1st the amendment

IS ALIVE AND...

WHAT DOES "FREEDOM OF SPEECH" MEAN?

HOW HAS "FREEDOM OF SPEECH" BEEN EVOLVING IN THE UNITED STATES?

Education Program
Newsweek®
NEWSSOURCE

The First AMENDMENT Is Alive and ?

Newsweek education program NewsSource

CONTENTS

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Objectives

This NEWSWEEK NewsSource is designed to helped students:

- read about 20th-century applications of and challenges to the First Amendment;
- evaluate the historical and evolving importance of freedom of speech, press and religion;
- consider the various ways that the First Amendment has been interpreted to suit the interests of specific groups and individuals;
- critique the responses of the courts, including the Supreme Court, to controversial First Amendment issues;
- discover their own First Amendment rights and limitations;
- develop opinions on what limitations, if any, the First Amendment should have, in theory and in practice;
- research First Amendment issues in detail—in particular, those with identifiably local or personal applications;
- demonstrate the ability to evaluate an issue from several viewpoints;
- consider viewpoints that they would not have understood or appreciated prior to the reading and research;
- assess the effects of important Supreme Court decisions on the First Amendment;
- speculate as to the future of the First Amendment;
- construct arguments based on reading, research and discussion;
- debate controversial issues in a reasonable and well-supported manner, and
- compare their prior assumptions with newly developed opinions.

MATERIALS

This NEWSWEEK NewsSource includes:

- two visuals for overhead projection;
- 16 reproducible readings;
- a teacher's guide geared to the readings and visuals, and
- a worksheet that will guide students in their First Amendment research.

INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." How could one amendment cover so much in so few words? This NEWSWEEK NewsSource, "The First Amendment Is Alive and ?" will brief students on the issues and controversies surrounding freedom of speech, press and religion, and attempt to show students how these freedoms and rights affect their lives. The range of issues covered is broad, but nowhere near comprehensive: in Unit I, we cover important Supreme Court decisions concerning freedom of the press and speech that touch on many concerns, including libel, clear and present danger, public and private figures, obscenity, censorship, artistic freedom and the Internet. In Unit II, readings examine how freedom of religion has been interpreted and "revised" during the course of this century. Unit III briefly asks students to consider the future of the First Amendment, the evolution of its interpretation and how the public feels about these privileges. Are they appreciated, taken for granted or even abused? Does the American citizen realize the ramifications of circumscribing these rights?

This NewsSource unit does not cover the right to peaceably assemble, nor to petition the government. While the right to assemble, in particular, remains of vital importance, the issues of press, speech and religious freedom seem to have more broad and current applications and challenges. Even within these categories, certain key issues (such as campaign-finance reform) have been excluded upon determining that certain issues would have more relevance and interest for students. As they pursue further research, ideally they will want to engage some of the nuances of this complicated amendment and venture into less popular but equally dynamic terrain.

STANDARDS CONNECTION

"The First Amendment Is Alive and ?" incorporates several of the standards established by the National Council for the Social Studies Curriculum. By examining the history and ongoing challenges to freedom of press, speech and religion, it engages issues related to **Time, Continuity and Change.** The involvement of city, state and federal government as well as the tiered court system ensures engagement with **Power, Authority and Governance.** As students query how these freedoms apply to their lives and rights as an American citizen, they will be studying **Individual Identity and Development.** The unit that discusses freedom of religion encourages discussion of different **Beliefs and Cultures.** Finally, the ways in which First Amendment issues allow, encourage and even force people of different positions to reconcile their differences under the roof of this constitutional amendment—as well as thoroughly examining the responsibilities and limitations of the press—certainly speaks to the study of **Individuals, Groups and Institutions.**

TEACHER'S GUIDE

UNIT I
FREEDOM OF SPEECH AND THE PRESS

Lesson 1
Overview

1. Read "The Role of the Media in a Democracy."
   a. Discuss: according to the article, why has the press "seldom been loved"? What is desirable about "objectivity"? Is objectivity possible? Why or why not? How does the author characterize the relationship between the news media and the public? Speculate: what do they want from each other? How do capitalism and journalism interact and potentially conflict with each other? What keeps journalism from "excesses"? How is it journalism's responsibility to "preserve public stability"? How does journalism function in nondemocracies?
   b. Who does Krimsky quote, and why? Discuss the following quotes, touching on the ways in which you think they are true, resonant, current or outdated: "Let the people know the facts, and the country will be safe." "If it were left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." "Let us raise a standard to which the wise and honest can repair."
   c. Highlight the thesis and main ideas in his article. Rather than summarizing them, turn them into a working outline, like one he may have followed during his writing process—as though you're drawing the skeleton of the piece.
2. It is human nature to romanticize the distant and even the recent past. Research the history of American journalism. Historically, was journalism more "pure" than it is now? Have objectivity and neutrality always been the goal? How have newspapers changed, in terms of partisanship? How have news magazines and broadcast media affected newspapers?
3. Take a poll or survey of students (outside your class), parents and teachers to find out which medium they get their news from—newspapers, magazines, television or radio. Include in this poll questions regarding their feelings about the media, getting those polled to identify their problems and concerns. Devise a list of specific questions and query at least 20 people. Organize your responses into a chart, graph or text format.

Lesson 2
The Courts Speak

1. Read "Heed Their Rising Voices."
   a. Discuss: How does the author "invite you" into the piece? How does he make you want to continue reading? What do we know about the people involved? What were The New York Times's rules about editorial advertisements? Does the text of the ad seem inflammatory to you? How does the author make the point that the text should not have been considered controversial or problematic? How did the public respond to the ad?
   b. What do you know about Dr. Martin Luther King Jr., the Southern Christian Leadership Conference and other important civil-rights organizations and figures of the time? Conduct further research in this area.
   c. Either continue to read from the book "Make No Law: The Sullivan Case and the First Amendment," or conduct your own research on how the Sullivan case progressed and its importance to the freedom of the press.
2. Read "The First Amendment and Freedom of the Press."
   a. Discuss: Goodale notes that the information that The New York Times would publish discussed the "unflattering history" of the government's decision-making process in Vietnam. Why is it important that this was "history"? Why would the attorney general think that this publication would cause "irreparable injury to the defense interests of the United States"? Did it? How did the results of this case affect the press?
   b. Discuss the other cases in Goodale's article. Which cases seem most important/relevant to you? See the First Amendment Worksheet, which directs you to choose a case and conduct in-depth research.
   c. Research these terms and issues:
   ✓defamation
   ✓libel law
   ✓public officials and public figures
   ✓actual malice
   ✓Shield law
   d. Discuss whether the following quotations have practical ramifications. How do they affect the behavior of the press? "The primary purpose" of the First Amendment was "to create a fourth institution outside the government as an additional check on the three official branches ..."
   "... if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."
   "... without an informed and free press there cannot be an enlightened people."
   e. Discuss: What press issues are not covered by the First Amendment? What privileges are not provided to the press? Do you think the First Amendment provides sufficient protection for the press? Too much protection?

Lesson 3
Politics of the First Amendment

1. Read "Fair-Weather Friends of the First Amendment."
   a. Identify Hentoff's main point about the First Amendment, as well as his supporting arguments. What is the "bad news"? Is there "good news," according to the article? Discuss the instances of student censorship that Hentoff brings up. What do you think of them? Are you surprised? Dismayed? Pleased? Why is he surprised that students are censoring other students?
   b. Discuss: What do you think about the issue of "controversial books" being banned? Who decides if a book is controversial? Do you think that you will find the same things controversial in 10 years that you do now? What are the problems with government's regulating speech?
   c. Research the following issues:
   —restricting campaign expenditures or providing "free time" on television to political candidates
   —the history of Supreme Court decisions about obscenity.
   d. Discuss whether the following quotations seem relevant, timely, important, outdated or naive. "Very few Americans have ever actually been willing to grant [First Amendment] freedoms respecting either political or aesthetic matters that they dislike or believe fraught with danger to the general welfare." "The right to receive information is corollary of the rights of free speech and press because the right to distribute information protects the right to receive it." "... It is important for young people to ... discover both the good and the bad in our history ... It is simply not the role of courts to serve as literary censors or to make judgments as to whether reading particular books does students more harm than good." "There are as many definitions of

obscenity as there are men, and are as unique to the individual as his dreams ... Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment."

e. Hentoff calls the left and the right "brothers and sisters under the skin" when it comes to imposing censorship and limiting or abusing the First Amendment: each does so when it serves their own beliefs, and will not defend the other's right to free speech. How do you feel about that? Consider the questions that Hentoff poses toward the end of his article. Would you agree with the statements made by William O. Douglas and Oliver Wendell Homes? Why or why not?

2. Read "Who's Against Free Speech?" Discuss: Where do you fit in the statistics? Are they surprising to you? Why or why not? What attitudes changed with education, income and age? How would you explain those changes? Do you think your attitudes will change? How do they differ from those of your parents? Would Nat Hentoff be surprised at the results of this survey?

3. Read "Students' First Amendment Rights."

a. Discuss: As students, how do you feel the issues in this article affect you? Where do you stand on the issues? Do you think there's a difference between a school newspaper and a yearbook? Do you think that First Amendment issues apply differently to high-school versus college students? What other factors are involved in this case (such as the adviser)?

b. Research the famous case *Hazelwood v. Kuhlmeier.* You may do so through the Student Press Law Center (SPLC) or through other sources. The Web site for SPLC is www .splc.org. In addition, continue to follow the KSU case. Offer to write an ongoing article about the issue in your school's newspaper.

c. Conduct a debate in which one side defends the yearbook staff and the other side defends the college administration. Make sure that each side is equally researched and argued. Have your teacher (or an outside team of students) decide who won. Then, try to predict as a class who will win the KSU case.

Lesson 4
Speech and Art

1. Read "Artistic Repression in America."

a. Discuss: According to the article, what is the difference in opinion between "pro-censorship activities" and "civil libertarians"? Which of the media is hit hardest with censorship attacks? Which group or groups is (are) behind instances of censorship? In what "arenas" is censorship occurring with increasing frequency? What subjects/images are most likely to be censored? What does the author consider the "greatest tragedy of the censorship campaign"?

b. Research the recent struggles undergone by the National Endowment for the Arts, the National Endowment for the Humanities and the Corporation for Public Broadcasting. What is controversial about these agencies? What incidents triggered diminished funding? What are the various arguments being made concerning these organizations?

c. Debate: Should the government subsidize the arts? Why or why not? This debate will require extensive research and the development of thoughtful positions. Keep in mind the First Amendment issues and the notion of the "slippery slope," as well as considerations of public standards.

d. Discuss Justice Louis Brandeis's assertion that the "remedy for messages we disagree with or dislike in art, entertainment or politics is 'more speech, not enforced silence'." What did he mean?

2. Read "Two Recent Debates Reveal Defense of First Amendment Rights Is Conditional" and review "Fair-Weather Friends of the First Amendment."

a. Discuss: According to the article, what is the difference between supporting the First Amendment rights of "Desmond Pfeiffer" and those of "Corpus Christi"? Why did the arts community get behind one protest and not the other? Does the writer think this is a problem? What would Nat Hentoff (author of "Fair-Weather Friends") say about it? Consider his similar argument in that article: that left and right sometimes become allies in support of censorship. According to Norman Lear, why do we need to laugh at ourselves? Why is it currently difficult to do so? What does the term "politically correct" mean?

b. Research the term "politically correct." Try to find articles that discuss it from many angles. Look hard—people have strong feelings about this term. Then write a research-based essay that includes your opinions on the difficulty of defining this term and concept.

c. Think about the quote "Self-interest too often and too easily pulls at our moral compass." Try to think of movies or television shows that have offended you. What about them has offended you? What do you think is the best way to deal with art or speech that offends you? Do you think you'd be capable of defending the right to make art or speech that you did not agree with?

Lesson 5
Electronic Media: The New Frontier

1. Read "On the Net, Anything Goes."

a. Discuss: What was the Communications Decency Act? Why was it found unconstitutional? Whose responsibility is it to monitor the press, speech and art on the Internet? Why is the Internet different from a TV screen concerning censorship issues? Who would decide which material is "indecent"? What should the parental role be?

b. Interview your parents as to how they feel about the availability of information on the Internet. If you have Internet access at home, do your parents monitor it in some way? How? Do you have rules about television watching and which movies you can see? Ask your parents how they made these decisions. Which decisions have they left up to you? How do you make your own decisions on what to see and what to avoid? Do you think that access to sensitive or obscene material on the Internet is a problem? Do teenagers observe the restrictions?

c. Write an opinion piece of 1,000 words in which you discuss the ways that families censor their members and how we censor ourselves. Provide both critique and justification; be balanced and fair.

2. Read "High Court Upholds Law Banning 'Obscene' E-Mail."

a. Discuss: What is the main argument put forth in this article? Who won and why? Do you think that the victor should have won? Have you ever received an unpleasant or "obscene" e-mail? Do you think there should be rules to regulate e-mail content?

3. Review Cartoon C (on page 24) by Tom Toles. Speculate: Who are the people talking, and what is the only "prop" in the scene? What purpose do the arrows serve—and why is there no identifiable beginning or end to the conversation? What is their discussion about? What are the potentially conflicting issues that they keep going "round and round"

about? What message is the cartoonist trying to send? Is he doing so effectively? Do you agree or disagree? How do you think your parents would feel?

4. Review the readings "On the Net, Anything Goes" and "High Court Upholds Law Banning 'Obscene' E-Mail," as well as the information gleaned from the cartoon.

a. Conduct a mock debate between three groups: parents, high-school students and legislators over First Amendment issues and the Internet. Remember: if you are part of the parent or legislator group, you must make your arguments as strong as if you were really part of the group to which you are assigned. All three groups will probably need to conduct further research in order to make their points thoroughly and intelligently.

b. After the debate, discuss your own point of view. Did it change at all during the course of the debate? How and why?

Lesson 6
A Speech Act: The Flag

1. Read "Legislating Patriotism."

a. Discuss: What would you have expected a veteran to feel about the flag-desecration amendment? Were you surprised by Keith Kreul's response, and the later response of veteran Don Bennion? Did it change your mind at all? What was Feingold implying when he asked the Senate if the United States wanted to be added to the list of governments unfettered by a Bill of Rights, including Haiti, Cuba and Iran? What point was he making? Was it well received? Why does author Hentoff repeat this allusion in a later paragraph? Why does he bring up the 1948 Supreme Court decision that overturned the expulsion of the children of Jehovah's Witnesses? What does it mean to "legislate patriotism"?

b. Discuss the flag as an object and as a symbol. What does it symbolize? How are we supposed to treat it? What are we saying if we don't treat it that way? Are we saying something that should or could be condemned? Or something that should be addressed and responded to?

c. Research the history of flag-burning cases and incidents. Make up a timeline of relevant cases and present it to the class. Discuss: How do you feel about a flag-desecration amendment? Would you have voted for or against it? Why?

2. Review Visual A, "Free Speech Unfurled?"

a. Discuss: Are you surprised by the results of the Gallup poll? Why or why not? Write a half-page summary of the information gleaned from the poll. Then, following the instructions on the visual, devise and conduct your own poll concerning the flag-desecration amendment. (Be sure to poll different groups of people—students, teachers, parents and, ideally, others in your community.) Discuss: Are you surprised at the results of your poll? Which groups favored constitutional protection of the flag, versus constitutional protection of the right to burn the flag? What is your opinion on the issue? Has it changed since you began studying it?

b. Analyze the political cartoon (D) by Tony Auth on page 26. Describe the components of the cartoon. How would you characterize the person? What is he doing, and why? What is the tone of his statement? What is the cartoonist trying to say? Does he do so effectively? Do you agree or disagree with his assertion? What is your reasoning?

3. Review the cartoon (E) by Ben Sargent, "True Flag Desecration" (page 27). Who is in this cartoon, and what is she wearing—on her head and around her mouth? What is odd about the torch? What is the expression on her face? How is she leaning? What is the cartoonist trying to say? How is he relating free speech and flag desecration? Does he make his point effectively? Do you agree with his message? Why or why not?

4. Gathering the information you gleaned from the cartoons and article about the flag-desecration amendment, find out how the politicians who represent you feel about the amendment, and how they voted (if they did so). Then write a letter to one of your representatives in which you thoroughly express your viewpoint. (It should be at least 500 words.)

UNIT II
FREEDOM OF RELIGION

Lesson 1
Prayer in the Schools

1. Read Ed Doerr's "Religion and Public Education."

a. Discuss: What was the Istook amendment? Why was it controversial? Who supported it, and who did not? What does the author say about "alleged violations of students' religious freedom"? In the "Religious Education in Public Schools" guidelines, which religious acts are permitted? Discuss each permitted act in your classroom. Are they all acceptable, or are some controversial? What about the prohibited acts?

b. Have your class vote on each permitted and prohibited act. Be sure that each is discussed, particularly in reference to how they affect minority religious groups. Do you live in a religiously homogeneous community? To what extent? Do you think this affects how you feel about religious expression in your school?

c. Discuss what the author categorizes as the "three areas in which problems continue." Why would these tend to take place in more religiously homogeneous communities? What can be done to prevent these infractions? Why is it difficult to teach religion successfully? What do you think about teaching religion "critically," as the author describes it? Try to respond as a class to each of the questions that the author raises.

d. As an individual, respond to one or two of the author's questions in a personal essay format. In this essay, you may or may not want to discuss your religious upbringing or training. If you do so, do not allow yourself to "preach" your faith in the course of the essay. Try to maintain an even, objective perspective, while presenting your views.

e. Discuss the following quotation: "It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influence of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic."

2. Read "A Wing and a Prayer: Religion Goes Back to School."

a. Discuss: Kaminer lists numerous instances of one school's teachers' and students' being allowed to impose majority religious views on students of minority faiths. Why, according to the article, does this still happen? Which of the infractions did you find most oppressive? What would you have done, had you been one of the Willis children? Do you think that illegal religious practices exist in your school? What should be done?

b. What is the main difference between Kaminer's and Ed Doerr's articles? If you could conduct a dialogue between Kaminer and Doerr, based only on their articles, what do

you think they would say to each other? (Try to pull quotations directly from the articles.) Now, imagine a dialogue not based on their articles that you would write for them.

3. Read the article "Amending the First Amendment."
   a. Discuss: How does the writer of this op-ed piece feel about the Istook amendment? What kinds of support does he use for his position? How would this Istook amendment have changed the founders' intentions for the separation of church and state?
4. Review Visual B, "Prayer in Schools."
   a. Write a half-page summary of the information in the poll. Which are the most hotly contested issues concerning religion in the public schools? Follow the instructions on the worksheet and take your own poll.
   b. Analyze the political cartoon (F) drawn by Pat Oliphant (page 30). Identify the people in the cartoon. What are they saying to each other, and why? What are the expressions on their faces? What sizes are they, relative to each other? What is the cartoonist trying to say? Do you think he effectively conveys his message? Why or why not? Do you agree with his message?
   c. Analyze the political cartoon drawn by Ben Sargent, "In Government We Trust" (page 34). What are the different components of this cartoon? Where might the person be? Why does the person cross out "God" and spray-paint in "Government"? What message is the cartoonist trying to convey? Does he do so successfully? Why or why not? Do you agree with his message?
   d. Combining the above cartoon analyses and poll summary with what you read in "Religion and Public Education," "A Wing and a Prayer" and "Amending the First Amendment," write a 1,000-word essay in which you discuss your feelings and concerns about religion in the public schools. If you attend a public school, identify the ways in which religion does or does not enter into your education. If you attend a private school, identify the ways religion affects or does not affect your education. Are you satisfied with the level of religion in your education? Why or why not? Are you sympathetic to the concerns of minority religions and how possible infractions of the First Amendment may affect adherents to other faiths?

Lesson 2
Practicing Our Faiths

1. Read "Do We Have Freedom of Religion?"
   a. Discuss: How do you feel about Rush's position and experience? How do the media treat small, alternative religious groups? Is the treatment justified? In what cases would it be? Does Rush's decision to move to a "spiritual community" affect your opinion of her argument? Why or why not? Speculate as to why people would choose to vandalize Rush's community. Which other types of organizations does Rush equate with oppressive spiritual communities?
   b. Split the class into four groups to research the history of the religious communities Rush mentions—the Mennonites, the Shakers, the Hutterites and the Inspirationists. Each group should develop a presentation that discusses their assigned community's spiritual beliefs and lifestyle choices.
   c. Identify the introduction, thesis statement, main arguments and conclusion of this essay. What kinds of support does Rush use for his arguments? What is the tone of her piece? Identify what you believe are the strongest points in Rush's essay.
   d. What does Rush hope to achieve by writing this article? What types of First Amendment protections are afforded religious groups and the press? Do these protections ever come into conflict?

UNIT III:
FUTURE OF THE FIRST

Lesson 1
Taken for Granted?

1. Read "A Slow Retreat From Freedom."
   a. Discuss: What does the author mean by the title? Does he think that Americans fully understand and appreciate the First Amendment? Why or why not? What, does he say, are the "costs" of extending "free expression beyond the limits tolerated in most advanced societies"? Where are challenges to the First Amendment coming from? Which issues does he identify as particularly telling of Americans' evolving view of the First Amendment? How do American citizens and the courts let the media know when they've gone too far? What is dangerous about the "slow retreat"?
   b. Research Joe McCarthy, a senator in the 1950s who was famous for his "Red-baiting" trials.
2. Choose a First Amendment issue that you find intriguing and design a poll based on the issue. You may want to ask whether other people believe this issue is as crucial as you do, as well as a variety of specific questions that focus on the issue. Present your findings in numerical and textual formats.
3. Speculate: Which new challenges to the Amendment will surface in the 21st century? Which old challenges will ebb or resurface with new energy? Why? Do you think the First Amendment will end up being amended? Should it? Why or why not?
4. Turn to the "First Amendment Worksheet." You will need to review the court cases you read about in Readings 2 and 3, though they do not address many of the cases listed in the worksheet. Follow the worksheet instructions: gather the appropriate information and respond to the questions. Bring your information to class and be prepared to discuss the possible future ramifications of "your case" in the context of the question: what is the future of the First Amendment?

Most Americans Would Give Old Glory Legal Protection

The results below are based on telephone interviews with a randomly selected national sample of 1,016 adults, 18 years and older, conducted June 25–27, 1999. For results based on this sample, one can say with 95 percent confidence that the maximum error attributable to sampling and other random effects is plus or minus 3 percentage points. In addition to sampling error, question wording and practical difficulties in conducting surveys can introduce error or bias into the findings of public-opinion polls.

Do you favor or oppose a constitutional amendment that would allow Congress and state governments to make it illegal to burn the American flag?

	Favor	Oppose	No opinion
99 June 25–27	63%	35%	2%
95 July 7–9	62	36	2
90 June*	68	27	5
89 Oct**	65	31	4
89 June*	71	24	5

* Question wording: Do you think we should pass a constitutional amendment to make flag burning illegal, or not?

**Question wording: Do you favor or oppose a constitutional amendment that would allow federal and state governments to make flag burning illegal?

EXERCISE: YOUR OWN POLL

Using the question devised by the Gallup Organization as well as those of your own devising, take a poll of high-school students, teachers, parents and other acquaintances about this controversial amendment. Rather than taking it on different dates, divide your data by age, occupation, gender and other criteria that you may deem relevant or interesting. Present your data on a separate sheet of paper.

Most Americans Support Prayer in Public Schools

The results below are based on telephone interviews with a randomly selected national sample of 1,016 adults, 18 years and older, conducted on June 25–27, 1999. For results based on this sample, one can say with 95 percent confidence that the maximum error attributable to sampling and other random effects is plus or minus 3 percentage points. In addition to sampling error, question wording and practical difficulties in conducting surveys can introduce error or bias into the findings of public-opinion polls.

Read a variety of proposals concerning religion and public schools. For each one, express your opinion on whether you would generally favor or oppose it.

EXERCISE: YOUR OWN POLL

Using the questions devised by The Gallup Organization as well as questions you develop, take a poll of high-school students, teachers, parents and other acquaintances about prayer in public schools. Present your data on a separate sheet of paper.

A. Making public-school facilities available after school hours for use by student religious groups

Favor	**78%**
Oppose	**21**
No opinion	**1**
	100%

B. Allowing public schools to display the Ten Commandments

Favor	**74%**
Oppose	**24**
No opinion	**2**
	100%

C. Allowing students to say prayers at graduation ceremonies as part of the official program

Favor	**83%**
Oppose	**17**
No opinion	*****
	100%

D. Using the Bible in literature, history and social-studies classes

Favor	**71%**
Oppose	**28%**
No opinion	**1**
	100%

E. Allowing daily prayer to be said in the classroom

Favor	**70%**
Oppose	**28**
No opinion	**2**
	100%

F. Teaching creationism ALONG WITH evolution in public schools

Favor	**68%**
Oppose	**29**
No opinion	**3**
	100%

G. Teaching creationism INSTEAD OF evolution in public schools

Favor	**40%**
Oppose	**55**
No opinion	**5**
	100%

In a free-market democracy, the people ultimately make the decision as to how their press should act, says George Krimsky, the former head of news for the Associated Press's World Services and author of "Hold the Press (The Inside Story on Newspapers)." In the following article Krimsky reviews the history of the U.S. media and outlines the challenges they face in this electronic age.

The Role of the Media in a Democracy

By George A. Krimsky

Volumes have been written about the role of the mass media in a democracy. The danger in all this examination is to submerge the subject under a sludge of platitudes. The issue of whether a free press is the best communications solution in a democracy is much too important at the close of this century and needs to be examined dispassionately.

Before addressing the subject, it helps to define the terminology. In the broadest sense, the media embraces the television and film entertainment industries, a vast array of regularly published printed material, and even public relations and advertising. The "press" is supposed to be a serious member of that family, focusing on real life instead of fantasy and serving the widest possible audience. A good generic term for the press in the electronic age is "news media." The emphasis in this definition is on content, not technology or delivery system, because the press—at least in developed countries—can be found these days on the Internet, the fax lines, or the airwaves.

A self-governing society, by definition, needs to make its own decisions. It cannot do that without hard information, leavened with an open exchange of views. Abraham Lincoln articulated this concept most succinctly when he said: "Let the people know the facts, and the country will be safe."

Some might regard Lincoln's as a somewhat naive viewpoint, given the complexities and technologies of the 20th century; but the need for public news has been a cornerstone of America's system almost from the start.

Thomas Jefferson felt so strongly about the principle of free expression he said something that non-democrats must regard as an absurdity: "If it were left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." The implication of those words is that self-governance is more essential than governance itself. Not so absurd, perhaps, if you had just fought a war against an oppressive government.

In the wake of America's successful revolution, it was decided there should indeed be government, but only if it were accountable to the people. The people, in turn, could only hold the government accountable if they knew what it was doing and could intercede as necessary, using their ballot, for example. The role of public "watchdog" was thus assumed by a citizen press, and as a consequence, the government in the United States has been kept out of the news business. The only government-owned or -controlled media in the United States are those that broadcast overseas, such as the Voice of America. By law, this service is not allowed to broadcast within the country. There is partial government subsidy to public television and radio in the United States, but safeguards protect it against political interference.

Because the Constitution is the highest law in the land, any attempts by courts, legislators and law enforcement officers to weaken protected liberties, such as free expression, are generally preventable.

Fairly simple in theory, but how has all this worked out?

Generally speaking, pretty well, although the concept of a free press is challenged and defended every day in one community or another across the land. The American press has always been influential, often powerful and sometimes feared, but it has seldom been loved. As a matter of fact, journalists today rank in the lower echelons of public popularity. They are seen as too powerful on the one hand, and not trustworthy on the other.

In its early days, the American press was little more than a pamphleteering industry, owned by or affiliated with competing political interests and engaged in a constant war of propaganda. Trust was not an issue. What caused the press to become an instrument for democratic decision-making was the variety of voices. Somehow, the common truth managed to emerge from under that chaotic pile of information and misinformation. A quest for objectivity was the result.

Many critics have questioned whether there is such a thing as "objectivity." Indeed, no human being can be truly objective; we can only *seek* objectivity and impartiality in the pursuit of truth. Journalists can try to keep their personal views out of the news, and they employ a number of techniques to do so, such as obtaining and quoting multiple sources and opposing views.

The question is whether the truth always serves the public. At times, the truth can do harm. If the truthful report of a small communal conflict in, say, Africa, leads to more civil unrest, is the public really being served? The journalistic purists—often those sitting in the comfortable chairs far from conflict—say it is not their job to "play God" in such

matters, and that one should not "shoot the messenger for the message." This is without a doubt the most troubling conundrum in journalism, and it forces fair-minded professionals (yes, they still exist) to a middle ground that might be termed "responsible restraint."

If, however, one takes the rigid view that the truth always needs to be controlled—or Lenin's dictum that truth is partisan—the door is wide open for enormous abuse, as history has demonstrated time and time again. It is this realization (and fear) that prompted Jefferson to utter that absurdity about the supreme importance of an uncensored press.

What Jefferson and the constitutional framers could not have foreseen, however, was how modern market forces would expand and exploit the simple concept of free expression. While media with meager resources in most developing countries are still struggling to keep governments from suppressing news that Westerners take for granted, the mass media in America, Britain, Germany and elsewhere are preoccupied with their role as profitable businesses and the task of securing a spot on tomorrow's electronic superhighway. In such an environment, truth in the service of the public seems almost a quaint anachronism.

Is the capitalist drive an inherent obstacle to good journalism? In one sense, the marketplace can be the ally, rather than the enemy of a strong, free media. For the public to believe what it reads, listens to and sees in the mass media, the "product" must be credible. Otherwise, the public will not buy the product, and the company will lose money. So, profitability and public services can go hand in hand. What a media company does with its money is the key. If it uses a significant portion of its profits to improve its newsgathering and marketing capabilities and eliminate dependence upon others for its survival (e.g. state subsidies, newsprint purchases, or access to printing facilities), the product improves, and the public is served. If it uses its profits primarily to make its owners rich, it might as well be selling toothpaste.

The assumption in this argument is that the public overwhelmingly wants to believe its news media, and that it will use this credible information to actively and reasonably conduct its public affairs. Unfortunately, that assumption is not as valid as it was in simpler times. In affluent societies today, media consumers are seeking more and more entertainment, and the news media's veracity (even its plausibility) is less important than its capacity to attract an audience. This trend is not lost on the big media conglomerates, such as Time-Warner, Disney/ABC and Rupert Murdoch's worldwide media empire. It is arguable that these companies have as much *created* the public demand for non-stop entertainment as they have tried to fill it.

The problem in many new democracies is that journalists who once had to toe the single-party line equate independence with opposition. Because they speak out against the government, they say they are independent. But haven't they just traded one affiliation for another? There is little room for unvarnished truth in a partisan press

But, you say, look at the new technology that can penetrate any censorship system in the world. Look at the choices people have today. Look at how accessible information is today. Yes, the choices may be larger, but a case can be made they are not deeper—that big money is replacing quality products and services with those of only the most massive appeal. The banquet table may be larger, but if it only contains "junk food," is there really more choice? Declining literacy, for example, is a real problem in the so-called developed world. That's one reason why newspapers are so worried about their future. But if panic sends the print media running to the Internet and cable television to serve the shortened attention span, it is difficult to see how literacy will be served.

Where is the relevance of all this to the emerging democracies around the world? Certainly the American experience, for all its messiness, provides a useful precedent, if not always a model.

For example, when one talks about an independent media, it is necessary to include financial independence as a prerequisite, in addition to political independence. The American revenue-earning model of heavy reliance on advertising is highly suspect in many former communist countries, but one has to weigh the alternatives. Are government and party subsidies less imprisoning? If journalists are so fearful of contamination by advertiser pressure, they can build internal walls between news and business functions, similar to those American newspapers erected earlier in this century.

If they are fearful of political contamination of the information-gathering process, they can build another wall separating the newsroom from the editorial department—another important concept in modern American journalism.

The problem in many new democracies is that journalists who once had to toe the single-party line equate independence with opposition. Because they speak out against the government, they say they are independent. But haven't they just traded one affiliation for another? There is little room for unvarnished truth in a partisan press.

Is objectivity a luxury in societies that have only recently begun to enjoy the freedom to voice their opinions? Listen to the comment of a Lithuanian newspaper editor shortly after his country gained its independence: "I want my readers to know what their heads are for." His readers were used to being told not only what to think *about,* but what to *think.* Democracy requires the public to make choices and decisions. This editor wanted to prepare citizens for that responsibility with articles that inform but do not pass judgment. His circulation increased.

(Reading 1)—continued

Though nearly 60 percent of the world's nations today are declared democracies—a monumental change from a mere decade ago—most of them nevertheless instituted press laws that prohibit reporting on a whole array of subjects ranging from the internal activity and operations of government to the private lives of leaders. Some of these are well-intentioned efforts to "preserve public stability." But all of them, *ALL* of them, undermine the concept of self-governance.

The watchdog role of the free press can often appear as mean-spirited. How do the government and public protect themselves from its excesses? In the United States, it is done in a variety of ways. One, for example, is the use of "ombudsmen." In this case, news organizations employ an in-house critic to hear public complaints and either publish or broadcast their judgments. Another is the creation of citizens' councils which sit to hear public complaints about the press and then issue verdicts, which, although not carrying the force of law, are aired widely.

Last, and most effective, is libel law. In the United States, a citizen can win a substantial monetary award from a news organization if libel is proven in a court of law. It is much harder for a public official or celebrity than an ordinary citizen to win a libel case against the press, because the courts have ruled that notoriety comes with being in the limelight. In most cases, the complaining notable must prove "malice aforethought."

There is nothing in the American constitution that says the press must be responsible and accountable. Those requirements were reserved for government. In a free-market democracy, the people—that is the voters and the buying public—ultimately decide as to how their press should act. If at least a semblance of truth-in-the-public-service does not remain a motivating force for the mass media of the future, neither free journalism nor true democracy has much hope, in my opinion.

The nature and use of new technology is not the essential problem. If true journalists are worried about their future in an age when everyone with a computer can call themselves journalists, then the profession has to demonstrate that it is special, that it offers something of real value and can prove it to the public. There is still a need today—perhaps more than ever—for identifying sense amidst the nonsense, for sifting the important from the trivial, and, yes, for telling the truth. Those goals still constitute the best mandate for a free press in a democracy.

UNIT I: FREEDOM OF SPEECH AND THE PRESS (Reading 2)

This reading is the first chapter of a book titled 'Make No Law: The Sullivan Case and the First Amendment." This case challenged the First Amendment in an exceptional way and established definitive protections for journalists when dealing with public figures.

Heed Their RISING Voices

It began in the most ordinary way. Late in the afternoon of March 23, 1960, John Murray went to *The New York Times* building on West Forty-third Street in New York to make arrangements for an advertisement in the paper. In the advertising department, on the second floor, he was introduced to a salesman named Gershon Aronson.

Aronson had worked for the *Times* for twenty-five years, and he was dedicated to the institution—"reverential," his daughter Judy said. One of his assignments now was to handle ads from organizations advocating some cause—editorial advertisements, as they were called. The *Times* carried a good many of them, some for far-out causes; every year or so Kim Il Sung, the Communist dictator of North Korea, used to take two full pages to praise his "dynamic revolutionary ideology" in small type. Aronson was sometimes tempted to tell people not to bother trying to push extreme views, but he resisted the temptation.

Murray wanted to reserve space, a full page, for an editorial advertisement. It was for an organization called the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The civil rights movement, with Dr. King as its most important leader, was challenging the rigid racial segregation that in 1960 still existed in the states of the Deep South, enforced by law and by violence. The latest phase of the struggle had begun just the previous month, when four black college students sat down at a Woolworth's lunch counter in Greensboro,

North Carolina, and asked to be served. When they were refused, they kept sitting there—and the sit-in movement spread quickly across the South. Dr. King immediately endorsed what the students were doing. Then, two weeks later, he faced a forbidding legal attack. An Alabama grand jury charged him with committing perjury, a felony, when he signed his 1956 and 1958 state tax returns. It was the first felony tax-evasion charge in Alabama history, and Dr. King feared that state officials were intent on finding some way to put him behind bars.

The committee was set up in New York to raise money for Dr. King and others under pressure in the South. Its officers included union leaders, ministers and such entertainment stars as Harry Belafonte, Sidney Poitier and Nat King Cole. John Murray was a volunteer worker at the committee. A playwright, he had helped to write the advertisement. That day, March 23, he was asked to take it down to the *Times* from the committee's office on 125th Street.

A full-page ad in the *Times* then cost a little over forty-eight hundred dollars. Murray said an advertising agency would handle the payment and send over a written order for the ad, but to save time he wanted the *Times* to go ahead and set the copy in type. He had a letter from the co-chairman of the committee, A. Philip Randolph, a great black leader who was president of the Brotherhood of Sleeping Car Porters, certifying that those shown as signers of the ad had given permission for the use of their names. All this was satisfactory to Aronson. He referred the ad to another *Times* department, advertising acceptability. The paper had a policy against fraudulent or deceptive advertising, and against "attacks of a personal character." (It was also on guard against smut, and policed movie advertising to keep out suggestive pictures.) The head of advertising acceptability, D. Vincent Redding, looked over the ad and approved it for publication.

The advertisement appeared in the paper of March 29, 1960. The headline, in large type, said "Heed Their Rising Voices." That phrase came from a *Times* editorial of March 19, which was quoted in the top right-hand corner of the ad: "The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable.... Let Congress heed their rising voices, for they will be heard." Then came ten paragraphs of text.

"As the whole world knows by now, the ad said, "thousands of Southern Negro are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution.... They are being met by an unprecedented wave of terror who would deny and negate that document...."

Some examples of racism in the South followed. The third paragraph said: "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Congress shall make no law ... abridging the freedom of speech, or of the press

The ad did not criticize anyone by name. It spoke, rather, of "Southern violators of the Constitution." It said they were "determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King Jr...." The sixth paragraph said: "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for ten years...."

Below the text were the names of sixty-four people, sponsors of the ad, among them Mrs. Eleanor Roosevelt and Jackie Robinson. Then came another list, introduced by the statement "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," with twenty more names, most of them of black ministers in the South. In the lower right-hand corner of the page there was a coupon for readers to send in with contributions. And readers responded. Within a short time the King defense committee had received contributions totaling many times the cost of the ad.

For John Murray, Gershon Aronson and the others involved in writing and printing the advertisement, that was the end of it. Or so they thought. No one could have guessed then that "Heed Their Rising Voices" would set off a profound struggle on an issue other than that of racial justice. No one could have guessed that the advertisement would test the right of Americans to speak and write freely about the state of their society. No one could have guessed that it would become a landmark of freedom. But that is what happened.

The advertisement was a beginning, not an end: the beginning of a great legal and political conflict. The conflict threatened the existence of *The New York Times.* It threatened the right of the press to report on tense social issues, and the right of the public to be informed about them. In the end, four years later, those threats were dispelled by a transforming judgment from the Supreme Court of the United States. The Court used to the full its extraordinary power to lay down the fundamental rules of our national life. It made clearer than ever that ours is an open society, whose citizens may say what they wish about those who temporarily govern them. The Court drew fresh meaning from those few disarmingly simple words written into the Constitution in 1791, in the First Amendment:

Congress shall make no law ... abridging the freedom of speech, or of the press.

James C. Goodale served as general counsel to The New York Times when the U.S. Supreme Court decided that the Times could continue to publish the then classified Pentagon Papers. In the following article, Goodale describes several Supreme Court cases in which First Amendment rights have been upheld, allowing the press to pursue its mission, no matter how odious that mission might seem to those in power. Goodale is an attorney with Debevoise & Plimpton, a New York law firm that specializes in First Amendment and communications law. Craig Bloom, an associate, assisted in the preparation of this article.

THE FIRST AMENDMENT & Freedom OF THE PRESS

By James C. Goodale

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom ... of the press." Although the First Amendment specifically mentions only the federal Congress, this provision now protects the press from all government, whether local, state or federal.

The founders of the United States enacted the First Amendment to distinguish their new government from that of England, which had long censored the press and prosecuted persons who dared to criticize the British Crown. As Supreme Court Justice Potter Stewart explained in a 1974 speech, the "primary purpose" of the First Amendment was "to create a fourth institution outside the government as an additional check on the three official branches" (the executive branch, the legislature and the judiciary.)

Justice Stewart cited several landmark cases in which the Supreme Court—the final arbiter of the meaning of the First Amendment—has upheld the right of the press to perform its function as a check on official power. One of these cases—the 1971 Pentagon Papers case—lies especially close to heart.

Back then I was general counsel to *The New York Times,* which had obtained a leaked copy of the classified Pentagon Papers, a top-secret history of the United States government's decision-making process regarding the war in Vietnam. After a careful review of the documents, we began to publish a series of articles about this often unflattering history, which suggested that the government had misled the American people about the war.

The day after our series began, we received a telegram from the U.S. attorney general warning us that our publication of the information violated the Espionage Law. The attorney general also claimed that further publication would cause "irreparable injury to the defense interests of the United States."

The government then took us to court, and convinced a judge to issue a temporary restraining order which prohibited the *Times* from continuing to publish the series. Following a whirlwind series of further hearings and appeals, we ended up before the Supreme Court two weeks later. The court ruled that our publication of the Pentagon Papers could continue. The court held that any prior restraint on publication "bear[s] a heavy presumption against its constitutional validity," and held that the government had failed to meet its heavy burden of showing a justification for the restraint in *New York Times Co. v. United States, 403 U.S. 713 (1971).* We immediately resumed our publication of the series, and we eventually won a Pulitzer Prize, the profession's highest honor, for the public service we performed by publishing our reports.

Seven years before the Pentagon Papers case, the Supreme Court handed *The New York Times* another landmark First Amendment victory, this time in the seminal libel case *New York Times v. Sullivan, 376 U.S. 254 (1964).* This action was brought by an elected official who supervised the Montgomery, Alabama police force during the height of the civil rights movement in the 1960s. The official claimed that he was defamed by a full-page advertisement, published in the *Times,* that accused the police of mistreating non-violent protestors and harassing one of the leading figures in the civil rights movement, the Rev. Martin Luther King.

The Supreme Court found that even though some of the statements in the advertisement were false, the First Amendment nevertheless protected the *Times* from the official's suit. The court considered the case "against the background of a profound national commitment to the principle that

debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." In light of this commitment, the court adopted the rule that a public official may not recover damages for a defamatory falsehood related to his official conduct "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The court later extended this rule beyond "public officials" to cover libel suits brought by all "public figures." *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker, 388 U.S. 130 (1967).*

Although the *Sullivan* case is best known for the "actual malice" rule, the Supreme Court's decision included a second holding of great importance to the press. Noting that the challenged advertisement attacked the police generally, but not the official specifically, the court held that an otherwise impersonal attack on governmental operations could not be considered a libel of the official who was responsible for the operations.

The First Amendment also protects the right to parody public figures, even when such parodies are "outrageous," and even when they cause their targets severe emotional distress. In *Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988),* the court considered an action for "intentional infliction of emotional distress" brought by Jerry Falwell—a well-known conservative minister who was an active commentator on political issues—against Larry Flynt, the publisher of Hustler, a sexually explicit magazine. (This case figures prominently in the critically acclaimed film "The People vs. Larry Flynt," which opened in the United States in late 1996.)

The *Hustler* case arose from a parody of a series of Campari liqueur advertisements in which celebrities spoke about their "first times" drinking the liqueur. The *Hustler* magazine parody, titled "Jerry Falwell talks about his first time," contained an alleged "interview" in which Falwell stated that this "first time" was during a drunken, incestuous encounter with his mother in an outhouse. The parody also suggested that Falwell preached only when he was drunk.

The Supreme Court held that the First Amendment barred Falwell's contention that a publisher should be held liable for an "outrageous" satire about a public figure. The court noted that throughout American history, "graphic depictions and satirical cartoons have played a prominent role in public and political debate."

The founders of the United States enacted the First Amendment to distinguish their new government from that of England, which had long censored the press and prosecuted persons who dared to criticize the British Crown

Although the Supreme Court opined that the *Hustler* parody at issue bore little relation to traditional political cartoons, it nonetheless found that Falwell's proposed "outrageousness" test offered no principled standard to distinguish between them as a matter of law. The court emphasized the need to provide the press with sufficient "breathing space" to exercise its First Amendment freedom. The court added that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."

The protection of the First Amendment extends beyond press reports concerning major government policies and well-known public figures. The Supreme Court has held that if the press "lawfully obtains truthful information about a matter of public significance then [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order," *Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).*

Applying this principle, the Supreme Court has employed the First Amendment to strike down state laws which threatened to punish the press for reporting the following: information regarding confidential judicial misconduct hearings, *Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978);* the names of rape victims, *Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975);* and the names of alleged juvenile offenders, *Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).* The court also struck down a law which made it a crime for a newspaper to carry an election day editorial urging voters to support a proposal on the ballot, *Mills v. Alabama, 384 U.S. 214 (1966).*

The First Amendment also prevents the government from telling the press what it must report. In *Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974),* the Supreme Court considered whether a state statute could grant a political candidate a

right to equal space to reply to a newspaper's criticism and attacks on his record. The court struck down the law, holding that the First Amendment forbids the compelled publication of material that a newspaper does not want to publish. The court held that the statute would burden the press by diverting its resources away from the publication of material it wished to print, and would impermissibly intrude into the functions of editors.

The Supreme Court has not, however, afforded similar protection to the broadcast media. In a pre-*Tornillo* case, *Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969),* the Supreme Court upheld a Federal Communications Commission rule that required broadcasters to provide a right of reply under certain circumstances. The court justified this regulation by citing the scarcity of the broadcast spectrum and the government's role in allocating frequencies.

Today, the scarcity problem is much reduced in light of technological advances in the division of the spectrum, and the rise of new media outlets such as cable television and the Internet. Although many issues regarding the reach of the First Amendment to these new media remain unresolved, First Amendment advocates hope to convince the Supreme Court to provide these media with the highest level of First Amendment protection.

Although the First Amendment generally prevents the government from restraining or punishing the press, the First Amendment usually does not require the government to furnish information to the press. However, the federal government and the state governments have passed freedom of information and open meetings laws which provide the press with a statutory right to obtain certain information and to observe many of the operations of government. In addition, the First Amendment does furnish the press with the right to attend most judicial proceedings.

The First Amendment also provides journalists with a limited privilege not to disclose their sources or information to litigants who seek to use that information in court. In *Branzburg v. Hayes, 408 U.S. 665 (1972),* the Supreme Court held that reporters did not have a privilege to refuse to answer a grand jury's questions that directly related to criminal conduct that the journalists observed and wrote about.

However, the court's opinion noted that news gathering does have First Amendment protections, and many lower courts have applied a qualified First Amendment privilege to situations in which the need for the journalist's information was less compelling than in *Branzburg.* These courts require litigants to prove that the material sought is relevant to their claim, necessary to the maintenance of the claim, and unavailable from other sources. In addition, more than half of the states have adopted statutes called "Shield Laws," which provide a similar privilege to journalists.

Although the press normally must obey generally applicable laws, the First Amendment prevents the government from enforcing laws which discriminate against the press. For example, the court has struck down a law which imposed a special tax on large newspapers, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983),* and a law which imposed a tax on some magazines but not others based on their subject matter, *Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).*

As the cases discussed above illustrate, over the course of the 20th century the Supreme Court has breathed life into the text of the First Amendment by upholding the right of the press to pursue its mission, no matter how odious that mission might seem to those in power. The courts have imposed some limits on this liberty, and questions remain as to how far this liberty will extend to new media, and to some of the more aggressive efforts employed by journalists to obtain the news. Still, I am confident that the Supreme Court will continue to recognize that, as Justice Stewart wrote in the Pentagon Papers case, "without an informed and free press there cannot be an enlightened people."

. . . over the course of the 20th century the Supreme Court has breathed life into the text of the First Amendment by upholding the right of the press to pursue its mission, no matter how odious that mission might seem to those in power

Longtime defender of the First Amendment Nat Hentoff takes to task those who would erode the amendment's protections when it serves their interests but stand by its assertions when they don't like the speech or press it protects.

Fair-Weather Friends of the First Amendment

By Nat Hentoff

Of all the Supreme Court justices, William O. Douglas was the most passionate and unequivocal defender of the First Amendment. In 1951, he said: "Very few Americans have ever actually been willing to grant [First Amendment] freedoms respecting either political or aesthetic matters that they dislike or believe fraught with danger to the general welfare."

So it has always been from the time of the Alien and Sedition Acts of 1798 to the present. In recent months at Cornell University, black students have twice stolen copies of The Cornell Review, a conservative campus paper, and burned them in public celebrations.

The dean of students told me approvingly that those actions were, after all, simply the exercise of free expression by students critical of the paper. But, somehow, the Framers of the Constitution neglected to include theft and arson as protected speech under the First Amendment.

Meanwhile, there is rising censorship of high school newspapers by principals and school boards—as documented regularly in the Student Press Law Center Report (1101 Wilson Blvd., Suite 1910, Arlington, VA 22209). The Center provides free legal advice to beleaguered student editors, and calls have increased by a third in the past year—coming from all fifty states. In Texas, school administrators "pulled a story about the formation of a gay and lesbian support group for students on campus from the front page of the school's student newspaper in May 1998," the Report notes.

There is also a continuing, very often successful attempt to remove books from classes and libraries in public schools. Huckleberry Finn is the most frequent target because the word "nigger" appears in many parts of the book. Mark Twain used the word to illuminate the pervasiveness of racism in the time and place of his novel. Except for Huck, the only person of integrity in the novel is a black man, Jim.

There is good news, however. The clearest and strongest federal court opinion protecting the First Amendment rights of teachers to assign controversial books has just come down from the Ninth Circuit Court of Appeals.

Writing for the three-judge panel that heard a case involving censorship of Huckleberry Finn, Judge Stephen Reinhardt first made an essential point that is often overlooked in all kinds of censorship cases: "The right to receive information is a corollary of the rights of free speech and press because the right to distribute information protects the right to receive it." When Justice William Brennan made the same point years ago, he was mocked by some of his brethren (no women were on the court then) who claimed the First Amendment says nothing about the right to receive information.

In the current case, Kathy Monteiro v. The Tempe Union (Arizona) High School District, Judge Reinhardt went on to emphasize "the students' rights to receive a broad range of information so that they can freely form their own thoughts.... It is important for young people to ... discover both the good and the bad in our history.... It is simply not the role of the courts to serve as literary censors or to make judgments as to whether reading particular books does students more harm than good."

In years of visiting high schools around the country, I have found that just about the only students who have a clear and ardent understanding of the First Amendment are the high school journalists who fought for their free rights. Mark Goodman, director of the Student Press Law Center, emphasizes: "For most high school journalists, their attitude about the media and the importance we place on press freedom will be fundamentally shaped by experiences that end the day they graduate from high school."

Having also taught in a number of colleges, I can attest that far too many college students are ignorant of the score and depth of the First Amendment.

Only recently has a book been published that documents how pervasively and cynically the Bill of Rights, including the First Amendment, has been subverted on college campuses—including at the most prestigious schools.

This documented indictment is The Shadow University, by Alan Charles Kors and Harvey Silverglate (The Free Press). Included in the book is a memorandum to

all faculty at the University of Minnesota suggesting that a "Classroom Climate Adviser be invited to scrutinize those classes where a student feels that a classroom discussion about race or gender was disrespectful or insulting."

George Orwell lives!

The right to be offensive—in any of the limitless meanings of that term—continues to be in danger also on the Internet. Although the Supreme Court unanimously rejected the Communications Decency Act in 1996 as an assault on the First Amendment, Congress has now passed the Child On-Line Protection Act, which Bill Clinton signed into law.

The Communications Decency Act was struck down because it would have lowered the permissible standard of expression on the Internet to material suitable—that is, not "indecent"—for children. The new law makes it a crime—as the American Booksellers Foundation for Free Expression points out—"for any commercial web site to distribute to a minor material that is 'harmful' to minors.' " Since any material that is posted on the web can be accessed by minors, this means that an on-line bookstore could be prosecuted for merely displaying a book excerpt—or pictures of a book jacket—that could be judged "harmful to minors."

If former Surgeon General C. Everett Koop's specific recommendations for preventing AIDS were placed on the Internet under the new law, those responsible could be fined up to $50,000 for each day of violation and sent to prison for up to six months for "knowingly" communicating for "commercial purposes" material judged "harmful to minors."

Although Congress is so often a visible enemy of free expression, a new array of more subtle devaluers of the First Amendment has been emerging in recent years. Floyd Abrams, a leading paladin of free expression in arguments before the Supreme Court, cited some of them in an article in a 1997 issue of the Columbia Journalism Review, "Look Who's Trashing the First Amendment."

Abrams cited Yale Law School professor Owen Fiss as one of the more prominent trimmers of the First Amendment among teachers of the Constitution. "To serve the ultimate purpose of the First Amendment, Professor Fiss has written, 'we may sometimes find it necessary to restrict speech of some elements of our society in order to enhance the relative voice of others.' "

In the current case ... Judge Reinhardt went on to emphasize "the students' rights to receive a broad range of information so that they can freely form their own thoughts.... It is important for young people to ... discover both the good and the bad in our history.... It is simply not the role of the courts to serve as literary censors or to make judgments as to whether reading particular books does students more harm than good."

Fiss was talking about the need to restrict expenditures in political campaigns, but consider the slippery slope his recommendation invites.

It is the power of government to regulate speech, after all, that the First Amendment protects us against.

Another law professor who appears frequently in The New Republic, The New York Times, and other nonconservative publications as an advocate of reducing the power of the First Amendment is Cass Sunstein of the University of Chicago. Floyd Abrams notes with alarm that according to this much-respected constitutional expert, "The government should ... be permitted to require the news media to provide a 'right to reply to dissenting views ... and to impose in public universities significant limitations on "hate speech" on campus.' "

If there is a mandated right to reply to the press, who will administer that right? The government, of course. So the governmental decision to tell an editor what to print—an action hitherto forbidden by the First Amendment—could well be a political decision to favor the incumbent government.

Similarly, many liberals have been urging that television networks give free time during political campaigns to reduce the huge percentage of campaign expenditures that goes to television. There again, however, it would be the government determining what goes on the air by implementing the "free time" provisions.

As William O. Douglas foresaw, once the camel gets its nose under the tent (his expression) there will be more government edicts against television programs. There already are some—none of which could be imposed on the print press. But since there isn't a hamlet in the United States that doesn't have more television channels than newspapers, the old "scarcity doctrine"—which allowed government restrictions on television—no longer applies. Newspapers, alas, are now scarcer than television channels.

The First Amendment should protect the independence of television, which should not be forced to provide free time for political candidates.

I expect that if a poll were taken on

whether there should be a legal right to reply to newspapers or television, a large majority of the population would agree. The concept of free television during political campaigns would also enjoy popular support. What this reveals is how little most Americans understand about the fundamental necessity of keeping government out of the business of regulating expression.

It was Chief Justice Warren Burger—hardly a noted champion of the First Amendment—who made clear in Miami Herald v. Tornillo (1974) that the First Amendment forbids government "intrusion into the function of editors."

And it was Justice William Brennan—who for years wrote majority opinions, however narrow, saying that "obscenity" was not protected speech—who finally said he could no longer discern a rationale for keeping so subjective a concept as "obscenity" outside the pale of the First Amendment.

As William O. Douglas put it, "There are as many definitions of obscenity as there are men, and they are as unique to the individual as his dreams.... Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment."

How many Americans agree with William O. Douglas? Do you?

In liberal college communities—like Cornell—there was no protest from the left or from the faculty when conservative student papers were stolen and destroyed. Meanwhile, elsewhere in the country, there are continuous calls from the right for censoring schoolbooks and books in public libraries. Brothers and sisters under the skin.

Justice William Brennan was essentially an optimist, basing his faith in an evolving Constitution.

Accordingly, for instance, he was sure that eventually we would become sufficiently civilized to put an end to the death penalty.

He was worried, however, about the extent to which the First Amendment was part of most people's true beliefs. Or, as he said to me one day, "For how many Americans do the words of the First Amendment come off the page and into their lives?"

Think of the people you know. How many do agree, as Oliver Wendell Holmes said, that the only useful test of whether someone believes in the First Amendment is whether he or she would vigorously protect the views of the people they hate?

Would you?

UNIT I: FREEDOM OF SPEECH AND THE PRESS — (Reading 5)

This brief article summarizes the findings of a survey that evaluated how Americans feel about the First Amendment. The findings—surprisingly?—indicate that citizens are less concerned about these rights and protections than, perhaps, they should be.

Who's Against Free Speech?

Should a person be allowed to make a speech against religion? Fewer than two-thirds of elderly Americans think so. And should a book most people disapprove of be kept out of a public library? A majority of Americans aged 55 and older say that it should. So do a majority of nonwhite and Hispanic Americans, those with a high school diploma or less, and those whose annual household income is $30,000 or less.

The right to free speech may be enshrined in the Bill of Rights, but a lot of Americans still think it's a bad idea. Support for free speech increases with education and income, according to the 1996 National Household Education Survey. But it decreases with age: 88 percent of U.S. adults aged 18 to 39 would grant atheists the right to speak, compared with 86 percent of those aged 40 to 54, 77 percent of those aged 55 to 69, and 64 percent of those aged 70 and older.

Free speech disturbs us more when it's in print and circulating to the public. A startling 73 percent of U.S. high school dropouts would ban a library book if most people disapproved of it, and so would 52 percent of adults with only a high school diploma. College is where those attitudes change. Only 39 percent of adults with some college experience would ban unpopular books from libraries, and only 24 percent of those with a bachelor's degree would do so.

Free speech in the U.S. is threatened by the have-nots and protected by the haves. Only 31 percent of adults with household incomes of $50,000 or more would ban unpopular books from libraries, compared with 60 percent of those earning $15,000 or less.

Those born in the United States are definitively U.S. citizens. But do the privileges and protections of the Constitution apply from "first breath," or do some kick in later in life? This article enters the fray of the ongoing controversy over student press rights, an issue that is still young and anything but clear.

Students' First Amendment Rights

Now the wait: 6th Circuit judges hear Kentucky State Univ. censorship case

Judge to students: "Your constitutional arguments are not persuasive"

By Mike Lebowitz

CINCINNATI—New battle lines were drawn in the war over whether college administrators can legally silence certain forms of student expression in a small courtroom in Cincinnati Thursday.

The case, *Kincaid v. Gibson,* which has been fought all the way to the U.S. Court of Appeals for the 6th Circuit, was argued by the two sides' lawyers who each had 15 minutes to jockey their positions to the three justices.

Media advocates dubbed it the "college *Hazelwood* case" after a lower court judge ruled that the 1988 Supreme Court decision, *Hazelwood School District v. Kuhlmeier,* which allows for much greater censorship of student publications in high schools, could be extended to colleges.

The case originated after two Kentucky State University students filed a lawsuit against the school after an administrator, Betty Gibson, claimed that the yearbook displayed a "lack of quality," and prohibited the publication from being distributed.

Arguing on behalf of the students, attorney Bruce Orwin argued that the KSU administrator violated the yearbook staff's First Amendment rights when she denied the yearbook's release due to content reasons.

"The yearbook was titled 'Destiny Unknown,' " he explained to the justices. "There was nothing bad about it—it was just about students. It was a style decision by the editor who utilized the authority delegated to her."

But Judge James Ryan appeared disinterested in the constitutionality of the case, as he pressed both lawyers instead about the differences between "content" and "viewpoint" discrimination.

"Your constitutional arguments are not persuasive," Ryan told Orwin.

But Orwin, waving a copy of a KSU handbook, said the school's own rules give control over publishing the student newspaper and yearbook to the student editors, not to administrators.

Ryan seemed skeptical.

"I can't believe that book says the university was going to hand over the yearbook to a student editor ... saying 'This is your baby, do with it whatever you want,' " Ryan said.

Meanwhile, J. Guthrie True, the attorney representing Kentucky State, stuck with the argument that the yearbook debate had nothing to do with the First Amendment. KSU only seized the book to prevent its poor quality from embarrassing the school, he said. He claimed the yearbook was not a public forum, which he said put the university-funded publication under the school's control.

"This is a government sponsored publication by a government sponsored university,"

he said. "The yearbook was withheld simply because they did a poor job which looks poorly on the university. It came in half the size (of previous yearbooks), with half the photos. The yearbook had poor photos and poor headlines. The university has the right to exercise reasonable control of the yearbook."

Orwin used his remaining time to tell the judges that the fate of not only yearbooks, but college journalism everywhere was hanging on their decision.

"If you affirm the decision of the lower court ... it will destroy the student press," he said.

Orwin added that a simple disclaimer stating the student newspaper and yearbook's position as a public forum would solve the problem.

After the hearing, Orwin professed his and many other people's belief that this case goes way beyond Kentucky State.

"Any and all activities on campus can be affected," he said. "Where's the limit? Every student publication will be fighting this war."

If the 1988 *Hazelwood* decision, which effectively legalized censorship of most school-sponsored high school publications, is incorporated into colleges, Orwin said student-run literary magazines, theater, English departments would be susceptible to censorship along with newspapers and yearbooks.

"*Hazelwood* is for high school students with limited maturity," he told the judges.

Laura Cullen, the former adviser of student publications at Kentucky State who attended the hearing, acknowledged that a personal dispute between herself and Betty Gibson, the Kentucky State vice president who ordered the yearbooks be locked up, may have been the catalyst that resulted in the seizure.

"I think it started out that way," Cullen said. "But now I think it's blown up into something bigger."

Cullen said she referred Gibson's request to censor a controversial letter to run in the student newspaper to the editor, who allowed its publication. Immediately after the letter ran, Cullen was removed from her advising position and was given the new job of distributing dorm room keys. Soon after, the publication of the yearbook was prohibited.

"It's all politics," Cullen said. "These administrators don't understand how hard these students work for their publications. So what if there are no cutlines (under the yearbook photos)?"

Although Cullen admitted the yearbook wasn't perfect, she stayed with her belief that the First Amendment was violated.

"It wasn't great and won't win any awards, but it was a good effort and the students learned from it," she said. "Once you create a publication, it is hands off from the university unless it is libelous or is an imminent disruption or obscene."

Cullen added that "the word will get out" if the students lose their appeal.

Other student media advocates in the 6th Circuit, which includes the university-rich states of Ohio, Michigan, Kentucky and Tennessee are openly siding with the students. Seventeen college journalism departments signed onto three friend-of-the-court briefs.

Dale Harrison, a journalism professor and student newspaper adviser at Youngstown State University in Ohio, said he made the nearly five-hour drive to attend the hearing out of a combination of fear and interest over the case.

"I have been watching this case very closely and am very concerned at this point," he said.

Harrison added that it was hard to tell how the justices will rule after watching the hearing.

"I'm scared," he said.

A decision is expected to be issued by the court within about the next six months.

'Any and all activities on campus can be affected,' he said. ***'Where's the limit? Every student publication will be fighting this war.'***

While artistic expression generally falls under the realm of "free speech," there have been numerous attempts by local, state and federal governments to restrict or "monitor" these expressions, often by well-intended citizens who are supporters of the arts. This article discusses numerous and varied examples of censorship.

Artistic Repression in America

By Barbara Dority

My first "Civil Liberties Watch" column, which appeared in the September/October 1990 Humanist, was entitled "The War on Rock and Rap Music." It is, of course, a personal shock to realize that this was more than eight and a half years ago. But the greater offense is that, since that time, censorship of art in popular culture has not declined; it has intensified and expanded.

Whatever their medium or message and regardless of whether their content is unpopular or upsets some people or is of poor quality, artistic creations are protected by the First and Fourteenth Amendments to the United States Constitution. The First Amendment mandates that "Congress shall make no law ... abridging the freedom of speech, or of the press," while the Fourteenth Amendment extends that prohibition to state and local governments.

The government must maintain a "content neutrality" position regarding expression; it cannot limit expression just because any one person—or even the majority of a community—is offended by its content. In the context of art and entertainment, this means tolerating some works that we might find offensive, insulting, outrageous, or just plain bad.

The U.S. Supreme Court has interpreted the First Amendment's protection of artistic expression very broadly. It extends not only to books, theatrical works, and paintings but also to posters, television, music videos, comic books, and many other venues. Essentially, protection is granted to anything the human creative impulse produces, including nonverbal expression such as wearing a symbol on one's clothing, dancing (including erotic and nude dancing), or participating in a silent candlelight vigil.

Many pro-censorship activists claim that only repression of expression by government entities constitutes censorship. Most civil libertarians don't share this view, maintaining that, when private pressure groups succeed in their efforts to limit or bar access to certain forms of expression, censorship has occurred.

Like other forms of expression, protection of the artistic process as a fundamental aspect of free speech rights is tested only when a particular work hits a raw nerve. Art that doesn't confront is rarely challenged. And ideas that don't provoke people have little need for protection.

Although attacks on the fine arts are certainly a problem, a much more virulent strain of censorship plagues art in U.S. popular culture. About a quarter of reported challenges include attempts to restrict commercial television, movies, and music, as well as photographs and films used in advertisements.

The American entertainment industry has been the center of a vast censorship controversy for at least twenty years. Religious political extremists, presidential candidates, government officials, and others continue to accuse Hollywood leaders of having "sold their souls" by working to "debase our nation and threaten our children." During the past eight years, the sponsors of more than 150 prime-time television programs have been targeted by pressure groups claiming the advertisers are sponsoring programs that contain anti-Christian themes, profanity, sex, and violence and that "promote" homosexuality.

Many questions immediately come to mind. Is there "good violence" and "bad violence"? If so, who decides? Sports and news are at least as violent as fiction—from the fights that erupt during televised hockey games to the videotaped beating of Rodney King by a gang of Los Angeles police officers, which was shown repeatedly on prime-time television all over the world.

If we are disturbed by images of violence or sex—or anything else—we can change the channel, turn off the TV, or decline to go to certain movies or museum exhibits. We can also exercise our own free speech rights by voicing our objections to forms of expression we don't like.

Supreme Court Justice Louis Brandeis said that the remedy for messages we disagree with or dislike in art, entertainment, or politics is "more speech, not enforced silence." This is as true today as it was when the justice said it in 1927.

In 1991 and 1992, threats to video and music stores began to increase; five stores in Nebraska were prosecuted for selling a rap music album. The Justice Department continues its use of "multiple prosecution" strategy to force book and film distributors to stop selling all sexually oriented material.

Where is most censorship of art taking place? In some pretty surprising places, like on college campuses—places seen as arenas

where free expression and respect for ideas and creativity are highly prized. The campuses of U.S. colleges and universities are settings for roughly one out of five art censorship incidents. Increasingly, students are seeking the removal of art that offends them.

A great deal of art censorship is also happening in public spaces, such a city halls and libraries. Objections to sexual material and religious content in art installed in such locations are greatly amplified because they are so highly public and displayed in such prominent locations. And hundreds of works of literature—from Maya Angelou's I Know Why the Caged Bird Sings to John Steinbeck's Grapes of Wrath—have been banned from public school libraries based on their "sexual content." The list of challenged and censored books in public schools has now grown into a book itself.

As Americans live more of their lives in shared spaces, such as office buildings, campuses, public parks, and other community facilities, conflicts will continue as individuals attempt to assert some measure of control over a rapidly changing social and cultural environment. Art censorship is a popular tool across the political spectrum, with both liberal and conservative groups using attacks on art to advance their agendas. Reflecting this trend, many attacks on art address specific political issues. Among the wide range of targeted themes are racial and ethnic conflicts, abortion, the U.S. flag, and police brutality.

The banning of visual and theater arts that depict nudity is also increasing. Nudity is being edited out of films by cable television stations, paintings of nudes are being excluded from art exhibits, and theatrical works that include nudity have been banned or altered across the country.

Artists are feeling pressure from government funding agencies to steer clear completely of art that deals with issues of gender and sexuality. Next in frequency of attack is art with "anti-religious content," then homosexual content, then content alleged to be "sexually harassing."

In Iowa several years ago, a high-school theater production of Agnes of God was canceled when school officials decided it might be offensive to Catholics. And in Homer, Alaska, a painting exhibited at a local post office came under attack as "satanic" and "demonic" because it includes pyramids. Post Office officials, reluctant to enter a controversy, simply took it down.

In the late 1980s, the Republican congressional leadership began a campaign to eliminate three U.S. cultural agencies: the National Endowment for the Arts, the National Endowment for the Humanities, and the Corporation for Public Broadcasting (which helps fund public TV and radio). As a result of these attacks, Congress changed the law in 1990 to require that all artwork even partially funded by the NEA comply with "general standards of decency," a restriction the Supreme Court let stand on June 25, 1998.

In this climate, we can be sure that hidden and unacknowledged compromises are being made by artists themselves. Those who have had works challenged or whose work addresses controversial issues are routinely censoring their own artistic impulses. Although most self-censorship never comes to public light, I strongly suspect that the greatest tragedy of these censorship campaigns is the art that is never produced.

I should at least mention briefly the issue of art in cyberspace. Although the Supreme Court declared it unconstitutional last year, the Communications Decency Act, which sought to impose wide-ranging censorship on the Internet, has been followed by many other national and state attempts to impose similar restrictions.

With technologies constantly advancing—the Internet is just one example—art and the ideas artists seek to communicate are more readily accessible to many more people. So it isn't surprising that there are those who seek to limit such means of communication, arguing that all such expression must be restricted to what is acceptable to all and to children in particular.

Art in a free society is much more than a diversion. It enlightens, educates, identifies societal problems, and raises awareness. Each challenge to the freedom of artistic expression sends a terrible message, particularly to young people: the way to address "disagreeable" speech is to squelch it, demand its removal, deny its funding, or cover it up.

Art is humanity's search for truth and self-awareness. The products of that search include art that confronts preconceptions and stimulates the impulse to censor.

But a free society is based on the principle that every individual has the right to decide what art or entertainment he or she wants—or doesn't want—to receive or create. When the human creative spirit is not free, the infectious disease of censorship threatens us all.

Art is humanity's search for truth and self-awareness. The products of that search include art that confronts preconceptions and stimulates the impulse to censor

Barbara Dority is president of Humanists of Washington, executive director of the Washington Coalition Against Censorship, and cochair of the Northwest Feminist Anti-Censorship Task Force.

This article takes the position that often those who defend First Amendment rights are doing so due to self-interest. The writer provides examples of two recent incidents of self-censorship in the artistic community, one of which was defended by this community and and one of which was endorsed.

Two Recent Debates Reveal Defense of First Amendment Rights Is Conditional

By Paul Hodgins

That constitutional lightning rod, the First Amendment, has been attracting white-hot strikes from contrasting quarters recently. Two high-profile controversies hint that our tolerance for free expression depends, to a distressing degree, on issues that have nothing to do with the Constitution.

In New York, Terrence McNally's new play about a contemporary, homosexual Christ-like figure, "Corpus Christi," was withdrawn from the Manhattan Theatre Club's 1998-99 season after threats of violence were made against the theater last spring.

Prominent theater artists protested, including playwrights Athol Fugard (who withdrew his play, "The Captain's Tiger," from MTC's season), Tony Kushner and Edward Albee. After loud public discussions about the sanctity of First Amendment rights and the bullying tactics of the religious right, the play was reinstated in the theater's lineup. It opened last month to mildly positive reviews—and only muted protest.

In Los Angeles, a new fall UPN sitcom also generated a blizzard of debate about free expression, but this time the tone of the discussion was noticeably more uncertain.

Critics and the public seem to agree that "The Secret Diary of Desmond Pfeiffer," about a black servant-adviser in the Lincoln White House, is an ill-conceived, unwatchable failure. But the lowbrow comedy also generated a lively debate between First Amendment defenders and the black community.

"'Desmond Pfeiffer' is the latest and most absurd addition to the long list of network assassinations of the black image," Earl Ofari Hutchinson wrote in the Los Angeles Times. "But this time we must say enough is enough and tell UPN that this is one diary that should permanently stay secret to viewers."

Protests were organized in front of Paramount Studios, which produced the show; Jesse Jackson attended. Candymaker Mars Inc. pulled its ads. The Los Angeles City Council ordered a review by the Human Relations Commission.

Free-speech champions were less vociferous this time around. And recognizable artists from any discipline were glaringly absent from their ranks. Our constitution was protected, in this case, by First Amendment professionals—the National Campaign for the Freedom of Expression and other organizations that routinely police American society for signs of censorship.

The incidents, and their very different results, beg obvious observations:

—A huge load of hypocrisy lurks behind the contrasting tenors of defense between "Desmond Pfeiffer" and "Corpus Christi." The arts community feels comfortable defending First Amendment rights when its foe is the political and religious right.

—There's a double standard in the artist community concerning First Amendment worthiness. Work by acknowledged masters that comes under threat of censorship always draws the big guns into the battlefield of public debate. A dismissable effort by a group of unknowns is inherently less defensible. Why stick your neck out for a bunch of backroom nobodies penning a feeble sitcom that will be forgotten by midseason?

—American society's rapidly rising level of political correctness has turned almost every thought-provoking artistic endeavor into a walk through a minefield.

A generation ago, the groundbreaking situation comedy "All in the Family" made TV history by deliberately confronting us with sensitive issues, boldly placing half of the dialectic in the mouth of a white, middle-age, working-class bigot. It's hard to imagine any major network green-lighting such provocativeness in a post-"Seinfeld" era where almost every new sitcom, it seems, aspires to be about nothing.

"This isn't the best time for America to be laughing at ourselves," "All in the Family" creator Norman Lear said recently. "I think political satire thrives much more at a time when we're in a mood to laugh at ourselves. The degree of political correctness has just gotten terrible."

Perhaps Lear has hit on the underlying problem. Americans' moral-ethical antennae are hypersensitized. First Amendment issues take on huge importance, and insults, real and perceived, are instantly magnified to the size of national crises because there's nothing truly terrible to worry about right now.

Sure, there's a philanderer in the White House, and the bullish economy of the last half-decade is starting to wobble. But think about "All in the Family's" era: Tricky Dick was in his first term, a costly and unpopular war raged in Southeast Asia, college campuses were ablaze with protest, and the sexual revolution was in full swing. We needed to unflinchingly examine ourselves and our rapidly changing society, take a deep breath—and yes, chuckle a little.

Thankfully, our era doesn't require such moments of painful national reassessment. Comparatively speaking, American society is much more stable now than it was then.

But in light of the "Desmond Pfeiffer" and "Corpus Christi" debates, it's clear that late-'90s America is a poorer society in two respects. Our constitutional altruism is fading, and we've lost our sense of tolerance.

The First Amendment is defended only selectively, indeed is often undermined in spirit, by those who should most vocally defend it. Self-interest too often and too easily pulls at our moral compass.

And nobody is allowed to experiment, to stumble, to make a joke anymore without getting wrist-slapped for stepping off the narrow path of political correctness. We've donned straitjackets of our own making—and we're all getting testier by the minute.

The Supreme Court rules that online speech, sexually explicit or no, is protected. So now what?

On the Net, Anything Goes

By Steven Levy

Born of a hysteria triggered by a genuine problem—the ease with which wired-up teenagers can get hold of nasty pictures on the Internet—the Communications Decency Act (CDA) was never really destined to be a companion piece to the Bill of Rights. Last week the Supreme Court officially deleted the CDA on constitutional grounds, concluding that the act endangers free speech and "threatens to torch a large segment of the Internet community."

The decision had resonance far beyond dirty pictures. This was the first time that the highest court had contemplated the status of the key medium of the next century. Instead of regarding the Net with the caution the court usually shows while exploring new frontiers, the justices went out of their way to assure that this most democratic of mediums (where "any person ... can become a town crier ... [or] pamphleteer," the court gushed) would receive the highest level of protection. Internet speakers will not be shackled with the regulations that limit content on television and radio; instead, they will enjoy the freedom granted to printed matter. And it will be up to parents, not the government, to keep kids from accessing smut. "This represents the legal birth certificate for the Internet," said Bruce Ennis, who argued the case before the court, representing a group of plaintiffs ranging from the American Library Association to Human Rights Watch.

In contrast, the CDA was a virtual death sentence. Introduced by (now retired) Sen. James Exon, without hearings or formal debate, the amendment to the 1996 Telecommunications Bill not only outlawed the electronic circulation to minors of "indecent" material (in the legal sense, this includes everything from nude photos of Pamela Lee Anderson to a stray four-letter epithet); it also ordained big fines and two years upriver to those who spoke out of turn. Opponents insisted that this trespassed on the First Amendment, and a year ago they convinced a three-judge panel in Philadelphia that the lawmakers had overstepped their bounds. As ACLU lead attorney Chris Hansen sees it, the key was requesting that the judges hear expert witnesses on the issues. By the end of the hearing the judges had attained near-ninja Internet knowledge—which taught them the impossibility of keeping smut from minors without infringing on all speech.

The highest court proved equally adept students. John Paul Stevens's opinion reads like a cyberspace primer, providing the Lexis crowd with crisp definitions of e-mail, chat rooms, mail exploders and the World Wide Web. Reading this must have set the plaintiffs' hearts aflutter, because in order to see how the CDA steps on the First Amendment, it is crucial to understand how the Internet works. Congress proceeded on the reasonable premise that it should be wrong to send smut to minors. But it is impossible to fully control who sees information posted on the Net. And in the Philadelphia hearings, witnesses proved that material outlawed went far beyond smut: it included AIDS information, Pulitzer Prize-winning plays, museum exhibits and, according to a government witness, the Vanity Fair cover showing a pregnant Demi Moore.

If there was alarm in the court's response, it was not at the prospect of pimply adolescents exposed to Hustler's Web site, but at other sorts of scenarios, like a parent going to jail for sending birth-control information to a 17-year-old son or daughter away at college. Even the partial dissent, written by Justice Sandra Day O'Connor and endorsed by Chief Justice William Rehnquist, shared the majority's disdain for the CDA's excesses. Unlike the majority, they felt that it was possible to sanction indecency knowingly sent by adults to minors.

"The court did its homework," said Ennis. "In Congress, they should have done theirs." While some legislators accepted the rap—"Our law was like a bull in a china shop," admits GOP Rep. Rick White—others felt that the justices blew it. "I'm at a loss to see how the court makes the distinction between a TV and a computer screen," said Republican Sen. Dan Coats. Read the decision, Senator: "The Internet is not as 'invasive' as radio or television," writes Stevens, citing the lower court's finding that for Net users the "odds are slim" of accidentally encountering porn. (Especially since most commercial online pornographers require credit cards, and even those who don't do so generally ask browsers to affirm that they are over 18.)

And if the kid *wants* to see the hot stuff? That's where parents must come in. The CDA's opponents have long contended that the solution to the problem is having Mom and Dad utilize the growing family of Internet filters to prevent Junior from surfing in the flesh zone. These products are constantly improving, but the fact is that the Internet makes it easier for a motivated

youngster to access salacious material. That, the court decided, was the trade-off to preserving free speech.

While the court feels comfortable with this, the forces in Congress that wrought the CDA can't accept that trade-off—and they are already vowing to try again. "Given the court's decision, I don't know what we can craft, short of a constitutional amendment," says Coats, who does not rule out such a movement. Others advise against knee-jerk tactics. "Congress should take a deep breath, read the decision and think," says White. "Passing a law may not be the solution to the problem."

The Clinton administration has its own ideas: in mid-July it will unveil a plan to make the filtering technologies ubiquitous. (Currently fewer than 40 percent of parents use them.) "We're going to get the V-chip for the Internet," says White House senior adviser Rahm Emanuel. "Same goal, different means."

Cyberspace will surely discuss all of this in its own unrestrained, long-winded manner. Last week, though, it was celebration time, not only online but at in-the-flesh rallies in Austin, Texas, and San Francisco. Mike Godwin, a lawyer for the Electronic Frontier Foundation, spoke for Netterheads everywhere. After citing the likes of Thomas Jefferson, he quoted a more up-to-date authority, Martha and The Vandellas: "Summer's here and the time is right," he said of the day when the Supreme Court went cyberpunk.

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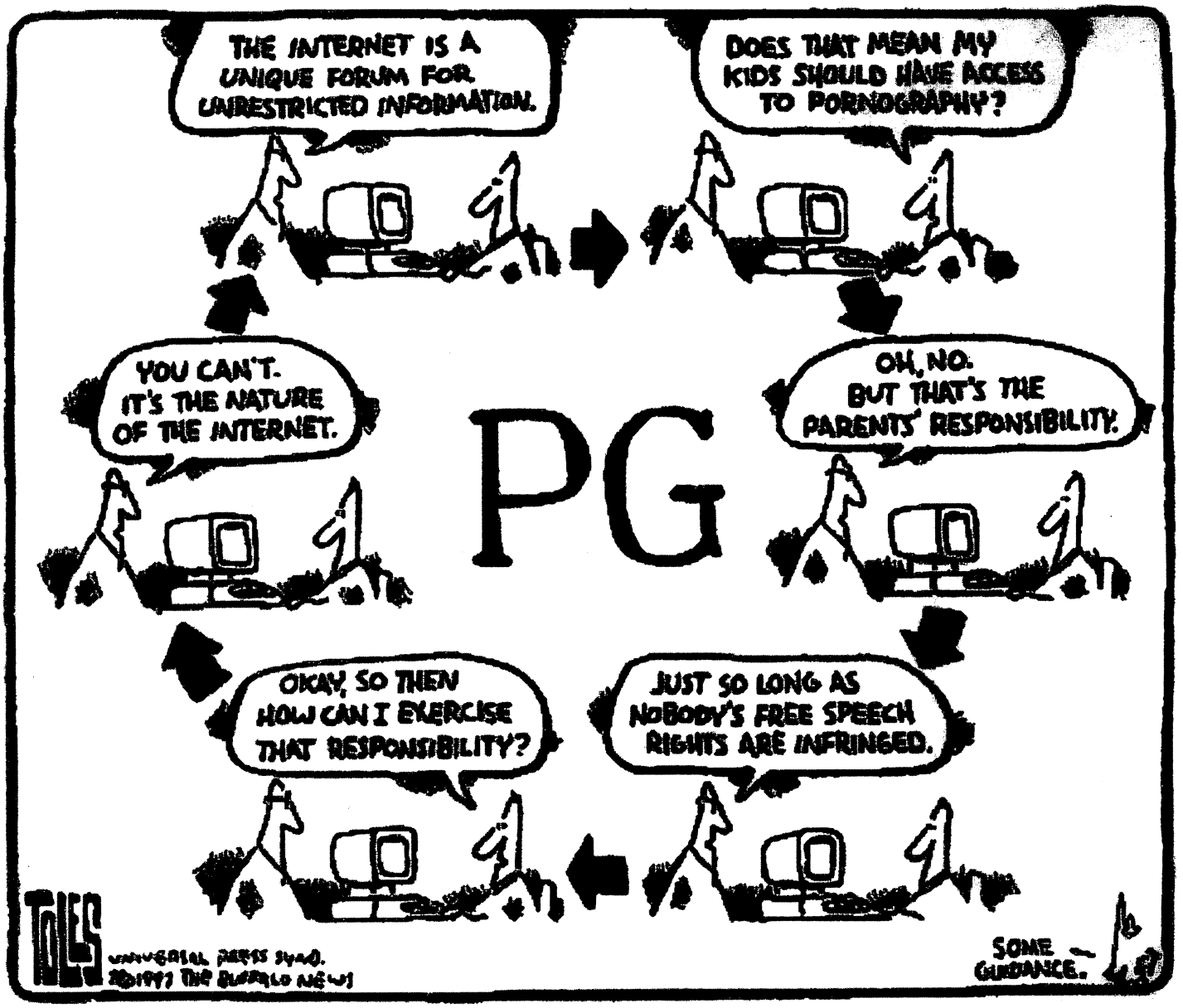

Technology, privacy and free speech all come in conflict in the arena of e-mail. Case by case, the Supreme Court wades through and weds old and valuable privileges with new techniques of communication.

High Court Upholds Law Banning 'Obscene' E-Mail

By Joan Biskupic

Justices Deny First Amendment Protection

The Supreme Court yesterday upheld a federal law that makes it a crime to send e-mails that are obscene or lewd as a way to annoy other people.

Rejecting a First Amendment challenge to one part of the sweeping 1996 Communications Decency Act, the justices ruled against a San Francisco-based company that runs a Web site called annoy.com and allows people to send anonymous messages to public officials. ApolloMedia Corp. claimed the act's terms were confusing and that it would discourage people from writing lawful but bawdy communications.

But the justices affirmed a lower court ruling that interpreted the provision as banning only "obscenity," that is, prurient communications that lack literary, political or other social value and therefore merit no First Amendment protection.

Yesterday's court action was not the usual start-of-the-week order rejecting an appeal and letting stand a lower court decision. The justices' one-sentence order affirmed the lower court and effectively endorsed the constitutionality of the e-mail provision.

The law makes it a crime to send a message that is "obscene, lewd, lascivious, filthy, or indecent with intent to annoy, abuse, threaten, or harass another person." ApolloMedia had argued that because the law's terms go beyond obscenity, it impinges on legitimate free speech and makes the firm vulnerable to criminal prosecution.

Such terms are important. While the high court has said obscenity—effectively, hard-core pornography—gets no First Amendment coverage, it has protected other sexually explicit and "indecent" material that offers some social value.

While the high court has said obscenity—effectively, hard-core pornography—gets no First Amendment coverage, it has protected other sexually explicit and "indecent" material that offers some social value

Two years ago the court struck down another part of the Communications Decency Act that targeted sexually explicit materials that children might see on the Internet. The justices said the prohibition was too broadly written and violated adults' free speech rights.

In yesterday's case, a special three-judge panel in California had ruled the e-mail provision targets only obscene materials. Referring to other congressional statutes, the court said the string of descriptions beginning with "obscene" was meant to characterize only illegally obscene material.

Agreeing with the interpretation in *ApolloMedia v. Reno,* the Justice Department said it would prosecute only obscenity. But that was not enough assurance for ApolloMedia, which says that while its communications are not obscene they could be considered indecent.

Yesterday the annoy.com home page featured the faces of the nine justices as well as dirty pictures and unprintable expletives. William Bennett Turner, the firm's lawyer, said a future Justice Department may interpret the law more broadly. And he said it has a chilling effect now: "It uses the term 'indecent.' How are ordinary users of the Internet supposed to know that it doesn't mean what it says?"

We may debate whether actions do speak louder than words, as the aphorism states, but we can't deny that they do speak—whether it's the wearing of an armband, a sit-in or the burning of a flag. The most current controversy centers on the flag, and whether it merits constitutional protection.

Legislating Patriotism

By Nat Hentoff

Last year, while Congress was debating whether to diminish the First Amendment by punishing desecration of the flag, Keith Kreul—an Army veteran and a past national commander of the American Legion—testified before the Senate Judiciary Committee. He was angry at this move to amend the Bill of Rights for the first time in our history.

"Our nation was not founded on devotion to symbolic idols, but on principles, beliefs and ideals expressed in the Constitution and its Bill of Rights. American veterans who have protected our banner in battle have not done so to protect a 'golden calf.' Instead they carried the banner forward with reverence for what it represents—our beliefs and freedom for all. Therein lies the beauty of our flag."

Kreul also told the Senate Judiciary Committee: "A patriot cannot be created by legislation."

Nonetheless, the House roared forward and passed a constitutional amendment—by a whopping 310 to 114—empowering Congress to prohibit the desecration of the flag. In the Senate, a move to bring the amendment to the floor under limited debate was blocked, in accordance with Senate rules, by Sens. Robert Kerrey (D.-Neb.) and Patrick Leahy (D-Vt.)

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Had there been a vote, two or three senators could have permanently changed the Constitution—the vote was that close.

In a previous hearing before the Senate Judiciary Committee, Russell Feingold (D.-Wis.) had told his colleagues some countries indeed punish desecration of the national flag. Iran, he said, provides a punishment of up to 10 years; Haiti mandates a life sentence at hard labor; and the more tolerant Cuban sanction is imprisonment for up to one year.

Feingold asked if the Senate wanted to add the United States to that list of governments unfettered by a Bill of Rights. He did not get a standing ovation.

Our native desecrators of the American flag have returned. Randy "Duke" Cunningham (R.-Calif.) has introduced H.J. Res. 33, which proposes a flag-desecration amendment to the Constitution that would be attached if ratified by three-fourths of the state legislatures within seven years of its submission for ratification.

The emulation of the patriotic values of Iran, Haiti and Cuba now has at least 269 cosponsors in the House. The historic assault on the First Amendment will be heard before the subcommittee on the Constitution,

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chaired by Charles Canady (R.-Fla.) During the impeachment proceedings, Canady was an impressive constitutionalist, but he apparently is not immune to more than a touch of jingoism.

A companion amendment to the Constitution has been introduced in the Senate by Orrin Hatch (R.-Utah), chairman of that body's Judiciary Committee, and there will be a hearing. Hatch professes to be something of a Constitution scholar, and I wonder how he would respond to a 1943 Supreme Court decision (*West Virginia Board of Education v. Barnette*) written by Justice Robert Jackson. That indignant board of education had expelled the children of Jehovah's Witnesses because they would not pledge allegiance to the flag. Their refusal was based on God's command in the Old Testament not to serve a "graven image." Moreover, parents of these truants were subject to imprisonment for child neglect.

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

'... no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion ...'

In 1996, another war veteran tried to bring congressional flag wavers in line with the Bill of Rights. Don Bennion wrote in a Salt Lake Tribune (Utah) op-ed article:

"I'm a war veteran (four years in the Marines and a supervisor of the battle for Iwo Jima) and I love my country. But I believe that this idea of passing a constitutional amendment to forbid the desecration of our flag is a dumb idea. Is the purpose to force people to be patriotic by passing a law? Why try to take away a freedom of expression? Is it a means for pandering for votes from veterans organizations?"

If that isn't the reason for this betrayal of the First Amendment, congressional supporters of the Cunningham-Hatch subversion of the right from which all other liberties flow obviously need a remedial course in why the American Revolution was fought.

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One of the central tenets of our founding documents addresses the essential separation of church and state. More than two centuries later, how religion is dealt with in the public-school system inspires impassioned arguments from those who believe in strict enforcement of this constitutional mandate to those who believe the mandate is misinterpreted or simply should not be applied.

Religion and Public Education

By Ed Doerr

On 4 June 1998, the U.S. House of Representatives voted 224 to 203 for the so-called Religious Freedom Amendment, sponsored by Rep. Ernest Istook (R.-Okla.) and more than 150 co-sponsors. (1) The measure fell well short of the two-thirds majority required to pass a constitutional amendment. In fact, the 52.4% vote dropped well below the 59.7% garnered on a similar proposal in 1971, the last time a school prayer amendment reached the House floor. The amendment's defeat is especially significant because it had strong backing from the House majority leadership and was the culmination of a massive four-year campaign led by televangelist Pat Robertson's Christian Coalition.

The Istook Amendment aroused strong opposition from education organizations, mainstream religious groups, and civil liberties organizations because it would have embroiled school districts and communities in prolonged, bitter, divisive conflicts over religious activities in the classroom or at graduations, athletic events, school assemblies, and other gatherings. In addition, the amendment's clause against "deny[ing] equal access to a benefit on account of religion" would have cleared the way for massive tax support of sectarian schools and other institutions. Opponents of the amendment correctly worried that it would weaken or wreck the First Amendment, taking the first major bite out of the Bill of Rights since its ratification in 1791.

Two weeks before the vote on the amendment, the U.S. Commission on Civil Rights held the first of three projected hearings on "Schools and Religion." Most of the 16 experts who spoke at the hearing (including this writer, I must disclose) agreed that the relevant Supreme Court rulings and other developments have pretty much brought public education into line with the religious neutrality required by the First Amendment and the increasingly pluralistic nature of our society. A fair balance has been established between the free exercise rights of students and the constitutional obligation of neutrality.

The speakers attributed the current reasonably satisfactory situation to 50 years of Supreme Court rulings plus two specific developments: passage by Congress in 1984 of the Equal Access Law, which allows student-initiated religious groups or other groups not related to the curriculum to meet, without school sponsorship, during noninstructional time; and the U.S. Department of Education's issuance in August 1995 of guidelines on "Religious Expression in Public Schools."

A minority of speakers at the hearing cited anecdotes about alleged violations of students' religious freedom. These turned out to be either exaggerations or cases of mistakes by teachers or administrators that were easily remedied by a phone call or letter. The occasional violations of student rights, like "man bites dog" stories, are few and far between and certainly do not point to any need to amend the Constitution.

Julie Underwood, general counsel designate for the National School Boards Association, told the hearing that inquiries to the NSBA about what is or is not permitted in public schools declined almost to the vanishing point once the "Religious Expression in Public Schools" guidelines were published.

The guidelines grew out of a document titled "Religion in the Public Schools: A Joint Statement of Current Law," issued in April 1995 by a broad coalition of 36 religious and civil liberties groups. The statement declared that the Constitution "permits much private religious activity in and around the public schools and does not turn the schools into religion-free zones." The statement went on to detail what is and is not permissible in the schools.

On 12 July 1995, President Clinton discussed these issues in a major address at —appropriately—James Madison High School in northern Virginia and announced that he was directing the secretary of education, in consultation with the attorney general, to issue advisory guidelines to every public school district in the country. This was done in August.

In his weekly radio address of 30 May 1998, anticipating the June 4 House debate and vote on the Istook Amendment, the President again addressed the issue and announced that the guidelines, updated slightly, were being reissued and sent to every district. This effort undoubtedly helped to sway the House vote.

The guidelines, based on 50 years of court rulings (from the 1948 McCollum decision to the present), on common sense, and on a healthy respect for American religious diversity, have proved useful to school boards, administrators, teachers, students, parents, and religious leaders. Following is a brief summary.

Permitted—"Purely private religious speech by students"; nondistruptive individual or group prayer, grace before meals, religious literature reading; student speech about religion or anything else, including that intended to persuade, so long as it stops short of harassment; private baccalaureate services; teaching about religion; inclusion by students of religious matter in written or oral assignments where not inappropriate; student distribution of religious literature on the same terms as other material not related to school curricula or activities; some degree of right to excusal from lessons objectionable on religious or conscientious grounds, sub-

ject to applicable state laws; off-campus released time or dismissed time for religious instruction; teaching civic values; student-initiated "Equal Access" religious groups of secondary students during noninstructional time.

Prohibited—School endorsement of any religious activity or doctrine; coerced participation in religious activity; engaging in or leading student religious activity by teachers, coaches, or officials acting as advisors to student groups; allowing harassment of or religious imposition on "captive audiences"; observing holidays as religious events or promoting such observance; imposing restrictions on religious expression more stringent than those on nonreligious expression; allowing religious instruction by outsiders on school premises during the school day.

Required—"Official neutrality regarding religious activity."

In reissuing the guidelines, Secretary Riley urged school districts to use them to develop their own, preferably in cooperation with parents, teachers, and the "broader community." He recommended that principals, administrators, teachers, schools of education, prospective teachers, parents, and students all become familiar with them.

As President Clinton declared in his May 30 address, "Since we've issued these guidelines, appropriate religious activity has flourished in our schools, and there has apparently been a substantial decline in the contentious argument and litigation that has accompanied this issue for too long."

As good and useful as the guidelines are, there remain three areas in which problems continue: Proselytizing by adults in public schools, music programs that fall short of the desired neutrality, and teaching appropriately about religion.

There are conservative evangelists, such as Jerry Johnston and the Rev. Jerry Falwell, who have described public schools as "mission fields." In communities from coast to coast, proselytizers from well-financed national organizations, such as Campus Crusade and Young Life, and volunteer "youth pastors" from local congregations have operated in public schools for years. They use a variety of techniques: presenting assembly programs featuring "role model" athletes, getting permission from school officials to contact students one-on-one in cafeterias and hallways, volunteering as unpaid teaching aides, and using substance abuse lectures or assemblies to gain access to students. It is not uncommon for these activities to have the tacit approval of local school authorities. Needless to say, these operations tend to take place more often in smaller, more religiously homogeneous communities than in larger, more pluralistic ones.

Religious music in the public school curriculum, in student concerts and theatrical productions, and at graduation ceremonies has long been a thorny issue. As Secretary Riley's 1995 and 1998 guidelines and court rulings have made clear, schools may offer instruction and religion, but they must remain religiously neutral and may not formally celebrate religious special days. What then about religious music, which looms large in the history of music?

As a vocal and instrumental musician in high school and college and as an amateur adult musician in both secular and religious musical groups, I feel qualified to address this issue. There should be no objection to the inclusion of religious music in the academic study of music and in vocal and instrumental performances, as long as the pieces are selected primarily for their musical historical value, as long as the program is not predominantly religious, and as long as the principal purpose and effect of the inclusion is secular. Thus there should be no objection to inclusion in a school production of religious music by Bach or Aaron Copland's arrangements of such 19th-century songs as "Simple Gifts" or "Let Us Gather by the River." What constitutes "musical or historical value" is, of course, a matter of judgment and controversy among musicians and scholars, so there can be no simple formula for resolving all conflicts.

Certain activities should clearly be prohibited. Public school choral or instrumental ensembles should not be used to provide music for church services or celebrations, though a school ensemble might perform a secular music program in a church or synagogue as part of that congregation's series of secular concerts open to the public and not held in conjunction with a worship service. Sectarian hymns should not be included in graduation ceremonies; a Utah case dealing with that subject has been turned down for Supreme Court review. Students enrolled in music programs for credit should not be compelled to participate in performances that are not primarily religiously neutral.

Textbooks and schools tend to slight religion not out of hostility toward religion but because of low demand, lack of time ... lack of suitable materials, and fear of giving offense or generating unpleasant controversy

As for teaching about religion, while one can agree with the Supreme Court that public schools may, and perhaps should, alleviate ignorance in this area in a fair, balanced, objective, neutral, academic way, getting from theory to practice is far from easy. The difficulties should be obvious. Teachers are very seldom adequately trained to teach about religion. There are no really suitable textbooks on the market. Educators and experts on religion are nowhere near agreement on precisely what ought to be taught, how much should be taught and at what grade levels, and whether such material should be integrated into social studies classes, when appropriate, or offered in separate courses, possibly electives. And those who complain most about the relative absence of religion from the curriculum seem to be less interested in neutral academic study than in narrower sectarian teaching.

Textbooks and schools tend to slight religion not out of hostility toward religion but because of low demand, lack of time (if you add something to the curriculum, what do you take out to make room for it?), lack of suitable materials, and fear of giving offense or generating unpleasant controversy.

The following questions hint at the complexity of the subject. Should teaching about religion deal only with the bright side of it and not with the dark side (religious wars, controversies, bigotry, persecutions, and so on)? Should instruction deal only with religions within the U.S., or should it include religions throughout the world? Should it be critical or uncritical? Should all religious traditions be covered or only some? Should the teaching deal only with sacred books—and, if so, which ones and which translations? How should change and development in all religions be dealt with?

To be more specific, should we teach only about the Pilgrims and the first Thanksgiving, or also about the Salem witch trials and execution of Quakers? Should schools mention only the Protestant settlers in British North America or also deal with French Catholic missionaries in Canada, Michigan, and Indiana and with the Spanish Catholics and secret Jews in our Southwest? Should we mention that Martin Luther King was a Baptist minister but ignore the large number of clergy who defended slavery and then segregation on Biblical grounds?

Should teaching about religion cover such topics as the evolution of Christianity and its divisions, the Crusades, the Inquisition, the religious wars after the Reformation, the long history of anti-Semitism and other forms of murderous bigotry, the role of religion in social and international tensions (as in Ireland, in the former Yugoslavia, and in India and Pakistan), the development in the U.S. of religious liberty and church/state separation, denominations and religions founded in the U.S., controversies over women's rights and reproductive rights, or newer religious movements?

The probability that attempts to teach about religion will go horribly wrong should caution public schools to make haste very slowly in this area. In my opinion, other curricular inadequacies—less controversial ones, such as those in the fields of science, social studies, foreign languages, and world literature—should be remedied before we tackle the thorniest subject of all.

And let us not forget that the American landscape has no shortage of houses of worship, which generally include religious education as one of their main functions. Nothing prevents these institutions from providing all the teaching about religion they might desire.

The late Supreme Court Justice William Brennan summed up the constitutional ideal rather neatly in his concurring opinion in Abington Township S.D. v. Schempp, the 1963 school prayer case: "It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influence of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic."

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1. Text of H.J. Res. 78, Rep. Ernest Istook's Religious Freedom Amendment: "To secure the people's right to acknowledge God according to the dictates of conscience: Neither the United States nor any State shall establish any official religion, but the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed. Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion."

In this NEWSWEEK "My Turn" column, the writer questions whether Americans—and particularly, journalists—truly endorse freedom of religion, or are really only accepting of mainstream faiths that endorse a Western model of practice and success.

Do We Have Freedom of Religion?

By Sheila Rush

During the years when I worked as a civil-rights attorney, I never thought a great deal about religious freedom. Now, though I appreciate the First Amendment's guarantee of religious freedom in a new way, I am very much aware of its limitations.

Two years ago, in a rather abrupt mid-life change, I moved to a spiritual community in northern California. Most people come here as I did, seeking a balance between the need to earn a living and raise a family, and the equally pressing need for spiritual insight and growth. Community members live in an environment that supports regular meditation and spiritual study. There are frequent gatherings, discussions and classes—opportunities to ponder the hows and whys of life without embarrassment or apology. One can earn a modest yet adequate salary working in a community-owned business. Those with greater needs can work on the outside or start businesses of their own.

Living here, I have learned that spiritual qualities of kindness, love, compassion and cooperation need not be restricted to monks and nuns living cloistered lives. They can be part of the texture of everyone's ordinary life—expressed in work, marriage, friendship and even play. This happens naturally when people are free enough of competitive pressures to allow their innate preference for harmony and cooperation to grow.

Vogue: I have also learned that spiritual communities exist under a cloud, especially communities like ours, with teachings drawn from Eastern spiritual traditions and ministers who call themselves Swami instead of Reverend. In the late '60s and early '70s, communities of all types enjoyed a brief vogue. Since then, they have been viewed with growing suspicion and are frequently targets of hostility.

The hostility takes different forms. Where I live, property has been vandalized and some businesses have been boycotted. Reinforcing if not creating this hostility is a press which, too often, seems to welcome the opportunity to write negatively about community life. Much of the time we are treated unfairly, and I wonder whether the situation can be very different for other communities "exposed" by the media.

When reporters visit our community, we show them around and answer their questions. Few, if any, restrictions are placed on whom they can talk to, what they can quote and what they can see.

They see a community organized as a village, with an elected government, open decision-making forums and members living in widely separated houses. There are both private and community-owned housing and businesses, a farm, a dairy, a market, schools, a meditation retreat and a temple used for spiritual observances. People come and go as they please, content to have only three rules: no drugs, no liquor, no dogs. We have a spiritual director whose influence is undeniable, yet no greater than that of the founder of any organization whose wisdom and compassion have been confirmed by experience. Community members are quite willing to discuss how the community has changed their lives, how they feel more joy, a greater sense of well-being and peace.

All too often, the reporters write about a community I don't know. They call it a "cult," meaning, I assume, that we are sectarian, undemocratic and exploitative. At best, we are a "commune," which conjures up an image of loose, hippie-style living. Our spiritual director is said to be a virtual dictator. Though they never quite equate us with Jonestown, the frequent mention of that community in discussions of ours tends to suggest a connection. By implication, these articles also suggest that those choosing to live in our community are misguided, manipulated or worse.

Perhaps there are spiritual communities where people are systematically programmed and even held against their will. There are also corporations that defraud stockholders, politicians who betray the public trust, doctors who prescribe unnecessary medications and parents who beat children. The press usually manages to see such abuses as the exceptions they are. They stick to hard facts, avoid generalizations and typically give equal time to critics and defenders. In the case of spiritual communities, however, the worst is assumed and even an abundance of exonerating evidence has little or no effect.

Pioneering: To be sure, not all media accounts trade in distortions and misrepresentations. Yet even the more objective treatments usually stress Eastern or exotic elements, and rarely give the public what it most needs—a way of seeing the spiritual community within a meaningful frame of reference, a way of making it familiar. Yet they could do this easily enough by placing certain communities within America's pioneering tradition where in fact they belong; by pointing to the country's long tradition of spiritual communities and the groups that started them—the Mennonites, the Shakers, the Hutterites and the Inspirationists. They might even note that these communities also had their critics, including disaffected former members.

The same history that clarifies the role of spiritual communities also reveals a tradition of violence coexisting with a tradition of religious freedom. Periodically, religious intolerance has erupted into violence against groups seen as different—the Mormons, Jehovah's Witnesses, others. The First Amendment draws an important line against government infringement upon religious liberty, but it says nothing about individuals or the press—the subtle distortions, the discrediting innuendoes which, of themselves, are not infringements yet nonetheless fan intolerance. These are left to the discretion of reporters and editors, and the flexible limits of libel laws.

History also reveals that public acceptance of new religious groups takes time. In the meantime, I hope and, yes, pray that offending members of the press become more aware of their biases and of all their possible consequences.

RUSH WAS A PROFESSOR AT HOFSTRA LAW SCHOOL BEFORE MOVING TO ANANDA COOPERATIVE VILLAGE IN 1980.

—NEWSWEEK, July 19, 1982

This article enumerates the dangers of allowing religion to be practiced in the public schools. Author Kaminer provides dismaying examples of minority religious groups being oppressed by "majority" religion imposed upon them. Meanwhile, some parents and teachers argue that their children and students being forbidden from practicing their religion during school hours and on school grounds is an infraction of their First Amendment rights.

A Wing and a Prayer:

By Wendy Kaminer

RELIGION GOES BACK TO SCHOOL

Governor Fob James Jr. of Alabama has promised to resist a recent federal court order prohibiting organized, officially sponsored religious activities in DeKalb County public schools. The court order, issued in Chandler v. James on October 29, includes an injunction against an Alabama law permitting organized, student-led "voluntary" prayers at school events. It's unclear what form the Governor's resistance might take, but James was the last heard threatening to call out the National Guard to protect the prerogative of state court Judge Roy Moore to hang a copy of the Ten Commandments in the courtroom, in defiance of the First Amendment and the federal courts. Meanwhile, Judge Moore has declared the recent federal court order on prayer in school an "unconstitutional abuse of power," refusing to recognize it as the law in his county. High school students, no doubt emboldened by these pronouncements, are protesting the court order, marching on city hall, walking out of class and leaving the stands at football games to pray. "Having Jesus in our school is something that we need. It gives us strength," one student explained.

Advocates of organized school prayer will laud this uprising as a demand for religious freedom, defending the "right" of students of prayer. But what is at stake in Alabama is the right not to pray to Jesus or be subjected to religious indoctrination. The facts of the case that led to the most recent federal injunction on organized prayer in school tell a very different story from that of the posturing of Alabama officials.

Chandler v. James involved a challenge to the virtual establishment of Christianity in DeKalb County schools. The case was brought by parents of public school students (including the assistant principal at one school) who protested sectarian prayer and Bible readings organized by school administrators and clergy, conducted in classrooms, at athletic events and during commencement exercises. Prayer was not voluntary. One teacher required students to pray out loud in class. Students who chose not to pray were encouraged to appoint surrogate worshipers, whose prayers they were required to attend. Christian devotionals were routinely delivered at schools, assemblies and other activities during which students were a captive audience. Gideon Bibles were distributed in school, even in the classroom.

All these practices were clearly unconstitutional and violated numerous federal court decisions, but Alabama has a history of defying federal law protecting civil rights and liberties. Pamela Sumners, attorney for the plaintiffs in Chandler v. James, has observed that Governor James is "whipping up" religious bigotry the way George Wallace once whipped people into a frenzy over race.

So the Chandler decision is unlikely to end religious persecution in Alabama public schools. It clarified no constitutional principles that were not already clear and had not already been rejected by public officials. In fact, after an earlier decision in the Chandler case struck down the state's student-led prayer statute, a similar lawsuit, Herring v. Key, was brought against Pike County, Alabama, public schools.

The Herring case, now pending before the same federal district court that issued the injunction in Chandler v. James, involves four Jewish children who have the misfortune to attend public school in Pike County. They report being tormented by school officials and classmates because they are Jews, denied the right to practice their faith and forced to participate in Christian religious observances. Three of the children, Sarah, David and Paul Herring, are in the sixth, seventh and ninth grades, respectively; they are also represented by Pamela Sumners.

The complaint in the Herring case makes you wonder if Pike County is part of America or Iran. It alleges that: Christian prayers and devotionals are aired over the school's public address system; the elementary school principal has led prayers at assemblies and introduced preachers to captive student audiences; children are required to bow their heads in prayer during assemblies; sixth-grader Sarah was expressly ordered by a teacher to bow her head for a "student-initiated" prayer; and seventh-grader David was physically forced by a student teacher to bow his head in devotion to Jesus. The children have been required to attend Christian sermons; Sarah was once led crying and shaking from an assembly after being told by the preacher that all students who did not embrace Jesus as their savior would burn in Hell. Ninth-grader Paul was required by the vice principal of his school to write an essay on "Why Jesus Loves Me" as punishment for disrupting class. The principal forbade Paul from wearing the Star of David to class, claiming it was a "gang symbol" (other children wear crosses). School officials have tolerated vicious anti-Semitic remarks directed at the children as well as physical assault. Their possessions have been defaced with swastikas and they have been given cartoons about the Holocaust.

Their mother and stepfather, Sue and Wayne Willis, have regularly protested the persecution of their kids, with very limited success. Sue Willis reports that the high school principal and an elementary school teacher both responded to her complaints "with words to the effect of 'If parents will not save souls, we have to.'"

It is tempting to dismiss these cases as anomalies, but violations of First Amend-

ment prohibitions on establishing religion in the schools are not uncommon, especially but not exclusively in the South. The New York Times reports that in parts of Alabama "prayer has remained as common as pop quizzes in many schools." In Mississippi in 1996 a federal court intervened to protect Lutheran children from organized prayer and Bible readings in a predominantly Baptist public school system. In West Virginia, prayers are broadcast over the public address system before every home football game at Nitro High School, and everyone in the audience is expected to stand with head bowed, according to a recent report by The Charleston Gazette. "They say it's illegal, but we've always done it," Nitro athletic director Patrick Vance reportedly said. The Gazette also reports that during graduation ceremonies at Herbert Hoover High School in Clendenin, West Virginia, students recite the Lord's Prayer.

Organized, officially endorsed sectarian religious activities in public school are indisputably illegal; but they persist, partly because relatively few people have the strength and courage to challenge them. Members of minority faiths who are most likely to object are also most at risk when they do so. But anyone who publicly complains about illegal, school-sanctioned prayer or goes to court to stop it should expect to be ostracized, harassed and threatened with physical injury or death by God-fearing neighbors.

This is the climate of religious intolerance in which Congress will consider a constitutional amendment intended to legitimize organized group prayer in the nation's classrooms. The amendment, introduced by Oklahoma Representative Ernest Istook Jr., establishes a constitutional right to engage in sectarian religious practices on public property, including schools, and gives religious groups an entitlement to government funds. The Istook Amendment does state that "neither the United States nor any state shall require any person to join in prayer or other religious activity [or] prescribe school prayers." But the amendment would authorize school-led prayers, which often involve the de facto endorsement of school officials and can be quite coercive. Anyone doubting the threat to the free exercise of religion posed by student prayers need only attend public school in Alabama.

"I don't want the government involved in the religious upbringing of my son," Michael Chandler, plaintiff in Chandler v. James, has explained. "The state has no business telling my child when, where and how to pray." You'd expect conservatives mistrustful of government to sympathize with Chandler's concern. Instead, supporters of the Istook Amendment promulgate the dangerous fiction that religion has been exiled from the public schools and students have lost their rights to pray.

In fact, students have the undisputed right to pray individually or in groups during their free time; they can say grace before lunch, drop to their knees on the football field or pray silently in every class, as many do. Religious associations of students have the same rights as other student groups to meet on school property. In Chandler v. James, while the court enjoined organized, official prayer, it expressly affirmed the rights of students to express personal religious beliefs in their schoolwork or during graduation services, engage in religious activities during noninstructional time, announce meetings of extracurricular religious activities over the school's public address system and wear religious symbols. The federal courts have generally made it clear that students have the right to exercise their religion in school; what they lack is the power to impose their religion on others.

Religious power, not religious rights, is what supporters of a school prayer amendment seek. In the name of rights, they seek the kind of power that subjects the children of minority faiths to religious persecution in the nation's schools. At least today that persecution is illegal and can be remedied in federal court, when the families at risk persevere. A constitutional amendment permitting organized school prayer would leave every public school student at the mercy of the religious majority. Introduce organized religion in the schools and you introduce sectarianism; and that is a prescription for tribalism, not virtue.

The federal courts have generally made clear that students have the right to exercise their religion in school; what they lack is the power to impose their religion on others

While changing the Constitution is no easy task, the addition of constitutional amendments in the course of U.S. history does indicate that it is possible. One recent suggested amendment would, indeed, have changed the intent and character of the First Amendment.

Amending the First Amendment

There are few passages in the Constitution more central to the premises of this country's government than the 10 words that open the First Amendment: "Congress shall make no law respecting an establishment of religion ..." It's a tough concept, but one might expect that more than 200 years after the document's ratification, these words had acquired a little respect on the part of those who govern the country. Apparently not. More than 150 members of the House of Representatives are currently cosponsoring a constitutional amendment that would render those words meaningless. The amendment, sponsored by Rep. Ernest Jim Istook Jr. (R-Okla.), was reported out of the House Judiciary Committee and is now awaiting a vote on the floor, and it would trump the Establishment Clause to allow for public school prayer. It reads, in part: "Neither the United States nor any State shall establish any official religion, *but* the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed."

The fact is that the First Amendment does not contain words like "but" because it states a principle, not a policy. That principle is that government has no business promoting divine visions or mediating between them. It is, in large part, the principle that permitted the traditions of religious pluralism and tolerance to flourish in this country. And it is a principle that accommodates no qualification. "Make no law" cannot mean "make some laws" and still be a robust force for religious liberty. The principle, in other words, is not merely adjusted but repealed by the glaring word "but" in the House proposal, and it is not saved by ambiguous language elsewhere that forbids the government to require or "prescribe school prayers."

The good news is that the amendment does not appear to have the two-thirds majority necessary to pass the House. But the proposal should never have gotten as far as it has. When the Supreme Court abolished school prayer in 1962, Justice Hugo Black wrote memorably that the First Amendment was written "to stand as a guarantee" that the "people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office." The House would do well to ponder the meaning of these words.

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The author of the article wonders if Americans appreciate the protections and privileges of the First Amendment. He cites examples of how Americans take these for granted, and posits that this has caused and could continue to cause the erosion of the central tenets.

A Slow Retreat From Freedom

America has the Super Bowl, the hamburger, the baseball cap; America has the first amendment. From the civics classes of their school days, Americans know that this addition to their constitution, adopted in the first years of the Republic as part of the Bill of Rights, guarantees freedom of religion, speech and assembly. For a young country, rebelling against the authoritarianism of the old world, these freedoms amounted to an animating creed. For the mature America of today, they remain a national icon.

The Freedom Forum, a think-tank, recently distributed 1997 first-amendment calendars; each day a new page offers a quotation (from eminences such as O.J. Simpson, Hilary Clinton, Sophocles) on the preciousness of freedom. A hot new movie, "The People vs. Larry Flynt," celebrates the first amendment, too. The film's hero, publisher of Hustler magazine, is set upon by wrong-thinkers who feel pornography should not be allowed. At the high point of the movie, the battle reaches the Supreme Court, and Mr. Flynt's lawyer argues that to condemn pornography on the grounds of bad taste would be to violate the first amendment. A legal argument about a constitutional sub-clause becomes the stuff of melodrama: only in America.

And yet, in diverse ways, America is starting to doubt the wisdom of this exceptionalism. The first amendment has been used to extend free expression beyond the limits tolerated in most advanced societies; the resulting costs are remarked upon increasingly. Freedom, it is now said both on the left and on the right, must be weighed against other goods, such as equity, morality and social order. The first amendment is no longer such a sacred text; where it is invoked, it should be tested.

Consider, for example, the hottest free-speech issue of the day: the question of whether the first amendment protects campaign spending. In 1976, the Supreme Court threw out post-Watergate limits on election spending, arguing that political advertisements (and indeed, the spending of money per se) are a form of speech, and so must be unrestricted. The result is that campaign spending has ballooned to a point that most Americans find disgusting. Even before the current scandal concerning the Democrats' fund-raising techniques, many thought the Supreme Court's decision wrong. Now a growing band—including Dick Gephardt, the Democratic leader in the House—advocates a constitutional amendment to reverse it.

The idea of expenditure as speech is a relatively new and tendentious one; but forms of speech long protected by the first amendment are equally under attack. Take indecency. Last February Bill Clinton signed the Communications Decency Act, which aspires to control pornography on the Internet. In November Wal-Mart was found to be cleansing its shelves of CDs with sexual or violent lyrics, to applause from moralistic politicians. In December political pressure induced television moguls to offer a system of ratings for violent or obscene programs, modeled on the ones already used in cinemas.

The first amendment also lays down that "Congress shall make no law respecting an establishment of religion"; this bars the government from helping any faith, lest rival ones suffer. Again, this principle has grown unpopular. These days Republicans and Democrats agree that religion is such an essential social glue that the state has an interest in promoting it. Many Republicans favour a constitutional amendment to allow prayer in government schools. The Clinton administration has found ways of channeling government money to religious charities, and religious schools are now model partners in government-subsidized voucher schemes.

In 1964 a Supreme Court ruling based on the first amendment gave America the world's freest press; increasingly, Americans doubt whether this was sensible. The court laid down that, in order to win a libel case, a public figure had to prove that an allegation was not merely inaccurate; it had to be deliberately malicious. As a result, American journalists can print allegations about politicians or tycoons without being required to prove that they are true, a ruinous course in some other countries, especially Britain. This makes it easier to deflate big shots, which is good. But it also makes for uncivil public debate, which stokes public revulsion with the media. Last month a Harris poll found that 84% of Americans believe government should regulate journalists in order to root out bias; 70% support court-imposed fines for inaccurate or biased reporting.

In sum, first amendment freedoms are increasingly questioned; and judges who uphold the prevailing wisdom of the courts, no matter how long-established, may find themselves as loggerheads with public opinion, sometimes in the shape of their own juries. This seems especially true in the case of press freedom. Though judges make it hard to convict journalists for libel, juries vent their wrath against the media by imposing monumental awards on the unlucky few who lose their cases. To inflict maximum pain, they punish individual journalists as well as media firms. Last month ABC television was ordered to pay $10 million in damages to Alan Levan, a financier; the producer of the offending report was ordered to pay $500,000.

A second case, also involving ABC last month, demonstrates another way in which courts intimidate reporters. Food Lion, a supermarket chain, sued ABC over a documentary that showed employees doctoring spoiled meat and bleaching fish to make it smell better. Food Lion did not claim that the report was wrong, and did not sue for libel. But it successfully sued ABC for fraud: its journalists had lied about themselves in order to get jobs with Food Lion and opportunities to film its unhygienic practices. This legal device—attack reporting techniques rather than the reports themselves—has

grown popular in recent years. Despite the first amendment, journalists are on the defensive.

And so, by various routes, America is reconsidering its famous love of freedom. Some may think this no bad thing. America may be returning to its old balance, correcting the libertarian excesses of first-amendment judgments made in the past couple of generations. It may also be responding sensibly to changed times: and particularly to the view that, since the media has come to saturate American life, protection of free speech in the broadest sense may not be possible without certain limitations.

Yet the slow retreat from freedom does contain a danger. America has disdained the first amendment before, and the results have not been edifying. In the 1950s, Joe McCarthy's Red-baiting was made possible by the court's refusal to help his victims when they invoked first-amendment rights. This shameful episode partially explains why courts embraced the first amendment with compensating zeal in later years. It would be nice if Americans remembered this history rather than repeated it.

First Amendment Worksheet

The following are Supreme Court cases that involve the First Amendment. Choose one case to research, and write a one-page summary of the case. Include the following:

—who was involved
—a brief description of the issue
—how the court ruled
—brief descriptions of the majority and minority opinions
—why the court chose to rule on this case
—how this case might be relevant to you
—your opinion on the issue and the court's ruling

Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221 (1987)

Branzburg v. Hayes, 408 U.S. 605 (1972)

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)

Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967)

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)

Mills v. Alabama, 384 U.S. 214 (1966)

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983)

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

New York Times Co. v. United States, 403 U.S. 713 (1971)

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)

Smith v. Daily Mail Publishing Co., 433 U.S. 97 (1979)

Cohen v. California (1971)

Chaplinski v. New Hampshire (1942)

Ginsburg v. New York (1968)

Miller v. California (1973)

"Memoirs" v. Massachusetts (1966)

Roth v. United States (1957)

National Broadcasting Company v. United States (1943)

Rosenbloom v. Metromedia (1971)

Wolston v. Reader's Digest Association, Inc. (1979)

St. Amant v. Thompson (1968)

Herbert v. Lando (1979)

Gertz v. Robert Welch (1974)

Richmond Newspapers v. Virginia (1980)

Gannet Co., Inc. v. De Pasquale (1979)

Nebraska Press Association v. Stuart (1976)

Irvin v. Dowd (1961)

Rideau v. Louisiana (1963)

Near v. Minnesota (1931)

Gillette v. United States (1971)

United States v. Seeger (1965)

Sicurella v. United States (1955)

Frain v. Barron (1969)

Minersville School District v. Gobitis

Board of Education v. Allen (1968)

McCollum v. Board of Education (1948)

Zorach v. Clauson (1952)

School District of Abingdon Township v. Schempp (1963)

Murray v. Curlett (1963)

Dennis v. United States

Yates v. United States

Gitlow v. United States (1925)

Abrams v. United States (1919)

Schenck v. United States (1919)

John Peter Zenger (1735)

Keyishian v. Board of Regents (1967)

Sterzing v. Fort Bend Independent School District (1972)

Parducci v. Rutland (1970)

Wieman v. Updegraff (1952)

Tinker v. Des Moines Independent School District (1969)

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