago Mercantile Exchange sank rapidly. Later, Texas cattleman Paul F. Engler and others filed suit to recover damages under the state's 1995 food-disparagement laws.

Food-disparagement laws came on the heels of a scare over Alar, a chemical used to keep apples fresh. In 1989 apple growers claimed a loss of $130 million because of reports of a link between Alar and cancer aired on CBS's "60 Minutes." Washington state apple growers filed suit against "60 Minutes," but the Supreme Court, without comment, let stand lower-court rulings that found that apple growers had failed to prove the 1989 report contained false statements. Also in reaction to the Alar scare, food industry lobbyists launched a campaign to get state legislatures to enact laws restraining public remarks about foods that could have a devastating effect on the industry.

Among the many problems with food-disparagement laws is the fact that no one can decide what "sound science" means in relation to the laws. Ann Oldenburg of *USA TODAY* reported that thalidomide and DDT were once endorsed by science but were later found to cause birth defects and cancer, respectively.[20] The threat of a food-disparagement suit can affect almost anyone. Some writers have

STATES THAT HAVE PASSED OR ARE CONSIDERING DISPARAGEMENT LAWS

Have Law	Debating Law
Alabama	Maryland
Arizona	Nebraska
Colorado	Vermont
Florida	Wisconsin
Georgia	
Idaho	
Louisiana	
Mississippi	
Ohio	
Oklahoma	
South Dakota	
Texas	

mused that former President George Bush could have been sued under such laws for making his famous disparaging remarks about broccoli. As Sierra Club magazine writer Paul Rauber stated in his 1995 article, "Vegetable Hate Crimes," "If you do not have anything good to say about fruits and vegetables... you had better not say anything at all, or else the produce industry will sue you for every penny you're worth."

Legal services and petition rights

"The legal system is just now beginning to absorb the impact of a range of actions Congress took this year, in bills signed by President Clinton, to limit access to the courts by poor people," Linda Greenhouse reported in *The New York Times* in 1996.[21] A 1996 law barred attorneys in federally financed legal-services offices from handling class-action lawsuits and required a legal-services lawyer in Tucson, Ariz., to withdraw from a case concerning enforcement of child-support regulations two months before it was to be reviewed by the Supreme Court. Greenhouse regarded this curb as "the culmination of years of Congressional hostility toward the Legal Services Corporation, fueled by the view that it has become an illegitimate agent of social change, instead of a dispenser of retail advice to poor people with legal problems."

The vast majority of legal services are resolved through mediation, administrative proceedings or negotiated settlements. LSC assists clients with a host of local transactions, including government benefit programs, evictions, divorces, and spousal and child-abuse problems. Dorothy Lohman of the LSC office in Washington, D.C., says, "Our offices are part of the community. LSC boards around the country are made up of local people who have realized that we do bow to local decision-making."

Despite widespread successes, LSC continues to wage an annual battle for funds with some members of Congress who have sought its extinction. In 1995 and 1996, funding for the Legal Services Corporation was cut by nearly a third, and a series of new restrictions on what LSC could do for its clients—with federal and nonfederal funds—was imposed. Under the new rules, legal services attorneys can no longer use LSC funds to participate in class-action lawsuits and may not communicate with local, state or federal officials or regulators about regulations affecting their clients. Additionally, they may not represent prisoners or certain groups of immigrants.

These restrictions were challenged in court by at least five LSC offices in different cities. In one case, a rule that prevented LSC attorneys from challenging welfare-reform measures was ruled unconstitutional by U.S. District Judge Alan Kay in Hawaii in February 1997.[22] Kay's decision cited the First Amendment right to petition the government for redress of grievances and said that the restriction at issue would prevent legal-services offices from providing input on the welfare debate.[23] Although this decision officially applies only to the Legal Aid Society of Hawaii and four LSC offices in California and Alaska, it could have significant implications if it is appealed and upheld.

Impact of new laws to deter terrorism

Legal immigrants constitute approximately 4% of the U.S. population. They are the people the United States has invited to stay permanently and should be distinguished from nonimmigrant visitors (students, business travelers, tourists and others) and illegal immigrants. The Supreme Court has never ruled directly on whether immigrants have the same First

Amendment rights as American citizens, although one decision stated as much indirectly.[24] In the 1990s, the rights of legal immigrants have been one of the casualties of the federal government's effort to crack down on domestic terrorism. "In some cases," *The New York Times* observed, "the [new] law seeks to block individuals from going to court to challenge their deportations. Immigration officers can pick up people on the street and detain and deport them without a hearing if they cannot prove they entered on a visa or have been here for two years."[25] After the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Although this antiterrorism law received strong public support, an inspection of the legislation reveals a darker side. Many of the methods prescribed by the bill to combat terrorism conflict with First Amendment rights guaranteed by the Constitution.

According to Georgetown University law professor David Cole, "the two most troubling provisions of the AEDPA authorize the government to deport immigrants based on secret evidence not disclosed to the immigrant and to impose criminal and immigration sanctions on those who provide humanitarian aid to a foreign organization labeled 'terrorist' by the Secretary of State."[26] He also points to other constitutional flaws in the Antiterrorism Act, including its failure to define what "foreign" means in this context, which enables increased surveillance and harassment by the INS. Theoretically, under the AEDPA, a domestic group with one foreign member could be designated "terrorist" if it engages in illegal activity. Additionally, the AEDPA is devoid of any meaningful judicial review. Faced with a challenge to a "terrorist" designation, the secretary of state may assert that the reasons for the designation were based on a classified record, making review virtually meaningless.

The Illegal Immigration Reform and Immigration Responsibility Act of 1996 makes it more difficult to challenge the "terrorist" designation and, to cap this serious denial of due process, the AEDPA sets up a special court to handle deportation proceedings of suspected members of "terrorist" groups; the court may review a secret record of the State Department, but the alleged "terrorist" is entitled only to a summary of the record. How can this person defend against evidence he or she cannot see?

> If the government can try people in secret proceedings, this could cast a substantial chill on political activities.

And, if the government can try people in secret proceedings, this could cast a substantial chill on the political activities of those who support groups the administration dislikes.

It is not a theoretical risk. Since 1987 seven Palestinians and a Kenyan (known as the "L.A. Eight") who are associated with the Popular Front for the Liberation of Palestine and are represented by David Cole have fought the government's attempts to have them deported. In June 1997 a federal appellate court in California decided that the group had been targeted by the INS because of the group's participation in constitutionally protected activities, including speechmaking and the distribution of information on behalf of the Palestinian cause.[27]

Assuring the public's right to know

Access to government information is a central part of the right to petition. Information gathered and disseminated by the government is used by all sectors of society for a wide variety of purposes, ranging from crop forecasts to economic analyses about employment, retail trade and health care.[28] Information about government is perhaps most crucial to the public's ability to hold government accountable. That principle makes the Freedom of Information Act inseparable from the rights enumerated in the First Amendment.

Freedom of Information

The Freedom of Information Act provides a right of access to the records of all federal agencies. Before the act was passed in 1966—and later strengthened in 1974—there was no law that provided for public access to government information. One could ask for information, but often the request was denied or simply ignored. Since the FOIA was passed, the government, not the requester, has the burden of justifying any of the exemptions.[29] It has not changed the legendary resistance by government to reveal information. FOIA requests face long delays and plain bureaucratic resistance, but the right of access is enforceable.

Nearly 600,000 FOIA requests are filed annually. Although just a small portion of these are filed by journalists, the news stories based on responses to these requests have led to important discoveries about things happening inside the government. FOIA requests have led to amazing stories about government corruption and harassment by the FBI and IRS, and post-World War II experiments involving the injection of plutonium into humans.

A major impediment to public and press scrutiny is excessive secrecy in the federal government; classification of documents often is a way to ensure that those documents will not be revealed through an FOIA request. In 1995 the U.S. government designated 400,000 pieces of information Top Secret, a figure cited by Sen. Daniel Moynihan (D-N.Y.) to explain the need for legislation he was sponsoring in 1997 to put an end to out-of-control government secrecy. Around the same time, George Herring, a historian who had served on a Central Intelligence Agency panel—which was ostensibly created to examine and then release information about the agency's covert operations—declared that he had been "used" to create the impression of openness when, in fact, agency policies and procedures remained heavily biased toward denial of declassification.

The Electronic FOIA

Some of the more protracted FOIA battles of the 1990s have revolved around the issue of information in government-created databases. The Electronic Freedom of Information Act (EFOIA) was enacted in the fall of 1996, after more than five years of legislative efforts headed by Sen. Patrick Leahy (D-Vt.). The EFOIA guarantees that the federal government's electronic records will be as accessible to the public as paper records. The 1996 legislation expands the definition of "records" covered by the act: "Any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, in-

FOIA requests face long delays and plain bureaucratic resistance, but the right of access is enforceable.

cluding an electronic format." There had been some question as to whether computer programming necessary to search a database was considered creation of a document. EFOIA explicitly extends the definition of "search" to include "review by automatic means of agency records for the purpose of locating those records which are responsive to a request."

The existing 10-day response time, which was rarely honored by federal agencies, was lengthened to 20 days, and a requirement was established to give requesters an opportunity to limit the response time by limiting the request. The "exceptional circumstances" time exception will not be allowed for agency backlogs or "delay that results from a predictable agency workload of requests."

Of greatest importance to journalists is a provision entitling reporters who demonstrate a "compelling need" to obtain "expedited" processing of their requests. The compelling-need standard, which previously related to government actions that were the subject of contemporaneous media coverage, was broadened to include current matters where a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a matter of great import.

Computerized records

For most of the nation's history, information at all levels of government has been disseminated predominantly on paper. However, in recent years there has been a rapid and widespread adoption of electronic formats at the federal level, with state and local agencies moving in the same direction at a slower pace. The use of electronic technology provides new opportunities for accessing government information. Over the past couple of years, an enormous amount of information has been made available through the World Wide Web. Dozens of federal agencies maintain Web sites, including the Securities and Exchange Commission, which is putting corporate financial filings on line. On the legislative side, Congress has provided free access to information about legislation through the Thomas Web site.

At the same time, however, many of the key laws relating to public access—including the 1895 Printing Act and the 1962 Depository Library Program—have yet to be amended to include electronic as well as paper information. This has generated considerable confusion about the current obligations of the government to provide access to information now being created electronically, including the issue of whether such information must be offered in electronic and print formats. A similar confusion exists in many states. In Oregon, for example, state law requires that copies of agency documents be shared with the state library. However, a number of agencies do not think the same law demands that paper versions of public information stored in electronic form be supplied, and the law has not yet been amended to say so.

A related issue of great significance for federal and state policy makers is that of information equity. In a society where most of the work force and industry increasingly depend on electronic information, people without electronic access are disadvantaged. A central issue is the responsibility of federal and state governments to assure equity of access to information in electronic form, as well as on paper.

Privatization of government records

During the 1980s the Reagan administration launched a campaign to restrict public access to government information under the banners of budget-cutting, deregulation and paperwork reduction. Key data collection programs in agencies such as the Bureau of Labor Statistics were severely curtailed. The federal Office of Management and

Budget moved to reduce the reporting requirements of corporations—the raw material of government information on matters such as the environment and housing. The OMB has adopted a lower profile during the 1990s, and mindless budget-cutting is no longer the order of the day. Yet a key threat that emerged in the Reagan era continues to eat away at public access to government information: privatization of government databases.

Along with the computerization of government records, public officials are increasingly turning to the private sector to participate in the management of that information. Such privatization is being promoted in the name of efficiency and cost-cutting, but it raises serious questions about public access. Similar issues are posed when the government maintains control over the information but begins to charge users market rates to obtain access.

"Wiping out the record" is how one newspaper article described the way that access to certain government publications such as the *Congressional Record* is being restricted by means of fees or availability only in electronic form. Sen. John Warner (R-Va.) lamented the loss of certain materials because of privatization when he introduced legislation in April 1997 that would update the responsibilities of the Government Printing Office.[30] For example, Warner spoke of an arrangement "negotiated in secret" between the National Cancer Institute and Oxford Press in which only those who paid a $150 subscription fee and joined Oxford Press Information Associates could obtain the journal of the National Cancer Institute. The revenues from this endeavor do not come back to the institute to support research, Warner stated, but go to support Oxfords Press's nonprofit membership program.

Maximum access to government information will be achieved only if agencies within the three branches of government uphold the principles that have protected the framework for informing the nation for more than a hundred years. These principles, as listed in a 1996 Government Printing Office study, are:

•The public has a right of access to government information.

•The government has an obligation to disseminate and provide broad public access to its information.

•The government has an obligation to guarantee the authenticity and integrity of its information.

•The government has an obligation to preserve its information.

•Government information created or compiled by government employees or at government expense should remain in the public domain.

These five principles set the parameters for debates about the privatization of federal information. They can be used to formulate goals and restrictions for advanced, digital information services that are consistent with these maxims for preserving an informed citizenry.

State-level privatization

The privatizers are busy at the state level as well. In many cases the impetus comes from phone companies seeking exclusive contracts to distribute government information to the public. In Jacksonville, Fla., for example, residents can use a BellSouth dial-up system to access public information. Ameritech, another Baby Bell providing telephone service in Illinois, Indiana, Ohio, Michigan and Wisconsin, is offering online service through CivicLink, formed as part of a corporate partnership with BC Systems Corp. of Canada. CivicLink provides computer access to court, meetings, property and tax records, and other types of public information.

Private investors expect to reap billions of dollars in future decades as a result of their public information

initiatives. Local governments eager for additional revenue have been receptive to offers by private firms of free computerization and systems development in exchange for their ability to obtain a portion of the access fees. For example, as a result of corporate lobbying, Indiana adopted a law that requires public agencies to develop databases, which opened the door for Ameritech.

While computerization of government information can enhance public access to information, putting control over this process in the hands of private interests creates serious problems, especially when the contractor is granted an exclusive franchise. The principle of equal access is undermined by the inclination of private vendors to create "enhanced" services that are priced beyond the means of the average citizen.

This raid on the public trust has not been well publicized. At the state level, a cautionary bell has been rung by journalists, who are among the most avid users of government information. After Ameritech quietly signed exclusive contracts with four cities in Illinois, the state journalism association rallied others in support of a law enacted in 1997 that prohibits a "public body" from contracting exclusively with another for the copying and dissemination of court records.[31]

There is a movement countering the privatization of public records in other states, as well. In Iowa, where Ameritech sought but was unable to get exclusive rights to sell judicial information for the first 72 hours after a case ruling, a 1996 revision of the state's Open Meetings/Open Records law says that no extra charge shall be assessed for a document that has been produced by computer software. It also states that: "A public record shall not be withheld from the public because it is combined with data processing software."[32] Bill Monroe, executive director of Iowa's Journalism Association, said newspaper publishers were interested in the greater speed and possible reduction in costs of accessing information electronically. However, he said, "journalists opposed companies that were trying to position themselves as the only source."

A 1997 report by the National Newspaper Association and American Court & Commercial Newspapers Inc. provides detailed information about CivicLink and raises questions regarding such public/private arrangements. Senny Boone, the NNA coordinator for this project, explained that the study will be expanded and released in late 1997 to include other contracts giving companies rights to oversee and set fees for online services providing access to public information. There also will be important insights in a study by the Reporters Committee for Freedom of the Press, released in July of 1997. This state-by-state project examines access laws applicable to public records and public meetings, including how such laws have been changed to apply to electronic information.

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Depository libraries

Across the country, 1,400 depository libraries provide free access to federal documents in every state. They serve as the local link to government information in all formats, providing space, equipment and professional assistance. As agencies make greater use of electronic for-

mats, some have limited their Depository Library distribution to paper and microfiche products. Over time, this could dramatically reduce the type and amount of government information reaching the public. Moreover, as in many other areas, the future vitality of First Amendment rights is threatened by insufficient budget allocation. For example, of a budget of nearly $900,000 for 1996-1997, the California State Library, which serves more than 100 depository libraries, had only $90,000 for purchasing materials such as indexes and reference sources needed to support the collection.[33]

Strengthening the Depository Library Program is of the utomost improtance. Testifying before Congress on this subject, on behalf of six major library organizations, Robert Oakley, director of the law library at Georgetown University, stated: "Our two most critical concerns are the public's ability to locate information in a distributed electronic environment and the fundamental need to guarantee that electronic government information will be permanently accessible."[33]

'Wiring' the nation's schools and libraries

Even if government information is available online, that means little to members of the public who have no way to access it. Although an increasing number of households have home computers with modems, there is a substantial number of people who cannot afford such equipment. For them, the key to access will be telecommunications facilities at public institutions such as libraries and schools.

The Telecommunications Act of 1996, which deregulated certain aspects of the communications industry, contained a provision that was supposed to widen public access to online government information by allowing libraries and schools to obtain discounted connections to the Internet. On May 7, 1997, the Federal Communications Commission voted to implement a program providing $2 billion a year for the "wiring" of public schools and libraries. This plan expands a service through which the FCC, in conjunction with state public utility commissions, will fund telephone service to ensure that Internet and World Wide Web access is available to the poor and those living in remote areas.

It remains to be seen whether this program is, in fact, a victory for librarians. Julie Pringle, a librarian in Fairfax, Va., regards the latest discounts as an important acknowledgment that "libraries need this access and it shouldn't be at full price." Yet she is not sure that sufficient funds will be forthcoming. "To be frank," Pringle said, "we are being killed by our telecommunications costs. People want more and more, but libraries are able to provide less than what both the public and the library want." Lynne Bradley of the Washington, D.C., Office of the American Library Association summed up the hope and fear of libraries by saying, "the devil is in the details."

Conclusion

Assembly and petition often are considered "the orphan freedoms" of the First Amendment. But they play vital roles in the public life of this nation. Generally, citizen actions regarding housing, the environment and a host of other issues are protected by a framework of judicial and administrative laws based on the First Amendment rights of assembly and petition. Unfortunately, those freedoms are never secure.

Threats to democratic speech and action have been seen in the spread of Strategic Lawsuits Against Public Participation, which target lawful initiatives; along with harassment and intimidation, they weaken citizen action. In addition, First Amendment freedoms for legal immigrants have

come under increased attack in the 1990s, through unwarranted surveillance and the passage of antiterrorism legislation. Immigrants have been treated as the country's new post-Cold War "enemies." Finally, there are serious questions today about the federal government's enthusiasm for providing comprehensive, accurate and affordable information to the public about its activities, thwarting the Jeffersonian idea of an informed citizenry and undermining the ability to effectively petition government.

[1] Thornhill v. Alabama, 310 U.S. 88 (1940).
[2] NAACP v. Alabama, 357 U. S. 449 (1958).
[3] Keyishian v. Board of Regents, 385 U.S. 589 (1967).
[4] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).
[5] Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364 (1997).
[6] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[7] Baird v. State Bar, 396 U.S. 998 (1970).
[8] Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982).
[9] Charisse Jones, "Cities Give Curfew Laws a Closer Look," *USA TODAY*, June 27, 1997, p. 3A.
[10] People ex. rel. Gallo v. Acuna, 14 Cal. 4th 1090 (1997).
[11] David G. Savage and Carla Rivera, "Court Upholds Injunction Against Gangs," *Los Angeles Times*, June 28, 1997, p. 1.
[12] Hutchins v. District of Columbia, 942 F. Supp. 665 (D.D.C. 1996); State v. J.D., 86 Wash. App. 501, 937 P.2d 630 (1997).
[13] Jones, p. 3A.
[14] George Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (Philadelphia: Temple Univ. Press, 1995).
[15] Gordon v. Marrone, 590 N.Y.S. 2d 649, 656 (Sup. Ct. 1992).
[16] H.R. 589, "Fair Housing Reform and Freedom of Speech Act of 1997," Sec. 821: [The Act shall not apply to] "any otherwise lawful activity engaged in by one or more persons, including the filing or maintaining of a legal action, that is engaged in solely for the purpose of—(1) achieving or preventing action by a government entity or official, or (2) receiving an interpretation of any provision of the Act in a court of competent jurisdiction."
[17] Robert D. Richards, "Suing to Squelch," *The Washington Post*, Aug. 16, 1992, p. C1.
[18] Alexandra Lowe, "The Price of Speaking Out," *ABA Journal*, September 1996, p. 48.
[19] City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991).
[20] Ann Oldenburg, "Warning: You can be sued for insulting vegetables," *USA TODAY*, March 27, 1996.
[21] Linda Greenhouse, "How Congress Curtailed the Courts' Jurisdiction," *The New York Times*, Oct. 27, 1996, p. 5.
[22] Rod Ohira, "Legal Aid Society Wins Suit Against Spending Restrictions," *Honolulu Star-Bulletin*, Feb. 20, 1997.
[23] Legal Aid Society of Hawaii v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Haw. 1997).
[24] Bridges v. Wixon, 326 U.S. 135,148 (1945).
[25] "Hard Times for Immigrants," *The New York Times*, Aug. 6, 1997, editorial about recently enacted Illegal Immigration Reform and Responsibility Act of 1996, p. 34.
[26] David Cole, "Blind Decisions Come to Court," *The Nation*, June 16, 1997, p. 21.
[27] "Ninth Circuit Skeptical of INS Bid to Reinstate 'L.A. Eight,' " Metropolitan News Company *MetNews*, June 24, 1997.
[28] An excellent resource on this topic is the American Library Association's "Less Access to Less Information," compiled by Anne Heanue of the ALA's office in Washington, D.C.
[29] The FOIA exempts nine categories of information covering: classified documents; internal personnel rules and practices; information exempt under other laws; confidential business information; internal government communications; personal privacy; law enforcement; financial institutions; and geological information.
[30] Opening Remarks of Sen. John Warner, U.S. Senate Committee on Rules and Administration, hearing on legislative proposal to reform Title 44, April 24, 1997.
[31] Amendment to Illinois Freedom of Information Act, 1997.
[32] Amendment to Iowa Open Meetings/Open Records law, 1996.
[33] Testimony before the House Subcommittee on Government Management, Information and Technology, Committee on Government Reform and Oversight, May 8, 1997.

5 Education

The American experiment in self-government depends foremost on each person's participating as a citizen—and not just once a year in a voting booth. Being an active citizen means understanding one's rights and exercising them. To that end, the ability of schools to help students understand and exercise constitutional freedoms, particularly those in the First Amendment, is of fundamental importance. This is no easy task in a society that often seems to encourage passivity, apathy and sometimes outright hostility to civic participation.

What is more troubling is that detachment from civic matters seems to be growing, and young people are growing up with a less-than-impressive understanding of the core values of American democracy. One indication of this comes from a national assessment of civic education conducted every 10 years under the auspices of the U.S. Department of Education. The last such assessment, performed in 1988, found that less than half of 12th graders understood specific government structures and their functions. The report's summary concluded that, "even by the 12th grade, civics achievement remained quite limited in many respects."[1]

Problems have been found among adults, too. A 1996 survey by the Department of Education on adult participation in community and political organizations found that only 55% of respondents could correctly answer three of five basic questions about American government. Among young adults only 39% could do so.

Young people are growing up with a less-than-impressive understanding of the core values of American democracy.

The civic-education movement

The need for improved civics education has been recognized for a long time. Since the 1960s, there has evolved a network of educators, lawyers, public officials, foundations and others who have worked hard to make people better-informed participants in the lives of their communities and nation. Together they continue to design and distribute materials intended

to improve learning about the exercise of constitutional freedoms.

Charles Quigley has been the catalyst for many of these initiatives. He founded the earliest of these organizations, the Center for Civic Education, in 1964, and proceeded to inspire and be a major contributor to projects that develop curricular programs in high school civic education, as well as national competitions involving debate by young people about constitutional issues. “The train [of teaching good citizenship] has gone in two directions,” Quigley observes. “The requirement that civics be taught in the eighth and 12th grades has been dropped. If you look at curriculum today, you see there is nothing. But, individual schools are doing sophisticated things.”

Those involved in teaching about government, American history and constitutional freedoms agree that teaching these subjects used to be dull and distant from the lives of students. Todd Clark, head of the Constitutional Rights Foundation in Los Angeles, attributes the marked improvement in civics education to a shift in instruction toward emphasis on what’s happening in the community and to the greater involvement of lawyers in the classroom. “Engaging young people in dispute resolution through mock debates, mock trials and role playing, with students acting as local decision-makers, is particularly effective for teaching the importance of the basic principles of good citizenship,” Clark believes.

The improvements in civics education owe much to the commitment of the talented group of educators, judges and community leaders who are teaching young people how to use knowledge of the law and the processes of government to resolve their own problems. Lee Arbetman, one of the pioneers in law-related education and staff director at Street Law (formerly the National Institute on Citizen Education in the Law) maintains that much of the thinking about new ways of teaching good citizenship originated in the civil rights, women’s and environmental movements of the 1960s and 1970s. He describes two main elements of successful law-related teaching as follows:

1) The programs focus on law, the legal system, and the fundamental principles and values on which our constitutional democracy is based.

2) Lessons are interactive and explicitly aimed at developing in young people the skills needed to use their newly acquired information. Volunteers come from the justice system into the classroom, and students are sent outside the classroom to witness the law in action in their communities.

The spread of law-related education has been attributable, in part, to the encouragement and supply of teaching materials provided by the American Bar Association’s Division for Public Education. It makes books about the rights and obligations of citizenship, including the First Amendment, available in every state for students from kindergartners to high school seniors, according to Paula Nessle, director of this program at the ABA.

Judy Cannizaro, a social studies teacher in Nashville, Tenn., received funding from the ABA in 1992 to implement a law-related education program for Metropolitan Nashville Public Schools. Lessons cover the five freedoms of the First Amendment and other constitutional issues. They are designed to involve parents as well as students. Describing her experience, Cannizaro says that interest in the study of rights increased significantly when classes began to focus on basic questions such as, “Why can’t you do certain things?” and “What are your rights?” “This brought things home on a personal basis,” Cannizaro said.

The Department of Justice Office of Juvenile Justice and Delinquency Prevention has funded organizations providing law-related education since 1979. Specifically, its Youth for Justice program backed law-related education through funds distributed to five organizations: the American Bar Association Special Committee on Youth Education for Citizenship, the Center for Civic Education, the Constitutional Rights Foundation, the National Institute for Citizen Education in the Law, and Phi Alpha Delta Public Service Center. According to Frank Porpotage of the Justice Department, the amount that Congress has granted for these groups peaked in the early 1990s at $3.2 million and has fallen since then to $1 million in 1997. In 1998, only $500,000 will be available for distribution among these organizations. "We think [law-related education] has shown it works and are ready to do more, but this depends on Congress," Porpotage said.

Teaching materials

Improving the study of a range of subjects, including the framework of government and exercise of constitutional rights, depends upon the availability of materials to guide the teacher and engage the student. Those involved in developing educational reading and audiovisual material frown upon the use of standard textbooks. "The traditional way of teaching history and government gets in the way of teaching policy and government. Textbooks aren't as interested in contemporary issues as they need to be to interest today's students," says Todd Clark.

Some organizations have designed teaching materials for all levels. The First Amendment Congress developed two guides, one for kindergarten through grade four and one for grades five through 12, called *Education for Freedom*. These guides, now administered by The Freedom Forum First Amendment Center, present issues that relate to student experience and to the curriculum of each grade level.

The Center for Civic Education set a high standard when it started its "We the People" civic education program in 1987. The center provides instructional materials for upper elementary, middle and high schools about the history and principles of constitutional democracy, including the First Amendment. Upon completion of the course, students receive a certificate of achievement signed by their member of Congress or other prominent official. At the high school level, students participate in a nationwide competition with state champions traveling to Washington, D.C. for the "We the People" national finals.

In addition to materials for teaching basic history and civics courses, there are print and video media that tie learning about rights to the situations young people face. The Constitutional Rights Foundation, for example, publishes *From the Newsroom to the Courtroom: Lessons on the Hazelwood Case*, which deals with questions relating to the rights of student journalists.

LEADING CIVIC EDUCATION PROGRAMS

American Bar Association
Division of Youth Education
541 North Fairbanks Court
Chicago, IL 60611
312-988-5735

Center for Civic Education
5146 Douglas Fir Road
Calabasas, CA 91302
800-350-4223

Close Up Foundation
44 Canal Center
Alexandria, VA 22314
703-706-3300

Constitutional Rights Foundation
601 S. Kingsley Drive
Los Angeles, CA 90005
213-487-5590

Educational Information and Resource Center
606 Delsea Drive
Sewell, NJ 08080
609-582-7000

National Institute for Citizen Education in the Law
711 G Street SE
Washington, DC 20003
202-546-6644

National Council for Study of Social Studies
3501 Newark Street, NW
Washington, D.C. 20016
202-966-7840

People for the American Way
2000 N Street, NW
Washington, D.C. 20036
202-293-2672

Phi Alpha Delta Public Service Center
P.O. Box 3217
Granada Hills, CA 91394
800-835-4865

"The extent to which education about the Constitution has improved varies," says Lee Arbetman of Street Law. "In the state of Connecticut, every school district is its own fiefdom. North Carolina has a statewide approach. It's hard to get a single picture of the nation."

Nissan Chavkin of the Constitutional Rights Foundation emphasizes the need to be sure the issue raised is related to local needs: "Different states do different things. The network [of civics education] fluctuates in response to what people need, and it depends on what is the issue on the ground."

Robert Leming, a former teacher who now works at the Indiana Program for Law-Related Education, based at Indiana University, believes that "to get teachers or parents or anyone interested, materials about government have to be infused into the curriculum and raise issues that are important to their communities." As an example, Leming suggested the controversy over whether Joe Camel advertising was directed at enticing young people to smoke cigarettes. He mentioned two possible questions: "Can the government step in? Does that infringe on the First Amendment rights of the tobacco companies?" [2]

Government support is flagging

Despite these notable initiatives, there seems to be a spirit of resignation common among people involved in civics education. "It shouldn't strike anyone as ironic that in the late 1990s, there is no money from the government to teach children about the government," says Nissan Chavkin.

During the final decade of the 20th century, there have been steep cutbacks in federal funding for key programs. The federally funded surveys of educational achievement are expensive and must be authorized by Congress. Although numerous members of Congress have endorsed educational programs, funding remains woefully insufficient. Nevertheless, the federal government is involved in some far-reaching civic education in this country and abroad, even as it scrimps on other important educational projects.

Over the past decade there has been growing consensus on the need for national educational goals. In 1994 Congress passed the Goals 2000: Educate America Act. Its provisions include the creation of the National Educational Goals Panel. Among the goals set by the panel is ensuring that each student demonstrates competency in civics and government. Another goal, relating to adult literacy and lifelong learning, calls for giving each adult "the knowledge and skills necessary to exercise the rights and responsibilities of citizenship."

International civics education

Many Americans believe that their form of democracy is a model for the rest of the world. Thus, it is not surprising that the collapse of totalitarian regimes in the former Soviet bloc has brought with it U.S. efforts to export American civic values. One of the most innovative of these is Civitas, an international civic education exchange Program. An informal network of educators and government officials in the United States and foreign countries, Civitas has programs in Bosnia and Herzegovina, the Czech Republic, Hungary, Latvia, Poland and Russia. It is sponsored by a consortium of government and private organizations and administered by the Center for Civic Education, with support from the Department of Education and the United States Information Agency.

The primary aims of this program are to help educators from former Eastern bloc nations adopt effective civic-education programs and to encourage research

on the effects of civic education in developing the knowledge, skills and traits of public and private character needed for constitutional democracy. At the same time, educators are working to create teaching materials for students in the United States that will give them a better understanding of these emerging constitutional democracies.

Communities linking via computers

Local groups all over the United States have been building online networks, which should play an important role in increasing civic knowledge. The networks enable citizens to further effective advocacy through group association in this era of electronic information. Community "nets" overcome time and distance limitations and put groups in contact with others holding common interests and problems. These networks often result in the greater sharing of organizational resources.

Inherent in such nets are possibilities for strengthening citizen action on various issues. In fact, computer networks provide an independent base for citizen action, at a time when digital information services are becoming more commercial and centralized.

ONLINE EDUCATION ABOUT THE FIRST AMENDMENT

Educational efforts relating to democratic values can be found in cyberspace as well. Users of the Internet tend to be strong believers in free speech, so it is not surprising that the online world contains a great deal of information about First Amendment issues. Here is a list of only some of the many sites that provide access to valuable information relating to First Amendment freedoms:

American Civil Liberties Union
http://www.aclu.org

American Library Association
http://www.ala.org

Chronology of U.S. Historical Documents
http://www.law.uoknor.edu/ushist.html

Electronic Frontier Foundation
http://www.eff.org

Electronic Privacy Information Center
http://www.EPIC.org

First Amendment Cyber-Tribune
http://www.w3.trib.com/FACT

Free! The Freedom Forum Online
http://www.freedomforum.org

Freedom of Information Listserv
http://web.syr.edu/~bcfought

Project Censored
http://censored.sonoma.edu

Reporters Committee for Freedom of the Press
http://www.rcfp.org

Step-by-Step Guide to Using the Freedom of Information Act
gopher//gopher.nyc.pipeline.com:6601/00/publications/reports/foia

Student Press Law Center
http://www.splc.org

University of Missouri FOI Center
http://www.missouri.edu/~foiwww/laws.html

Community nets are limited in areas where the law has not caught up with technology. Schools and libraries, which are often the bases of these nets, must exercise special caution regarding the transmission of certain words and images because of uncertainty about content considered indecent, dangerous, or defamatory and who will bear legal responsibility for online misconduct.

A publication released by the Benton Foundation in May 1997, ***Local Places, Global Connections***, focuses on the importance of libraries in the growth of community nets and gives a detailed account of ways that foundations, government agencies and private corporations have supported these important 21st century pro-democracy initiatives.

The following describes three community nets in Minnesota, Michigan and Washington, D.C.

MetroNet

MetroNet, connecting people at libraries, schools and media centers in the Minneapolis/St. Paul region, has been active online for more than a decade. It offers a good example of the ways that local online community building can lead to new collaborative relationships, both online and away from the computer.

Mary Treacy, MetroNet founder and one of its guiding lights, says that its goals include "putting libraries first; connecting libraries with the agendas of other organizations and making access to government information a priority."

Currently, MetroNet sponsors its own Web site, a bulletin board and several listservs. Everything on this site is intended for librarians, information mavens and book lovers. MetroNet makes its own publications available online: the weekly MetroFax and monthly MetroBriefs. The site can also be used for creating one's own site. Its Webmasters provide an annotated list of the best resources for designing and implementing Web sites. The Librarian's Homepage Creator is an interactive tool used in MetroNet's homepage workshops.

MetroNet also is the home of the Minnesota Coalition on Government Information. It allows state agencies to interact on an ongoing basis with libraries and has led to the expansion of other online and print resources for obtaining access to government information.

The Flint Community Networking Initiative

This initiative, based at the Flint Public Library, takes maximum advantage of the available resources and drive for learning offered by the library and the University of Michigan School of Information and Library Studies. The FCNI serves a diverse population of 140,00 people. Its main objective is to be a tool for building collaborative relationships with local agencies and groups. With this in mind, it endeavors to teach computer skills and integrate digital systems with other kinds of community resources at social service centers such as the Agency on Aging and hospitals in the area.

The Flint Public Library has been centrally involved in this project and has done much to promote computer literacy. "We soon discovered that we have the potential through the Internet to access, organize, and retrieve information from around the world," says Professor Joan Durrance, director of the university's School of Information and Library Studies, who works with students and people from a variety of area organizations to assist the growth of "people networks."

HandsNet

HandsNet is based in Washington, D.C. Its executive director, David Goldsmith, describes this network of non-profit grassroots organizations as "an Intranet for those working in the public service community." HandsNet is a membership-funded organization of

more than a hundred groups. Its online network provides reports and resources about a variety of local issues. These include community and economic development, child abuse, drug and alcohol addiction and anti-poverty programs.

The information on HandsNet is provided by experts in these fields and can be used to develop plans on a given topic. A partial list of HandsNet online features includes: Members Exchange, which can be used for sharing an inquiry or announcement; Alert!, with notices and calls for action; and Housing and Community Development, a resource for nonprofit housing developers and neighborhood groups.

All together, the hundreds of community computer-linking initiatives now under way are reinforcing the country's commitment to free and meaningful political action and demonstrate the First Amendment in action.

Conclusion

Abraham Lincoln's pronouncement that the United States is a country governed "by the people and for the people" has little force without widespread participation by all Americans in the civic life of their communities and the nation. According to a variety of indicators, the degree of such participation has been on the decline. At the same time, there has been a flowering of programs meant to reawaken in Americans an appreciation for the principles of our democratic system. Local groups building online networks, aided by libraries and schools, are serving as the on-the-site vanguard of American democracy. These groups, raised in a print world, are bringing the First Amendment rights of petition, assembly and association into the next century. But the power and promise of those rights depend less on the tools of technology than the willingness of Americans to re-engage in the public life of their society. How much importance they place on protecting and exercising those rights will have a profound impact on the future of our democracy.

[1] The Nation's Report Card, 1988, U.S. Department of Education.

[2] In July 1997 cartoon figure Joe Camel was "retired" by RJR Nabisco. This occurred after the interview with Leming in May.

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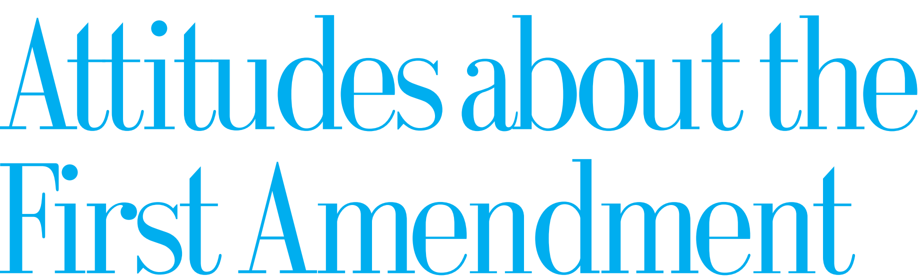

Attitudes about the First Amendment

By Ken Dautrich

Elections and campaigns, significant international events, terrorism, political scandals, corporate mergers, natural disasters and high-profile crimes are commonly the subject of public opinion polls. They are events that most often have a beginning and an end. Their high visibility in the news and larger degree of public interest make polls on these topics newsworthy in and of themselves. Public opinion polls on enduring issues, more abstract issues, and issues generally not typically discussed at dinner, at work or in the news are far less common.

Such is the case with polls on the First Amendment. Although from time to time an event directly related to a First Amendment topic receives some attention in national polls—such as ABC's use of deceptive practices in investigating Food Lion supermarkets—it is uncommon to find extensive public opinion polls on First Amendment issues.

This chapter presents the findings from a new Freedom Forum poll that comprehensively measured public opinion on a wide variety of First Amendment issues. It is the first significant inquiry into public opinion on the First Amendment since 1991, when Robert Wyatt reported on a series of polls finding that, from the perspective of the American public, "it is apparent that free expression is in very deep trouble." Before Wyatt's research, there were two notable comprehensive studies of attitudes about civil liberties—one conducted in the mid-1950s during the McCarthy era by Samuel Stouffer, and one in the late 1970s by Herbert McCloskey and Alida Brill.

The Freedom Forum poll on the First Amendment was conducted by telephone at the University of Connecticut with 1,026 American adults. Interviewing was conducted between July 17 and August 1, 1997. Sampling error is $\pm$3% at the 95% level of confidence.

This Freedom Forum poll sought to provide a comprehensive picture of American opinion on the First Amendment in contemporary society and to trace changes in opinion about the First Amendment wherever possible. More specifically, the survey ad-

Americans express a strong skepticism about government restricting their First Amendment freedoms.

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dressed the following First Amendment issues:

•How important are First Amendment freedoms to Americans?

•How do First Amendment freedoms compare in importance to other constitutionally protected rights?

•Is support for the First Amendment holding steady, or is it changing?

•Would Americans vote to ratify the First Amendment if they were voting on it today?

•What do they feel about the amount of freedom currently afforded by the First Amendment's protections of religion, speech, press, assembly and petition?

•Do Americans think they have too much, too little or about the right amount of freedom in each of these areas?

•To what extent would Americans restrict First Amendment freedoms?

•Are Americans more protective of their own rights than the rights of others?

•How do Americans feel about amending the First Amendment?

•What are Americans' experience with and opinions about First Amendment education in the schools?

•How free do Americans feel to express themselves in different situations, such as at work and in the classroom?

Summary of findings

The Freedom Forum poll finds that Americans express strong support for the freedoms guaranteed by the First Amendment. While there are some areas of concern, on the whole the First Amendment is alive and well—at least from the perspective of the American public.

For example, most Americans feel that First Amendment freedoms are not just important, but are "essential" American rights. Eight in 10 feel this way about freedom to practice religion, seven in 10 about freedom of speech and about the right to practice no religion, six in 10 about freedom of the press, and more than five in 10 about the right to assemble and petition. Further, fewer than one in 10 Americans say that any First Amendment freedom is not important.

Another significant finding of this study is that Americans express a firm appreciation for the "slippery slope" argument when it comes to First Amendment rights. They understand that once restrictions are placed on these rights it becomes easier to place further restrictions on them. Also, some of our findings suggest that Americans have, over the past two decades, become more supportive of First Amendment rights. To be sure, however, there are findings that suggest that the American public may not wholeheartedly endorse First Amendment rights. While large majorities feel that religion, speech, and press rights are essential to American society, significant minorities are not willing to relegate these rights to the status of "essential." In the area of speech rights, the American public is quick to support restrictions, particularly when sexually explicit and/or offensive material is at issue. On free press, strong majorities disagree that the use of hidden cameras should be allowed. And on religion, while most Americans are willing to extend freedom to worship rights to groups regardless of how extreme their beliefs are, most also are willing to agree with allowing practices that blur the line between church and state.

Another healthy sign for the First Amendment is the strong support it would have if it were voted on by Americans today. Fully 93% of Americans say they would vote to ratify the First Amendment if they were voting on it now.

The perceived importance and strong support for the First Amendment may reflect Americans' sense that current applications of these freedoms are neither too restrictive nor too lax, but about right. Seven in 10 say that in contemporary society Americans have about the right amount of freedom to speak freely, and the same number say the Americans have the right amount of religious freedom. In both of these areas, two in 10 say there should be more freedom and

only one in 10 says there should be less.

Opinion is less favorable for freedom of the press. While half say the press has about the right amount of freedom, 38% say it has too much.

Americans express strong skepticism about having government place restrictions on First Amendment freedoms. Nearly nine in 10 agree that once any restriction is placed on a freedom, it becomes much easier—and is therefore dangerous—to place further restrictions. Also, 50% of those polled believe that government should not be involved in rating television programs, compared with 46% who thought it was all right.

Another sign that the First Amendment is healthy is that the majority do not support two proposed constitutional amendments that would alter it. While most Americans disagree with flag-burning as a form of political speech, only 49% say a flag-burning amendment should be adopted. Also, while majorities agree with allowing prayer in the schools under certain circumstances, only 42% would favor a school-prayer amendment to the U.S. Constitution.

Other important poll findings further support Americans' supportive feelings about the First Amendment:

• On freedom of the press, strong majorities say that tabloid papers should have the same protections as more traditional newspapers, that news sources should be allowed to be kept confidential, and that the media should be allowed to publish government secrets.

• On freedom of speech, nine in 10 say Americans should have the right to express unpopular opinions, and majorities feel that companies should be allowed to advertise tobacco and alcohol.

While the First Amendment enjoys strong support and affection from the American public, the Freedom Forum poll suggests that there are some areas where Americans would restrict these freedoms. This is particularly true on freedom-of-speech issues involving offensive or sexually explicit material. For example, majorities of Americans disagree with allowing the media to broadcast nudity or allowing sexual material on the Internet. Also, on a right-to-petition issue, seven in 10 do not think that groups should be allowed to hire people to influence government officials or policies.

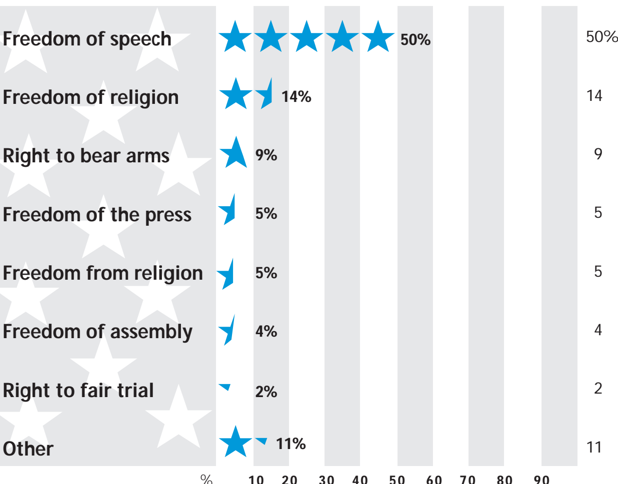
The poll does suggest cause for concern about how well Americans are educated about First Amendment topics. Only half of Americans say they have even had a class that taught something about the First Amendment. Further, only three in 10 give positive grades to the job American schools are doing in teaching about the First Amendment. Evidence of poor education in this area is the finding that few can name many of the rights included in the First Amendment (49% name speech, 21% religion, 11% press, 10% assembly, and 2% petition).

Also of concern is the finding that as many as three in 10 people say they have found themselves in situations recently where they did not voice their opinion because they thought they might in some way be punished or penalized for doing so. While most Americans feel they can express themselves without fear, a substantial minority sometimes feel they cannot.

As the rest of this chapter will show, many findings suggest positive opinions about the First Amendment. But other findings raise concerns about the future of the First Amendment. The dominant impression in this Freedom Forum poll is that while most Americans express strong support for the idea of First Amendment freedoms, they are less supportive when confronted with specific instances of the First Amendment in action.

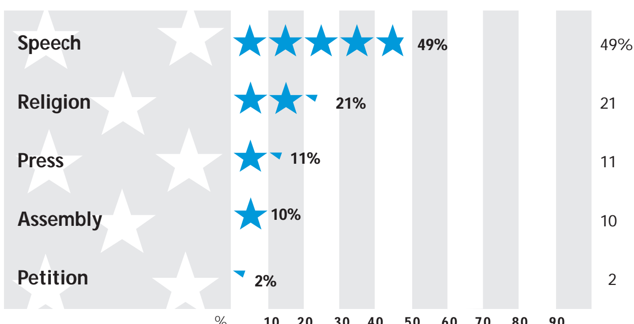
Rights we cherish most

Freedom of speech is by far the most important of rights and freedoms that Americans cite when asked.



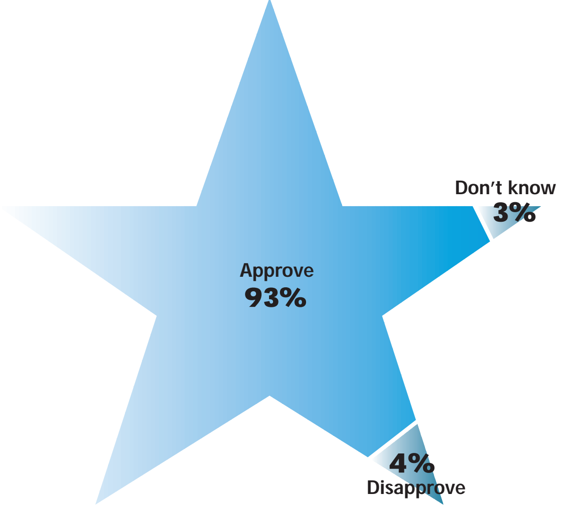
Few can list the five freedoms

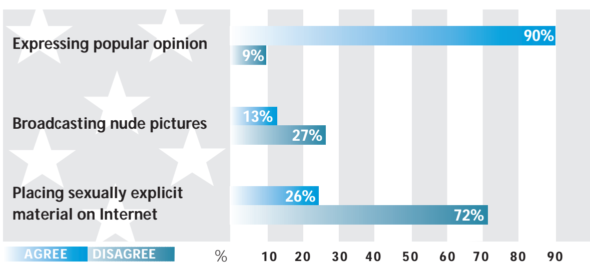
Only 2% of Americans can name all five First Amendment freedoms, with speech and religion the most often cited.



Support for the First Amendment

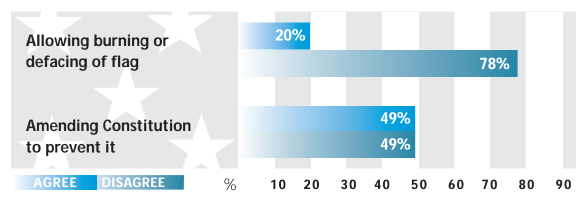
Even though few can name the specific freedoms of the First Amendment, the vast majority of Americans would ratify the Amendment again if asked.





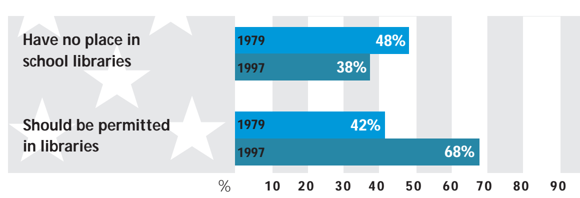
Putting limits on speech

Although supporting the idea of free speech, when asked their opinions about whether specific instances of offensive speech should be allowed, most respondents would readily limit speech.



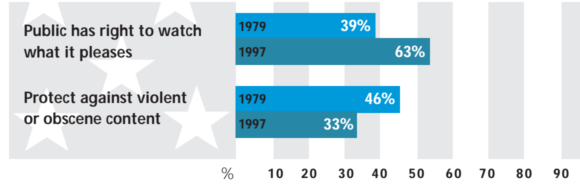
Little support for flag-burning

The majority of Americans don't think people should burn or deface the flag as a political statement, but they are evenly split on whether the Constitution should be amended to prevent it.



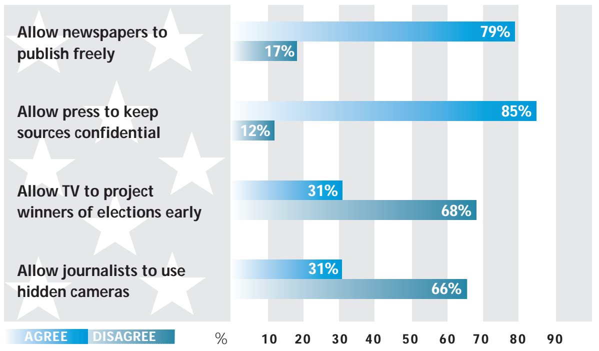
More latitude for books

In the past two decades, Americans have become more tolerant of libraries having novels that describe explicit sex.



Control of TV opposed

Americans are not as willing to have government control television programming, especially violent and indecent content, as they were two decades ago.

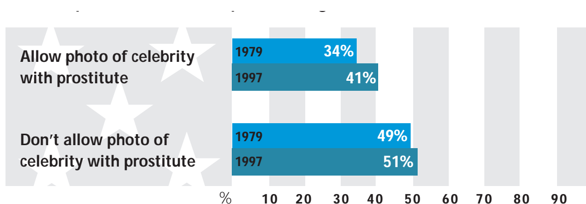


Press has mixed support

Americans give majority support to some press practices but would restrict others.

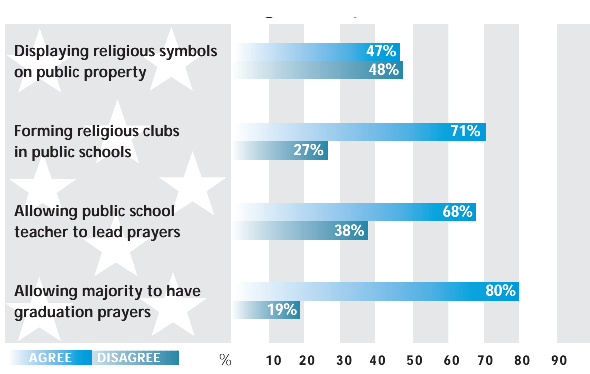
The press and privacy

Attitudes about the press invading personal privacy by taking a photograph of a public figure with a prostitute have not changed appreciably in the last two decades.



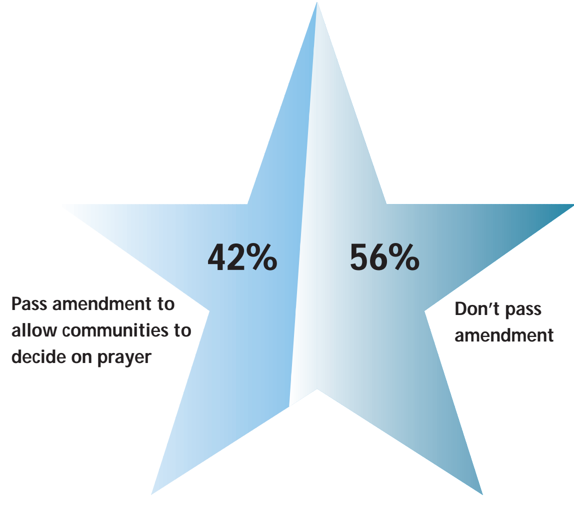
Freedom and religious practices

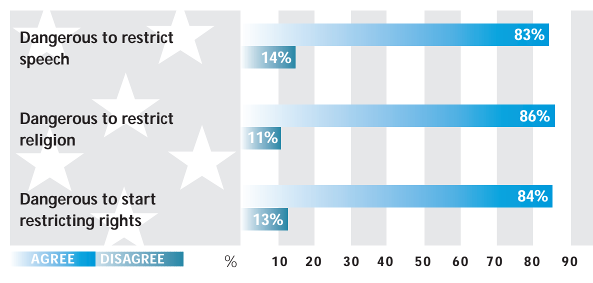
Many Americans would ignore Supreme Court rulings concerning the separation of church and state to allow certain religious practices in public settings.



School prayer amendment

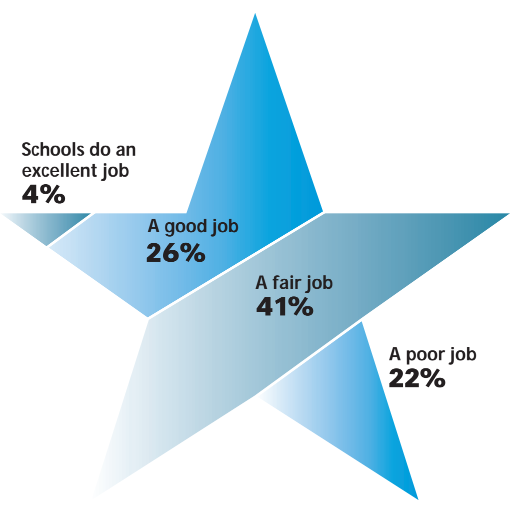
Although a majority of Americans support prayer in public schools, they would not amend the Constitution to permit communities to decide on school prayer.





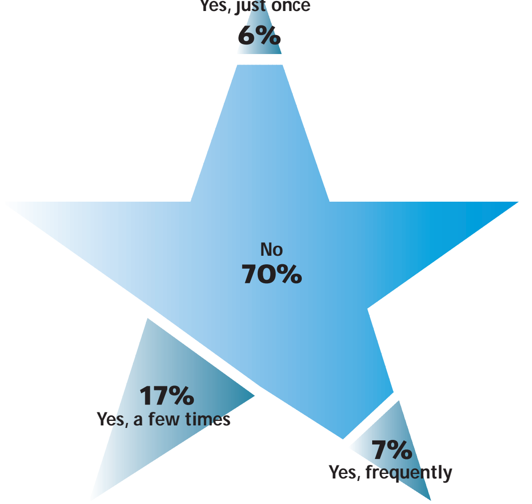
Americans wary of restrictions

Large majorities believe it would be dangerous for the government to limit certain rights because it might lead to restricting other rights.



Rights education gets low grades

U.S. schools do a poor job of educating Americans about their First Amendment freedoms, a majority of Americans says.



Americans speak up

Most people report that they have no fear of voicing their opinions, but about one in three do. Responses to the question of whether people had feared penalty or punishment if they had spoken up.

Survey Responses

I. Knowledge and Opinions about the First Amendment and American Society

1. As you know, the U.S. Constitution provides citizens many rights and freedoms. Are there any particular rights or freedoms that you feel are most important to American society?

5%	Freedom of the press
50%	Freedom of speech
5%	Freedom not to practice religion
14%	Freedom to practice religion
1%	Right to petition
4%	Right of assembly/Right to association
9%	Right to bear arms/own guns
2%	Right to trial by jury/fair trial
1%	Right to privacy
1%	Freedom from unreasonable search and seizure
0%	Right to protest
11%	Other
30%	Don't know/refused

2. As you may know, the First Amendment is part of the U.S. Constitution. Can you name any of the specific rights that are guaranteed by the First Amendment?

11%	Freedom of the press
49%	Freedom of speech
21%	Freedom of religion
2%	Right to petition
10%	Right of assembly/Right to association
7%	Other
37%	Don't know/refused

3. The U.S. Constitution protects certain rights, but not everyone considers each right important. I am going to read you some rights guaranteed by the U.S. Constitution. Please tell me how important it is that you have that right.

A. You have the right to assemble, march, protest or petition the government about causes and issues.

56% Essential
36% Important
7% Not that important
1% Don't know/refused

B. You have the right to speak freely about whatever you want.

72% Essential
27% Important
1% Not that important

C. You have the right to practice the religion of your choice.

81% Essential
18% Important
1% Not that important

D. You have the right to practice no religion.

66% Essential
24% Important
9% Not that important
1% Don't know/refused

E. You have the right to be informed by a free press.

60% Essential
33% Important
6% Not that important
1% Don't know/refused

F. You have the right to own firearms.

33% Essential
31% Important
33% Not that important
3% Don't know/refused

G. You have the right to privacy.

78% Essential
21% Important
1% Not that important

H. You have the right to a fair trial.

86% Essential
14% Important

4. The First Amendment became part of the U.S. Constitution more than 200 years ago. This is what it says: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or of abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Imagine that the country was again voting to ratify the First Amendment. If you were voting on whether or not to approve it, how would you vote?

93% Approve it
4% Not approve it
3% Don't know/refused

5. How closely do you pay attention to issues involving the First Amendment's freedoms of speech, press, religion, assembly and petition?

39% A lot
45% Some
9% Just a little
6% Not much at all

6. Please tell me if you agree or disagree with the following statement: Americans don't appreciate First Amendment freedoms the way they ought to.

47% Strongly agree
29% Mildly agree
12% Mildly disagree
8% Strongly disagree
4% Don't know/refused

7. Even though the U.S. Constitution guarantees freedom of the press, government has placed some restrictions on it. Overall, do you think the press in America has too much freedom to do what it wants, too little freedom to do what it wants, or is the amount of freedom the press has about right?

38% Too much freedom
9% Too little freedom
50% About right
3% Don't know/refused

8. Even though the U.S. Constitution guarantees freedom of speech, government has placed some restrictions on it. Overall, do you think Americans have too much freedom to speak freely, too little freedom to speak freely, or is the amount of freedom people have to speak freely about right?

10% Too much freedom
18% Too little freedom
68% About right
4% Don't know/refused

9. Even though the U.S. Constitution guarantees freedom of religion, government has placed some restrictions on it. Overall, do you think Americans have too much religious freedom, too little religious freedom, or is the amount of religious freedom people have about right?

6% Too much freedom
21% Too little freedom
71% About right
2% Don't know/refused

10. Do you think that imposing curfews on young people violates their First Amendment rights or not?

19% Violates rights
78% Not violate rights
4% Don't know/refused

11. Overall, would you say that the moral values in American society are improving, deteriorating, or aren't they changing all that much?

6% Improving
78% Deteriorating
14% Not changing
2% Don't know/refused

12. Please tell me whether or not you have done any of the following in the past year:

A. Displayed an American flag at your home.

62% Yes
38% No

B. Voted in an election.

80% Yes
20% No

C. Participated in a political rally.

14% Yes
86% No

D. Attended a public meeting.

58% Yes
42% No

E. Contacted an elected official.

43% Yes
57% No

F. Sent a letter to the editor.

12% Yes
88% No

II. Freedom of speech

1. I'm going to read you some ways people might exercise their First Amendment right of free speech. For each, tell me if you agree or disagree that someone should be free to do it.

	Strongly agree	Mildly agree	Mildly disagree	Strongly disagree	DK/ refused
People should be allowed to express unpopular opinions.	68%	22%	5%	4%	1%
Companies should be allowed to advertise tobacco.	26%	30%	11%	31%	3%
Companies should be allowed to advertise liquor and alcohol products.	25%	35%	12%	26%	2%
The media should be allowed to broadcast pictures of nude or partially clothed persons.	8%	19%	19%	52%	3%
Musicians should be allowed to sing songs with words that others might find offensive.	23%	28%	16%	31%	3%
People should be allowed to place sexually explicit material on the Internet.	10%	15%	10%	62%	3%
People should be allowed to burn or deface the American flag as a political statement.	10%	10%	8%	70%	2%
School students should be allowed to wear a T-shirt with a message or picture that others may find offensive.	9%	17%	22%	48%	4%
People should be allowed to use words in public that might be offensive to racial groups.	8%	15%	14%	61%	2%
People should be allowed to display in a public place art that has content that might be offensive to others.	20%	24%	22%	31%	4%

2. Which comes closest to your own opinion? Novels that describe explicit sex acts …

- 38% Have no place in a school library and should be banned.
- 56% Should be permitted in the library if they are worthwhile literature.

3. Would you say that giving government the power to decide which TV programs can or cannot be shown …

- 64% Violates the public's right to watch what it pleases.
- 32% Is necessary to protect the public against violent or obscene shows.

4. Do you think that books that could show terrorists how to build bombs should be ...

- 70% Banned from public libraries.
- 25% Available in the library like every other book?

5. Some people feel that the U.S. Constitution should be amended to make it illegal to burn or desecrate the American flag as a form of political dissent. Others say that the U.S. Constitution should not be amended to specifically prohibit flag-burning. Do you think the U.S. Constitution should or should not be amended to prohibit burning or desecrating the flag?

- 49% Should be amended
- 49% Should not be amended
- 2% Don't know/refused

5a. If an amendment prohibiting flag-burning were approved, it would be the first time any of the freedoms in the First Amendment have been amended in more than 200 years. Knowing this, would you still support an amendment to prohibit flag-burning?

- 88% Yes
- 9% No
- 3% Don't know/refused

6. Please tell me if you agree or disagree with the following statement. It's dangerous to restrict freedom of speech because restricting the freedom of one person could lead to restrictions on everybody.

- 59% Strongly agree
- 24% Mildly agree
- 8% Mildly disagree
- 6% Strongly disagree
- 3% Don't know/refused

III. Freedom of the press

1. To the best of your recollection, have you read or heard anything about a recent U.S. Supreme Court ruling regarding the Internet?

49%	No — not read/heard
8%	Yes — a lot
19%	Yes — some
22%	Yes — a little
1%	Don't know/refused

2. As you may know, courts have traditionally given broad First Amendment protections to books and newspapers which contain material that may be offensive to some people. Recently the U.S. Supreme Court ruled that material on the Internet has the same First Amendment protections as printed material such as books and newspapers. Do you agree or disagree with this ruling?

30%	Strongly agree
26%	Mildly agree
15%	Mildly disagree
23%	Strongly disagree
5%	Don't know/refused

3. There has been a lot of talk lately about rating television programs. Do you think that government has a role to play in developing a system to rate television programs or do you think government should not be involved?

44%	Government should be involved
52%	Government should not be involved
4%	Don't know/refused

4. Please tell me whether you agree or disagree with the following statement: Tabloid newspapers such as *The Star* and the *National Enquirer* should have the same freedom to publish what they want as other newspapers such as *The New York Times* and *The Wall Street Journal*.

42%	Strongly agree
34%	Mildly agree
9%	Mildly disagree
14%	Strongly disagree
2%	Don't know/refused

5. Overall, how would you rate the First Amendment's guarantee of freedom of the press in helping the public become informed about issues in government?

15%	Excellent
48%	Good
28%	Only fair
6%	Poor
4%	Don't know/refused

6. I'm going to read you some ways that freedom of the press may be exercised. For each, tell me if you agree or disagree that the press should be free to do it.

	Strongly agree	Mildly agree	Mildly disagree	Strongly disagree	DK/ refused
Newspapers should be allowed to publish freely without government approval of a story.	56%	23%	11%	6%	3%
Journalists should be allowed to keep a news source confidential.	58%	27%	6%	6%	2%
Broadcasters should be allowed to televise courtroom trials.	28%	23%	19%	25%	4%
Newspapers should be allowed to endorse or criticize political candidates.	43%	26%	11%	18%	2%
The news media should be allowed to report government secrets that have come to journalists' attention.	35%	26%	14%	21%	5%
Television networks should be allowed to project winners of an election while people are still voting.	15%	16%	17%	51%	1%
High school students should be allowed to report controversial issues in their student newspaper without approval of school authorities.	24%	21%	23%	29%	3%
Journalists should be allowed to use hidden cameras in their reporting.	13%	18%	20%	45%	3%

7. Please tell me which comes closest to your opinion: If a news photographer takes a picture of a famous person with a prostitute, the photos should be…

41% Permitted under the guarantees of a free press

51% Forbidden as an invasion of privacy.

8. Do you think that jailing reporters who refuse to reveal their news sources during trial…

36% Is justified when the names are necessary for a fair trial

54% Is wrong because people with important information will be afraid to tell the truth to reporters?

9. Before a criminal case comes to trial, do you think that reporters who have found out certain facts of the case should be:

51% Forbidden to publish the information since it might bias jurors

42% Allowed to publish the information because no one, not even a judge, should be able to censor the press.

IV. Freedom of religion

1. I'm going to read you some ways people might exercise their First Amendment right of freedom of religion. For each, tell me if you agree or disagree that someone should be free to do it.

	Strongly agree	Mildly agree	Mildly disagree	Strongly disagree	DK/ refused
People should be allowed to display religious symbols on government property.	27%	20%	22%	27%	4%
Public school students should be allowed to form a religious club that meets on school property.	44%	27%	11%	16%	2%
Teachers or other public school officials should be allowed to lead prayers in school.	37%	20%	15%	25%	2%

2. Do you feel that freedom to worship as one pleases…

69% Applies to all religious groups regardless of how extreme their beliefs are?
24% Was never meant to apply to religious groups that the majority of people consider extreme or on the fringe?

3. Do you agree or disagree with the following statement: It's OK for a prayer to be said at a high school graduation ceremony if a majority of the graduating class favors it.

62% Strongly agree
19% Mildly agree
9% Mildly disagree
9% Strongly disagree
2% Don't know/refused

4. Some people feel that the U.S. Constitution should be amended to let local communities decide on whether or not prayer should be allowed in public schools. Others say that the U.S. Constitution should not be amended to allow local communities to decide on prayer in the schools. Do you think the U.S. Constitution should or should not be amended to allow local communities to decide on prayer in the schools?

42% Should be amended
56% Should not be amended
3% Don't know/refused

(IF "SHOULD BE AMENDED" IN Q4, ASK:)
4a. If an amendment allowing communities to decide on school prayer were approved, it would be the first time any of the freedoms in the First Amendment have been amended in over 200 years. Knowing this, would you still support an amendment to let local communities decide on prayer in their local schools?

90% Yes
7% No
4% Don't know/refused

5. Please tell me if you agree or disagree with the following statement: It's dangerous to place restrictions on freedom of religion because restrictions on one type of religious activity could lead to restrictions on others.

63% Strongly agree
23% Mildly agree
6% Mildly disagree
5% Strongly disagree
3% Don't know/refused

V. Other questions

1. Do you agree or disagree with the following? Any group that wants to should be allowed to hire people to influence government officials or policies.

13%	Strongly agree
18%	Mildly agree
18%	Mildly disagree
47%	Strongly disagree
4%	Don't know/refused

2. Do you agree or disagree with the following? Any group that wants to should be allowed to hold a rally for a cause or issue even if it may be offensive to others in the community.

38%	Strongly agree
34%	Mildly agree
10%	Mildly disagree
15%	Strongly disagree
3%	Don't know/refused

3. Please tell me whether you agree or disagree with the following statement: Once the government starts limiting certain rights it becomes easier for it to put limits on more rights.

64%	Strongly agree
20%	Mildly agree
7%	Mildly disagree
6%	Strongly disagree
3%	Don't know/refused

4. To the best of your recollection, have you ever taken classes in either school or college that dealt with First Amendment freedoms?

51%	Yes
47%	No
2%	Don't know/refused

4a. Would that have been in grade school, high school or college? (Circle all that apply.)

16%	Grade school [Grades 1—8]
67%	High school
56%	College
1%	Don't know/refused

5. Overall, how would you rate the job that the American educational system does in teaching students about First Amendment freedoms?

4%	Excellent
26%	Good
41%	Only fair
22%	Poor
6%	Don't know/refused

6. I'm going to read some situations in which you might find yourself. For each, tell me how free you feel to speak your mind.

	Very free	Somewhat free	Not Very free	Not free at all	DK/ refused
At work among your fellow workers	58%	28%	8%	4%	3%
At a public meeting in your community	50%	37%	7%	3%	3%
At a political rally	43%	33%	9%	4%	11%
In a school classroom	48%	35%	9%	4%	4%

7. Over the past year, have you been in any situations when you did not express your opinions on something because you thought you might be punished or penalized for voicing your opinion? (IF YES:) Have you been in this situation frequently, a few times, or just once in the past year?

70%	No — not been in this situation
7%	Yes — frequently
17%	Yes — a few times
6%	Yes — just once

VI. Demographics

1. Age

20%	18-29 years old
35%	30-44 years old
27%	45-59 years old
18%	60-plus years old

2. Education

1%	Grade school or less
5%	Some high school
27%	High school
31%	Some college
22%	College graduate
14%	Postgraduate

3. Race

82%	White
8%	Black
5%	Hispanic
2%	Asian
3%	Other
1%	Don't know/refused

4. Household Income

13%	Under $20,000
29%	$20,000-$40,000
36%	$40,000-$75,000
11%	$75,000-plus
11%	Don't know/refused

5. From which news medium would you say you get most of your news?

48%	Television
22%	Newspapers
10%	Radio
1%	Magazines
1%	Internet
1%	Other source
15%	Combination
1%	Don't know/refused

5a. Do you have access to the internet?

15%	Every day
11%	Once a week
7%	Once a month
9%	Less than once a month
56%	No access
2%	Don't know/refused

6. In which state do you live?

7. In politics, as of today, are you a Democrat, a Republican, an independent or what?

35%	Democrat
30%	Republican
25%	Independent
6%	Other
6%	Don't know/refused

8. Politically speaking, do you consider yourself to be liberal, moderate, or conservative?

24%	Liberal
36%	Moderate
33%	Conservative
2%	None
5%	Don't know/refused

9. Are you Catholic, Protestant, Jewish, or another religion?

28%	Catholic
43%	Protestant
2%	Jewish
16%	Other
9%	No religion
3%	Don't know/refused

9a. Do you attend religious services?

37% Once a week
13% Two or three times a month
9% Once a month
33% Less than once a month
9% Don’t know/refused

10. What is your marital status?

27% Single
55% Married
11% Divorced/separated
6% Widowed
1% Don’t know/refused

11. Are you currently employed?

60% Full-time
13% Part-time
14% Retired
1% Temporarily laid off
11% Not employed
1% Don’t know/refused

12. Are there any children under the age of 18 living in your household?

42% Yes
58% No

12a. Are any of these children 11 years old or younger?

69% Yes
30% No
1% Don’t know/refused

b

Survey Methodology

The Freedom Forum commissioned the University of Connecticut to conduct a general public survey of attitudes on the First Amendment. The questionnaire was developed jointly by The Freedom Forum and the University of Connecticut. At the University of Connecticut, Professor Ken Dautrich directed the project. Larry McGill of the Media Studies Center aided in developing the questionnaire, and Paul K. McMasters of The Freedom Forum provided overall direction for the project.

Telephone questionnaires were pre-tested with 30 respondents. The pretest was used to ensure that questions were understood by respondents and response categories were appropriate.

Sample design

The University of Connecticut follows procedures in sampling and data processing that are designed to minimize error. For the sampling procedure, we used a variety of random-digit dialing—working residential "blocks" were identified with the aid of published directories. These exchanges were chosen in a modified stratified procedure based on the proportion of the theoretical universe residing in the geographic area covered by each published directory. Thus, in general, if 10% of the universe lives in the area covered by a directory, 10% of the exchanges will be chosen from that area. The universe for the First Amendment project was the adult, non-institutionalized population 18 years of age and older. The geographic distribution used in sampling was based on estimates of the distribution derived from the census figures for towns.

Once "working blocks" were identified, one telephone number was generated at random for each block. A household was given five distinct opportunities to be contacted before a substitution was made for it. Once it was learned that the household did contain an eligible respondent, a random selection—unbiased by age or sex among the eligible respondents—was made. Should that person not be the one who answered the telephone, an eligible respondent was called to the telephone. "Household" was defined as a dwelling where at least one adult 18 years of age resided. Such institutions as college dormitories, prisons, and the like were omitted.

Fieldwork

Interviewing for the survey was conducted by telephone between July 17 and Aug. 1, 1997. We employed a Computer Assisted Telephone Interviewing system to conduct the interviewing. In a CATI system, questionnaires are computerized, reducing the amount of human error in the survey process. The telephone interviews took place on weekday evenings, on Saturday mornings and afternoons, and on Sunday afternoons and evenings. This procedure prevented a bias in selecting people only at home at certain times. If a given telephone number did not result in an interview—for whatever reason—a substitution was made for it from within the same working block (which functioned as our single member "cluster"). This meant that one person not being at home, for example, did not keep his or her cluster from coming into the survey. All interviewing was conducted at the University of Connecticut's telephone center.

Sampling error

A total of 1,026 interviews with a national scientific sample of adults were conducted. Sampling error for a sample of this size is ±3% at the 95% level of confidence. Sampling error for subgroups (e.g. men, women, etc.) is larger.

Time-line comparisons

Some of the questions in this survey are repeated from questions administered on surveys conducted in the late 1970s by Professors McCluskey and Brill. These serve as a time-line comparison to track changes in opinion.

A Year in the Life of the First Amendment

The First Amendment touches the daily lives of all Americans in large and small ways. The following log demonstrates that the state of the First Amendment is ferment; its freedoms are constantly in action or under siege. Here are just a few notable First Amendment happenings during 1996.

January 10

A federal appeals court strikes down a Mississippi law that let students lead prayers in public schools. The law was intended to circumvent U.S. Supreme Court doctrine that does not allow teacher-led prayer.

January 23

In his third State of the Union Address, President Clinton calls for Congress to pass the v-chip legislation in the Telecommunications Act and for the media to clean up its act. The president says he wants leaders of the entertainment industry to meet with him to find ways to improve what children see on television.

January 29

The Washington Post reports that relatives of murder victims have filed suit in Greenbelt, Md., federal district court against the publisher of *Hit Man: A Technical Manual for Independent Contractors*, claiming the publisher "aided and abetted" a 1993 triple murder in Silver Spring, Md. If a publisher is found liable for the acts of murderers who use their books in commissions of crimes, it would break new ground in First Amendment law.

February 1

The U.S. House passes the Telecommunications Act of 1996 by a vote of 414 to 16, and the U.S. Senate passes it 91 to 5. The law's Communications Decency Act exacts criminal and civil penalties (up to a $250,000 fine and two years in jail) against those who post indecent material on the Internet. It also requires television manufacturers to install v-chips in all sets 13 inches and larger and compels the industry to devise a satisfactory program-rating system within a year or the FCC will appoint an advisory commission to devise one. In addition, the act includes provisions that force "adult" cable channels to take steps to keep children from seeing images that "bleed" from scrambled shows.

February 8

President Clinton signs the Telecommunications Act into law.

A coalition of groups headed by the ACLU files a legal challenge to the Communications Decency Act in federal court in Philadelphia.

February 15

The Washington Post and *The New York Times* report that executives of ABC, CBS, NBC and Fox TV networks have been meeting in New York and Los Angeles to discuss development of a ratings system similar to the one used by the motion picture industry.

Federal Judge Ronald Buckwalter grants a temporary restraining order against the Communications Decency Act, ruling that the law naming certain material "indecent" (and therefore illegal) is so vague as to make its application unconstitutional. However, Buckwalter upholds the language permitting prosecution of "patently offensive" materials.

February 20

Without comment, the U.S. Supreme Court turns away arguments by the Freedom From Religion Foundation that a monument engraved with the Ten Commandments in a public park near the state capitol in Denver is unconstitutional.

February 21

The Supreme Court schedules oral arguments on the constitutionality of the federal law (the Television Consumer Protection and Competition Act) that encourages cable television operators to restrict indecent programming on public-access channels.

February 26

The Citizens Internet Empowerment Coalition, which is coordinated by the Center for Democracy and Technology, America Online and the American Library Association, and joined by other Internet and press groups, files suit in federal court in Philadelphia challenging the Communications Decency Act. This suit differs from the ACLU suit in that it devotes 50 pages to explaining why the Internet is more like a newspaper than like television. Later it is consolidated with the ACLU suit to form the case *ACLU v. Reno*.

February 29

Television-industry leaders meet with President Clinton and announce that they will come up with a program-rating system by next January. Indications are that each network will rate its own shows, that ratings would be linked to the v-chip, and that news and sports will not be included. Jack Valenti, who helped developed the Motion Picture Association of America rating system 28 years ago, heads an "implementation group" that is to begin work March 1 developing the system.

March 5

In a First Amendment victory for the press, the Sixth Circuit Court of Appeals rules that a lower federal judge was wrong when he imposed a gag order on the press by barring *Business Week* magazine from publishing sealed court documents. The documents, which relate to a lawsuit Proctor & Gamble brought against Bankers Trust, were leaked to a reporter. The appeals court ruled that keeping the press from publishing amounted to government censorship.

March 12

President Clinton signs into law an act that requires news broadcasters such as CNN to obtain a license before opening a news bureau in Havana. The law, commonly called the Helms-Burton Act, after sponsors Jesse Helms (R-N.C.) and Dan Burton (R-Ind.), is designed to punish Cuba through economic sanctions.

March 14

The National Basketball Association lifts its suspension of Mahmoud Abdul-Rauf of the Denver Nuggets, who had refused to stand during the National Anthem before games. The player, a Muslim since 1991, had stopped standing for the anthem at the start of the season, sometimes remaining in the locker room, at other times sitting on the bench, other times facing away from the flag. He was reinstated after one game when he agreed to stand and pray silently during the anthem.

March 18

The Supreme Court agrees to accept the case of *Schenck v. Pro-Choice Network*, which would clarify how far protesters must be kept from abortion clinics. The case stems from a court order that created a 15-foot buffer zone around abortion clinic entrances in New York as well as around vehicles entering clinic driveways and patients entering or leaving the clinics.

March 20

The Supreme Court hears arguments in *O'Hare Truck Service v. Northlake*. The court must decide whether a city government can cut off a contractor because he supported the mayor's opponent in an election. This is similar to the *Heiser v. Umbehr* case also heard this term, except that *O'Hare* claims violation of freedom of association whereas *Umbehr* involves freedom of speech. Lower courts have ruled that political patronage contractors do not have the same First Amendment rights as government employees.

April 1

The U.S. Naval Academy removes a civilian professor from teaching duties after he writes an article in *The Washington Post* that says the academy is "plagued by a serious morale problem caused by a culture of hypocrisy ... that tolerates sexual harassment, favoritism and the covering up of problems."

April 15

The Supreme Court hears arguments in *Colorado Republican Federal Campaign Committee v. FCC* about whether the Colorado Republican Party violated federal law by spending too much on congressional races. The organization argues that limits on campaign spending are a violation of First Amendment rights, since spending money is a form of expression.

April 18

The federal government fires Timothy Connolly, a civilian employee of the Defense Department, for criticizing the Clinton administration's policy on the use of land mines.

April 24

Congress passes the Anti-Terrorism and Effective Death Penalty Act of 1996. The statute allows the government to deport a legally admitted alien on the grounds of suspicion of a connection to terrorism without letting the person charged see or directly challenge the evidence. Even aliens who give money to or speak out about a political cause may be deemed to have a "connection" and therefore may be deported.

April 26

The government asks the federal court trying Timothy McVeigh to stop taping the proceedings of the Oklahoma City bombing case and to stop distributing those tapes to reporters. The court later rules that the tapes should still be made, but that they should not be provided to the press.

May 10

The Third Circuit rules that when the Justice Department referred a complaint about indecent pictures on CompuServe to the FBI, the agency had "clearly run afoul of both this Court's orders and the Government's promises" not to prosecute the transmission of "indecent" images over the Internet until the Supreme Court had ruled on its constitutionality.

May 13

The Supreme Court rules that a Rhode Island law banning the advertisement of liquor prices violates retailers' free-speech rights. During arguments in the case, *44 Liquormart, Inc. v. Rhode Island*, the state said the ban was needed to promote temperance.

May 16

Maryland's attorney general criticizes a recently passed state law that prohibits lawyers from soliciting criminal defendants until 30 days after suspects are arrested. The ban is unconstitutional, Attorney General Joseph Curran says, because it is a restriction on attorneys' free speech and puts defendants' legal rights in jeopardy.

May 29

The ACLU begins defending a former Oakland County, Mich., police officer who is being sued by his former chief for defamation. The officer had publicly criticized his boss for acts of official misconduct. Supporters of the officer say the defamation action is a Strategic Lawsuit Against Public Participation that attempts to chill a citizen's right to speak out on public matters.

June 4

The Boulder, Colo., city council passes an amendment to the city's anti-smoking bill to allow actors to smoke on stage as part of theater performances. Several people had complained when, during a dinner theater performance of "Grand Hotel," characters on stage had smoked. Theater supporters defended the smoking, calling it a type of artistic expression.

June 11

New York's highest court rules that prison officials who punished an inmate for failing to attend an Alcoholics Anonymous meeting violated his First Amendment rights to religious freedom. Since the AA program relies on religious teachings, the court said, forcing agnostic or atheist inmates to attend the gatherings impinges on their freedom of religion — in this case, atheism or agnosticism.

A federal judge rules that Missouri highway officials cannot keep the Ku Klux Klan from participating in the state's "adopt-a-highway" program. The judge said the state's action would restrict the Klan's free-expression rights.

June 12

U.S. District Court in Philadelphia rules that the Communications Decency Act unconstitutionally restricts free speech on the Internet. The judges express concern that legal speech may be chilled when Internet users restrain their otherwise legitimate expression for fear that it may be punished. The Justice Department has the option of appealing the ruling to the Supreme Court.

June 26

CIA Director John Deutch testifies before Congress that the nation's information supply is vulnerable to terrorist attack, and that enemies of the U.S. could disrupt computer-based banking, air-traffic control, and electric power grids. Deutch advocates government inspection of some information on the Internet to prevent such terrorism.

June 28

The Supreme Court rules that cable companies must carry programming on public-access channels even when some people consider it indecent, although cable operators can ban indecent programs on commercial-sponsored channels that are leased to organizations — so called "leased access" channels. Supreme Court watchers think this case may have implications for the regulation of indecency on the Internet.

July 8

The Sixth Circuit Court of Appeals upholds a lower-court decision that a city's ban on for-sale signs in front yards is unconstitutional, reaffirming the notion that for-sale signs are a recognized form of speech and that they provide the public with important information.

July 9

Miami University at Ohio's campus newspaper sues the school to obtain student disciplinary records. The newspaper wants documents on student crimes, such as rape, which have been adjudicated by the university disciplinary board. The university claims that handing over the records would violate a federal law that protects student privacy.

July 26

Volunteers and clerics in Minnesota prisons settle a federal lawsuit after it is agreed that, under certain circumstances, volunteers may discuss their religious beliefs on homosexuality with inmates. Two years earlier, after a volunteer told a lesbian that homosexuality was a sin, Hennepin County officials told volunteers to steer away from this type of offensive speech.

July 30

The *Fort Lauderdale* (Fla.) *Sun-Sentinel* reports that a charter board member has filed a $1 million lawsuit against the city, saying it refused to let him serve because he would not take a loyalty oath for religious reasons. The suit is later dismissed.

July 31

An Ohio state judge upholds a school voucher program in Cleveland. Critics of such programs, in which the government provides vouchers so students can attend private schools, say the program violates the establishment clause of the First Amendment.

August 11

Protesters at the Republican National Convention in San Diego complain that their demonstrations were ineffective because they were corralled into a "designated protest zone" surrounded by a 12-foot-high fence, and that the view of the convention center was partially blocked by a row of trailers.

August 13

The Supreme Court of Idaho rules that an attorney's criticisms of a judge's ruling were not protected under the First Amendment. The Idaho State Bar sanctioned the attorney for violating rules of professional conduct when he said publicly that a judge's ruling had been influenced by politics.

August 29

Government attorneys, worried that media interviews would pollute an Oklahoma City bombing jury pool, request a ban on media contact with Timothy McVeigh. A federal judge rules that reporters can contact McVeigh via telephone and mail but may not communicate through face-to-face interviews.

August 30

The families of three people murdered by a killer-for-hire appeal to the U.S. Court of Appeals for the Fourth Circuit when a federal district court in Maryland refuses to hold the publisher of the hit man manual responsible for the killings (see January 29).

September 1

The sheriff in Plymouth, Mass., bans the reading of all adult magazines in his jail, saying that the founding fathers never meant the First Amendment to allow prisoners to read smut.

September 10

The *Omaha* (Neb.) *World-Herald* sues to gain access to computerized court and police records. The newspaper argues that if it cannot obtain the records, it cannot look for patterns of crimes and other important public information. The city's refusal to release computerized records restricts the freedom of the press, the newspaper says.

After House approval, the Senate passes the Defense of Marriage Act, which defines marriage as a union only between a man and a woman. Gay-rights advocates denounce the bill as an election-year ploy that infringes on rights to free association. President Clinton says that he will sign the bill.

September 11

The Texas Court of Criminal Appeals strikes down an anti-stalking law that disallows harassing, annoying and alarming speech, saying it could chill First Amendment rights to free expression. In response, the state legislature begins crafting a narrower bill.

September 12

An elementary school principal in New York stops a student from circulating a petition that criticizes the suspension of the school lunch program. One week later, under pressure from the community, the principal gives the petition back and allows the girl to solicit signatures.

September 23

President Clinton signs the Military Honor and Decency Act into law. This act prohibits the sale or rental of sexually explicit material on military bases and other property controlled by the Department of Defense. It is struck down as unconstitutional four months later.

Congress passes the Child Pornography Prevention Act of 1996 as an amendment to the Senate budget bill. The act makes it unlawful to "appear" to depict children in sexual situations, whether in film, computer images, or photographs.

October 10

A federal appeals court overturns a ruling by a district court that stated that artists did not have "core" First Amendment protection. New York City visual artists sued when they were told to get vendor licenses that city officials then refused to give them. A three-judge panel said the city can regulate the time, place and manner of selling art, when it needs to protect the health and safety of pedestrians, but it cannot forbid the sale of art in parks and on sidewalks.

October 15

The Federal Communications Commission fines radio station WVGO of Richmond, Va., for broadcasting indecent language in a Howard Stern show.

October 22

A federal judge rules that a law prohibiting lawyers from soliciting criminal suspects for 30 days is unconstitutional. The ban restricts the free flow of information, the judge says.

October 28

The California Office of Administrative Law strikes down a temporary ban that kept journalists from interviewing state prisoners. The ban, which could have been made permanent, was discarded because corrections department officials did not adequately answer the public's objections to the law.

October 29

In a major defeat for juvenile-curfew laws, a federal judge in Washington, D.C., strikes down the district's law keeping children out of public places between 11 p.m. and 6 a.m. on weekdays and between midnight and 6 a.m. on weekends. Under the law, parents also could be punished for a child's curfew violation. The court says that minors "possess a fundamental right to free movement to participate in legitimate activities that do not adversely impact on the rights of others."

November 4

U.S. District Court Judge Charles R. Weiner rules that Cyber Promotions Inc. "has no right under the First Amendment" to reach AOL subscribers with e-mail advertisements sent over the Internet and that AOL can block the direct-marketing firm from sending the unsolicited mass mailings.

November 5

This is the first time that the Internet is used to communicate voter results in a presidential election. Some World Wide Web sites are slowed or overwhelmed as hundreds of thousands of users logged on to the Net for election returns.

The U.S. Court of Appeals for the Ninth Circuit upholds a lower court's decision that the decency standard to be used in granting money to artists, adopted in 1990 by the National Endowment for the Arts, was vague, potentially arbitrary and in violation of the First Amendment.

November 6

A federal district court judge in Manhattan issues a broad ruling barring Mayor Rudolph W. Giuliani from trying to compel Time Warner to alter its constitutionally protected editorial decision not to carry Fox News on its cable system.

November 8

A panel of federal judges from Delaware denies *Playboy* an injunction against enforcement of Section 505 of the Communications Decency Act in the case *Playboy Entertainment Group, Inc. v. United States of America*. Section 505 mandates that cable operators must scramble or block signals of adult channels in order to prevent "signal bleed," the reception of programming on the televisions of non-adult channel subscribers.

November 12

Wal-Mart's practice of altering musical compact discs — taking out words considered "indecent" — before selling them to customers is revealed in a front-page story in *The New York Times*. Other large retail chains, such as Blockbuster and Kmart, require producers to take similar steps, as a condition of selling entertainment products. As a result, some studios censor films to meet corporate decency requirements.

December 6

A federal court in New York refuses to dismiss a suit by Larry Agran, a 1992 presidential candidate, who was thrown out of a debate between President Clinton and then-Democratic candidate Jerry Brown. Officials at the debate, which was held at City University, told security guards to silence all who were not participating in the debate.

December 10

The D.C. Court of Appeals rules that a federal act prohibiting anti-abortion protesters from intimidating and interfering with access to abortion clinics is constitutional. Anti-abortion activists had complained that the act suppressed their First Amendment rights of expression, but the court said the law was meant to prohibit physical acts.

December 17

The United States Parole Commission restricts the rights of some federal parolees to use the Internet for fear that they will try to gather information for criminal purposes or contact other wrongdoers.

December 18

A Miami jury awards a bank holding company and its chief executive officer $10 million in a libel suit over a 1991 "20/20" show. The jury found that the ABC News magazine defamed CEO Alan Levan and his company when it alleged he scammed investors into buying worthless bonds. Because hoodwinked investors settled their suits with Levan out of court, the judge in the libel case did not allow the Miami jury to consider their suits as evidence of Levan's wrongdoing. The $10 million award is later reduced on appeal.

December 20

A North Carolina jury awards $1,402 in actual damages to the Food Lion supermarket chain as compensation for fraud by ABC "PrimeTime Live" producers. The producers, in an attempt to catch Food Lion employees selling spoiled meats, faked resumes to get jobs in the stores. One month later, the jury awarded Food Lion $5.5 million in punitive damages. The supermarket chain had asked for $1.9 billion in punitive damages, claiming it had lost this amount when the price of its stock plunged after ABC's story aired. The network appealed the decision.

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—Donna Demac

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