

STATE  
OF THE



FIRST  
AMENDMENT

CONFERENCE REPORT

THE  FREEDOM FORUM

# State of The First Amendment

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**State of the First Amendment  
Conference Report**



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# Introduction

## A Gathering of First Amendment Eagles

By Paul K. McMasters



The occasion was a conference convened to announce the release of the *State of the First Amendment* report and a new national poll on public attitudes toward First Amendment freedoms. It was December 16 and a busy time of the year, but a veritable Who's Who of the First Amendment community crowded the rooftop conference room at The Freedom Forum World Center. In his welcoming remarks, Chairman and CEO Charles Overby said, "I once worked with someone who said that you cannot call a meeting a summit unless it is a true gathering of eagles. As I look out and see the eagles who are here, I know that this is truly a summit meeting about the First Amendment."

*State of the First Amendment* was written by Donna Demac, who researched the project for a year as a Freedom Forum fellow. In her opening speech, Demac warned of a First Amendment in peril: "These are freedoms that must be fought for and won over and over again. The first step in this battle is to understand the threats that we face."

Her remarks set the tone and the standard for a day of invigorating presentations and discus-

sions led by some of the brightest lights in the First Amendment firmament. A dozen experts laid out the trends and issues in "Speech on the Fringe," "Institutions Under Fire," and "The Medium is the Target." Keen Umbehr, a trash hauler from Alma, Kansas, and the plaintiff in a landmark First Amendment Supreme Court case, delivered an urgent dispatch from the First Amendment trenches, and Robert S. Peck, author and constitutional scholar, put the day's worries and warnings into perspective by noting that attempts to censor speech invariably arise out of people's fears and reminding the assembly that, "History teaches that, no matter how legitimate the fear, suppression never secures safety, never empowers anyone and never prevents ideas from gaining circulation."

In all, the intellectual firepower and inspirational eloquence of these proceedings were such that we decided to share them with an even larger audience. We think you'll agree after reading this report that the State of the First Amendment Conference was, in fact, a gathering of the First Amendment eagles.

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# State of the First Amendment

## Turmoil Beneath a Tranquil Surface

On December 16, 1997, one day after the First Amendment's 206th birthday, 130 attendees packed a Freedom Forum conference culminating a year-long project on the state of the First Amendment. One reason for the high interest, unfortunately, may be the precarious state of our nation's First Amendment freedoms. These freedoms have to be won every day, as Freedom Forum Fellow Donna Demac has long argued. Demac, who produced the *State of the First Amendment* report released at the conference, is a lawyer, scholar, and the author of two books and numerous other articles and publications. Her speech opening the conference follows.

### SPEAKER

**Donna Demac**

Fellow

*The Freedom Forum*



### STATE OF THE FIRST AMENDMENT

By Donna Demac

The *State of the First Amendment* report conveys mixed conclusions because our society today is ambivalent. On the surface, the environment seems peaceful. There is no heavy-handed suppression of dissidents, nor are government officials shutting down newspapers. Instead more subtle, yet potentially dangerous, threats abound. Government entities, as well as groups of citizens, have taken some very troubling actions.

This is a time when threats to the First Amendment are more complex than ever before. For example,

consider the current controversy over Internet ratings. A few weeks after the Supreme Court struck down the Communications Decency Act in 1997, major Internet-service providers, prodded by the White House, publicly announced plans to rate Internet sites and block those deemed indecent.

This supposedly benign effort to restrict access to certain parts of the Net raises some important issues about private censorship. First, is this form of information control a good thing, and does it fit with the goal of free speech and hope for a communications medium



with enormous potential to aid the expansion of people's knowledge about the world? Second, will rating systems developed by private companies stay private, or is the indirect tie-in with government a problem? Already, an aura of virtue has freed these companies from public-interest obligations such as disclosure about which sites have been blocked and by what criteria.

Another problem area is the so-called "hate speech" debate—the conflict between traditional thinking

speech pose serious First Amendment problems. Clearly this debate contains important legal and moral issues which are not easily resolved.

Still another difficult area involves the so-called *Hit Man* controversy. A book by that title included graphic detail on the art of assassination. Several years ago a contract killer followed its instructions, murdering several people in Maryland. The victims' relatives later sued publisher Paladin Press, charging that the publication of *Hit*

Department official stated, the plan was not to license journalists but "to license the right to do business transactions on Cuban soil." How tame that sounds. But is this a sufficient rationale for licensing the media? News organizations permitted to open Havana bureaus received licenses good for just one year—suggesting that renewal might be linked to the media organizations' performance. To date, only the Cable News Network has received approval from Fidel Castro to open a bureau—which is a condition for obtaining a license—while nearly a dozen media organizations have applied. This new type of restraint on press freedom should be monitored closely.

Next, welfare reform passed in 1996 dismantled the old system of federal assistance, in its place encouraging organizations such as churches to get involved. Participating churches are not required to remove religious symbols and may share church doctrine with the people they assist. Some say this is nothing new and that it involves churches in their traditional mission. Critics argue that allowing churches to share their beliefs with, even to evangelize, those they help breaches the traditional separation of church and state and will involve churches deeply in government functions.

about freedom of speech and attempts to control speech meant to intimidate others based on their race, religion or gender. Advocates of hate-speech regulation agree with critical race theorist Mari Matsuda that "tolerance of hate speech is not tolerance borne by the community at large. Rather it is a psychic tax imposed on those least able to pay." First Amendment pieties, some argue, mainly benefit the haves of our society and often ignore the disadvantaged. On the other hand, there is no getting around the fact that controls on

*Man* aided and abetted the killer. The case, still making its way through the courts, raises tricky issues. The knee-jerk reaction is to say that mere speech should always be protected. On the other hand, some First Amendment scholars argue the First Amendment is not intended to protect the content of a book such as *Hit Man*.

A fourth example of the greater complexity of First Amendment threats in our society is a provision of the Helms-Burton Act of 1996, which established a licensing system to open news bureaus in Cuba. As a Treasury

## There are more subtle, yet still potentially dangerous, threats to the First Amendment.

These are all complicated areas.

In addition, more straightforward forms of censorship continue. Oklahoma City police not long ago seized copies of the film *The Tin Drum*, not only from video stores but from people in their homes who had rented the video. Barnes & Noble was indicted for selling allegedly obscene material in some of its stores. And the courts are increasingly willing to seal criminal and civil records so the press cannot see them, let alone inform the public. In criminal cases, sentencing terms are routinely available. But civil case settlements are often secret, keeping the public in the dark about product defects that injure or kill hundreds of people. For example, a protective order that sealed litigation records kept the dangers of silicone breast implants hidden for eight years.

Alongside all that troubling news, there have been bright spots. At the top of the list is last year's Supreme Court's veto of the Communications Decency Act. After more than a year of serious worrying, the Supreme Court ruling is exhilarating. It

points this country toward an era in which the public can use technology to broaden our knowledge of the world and of one another.

Another positive step occurred when the Supreme Court decided last June to

the respondents knew the five freedoms. Only 11% knew that the First Amendment includes freedom of the press. These are individual liberties, really the bedrock of what makes ours a vibrant democracy.

**The Supreme Court's ruling against the Communications Decency Act is exhilarating. It points this country toward an era in which the public can use technology to broaden our knowledge of the world and of one another.**

let stand a ruling that recognized artists' First Amendment rights. This case stemmed from an attempt by the Giuliani administration in New York City to ban artists from displaying or selling their works on the sidewalk.

Finally, I included a chapter on civics education in the report. As the poll done for this project shows, most people in this country are unaware of exactly what freedoms the First Amendment protects. Only 2% of

So, even if today's First Amendment issues are more complex and sometimes subtler than ever, and public understanding of these freedoms remains inadequate, the only hope for the future is that some people will continue to stand up and defend the five freedoms.

As has been said many times, these are freedoms that must be fought for and won over and over again. The first step in this battle is to understand the threats that we face.

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# Discussion

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**Ray Jenkins** retired, *The Sun*, Baltimore: The Paladin case is now before the Fourth Circuit en banc, to determine whether the three-judge panel correctly held that Paladin Press could be sued for a reader's actions. What do you predict?

**Demac** Based on the history and what continues to be a strong belief that words don't kill, my sense is that those suing the publisher will not succeed.

**Ronald K.L. Collins** If private corporations have a right not to be compelled to air views in newspapers, television and radio stations or other properties they own, why doesn't the First Amendment protect the same "right" for Internet service providers? Why do online entities have a standing different from newspapers, television stations or shopping-center owners?

**Demac** You raised several unresolved issues, but I think what is most important, legally, is that it is still open to question whether an online service is a publisher or whether it is more like a common carrier.

**Tom Simonton** Society of Professional Journalists: *The Tin Drum* circulated widely about 15 or 20 years ago without incident. Why is this suddenly an issue in Oklahoma City?

**Judith Krug** American Library Association: The whole issue began because one person wanted to clean up the library, and when he got his hands on *The Tin Drum*, he took it to a judge who viewed 11 minutes and declared it child pornography. Subsequently, of course, the issue involved video stores and the confiscation—or as the police put it, the giving back—of the film when police went to video renters' homes.

**Mike Godwin** Electronic Frontier Foundation: Another factor is that *The Tin Drum* was released in the late '70s, prior to the 1982 Supreme Court ruling in the *Ferber* child-pornography case and prior to many laws now on the books addressing so-called "child pornographic content."

**JJ Blonien** Enterprise Communications: I used to be a newspaper publisher for about 22 years, and now I publish on the Internet. We see throughout the country legislation to regulate the Internet by placing the onus of censorship on the service provider. In Wisconsin we just defeated a bill, introduced for the third time, that would have held us responsible for the content of any electronic document we publish. Legislators want to shut down the information even though it is technically impossible. We could always move computers offshore. Legislators just don't understand that Internet technology has no boundaries. Does Congress understand that you cannot legislate the world of information? Can we as a country legislate censorship or restrictions on information worldwide?

**Demac** I take that as a rhetorical question, and I wonder what you suggest should be the zone of liability for someone like yourself. Would you like it on a parallel with newspapers?

**Blonien** Absolutely.

**Paul McMasters** I suspect Congress understands this is a real issue with Americans. There is a certain amount of ignorance, therefore fear, of this new technology, and the word about the Internet's scariness has gotten out ahead of the word about its po-

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tential and promise. Those concerned about Internet content have been better organized and gotten out in front with their message a lot sooner than the other folks. Those in the community who take their First Amendment rights for granted have not been so quick to tell the other side of the story.

**Jim Keat** Maryland-Delaware-DC Press Association: The answer to whether Congress can legislate worldwide, unfortunately, is yes. Congress does it when it tells Canadian and French firms they cannot trade with China or Cuba. It stretches all kinds of American rules and expects the world to go along. Now, I don't happen to approve of it, but it is a real danger that if Congress gets whipped into a frenzy, it could do things in the middle of the night as it did a few years ago with motor-vehicle records.

**Bob Richards** Pennsylvania Center for the First Amendment, Penn State: Donna, your report looks across all First Amendment areas. Does any one pose more perilous problems than the others?

**Demac** Time and again, I have thought to myself that our First Amendment goals are being trumped by money, and what do we do about that? Powerful corporations have First Amendment rights now, and there are clearly situations in which, if you take an absolute line, governments cannot establish any safeguards with regard to advertising of harmful products, for example. The report doesn't cover this, but with regard to media concentration, the pools of big money are having a dampening effect on free speech in our society. So, I cannot find one biggest issue. These all are big, complicated problems with regard to carrying the goals of the First Amendment into the 21st century.

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# Speech on the Fringe

## Many Want Protection to End Where Offense Begins

Speech on the fringes of First Amendment protection is the category most frequently under attack and considered for regulation and restriction. However, as moderator Robert O’Neil said, “If it is speech, then almost by definition it cannot really be on the fringe. Some messages are concededly more controversial than others. They are harder to defend or harder to understand, but in a sense, just by being on the fringe, we cannot say that they are somehow less deserving of First Amendment protection.” The following speakers provided insight into the tensions, crosscurrents, complexities and inherent difficulty of these issues in four primary areas of speech under siege today.

### MODERATOR

**Robert O’Neil**

Director  
*Thomas Jefferson Center for the Protection of Free Expression, University of Virginia*

### SPEAKERS

**Marjorie Heins**

Director  
*Arts Censorship Project, American Civil Liberties Union*

**Ronald K.L. Collins**

Director  
*Foodspeak Coalition for Free Speech, Center for Science in the Public Interest*

**Joan Bertin**

Director  
*National Coalition Against Censorship*

**Elliot M. Mincberg**

Legal Director and General Counsel  
*People for the American Way*

### VIOLENCE

By Marjorie Heins



I want to talk very briefly about three themes—art, science and law—and let me start with art.

“Menelaus hacked Pisander between the eyes, the bridge of the nose, and bones cracked, blood sprayed, and both eyes dropped at his feet to mix in the dust.

“Little Ajax lopped the head from the corpse’s limp neck and with one good heave sent it spinning into the milling fighters like a ball.”

Atreus made his brother Thyestes a feast of his own children, “a feast that seemed a feast for gods, a

love feast of his children’s flesh. He cuts the extremities, feet and delicate hands into small pieces, scatters them over the dish and serves it.”

The first two of those three extracts you will recognize from *The Iliad*. The third is from *Agamemnon* by Aeschylus. All three are quoted in a report published last spring by the Association of the Bar of the City of New York, entitled *Violence in the Media*. Obviously, I could regale you with countless other examples of gory literature, art and popular entertainment in all media throughout history.

## Scapegoating art and entertainment for social ills remains a perennially popular American political sport.

Violent behavior—everything from kids battling in the schoolyard to genocidal world wars—has been part of human history since its inception and, accordingly, a critical subject for artists, historians, cartoonists, tragedians, TV scriptwriters, video-game creators, puppet-show performers, Nobel Prize winners, crime-fiction authors, manufacturers of “serial killer” trading cards, country music singers and

least since 1952, when Congress held its first hearings on the subject. Almost 50 years and many studies later, what do we really know about the mysterious mental mediation through which millions of individuals of diverse ages, personalities, family histories, genetic makeups and life experiences process the inundation of art, literature, journalism, advertising and other information sources

and what causes humans to act aggressively and violently ... Some [psychologists] see aggression as an innate human drive which demands discharge in some form. Evolutionary psychologists see it as a naturally evolved response to particular environments. ... Finally, there are psychologists who believe aggressive behavior is learned from the environment. It is primarily these theorists who have looked particularly at television and violence. ... For over 30 years researchers have been attempting to discern the relationship, if any, between aggressive behavior and television violence. The results remain controversial, and skeptics abound.”

opera composers.

A December 1993 report from Sen. Byron Dorgan (D-N.D.) summarized a one-week survey of TV violence. Among the shows containing the highest numbers of violent acts per hour were *The Miracle Worker*; *Civil War Journal*; *Star Trek 9*; *The Untouchables*; *Murder, She Wrote*; *Back to the Future*; *Our Century: Combat at Sea*; *Teenage Mutant Ninja Turtles*, and Alfred Hitchcock’s *North by Northwest*. The Dorgan report nicely illustrates the overbreadth problems that arise from attempts to label, block, regulate or ban violent content in the media.

Second theme, science. Violence in the media has been blamed for social ills at

that comprise our culture?

Often one is accused, and I am among those, of either hopeless bias or pathological denial if one questions the supposedly well-established “proof” that media violence causes aggression. The facts are more ambiguous. On this point I commend to you again the City Bar Association report. It explains, in part:

“The subject of violence and aggression in psychology is vast. ... What is most striking, even after sampling a small amount of this literature and thought, is how little agreement there is among experts in human behavior about the nature of aggression and violence,

Why, then, is Congress and a large portion of the American public persuaded that media violence affects behavior? Let me suggest that the “social learning” theorists, who believe aggression is learned from the environment, have received undue attention because that is where the grant money is. That’s where the grant money is because scapegoating art and entertainment for social ills remains a perennially popular American political sport.

Final theme, law. The ACLU wrote a recent brief to the 2nd U.S. Circuit Court of Appeals involving a Nassau County ban on selling to minors trading cards

depicting “heinous crimes.” It says, in part:

“The very premise of the law ... is constitutionally repugnant. ... Whether relying on social-science studies or general ‘common sense’ beliefs, our most fundamental

crime,’ the remedy cannot be censorship.”

We won that case last week but not because the trading-card law tried to censor bad ideas. The court found the law unconstitutional because Nassau

not applicable to kids. Nevertheless, the Nassau County case was in line with every court decision I am aware of involving attempts to regulate violent content in the arts or entertainment. That is, all such attempts have

## What do we really know about the mysterious mental mediation through which millions of individuals process the information sources that comprise our culture?

First Amendment ideals bar government from regulating speech because it is thought to give people ‘bad ideas.’ Indeed, if the law were otherwise, virtually any work of art, entertainment or news reporting could be banned. One obvious target would be the Bible, which contains extensive descriptions of violence. ... The Supreme Court has ruled many times that government cannot pass laws ‘aimed at the suppression of dangerous ideas.’... Whatever ‘moral’ harm Nassau County believes ... is caused by speech that depicts ‘heinous

County had not proven it would serve the government’s “compelling interest” in protecting minors from psychological harm or criminal conduct. The assumption here is that if Nassau County had been able to make a factual case against “heinous crime” trading cards based on social-science evidence, then the court might have permitted an exception to the First Amendment. The court either ignored the principle that government may not censor “bad ideas,” or it simply thought the principle

been struck down.

Indeed, the fact that speech about violence, short of incitement, enjoys full constitutional protection no doubt explains why Congress in last year’s V-chip law adopted an indirect method of television censorship—a convoluted scheme of mandatory blocking technology combined with supposedly “voluntary” industry ratings. It remains to be seen whether the new government-compelled ratings will survive constitutional attack.





## HATE SPEECH

By Ronald K.L. Collins

*The Washington Post* recently ran an interesting story about the Ku Klux Klan's attempt to buy underwriter or sponsorship ads for "All Things Considered." It sought to purchase air-time from a National Public Radio affiliate in St. Louis. The Klan claimed that if a public-funded radio station runs underwriter ads by the NAACP and B'nai B'rith, then by the logic of *RAV v. City of St. Paul* and other cases, the station cannot discriminate on the basis of content. The Klan argued it had a First Amendment right to air its views in a public forum equal to the right of other organizations. I think that claim brings us to this topic of "hate speech" in a very sharp way.

By and large, Americans believe in the power of the word—not that the word is always successful but that the word can change minds. It can help democracy. It can improve our environment. It can improve our cities, our culture, our faith in mankind and womankind, too. So, at least, goes the noble account of the First Amendment.

Well, if the word has power to do good, it also has the power to harm. Justice William O. Douglas made a telling point when he said, "Speech may strike at prejudices and have unsettling ef-

fects as it presses for acceptance of an idea." Given that, what if the consequences of speech are more than unsettling? What then?

We talk a lot about "hate speech" and the "hate-speech doctrine." Let us be clear at the outset. There is no hate-speech *legal* doctrine. The Supreme Court has never, if Lexis-Nexis can be trusted, used the words "hate speech" in a majority opinion. The term has only appeared in a concurring opinion by Justice Byron White in *RAV v. City of St. Paul*.

Hence, to attack hate speech, assuming it can be defined, is to attack it indirectly. That is, it is a cause in search of a legal doctrine. Just as racism and segregation once were attacked indirectly, just as the 14th and 15th Amendments couldn't be used to frontally attack racism prior to *Brown v. Board*, so today attacks on racist expression and on hate speech must be attacked indirectly.

Therefore, many questions arise. For example: Is the expression in question protected speech or unprotected conduct? Does a law target speech itself or the "secondary effects" of speech? Does the expression in question fall under a traditional First Amendment exception—e.g. fighting words, libel, obscenity or

commercial speech?

Furthermore, does the speech in question amount to a criminal threat? This was the issue a few years back in *U.S. v. Baker* (E.D. Mich., 1995), concerning whether or not a student's words on the Internet amounted to criminal threats. Did the speech violate federal law? If so, the question was whether the statute violated the First Amendment. The court never reached the First Amendment question because it found that the alleged threats *did not violate federal law*. But that does not deny the possibility, the everyday reality, that criminal threats consistent with the statute might well withstand constitutional scrutiny.

Finally, does a regulation amount to *state action*? For example, if the government says, "No racial hate speech," that might well violate the First Amendment as currently constructed. But if an Internet service provider bars hate speech, using filtering devices to find and block it, arguably the online service's action not only cannot be regulated by the government but constitutes a First Amendment right in and of itself. Government censorship violates the First Amendment, whereas private censorship is protected by it.

It is quite often said that hate-speech regulation is a slippery slope. I submit that the slippery slope metaphor isn't very helpful. Life itself is a series of slippery slopes. I risk slippery slopes every day with my four-year-old who is becoming increasingly sophisticated in arguing about why he has to go to bed at 8:30. Even if we lend credence to the metaphor in the hate speech context, it works against us. Arguably, to permit racial hate speech of one type could engender *more* racial hate speech of another type, and another type, and another type, until the threat of racist acts becomes clear and present.

I see a broader philosophical issue here, too, concerning equality or anti-discrimination principles on the one hand, and free speech or liberty principles on the other. In the 1960s, the equality and liberty principles joined forces. The First Amendment thereby helped to dismantle racism. There was a time when the First Amendment and the 14th Amendment worked in tandem to fight discrimination, racism and bigotry. Today, with some merit, Catharine MacKinnon and others argue that the First Amendment is on a collision course with equality.

The question of *context* is also quite relevant when considering race hate speech issues. For example, does the

speech occur on a college campus? Or does the hate speech occur in a public or private workplace? Recently, the Supreme Court denied certiorari in a case where a municipal official was fired for engaging in hate speech connected to his job. I think the outcome had a lot to do with the fact that the speech occurred in the employment context.

Does the speech occur in a public forum? Does it occur on TV, radio (*FCC v. Pacifica*), or does it occur on the Internet (*Reno v. ACLU*)? Does the notion apply in face-to-face contact, where the likelihood of fighting

words is greater? If so, completely different standards come into play. All of these contexts raise questions about hate speech and whether it will or will not be regulated.

In the United States, we First Amendment defenders have varied stripes but nonetheless hold to a certain chauvinism. We think that the United States, and the United States alone, got it right when the Supreme Court rendered its *St. Paul* opinion. I mean, other civilized, democratic societies,

Canada and Israel among them, ban hate speech. Their high courts have upheld those bans, and I think the debate would be far better informed by looking to developments in Canada or Israel.

Finally, I would like to say that to talk about hate speech in the context of Supreme Court doctrine is to ignore something very important—the culture of free speech. That is, there *may* be a First Amendment right to engage in whatever we define as hate speech. But that doesn't mean the culture will honor that right. For any society wedded to the equality prin-

There may be a First Amendment right to engage in whatever we define as hate speech, but that doesn't mean the culture will honor that right.

ciple, any society mindful of the threat of discrimination and racism in a post-Holocaust world, will impose consequences on anyone who publicly engages in expressions of hate. And it is well and right that it do so. Those non-governmentally supported consequences may be social, they may be personal, but that is a part of the culture of the First Amendment. That culture may not always be in harmony with the Supreme Court, but it is still a part of the First Amendment as we know it.



## PORNOGRAPHY

By Joan Bertin

The pornography debate framed by Catharine MacKinnon and Andrea Dworkin is relatively quiescent, except perhaps on college campuses. What is important now is — not surprisingly — connected to our perhaps obsessive rhetorical focus on the welfare of children. We are fighting about *The Tin Drum*, *Lolita* and Jock Sturges photos, and these debates relate to two developments.

One is the Child Pornography Prevention Act of 1996. The second is the national sentiment that seems to permit, if not encourage, prosecutions undreamed of 10 or 20 years ago.

depiction is, or appears to be, of a minor engaging in sexually explicit conduct.”

The phrase “sexually explicit conduct” was in the prior statute, but “appears to be a minor” and “computer-generated image” are new. The Act further defines sexually explicit conduct to include “lascivious exhibition of the genitals or pubic area.” This amended statute significantly expands child-pornography law.

In the 1982 *Ferber* case, upholding the New York State child-pornography statute, the Supreme Court’s rationale was that it was appropriate and necessary to criminalize child pornogra-

image that looks like a child, whether or not it is a child, and about how those images affect the observer’s mind.

We are really back in the old-fashioned thought-control arena here. The assumptions are that such materials stimulate sexual crimes against minors and that anyone interested in viewing such materials should be punished.

*The Tin Drum* case is based on a comparable state statute. This 1979, Oscar-winning film contains no explicit sex scenes. It has some suggestive scenes involving young Oscar, who is born into pre-World War II Europe and refuses to grow up because of his disgust with what he sees around him during the war years. It is a complex allegorical movie, like Günter Grass’ famous book, from which it was drawn.

Consider next the difficulty of getting an American distributor for the new film version of *Lolita*, starring Jeremy Irons. Some reasons why this movie is not being circulated relate to film-industry economics. However, the potential threat of prosecution for a movie about pedophilia is simply so great that the topic is now off-limits for the genre.

The final case-in-point relates to the protest against

The dominant idea is that if you can control undesirable images you can control undesirable actions.

I want to read from the Child Pornography Prevention Act. It now defines child pornography as “any visual depiction—including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means ... where such visual

phy to protect children used in its production—the premise being that if you created sexually explicit images using actual children, those children were harmed, and that harm justified a limitation on any First Amendment rights that might otherwise exist.

Plainly, Congress now is simply concerned about an

Jock Sturges' books. Sturges is a fine-arts photographer whose works hang in many museums of great renown. He takes pictures of naturists — in other words nudists — in France and California. Many works are intergenerational pictures of naturists who have frequented the same beach in France for years. Sturges has been targeted by Randall Terry, who now leads a group called Loyal Opposition, and by Focus on the Family. Other photographers have been similarly targeted, but the Sturges books have received the most attention, and Terry's followers have defaced them in book stores.

These books depict nude children who are uninhibited in the way in which they sit around and pose. There are no pictures focusing on the genital area. There are no sexually suggestive pictures, unless you think a child's nude body or a pre-adolescent body is in itself pornographic.

Think about everything that would go down the tubes if the Child Pornography Prevention Act were enforced as its language suggests it could be.

Some of you may have seen the painting by Balthus called "The Guitar Player." Balthus was plainly interested in the young female body, and "The Guitar Player" demonstrates that interest, certainly verging

on the erotic. Greek vases had some pretty racy stuff around the edges. In some versions of Romeo and Juliet, the young lovers consummate their relationship.

Sex-education materials for teenagers and even films about sexual abuse of minors, female genital mutila-

tion and the like, if they involve minors, would presumably be outlawed by this statute, even if made to oppose child sexual abuse or female genital mutilation. We are talking about all kinds of historical, scientific and artistic expression that the Act does not exclude, not to mention morphed or fantasy images.

The focus on nudity as a form of child pornography has spilled out into other areas. A San Francisco bookstore owner recently wanted to know if he could be prosecuted because two women, with children in strollers, complained about a poster with a picture of a nude male in the store window. A woman in Tennessee called about trying to exhibit a painting called "The Philly Flasher," which is exactly what it sounds like. Sculptures of nudes were removed from a Rodin exhibition at

Brigham Young University. As the curator of this traveling show said, "Well, you cannot really have a Rodin show unless you are willing to show nudes because that was his *metier*."

These events epitomize a problem endemic in the First Amendment area, and

## We are really back in the old-fashioned thought-control arena here.

that is confusion and conflation of thoughts, ideas and actions. The dominant theme is that if you can control undesirable images you can control undesirable actions.

A little anecdote illustrates the problem and how far it goes into other sectors. At the Internet Online Summit, Vice President Gore said that just as it is parents' duty to lock medicine cabinets and protect young children by covering electrical sockets, so it is their duty to lock off portions of the Internet containing sexual imagery.

It struck me then that we really have reached a crisis, if we equate the physical harm from an electrical charge or poison with some unknown, undefined and hypothetical harm that might occur from seeing a sexual image.



## FLAG DESECRATION

By Elliot M. Minberg

This subject is a bit different from the other topics we've considered. For one thing, a very, very serious proposal has arisen to amend the Constitution to allow government to ban flag desecration.

Second, flag desecration makes for strange bedfellows. Among those who claim it should be illegal are not just the American Legion, but also Adrian Cronauer, the "Good Morning, Vietnam" disc jockey who opposed military censorship, and Supreme Court Justice John Paul Stevens, who wrote the decision striking down the Internet

other First Amendment issues is that it stems from two events that in my view should never, ever be mixed—a political campaign and a controversial Supreme Court decision.

After the Vietnam War, the debate about flag desecration was relatively quiescent until 1988, when Gov. Dukakis vetoed a Massachusetts law calling for a mandatory Pledge of Allegiance. President Bush used this to question Dukakis' patriotism, campaigned in flag factories, and things went upward or downward from there, depending on your point of view.

importance of retaining the full protection of the First Amendment.

Some of the controversy cooled by late that summer. Nonetheless, Congress passed the Flag Protection Act, which advocates hoped would pass constitutional muster. But few of us were surprised when the Act was ruled unconstitutional in 1990, in *U.S. v. Eichmann*. By then, the public had tired of the issue, and the Supreme Court became more temperate. In fact, *Eichmann* drew only one temperate dissent joined by four justices, and the dissent specifically criticized the manipulation of the flag for partisan purposes.

The issue stayed quiet until 1994, when the Republicans gained control of both houses of Congress. As a bipartisan matter, Congress also became more conservative, opening a new opportunity for flag-amendment supporters. Additionally, the American Legion and other amendment boosters tried to help enact it by forming the well-funded Citizens Flag Alliance. In 1995, only a handful of Senate votes stopped Congress from approving an amendment.

Like so many other issues, the issue has now resurfaced. The House of Representatives recently

Amendment backers want to ban desecration because of what it communicates. Opponents argue against a ban for the same reason.

censorship law. The other side, those who have opposed flag desecration laws, includes not just People For the American Way and the ACLU but arch-conservative voices like George Will, William Safire, *The National Review* and Justice Antonin Scalia.

The third reason this controversy differs from

This primed the political reaction in 1989 to the Supreme Court's 5-4 *Johnson* decision, which found a Texas flag-desecration law to be unconstitutional. The Court's language on both sides inflamed much rhetoric about the shame of allowing the flag to be burned or desecrated as a unique national symbol versus the

approved a flag amendment, and the Senate will undoubtedly consider it around one of the upcoming patriotic holidays. We hope, again, for a small margin of victory in the Senate.

So, what are the substantive arguments on both sides? Supporters argue that flag desecration is not speech but conduct, of an especially repulsive nature. They claim public support, based on polls they helped sponsor, and say the flag is a unique national symbol that deserves unique protection.

Let me read from Adrian Cronauer because I think he put it for his side very well: "The flag is qualitatively different from any other symbol we have in this country. It represents things that are uncommonly powerful, both intellectually and emotionally — love of country, the country itself, patriotism, and the sacrifices that have been made on behalf of our nation for generations. I have concluded the flag has a secular sacredness that entitles it to a special form of constitutional protection, one that can be achieved without undermining the basic values of the First Amendment."

Few would claim that flag burning incites sexual misconduct or violence, despite a few claims on the violence score. It clearly is an issue about the message sent by flag burning. Amendment backers want to ban desecra-

tion because of what it communicates. Opponents argue against a ban for the same reason. To paraphrase Voltaire, I disagree with what you say but will defend to the death your right

## Flag burning is a problem seeking a solution. Desecration increases whenever somebody tries to ban it.

to say it. In fact, when the American people understand that you're talking about changing the First Amendment, the support for a flag amendment drops significantly, as The Freedom Forum poll showed.

Flag burning is a problem seeking a solution. Desecration increases whenever somebody tries to ban it. I'm also concerned about vagueness, overbreadth and the slippery slope. Would a flag-desecration amendment apply to art? To commercial exploitation of the flag? To the web site with a computer image of a burning flag? Moreover, how in the world can we truly stop with the flag as the only symbol we are concerned about?

What about Roseanne's desecration of the National Anthem a few years ago? What about displaying the Nazi flag or swastika, which clearly cause many people pain equivalent to desecration of the U.S. flag?

For those and other reasons, many of us oppose the proposed amendment. To balance Mr. Cronauer, I will quote someone often on the other side of the political agenda from those like me.

Sen. Mitch McConnell (R-Ky.) wrote, "Those who burn the flag deserve our contempt, but they should not provoke us to tamper with the First Amendment. After all, among the values the American flag symbolizes is free speech, even those ideas with which we disagree. While we revere the flag for the values and history it represents, we cannot worship the flag as an end unto itself, and we cannot coerce people to respect the flag in the manner in which we know it deserves to be respected. To do so would be tantamount to imposing a speech code and our own conservative brand of political correctness."

Patriotism undoubtedly is an important issue here, and the following passage expresses the experiential argument, so to speak, from James Warner of the National Rifle Association, who was a prisoner of war in Vietnam:



“I didn’t appreciate the power behind the views about the flag and freedoms before I was a prisoner of war. I remember one interro-

gation where I was shown a photograph of some American protesting the war by burning a flag. There, the officer interrogating me said, ‘People in your country protest against your cause. That

proves that you are wrong.’ ‘No,’ I said, ‘That proves that I am right. In my country we are not afraid of freedom, even if it means that

astonished to see pain compounded by fear in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him. We don’t need to amend the Constitution to punish flag burners. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? Don’t be afraid of freedom. It is the best weapon we have.”

—James Warner

## Freedom “is the best weapon we have.”

gation where I was shown a photograph of some American protesting the war by burning a flag. There, the officer interrogating me said, ‘People in your country protest against your cause. That

people disagree with us.’ The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting, I was

astonished to see pain compounded by fear in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him. We don’t need to amend the Constitution to punish flag burners. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? Don’t be afraid of freedom. It is the best weapon we have.”

## Discussion

**Harvey L. Zuckman** Institute for Communications Law Studies, Catholic University: What, if anything, is wrong with Congress mandating hardware circuitry in the television set, or software in a computer, that can allow parents to decide what they want their children to see?

**Marjorie Heins** The hardware itself, of course, accomplishes nothing without a rating system, and Congress did not think it could affirmatively mandate that. But it tried to accomplish the same result through semi-coercive measures. Now we have a complex system awaiting FCC approval that includes both age-based and content-based ratings. Congress was not interested only in ratings in general; it targeted violent and sexual content. It focused on what it considered harmful, ideas it didn’t like and wanted to discourage if not completely suppress, and it went as far as it thought possible toward censorship and a law it thought could be upheld.

The second part of your question has to do with giving parents information. We must look at the kind of information a rating system provides and who really makes the decisions. These are private industry ratings. We don’t know who really decides which marks and symbols the shows get. It is going to be difficult for raters to make subtle judgments about whether the violence is gratuitous, whether it is valuable, whether it is educational, or whether it is likely to lead a child to be traumatized or become violent. These are judgments on which there is little agreement, and so there are going to be numbers and letters assigned to art that don’t give parents any useful information and certainly don’t give them actual control over their children’s upbringing.

**Ronald K.L. Collins** Even if one agrees with the laudable idea of parental control, the question is whether or not the technology will do what it portends. That is, can it really do what parents hope? Furthermore,

many recent arguments also reveal that filtering software is discriminatory. If the word “gay,” “lesbian” or “homosexual” appears, for example, a web site may perforce be deemed objectionable. Here, too, the question is whether the software delivers in a way that does not in itself offend our values.

**Joan Bertin** The notion of parental control is very appealing but problematic as a way to mediate culture wars. When we talk about parental control, we blur the distinctions between 6-year-olds and 16-year-olds. We forget that at some point children develop an independent right and interest in knowing about the world of ideas even if their parents don’t want them to. We also blur the point about parental duties to help children handle offensive ideas and images. Ratings and the V-chips foster the notion that you deal with the world by shutting out what you don’t like. Right there, you lose the essence of the First Amendment, the notion that our rights are best served by robust debate and the willingness to look the full range of ideas and images in the eye and respond to them. Apart from the legal concerns, we should talk about values and how parents teach children how to respond to unpleasant things.

On the strictly legal front, the blurring of lines between government and private action is very, very scary. Congress threatens to act if the industry doesn’t respond voluntarily. Well, “voluntarily” has no meaning if you know that members of Congress have bills ready, often already introduced, mandating that you do this, or else.

**Bob Becker** attorney: This is directed at Ron Collins. I, too, read the *Washington Post* article about the Klan, and I had a decidedly queasy feeling in my stomach when I finished because I couldn’t figure out which side I was on. How do we discern where our First Amendment feelings reside here?

**Collins** It’s healthy that you are conflicted. I think a society that is not conflicted about hate speech, that sees even liberty *sans* equality as an absolute, invites a certain tyranny. Concerning the St. Louis NPR case, insofar as the government decides to withdraw funds from public radio and public television, it invites commercialization of those media. We can call it “underwriting,” but the ads are getting longer and more commercialized. If NPR says, “These aren’t really commercials; these are statements that underwrite public-service sorts of things,” then all of a sudden they are no longer commercial speech. They are political speech, meaning the claim for content neutrality becomes substantially stronger.

In terms of hate speech, I think too many, often well-intentioned First Amendment defenders fail to appreciate the human societal cost of protecting hate speech. What is so wonderful about the First Amendment is that it involves an *experiment*, as Holmes said. And experiments can fail. We have examples in Nazi Germany of failed experiments, including experiments in speech. To defend the First Amendment is to defend risk-taking. We need to remember that.

**Solange Bitol** ACLU: Does Mr. Collins see any First Amendment implication in federal hate-crime statutes, particularly the recent proposed expansion of the federal hate-crimes definition?

**Collins** One of the real difficulties with so-called “hate crime” legislation is there are already a variety of ways to prevent or punish hate crimes indirectly. When lawmakers regulate hate speech, there is always a definitional problem: Are we regulating an act or expression? To regulate hate speech consistent with existing law, regulators must aim not at speech but rather at its “secondary effects.”



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**Elliot M. Minberg** I wanted to point out that after *RAV v. St. Paul*, the Supreme Court issued another decision, *Wisconsin v. Mitchell*, which distinguished between hate speech and what we popularly call hate crimes, crimes motivated by a specific intent. There is a point at which the law punishes people,

at least in part, for the intent behind their acts. If not, you would have to eliminate the distinction between first-degree and other forms of murder. How far that goes I don't think has yet been fully resolved.

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## The Freedom Forum Poll

### Public Opinion: Much to Celebrate, Much to Improve

The Freedom Forum commissioned a nationwide poll on public attitudes toward the First Amendment as part of the State of the First Amendment project. Ken Dautrich, director of the Center for Survey Research and Analysis at the University of Connecticut, conducted the poll and analyzed it in Chapter 6 of the report. The poll shows that Americans are conflicted about First Amendment freedoms: very supportive of the First Amendment in the abstract but wavering when confronted with specific instances of objectionable speech. Here are the perspectives on the poll and its results by Professor Dautrich and others.

#### ..... **MODERATOR**

##### **Lawrence T. McGill**

Director of Research  
*The Freedom Forum  
Media Studies Center*

#### ..... **SPEAKERS**

##### **Ken Dautrich**

Director  
*Center for Survey Research and  
Analysis, University of Connecticut*

##### **Bob Wyatt**

Professor of Journalism  
and Director, Office of  
Communication Research  
*Middle Tennessee  
State University*

##### **Kenneth A. Paulson**

Senior Vice President and Executive  
Director  
*The Freedom Forum  
First Amendment Center, Nashville*

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#### ..... **THE POLL**

By Ken Dautrich

Despite the plethora of polls in America today, few have focused completely and comprehensively on First Amendment issues. Three landmark studies can be identified since 1950. One back in the 1950s, during the McCarthy era, looked at political tolerance and largely concluded that Americans are intolerant of many rights guaranteed by the Constitution, particularly First Amendment rights. The second, in the late 1970s, arrived at similar conclusions. The third, in 1991, was conducted by Bob Wyatt, who is on this panel.

Our study dealt with a wide range of public attitudes about the First Amendment, including the importance of different rights; the salience, awareness and knowledge of First Amendment rights; and the viability of the First Amendment in contemporary society. We wanted to know: Are Americans satisfied with the current degree of freedom in the areas of speech, press and religion? To what extent do Americans support restricting First Amendment freedoms under certain circumstances?

Here are some of our findings, beginning with the per-

centage of Americans that consider each of eight rights to be essential, including First Amendment rights.

Among the First Amendment rights, 81% said the right to practice one's chosen religion is essential; 72% said free speech is essential; 66% said freedom **from** religion is essential; 66% said a free press is essential, and 56% said the right to peaceably assemble is essential. Less than 10% said that no First Amendment freedom was either important or essential.

the low levels of knowledge about specific rights.

Despite Americans' limited knowledge about the First Amendment, the vast majority—fully 93%—would approve the First Amendment in a vote today.

Response to another question, related to the “slippery slope” argument, showed Americans are wary of government restrictions, especially of First Amendment freedoms. More than eight in 10 agreed that once restrictions are in place, fur-

ther restrictions become easier to enact. However, only 50% say the press has the right amount of freedom, with 38% saying that the press has too much freedom.

Our poll confirmed past studies, which found that high support for First Amendment rights in the abstract drops in response to specific examples. While most, 90%, believe in freedom to express unpopular opinions, support falls radically for sexually explicit or offensive expression.

Despite low levels of tolerance for sexually explicit material, there is some evidence that the public has become more tolerant than in the past. We found a 14-point increase since 1979 in the percentage of Americans agreeing that school libraries should be allowed to include novels with sexually explicit content.

We also explored support for examples of press freedom. With the exceptions of using hidden cameras and televised projections of election winners while polls are still open, most people largely support press freedoms under a variety of circumstances. They decisively endorsed the idea that tabloid newspapers should have the same freedom to publish what they want as the so-called “elite” papers.

In terms of government's role in the TV ratings system, there appears to be a large increase in the percent saying that giving the gov-

However, the ability to name specific rights guaranteed by the First Amendment was not terribly impressive. Almost half, 49%, named freedom of speech, but 37% could not name any of the five First Amendment rights. Those other than free speech were specified by only one in five, or fewer, respondents. This finding has implications for the education system. As the poll bore out, most Americans receive little or no First Amendment instruction in grammar school, high school or even in college. Clearly the lack of instruction is apparent by

ther restrictions become easier to enact. Bear in mind, though, that when the poll specified expressions or practices that might be unpopular, support for those respective rights plummeted. Another important point is the intensity with which people agreed with the slippery-slope argument. Most who agreed with the argument “strongly” agreed.

Americans sense that they have the right amount of freedom in each of three First Amendment areas—press, speech and religion. About eight in 10 say Americans have the right degree of freedom of speech or reli-

## 20 The First Amendment is alive and well ... at least from the perspective of the American public.

ernment the power to decide on TV content is a violation of the public's right to watch what it pleases.

When we compared 1979 to the current survey, there is an increase (from 39% to 63%) in the percentage of people who feel that government power to decide which TV programs can or cannot be shown violates the public's right to watch what it pleases. Our survey also found that, by a 52% to 44% margin, Americans say government should not be involved in TV ratings.

When it comes to religious freedoms, most people supported several examples of religious expression in public schools, including allowing a public-school teacher to lead prayers. Even so, when Americans were asked if they would support a constitutional amendment allowing local communities to decide on prayer in schools, they rejected the idea by a margin of 55% to 42%.

The survey found that most people say that they

personally feel free to express themselves in a variety of situations – 70% say they have not in the past year been in any situation when they did not express themselves because they thought they might be penalized for doing so.

Overall, the First Amendment is alive and well in 1997, at least from the perspective of the American public. A strong majority say that the First Amendment rights are not just important but essential to American society. The vast majority say that they would vote to approve the First Amendment today. They would be reluctant to amend the Constitution to restrict First Amendment freedoms.

With the exception of sexually explicit and offensive material, the majority support free speech in particular circumstances. There are a few situations where press rights are not supported. Americans understand the slippery-slope problem when it comes to First Amendment restric-

tions, and they feel quite free to express themselves.

Despite these reasons to be optimistic about the state of the First Amendment, there are areas of concern. Majorities are willing to agree with practices that blur the line between church and state. Majorities support restrictions on free speech when it comes to sexually explicit and offensive material. The educational system is not doing a very good job in providing instruction on First Amendment issues. And while most feel the right amount of freedom is offered for speech and religious expressions, many feel the press has too much freedom.

I think the broad picture from this survey suggests that we have much to celebrate in how Americans feel about the First Amendment, and there is much more that can be done to further improve Americans' knowledge and views of First Amendment rights.



## RESPONSE

By Bob Wyatt

In a book following my 1991 poll, I wrote, “Free expression is in very deep trouble.” However, I focused a lot of that interpretation on free speech around the fringes. I think Ken Dautrich focuses a lot of his interpretation on the broad support for mainline free speech.

We First Amendment near-absolutists tend to get rather hysterical when we think about what might happen on the Internet or at our local book store. The Barnes & Noble down the pike from me is under assault, yet it is valuable to understand that there is broad support for free speech, at least in abstract principle. My study and oth-

teaches people to answer a multiple-choice question correctly. It is raising the general level of education that over the last 20 or 25 years has increased support for free expression.

If you look at data from the University of Chicago’s General Social Survey, you will see that support has dropped dramatically for banning books from libraries if written by homosexuals. Support for racist material has not dropped, incidentally. We must realize that support for very challenging, very offensive, very harmful expression—and I favor protecting expression even if it is demon-

siderable resistance to unpopular and offensive speech, paints a bit too rosy a picture of journalism. In controlled experiments, a former colleague of mine demonstrated that usually, if you give a right to the people, say, the right to endorse a candidate for office, oh, two-thirds will support it, but if you give it only to the press, only about half that number, or one-third, would support it. In this regard I think the current survey does not contain tough-enough questions about press rights; for example, the right to criticize the military during the Persian Gulf War.

Finally, I think there have probably been enough studies to get the general idea: the more you dislike it, the less likely you are to support it. That includes me and you, not just the unwashed American public. It is probably time to try to understand the mechanisms that lead people to support free expression, particularly those mechanisms by which education leads people to support free expression.

Does education raise support because it raises general tolerance for pluralism, for different ideas, or does it raise support for free expression because it teaches people to engage in prin-

It is probably time to try to understand ... how education leads people to support free expression.

ers have emphasized that when things get bothersome, offensive or challenging, that support drops out the bottom. Therefore, I like to say that people believe they believe in free expression, but when it pushes them to the brink, they do not.

I agree that education is key to increasing support for free expression, but not just the kind of education that

strably harmful—is still very high in this country.

I think the current survey, also, taps into a lot of general anti-government rhetoric. For instance, I think we could get fairly large numbers of people to ratify anything that began with the phrase, “Congress shall make no law.”

I also think this survey, although it does show con-

ciplined reasoning—that is, to take the general principles of the First Amendment and

reason from them as to whether or not you want to let the local book store dis-

play without covering a book by Jock Sturges?

## RESPONSE

By Kenneth A. Paulson

This is an interesting study that asks some questions that haven't been asked in any depth before. We can overreact to some of them. That only 2% of Americans can name all five freedoms is interesting, but only critical if you are playing the home version of Jeopardy.

At the American Press Institute, virtually every month, we hold sessions with seasoned journalists from the U.S. and a few folks from Canada and elsewhere in which John Seigenthaler and I do a basic 90-minute discussion of the First Amendment—its past, its present, its future—and one of our stock questions to begin the session is to ask, for five points, how many freedoms there are in the First Amendment and then, for 10 points, to name them. About 20% of the teams get it right.

So, in any survey there are things you can react to and overreact to. I will say, though, that the notion that 93% would ratify is astonishing, encouraging and exciting. I also agree with some of the sentiment that people will buy just about

anything if couched the proper way. However, there were other parts of the survey couched in the same glorifying language, and the respondents just didn't go in that direction.

On the flag-desecration issue, Elliot Mincberg pointed out that when people know a ban involves amending the Constitution, support for a ban drops to

49%. But the very next question was fascinating. When that 49% was told that an amendment prohibiting flag-burning "would be the first time any of the freedoms in the First Amendment have been amended in 200 years; knowing this, would you still support an amendment to prohibit flag-burning?" a full 88% still said, "Yes." That was really surprising.

What is so encouraging here, though, is that core of support for ratification. If you could imagine the First Amendment being a private corporation, calling in some folks from Madison Avenue and Wall Street and saying, "Here's the deal. We've got this company, it's been private, and it's got a 93% support and acceptance factor," the Madison Avenue person



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We try to remind people daily that the First Amendment has to be protected, that there are issues in our everyday lives with First Amendment implications.

would be dancing in the aisles, saying, "All we need is a slogan and a mascot, and we are in business." The Wall Street person would go, "We clearly need a public offering of this product. This can be sold."

That is part of the challenge here. All education is positive, but one thing we attempt with The Freedom Forum's web site (<http://www.freedomforum.org>) is

to remind people daily that the First Amendment has to

most fall into the category of goofy. It didn't surprise

waves." It said "sing." It didn't even say "in public." I mean, there could be a First Amendment risk in your shower. There may be no better question for conversation starters than that one, and I appreciate the fact that you put it in.

Many questions in this study suggest, depending on your perspective, a glass half-full or a glass half-empty, but this is one of those subjects where we all need to make sure that glass is pretty much filled to the top.

**“What is so encouraging here, though, is that core of support for ratification.**

be protected, that there are issues in our everyday lives with First Amendment implications. We can draw on that enormous good will for the First Amendment.

Some results in the study floored me because they al-

me that 38% say the press has too much freedom.

What amazed me is that 49% said musicians should not be allowed to sing songs with words others might find offensive. It didn't say "record." It didn't say "air-

## Discussion

**Leslie Harris** Leslie Harris Associates: As someone who's been a lobbyist for the First Amendment, I am struck that among the core freedoms for a functioning democracy, we haven't talked about the remarkable lack of support for petitioning the government. It feels like maybe we have moved people to support the Hare Krishnas in the airport, but when it comes down to some of the core things we need to function as a nation, the study makes me fairly pessimistic.

**Ken Dautrich** We asked, "The U.S. Constitution protects certain rights, but not everyone considers each right important. I am going

to read you some rights guaranteed by it. Tell me how important it is that you have that right. Is it essential, important but not essential, or not important?" When it comes to, "You have the right to assemble, march, protest or petition the government about causes and issues," 56% said that it is an essential right. Another 36% said that it is important though not essential. Again, it is largely a question of interpretation. Is the glass half-full or half-empty? My interpretation is that if 56%, a majority of Americans, say it is essential; that is fairly high.

**Bob Wyatt** But is it essential when the Nazis are marching in Skokie? That, you see, is the challenge. Again, it is very abstract, and each of us has his or her own hot-button issues over which we would shut down a march. I would not bet 100% that there is not some form of expression even a First Amendment absolutist wouldn't restrict.

**Dan Kubiske** Society of Professional Journalists: I am really happy to see that 93% would vote for the First Amendment, but I wonder, if the First Amendment were reworded, words we weren't raised with, would it still pass by such an overwhelming majority?

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**Wyatt** There is still a lot of experimental research about phrasing the question in different ways to see if changing the words makes a difference. Simply rephrasing as to whether individuals have the right or media have the right would make a difference, for instance.

**Kenneth A. Paulson** One exercise we do with college students at the First Amendment Center is called “Second Thoughts on the First Amendment.” We tell a group, “This thing is old, it’s got this stodgy language. Let’s rewrite the First Amendment, build the World Wide Web into this, build e-mail into this. What are we going to protect and what aren’t we?” You would be amazed. When they come back with the rewrite, more often than not, the original 45 words are still there.

**Dautrich** Paul, Larry and I agonized over how to ask this question because the way you ask can affect the results. So, we decided to present the actual text of

the First Amendment. We tried to keep the question at its bare bones so the wording wouldn’t necessarily affect the responses.

**Richard Schmidt** counsel for the American Society of Newspaper Editors: Mr. Paulson said that the survey showed 88% would vote for a flag amendment; I think that was 88% of the 49%. ASNE, the American Bar Association and a couple of other brave organizations have been fighting to preserve the integrity of the First Amendment as it concerns flag-burning. In the ABA survey, an overwhelming percentage said, “No, we do not wish to amend the First Amendment.” So, I hope we understand that the response referred to a majority of a minority.

**Paulson** Exactly, but when that minority, or that 49%, cast their vote and then it was explained to them, “Do you realize what you are doing with this?” a full 88% still said, “No, we will stick with our position.”

**Ethel Sorokin** Center for First Amendment Rights, Hartford, Conn.: Given the answer that 70% have not been in any situation when they didn’t express themselves for fear of being penalized, that seems like a pretty free percentage. I mean, those people go to work. They go into public and social groups and meetings of all kinds. I wonder whether the fact that, say, seven or 10 major companies control all major media affected that outcome—that Americans actually don’t have as many diverse opinions as a group as they may have had in the past?

**Dautrich** That is a good point. It is not something we asked specifically in this survey. In another poll early in 1997 for the Newseum, however, we asked a national adult sample their attitudes about media mergers and the role of corporations in media ownership. About two-thirds of the respondents found those developments problematic.



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# The Trashman's Triumph: Taking Principle to the Supreme Court

## Heroism on the First Amendment's Front Lines

In 1991, Keen Umbehr from Wabaunsee County in north central Kansas lost his longstanding trash-hauling contract with the county commissioners because of his vocal and rather extensive public criticism in many venues, including newspaper columns that criticized the commissioners for practices he didn't feel were appropriate.

With the Justice Department siding with Mr. Umbehr, the Supreme Court endorsed the concept that contractors do enjoy the same First Amendment protections as employees, a 7-2 decision by the Court in June 1996.

His case has deep implications for the future, a future in which the government is making ever-increasing use of contractors rather than full-time employees, an estimated 300,000 alone in the Defense Department.

Because Keen Umbehr pursued his First Amendment rights, the principle might even be extended to establish that contractors may actually enjoy more protection than full-time employees because they are less likely to cause a sort of disruption in the government office's chain of command, where arguably there is a necessity at some point to salute and move forward. Following are remarks from Keen Umbehr, the man who guaranteed for a lot of us the right to gripe.

—Gene Policinski

### MODERATOR

**Gene Policinski**  
*The Freedom Forum*

### SPEAKERS

**Keen Umbehr**  
Plaintiff  
*Board of County Commissioners  
v. Umbehr*

**Robert Van Kirk**  
Plaintiff's attorney  
*Williams & Connolly,  
Washington, D.C.*



### KEYNOTE ADDRESS

By Keen Umbehr

I am not an author, a scholar or a lawyer. I'm a trashman from Kansas. When Paul McMasters asked me to speak about what it's like down in the trenches in a First Amendment lawsuit, I thought, you know, that is a real good analogy because that is exactly how it feels. Once

you pull the trigger and file a First Amendment lawsuit, it is a war. So, today I want to frame my remarks as a report from the front lines.

My story begins in 1981, when I bid on and received a trash-collection contract from the Wabaunsee County Commissioners. For 10 years, everything was

fine until I became interested in local county government. There seemed to be things that didn't add up. So, in my spare time I started researching my sus-

On one occasion, the commissioners forcibly removed me from a public meeting so they could talk privately to employees of the county Road and Bridge

Department and concluded that public resources had been improperly used.

Now, you can imagine the county commissioners had just about had enough. I had embarrassed them. I had caused investigations. I had destroyed their credibility. Elections were coming. The newspaper editor and I both had county contracts that neither of us could afford to lose and stay in business.

I guess about here I should answer the obvious question: By publicly criticizing the very government officials who hold your contract in their hands, aren't you biting the hand that fed you? Aren't you petting the bulldog against the fur? That is exactly what you are doing. But I grew up overseas and lived in some Third World countries that didn't have First Amendment or civil rights, so I took my rights seriously. I believed in my heart that my constitutional rights and, most importantly, my First Amendment rights were alive and real, waiting to be activated. I believed that exposing governmental corruption and malfeasance was at the very center of what the First Amendment protected. I saw it as my duty to speak the truth, regardless of the consequences.

The commissioners' retaliation wasn't long in coming. They summoned the newspaper editor to a

Department. I warned them that they were violating the Kansas Open Meetings law and suggested they seek counsel. One of them quite proudly told me, "It will be a cold day in hell before we take advice from a trashman." After I wrote about this, the state Attorney General investigated and found the commissioners had violated the Kansas Open Meetings Act. He forced them to sign a consent agreement, publicly admit they violated the Open Meetings Act and to take some remedial instruction in open public session—while I was there.

But the straw that broke the camel's back was the commissioners' practice of lending county road and bridge equipment to friends and supporters—backhoes, bulldozers, dump trucks, whatever you needed. If you were one of the chosen few, you could get the equipment for work on your private property. I wrote a series of articles exposing this practice. Again, the Attorney General and the Kansas Bureau of Investigation in-

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meeting and told him, in my presence, “Bob, you had better start taking a second look at what you put in your paper if you want to avoid trouble.” So, I raised my hand. “Sir, could you clarify this thinly veiled threat for me? I want to make sure I get it right here.” He was so angry, he pounded his fist in his palm and said, “Umbehr, your articles are offensive and should be censored!”

You know, as much heartache and trouble as this whole lawsuit caused, I still am dumbfounded when I recall that statement. These are the same men who put up their hands and swore to God and country that they were going to uphold the Constitution, yet they make a statement like that—that your views should be censored.

Eventually, the commissioners realized that I wasn’t going to quit writing articles, and the newspaperman wasn’t going to quit publishing them. So, they summarily terminated our contracts—the newspaperman’s contract to publish legal notices and then my contract to haul trash. With a stroke of a pen, we both lost our livelihoods.

Samuel Adams once said, “If we suffer tamely a lawless attack upon our liberty, we encourage it and involve others in our doom.” I had a decision to make. Would I suffer tamely? Would I dig in and fight, or turn tail and run?

Another man I read a lot about is Thomas Paine, who said, “Those who expect to reap the blessings of liberty must, like men, undergo the fatigue of supporting it.”

You know, those are easy words to say, and they roll off the tongue nicely until you are faced with suing to get back something that is inalienably yours: Your right to express your opinion.

My wife and I decided we would not suffer tamely and that we would spend whatever it took, probably a lot more than we had. So, in May 1991, we sued, alleging that the Wabaunsee County Commissioners terminated my contract in direct retaliation for my public criticisms. On Dec. 30, 1993, after discovery was complete, Federal District Judge Richard Rogers in Topeka, Kansas, granted a summary judgment for the county. He ruled that inde-

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pendent contractors working for the government do not have the same First Amendment rights as government employees, stating, “The First Amendment does not prohibit the defendants from considering the plaintiff’s expression as a factor” in deciding whether to do business with him. Case

dismissed.

We were thrown out of court without so much as a hearing. We were seemingly defeated, deep in debt and very discouraged. We had 30 days to decide what to do. The previous attorneys we had weren’t very crazy about going forward. We owed them a lot of money. That is the reality of a First Amendment lawsuit. It takes a lot of dollars.

My brother-in-law Bob Van Kirk, four or five years out of law school, offered to take the case, and we gladly accepted. Bob wouldn’t allow us to take care of any of his expenses, so he paid a big price right along with us because he signed on for the expensive part and had to spend evenings and weekends preparing our appeal.

In January 1995, the 10th Circuit reversed, ruling that independent contractors do

have the same First Amendment rights as government employees, remanding the case back to Topeka for trial. Of course, the county commissioners could not believe this. If we can’t suppress the speech of independent contractors, what’s the point of having them, you know?

The commissioners appealed to the Supreme Court on the question of whether, and to what extent, the First Amendment

First Amendment rights.” We had finally won.

We learned many lessons, but today I want to highlight an issue that you won’t

which they work.” Independent contractors and employees at all levels who provide goods and services to the government need adequate ammunition in the form of knowledge. They need to know how to express their opinions on matters of public concern in a time, place and manner that keeps them within the protective scope of the First Amendment.

Under this roof today, we have the knowledge, the experience and the expertise. In my mind, this is a logistics problem: You have that here, and they need it out there. We need to find a way to package it and get it to the troops on the front lines.

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protects independent contractors from retaliatory termination. On June 28, 1996, the Supreme Court decided 7-2 in our favor. Sandra Day O’Connor wrote for the majority, “We recognize the rights of independent contractors not to be terminated for exercising their

find in the written opinion. I want to tell you that the troops on the front lines desperately need help. As Justice O’Connor stated, “Because of their dealings with the government,” these citizens “are often in the best position to know what ails the agencies for

## Discussion

**Gene Policinski** I’m not sure I know of a more unlucky group of people than the County Commissioners of Wabaunsee County when they chose these contracts to terminate. At the time Bob Van Kirk entered the case, he was not just Keen Umbehr’s brother-in-law, he also was at the Justice Department. As the case progressed, he moved to the Office of the Counsel to the President and at one point was an Acting Deputy Assistant Attorney General. Bob, what did Keen do right to set himself up to win in the Supreme Court?

**Bob Van Kirk** plaintiff’s attorney: First, Keen published in a traditional First Amendment forum—newspaper articles and editorials. He talked about issues unrelated to his own contract, not about the commissioners turning down his price increases or not letting him dump in the landfill at preferred times. We were able to argue, “This is the kind of speech the government has no business regulating.”

One of the decision’s disappointing aspects was that the court adopted a *Pickering* balance test for independent contractors without really discussing how it should be applied, given the

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incredible variations among the roles contractors play. We were focused on whether or not independent contractors had First Amendment rights at all. This question subsumed the rest and made it difficult to focus on what test should apply. Ultimately, some federal judge is going to decide whether or not a given individual's interest in speaking out on the matter of public concern is greater than the government's interest in, for example, regulating its office environment. It is going to vary immeasurably from case to case. Keen did some things that weighed heavily in his favor under the *Pickering* balance test. Other people won't be so lucky because they are in situations that are less clear and less removed from their relationship with the government.

**Policinski** Keen, you also faced pressure from other contractors and some of your friends in town.

**Umbehr** In a small town, everybody second-guesses everything you do, what your kids do, what car you drive, how tall your grass gets before you mow it. People began to worry that I had ulterior motives in suing the county. They wanted me just to take the hit because everybody took the hit. This was the power structure. No one opposed it before me, and suddenly people had to decide what side they wanted to be on. But most people thought that my motive was just to bankrupt the county and make money because they didn't understand all the intricacies. They didn't understand the preciousness of First Amendment rights.

What probably hurt the most was that my wife and I became social outcasts. Our friends and, sad to say, even some of our relatives would cross to the other side of the street because anyone who talked to us would be seen as supporting us. The commissioners paint with a wide brush, and nobody wanted to get caught up in what would happen to us. No one befriends a man going to death row because they figure

there won't be much future in that relationship. People felt it was just a matter of time before the commissioners would get us, and we would go out of business.

**Jim Keat** Maryland-Delaware-DC Press Association: How did your newspaper editor or publisher survive during this period of time, having lost a big chunk of advertising?

**Umbehr** Mr. Stuewe was 72 years old, and after his contract got terminated, I begged him to fight the case and actually provided him with the case law on point, *North Mississippi Communications v. Jones*, but he wouldn't. He said he was too old and wanted to sell out. The person who bought the newspaper vowed never to print "My Perspective" and, of course, he got the county advertising business back.

**Carol Ann Riordan** American Press Institute: Has the community gotten more involved in the political process and watching the county commissioners, and are those supervisors still in office?

**Umbehr** After we sued, both commissioners in question resigned, thinking they somehow would be excused from the lawsuit, which wasn't true. After we won, many people would complain to us about some government official, and I said, "I have already paved the way. If you have a concern, put your opinion in the local newspaper, and your opinion can change your situation."

It is not fun now to be an elected official in Wabaunsee County. The newspaper prints so many letters to the editor, about even the smallest concerns. That is the kind of discourse we want, though. Now, if you are a government official, teacher or city-council or school-board member, you get tired of being second-guessed in the paper, and you long for the old days when nobody paid attention.

**Policinski** Bob, you now have some litigation coming, an extension of this case.

**Van Kirk** I left government and joined a law firm and am currently representing a newspaper in a small Colorado resort town that, like the Wabaunsee County paper, saw its advertising dollars withdrawn based on editorial criticism of town officials. The case demonstrates that there is more work to be done. Even after *Umbehr* came out, the district judge said, “Isn’t this a discretionary function? Whether or not you pick up garbage is an inherent government function and something they have to do. They have to contract for that, so *Umbehr* applies in those situations. But when you get into discretionary situations such as whether to advertise, and the government functions like any other business entity, why can’t it do business with people it likes? Why can’t it do business with people who aren’t constantly stabbing it in the back?” It is tough to explain to the judge that government cannot act in the same ways that we can as private citizens. It has different constraints. Ultimately, he did deny the government’s motion to dismiss, and we are set to go to trial this spring.

**Policinski** Actually, if you append a sort of support of the patronage system, and that was Justice Scalia’s argument, why can’t the government do it? After all, it’s always been done that way.

**Van Kirk** Absolutely. I think Justice Scalia wrote probably one of his most caustic opinions in his dissent in this case. His best line was, “Day-by-day, case-by-case, this court fashions a Constitution for a country I no longer recognize,” which I thought was truly extraordinary given the principles at stake.

**Buck Ryan** School of Journalism and Telecommunications, University of Kentucky:

Keen, do you now continue to hold the contract, do you continue your trash-hauling business, and what compensation was involved in this case? Also, it’s ironic that you talk about getting knowledge to the front lines because journalists tend to think of themselves as the front line, and you have redefined that. What would you see this information being exactly, and how would it be distributed?

**Umbehr** What I envision is a re-education of government employees, high-school students and regular citizens. It has been too long for most people to remember U.S. history classes that discussed the First Amendment, and there have been too many court cases since then. I see it as a general guide to changing America, one opinion at a time. I would like to think that we are heading toward a better, more efficient government and one that engenders more interest from the population.

Off the cuff, I see this as reaching three groups. High-school students have a lot of gripes, and they need to be nurtured to express those concerns in an appropriate time, place and manner. The second group would be public employees’ unions, which could easily distribute information. The third group would be state and national government groups. If we could send out an army of speakers to discuss this, I think it would be helpful. We could avoid a lot of lawsuits and needless suppression of speech.

One of your questions was about compensation. After we won in the Supreme Court, we settled out of court for \$100,000 plus attorneys’ fees. I think the total attorneys’ fees were in the \$178,000 range.

**Policinski** Keen, I think you said that because it was a case of first impression, you couldn’t get punitive damages.

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**Umbehr** It was the first time in more than two centuries that the Supreme Court had addressed the issue. Going back to the very first question about how I survived, I picked up the town contracts individually except one, which amounted to 17% of my business. Maybe you can live on 17% less, but I couldn't because of the principle.

**Policinski** Having spent a lot of my career at community-size newspapers, I think the legacy of your remarks and your legal battle will be a unique flowering of First Amendment opportunities for a lot of people in your community. I think you are a true hero of the First Amendment.



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# Institutions Under Fire

## Public Hostility Threatens Rights

Sometimes, controversies about First Amendment freedoms involve more than individuals or issues. They involve entire institutions, and frequently they are not far-off fights but right in our backyards, according to Ken Paulson. Three institutions where some of the battles are most intense today are the press, art and religion. Reports from the front follow.

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Kenneth A. Paulson  
*The Freedom Forum  
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### SPEAKERS

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*School of Communications,  
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**Amy Adler**  
*School of Law,  
New York University*

**Charles C. Haynes**  
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### THE PRESS

By Sanford Ungar



We often believe we live in times that are unique. Of course, there have been many, many times in American history, not to mention around the world, when the press has been under fire. It has been called lots of bad names, sometimes deservedly so. I don't need to tell you about the experience of the American press during the Civil War and other wars, even in the Revolutionary period, and during the McCarthy era, when the press was one of the main places to hunt for "pinkos," subversives and other people who could be blamed for the country's problems.

So, are we under fire, and are we threatened today? We should certainly worry about the poll discussed ear-

lier, in which 38% of the people said the press has too much freedom. This number need not be over 50% to justify our being concerned about it.

I think the media may worry too much about their popularity at any given moment, but their unpopularity today certainly seems to have an effect on the spirit in newsrooms. And *The New York Times* reported recently that the speaking fees for celebrity journalists are down considerably.

The pendulum swings, of course. I well remember the time of Vietnam, Watergate and the Pentagon Papers case, when a lot of us felt we were alone at the barricades. We were fighting a constitutional battle. It seemed to us that we were saving the

country from itself, and I think a significant percentage of the American population came to believe that, too. Arriving in Washington as a young journalist during the Nixon administration, I

that. Defiance of the media now carries a particular respectability.

The biggest and most worrisome question is whether people still pay attention to the press (or the

For many people—and this is one of the reasons I have resisted using the term “press” instead of “media” here—local television news symbolizes the media. When you ask people what they think of the media, they often talk about blood and guts, the violence, the lack of importance of the stories that get the most attention. Weather news now crowds out even the sports on local television, adding to the sense of insubstantiality and triviality.

But the worst problem facing us, meaning the media, may be one of the proposed alternatives, namely the Internet. Removing the media filter between people and news is touted as a wonderful means to empower individuals, but it also has made it possible for anything to be considered journalism or reportage. I’m not sure how much you have looked recently at what is regarded as “news” on the Internet. There you can find “newsgroups.” They distribute something as far from news as anything you could imagine.

Newsgroups serve up opinion, if not demagoguery. The Internet has made it harder, not easier, to sort out the facts, and it is helping to create a crisis in America today over facts. What are they? The urban legends keep growing in size and shape. One story out there says that if you

## The most worrisome question is whether people depend on the media for information or whether the media represent a kind of sideshow.

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really felt the First Amendment might be threatened.

As during other times in history, there remains today a widespread temptation to shoot the messenger who brings bad news. There is not supposed to be bad news now. It is post-Cold War. The Soviet Union has disappeared. Communism is in retreat. How can all these things really be wrong that the media tell us about? Like Cleopatra, who ordered the messenger beaten for bringing her the bad news about the misdeeds of Antony far away in Rome, politicians have a tendency to want to beat the media for bringing bad news. As we see in the survey and around us every day, the American people do not necessarily trust the media. In fact, if the question were posed with the right words, we probably would find an easy majority confirming

media)—whether they depend on the media for information—or whether the media have come to represent a kind of sideshow, entertaining instead of informing.

How much of this wound might be self-inflicted? We hear complaints everywhere about the media’s focus on the trivial, the personal, and the scandalous at the expense of the big issues. At a meeting yesterday, I heard a very learned person say that American foreign policy is ineffective because the media don’t treat these issues seriously, if they ever did. So it is convenient to blame the media for the decline of civility and civic discourse. Of course, the media cannot be held responsible for the way people treat each other on the floor of Congress. And the lack of public knowledge in many areas just might relate to the failure of our educational system.

check into certain hotels around the country, you might end up being drugged and having a kidney removed without permission. All these stories are circulated on the Internet as fact, as truth, substituting for all that alleged propaganda otherwise presented by the press.

The irony is that, as with the tabloid media, the Internet is presented as an alternative to the mainstream; but in the end the media get blamed for much of the false trash on the Internet anyway. That is a problem we will grapple with for quite a long time.

At the same time, the media are entirely appropriate places for experimentation, for some of the culture wars or skirmishes to be fought.

still are disliked when seen to oppose and criticize the government and the institutions we were taught to believe in, the really subtle

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They are a place to take society's pulse, which is often difficult to do through official channels. Some of the attempted remedies to the problems—public journalism, for one—raise as many questions as they answer.

I find it a supreme irony that, although the media

surveys show you that now people regard the press as part of the problem along with government. If the press is just one more institution to be distrusted along with government, then I would submit that is perhaps the worst fix of all that we could be in.

### ART

By Amy Adler

I can think of one group that is even less popular than journalists in this country, and that group would be artists. Art—called a “sandbox for the rich,” “pork for the cultural elite,” a bastion of perversity and pornography, and a haven for homosexuals, AIDS activists, feminists and race activists—at once worthless and threatening.

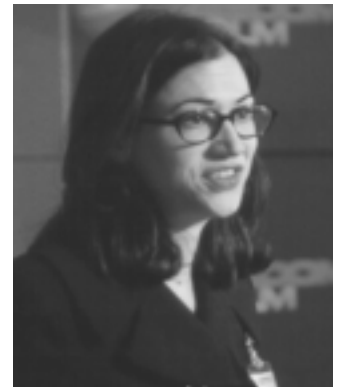
Art is a good topic for a would-be censor. You can get a lot of bang for your buck; Mapplethorpe and Serrano are now household names. We heard this morning about some recent cen-

sorship controversies, all involving threats to artistic expression: *The Tin Drum*, the problem of finding a distributor for *Lolita* and the threat to photographer Jock Sturges. Something about art as a medium generates real political hostility, so it's no accident that art is on the front lines in many, many censorship battles.

Nowhere is this political hostility toward the arts more visible than in the seemingly endless battles over National Endowment for the Arts funding, which recur every year like a bad dream, with the same char-

acters and some new, controversial artist who is dug up to horrify and shock the nation. Yet the NEA, battered and bruised, limps along even eight years after Mapplethorpe and Serrano first became so famous.

The NEA will be a party to one of the most significant First Amendment lawsuits before the Supreme Court this term. That is the Karen Finley case, challenging the so-called “decency amendments” to the NEA funding guidelines passed in the wake of the Mapplethorpe controversy. The court will hear the government's appeal from



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the 9th Circuit's decision, which voided as unconstitutionally vague Congress' requirement that the NEA consider "general standards of

all. More importantly, elimination of the decency clause may change nothing, because funding decisions or, for that matter, decisions

of the atomic bomb. The "West as America" show was criticized for presenting a negative view of Manifest Destiny and subsequently revised. An Irish cultural exhibition in New York was canceled for fear it would reinforce stereotypes about the Irish. Four anti-lynching cartoons were removed from an exhibit at the Library of Congress, again, for fear of offending people. One curator attempted to remove a well-known work of art by Sol Lewitt from an exhibition because she felt that its focus on a woman's pelvic area was offensive to feminists.

David Leventhal, a white artist who took photographs of black memorabilia, had his show canceled by the Institute of Contemporary Art, the very institution where the Mapplethorpe show opened eight years ago. "Back of the Big House"—a Library of Congress show documenting slave life that tried, according to the curators, to show the dignity of slave culture in the face of tremendous adversity—was taken down after staff members, many of them black, said it offended them to come to their workplace and see pictures of slaves.

One note about these controversies—in addition to the point that there is now a self-generating quality to censorship and the arts—is that they represent a surprising array of pressures. Typically, when we think of

decency and respect for the diverse beliefs and values of the American public" in its funding decisions. Alternatively, the 9th Circuit argued that this requirement was unconstitutional because it invited viewpoint discrimination. The Supreme Court will use this case to navigate the gap between *Rust v. Sullivan* and the *Rosenberger* precedents; *Finley's* significance stretches far beyond its effect on the arts.

I think the plaintiffs have an uphill battle. Perhaps this is just my pessimism after having observed arts battles for several years, but even if the plaintiffs win, their victory may be a Pyrrhic one. The case doesn't go to the primary issue surrounding the NEA, and that is whether to fund it at all. There is no constitutional obligation to do so, and a victory for the artists might be the final fuel that NEA opponents need to kill the endowment once and for

made by institutions about what kinds of art to show, already respond to a hostile political climate. In a sense, the damage of these repeated controversies has been done and already has ushered in a chilling effect extending beyond the NEA.

As an illustration, I want to note some incidents of museum self-censorship from the last seven or eight years. There has been a spate of museum cancellations and revisions in response to political fears. Museums are so nervous that they will take down a show or alter it in response to the possibility of offending just about anyone.

Some examples concern historical exhibitions. This is just a short list. The Freud show in Washington, D.C., was canceled because anti-Freudians didn't like it. I think everybody knows about the Enola Gay show and the controversy over how to present the dropping

the real players right now in censorship battles, we think of the conservative Christian Right. I don't want to discount the impact that the far right has had on art censorship issues, but the battle waged by the so-called "left" is quite alive and well and reflects the changing First Amendment landscape.

## The damage of these controversies has been done and already has ushered in a chilling effect extending beyond the NEA.

Feminists and opponents of "hate speech" are coming to the fore and calling a lot of the shots.

Increasingly, art is subject to attack from both the right and the left.

### RELIGION

By Charles C. Haynes

Sometimes religious liberty work is seasonal—how many Christmas carols to have in the assembly program; whether to put a tree, creche or menorah in the school lobby; sometimes even what color paper plates to have at the holiday party. Even these small and perhaps silly-sounding issues trigger deep emotions and ugly lawsuits. The issues really aren't the Christmas tree or the prayer before the football game. They are whose schools are these, what kind of country are we, and what kind of country will we be?

For many Americans, these are the deepest and most important issues. More broadly, conflicts over religion and public life are arguments about the meaning of religious liberty in the United States, and the outcome of even small disputes will shape our future lives together as Americans.

Despite some sad chapters of prejudice, we have managed so far to apply the First Amendment's religious-liberty clauses fairly and justly to ever-increasing numbers of people. I cannot say we are "under fire" in religion as much as we face a lot of challenges. Despite them, the United States remains the best example in world history of living with deep and abiding religious differences.

we will muddle through as a nation no matter how divided or tribalized we become. When we sue one another as the first resort or continue to demonize and ridicule our opponents, we dangerously assume that we will win our causes without tearing the fabric of the nation. The reality is that our exploding religious diversity combined with our bitter cultural wars create a public

## Our exploding religious diversity combined with our bitter cultural wars create a public square that is often not only crowded but angry and hostile.

The peril is not that we will become Bosnia or Northern Ireland but rather that too many citizens take the American experiment for granted—that somehow

square that is often not only crowded but hostile.

I am convinced that the way to address these growing divisions is to ask average American citizens to renew



their civic commitment to religious liberty, to think about how these principles should be understood and applied in our time. Whenever the First Amendment Center is asked to intervene in one of these issues, the first thing we ask people to do is to think about the roots of religious liberty as an inalienable right for people of all faiths or no faith. We ask them to reaffirm their civic responsibility to guard those rights, even for those with whom they deeply disagree. Finally, we ask them to commit themselves to civil debate. The good news is that, across the religious and political spectrum, Americans embrace this task with enthusiasm,

is how to define neutrality in practice. The court indicated that neutrality requires equal treatment when it upheld the constitutionality of the Equal Access Act, which allowed kids to form religious clubs in public schools.

Equal treatment also may extend to government benefits that indirectly reach religious organizations. In *Rosenberger*, for example, the court ruled that the First Amendment may require equal financial benefit, in that case, when publishing religious viewpoints. In other cases, the court indicated that government may allow welfare recipients to exercise freedom of choice as to the service provider, whether religious or secular. It remains to

ment now shapes the perennial debate about school prayer. Most leading advocacy groups are no longer debating primarily about teacher-led prayer, and many share the recognition that government-sponsored prayers in a public school are not a good idea. While still contentious, the shift in emphasis is good news about the importance to people of government neutrality, concerning religion and the public schools at least.

On the free-exercise front, recent Supreme Court rulings are less confusing but perhaps more chilling. When the court sharply curtailed application of the compelling-interest test in the 1990 decision, *Employment Division v. Smith*, most religious and civil-libertarian groups agreed that the free-exercise clause had been all but removed from the First Amendment. Government apparently may restrict religious practice through generally applicable laws, and religious individuals and groups will have to depend upon the whims of a legislative majority. I thought that was what the First Amendment was intended to prevent.

Congress' attempt to restore the compelling-interest test by passing the Religious Freedom Restoration Act was short-lived. The Supreme Court declared the law unconstitutional, saying Congress had exceeded its

## The real test will come in the battles over public policy, where deep religious and philosophical convictions now collide with increasing fury.

and I think that is good news for the United States.

Any discussion of the state of religious liberty in America today must take into account how the Supreme Court interprets the First Amendment. For a majority of the present Supreme Court, "no establishment" still appears to mean that the government must remain neutral. The question

be seen whether the court will extend this equal-treatment principle to upholding a school-voucher program including religious schools. Some court watchers say the court is ready to uphold vouchers. Upcoming rulings will do much to define anew what the court means by neutrality.

A similar debate about neutrality and equal treat-



powers. Some states are considering their own RFRAs, and members of the Free Exercise Coalition are discussing other remedies, including possible federal legislation. Somehow, we have got to find a way to restore the free-exercise clause to the First Amendment.

Some of these Supreme Court debates have actually strengthened many citizens' resolve to make religious liberty work better for more of us. For example, the recent presidential directive on religious liberty in the federal workplace—drafted with the help of the American Jewish Congress, the Christian Legal Society, People For the American Way and others—is an outstanding example of how Americans can work together across religious differences to maintain government neutrality while protecting the right to practice one's faith. Another example is the search for common ground in the schools. Scores of school districts have crafted new policies protecting students' religious-liberty rights

and made commitments to take religion more seriously in the curriculum.

One statement we crafted—endorsed by the Christian Coalition, People

sion into practice and get schools to take it seriously.

The greatest test will not concern religion in the schools or the workplace. It will concern public-policy is-

We have managed so far to apply the First Amendment's religious-liberty clauses fairly and justly to ever-increasing numbers of people.

For the American Way, various national educational associations and many others—states that public schools may neither inculcate nor inhibit religion. They must be places where religion and religious conviction are treated with fairness and respect. This is a shared vision across the political and religious spectrum. In 1995, President Clinton announced directives for schools on how religion and religious liberty should be treated. The challenge is to translate that vi-

sues where deep religious and philosophical convictions collide with increasing fury—abortion, homosexuality and parental rights, to mention just three. How we debate, not only what we debate, is critical. Ultimately, these debates will challenge us to reaffirm our commitment to the guiding principles of religious liberty, principles that we hope in the 21st century will enable citizens with deep religious differences to contend robustly but civilly with one another.

## Discussion

**Mike Godwin** Electronic Frontier Foundation: I was a little disturbed at Mr. Ungar's dismissal of the wild rumor and speculation you see on the Internet. We have tolerated it in barber shops and bars for years. The Internet has corrected errors in more traditional journalism, for example in 1995,

when Internet users' investigations exposed the fraudulence of *Time* magazine's cyberporn cover story.

**Sanford Ungar** I am delighted to have the Internet compared to barber shops and bars because much of what is on the Internet is



about as reliable as the discussion in those venerable institutions. Sometimes it is quite reliable, depending on where you go, the time of the evening you stop by, and how crowded it is. I think it is an apt comparison. Of course, people on the Internet have helped correct media mistakes. I think that's excellent. I don't dismiss the Internet. I'm trying to raise some cautions, and you only have to get caught up in one of these things once to feel cautious. About a year ago I had a forum at my university about some aspect of political or governmental coverage, and we were visited by people who called themselves "independent investigators" who were working on, their words, "the assassination of Vince Foster." They tried to take over the forum. It was a pressing moment for them, but an inappropriate one for us and offensive to some of the panelists.

I ruled them out of order with some difficulty, and as it happens, you must believe me, for the only time in 12 years of doing these forums, the room's sound system failed. By the next morning this "newsgroup" on the "assassination" of Vince Foster vilified me as somebody who was part of the conspiracy because I turned off the sound. It was really quite vitriolic and went on for a couple of weeks. It was a bruising experience for me, and it gave me an intense personal lesson about what can go on in the name of open discussion.

Now, I don't challenge the right of those people to say anything about me they like, so long as it doesn't put me in some kind of danger, and it didn't. But later, one of my students showed me how my address could be found on the Internet, my house pinpointed with a star, which was slightly chilling.

I worry that the Internet is given greater credibility than the bar or the barber shop as a locale for discussion of matters like this. Lots of people advance it as the new cure to alienation and disaffection in America.

**JJ Blonien** Enterprise Communications:  
Have talk radio and tabloid TV—Rush

Limbaugh, Howard Stern, Geraldo, Imus—contributed to the lack of respect for the journalistic-based media?

**Ungar** In a word, yes. But it is all part of the natural evolution of the product in some ways. Some media at the last turn of the century made very questionable contributions to the public discourse, and newspapers competed for circulation in New York City based on how sensationalist they could be. But the age of yellow journalism passed eventually.

**Tom Simonton** Society of Professional Journalists: Parochial schools seem to have policies that students need not take religion classes, but I have heard of requirements in some places, too. What is the situation in terms of parochial schools requiring religious instruction?

**Haynes** Of course, it is their right to do so, but I think a big question is what will happen if vouchers are adopted. Will religious schools have to change their ways? The Seventh-Day Adventists, for example, don't take aid for their schools because they want complete freedom to teach what and how they want. Even voucher proponents are nervous about whether the program will come with strings attached, keeping people from instructing the way they wish. It is in the spirit of the First Amendment that religious schools can teach as they wish, and I hope we preserve that.

I think all students should be exposed to various religious perspectives. Public schools need to do this, too, if we are going to understand one another. The better job we do in creating a public-school culture that treats religion fairly, honestly and openly, the less support there will be for leaving the public schools. Public schools have been either imposing or ignoring religion, but we are offering a third model that will be good for everybody, including religious schools.

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**Elliot M. Minberg** People For the American Way: One of the two states with an experimental voucher program, I think Wisconsin, provides that kids attending religious schools on vouchers not be required to attend services and that the schools should not teach “hatred based on religion.” This raises all sorts of difficulties entangling the government. The opposite of that—to say, “Let them do whatever they want”—would commit public funding for purposes that people may be concerned about. I wholeheartedly agree with what Charles said about teaching about religion in the right way. But the Fort Myers, Fla., case about a Bible-studies course shows that people can talk about doing it right when in fact they are doing it wrong, and it requires a lot of scrutiny on a case-by-case basis.

**Ronald K.L. Collins** Artist groups are concerned, in light of the funding wars, about commercialization of museums and how, with greater frequency, museums won't

have certain exhibits unless there are some dollars to be had. Specifically in Los Angeles a few years, a public art museum had a Ferragamo shoe exhibit sponsored by Ferragamo lock, stock and barrel. Folks including myself wanted to take issue with Ferragamo and some of their history and practices by way of artistic exhibits. The museum categorically opposed the idea. Any comment about the dangers of commercialization of public museums and the threat in terms of censorship?

**Amy Adler** You are pointing out an example of what happens when we lose public funding of the arts and turn to private sponsors. It's funny, Philip Morris is an extraordinarily generous funder of the arts, certainly in New York, and no one ever says a word about the cigarettes distributed at Philip Morris events. The problem you point to is bigger than just a funding issue. It is age-old, in fact, and goes back to the history of patronage.

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# 6

## The Medium Is the Target

### New Technology an Excuse for New Censorship

Activists and regulators offended by speech of a sexual or violent nature often try to restrict it by regulating the mode of communication, especially when a new or fairly new technology is involved. A good example is the Telecommunications Act of 1996, which sought to regulate “indecent” material on the Internet and violent and sexual content on television with the V-chip. There have been similar efforts at the state and local levels directed at video sales and rentals with sexual content. The following speakers address the First Amendment implications of these government activities.

#### MODERATOR

**Adam Clayton Powell, III**

vice president  
*The Freedom Forum*

#### SPEAKERS

**Robert Corn-Revere**

attorney  
*Hogan and Hartson*

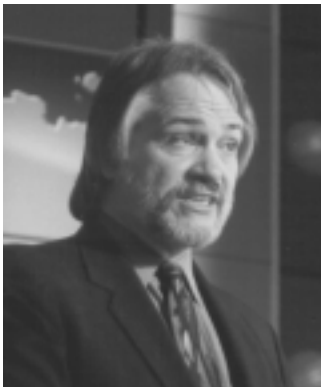
**Ann Beeson**

attorney  
*American Civil Liberties Union*

**Chris Finan**

executive director  
*The Media Coalition*

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#### TELEVISION

By Robert Corn-Revere

Television is everybody’s favorite whipping boy, either because they feel it is just mindlessly stupid, a vast wasteland, or because, constitutionally, people believe they get free rein to treat it as they will. The issue is somewhat broader. You cannot really treat television as a medium apart and intelligently discuss the regulatory and judicial issues facing it.

There are three overriding issues. First, the issue isn’t television. The issue is technology. Second, quite often there is an effort to create an architecture that enables control rather than an architecture that pro-

motes freedom of expression. Third, we need to explore the concept of “voluntary” self-regulation.

First, technology as the issue. *Reno v. ACLU* was a cause for celebration. The Supreme Court looked at the Internet and said, “This is a protected medium. We see nothing in our prior decisions to treat this any differently from anything else.” In some post-mortems, you see this underlying theme: “Protect us. We are not TV, for God’s sake. We are the Internet.”

It’s not that simple. In the *Reno* decision, the court distinguishes the Internet from some precedents, for

example, *Pacifica v. FCC* on indecency. But I don't think you can read into it a simple statement that if it's not television, you cannot regulate it. Within two weeks of the *Reno* decision, the Federal Communications Com-

No one would assume, for example, that you could require a Braille edition of *The New York Times*, although it might be a good idea. Yet the government recently imposed captioning requirements for video distributors,

So, you don't have to look far to see that regulations once thought the province of one medium are extending to all. More and more media have electronic components, which means the First Amendment will look very different in the future if those assumptions aren't challenged.

We are seeing the beginnings of that in the movement toward digital television. The FCC allocated spectrum space and developed a transition plan toward digital television, so there will be less and less difference between technologies, such as between regular television and the Internet.

It is important to pay very careful attention to what regulators have in mind for one medium when you think about how it might apply to others. For example, the Gore Commission is looking at public-interest requirements for television and digital-TV broadcasters. The recommendations the commission comes up with will be important not only for the television industry but the Internet, to the extent we are talking about a social-compact notion which can extend those regulations to other media, regardless of whether they use the broadcast spectrum. The Communications Decency Act is Exhibit A, because that was a broadcast regulation simply transposed and applied to the Internet.

## You don't have to look far to see that regulations once thought the province of one medium are extending to all.

mission read it as upholding broadcast regulation, despite the fact that it wasn't about broadcast regulation and that the court's discussion of broadcast precedents was tepid. *Reno* is the first exception, a wonderful and major exception, to the history of treating new technologies, at least initially, as second-class citizens under the First Amendment.

Governments have felt free to impose regulations on new media that you would never think about if you were talking about the print medium. Regulation is accepted as commonplace for broadcasting. The Fairness Doctrine, for example, which required government oversight of editorial balance, is not allowed for print. Thank God, the FCC finally decided to discard it on its own. Another example is the children's television regulation requiring a quota of educational programming.

both broadcast and cable television.

Then there is the old standby, indecency regulations, that have not been permitted in the print world—and now in the Internet world—yet still apply to broadcast and increasingly to cable.

These examples always have been treated as an exception to First Amendment analysis, not the rule. More and more, people contend that broadcast regulations are the rule and that anyone who would live without them must justify their exception to the exception. That was the argument in the Internet case. Former FCC Chairman Reed Hundt said it would be reasonable to put all media under some obligation to serve the public interest. He said it would be wonderful to require Internet providers to hook up more connections for educational institutions, for example.

The second major issue: the means of control. People argue that controlling the architecture is not regulation, that the V-chip is not regulation, just a voluntary system that will give us a tool to choose our television programming. To say that is not regulation takes some doing.

Adopted as part of the Telecommunications Act of 1996, the V-chip requirement provided for the FCC to set technical standards for broadcasters to transmit ratings information, while an FCC advisory committee would recommend ratings guidelines. It gave the industry a year to come up with voluntary guidelines, which the FCC would then accept or not. Otherwise, the FCC would impose its own guidelines. The overriding message is that the V-chip is voluntary, and if the industry knows what is good for it, it will come up with a rating system, and it did. Ted Turner probably put it best: “We are voluntarily having to go along.”

The industry came up with a system based on the Motion Picture Association of America’s movie ratings, with age-based categories and exempting news and sports programs. It took about, oh, two hours or less for critics to come out of the

woodwork saying that simply wasn’t enough. We need, they said, what we in the First Amendment business see as a red flag: a con-

television has gone through that even if it is just to amend Webster’s, I think we need to figure out what the word “voluntary” means.

## The issue isn’t one medium versus another. It is a much broader one of how technology will be treated under the First Amendment.

tent-based ratings system. Most of the industry agreed to add content-based flags: S for sex, V for violence, L for language, D for suggestive dialogue or FV for fantasy violence.

Sen. John McCain (R-Ariz.), one of the primary congressional voices urging a voluntary solution, told *The Washington Post*, “This was voluntary in that we in Congress did not dictate the terms of the agreement, and yes, we expect everyone to comply with it.” He acknowledged the threat of legislation but said American families would be happy with the result. NBC chose not to go along with it, and they are under pressure as a result. The word “voluntary” is used a lot these days, and I think it is important to learn from the experience that

The FCC still hasn’t told us whether the industry’s rating system is acceptable. It also has a technical proceeding on V-chip transmission standards and has documented its intent to install V-chips in any apparatus receiving television signals, including personal computers, and to rate programming regardless of the transmission source. Now, that went unnoticed for awhile, and a number of parties thankfully have filed objections with the FCC. But the language indicates how regulations can easily, sometimes subtly, bleed over from one technology to another. The issue isn’t one medium versus another. It is a much broader one of how technology will be treated under the First Amendment.



## THE INTERNET

By Ann Beeson

We ought to feel pretty triumphant. We've won several important battles, the first being the Supreme Court's unequivocal rejection of the Communications Decency Act in *ACLU v. Reno*. The second was our victory in the District Court in New York in *American Library Association v. Pataki*, in which the judge ruled that online indecency regulation violated the Constitution's commerce clause.

A third victory, in *ACLU v. Miller*, struck down a Georgia statute that would have criminalized pseudonyms or other anonymous Internet communication. We also won an important District Court victory in *U.S.*

communicate or access sexually explicit material. [The court has since ruled the law unconstitutional.]

You would think we should be feeling optimistic. Unfortunately, I am frustrated, worried and most of all quite angry.

In *ACLU v. Reno*, the lower court said the Internet was the most participatory mass medium the world has yet seen. The Supreme Court wholeheartedly agreed and commented that Internet content is as diverse as human thought. Its very architecture encourages free expression. The second generation of battles over free speech on the Internet will concern protecting that

First, minors, including teenagers. Second, marginalized or controversial speakers, including artists, speakers about gay and lesbian issues and disseminators of hate speech. Third, the poor and disenfranchised, who may not even have a telephone, let alone a computer. They need to get on the Internet at the public library. Finally, of course, people all over the world who see the Internet as their only chance to participate in democratic debate.

Rating speech on the Internet is not just about labeling information. It is about what happens after the labeling. The whole purpose behind the rating scheme, make no mistake, is to block access to whole categories of speech. First and most importantly, minors will be blocked. The whole rationale behind the debate is that we need to protect minors from information that is "harmful" to them.

Minors' rights were an important part of *ACLU v. Reno*, in the sense that many Internet content providers believe minors to be a crucial audience. One [such provider], the Critical Path AIDS Project, offers a wide variety of information to fight AIDS written in terms geared toward teenagers. Teenagers even wrote affidavits in the case, some of the most pow-

The whole purpose behind the rating scheme, make no mistake, is to block access to whole categories of speech.

*v. Bernstein*, which we hope the 9th Circuit will affirm, finding the government's encryption regulations to be "an unconstitutional prior restraint." And on behalf of several university professors in Virginia, Marjorie Heins made a compelling oral argument against a Virginia statute forbidding state employees from using state-owned computers to com-

democratizing and equalizing quality. All of these battles have to do with access. Who is going to get to speak in this medium and who is going to get unfiltered access?

This second wave of battles will be just as threatening as the Communications Decency Act. They will be about whether to exclude certain groups of speakers:

erful I believe the Supreme Court has read. Neither the lower court nor the Supreme Court ruled on the minors' rights point, but it is crucial to remember that a wide variety of evidence showed no problem here. The government had the burden of proving a compelling interest in protecting minors from smut on the Internet, and it failed.

Marginalized speakers will get blocked because third parties or the speakers themselves will be required to rate their sites. Studies now show what a terrible job labeling and filtering programs do by blocking valuable information. And how can a site such as the Critical Path AIDS Project rate its own speech and still communicate to minors? It's either got to rate its speech harmful to minors or not to rate at all. Blocking programs almost always block unrated speech. So, you get blocked either way.

The third big access issue concerns libraries. Only there can universal Internet access be realized. One of the most important debates is about filtering at public Internet terminals in libraries.

Another threat is the increasingly popular tap-on-the-shoulder policy. Instead of installing filters, librarians have the right to stop you if they see you viewing anything offensive. They can kick you off the com-

puter and suspend your library privileges. Obviously, that is a grossly unconstitutional policy and one we all need to fight.

Yet another policy we see is a parental-permission requirement for those under

bidding political use. More recently at both high school and college levels, we see policies that forbid student newspapers to publish online the real names of any of the students. How do you publish news like that? "Joe

## Who will be allowed to speak in this medium? Who will get full, unfiltered access to this medium?

18. We believe that this policy can be more pernicious than the use of filters, because it excludes many minors from getting any information at all on the Internet. The Supreme Court has held in the past that minors do have First Amendment rights to obtain some information over their parents' objection, including information about contraceptives.

I will mention schools and universities briefly. About a year ago, Princeton University passed a policy that its online computer network could not be used "for political purposes." The university based the policy on fears the IRS could threaten its non-profit status without such a policy. We did our own research, convinced Princeton to rescind the policy, and its officials agreed they would even help us fight any future IRS counter-ruling for-

Doe won the class presidency last week"?

That voluntary Internet ratings lead to legislation is no longer just a hypothesis. About four bills pending in Congress would regulate content, including one that would impose penalties for misrating sites and another that would penalize Internet service providers that don't provide filters. At least 13 states have passed their own Internet legislation. Some laws have been overturned, but I am sure we will see a new flurry of bills requiring libraries to install filters.

It's crucial that we try to expand on the principles we won in *ACLU v. Reno*. The principle that the Internet is entitled to the highest degree of First Amendment protection will mean nothing if we don't protect the right of all disenfranchised or marginalized speakers to access and speak in this medium.





## VIDEOS

By Chris Finan

After listening to all the learned discussion of these heavy issues, I am beginning to suspect that I was invited for my entertainment value. Because in my job I am usually up to my neck in sex and violence. But the fact that a video retailer in the region was recently put out of business by an obscenity prosecution shows how serious the problem of video censorship can be.

The Media Coalition is an association of trade groups that produce, distribute and retail books, magazines, recordings, videos and video games that get into trouble because of sexual or violent content. We are not pioneering technology. We are the old technology, and we operate under laws that have been on the books for quite a while. The Media Coalition formed, as did the National Coalition Against Censorship, in the aftermath of the last landmark decision on obscenity, *Miller v. California* in 1973. NCAC was to represent not-for-profit entities and we were to represent the trade groups. Even though laws are on the books, and precedents established, we have a real problem: The definition of obscenity can threaten non-obscene material with sexual content, whether it is art, books, novels, or videos.

The *Miller* definition is not so bad. It sets forth a three-part test that is fairly specific. It says the material, taken as a whole, must appeal to prurient interest; it must be patently offensive according to community values, and it must lack serious literary, artistic, political or scientific value. It is by no means an easy test to meet. The community-standards provision was built into it to give some latitude so that New York didn't have to be regulated by the standards of Peoria and vice versa. It is definitely a better definition than any that preceded it.

Having said that, it is still so vague that our members wonder when something they sell might be found obscene because, in the vast majority of cases, we have no list of obscene material. There is always the risk that something new will be attacked, and a good example came this year from Newport News, Va. A grand jury investigated nine video stores—viewing a sample of their videos—decided one store's videos were obscene, and brought the retailer to trial.

What is unusual in this case is the fact that somebody actually went to trial because, usually, the threat of prosecution is enough to make people change what

they have on their shelves. At least two stores decided not to carry adult products rather than face the grand jury. In fact, there are many cases that we never hear about because retailers decide not to fight. The one retailer who fought had four adult book stores, and he said, "I got an adult business license. I was in business for 12 years selling exactly the same kind of product I am selling now, and now you indict me for obscenity? This is capricious." The jury agreed and acquitted him. Juries usually acquit obscenity cases. Unfortunately, the two stores that caved and decided not to carry adult product anymore went out of business.

A couple of years ago in Cincinnati, the police began to visit a gay bookstore called the Pink Pyramid. They rented something, returned to the police station, viewed it, decided it wasn't hot enough, returned to the bookstore for more material, and a customer said, "You've got to try this because this has got everything in it." So, the police said, "Thanks very much." They decided it indeed had everything in it and arrested the seller for pandering obscenity, not for selling obscenity.

The video that they busted was *Salo, 120 Days of*

*Sodom*, a famous art classic that was an allegory about fascism. There was really never a case for establishing obscenity; under the third prong of the obscenity test, he was going to walk. So, the prosecutor charged him with pandering, which meant they didn't have to establish that the material was obscene. They only had to establish the material had been held out to be obscene. So the seller had to plead guilty. This little bookstore had a two-year fight, not only with the police but with the threat of bankruptcy and avoided it by the narrowest of margins.

This example again shows the problems that all retailers have. Blockbuster Video has a policy: "We do not rent NC17. We do not rent X. We certainly don't rent XXX." Did that protect them from the Oklahoma City police coming in and seizing without warrant copies of *The Tin Drum*? No. Again, largely with the V-chip kind of logic, police asked for them to be "voluntarily" surrendered. They had no court order. They also asked for the video records, to which they had no right, and went to the homes of the people who

had rented it, including the development director of the ACLU, and asked for their copies. So, we now are trying to get justice in Oklahoma City with a lawsuit.

It can happen to Blockbuster, it can happen to Barnes & Noble. Barnes & Noble is one of the two biggest national book-store chains, but that has not protected it (as well as Borders Books) from a national campaign to stop selling Jock Sturges' books because they are allegedly child pornography. As you heard earlier, a

to the defense of Barnes & Noble and have issued a statement about why they will not make decisions for their customers about what can and cannot be sold.

The good news in Oklahoma City is that while we are in court for perhaps an interminable period of time trying to get this thing sorted out, an anti-censorship citizens group has formed. They recognize that, in order to protect free speech in Oklahoma City, a group must pressure the police in favor of First Amend-

## The definition of obscenity can threaten non-obscene material with sexual content.

Barnes & Noble outside of Nashville was indicted not for child pornography, not for obscenity, but for violating a harmful-to-minors display law—yet another way people can get into trouble.

Barnes & Noble insists it will defend the suit, that it has a First Amendment right to sell this material. Borders Books and the American Booksellers Foundation for Free Expression have rallied

ment rights because there's a well-established anti-pornography group pushing the other way.

What I see at the end of the 20th Century, with 27 years of experience after *Miller v. California*, is that there is no end in sight to this. We will fight it in the courts, but we also will fight it politically, and I am confident that we will continue to hold the line.

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## Discussion

**John Kamp** American Association of Advertising Agencies: Ann, are you at all squeamish about the under-12 children? And who actually has the First Amendment right in the case of parents with children under 12?

**Ann Beeson** The question is, who gets to decide what that under-12 child has a chance to read? It shouldn't be the government, not even a public librarian. The parents should decide.

**Kamp** How do they decide? What support can they get that would meet your concerns?

**Beeson** I'm not sure what context you are referring to, but it is the parents' duty to educate themselves about the medium and decide what level of access in the home they want to provide.

**Harvey Zuckman** Institute for Communications Law, Catholic University: Yes, but parents are not there 12 hours a day. There are an awful lot of latchkey kids in this country.

**Beeson** Right, and there always have been. That was never a justification for the government to play babysitter. They never have in other contexts, and they shouldn't on the Internet.

**Robert Corn-Revere** I have always been uncomfortable about the number of latchkey kids determining my family's rights. I have four children under 12 who use the libraries of Loudoun County, Va., where the board of trustees recently decided to protect us from the Internet. We were doing a pretty good job as parents before the library decided whether or not the material my kids could access over the Internet was appropriate. The training we have done at home is more

important, and staying away from government solutions is best.

**Beeson** I also want to echo what Joan Bertin said earlier today—that we shouldn't be afraid to teach our kids how to deal with controversial content.

**Steve McFarland** Center for Law and Religious Freedom: Ann's list of triumphs included a challenge to Virginia's prohibition against its employees accessing porn on state computers. Maybe I didn't understand the facts in that case correctly, but I don't understand why it wouldn't be within the state's prerogative to say that activity is off-base for our employees on company time on state-financed computers.

**Beeson** The state of Virginia did not forbid its employees to access something called pornography. They forbid access to "sexually explicit" content. Virginia employees include quite a number of professors of state universities and colleges, many of whom study issues concerning sexuality. They are either psychologists, teachers in the medical college or cultural theorists who discuss the effects of pornography. They study sexuality in many facets, as academics always have and will. They use the Internet to communicate their research and views, to communicate with other scholars in a conversational way and to access the information.

**Jayne McQuade** Arlington County Public Library: I read something the other day that said, "Next to your home, the public library is now the second most common place for people to access the Internet." Many people don't have home computers, so the library is an important place for access. Our collection-development policies, both for online access

and for materials, say that parents are in charge of their children's reading, that they may influence their children's, and only their children's, reading or viewing. You have to educate people. You don't just reach the Internet and a pornographic picture jumps up to get you. Lots of stuff there is very, very good. We offer selected sites. So, if you are interested in medicine you can go to that section of our home page and link to various medical sites that may be of interest.

**JJ Blonien** Enterprise Communications: Are you aware of any dialogue between the government and Microsoft to incorporate web filtering into the Windows operating system in exchange for some slack in the antitrust case?

**Beeson** We certainly are aware of many discussions between high-level industry and the White House to come up with these

"voluntary" solutions to the "problem" of indecency.

**Corn-Revere** I haven't heard that one, but when the FCC considers broadcast or transfer applications, they often will address content issues. During significant network mergers a few years back, following some complaints about the amount of children's programming, one network agreed to transmit more children's programming in exchange for a waiver of certain FCC ownership policies. This was actually before the FCC's new children's programming rules. But the commission nevertheless found a way to impose the children's rules before the fact. The other network refused, and its waiver request was rejected. So, it's not unheard of for the government to use pressure on unrelated regulatory issues to get content concessions.

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# 7

## The First Amendment in Evolution

### Suppression Never Secures Safety

One of the most persuasive voices on the Bill of Rights, Robert Peck put an exclamation point on the conference. The constitutional lawyer, scholar and author's eloquent wrap-up follows.

#### SPEAKER

**Robert S. Peck**

Constitutional lawyer and author

#### PROTECTING FREEDOM OF THE MIND

By Robert S. Peck



My topic, “The First Amendment in Evolution,” should not be taken literally. Since it was enshrined in our Constitution in 1791, the words of the First Amendment have not changed. It reads as it did more than two centuries ago—despite a plethora of attempts to change it by constitutional amendment.

The surface simplicity of its language, “Congress shall make no law ...,” is misleading because the text masks submerged complexities that become apparent only from its application to real situations. The poll results, no different than polls taken early in the century, show overwhelming support for the First Amendment—more than 90%—as an abstract thought. Once you start talking about specific applications, that consensus

breaks down, and it is from applying these timeless principles to new situations and new contexts that an evolution has occurred.

That a single amendment joined religious and expressive freedoms, and concerns us here today, should not seem unusual. The world the Framers knew as colonials was one where church and state *were* joined. Dissent from orthodoxy, thus, was at once heretical and seditious.

These First Amendment freedoms remain joined in important ways. When reduced to their essence, they represent freedom of the mind, a freedom to think, believe, proselytize, express, represent, boycott and in some ways act, in accordance with one's beliefs and ideas. Such freedom, of course, is entirely subversive. That is why so many decry it and why so many celebrate it.

Still, it forces people with nobler ideas to defend much that they regard as reprehensible. Both free-speech and religious-freedom controversies often involve individuals or causes at the outer edges of society—things you might not tolerate in your home but believe that society must, no matter how unsettling, offensive or even just plain wrong-headed. This is to be expected. Widely accepted religious practices and expressive forays are in no danger of being suppressed. The need to protect what we detest is the reason freedom

**Freedom: Use it or lose it**  
Now let me utter a little bit of heresy: This is not necessarily a bad thing. Yes, the stakes are high, and the potential for losing so much, even everything, is great. But if people don't use these freedoms to question popular wisdom and the beliefs that society accepts, as well as to unsettle what seems secure, then, like a muscle that atrophies from disuse, the very need and value of freedom will come into question, dimming little by little as of its own accord.

Overlapping regimes, protective or repressive of

injury alone cannot justify suppression. ... Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears."

History also teaches that, no matter how legitimate the fear, suppression never secures safety, never empowers anyone and never prevents ideas from gaining circulation. It is a lesson, unfortunately, that we have to relearn again and again. The Salem witch trials and the banishment of Anne Hutchinson from the Massachusetts Bay Colony in 1637 for questioning biblical primacy resound through history, as do a virtually uninterrupted string of religious persecutions of those who were different in their communities.

In the realm of free expression, we recall the prosecution of John Peter Zenger, the battle over the Alien and Sedition Acts, in the same decade that the First Amendment was ratified. Abolitionists were jailed just for advocating an end to slavery. The justification? People believed it was talk that could lead to a bloody civil war. That prophecy came true, yet no one today seriously would say that those words should not have been uttered, that this portent was a sufficient compelling interest to silence the abolitionists.

## First Amendment freedoms, when reduced to their essence, represent freedom of the mind. Such freedom, of course, is entirely subversive.

of the mind exists and remains under siege.

The Freedom Forum poll results, like many before it, again show us why that is true. Talk about an individual situation and someone says, "Gee, that one makes me uncomfortable. My support is not as broad as it was a moment ago." The vulnerability and fragility of First Amendment values is nothing new. This is how it has always been and how it always will be.

freedom, have pockmarked our history. For the most part, fear has engendered the episodes of repression—fear of the unknown, fear of dangers real and imagined, fear that a comfortable and welcome way of life is threatened, fear that our moral underpinnings cannot survive exposure to some evil. Justice Brandeis spoke powerfully to those fears when he wrote in his concurrence in *Whitney v. California*, "Fear of serious

The suppression of political dissent, from anti-war protests throughout the century to civil rights marches; the purging of those who may have sympathized with communism; issues of artistic and academic freedom, and the public's right to know—all these are chapters of our history. Yet in spite of episodic repression, I suggest that our religious and expressive freedoms have emerged stronger, generally more secure and of greater importance for having been through the crucibles of these experiences.

This is not to say there is no danger in the land. The very idea of that freedom as an American article of faith is being questioned, perhaps to a greater extent than ever before. Instead, we are being asked to justify these freedoms: What purpose does it serve? Is it really so important compared to this or that socially desirable goal? What harm is committed, if we simply give up some seemingly marginal religious practices or speech regarded as very low value, especially when it is for a good cause?

I suggest that if we submit to this kind of balancing that so many advocate, freedom will ultimately lose. There will be small abridgements that no one will regard as a serious threat. Yet as Justice Bradley recognized in an 1885 decision, "Illegitimate and unconstitutional

practices get their first footing ... by silent approaches as slight deviations."

The danger is that, through balancing, we will

**History teaches that, no matter how legitimate the fear, suppression never secures safety, never empowers anyone and never prevents ideas from gaining circulation.**

no longer regard freedom as a good unto itself. Instead, we will hear that minority religions seek special rights—exemptions—not enjoyed by all because of some seemingly strange requirements for their followers. We will hear that these exemptions, as well as the toleration of certain kinds of speech, will disrupt and lead to disrespect for the rules and authority that the rest of us are governed by. And don't we have a responsibility, we will hear, to protect children from speech they are not mature enough to question or analyze, particularly when the speech in question gives us a substantial amount of discomfort and doesn't seem to advance any legitimate values?

A debate framed this way has a predetermined outcome. Freedom advocates can warn of a slippery slope, but that argument will not

be compelling. We will hear that we can always pull back from the brink if the restrictions go too far. Yet, perhaps not. If the purposes of free

speech, for example, are the furtherance of democratic government, self-fulfillment and self-realization, trade in the currency of ideas and knowledge, the kind of creativity that serves human achievement, or perhaps even to provide a safety valve, it is not difficult to demonstrate that certain speech ill serves these goals, while compelling justifications exist for curtailing it.

### **Six challenges**

We can engage in trench warfare necessary to preserve freedom as we celebrate it here, eking out legal victories here and there, or we can see the attacks as an opportunity to have a rebirth of freedom. So, I want to leave you with six challenges as advocates of freedom:

First, recapture the notion that religious freedom is a value of the first rank and not, as the Supreme



Court now holds, an adjunct to other constitutional values.

Second, examine anew the interplay and synergy between the expressive rights of religious speech and the separationist

mate concerns.

As a fourth item, fight the labeling of speech, whether by government or industrial initiative. If ratings become the standard expectation of the public and can be found in movies,

sorship into expanding the opportunities for access to free-speech platforms and into resisting the concentration of state or other power over speech.

Finally, work to develop a fuller, more widespread cultural appreciation for freedom in the practical ways that are needed but often unrecognized. Religious and expressive freedom has long been a boon to those who seek social change. The First Amendment, despite the sanctuary it gives to bigoted and other detestable forms of expression, remains our most important civil rights law, an idea that is often overlooked.

We have an important role as educators as well as advocates. If freedom of the mind—freedom of conscience, freedom of inquiry and freedom of ideas—is to survive and remain meaningful, freedom must be a guiding principle—not just in law but in spirit.

We are being asked to justify these freedoms: “What purpose does it serve? Is it really so important compared to this or that socially desirable goal?”

strands of the Establishment Clause. Our analytical tools for understanding and conveying these issues remain far too crude.

As a third item, I urge you to resist a child-protection exception to free speech. It has no limiting principle. Instead, I suggest that we put time and effort into providing educational tools to assist parents in addressing their very real and legiti-

television programs, rock concerts and web sites, regardless of whether state action is involved, there is no reason to expect that they will not be applied as well to art, literature and even news. Once that is achieved, pressure groups and politicians will push for more pervasive and pejorative ratings in all these media.

Fifth, put as much effort as you put into fighting cen-

## Discussion

**Harvey L. Zuckman** Institute for Communications Law Studies, Catholic University: I like what I’ve heard, but I thought some speakers were a bit cavalier about protecting children under the age of, say, 12. Child psychiatrists and psychologists suggest that exposure to adult material at an early and formative age can be quite devastating and

distorting. I think the burden is on those who say the government has no role to suggest how children can be protected.

**Peck** I have debated this issue with psychologists too many times. Many say the research which shows a correlation, but not causation, shows equally that violent im-

ages have that same adverse effect. They say that *Forrest Gump*, for example, harms kids under 12 and they are concerned about network broadcasts. They say that passing an anti-abortion protest with their very graphic signs also troubles children and causes nightmares. The only way to keep children pristine is to shield them from seeing anything.

Studies also show these issues can be dealt with—that we have an obligation to teach media literacy, to understand the images we see. But it has long been First Amendment doctrine that you cannot ban speech simply because of its emotive effect, and I think that once we start walking down that road we basically have thrown the First Amendment out.

**Marjorie Heins** ACLU In *ACLU v. Reno*, we put in a lot of evidence of sexually explicit, indecent or arguably indecent Internet content that not only would not harm minors but might be educational and enlightening. We thought it necessary to start educating the courts about the broad scope of these laws to protect minors and to start exploring their underlying assumptions. There is no scientific way to contend that excessive amounts of violent media exposure causes aggression or violence in young people. They simply get, we all simply get, too much information of too many kinds, and there are too many variables to draw scientific conclusions.

As far as I know, and I am happy to be corrected, there is very little statistical data in this area. When people talk about destructive and distorting effects of, say, pornographic material—if we can find a way to distinguish that from other sexually explicit speech—what do “destructive” and “distorting” mean? What we are really talking about is morality, about trying to suppress certain difficult-to-define categories of information because we think they will give young people bad, immoral ideas.

The government probably has no role in this area, and I like to think in terms of a First Amendment “inoculation” theory. To help young people develop healthy sexual attitudes and have solid, useful, enlightening and safe information, exposure to some imagery that we might find offensive, immoral or distorting of their developing attitudes, and the ability to help them process it and to explain it to them, might affect them like an inoculation. It might help them develop better than if we suppress what we consider forbidden and immoral—and by that process just make it more attractive.

**Joan Bertin** National Coalition Against Censorship: I am not sure I can fully shed my civil-libertarian perspective, but I want to speak as the parent of two children, 12 and 14, who surf the Net without much supervision or concern by me but with a certain amount of discussion about what they find. I have had to talk to my children about never revealing on the Internet where they can be reached, their telephone number or address, in the same way I talked to them when they were much younger about speaking with strangers or people not well known to them. I have been interested to observe that my children and others of my acquaintance know instinctively when something is “yucky” (that is their term of choice).

It strikes me that we are engaging in a vast overreaction to something that in the scheme of things for children is a very small threat. When you think of the things that threaten the well-being of children—poverty, educational inadequacy, war, famine, pestilence, bad parenting, the list goes on and on—the threat posed by the possibility of stumbling onto something on the Internet seems small. It behooves us to think about children’s well-being in a more global and comprehensive way and not to focus on this piece as if it is the entire universe.

**John Kamp** American Association of Advertising Agencies: I think we also have to focus

on whose First Amendment it is. I happen to agree with most of what you say about the effects research, and the inoculation theory is at least as valuable as any of the others. But we shouldn't forget the fundamental questions: How do we raise our children in our society, and how does the First Amendment relate to that? This fundamental notion of who we are as a people and how we become adults is in the context of the family unless we are ready to make some pretty serious changes.

I also wanted to raise another First Amendment issue that wasn't discussed today that I think deserves some examination—the issue of commercial speech, one of those backwaters like pornography and other hated speech. This is a First Amendment question that goes to the very core of who we are as a people, and I find it appalling that the Food and Drug Administration and the president of the United States just signed another bill reinforcing the FDA's ability to censor that kind of truth. I may need chemotherapy one day. I want my doctors to know everything about that chemical compound that is available to them. To systematically disallow the company that created the product and knows the most about it to tell the truth about it seems outrageous and amazing at the end of the 20th century.

**Paul McMasters**, The Freedom Forum: Commercial speech alone could give us a couple of days of conversations. I share John's concern, not just with the FDA but the FTC and the FCC—three federal agencies that are becoming remarkably aggressive about expanding their jurisdiction over speech. The Media Institute's most recent newsletter contains a rather chilling series of stories about the FDA alone and how the agency is trying to assert jurisdiction over, limit and regulate speech.

It has always amazed me how technology or any new medium is quickly assailed as an end to society as we know it, a threat to our children and our children's children. Often

we rush to the ramparts and make or embrace proposals that, in the name of protecting the children, robs them of their First Amendment rights after they are 21.

We have seen it with radio. We saw it with silent movies. It took 34 years for courts to recognize First Amendment protection for movies. We saw it with television. We saw it with comic books, when two-thirds of the existing comic-book titles disappeared after the "voluntary" Comic Books Code was enacted. I worry that the same sort of panic over justifiable, useful and necessary concerns, as Harvey points out about our children, blinds us to the larger ramifications of what we might rush to embrace.

**August Steinhilber**, National School Boards Association: I would like to point out that there are areas of exceptions to the First Amendment, and I live within one of them. No question that *ACLU v. Reno* was rightly decided. However, when we get into the education of children, particularly in public schools, we have a closed forum. At best we have a limited open forum, and so what is our responsibility? It is a responsibility to provide education within the norms of society. That means most school systems, for example, do not allow a teacher to show any R-rated movie without prior approval. Community standards still have a major force and a major place in the United States, and that may be an exception to the First Amendment, but I think we have to recognize it.

**McMasters**: Thank you, Gus. On that note, we have to conclude. I have been inspired by the idea that we have spent a whole day and not even begun to scratch the surface on the issues raised and principles embraced by the First Amendment to the United States Constitution. This amendment started out as 114 words, was sent to a joint committee and wound up being just 45 words, yet they laid down five of the most fundamental freedoms known to man. We come at this is-

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sue from different perspectives, but I think we agree that the First Amendment is a remarkable compact between a government and its people, unique in all the world today, and, I would venture to say, unique in all of history, too.

Finally, just let me say how deeply grateful I am for your attendance and your par-

ticipation. You have enthusiastically expanded the reach of what I consider my mandate as the First Amendment ombudsman at the Freedom Forum, which is, "The First Amendment: learn it, live it and leave it better than you found it."

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