newsletter on intellectual freedom

IFC ALA

Editor: Henry Reichman, California State University, East Bay
Founding Editor: Judith F. Krug (1940–2009)
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Supreme Court rejects ban on corporate political spending

Overruling two important precedents about the First Amendment rights of corporations, a bitterly divided Supreme Court ruled January 21 that the government may not ban political spending by corporations in candidate elections.

The 5-to-4 decision was a vindication, the majority said, of the First Amendment's most basic free speech principle—that the government has no business regulating political speech. The dissenters said that allowing corporate money to flood the political marketplace would corrupt democracy.

The ruling represented a sharp doctrinal shift, and it will have major political and practical consequences. Specialists in campaign finance law said they expected the decision to reshape the way elections are conducted. Though the decision does not directly address them, its logic also applies to the labor unions that are often at political odds with big business.

President Obama called the decision "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

The justices in the majority brushed aside warnings about what might follow from their ruling in favor of a formal but fervent embrace of a broad interpretation of free speech rights.

"If the First Amendment has any force," Justice Anthony M. Kennedy wrote for the majority, which included the four members of the court's conservative wing, "it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."

The ruling, *Citizens United v. Federal Election Commission*, overruled two precedents: *Austin v. Michigan Chamber of Commerce*, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and *McConnell v. Federal Election Commission*, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002 that restricted campaign spending by corporations and unions.

The 2002 law, usually called McCain-Feingold, banned the broadcast, cable or satellite transmission of "electioneering communications" paid for by corporations or labor unions from their general funds in the thirty days before a presidential primary and in the sixty days before the general elections.

The law, as narrowed by a 2007 Supreme Court decision, applied to communications

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Published by the ALA Intellectual Freedom Committee,
Martin Garnar, Chair

in this issue

targets of the censor

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IFC report to ALA Council

Following is the text of the ALA Intellectual Freedom Committee's report to the ALA Council, delivered by IFC chair Martin Garnar at the ALA Midwinter Meeting in Boston on January 19.

The ALA Intellectual Freedom Committee (IFC) is pleased to present this update of its activities:

Barbara M. Jones, Director of the Office for Intellectual Freedom

It is with great pleasure that I introduce you to Barbara M. Jones, the new Director of the Office for Intellectual Freedom. Barbara brings 25 years of active engagement on intellectual freedom issues to her new position. She served as treasurer of the Freedom to Read Foundation. She served on the FAIFE (Freedom of Access to Information and Freedom of Expression) IFLA Standing Committee, serving as Secretary to FAIFE from 2007–2009. She was a member of the ALA Intellectual Freedom Committee (1990–1994, 2001–2003) and served on the IFC Privacy Subcommittee (2009). In 1986–87 and in 2004–05 she served as Chair of the Intellectual Freedom Round Table. She was an ACRL Legislative Advocate and also has served on state Intellectual Freedom Committees in Iowa and Minnesota. As a FAIFE trainer and expert advisor, Barbara has developed curricula and training programs and has conducted workshops internationally. We are thrilled to welcome her in this new role within ALA's intellectual freedom community.

Information

Traditional Cultural Expressions

The IFC endorsed *Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect* and the Resolution to Endorse the Statement "*Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect*." Though it was not a unanimous vote, the IFC understands that this is an evolving issue in an information universe where there are no borders. As such, we feel it is important to be engaged in this ongoing conversation so that we can continue to speak for our core values of access and intellectual freedom.

Projects

Emerging Leaders

The IFC will work with a team of five librarians from ALA's Emerging Leaders initiative to revise the Libraries and the Internet Toolkit. The goal of the project is to develop a resource which will assist librarians in managing Internet use in libraries and educating their public about how to use online resources effectively, in accordance with the *Library Bill of Rights*, the ALA Code of Ethics, and ALA policy. Martin Garnar, chair of IFC, will serve as member mentor and Deborah Caldwell-Stone, deputy director of the Office for Intellectual Freedom, will serve as staff liaison. Our emerging leaders are Eileen Bosch, Toni Dean, Mara Degnan-Rojeski, Amanda Robillard, and Ngoc-Yen Tran. The new version of the Libraries and the Internet Toolkit will be ready by the 2010 Annual Conference in Washington, DC.

National Conversation on Privacy

The Office for Intellectual Freedom (OIF) hosted a fantastic event at this Midwinter Meeting on Saturday, January 16, to help launch ALA's new privacy initiative, Choose Privacy Week. A large and lively crowd gathered to enjoy cookies, refreshments, and a program featuring social critic Hal Niedzviecki, author of *The Peep Diaries: How We're Learning to Love Watching Ourselves and Our Neighbors*. After a welcome and introduction by ALA President Camila Alire, Niedzviecki talked about his interest in what he terms the age of "peep culture": a tell-all, show-all, know-all digital phenomenon that is dramatically altering notions of privacy, individuality, security, and even humanity. Using personal stories, humor, and incisive critical thinking, Niedzviecki highlighted crucial issues around privacy and self-disclosure that are at the forefront of ALA's initiative to generate a national conversation about privacy in a digital age.

ALA's efforts will culminate in the first-ever Choose Privacy Week, May 2–8, 2010, and will be an ongoing education and awareness initiative similar to Banned Books Week. Those attending the Saturday event at Midwinter also learned about new tools for libraries to educate and engage their users, and encourage citizens to think critically and make informed choices about their privacy. Following the program, the author took time to greet audience members and sign copies of *The Peep Diaries*, which were given away to the first 100 attendees.

All Choose Privacy Week materials (posters, bookmarks, buttons, and resource guide) are complete and for sale in the ALA Store at www.alastore.ala.org. The Choose Privacy Week Resource Guide in particular was a major undertaking and a huge success, thanks to the many ALA members who contributed content and resources to share.

Choose Privacy Week is made possible through a seed grant from the Open Society Institute (OSI) and we thank OSI for their generous support. OIF will continue to pursue other funding opportunities as well.

Civic engagement is a key aspect of this initiative and OIF is pleased to collaborate with the Libraries Foster Civic Engagement Member Initiative Group, particularly in light of ALA's recently announced designation as a Public Policy Institute by the Kettering Foundation.

IF Manual Progress Report

The manuscript for the *Intellectual Freedom Manual* has been sent to ALA Editions. The book will be released during the 2010 Annual Conference. Web-based documents that

supplement the *Intellectual Freedom Manual*, such as the Q & As, are being worked on by the IFC and will be released in conjunction with the *Manual*. The Committee would like to thank Candace Morgan, editor of the *Intellectual Freedom Manual*, for all her dedication and meticulous attention in shepherding the project.

Prisoners' Right to Read

The IFC is beginning review of the Prisoners' Right to Read statement recently posted to ALA Connect by Diane Walden of the LSSPS Library Service to Prisoners Forum. The Intellectual Freedom Committee will be using the LSSPS document content to begin work on drafting a policy statement in this area at our spring meeting.

Banned Books Week

2009 marked the 28th anniversary of Banned Books Week (BBW), which was held from September 26 through October 3.

The week kicked off with the annual Banned Books Week Read-Out!, held on Saturday, September 26, in Bughouse Square, the historic free speech arena in Chicago. OIF, the McCormick Freedom Project, and the Newberry Library hosted this remarkable event. Five of the ten most challenged authors from the 2008 Top Ten Frequently Challenged Books list came together to read from their books that have caused so much controversy. The authors were welcomed by ALA President Camila Alire and introduced by Chris Crutcher, a frequently challenged author and long-time supporter of the freedom to read. In addition to the readings, the CityLit Theatre Company of Chicago and the Chicago Public Library's Teen Readers' Theatre Troupe performed dramatic readings of banned and challenged books.

Banned Books Week 2010 begins on September 25 and continues through October 2. All BBW merchandise, including posters, bookmarks, t-shirts, and tote bags, are sold and marketed through ALA Graphics (http://www.alastore.ala.org/). More information on Banned Books Week can be found at http://www.ala.org/bbooks.

OIF and ALTAFF Webinars

OIF is partnering with the Association of Library Trustees, Advocates, Friends and Foundations (ALTAFF) to present three one-hour webinars in February for library trustees on the topic of controversial materials in library collections.

The webinars, entitled "Controversial Materials in the Library: Supporting Intellectual Freedom in Your Community," are intended to help trustees understand the basics of intellectual freedom in libraries. They will cover information on collection development policies, procedures for handling challenges to library materials, and tips on responding to controversies that may arise. Angela Maycock, OIF Assistant Director, will lead the webinars.

LeRoy C. Merritt Humanitarian Fund

The LeRoy C. Merritt Humanitarian Fund, founded in 1970 to help librarians who have been denied employment rights because of their defense of intellectual freedom or because of discrimination, is 40 years old in 2010!

To celebrate this landmark anniversary, the Merritt Fund will be having a gala celebration and dinner on Monday, June 28, 2010 in conjunction with ALA Annual Conference. The event will be held at the world-famous Folger Shakespeare Library from 6:30-9:30 p.m. and will feature a special address by ALA past president Carol Brey-Casiano. In addition, the Folger Library is offering a special "behind the scenes" tour starting at 5:30 p.m.

Tickets for the gala and the tour are available via Annual Conference registration. The Merritt Fund 40th Anniversary Celebration is co-sponsored by ALA's Intellectual Freedom Round Table and ALA President Camila Alire. Help the Merritt Fund help librarians in need by attending the 40th Anniversary Celebration or making a donation to the Merritt Fund!

For more information on the LeRoy C. Merritt Humanitarian Fund, or to donate, visit http://www.merrittfund.org.

ACTION

Resolution in Honor of the LeRoy C. Merritt Humanitarian Fund's Fortieth Anniversary

The IFC worked with the LeRoy C. Merritt Humanitarian Fund trustees to craft a resolution honoring the Fortieth Anniversary of the Leroy C. Merritt Humanitarian Fund. The Committee is pleased to put forward this Resolution in Honor of the LeRoy C. Merritt Humanitarian Fund's Fortieth Anniversary and urges Council to adopt the resolution, CD #19.1.

In closing, the Intellectual Freedom Committee thanks the division and chapter intellectual freedom committees, the Intellectual Freedom Round Table, the unit liaisons, and the OIF staff for their commitment, assistance, and hard work. ☐

resolution in honor of the LeRoy C. Merritt Humanitarian Fund's fortieth anniversary

WHEREAS, the LeRoy C. Merritt Humanitarian Fund was established in 1970 in the memory of Dr. LeRoy C. Merritt, one of the library profession's staunchest opponents of censorship and one of its most vigorous defenders of intellectual freedom; and

WHEREAS, the LeRoy C. Merritt Humanitarian Fund provides direct financial assistance to librarians who are denied employment rights or discriminated against on the basis of gender, sexual orientation, race, color, creed, religion, age, disability, or place of national origin; or

threatened with loss of employment or discharged because of their stand for the cause of intellectual freedom, including promotion of freedom of the press, freedom of speech, defense of privacy rights, and the freedom of librarians to select items for their collections from all the world's written and recorded information; and

WHEREAS, Judith F. Krug provided unwavering support and tireless advocacy for librarians in need through her decades of service (1970—2009) as the first and longtime Secretary to the Leroy C. Merritt Humanitarian Fund; and

WHEREAS, Barbara M. Jones brings many years of library service, as well as teaching, writing, and active engagement on intellectual freedom issues, to her position as the new Secretary of the Leroy C. Merritt Humanitarian Fund; and

WHEREAS, over $100,000 has been awarded to dozens of recipients over the past forty years to help pay legal bills, cover living expenses, and provide general support to eligible librarians during times of professionally-related distress; and

WHEREAS, the LeRoy C. Merritt Humanitarian Fund continues to be a necessary source of support to librarians facing discrimination for who they are or for their defense of intellectual freedom issues; now, therefore, be it

RESOLVED, that the American Library Association congratulates the LeRoy C. Merritt Humanitarian Fund on its fortieth anniversary, commends the Merritt Fund for its continued dedication to supporting librarians who are experiencing discrimination or fighting for the cause of intellectual freedom, and urges its members to financially support the Merritt Fund. □

FTRF report to ALA Council

The following is the text of the Freedom to Read Foundation's report to the ALA Council, delivered by FTRF President Kent Oliver at the ALA Midwinter Meeting in Boston on January 19.

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2009 Annual Conference:

Barbara M. Jones, Executive Director

I am delighted to introduce Barbara M. Jones as the new Executive Director of the Freedom to Read Foundation. She brings a rich background in library administration, scholarship and intellectual freedom advocacy to this position. From 2003–2009 she was the Caleb T. Winchester University Librarian and Deans' Council Member at Wesleyan University in Middletown, CT. She held previous library directorships at Union College, the University of Northern Iowa, and the Fashion Institute of Technology (SUNY), as well as administrative positions at the University of Illinois (Urbana-Champaign), Minnesota Historical Society, New York University, and Teachers College Library, Columbia University. She holds a Ph.D. in U.S. Legal History from the University of Minnesota/Twin Cities and also holds an M.A. in History, Archival Management, and Historical Editing from New York University; an M.L.S. from the Columbia University School of Library Service; an M.A.T. in English from Northwestern University; and a B.A. in English from University of Illinois at Urbana-Champaign. She is a member of Phi Beta Kappa.

It is a particular pleasure to introduce Barbara, as she is one of our own. She brings twenty-five years of active engagement on intellectual freedom issues to her new position. She was a member of the ALA Intellectual Freedom Committee and has served as chair of the Intellectual Freedom Round Table. She was an ACRL Legislative Advocate and also has served on state Intellectual Freedom Committees in Iowa and Minnesota. In addition, she has served on the FAIFE (Freedom of Access to Information and Freedom of Expression) IFLA Standing Committee, serving as Secretary to FAIFE from 2007–2009. As a FAIFE trainer and expert advisor, Barbara has developed curricula and training programs, and conducted workshops internationally. And crucially, she is an active supporter of FTRF, having served until her hiring as a Trustee and Treasurer of the Freedom to Read Foundation.

New Trustee John Horany

With Barbara's hiring, it became necessary to find someone to take up her work as a trustee and treasurer for FTRF. I am pleased to announce that John Horany, a Dallas attorney who is best known his work vindicating the right to read in the Wichita Falls library censorship case, has accepted our invitation to serve out Barbara's term. John recently served a two-year term as an FTRF trustee. He is a cooperating attorney with the ACLU of Texas and on the faculty of ALA's Lawyers for Libraries program.

Challenging the USA PATRIOT Act and NSL Authorities

For several years now, the Freedom to Read Foundation has supported legal challenges to the USA PATRIOT Act and the government's ability to use National Security Letters (NSLs) to conduct secret searches of some of our most private information. We supported the four Connecticut librarians who sought to set aside the NSL served on the Library Connection in Windsor, CT, and we continue to support John Doe and the ACLU, who are still engaged in their lawsuit, *John Doe and ACLU* v. *Holder* (formerly *John Doe and ACLU* v. *Mukasey*), challenging the constitutionality of the automatic gag order that accompanies every NSL.

Last summer, we were very happy to report that the

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West Bend Library wins Downs Award

The West Bend Community Memorial Library in West Bend, WI, is the recipient of the 2009 Robert B. Downs Intellectual Freedom Award given by the faculty of the Graduate School of Library and Information Science at the University of Illinois at Urbana-Champaign.

The faculty voted overwhelmingly to give this year's award to the West Bend Library for its steadfast advocacy on behalf of intellectual freedom in the face of a library challenge that garnered national attention. The efforts of the library board, Library Director Michael Tyree, the library staff, and many supportive community members are to be commended.

The controversy began in February 2009 when West Bend resident and conservative blogger Ginny Maziarka formally objected to the presence of books with LGBTQ (lesbian, gay, bisexual, transgender, queer, and questioning) content in the young adult section of the library. She formed a citizens' group, West Bend Citizens for Safe Libraries, and circulated a petition that called for the library to, among other requests, move "youth-targeted pornographic books into the adult section of the library."

In response to her objection, a second citizens' group was formed, West Bend Parents for Free Speech, which was active in supporting the library's decision not to move or remove any of the titles in question.

The controversy quickly escalated in the town of 30,000 people located outside of Milwaukee. Hundreds of people attended library board meetings and town hall gatherings. In April 2009, four library board members were denied reappointment by the West Bend Common Council for not acting on the petitions to remove the materials. According to Alderman Terry Vrana, who was quoted in the *West Bend Daily News*, "the appointees were not serving the interests of the community 'with their ideology.'" At a June 2009 meeting of the library board, a vote was taken and a unanimous decision to maintain the young adult collection without removing, moving, labeling, or restricting in any way, triumphed.

The American Library Association issued a statement in support of the library and against the efforts to control access to library collections. "Fanning the flames of this controversy, opponents of open access in libraries have launched a campaign spreading fear and misinformation. . . By resisting calls to censor potentially controversial materials, [the West Bend Library] promote[s] and protect[s] true education and learning, and uphold[s] the cherished freedoms that we, as Americans, hold most dear."

Maziarka launched an aggressive campaign and used social media, including her blog, to spread her message. National media outlets such as CNN, ABC News, and Fox News covered the story. In mid-July, the Pew Research Center's Project on Excellence in Journalism ranked the West End book challenges as among the top five blogged-about topics in the news.

"The West Bend librarians, library board, and library supporters demonstrated the strong and steadfast advocacy on behalf of intellectual freedom that is the focus of the Downs Award. Despite the enormous media attention that the controversy received, they were unwavering in their support of the public library's responsibility to provide a diverse collection to serve *all* community members," said Christine Jenkins, GSLIS associate professor and director of the Center for Children's Books.

A reception to honor the West Bend Library was held during the midwinter meeting of the American Library Association. The ABC-CLIO publishing company provides the honorarium to the recipient of the Downs Intellectual Freedom Award and also co-sponsors the reception.

The Robert B. Downs Intellectual Freedom Award is given annually to acknowledge individuals or groups who have furthered the cause of intellectual freedom, particularly as it affects libraries and information centers and the dissemination of ideas. Granted to those who have resisted censorship or efforts to abridge the freedom of individuals to read or view materials of their choice, the award may be in recognition of a particular action or long-term interest in, and dedication to, the cause of intellectual freedom. The award was established in 1969 by the GSLIS faculty to honor Robert Downs, a champion of intellectual freedom, on his twenty-fifth anniversary as director of the school. ☐

conservatives gain in Texas textbook battle

The conservative bloc on the Texas State Board of Education won a string of victories January 15, obtaining approval for an amendment requiring high school U.S. history students to know about Phyllis Schlafly and the Contract with America as well as inserting a clause that aims to justify McCarthyism.

Outspoken conservative board member Don McLeroy, who reportedly spent over three hours personally proposing changes to the textbook standards, even wanted to cut "hip-hop" in favor of "country" in a section about the impact of cultural movements. That amendment failed.

The board also voted to delay further debate on the nationally influential standards until March, with a final adoption vote now scheduled for May.

But the current working draft of the standards has gotten a lot more conservative. Here are some of the key developments from the session in Austin:

- McLeroy proposed a clause in the civil rights section that read: "Evaluate changes and events in the United States that have resulted from the civil rights movement,

including increased participation of minorities in the political process and unrealistic expectations for equal outcomes." McLeroy plans to ask for a vote on this measure at a later meeting.

- Complaining that the standards were "rife with leftist political periods and events: the populists, the progressives, the New Deal, and the Great Society," McLeroy offered this amendment: "Describe the causes and key organizations and individuals of the conservative resurgence of the 1980s and 1990s, including Phyllis Schlafly, the Contract with America, the Heritage Foundation, the Moral Majority, and the National Rifle Association." It was approved. The standards do not include a progressive counterpart clause for the same period.
- On the issue of Joseph McCarthy, another McLeroy amendment was approved requiring textbooks to explain in discussions of McCarthyism "how the later release of the Venona Papers confirmed suspicions of communist infiltration in U.S. government." Venona Papers refers to decrypted Soviet intelligence messages, the significance of which is the subject of longtime debate. McLeroy previously told curriculum writers that McCarthy had been "basically vindicated." As liberal watchdog group Texas Freedom Network pointed out, Emory University professor and Venona expert Harvey Klehr, who has argued that McCarthy was right about "some of the large issues," said in a 2005 speech, "Many of his claims were wildly inaccurate; his charges filled with errors of fact, misjudgments of organizations and innuendoes disguised as evidence."
- Republican board member Cynthia Dunbar unsuccessfully tried to strike the names of Scopes monkey trial attorney Clarence Darrow and Pan-Africanist Marcus Garvey from the standards. Asked by another member about her opposition to Garvey, Dunbar explained, according to the *Texas Tribune*: "My concern is that he was born in Jamaica and was deported." Reported in: talkingpointsmemo.com, January 13. □

AAUP unveils new *Journal of Academic Freedom*

On January 27, via an email to its members, the American Association of University Professors (AAUP) announced the debut of a new online project —*The AAUP Journal of Academic Freedom*. In a statement to members, AAUP President Cary Nelson, who is also editor of the journal said:

"Scholarship on academic freedom—and on its relation to shared governance, tenure, and collective bargaining—is typically scattered across a wide range of disciplines. People who want to keep up with the field thus face a difficult task. Moreover, there is no one place to track the developing international discussion about academic freedom and its collateral issues. Edited collections and special issues of journals have helped fill the need for many years, but there has been no single journal devoted to the subject. Now there is. It is published by the organization most responsible for defining academic freedom.

"Publishing online gives us many advantages, the first being the ability to offer the journal free to everyone interested. A link to this inaugural issue will go out by e-mail to nearly 400,000 faculty members. We hope they forward it to students and colleagues everywhere. Online publication also gives us the freedom to publish quite substantial scholarly essays, something that would be much more costly in print.

"We invite people to submit essays for our next issue. Whether the journal is published as an annual volume or twice a year will depend in part on the number of quality submissions we receive. We will also maintain a continuing relationship with the AAUP's annual conference on the state of higher education, itself founded in 2009. We are publishing four essays from the 2009 conference but expect to increase that number next time.

"This first issue is devoted to essays solicited by the editor, with members of the editorial board checking essays for historical errors. The next issue will be conventionally refereed. Neither the editor nor the board members are ex officio. All were appointed on the basis of their publishing history and expertise.

"We have done our best to gather a diverse range of essays. They range from historical studies to analyses of contemporary conflicts, from accounts of individual faculty experiences to institutional histories. Thus Phillip Deery details a case from the McCarthy era, whereas Ellen Schrecker analyzes the Ward Churchill case. Four essays deal with institutional crises—Jan H. Blits's, Jean Gregorek's, Cary Nelson's, and one jointly authored by Nancy D. Campbell and Jane Koretz. Dan Colson breaks new ground in discussing graduate student academic freedom, whereas Larry Gerber reviews the history of the relationship between academic freedom and shared governance. We welcome your responses and suggestions."

The editorial board includes past AAUP General Secretary Ernest Benjamin, Michael Berube of Pennsylvania State University, Matthew Finkin of the University of Illinois, Mary Gray of American University, AAUP Associate General Secretary Jordan Kurland, AAUP Associate Secretary Anita Levy, Debra Nails of Michigan State University, Robert Post of Yale University, David Rabban of the University of Texas, Adolph Reed of the University of Pennsylvania, AAUP General Secretary Gary Rhoades of the University of Arizona, and Ellen Schrecker of Yeshiva University. Gwendolyn Bradley, AAUP Communications Director, serves as Managing Editor.

The Journal of Academic Freedom may be found online at http://www.academicfreedomjournal.org. □

J.D. Salinger, 1919-2010

J.D. Salinger, who was thought at one time to be the most important American writer to emerge since World War II but who then turned his back on success and adulation, becoming the Garbo of letters, famous for not wanting to be famous, died January 27 at his home in Cornish, N.H., where he had lived in seclusion for more than fifty years. He was 91.

Salinger's breakthrough novel, *The Catcher in the Rye*, published in 1951, was one of the most frequently censored titles in American literature, even as it became among the most widely read, especially in high school English classes.

As Charles McGrath wrote in Salinger's obituary in the *New York Times*, "With its cynical, slangy vernacular voice (Holden's two favorite expressions are "phony" and "goddam"), its sympathetic understanding of adolescence and its fierce if alienated sense of morality and distrust of the adult world, the novel struck a nerve in cold war America and quickly attained cult status, especially among the young. Reading *Catcher* used to be an essential rite of passage, almost as important as getting your learner's permit."

The novel's allure persists, even if some of Holden's preoccupations seem dated, and it continues to sell more than 250,000 copies a year in paperback.

Although *Catcher* was a frequent target of censorship, Salinger himself acted to prevent publication of material he believed to violate his privacy. In 1984 the British literary critic Ian Hamilton approached Salinger with the notion of writing his biography. Not surprisingly, Salinger turned him down, saying he had "borne all the exploitation and loss of privacy I can possibly bear in a single lifetime." Hamilton went ahead anyway, and in 1986, Mr. Salinger took him to court to prevent the use of quotations and paraphrases from unpublished letters.

The case went all the way to the Supreme Court, and to the surprise of many, Salinger eventually won, though not without some cost to his cherished privacy. In June 2009 he also sued Fredrik Colting, the Swedish author and publisher of a novel said to be a sequel to *Catcher*. In July 2009 a federal judge indefinitely enjoined publication of the book in the U.S. □

Facebook founder: online privacy not a "social norm"

Speaking at an awards show in San Francisco in January, Facebook founder Mark Zuckerberg described increased sharing of personal information with wider groups of people and businesses as a new "social norm," pointing to the vast number of people on the Internet who post information about their lives to blogs and who have become "comfortable" sharing information about themselves—and their activities, habits, and purchases—with more and more people and businesses.

In this context, Zuckerberg described Facebook's recent privacy overhauls—which default to sharing substantial information about users with the whole world—as keeping with with current social norms. In other words, in Zuckerberg's world view, online privacy is not something Internet users expect.

Zuckerberg's comments came as his company recently revamped its default privacy settings for Facebook accounts so that, by default, users' photos, profile, and status updates are accessible to the entire Internet—including search engines such as Google, which have the capability to store the information in cache for an indefinite period of time, effectively making it "immortal" on the Internet. If users do not wish to share that data with the entire world, they have to specifically alter their privacy settings to block that information from being shared.

"When I got started in my dorm room at Harvard, the question a lot of people asked was 'why would I want to put any information on the Internet at all? Why would I want to have a website?'" Zuckerberg said.

"And then in the last five or six years, blogging has taken off in a huge way and all these different services that have people sharing all this information. People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that has evolved over time," he continued.

Zuckerberg's comments represented a radical change from the way he had for years emphasized the importance of user privacy. That personal information would only be visible to the people the user accepts as friends was fundamental to the Facebook social network that hundreds of millions of people have joined over the past few years. Privacy control, he told one blogger less than two years ago, is "the vector around which Facebook operates."

From last December onwards, all Facebook users' status updates are made publicly available unless the user actively opts to change the settings and make its private. Users were alerted to changes via a 'Notification' posted in the bottom right hand corner of the site.

The sites' users were also given the opportunity to change settings on things like photographs and videos they upload to the site. However, the changes sparked criticism from Internet users' rights groups who said the move was a way for Facebook to facilitate more people making more personal information publicly available without realizing it.

The changes also followed agreements Facebook signed with both Google and Microsoft's Bing, to allow people's status updates (which are not set to private) to be indexed by both search engines in order to enable the search giants to provide real-time results.

Facebook chief operating officer Sheryl Sandberg publicly said in September 2009 that Facebook was making no

money from the search arrangement with Microsoft—unlike Twitter—which has signed similar deals and is understood to be generating cash from both arrangements with Google and Microsoft. Although all three parties—Twitter, Microsoft and Google—have declined to comment.

Zuckerberg defended the changes made by Facebook to its privacy settings, saying it was in line with the new social norms. "A lot of companies would be trapped by the conventions and their legacies of what they've built," he said. "Doing a privacy change for 350 million users is not the kind of thing that a lot of companies would do.

"But we viewed that as a really important thing, to always keep a beginner's mind and what would we do if we were starting the company now and we decided that these would be the social norms now and we just went for it," he explained.

The Electronic Privacy Information Center has filed a complaint with the Federal Trade Commission alleging that Facebook's privacy practices endanger its users in an age of online predators, surveillance, and identity theft, and that the company is engaging in "unfair and deceptive practices." Groups signing on to EPIC's complaint include the American Library Association, the Center for Digital Democracy, and the Consumer Federation of America.

Zuckerberg may be correct in asserting there is a growing generation of Internet users who don't care whether information they post to Facebook or other social networking services is widely shared with the world, businesses, and other Internet users; certainly, that sort of real "lifestyle" data is invaluable to advertisers who seek to target Internet users based on their interests and habits. However, lack of online privacy—and users' cognizance of it—may also generate a backlash, wherein the information users choose to share with the world is exaggerated, half-true, or outright fictional as users create online personas to protect the privacy of their real lives. In that way, lack of online privacy actually works counter to the business interests of social networking sites, because the information they're providing to their users—and advertisers—may not be a close match with reality. Reported in: telegraph.co.uk, January 11; digitaltrends.com, January 11; readwriteweb.com, January 11. □

press freedom in Russia: a tale of contradictions

Late last summer, Ilya Barabanov, a young Russian editor, posted a message on his Web site under the heading, "A Long Story." A couple of weeks earlier, Russia's Constitutional Court had ruled, unsurprisingly, that Barabanov's wife and former colleague, Natalia Morar, could not re-enter the country. "In all honesty, I don't know and won't try to predict when Natalia will return to Russia," Barabanov wrote. It was the final chapter in a case that began in 2007, when Morar was detained at a Moscow airport after a reporting trip to Israel. A Moldovan citizen who had lived in Russia since 2002, she was sent, without explanation, to Chisinau, the capital of Moldova. There she was told she had been denied entry because she was a threat to the security of the state.

Morar was deported not long after publishing a series of articles in *The New Times*, a weekly Russian newsmagazine that specializes in long-form investigative stories. Based on anonymous sources within the Ministry of Internal Affairs, the articles portrayed an elaborate money-laundering scheme that included some of Russia's top banks, high-level officials, and the Austrian Raiffeisen Zentralbank. She also alleged that the 2006 contract killing of Andrei Kozlov, head of Russia's central bank, was tied to his ongoing investigation of the very same activities—an assertion that the Austrian Interior Ministry later said could not be ruled out.

The story touched a nerve. Morar said that after it was published she received a warning from sources close to the FSB, Russia's security and counterintelligence service, who told her, "There is no need to end your life with an article . Someone might simply wait for you at the entrance to your apartment building, and they will not find a killer afterward." This was a good summation of what has happened to several investigative reporters in Russia, including Dmitry Kholodov in 1994, Paul Klebnikov ten years later, and Anna Politkovskaya in 2006.

In a last bid to attain citizenship and return to Russia, Morar married Barabanov in Moldova and the couple flew to Moscow together in February 2008. They were detained for three days at Domodedovo airport, until Morar was again sent back to Moldova, where she still lives.

Barabanov is the twenty-four-year-old political editor of *The New Times*, which was launched in 2007, not long after the killing of Politkovskaya. It has taken on highly sensitive stories, from the poisoning of Alexander Litvinenko to the murder of Kozlov, the head of the central bank, to the Russian-Georgian war. A recent graduate of Moscow State University's journalism school, he'd intended to be a sports reporter. But he started working for the well-known opposition newspaper, *Novaya Gazeta*, during college and went on to one of Russia's largest news Web sites, gazeta.ru, before becoming a correspondent at *The New Times*.

New Times, with 50,000 readers, is privately financed and published by Irina Lesnevsky, who made her fortune as co-founder of REN TV, one of Russia's last truly independent television stations. In 2005, though, Lesnevsky and her son (a film producer) sold their 30 percent holding, and the station has since been auctioned off to allies of the Kremlin in what many view as a gentle takeover. But Lesnevsky returned to the world of media and politics with a rather daring gamble: to invest in a highly critical media venture at a time when most observers are lamenting the death of free speech in Russia.

Indeed, one might reasonably ask why there are

journalists left in Russia willing to take on investigative stories. As Thomas de Waal, who covered the first Chechen war for *The Times* of London and *The Economist*, said, "For every journalist who gets killed there must be twenty who decide that they're not going to write the story that they might have written."

Yet important stories still do get covered. And when reporters continue to face the threat of such reprisals for their work, there seems to be a paradox in the claim–made by everyone from Putin to journalists themselves–that independent newspapers and magazines have become irrelevant.

Meanwhile, a rapidly growing community of online readers has made it increasingly difficult for the Kremlin to control the flow of information, even if the Web is hardly able to compete with state-owned TV. (Roughly 25 percent of the population used the Web as of 2007, close to 60 percent of Muscovites.) Financial reporting has also flourished lately. And stories that in the past would appear only in opposition newspapers, often on social issues such as hazing and abuse in the military, Russia's crumbling health care system, and even reports from Chechnya and the North Caucasus, are not uncommon in Russia's relatively new glossy magazines.

Although the last two decades have been deeply troubling for journalism in Russia, young reporters and independent media continue to pursue stories that matter. On the occasion of the one-year anniversary of *The New Times* in 2008, Lesnevsky acknowledged the almost impossible task ahead of her, and the possibilities, too. "A year has passed," she wrote. "Everyone is alive. And we're even celebrating."

In Russia, circulations seem to rise and fall along with political hopes. In 1990, when the reforms of the Gorbachev era reached their apex, daily newspaper circulation in Russia was 38 million. By the time Boris Yeltsin left office at the end of the decade, when press freedom was already beginning to shrink and the economy had suffered a shocking collapse, that number had fallen to just 7.5 million. Media scholars often refer to the late perestroika years and the early days of the Yeltsin regime as a golden age of Russian journalism. Crowds of people could be seen waiting on line every Wednesday for copies of the influential *Moscow News*.

Moreover, the public trusted journalists. They were seen as public servants and truth tellers. According to Andrei Richter, director of The Moscow Media Law and Policy Institute, many journalists were elected to national, regional, and city offices. *Argumenty i Fakty*, once the country's largest mass circulation weekly and still popular, had fourteen staff members elected to public office. In his study of media and power in post-Soviet Russia, Ivan Zassoursky, a professor at Moscow State University's journalism school, says that in the late 1980s the concept of a fourth estate was just beginning to take hold. "It was a very exciting period," Richter said.

The ebullience of that period, however, was quickly offset by skyrocketing inflation. Newspapers were forced to accept state subsidies early on, creating a dynamic that has become increasingly politicized under Putin. Meanwhile, a number of wealthy oligarchs bought media outlets during the 1990s, paying journalists well and providing a measure of independence. By the Putin era, only oligarchs close to the Kremlin could survive.

The problems Western media face–from budget cuts to the impact of the Web–exist in Russia too. But in Russia the foundation was already shaky. And there is no deep tradition of investigative reporting, or the institutions to support it. Readership declined.

In recent years, it has declined further and advertising revenue has plummeted. In the last year alone, daily papers in Russia lost 17 percent of their readers, and a recent TNS Gallup survey showed that less than 10 percent of the population bothered to read dailies between December 2008 and April 2009. (In most European capitals the same figure is closer to 50 percent.)

The legacy of a "pay to play" model dating from the oligarch-dominated era of the 1990s, in which newspapers and magazines accept money for "articles," has further weakened public trust. Called dzhinsa (Russian for "blue jeans"), the practice has become institutionalized; newspaper managers or editorial board members are often paid directly. "Newspaper type has become the weapon of the banker and the politician," a journalist wrote in the mid-1990s. "The journalist has been transformed into a mouthpiece."

The public has become so suspicious of placed articles that reporting or reviews are often assumed to have been paid for. Maxim Kashulinsky, the thirty-six-year-old editor of *Forbes Russia*, says he still has to persuade people that *Forbes* doesn't sell entries to its list of Russia's one hundred richest businessmen.

Perhaps worse has been the state's gradual domination of print publications. First, over the course of Putin's presidency, a number of large-circulation dailies, including *Komsomolskaya Pravda*, *Kommersant*, and *Izvestia* were sold to Kremlin-friendly business groups, including the state-owned gas monopoly Gazprom. At the same time, state subsidies for newspapers gradually became tied to content and ideology. Until a few years ago, Russian newspapers received uniform support from state and local budgets for print costs and distribution, regardless of size or political orientation. In 2005, however, a new law changed the funding system; money would be distributed through a competition for grants administered by the Federal Agency on Press and Mass Communications. The grants were not based on objective criteria, but on the kind of stories publications printed–whether they were sufficiently sympathetic to those in power.

(continued on page 78)

censorship dateline

libraries

Cheshire, Connecticut

Pressure to remove a book about local homicides from library shelves isn't going away. That's according to Chris Gilleylen, a neighbor of the property where the killings occurred, who has been working to overturn the public library's decision to stock *In the Middle of the Night* (see *Newsletter*, January 2010, p. 7).

Gilleylen and others formed Citizens Ask for Re-Evaluation after public hearings failed to move either Library Director Ramona Harten or the Library Advisory Board to keep the book off the shelves. Although supporters of the book have been framing the issue as "a freedom of speech thing," Gilleylen said, "It's more of a victims' rights thing. It needs to be reframed."

In the Middle of the Night, by Brian McDonald, is written mainly from the perspective of one of the co-defendants in the triple homicide case, Joshua Komisarjevsky. Gilleylen and others feel the book was written in violation of a court gag order, and Gilleylen said she began an online petition several months ago to block the book's distribution and sale.

An attorney for Steven Hayes, the other co-defendant, said Komisarjevsky violated the gag order by talking to McDonald and requested a delay of jury selection due to the inflammatory nature of the book, but a New Haven Superior Court judge rejected the request in December.

The five-member group, which calls itself CARE, will make official library material reconsideration forms available to residents and then will deliver them to the library, Gilleylen said. She said more than a hundred forms asking for a reconsideration of the book have been collected. She expects those forms to be delivered by the end of the week, saying they'll have more impact if delivered en masse. Gilleylen said some businesses in town seemed willing to provide forms for residents, although she declined to name the businesses.

Material reconsideration forms go to Harten, who will review the book in question and compare it to the materials selection policy. Harten and the board reviewed that policy in November and concluded—with the single dissenting vote of Republican board member Marilyn Bartoli—that *In the Middle of the Night* should be included in the library's collection.

"That policy was followed in this case," said Harten, who has authority over which items the library stocks. Books are chosen based in part on demand and local relevance, according to the materials selection policy. Harten said she had received one reconsideration form about the book, in October. Reconsideration forms are rare for the library. "Maybe one a year," she said.

The library bought two copies of McDonald's book, both of which are on loan and have a waiting list.

Gil Linder, a Republican Planning and Zoning Commission member and president of the Deaconwood homeowners' association, has read excerpts of *In the Middle of the Night* but doesn't wish to read the rest. He plans to submit a reconsideration form to the library. "It's, in my opinion, not high-class writing," he said. "It appears to be a kind of voyeuristic thing." The gag order was also a reason to oppose the book, Linder said.

Linder has helped distribute the forms, but said he doesn't expect that Harten will reverse her decision. The library forms are one of the last options for pulling the book from the library, he said. Reported in: recordjournal.com, December 17.

Mt. Prospect, Illinois

Mike Alaimo thinks Ann Coulter should know what's going on with her books at the Mount Prospect library. "I probably won't hear back, but I e-mailed her this week," he said.

Earlier this month, the Mount Prospect resident was scrolling through his library's online catalog when he came across a list of books by Ann Coulter, a prominent conservative pundit whose works include *Godless: The Church of Liberalism* and *If Democrats Had Any Brains, They'd Be Republicans*. Someone had tagged "hate speech" on virtually every listing, Alaimo said.

"I don't understand why the library is letting people make political statements on their site," said Alaimo, a political conservative. "By not taking it off, the library is agreeing with it." Library officials disagree.

In July, the library started a new cataloging system that

allows readers to "tag" books with terms they think other readers might find useful, said Marilyn Genther, executive director of the Mount Prospect Public Library. For example, someone tagged Dan Brown's popular novel *Angels & Demons* with the terms "Papacy" and "Vatican City," which are both themes in the book.

"It's just a way for the average person to describe a book, and for readers to zero in on different material," said Cathy Deane, Mount Prospect's deputy director of public services. However, readers could also add totally irrelevant tags to Brown's book such as "pickles" and the library won't remove them, Genther said.

The library doesn't monitor the tags too closely and will remove tags only if they contain explicit material or racial slurs, Deane said.

Alaimo said the tags appear under each book's call number and look like they were added by library officials. In several e-mails to Mount Prospect library officials, Alaimo said an online book catalog isn't the place for political banter.

"If the library wants to start a dialogue, they should start a Twitter page," he said.

In the Mount Prospect system, the only requirements to tag are that the reader register by creating a user name and e-mail address. Rosemary Groenwald, head of the library's technical services, said Alaimo's complaint is the only one the library has received since the new system started in July. "There is nothing stopping this patron from going in and tagging (Coulter's books) with 'free speech' to even it out," Groenwald said.

"I don't know, I may go and tag something," Alaimo responded. "I'm thinking about it." Reported in: *Arlington Heights Daily Herald*, December 18.

Jessamine County, Kentucky

The graphic novel that got two employees fired and launched a book-banning campaign in Jessamine County is being recataloged, along with other graphic novels with mature themes, to the adult section of the library.

Critics had contended that Alan Moore's *The League of Extraordinary Gentlemen: Black Dossier* was shelved in a section of the Jessamine County Public Library that was too close to the young adult fiction. They also said it was too obscene for young readers and too similar to comic book material. The graphic novels that belong in the teen section will be moved as well, library director Ron Critchfield said.

The move was prompted by recent public outcry about censorship, book placement and whether certain books belong in the Jessamine County collection. It came after a heated November library board meeting in which more than 100 people came to voice their opinions to the board about who—the library or parents—is responsible for what children check out.

In September, library employee Sharon Cook, who had checked out Moore's graphic novel repeatedly to keep it off the shelves, was asked to relinquish it because a library patron had put a hold on it. Cook and another employee, Beth Boisvert, went into library records to discover, they say, that the hold was requested by an 11-year-old girl. Both women judged the book to be pornographic and inappropriate material for a child.

The graphic novel, which contains drawings of sexual activity between adults, was one of *Time* magazine's top graphic novels of 2007 and has been acclaimed in literary circles.

The women were fired for breaching library policy.

When told of the decision to recatalog the books, Boisvert deemed it "very good news." Cook was more cautious. "It would appear that the library is trying to soothe its tax base by moving the graphic novels," she said. "This is a situation that already exists in other libraries and so is not a new nor creative solution. This very simple solution is one step in the right direction. We can hope that this is the first step in JCPL being more responsive to its tax base."

Critchfield explained that the decision was made after "we researched options, contacted legal counsel and diligently worked to discern how to address concerns. As a result, JCPL took action to address public concerns in cooperation with the practices and procedures of the library and respect for First Amendment rights."

In recent weeks, Critchfield, who has a doctorate in information science in addition to a bachelor's degree in religion from Centre College and a master's degree in theological studies from Duke, has been threatened with physical harm because of his defense of a library's duty to provide material that not everyone approves of.

The announcement, he said, was well-received by "a number of persons in the community who use the library (and) local government officials."

Cook and Boisvert are continuing to dispute their denial of unemployment benefits after their firings. Both blame Critchfield specifically for "signing the papers denying the claims." Reported in: *Lexington Herald-Leader*, December 4.

North Kansas City, Missouri

North Kansas City Schools appear to be headed towards segregating elementary school libraries according to "age appropriateness." The move follows the Board of Education's split vote to keep the children's book *And Tango Makes Three* on library shelves (see page 73). A Bell Prairie Elementary School parent complained to the district about the book because of its portrayal of two male penguins that raise a chick together.

One of the things that emerged from the board's discussions about the complaint was that most members were uncomfortable with the book's allegedly "sexual" content.

Both Kathleen Harris and Chace Ramey voted to keep the book in general circulation, but only because they didn't think district policies allowed further restrictions without violating free speech laws. Several of the board members suggested more should be done to protect younger students from inappropriate information.

"I think were can be smarter about how we allow titles in our library," Harris said. "We need to treat them with a thorough, insightful way that fits our community." By consensus, the board directed Superintendent Todd White to come up with a plan to classify library materials according to age appropriateness. They seemed to indicate that students would only be allowed to view or check out materials in their own age-class or younger. The definition of "age appropriateness" was left undefined. Who gets to decide how books are classified was also unclear. Reported in: *North Kansas City Sun-Tribune*, December 29.

Pataskala, Ohio

The Pataskala Public Library is not throwing out a book a handful of residents find objectionable, but it is implementing a new policy that will allow parents to limit what their children can check out. Library Director Matt Nojonen informed the residents of the decision via a letter. "We're not going to put (the book) in any unusual place," Nojonen said. "We're going to put it in with the regular nonfiction."

Nojonen drafted the letter after six residents attended the library's regular December meeting to raise questions about Eric Marlowe Garrison's *Mastering Multiple Position Sex*, billed on its back cover as a lovemaking guide. Pataskala resident Marti Shrigley saw the book in plain view on a new book display and asked the library to move it. The board did agree to move the book to regular nonfiction shelving, but the book gained more notoriety after Shrigley appeared on a handful of central Ohio newscasts.

"They believe that relocating it adequately addresses concerns about the prominence of the book. Any future attention or publicity that is drawn to the book through the media or other influence is completely out of our hands," Nojonen wrote in the letter.

Shrigley's husband and a handful of other residents approached the board in December and asked it to consider placing the book behind the check-out desk or on a high shelf, out of the reach of children. In his letter, Nojonen defended the library's right to house the book on its nonfiction shelves.

"Sequestering material forces patrons to take unnecessary steps to locate it, thereby sacrificing their legitimate need and right to privacy. It creates an environment in which a patron's pursuit of completely legal information is treated as illicit or immoral. It actively discourages patrons from using the materials," he wrote.

Nojonen added the issue of child protection is a frequent topic of debate in libraries and communities. To that end, the library requires parents or guardians to sign statements of responsibility for the material their children check out.

The library is strengthening that policy via a new board-approved juvenile library card. A parent or guardian will be able to sign off on the card, thereby restricting his or her child's borrowing rights to juvenile materials. If a child tries to check out non-juvenile materials, a library employee will be alerted via a computer prompt. "This will be a tool parents can use," Nojonen said. "It won't restrict anyone else's access."

Library officials hoped to have the new card in place by February—it will require additional staff training and changes to the library's circulation software.

"I'm very, very pleased they're going to have juvenile-based literature (cards)," said Susan Risner, a critic of the book. "I think we've accomplished more than just limiting the book."

Nojonen, for his part, hopes the controversy fades so the focus returns to the library's programs and other offerings. "I just hate to think about people in the community whose perception of the library was altered," he said. Reported in: *Newark Advocate*, January 5.

Union, Oklahoma

The Union school board will decide whether a children's book objected to by a parent will remain on the shelves of one of the district's elementary school libraries. The issue came before the board after a parent brought her concerns to the district's Materials Review Committee in October. The committee ultimately ruled that the book should be kept on library shelves.

Superintendent Cathy Burden said books' being brought before the board for review is a rare occurrence. "I've been here 16 years, and we've never had a book reviewed by the board of education," she said.

The book in question is *Buster's Sugartime*, by Marc Brown, an adaptation of an episode of the "Postcards from Buster" series that airs on PBS. The episode was pulled from many PBS stations in early 2005 after controversy erupted because it showed two same-sex couples. "Sugartime," like other episodes from the series, is a combination of animated and live-action spots that feature Buster visiting children and their families with a wide range of backgrounds. In this particular episode, Buster visits Vermont during "Mud Season" to learn about the state and how maple syrup is made.

Most of the episode is devoted to Buster's following the children of a same-sex couple as they play, make cookies, visit a dairy, have dinner and make maple syrup.

Vermont was the first state to legalize same-sex civil unions in 2000 and legalized same-sex marriage last year.

The book is a condensed version of the episode. Of the story's 31 pages of text and pictures, two short passages mention the same-sex couple; one picture at the book's

end features the two same-sex couples and their children together; and a drawn picture of one of the couples is in a scene's background. The two passages state: "Buster went to visit his mom's friends Karen and Gillian. They had three children . . ." and "Lily's moms, Tracy and Gina, were very good cooks."

According to the minutes of the school district's seven-person review committee's October 29 meeting, the parent who filed the request for review said that on September 2 her kindergarten-age son brought the book home from Thomas Jefferson Elementary School's media center.

Once the parent read the book, she said she and her husband thought the reference to "two moms" was inappropriate for elementary-age children and that she thought it was the author's intent to expose children to same-sex marriage, according to the minutes. The parent also told the group that "since Oklahoma law does not recognize same sex marriages, they (the parents) feel the subject matter is inappropriate for Jefferson media center," according to the documents.

After reviewing the case, the committee voted 6-1 to keep the book on the library shelves, citing the fact that several books in district libraries show different family structures and noting that children of same-sex parents who might relate to the book attend the district.

"The committee felt that it was the author's intent to expose different family structures. It was decided that the author was making a statement," the minutes state. "Maybe in Vermont, mud season, how maple syrup is tapped from trees and family structure of this type is accepted." Reported in: *Tulsa World*, January 27.

Fond du Lac, Wisconsin

A popular, young adult book in the Theisen Middle School Library is being challenged as inappropriate. Parent Ann Wentworth of Fond du Lac issued a formal complaint with the school district, objecting to "sexual content too mature for 11- to 14-years-olds" in the book *One of Those Hideous Books Where the Mother Dies*, by Sonya Sones. The Fond du Lac School District's nine-member Reconsideration Committee met on January 27 to hear Wentworth's complaint.

Wentworth said she read the book after her 11-year-old daughter, who is in sixth grade, brought it home from school. "To the author's credit, it's a good story line, but it contains sexual content that my child, at that age, doesn't understand," she said.

The book, written in a poetic prose style, has won several awards, including being named the 2005 Best Book for Young Adults by the American Library Association. The story involves a high-school student named Ruby, who, after the death of her mother, moves from Boston to Los Angeles to live with her movie star father. The book is recommended for readers age 12 and up.

The complaint lists some examples of the inappropriate content from the book, including references to "losing your virginity," condoms, and a stepmother being called a "controlling bitch."

Sones is listed among the most frequently challenged authors, according to the American Library Association, most notably for her book *What My Mother Doesn't Know*.

The Reconsideration Committee, composed of an elementary teacher and principal, secondary teacher and principal, a library/media specialist from the school district, and three members of the community, functions solely to hear curriculum concerns from community members.

"The meeting tonight was a fact-finding mission. As soon as parents sign a complaint form, it becomes a legal issue and we have to post the notice in the newspapers," said committee chair John Whitsett, director of curriculum and instruction for Fond du Lac Schools. He said there are about three copies of the book in district libraries.

Theisen media specialist Kathy Prestidge said the library's wide variety of reading material is selected in accordance with School Board policies. Whitsett said that if a person objects to classroom or library materials being used in the school district, they must first go to the teacher or media specialist. If the issue is not resolved, it would then go to the principal of the school, then to the superintendent, and finally to Whitsett and the committee.

"I help the complainants fill out the forms and explain the process they will go through," he said.

The last time the committee heard a complaint was in November 2006, when parents wanted Maya Angelou's *I Know Why the Caged Bird Sings* pulled from the curriculum. The book remained as a classroom reading assignment at Fond du Lac High School, but parents are now informed about the book's content and may ask that their teen be given an alternate book to read. Reported in: *Fond du Lac Reporter*, January 28.

schools

Alameda, California

A San Francisco Bay area school board will use broad lessons against bias to replace a curriculum against bullying gay people that had become a national centerpiece in the opposition to same-sex marriage.

The vote by the Alameda Board of Education on December 7 did little to ease tensions in the island city near Oakland. A lawsuit and threats of recalling school board members accompanied debate over the so-called Lesson 9 curriculum adopted in May to prevent anti-gay bullying.

Gay parents in the community wanted their children protected from bullying, while other parents argued that elementary school is too early to talk to students about gay people.

The new anti-bullying lessons approved by the board, at the recommendation of School Superintendent Kirsten

Vital, will be supplemented by children's books that explicitly address six specific forms of bias, including against gays.

"This has torn apart our community," said school trustee Trish Herrera Spencer, the board member most opposed to the gay curriculum and who opposed adding the supplemental books. She said the board's latest action did not take into consideration "the strong beliefs" of all in the community.

The 45-minute Lesson 9, which was to be taught once a year in each grade starting with kindergarten, sparked a lawsuit, accusations that religious families were being discriminated against and threats of a recall election against the three board members who approved it.

Vital said her recommendation was meant to counter complaints from parents opposed to the original lesson because it highlighted only one type of bullying. "There is not an off-the-shelf, perfect curriculum that is going to work for our community," Vital said, explaining that she wants to solicit book recommendations, bring them back to the school board for approval in a few months and then work with teachers to develop accompanying lesson plans in time for the 2010–11 academic year.

Several parents said they did not trust a teachers' committee to pick books that would both satisfy gay and lesbian parents and parents with religious views that do not condone homosexuality.

"Freedom of religion is protected from harassment and discrimination from anyone. It may be of no consequence to some, but it is a very integral part of many traditional families and should be honored," said Kellie Wood, who has three children in Alameda schools and is part of a group circulating recall election petitions. "If we're all honest, the friction between two protected classes, in particular, will not go away."

Kathy Passmore, a lesbian mother of two, said she hears students using anti-gay language in her job as a sixth grade teacher in Alameda. She urged the school board to retain the spirit of Lesson 9. "The children of gay families exist and are attending ASUD schools every single day," she said. "They are here."

Alameda, an island city that foots Oakland and is home to a Coast Guard installation and a former Naval base that is being eyed for housing, is the latest community to be divided by its school district's desire to curb anti-gay bullying and the concerns of parents who do not want their children to hear about gay and lesbian issues in school.

During last year's campaign to pass a constitutional amendment to ban same-sex marriages in California, the measure's sponsors ran commercials featuring a Massachusetts couple who unsuccessfully sued their local district for the right to pull their child out of anti-bullying lessons that included references to gay households. A year later, the same public relations firm that developed that ad developed a new one for the campaign to outlaw gay marriage in Maine focusing on a second-grade picture book that was part of Alameda's Lesson 9. The book, *Who's In A Family?*, contains pictures of families headed by grandparents, single parents and gay parents, among others.

A dozen Alameda families sued the school district earlier this year over its contention that parents did not have to be notified in advance when teachers planned to give the lessons so they could keep their children from receiving them. Last week, an Alameda Superior Court judge sided with the school district, ruling that a state law allowing parents to have their "opt-out" of discussions about human sexuality did not apply to Lesson 9.

Kevin Snider, a lawyer with the conservative Pacific Justice Institute who represented the Alameda families, said before the school board's vote that his clients would not appeal the judge's ruling if the school board eliminated Lesson 9. He did not immediately return a call Wednesday for clarification on whether the board's action satisfied that condition. Reported in: *San Jose Mercury-News*, December 10.

Menifee, California

A Southern California school district has pulled dictionaries from classrooms because a parent complained when a child came across the term "oral sex." District officials said that the Menifee Union School District–which serves 9,000 kindergartners through eight graders in Riverside County–is forming a committee to consider a permanent classroom ban of the *Merriam Webster's Collegiate Dictionary*.

A memo from Assistant Superintendent Karen Valdes acknowledged it is a respected resource but district officials found that "a number of referenced words are age-inappropriate."

Some parents and free-speech advocates said the district is overreacting. Peter Scheer, executive director of the California First Amendment Coalition said "common sense seems to be lacking in this school."

Menifee is a city of about 67,000 people 80 miles southeast of Los Angeles. Reported in: *San Jose Mercury-News*, January 23.

Santa Rosa, California

Santa Rosa parent Liz Franzel has asked the Santa Rosa School Board to get the novel *Tortilla Curtain*, by T.C. Boyle, off the reading list for high schoolers. Franzel's daughter is a junior at Montgomery High School, whose class was assigned the book this year. Franzel called the book "appalling. It's embarrassing, it's humiliating." "This book is unbelievable," she said. "It's not like I want to be a book burner… It's just not okay for required reading."

A review committee made up of a library media teacher, teachers from three of the schools that taught the book, a school administrator and two district office administrators convened last fall to review the book under the district's

guidelines. The group approved continued use of the book with the following guidelines:

"The teacher must appropriately prepare students for the parts of the book that may be considered provocative; Limit the book to juniors and seniors; Should a parent object to the book, board policy is currently in place that allows a student to be excused from the book assignment and provides for an alternate assignment without penalty to the student."

But Franzel contends the book has no place on a high school reading list. Reported in: *Santa Rosa Press-Democrat*, January 26.

Montgomery County, Kentucky

The superintendent of Kentucky's Montgomery County Schools has removed several controversial Young Adult novels that were being used along with classics like *Beowulf* and Chaucer's *The Canterbury Tales* in some sophomore and senior accelerated English classes. His reason? The books weren't on the pre-approved curriculum list and couldn't be added by teachers in the middle of a school year without permission.

"There's supposed to be an approved curriculum for classrooms," said Donna McGuire, information specialist for Montgomery County Schools. "Any book that had not been approved we need to get out of [the classroom]. We only have a limited time in the class to cover materials."

But many charged the real reason superintendent Daniel Freeman pulled the titles, including *Lessons from a Dead Girl*, by Jo Knowles, *Twisted*, by Laurie Halse Anderson, and *Unwind*, by Boston Globe/Horn Book Award-winner Neal Shusterman, is because he received complaints from parents about their inappropriate language and content.

To avoid making a decision about the quality of the books, McGuire said Freeman is letting kids check the books out at the school library and read them in book clubs—but they're no longer available for classroom instruction. "He said this is irrelevant because we have a procedure in place, and here is a list of books we use and these weren't on it," McGuire said.

But any restriction of materials, even when students can still access them in another context, is of concern to many educators and media specialists who believe that it represents a violation of librarianship and a barrier to information. "And [Montgomery High School students] are very intelligent young adults, not very far away from voting age," said Angela Maycock, assistant director of the American Library Association's Office for Intellectual Freedom. "We need to be very cautious about what we're restricting their access to, as they're going to be adults soon."

Teachers can still request that the books be added to approved curriculum lists—if they ask their department head before the start of the new school year. But not every request will necessarily be granted. McGuire notes that the focus now is on raising test scores for high school students, which have fallen in recent years.

"Our curriculum at our high school has to be top notch because we have had a drop in scores for the last two to three years and we have to get the students ready for college," said McGuire. "And that's not happening right now." Reported in: *School Library Journal*, December 9.

West Linn, Oregon

School officials agreed December 7 that a West Linn teacher crossed a line when he used sexual vulgarity as part of a classroom lesson on censorship.

Michael Diltz, an Athey Creek Middle School teacher and librarian, wrote two profane words on the board in front of eighth-graders last week as a part of a districtwide "Banned/Challenged Book" project that explores the limits of free speech. Diltz was using the words to illustrate how language can often lead to the banning of books, said Assistant Superintendent Thayne Balzer.

Diltz said school officials had not authorized him to discuss the incident but expressed dismay at the fallout. "I just wish it hadn't backfired like this," he said.

Parents objected at a school board meeting. School board members said they supported the banned-book program but not Diltz's use of the objectionable words. Superintendent Roger Woehl agreed. "We still don't think it was good judgment to use the language," he said.

In past years, teachers have not used profanity as part of the project, and the objections to the lessons were the first regarding any aspect of the program, Woehl said. Athey Creek Principal Carol Egan issued an apology to parents through an e-mail list.

"It was meant to provoke student understanding and experience how words, taken out of context, can lose their significance. When taken out of context, an author's words can move a community to ban that author's book from a school library," Egan wrote.

The district refused to comment on any administrative actions with Diltz, who is in his second year at Athey Creek and his fifth within the district. Woehl called him an excellent teacher.

Several parents phoned in their support for the teacher, with some supporting the actual lesson, said Woehl.

"It's probably inappropriate, but it's probably nothing that they haven't heard before," said Shannon Anderson, the mother of an Athey Creek eighth-grader.

Terrell Eaton, another parent, regretted that she had not complained after hearing about the situation. "I was surprised and upset," she said. "I thought he could have taught that lesson in a different way."

Eaton's son, Ellis, thought the lesson was a bit "odd," but he wasn't offended. "I thought it was fine," Ellis Eaton, 14, said. "It was kind of funny."

The banned-book curriculum, which the district has taught for ten years, requires students to read a book that

has been banned or challenged outside of the district. Afterward, students write an essay that argues why a book should or shouldn't be banned.

The books range from Joseph Heller's *Catch-22* to E.B. White's *Charlotte's Web*. Reported in: *Portland Oregonian*, December 8.

Dallas, Texas

What do the authors of the children's book *Brown Bear, Brown Bear, What Do You See?* and a 2008 book called *Ethical Marxism: The Categorical Imperative of Liberation* have in common? Both are by authors named Bill Martin and, for now, neither is being added to the approved list of Texas schoolbooks.

In its haste to sort out the state's social studies curriculum standards the State Board of Education tossed children's author Martin, who died in 2004, from a proposal for the third-grade section. Board member Pat Hardy (R-Weatherford), who made the motion, cited books he had written for adults that contain "very strong critiques of capitalism and the American system."

Trouble is, the Bill Martin Jr. who wrote the Brown Bear series never wrote anything political, unless you count a book that taught kids how to say the Pledge of Allegiance, his friends said. The book on Marxism was written by Bill Martin, a philosophy professor at DePaul University in Chicago.

Bill Martin Jr.'s name would have been included on a list with author Laura Ingalls Wilder and artist Carmen Lomas Garza as examples of individuals who would be studied for their cultural contributions.

Hardy said she was trusting the research of another board member, Terri Leo (R-Spring) when she made her motion and comments about Martin's writing. Leo had sent her an e-mail alerting her to Bill Martin Jr.'s listing on the Borders.com Web site as the author of *Ethical Marxism*. Leo's note also said she hadn't read the book.

"She said that that was what he wrote, and I said: " . . . It's a good enough reason for me to get rid of someone,'" said Hardy, who has complained vehemently about the volume of names being added to the curriculum standards.

Leo said she planned to make a motion to replace Bill Martin and sent Hardy a list of possible alternatives. Hardy said she thought she was doing what Leo wanted when she made the motion. Leo, however, said she wasn't asking Hardy to make any motions. She said she didn't do any "research."

"Since I didn't check it out, I wasn't about to make the motion," Leo said, adding that she never meant for her "FYI" e-mail to Hardy to be spoken about in a public forum. Hardy said that her interest was in paring down that list and she didn't mean to offend anyone.

For some, however, the mix-up was an indicator of a larger problem with the way the elected board members have approached the update of state curriculum standards. Board members will take up social studies standards again in March. They plan a final vote on updates in May.

Hardy's motion is "a new low in terms of the group that's supposed to represent education having such faulty research and making such a false leap without substantiating what they're doing," said Michael Sampson, Martin's co-author on thirty children's books.

The social studies standards update, which started last spring when groups of educators met to suggest revisions, has brought criticism from the right and the left about politicizing the process. As trustees worked their way through a draft this month, political ideas like imperialism, communism and free enterprise were at the heart of some of the changes (see page 46). Reported in: *Fort Wort Star-Telegram*, January 24.

Culpeper County, Virginia

Culpeper County public school officials have decided to stop assigning a version of Anne Frank's diary, one of the most enduring symbols of the atrocities of the Nazi regime, after a parent complained that the book includes sexually explicit material and homosexual themes.

The Diary of a Young Girl: the Definitive Edition, which was published on the 50th anniversary of Frank's death in a concentration camp, will not be used in the future, said James Allen, director of instruction for the 7,600-student system. The school system did not follow its own policy for handling complaints about instructional materials, Allen said.

The diary documents the daily life of a Jewish girl in Amsterdam during World War II. Frank started writing on her 13th birthday, shortly before her family went into hiding in an annex of an office building. The version of the diary in question includes passages previously excluded from the widely read original edition, first published in Dutch in 1947. That book was arranged by her father, the only survivor in her immediate family. Some of the extra passages detail her emerging sexual desires; others include unflattering descriptions of her mother and other people living together.

Allen said that the more recent version will remain in the school library and that the earlier version will be used in classes. The 1955 play based on Frank's experiences also has been a part of the eighth-grade curriculum for many years. The diary's "universal theme, that there is good in everyone, resonates with these kids," Allen said.

Culpeper's policy on "public complaints about learning resources" calls for complaints to be submitted in writing and for a review committee to research the materials and deliberate, Allen said. In this case, the policy was not followed. Allen said the parent registered the complaint orally, no review committee was created and a decision was made quickly by at least one school administrator. He said he is

uncertain about the details because he was out of town.

"The person came in, and the decision was made that day . . . and that's fine. We would like to have had it in writing. It just did not happen," Allen said.

Hasty decisions to restrict access to some books do "a disservice to students," said Angela Maycock, assistant director of the office for intellectual freedom at the American Library Association. "Something that one individual finds controversial or offensive or objectionable may be really valuable to other learners in that community," she said.

The ALA has documented only six challenges to *The Diary of Anne Frank* since it began monitoring formal written complaints to remove or restrict books in 1990. Most of the concerns were about sexually explicit material, Maycock said. One record dating to 1983 from an Alabama textbook committee said the book was "a real downer" and called for its rejection from schools. Reported in: *Washington Post*, January 29.

university

San Luis Obispo, California

Last fall, Harris Ranch Beef Co. threatened to withdraw $500,000 in donations to California Polytechnic State University, San Luis Obispo, after nationally known agribusiness critic Michael Pollan was invited to speak. The university changed the format of Pollan's presentation to include a broader range of speakers, although it denied bowing to donor pressure.

Now, newly released documents show Harris Ranch also lobbied last fall to have a Cal Poly faculty member quit teaching a class he helped to develop in the 1990s called "Issues in Animal Agriculture." As they had done with Pollan, Harris Ranch executives criticized Cal Poly professor Robert Rutherford for his views on sustainable farming, which the Harris Ranch officials consider unrealistic and anti-big business. The Selma, California-based company is one of the nation's largest beef processors.

Since last fall, Rutherford decided to quit teaching the spring class. He has been the course's primary teacher since its inception. Rutherford said he was quitting the class voluntarily and wasn't pressured by anyone. The course has covered topics such as global climate change, the livestock industry's use of public lands, animal rights, biotechnology and food safety.

Rutherford, who began teaching at Cal Poly in 1974, said he is nearing retirement and thought it best for another faculty member to take over the class.

Harris Ranch chairman David Wood and his assistant, Michael Smith—who both studied animal science at Cal Poly—say students need a balanced view of agriculture. Cal Poly officials say their program provides that.

Harris officials also are requesting a meeting with Cal Poly officials to help them to decide whether to fulfill their financial pledge. Wood pledged $150,000, and company owner John Harris pledged $350,000 toward Cal Poly's $5 million meat-processing center. The university intends to start construction on the facility in the spring.

After a September 14 phone conversation between Smith and Rutherford, Wood sent an e-mail to Cal Poly president Warren Baker seeking Rutherford's removal from teaching the course, according to university records obtained through a California Public Records Act request.

Wood wrote in a September 23 letter or e-mail that Rutherford said "grain-fed production systems were not sustainable, that corn should not be fed to cattle, and especially not in large-scale animal feeding systems."

"Mr. Rutherford then had the audacity to offer Mike [Smith] an entirely unsolicited opinion that water should have never been provided to farmers on the west side of the San Joaquin Valley," Wood wrote Baker. "As Harris Ranch operates one of the largest farms in this region, Mr. Rutherford implies Harris Ranch should not be farming."

Rutherford said that he understands businesses try to protect their interests. He said he will continue teaching other courses, including sheep management and holistic management, which aim to encourage farming decisions that are "ecologically sound, economically viable, and socially just."

State Senator Leland Yee (D-San Francisco) called on the university administration not to allow wealthy donors to influence curriculum.

"Cal Poly should be catering to the students, not to big donors," said Yee. "Harris Ranch, or any donor, has no business trying to influence curriculum or infringing on academic freedom. The curriculum at our public universities should not be open to the highest bidder."

Because donations are often made to campus auxiliary organizations created to benefit the public campus, information regarding such donations is exempt from the California Public Records Act.

"These recent events beg the question, when else has Harris and other big donors influenced curriculum choices at Cal Poly," said Yee. "The university should publicly disclose all such attempts, as well as all written correspondence between university officials and donors."

Yee is currently pursuing legislation, SB 330, to require campus auxiliary organizations to be subject to the California Public Records Act, so the public can determine for themselves if any improper influence is at play at University of California, California State University, and community college campuses. Requests for information on how much Harris Ranch has given Cal Poly were rejected, thereby denying the public a proper accounting of the influence donations have made on the school's official actions.

"This is precisely the reason why we have strong campaign finance disclosure laws," said Yee. "When elected

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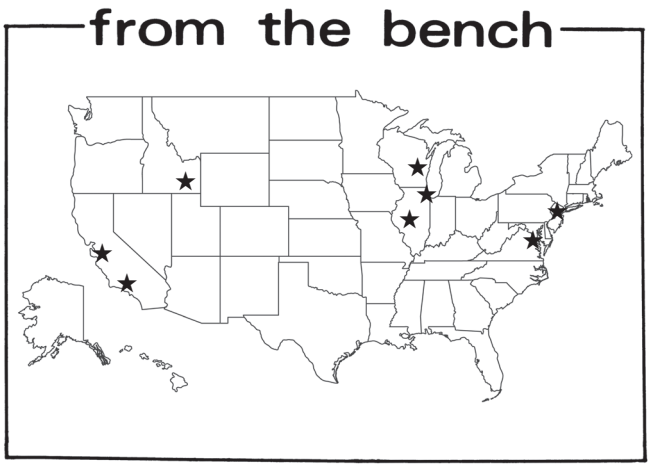

U.S. Supreme Court

(from page 41)

"susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The decision in *Citizens United* overturned

- A 63-year-old law, and two of the court's own decisions, that barred corporations and unions from spending money directly from their treasuries on ads that advocate electing or defeating candidates for president or Congress, but which are produced independently and not coordinated with the candidate's campaign.
- The prohibition in the McCain-Feingold Act that since 2002 had barred issue-oriented ads paid for by corporations or unions 30 days before a primary and 60 days before a general election.

The decision left in place

- The century-old ban on donations by corporations from their treasuries directly to candidates.
- The ability of corporations, unions or individuals to set up political action committees that can contribute directly to candidates but can only accept voluntary contributions from employees, members and others and cannot use money directly from corporate or union treasuries.
- The McCain-Feingold provision that anyone spending money on political ads must disclose the names of contributors.

The five opinions ran to more than 180 pages, with Justice John Paul Stevens contributing a passionate 90-page dissent. In sometimes halting fashion, he summarized it for some 20 minutes from the bench. Joined by the other three members of the court's liberal wing, Justice Stevens said the majority had committed a grave error in treating corporate speech the same as that of human beings.

Eight of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements, at least in the absence of proof of threats or reprisals. "Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," Justice Kennedy wrote. Justice Clarence Thomas dissented on this point.

The majority opinion did not disturb bans on direct contributions to candidates, but the two sides disagreed about whether independent expenditures came close to amounting to the same thing.

"The difference between selling a vote and selling access is a matter of degree, not kind," Justice Stevens wrote. "And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf."

Justice Kennedy responded that "by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."

The case had unlikely origins. It involved a documentary called "*Hillary: The Movie*," a 90-minute stew of caustic political commentary and advocacy journalism. It was produced by Citizens United, a conservative nonprofit corporation, and was released during the Democratic presidential primaries in 2008. Citizens United lost a suit that year against the Federal Election Commission, and scuttled plans to show the film on a cable video-on-demand service and to broadcast television advertisements for it. But the film was shown in theaters in six cities, and it remains available on DVD and the Internet.

The majority cited a score of decisions recognizing the First Amendment rights of corporations, and Justice Stevens acknowledged that "we have long since held that corporations are covered by the First Amendment."

But Justice Stevens defended the restrictions struck down in *Citizens United* as modest and sensible. Even before the decision, he said, corporations could act through their political action committees or outside the specified time windows.

The McCain-Feingold law contains an exception for broadcast news reports, commentaries and editorials. But that is, Chief Justice John G. Roberts Jr. wrote in a concurrence joined by Justice Samuel A. Alito Jr., "simply a matter of legislative grace."

Justice Kennedy's majority opinion said that there was

no principled way to distinguish between media corporations and other corporations and that the dissent's theory would allow Congress to suppress political speech in newspapers, on television news programs, in books and on blogs.

Justice Stevens responded that people who invest in media corporations know "that media outlets may seek to influence elections." He added in a footnote that lawmakers might now want to consider requiring corporations to disclose how they intended to spend shareholders' money or to put such spending to a shareholder vote.

On its central point, Justice Kennedy's majority opinion was joined by Chief Justice Roberts and Justices Alito, Thomas and Antonin Scalia. Justice Stevens's dissent was joined by Justices Stephen G. Breyer, Ruth Bader Ginsburg and Sonia Sotomayor.

When the case was first argued last March, it seemed a curiosity likely to be decided on narrow grounds. The court could have ruled that Citizens United was not the sort of group to which the McCain-Feingold law was meant to apply, or that the law did not mean to address 90-minute documentaries, or that video-on-demand technologies were not regulated by the law. The decision rejected those alternatives.

Instead, it addressed the questions it proposed to the parties in June when it set down the case for an unusual second argument in September, those of whether *Austin* and *McConnell* should be overturned. The answer, the court ruled, was yes.

"When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought," Justice Kennedy wrote. "This is unlawful. The First Amendment confirms the freedom to think for ourselves."

"Speech about our government and candidates for elective office lies at the heart of the First Amendment, and the court's decision vindicates the right of individuals to engage in core political speech by banding together to make their voices heard," said former U.S. Solicitor-General Theodore Olson, who argued the case on behalf of Citizens United.

The ruling was criticized, however, by the two senators most closely associated with campaign finance reform. Senator Russ Feingold (D-WI) said: "Presented with a relatively narrow legal issue, the Supreme Court chose to roll back laws that have limited the role of corporate money in federal elections since Teddy Roosevelt was president. Ignoring important principles of judicial restraint and respect for precedent, the court has given corporate money a breathtaking new role in federal campaigns."

"I am disappointed by the decision of the Supreme Court and the lifting of the limits on corporate and union contributions," added Sen. John McCain (R-AZ).

Justice Sandra Day O'Connor, who wrote the majority opinion in *McConnell*, was also critical of the decision. "Gosh," she said, "I step away for a couple of years and there's no telling what's going to happen."

Speaking at a public forum, Justice O'Connor reminded her audience that she had been among the authors of *McConnell*. "If you want my legal opinion" about *Citizens United*, Justice O'Connor said, "you can go read" *McConnell*.

Predictably, representatives of business groups welcomed the decision. "The Supreme Court's ruling frees American business from the yoke of second-class citizenship," said Gregory Casey, president and CEO of the Business and Industry Political Action Committee. "The reason American business is active in politics in the first place is to influence public policies that impact the prosperity of its employees and shareholders."

But consumer advocacy groups were critical. "This decision allows Wall Street to tap its vast corporate profits to drown out the voice of the public in our democracy." declarled Bob Edgar, president of the government watchdog group Common Cause.

"Today's decision so imperils our democratic well-being, and so severely distorts the rightful purpose of the First Amendment, that a constitutional corrective is demanded," added Robert Weissman, president of the consumer advocacy group Public Citizen. Reported in: *New York Times*, January 22, 27.

The Supreme Court on January 13 effectively eliminated the possibility that any part of the trial of a constitutional challenge to a ban on same-sex marriage under way in San Francisco would be broadcast before it concludes.

Saying lower-court judges in California had acted with unseemly and probably unlawful haste in pushing through new rules to allow broadcasting, the court extended a temporary stay issued two days earlier until it considers whether to hear an appeal of the issue based on papers yet to be filed. The court instructed the parties to act promptly, but the process will almost certainly take longer than the trial.

The vote in the case was 5 to 4 and divided along ideological lines, with the court's four more liberal justices in dissent.

The 17-page majority opinion, which was unsigned, focused mainly on what it said were irregularities in how the trial judge, Vaughn R. Walker of the U.S. District Court in San Francisco, and Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, changed the applicable rules to allow broadcast coverage.

The main flaw, the opinion said, was that Judge Walker allowed only five business days for public comment on the proposed changes. "Courts enforce the requirement of procedural regularity on others," the opinion said, "and must follow those requirements themselves."

Justice Stephen G. Breyer, writing for himself and Justices John Paul Stevens, Ruth Bader Ginsburg and Sonia Sotomayor, said Judge Walker had invited comments from the parties to the case in September and had received 138,574 public comments as well, with all but 32 favoring transmission of the proceedings.

"How much more 'opportunity for comment' does the

Citizens United v. Federal Election Commission

Following are excerpts (without citations) from the majority opinion in Citizens United v. Federal Election Commission *written by Justice Anthony M. Kennedy and joined by Chief Justice John Roberts and Justices Samuel Alito, Antonin Scalia, and Clarence Thomas.*

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm'n*. The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*. *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that "*Austin* was a significant departure from ancient First Amendment principles." We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. . . .

While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.

Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to interpret a law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, "must give the benefit of any doubt to protecting rather than stifling speech." . . .

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court believe necessary?" Justice Breyer asked his colleagues in the majority.

Justice Breyer added that micromanaging trial court procedures was not a wise use of the Supreme Court's docket and that "the public interest weighs in favor of providing access to the courts."

The majority opinion did not directly address the possibility of delayed broadcast of the trial by video posted on YouTube or the trial court's own Web site, apparently because Chief Judge Kozinski never approved Judge Walker's proposals concerning them. But it did block broadcasts to courthouses around the country, and its reasoning would apply to Internet broadcasts as well.

The opinion said it expressed no views about the wisdom of cameras in the courtroom, but it contained hints of disapproval. The opinion also recited a number of ways in which opponents of same-sex marriage might be subject to harassment should their testimony be broadcast.

Chief Judge Kozinski, in a letter to court administrators, defended the new rules as the product of careful deliberations and as warranted by the public interest. "Like it or not," he wrote, "we are now well into the 21st century, and it is up to those of us who lead the federal judiciary to adopt policies that are consistent with the spirit of the times and the advantages afforded us by new technology. If we do not, Congress will do it for us." Reported in: *New York Times*, January 13.

The U.S. Supreme Court will decide whether the University of California's Hastings College of the Law in San Francisco can refuse to recognize and fund a Christian student group because it excludes gays, lesbians and non-Christians, the justices said December 7. The case could affect public universities around the country. It puts the Supreme Court in the middle of a long fight by conservative Christian activists, who say their constitutional rights are violated when they are forced to tolerate views that run counter to their religious beliefs.

Both sides in the case before the court argue that they are defending students from discrimination. "Often university officials don't like the religious groups and we see [colleges' anti-bias rules] as one more mechanism for keeping religious groups off campus," said Kim Colby, a lawyer for the Christian Legal Society, which wants the right to organize chapters at public law schools even if those law schools ban discrimination based on sexual orientation. The society excludes gay people—and others who do not share its faith.

The Hastings College of Law of the University of California, like many public colleges and universities, has a policy barring discrimination based on sexual orientation

as a requirement for student organizations seeking recognition and funding—and denied recognition to the society as a result. Ethan Schulman, a lawyer for Hastings, frames the case this way. "There's no question of the importance of the issue of whether public colleges have a constitutional obligation to subsidize discriminatory groups on campus," he said.

The question of whether and when the Supreme Court might decide the issue has been the subject of much speculation. The court tends to take cases when there are splits among appeals courts, and that is the case on this issue.

Hastings was sued in October 2004 by the Christian Legal Society, which requires voting members to sign a statement committing to "orthodox" evangelical Protestant or Catholic beliefs. A student is ineligible, the group says, if he or she "advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman."

Hastings cited a campus policy barring discrimination on the basis of race, national origin, religion and sexual orientation when it refused to recognize a chapter of the Christian Legal Society in 2004. The group then sued in federal court.

U.S. District Court Judge Jeffrey White ruled in the law school's favor in 2006, and his opinion was upheld in 2009 by the U.S. Court of Appeals for the Ninth Circuit in San Francisco. The court said the school could require organizations to "accept all comers as members."

Attorneys for the Virginia-based Christian Legal Society said they hoped the Supreme Court would find that Hastings was forcing members of the school's chapter into an unreasonable choice: abandon their identity or shut down.

"Religious groups have a right to require their officers to share their religious faith," said Kim Colby, an attorney with the group, which has chapters at 165 law schools around the country and encourages lawyers to apply Biblical principles. "If, at every meeting, the president of the group said, 'Today we're going to discuss whether Jesus was the son of God,' that's going to bog the group down."

But Ethan Schulman, an attorney for Hastings, said the issue in the case is whether public universities are obligated to subsidize discriminatory groups. "This is about a blanket exclusion of gay and lesbian students and students who don't hold what the Christian Legal Society describes as orthodox Christian beliefs," Schulman said. "If they're going to use public money and public facilities, they have to be open to all interested students."

Hastings recognized the society's chapter for about a decade, Schulman said, when the group was open to all students. When the society restricted who could join, Hastings withheld $250 that had been set aside to help officers travel to their organization's national conference, and the group sued.

The center of the debate before the Supreme Court is the question of whether the Christian groups are suffering religious discrimination (as they say) or whether they are seeking special treatment (as Hastings says).

The Christian Legal Society argues that its First Amendment rights to religious freedom and free association can't coexist with requirements that they view as violating their basic beliefs. Colby, the lawyer for the society, said that the group expects its members to "conduct themselves in a manner that is Biblically correct" and that it is "common sense" that a religious group should be able to determine its own standards.

While critics of the society have noted that its members could still congregate on campuses without student funds or official recognition, Colby said that "it does matter whether you are recognized or not" and that the Supreme Court has backed that right. She noted a 1972 decision, *Healy v. James*, on the right of public college students to organize a chapter of Students for a Democratic Society (against the wishes of university administrators) as evidence that the Supreme Court sees official recognition as a significant right.

Christian students "want to be treated just like other groups," she said, and that means forming groups of like-minded students. "That's why universities set up these programs in the first place. They are a way of helping students organize around viewpoints, a diversity of viewpoints."

The Hastings argument, however, is that the Christian Legal Society is trying not to be treated like other student groups. "The Supreme Court has been sympathetic to the idea that religious groups should have equal access, that they should be treated in the same manner as other groups," Schulman said. "What's different here is that the Christian Legal Society is seeking special rights for religious groups. It is asking the court to say that religious groups should be exempted from generally applicable non-discriminatory policies and that would be a very dangerous and troubling precedent." Schulman noted that no one has presented any evidence that the Christian Legal Society had to face additional rules or different rules than those imposed on other student groups because of its religious status.

Further, he questioned the idea that letting in a gay student or a non-believing student would destroy the integrity of the society. He said that the case followed a period in which the Hastings branch of the society didn't seek to kick out those who didn't share the group's beliefs and that it had an openly gay member, and non-Christian members, without any impact on the group's views. Schulman contrasted that experience—in which students are welcome in all recognized groups—with the "official imprimatur of discrimination" that he said the society is seeking to impose.

The Supreme Court, attorneys said, may have noted a split between lower court rulings in the Hastings case and in a similar lawsuit brought by Christian Legal Society against Southern Illinois University. Under a 2007 settlement in that case, the university said it would recognize the group and its policies.

The court waded into a similar issue in 2000 when it upheld the Boy Scouts' right to exclude gays and atheists, citing the private organization's right of free association.

But in 2006, the California Supreme Court struck a blow in the other direction, ruling that Berkeley could deny a rent subsidy to the Sea Scouts, a Boy Scouts affiliate, because the group did not allow gay members or leaders. The U.S. Supreme Court refused to hear the Scouts' appeal.

Robert M. O'Neil, a former president of the University of Virginia and the University of Wisconsin System who directs the Thomas Jefferson Center for the Protection of Free Expression, said he was surprised that the Supreme Court took the case, given how recently it had turned back another opportunity to decide the issue.

While not predicting what the justices will decide, he noted that there could be middle ground found if the Supreme Court wants to respect both the "institutional interest in enforcing non-discrimination policy and the religious freedom and free association interests of these organizations."

One balancing act might involve public institutions keeping their anti-bias rules, but not applying them to the selection of officers of organizations, so that a Christian group could be assured that it would be led by members who share certain beliefs. Another approach—for which O'Neil gave credit to one of his law students—might have public colleges keep their policies and require all student organizations to acknowledge the policies and pledge commitment to them, but the institutions would not take actions against groups without a formal complaint.

The Supreme Court could of course decide to favor one side or another, O'Neil said, but he stressed that it was possible to envision compromise positions.

A challenge for Hastings and its supporters, O'Neil said, may be that there are not federal statutes and there are relatively few state laws barring discrimination based on sexual orientation. This "will make it very important for institutions to articulate clearly a rationale for including sexual orientation among forbidden types of discrimination."

O'Neil said that academic freedom issues may also be raised. He said that faculty groups may want to weigh in on behalf of the right of public colleges and universities to set their own anti-discrimination policies and to enforce them. The American Association of University Professors has yet to weigh in on the case.

The Foundation for Individual Rights in Education plans to file a brief in the case, backing the Christian Legal Society, on the grounds that free association rights are being endangered by the way Hastings and other public universities have enforced anti-bias rules.

The case is likely to be heard in March, and a ruling is due by June. Reported in: *San Francisco Chronicle*, December 7; insidehighered.com, December 8.

The Supreme Court agreed December 14 to decide whether a police department violated the constitutional privacy rights of an employee when it inspected personal text messages sent and received on a government pager.

The case opens "a new frontier in Fourth Amendment jurisprudence," according to a three-judge panel of an appeals court that ruled in favor of the employee, a police sergeant on the Ontario, California, SWAT team.

Orin S. Kerr, an authority on the Fourth Amendment at George Washington University's law school, said the case was simultaneously significant and idiosyncratic. "This is the first case on Fourth Amendment protection in data networks," Kerr said. But the case arose from unusual circumstances, making it fairly likely that the eventual Supreme Court ruling will be narrow.

The Supreme Court has given public employers wide latitude to search their employees' offices and files. But it has also said that the Fourth Amendment, which forbids unreasonable government searches, has a role to play in any analysis of that latitude.

The Ontario Police Department had a formal policy reserving the right to monitor "network activity including e-mail and Internet use," allowing "light personal communications" by employees but cautioning that they "should have no expectation of privacy." It did not directly address text messages.

Members of the department's SWAT team were given pagers and told they were responsible for charges in excess of 25,000 characters a month. Under an informal policy adopted by a police lieutenant, those who paid the excess charges themselves would not have their messages inspected.

The lieutenant eventually changed his mind and ordered transcripts of messages sent and received by Sgt. Jeff Quon. In one month in 2002, only 57 of more than 450 of those messages were related to official business. According to the trial judge, many of the messages "were, to say the least, sexually explicit in nature."

Sergeant Quon and some of the people with whom he messaged sued, saying their Fourth Amendment rights had been violated. Judge Kim McLane Wardlaw, writing for a three-judge panel of the United States Court of Appeals for the Ninth Circuit, in San Francisco, said the department's formal policy had been overridden by the "operational reality" of the lieutenant's informal policy.

Dissenting from the full Ninth Circuit's decision not to rehear the case, Judge Sandra S. Ikuta said the panel had violated "the dictates of reason and common sense" and had hobbled "government employers from managing their work forces."

The City of Ontario and its police department, in asking the Supreme Court to hear the case, said "a lower-level supervisor's informal arrangement" should not be allowed to trump "the employer's explicit no-privacy policy."

"It is not objectively reasonable to expect privacy in a message sent to someone else's workplace pager," the brief said, "let alone to a police officer's department-issued pager."

The Supreme Court's decision, the brief went on, will affect "a seemingly never-ending stream of new technologies."

Though the legal issue in the case, *City of Ontario v.*

Quon, concerns only text messaging in government workplaces, the Supreme Court's decision may provide hints about its attitude toward privacy in the Internet era more generally.

The larger question, Judge Stephen G. Larson of the U.S. District Court in Riverside, California, wrote in declining to dismiss Sergeant Quon's case before trial, is this: "What are the legal boundaries of an employee's privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friend and family via hand-held, computer-assisted electronic devices?" Reported in: *New York Times*, December 15.

The Supreme Court agreed January 15 to decide whether the First Amendment requires that the names of people who sign ballot-initiative petitions be kept secret.

As in the court's January 13 decision to block the broadcasting of the trial of a challenge to a ban on same-sex marriage in California, the appeal was brought by opponents of such unions who said they feared harassment should their views be made widely known.

The new case arose from an effort to overturn a Washington State domestic partnership law known as the "everything but marriage" act. Opponents of the law gathered more than 130,000 signatures, enough to place a referendum on the November ballot.

Several groups asked the state to turn over the names, under its public records law, and two groups said they intended to post the names on the Internet. Their goal, according to a news release, was to encourage conversations among friends, relatives and neighbors that "can be uncomfortable for both parties."

Protect Marriage Washington, a group that supports traditional marriage, sued to block release of the names, saying disclosure would probably result in "threats, harassment and reprisal."

A federal judge granted the request, but the judge's order was overturned by a three-judge panel of the United States Court of Appeals for the Ninth Circuit, in San Francisco. The Ninth Circuit panel said it was unclear whether petition signatures were speech protected by the First Amendment. In any event, it said, the signatures were gathered in public with no promise of confidentiality and collected on sheets with space for twenty signatures each.

Even if the names had warranted some First Amendment protection, the panel said, that protection was overridden by two justifications: protecting the integrity of elections through transparency and providing voters with information about who supported placing the referendum on the ballot.

As in the same-sex marriage case, the Supreme Court intervened at an unusually early stage in the Washington case, staying the Ninth Circuit's ruling in October. That had the effect of blocking disclosure of the names through the election in November. The effort to overturn the everything-but-marriage act failed.

Washington Families Standing Together, a group supporting equal rights for same-sex couples, joined the State of Washington in December in urging the Supreme Court not to hear the case. The group said the evidence of potential harassment was limited to "a small handful of cursory declarations, many of which concern incidents occurring in California or elsewhere."

James Bopp Jr., a lawyer for Protect Marriage Washington, said in a statement that the Ninth Circuit's decision infringed "the rights of citizens who support a traditional definition of marriage to speak freely and without fear."

"No citizen," Bopp added, "should ever worry that they will be threatened or injured because they have exercised their right to engage in the political process."

The Supreme Court's decision in the case, *Doe v. Reed*, is expected by late June. Reported in: *New York Times*, January 15.

The U.S. Supreme Court missed a golden opportunity to provide much-needed guidance on the state of student expression when it denied review January 11 in *Palmer v. Waxahachie Independent Community School District*.

The case out of Texas involved a challenge to a school dress-code policy that prohibited nearly all message T-shirts, even those with political messages. The student in the case, Paul "Pete" Palmer, had argued for the right to wear several message T-shirts, including a John Edwards for President shirt.

Lower courts, including a federal district court and the U.S. Court of Appeals for the Fifth Circuit, had ruled in favor of the school district because the dress code was supposedly content-neutral (though students could wear shirts with official school messages). These courts said the seminal student free-speech case in U.S. law—*Tinker v. Des Moines Independent Community School Dist.* (1969)—did not apply.

In *Tinker*, the Supreme Court ruled that students don't shed their rights at the schoolhouse gate and public schools couldn't prohibit them from wearing black armbands to protest U.S. involvement in the Vietnam War. The Court ruled that school officials couldn't restrict student speech unless they could reasonably forecast that the speech would create a substantial disruption.

Palmer's T-shirts—like the black armbands in *Tinker*—were pure political speech. They also—like the *Tinker* armbands—were not disruptive. However, the school district in *Tinker* had singled out black armbands because of the viewpoint associated with them. According to the courts in the Palmer case, the school merely had instituted a dress code irrespective of political viewpoints.

Under this reasoning, school districts can avoid *Tinker* by claiming that their regulation doesn't restrict student speech on a content or viewpoint basis. If school districts adopt this approach across the country, then more students will lose their First Amendment rights at the schoolhouse gate. Reported in: firstamendmentcenter.org, January 11. ☐

schools

Beverly Hills, California

One morning in May 2008, an eighth-grader walked into Janice Hart's office at a Beverly Hills school crying. She was upset and humiliated and couldn't possibly go to class, the girl told the counselor. The night before, a classmate had posted a video on YouTube with a group of other eighth-graders bad-mouthing her, calling her "spoiled," a "brat" and a "slut." Text and instant messages had been flying since. Half the class must have seen it by now, she told Hart.

Hart took the problem to the vice principal and principal, who took it to a district administrator, who asked the district's lawyers what they could do about it. In the end, citing "cyber-bullying" concerns, school officials suspended the girl who posted the video for two days. That student took the case to federal court, saying her free speech rights had been violated.

In November, a federal judge in Los Angeles sided with her, saying the school had gone too far. Amid rising concerns over cyber-bullying, and even calls for criminalization, some courts, parents and free-speech advocates are pushing back. Students, they say, have a First Amendment right to be nasty in cyberspace.

"To allow the school to cast this wide a net and suspend a student simply because another student takes offense to their speech, without any evidence that such speech caused a substantial disruption of the school's activities, runs afoul" of the law, U.S. District Court Judge Stephen V. Wilson wrote in a 60-page opinion.

"The court cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments," he wrote.

Schools' ability to limit student speech, from armbands protesting the Vietnam War to banners promoting marijuana use, is an issue that has been repeatedly tried and tested in the courts. But with teens' social lives moving increasingly to cyberspace, where what might have previously been private bickering is reproduced, publicized and documented for all to see, school officials find themselves on unfamiliar ground in dealing with e-mails, instant messages, profile pages, videos and the like that may result in hurt feelings or something more serious.

Free-speech advocates said the notoriety of recent cases, such as the Missouri girl who committed suicide after a mean-spirited MySpace message was sent, have led schools to overreact and excessively crack down on student expression when it comes to the Internet.

"It's better to have a lawsuit and lose some money than have a situation where a student commits suicide," said Eugene Volokh, a First Amendment expert and UCLA law professor who has criticized a bill in Congress that would make cyber-bullying punishable by up to two years in prison. "People don't appreciate how much the First Amendment protects not only political and ideological speech, but also personal nastiness and chatter. . . . If all cruel teasing led to suicide, the human race would be extinct."

The murkiness of this area of law and educational policy has resulted in legal challenges across the country over school officials' restriction of student speech or discipline meted out in such cases.

Attorneys and experts said court decisions have been "all over the map," offering little clarity to confused school administrators. The U.S. Supreme Court has yet to take up a case involving student speech online; the governing decision is from the 1969 *Tinker vs. Des Moines School District* case, which held that student speech could not be limited unless it caused substantial disruption on campus.

"We're in a rapidly evolving area of law with relatively few guidelines and remarkably little that has been charted," said Robert O'Neil, director of the Virginia-based Thomas Jefferson Center for the Protection of Free Expression.

O'Neil said that when a true threat is made, and when speech is made using school computers, schools have clear authority to regulate students' speech. But when something falls in the gray area between an expressed threat and mere teasing, and students are accessing the Internet outside the school's walls, administrators are faced with a tricky calculus.

"Everybody is justifiably confused about what they can and cannot do," said Witold Walczak, an attorney with the American Civil Liberties Union.

In Pennsylvania, a student sued his school district after he was suspended for ten days and placed in an alternative education program for creating what he claimed was a parody MySpace profile of the school principal. On the website, the student referred to the principal as a "big steroid freak," and a "big whore," among other things, and stated that he was "too drunk to remember" the date of his birthday.

U.S. District Court Judge Terrence McVerry found that even though the profile was unquestionably "lewd, profane and sexually inappropriate," the school did not have the right to restrict the student's speech because school officials were not able to establish that the profile caused enough of a disruption on campus.

"The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the World Wide Web," he wrote.

Walczak, the ACLU attorney who argued the case, said censoring is often the "easy way out" for schools that want to be able to say they did something about the situation rather than stand by and watch. "The Internet doesn't change what students say about other students or school officials, it just makes it more apparent to a larger number of people," he said.

The school district has appealed to the U.S. Court of Appeals for the Third Circuit, where a decision is pending.

In Florida, the ACLU sued a principal on behalf of a student who was suspended and removed from her honors

class for alleged cyber-bullying. Katie Evans had created a Facebook page criticizing an English teacher as "the worst teacher I've ever met" and invited others to express their "feelings of hatred."

Her attorney, Matthew Bavaro, said the reach of the Web was irrelevant to whether students are allowed to express themselves freely. "The audience, whether it's one person or one billion people, doesn't change that Katie still had a First Amendment right," Bavaro said.

In the Beverly Hills case, the student's lawsuit said her "speech" was entirely off campus and off-limits to the school administrators' regulation. The four-minute, 36-second video, in which a group of friends is chatting at a restaurant four blocks from campus, could not even be viewed at school because YouTube is blocked on the school's computers, her attorney contended.

Judge Wilson ruled that school officials had the authority to investigate the matter because the student told several of her classmates to watch the video, and it was foreseeable the video, or talk of it, would quickly make its way to the campus of Beverly Vista School. The video was "designed in such a manner to reach many persons at once," making it different from earlier cases involving school newspapers or a violent drawing, he found.

However, he ruled that the chatter in the video did not rise to a level that would cause enough disruption at the school to warrant the discipline. "The fear that students would 'gossip' or 'pass notes' in class simply does not rise to the level of a substantial disruption," he wrote.

The plaintiff's attorney, Evan Cohen, who is also her father, said the case highlighted the school district's failure to realize the limits of its authority. "Yeah, sure, they can fall back on cyber-bullying, but when you actually ask them questions and dig down deep into their understanding, they think it's OK for them to be a super-parent," he said.

Cohen's daughter, now a high school sophomore, is glad to put the case behind her and move on with her life, he said. She will be awarded nominal damages of $1 from the school, he said, and her two-day suspension will probably soon be removed from her academic record.

Attorney Gary Gibeaut, who represented the Beverly Hills Unified School District, declined to comment, saying the district had not decided whether to appeal the decision. Reported in: *Los Angeles Times*, December 13.

colleges and universities

San Jose, California

At a time when faculty groups are increasingly worried that a Supreme Court ruling is being used to limit the free speech rights of public college professors, a federal judge has declined a college's request to do just that.

The judge's ruling kept alive First Amendment claims in a lawsuit by June Sheldon, who in 2007 lost an adjunct science teaching job (and the offer of courses to teach the following semester) at San Jose City College. Sheldon lost her job following a student complaint about comments she is alleged to have made during a class discussion of the "nature vs. nurture" debate with regard to why some people are gay.

Some students complained that her comments suggested that she did not believe anyone could be born a lesbian, and that the way she endorsed the "nurture" side of the debate was offensive. (While it is not disputed that there was a general discussion on this topic, there is considerable disagreement over exactly what was said, and the ruling did not resolve that matter.)

Sheldon sued the college in federal court, charging that her First Amendment and other rights were violated. Judge Ronald M. Whyte, while rejecting parts of the suit, turned down a request by the San Jose/Evergreen Community College District to dismiss the First Amendment claims. While Judge Whyte's ruling made no determination on whether Sheldon's First Amendment rights were violated, the ruling stated that she has First Amendment rights and doesn't lose them by virtue of the speech in question taking place while she was teaching at a public college.

The ruling stated that "the precise contours of the First Amendment's application in the context of a college professor's instructional speech are ill-defined and are not easily determined," and also noted that Sheldon could still be punished for what she said in the classroom if the college was acting under "legitimate pedagogical concerns." But the ruling rejected the community college district's attempt to apply the Supreme Court's 2006 ruling in *Garcetti v. Ceballos* to reject Sheldon's claims to having First Amendment rights for classroom speech.

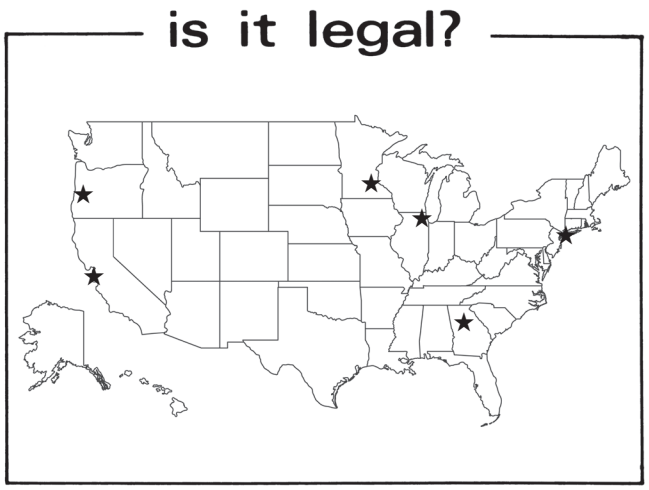
In theory, many faculty leaders say, *Garcetti* never should even be a cause of concern when it comes to faculty members' rights. The *Garcetti* ruling came in a case involving the district attorney's office in Los Angeles and rolled back the First Amendment protections available to public employees in the context of their jobs.

In the court's opinion in the case, Justice Anthony M. Kennedy wrote explicitly that the factors in the case were different from those at play in higher education, and that the Supreme Court was not making a determination about these issues as they might play out in higher education.

"There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching," Kennedy wrote.

At the time, advocates for faculty members said they

(continued on page 87)



colleges and universities

Atlanta, Georgia

Clark Atlanta University violated the rights of 55 faculty members—20 of them with tenure—when it eliminated their jobs without faculty consultation or due process, and without regard to whether or not they had tenure, according to a report issued January 13 by the American Association of University Professors. The AAUP called the dismissals—covering a quarter of the faculty—"outrageous" and "especially egregious."

The historically black university said at the time that it was responding to an "enrollment emergency," and repeatedly denied that it was facing "financial exigency." The latter state is one that the AAUP requires for the elimination of the jobs of tenured professors (although even in such cases, the association's guidelines require faculty participation in the process, which was largely absent at Clark Atlanta). Not only do AAUP guidelines not allow for such job eliminations as a result of enrollment declines, but the report questioned whether the declines were as significant as the university claimed.

From the time of the dismissals, in February, faculty members at Clark Atlanta (and ex-faculty members) described a situation that was unusual even by the standards of the past year, in which many colleges went through painful budget cuts. For example, faculty leaders say they gave President Carlton E. Brown a list of 46 specific ideas for saving money, including cutting the salaries of all faculty members by up to 10 percent, the day before the layoffs. Not only did he not accept their ideas, but he didn't tell them what was about to happen.

What happened was that the university briefly called off classes, and told the faculty members who lost their jobs that their positions had been eliminated and that they needed to pack up and leave campus immediately. At the time, Brown said that department heads had been involved in the decision on which faculty members to terminate. But the AAUP report, citing interviews with two chairs, said that this involvement consisted of the chairs being given a new faculty evaluation system in mid-January, and being given one weekend to evaluate their departments' members with new criteria—without having been told that the information would be used to determine who would stay and who would go.

The AAUP report, while acknowledging the tight budget situation facing many colleges, questioned the entire rationale given for faculty layoffs. "The investigating committee has found no evidence to support the administration's claimed enrollment crisis, however, and, in fact, finds credible that in all likelihood the administration, and President Brown in particular, attempted to manipulate enrollment numbers in order to establish plausible grounds to dismiss faculty members summarily," the report says. According to the AAUP, enrollment was down about 5 percent, or 230 students, at the start of the academic year in which the layoffs took place, although the university has gone back several years to note a larger decline.

Further, the AAUP committee found that the dismissals at Clark Atlanta "have exacerbated an atmosphere of mistrust and that shared governance exists at the institution only on paper, in handbook language that reflects the principles set forth in the Association's Statement on Government, but not in reality."

Among the conclusions of the AAUP investigative committee were that Clark Atlanta violated faculty rights by:

- Not providing dismissed faculty members with hearings before faculty peers, as required by both AAUP standards and university regulations.
- Making no distinction between tenured and non-tenured faculty members in dismissal decisions.
- Using a "largely nonexistent" enrollment problem as "a pretext for avoiding affordance of due process required under university regulations."
- Providing a "sorely deficient" one month of severance salary.

But Brown, the university's president, gave the AAUP this statement based on a draft of the report: "CAU's enrollment numbers speak for themselves, as does the state of our nation's economy. I'm sure you recall like I do a time not very long ago when this university boasted well over 5,000

students. Today, the enrollment is less than 4,000 students. Considering the progressive enrollment decline within the context of the worst economic recession since the Great Depression, and it should be clear to any objective person that the actions taken as a part of CAU's resource reduction program were absolutely essential. Please know that we understand and have always understood the position the AAUP would take in this matter. Our number one priority, however, has been and will always be the preservation of this fine institution for the students it serves now and will serve in the future."

The AAUP has faced criticism from some historically black colleges in the past over investigations. The four members of the panel that investigated Clark Atlanta included one professor at a historically black institution (Charles L. Betsey of Howard University) and one professor who has written extensively and sympathetically about black colleges (Marybeth Gasman of the University of Pennsylvania). Reported in: insidehighered.com, January 14.

Wheaton, Illinois

Many secular academics could never imagine working at a college with a "statement of faith" with which everyone must agree. What makes a controversy breaking out about Wheaton College in Illinois striking is that the criticism is coming from a church-going professor who has no problem with the concept of a statement of faith. And lest the criticism appear to be coming from an outsider, he wanted to make his points not in the secular press, but in *Books & Culture*, a highly respected publication that is something like a Christian *New York Review of Books*.

He almost pulled it off, and won the editor's backing for an ambitious look at the college. The piece was edited and the cover was designed and approved. But the article was killed at the last minute by the president of Christianity Today International, a ministry founded by Billy Graham that publishes *Books & Culture* and many other periodicals. According to the editor of *Books & Culture*, no article has been blocked in its 15-year history and he stands behind the killed piece. Harold B. Smith, the president of Christianity Today International, confirmed that it was his decision.

All of which has many people wondering why this article was killed, and whether its critique was on target. The author—Andrew Chignell, a Wheaton alumnus who is associate professor of philosophy at Cornell University—has just published the article online, along with "the back story" about how the piece was killed.

And so now those concerned about the future of Wheaton—seen by many as a flagship of evangelical higher education and known for top-notch academic programs—are debating both the article and what happened to it. The timing of the incident could be important as it comes as Wheaton's board is considering successors to Duane Litfin, who is finishing up a 17-year run as president and whose philosophy is very much in dispute in the article. Some observers believe the article was killed to avoid offending Litfin while others speculate that the article was killed to avoid boxing the board into a corner in which it would feel the need to appoint a successor with views identical to Litfin's. (Several people familiar with the issues declined to speak on the record, for fear of angering Wheaton, Christianity Today International or both.)

The article opens by noting all that Wheaton has much "to celebrate" from the Litfin years in office, including increased admissions selectivity, new academic programs, strong finances, "many excellent hires of younger faculty," and "in marked contrast to many American colleges with religious roots, Wheaton has not strayed from the core commitments on which it was founded." But the article also notes concerns.

"[W]hen one spends time talking with Wheaton faculty, students, and supporters, alongside real appreciation one is also likely to hear expressions of deep concern about the unusually pro-active roles that Litfin and his provost, Stanton Jones, have assumed as the definers and defenders of orthodoxy across the college. On the eve of transition to new leadership, this concern needs to be aired—not for the sake of settling scores, not in a spirit of smug judgment, but rather to provide one more important perspective as the college and its constituency look to the future. . . . The goal here is to view Wheaton the way it views itself: as the preeminent religious college in the country and the training ground for generations of Christian leaders."

Much of the article focuses on instances in which Litfin and Jones enforced the college's religious outlook. Wheaton is nondenominational, but has both a detailed statement of faith and a related "community covenant" that all at the college must follow.

Some of the incidents have been reported previously. For example, there is the case of a philosophy professor who was in otherwise great standing at the institution, but who was dismissed because he converted to Roman Catholicism. The fired professor, Joshua Hochschild, believed he could continue to sign and abide by the statement of faith, which doesn't bar anyone from being a Catholic. But Wheaton officials argued that his conversion to Catholicism (he had been Episcopalian) violated the college's belief that Scripture alone—not Scripture as interpreted by the pope and the Vatican—defines God's goals for humanity.

Other disputes reported by Chignell include debates over the teaching of evolution or disagreements over Wheaton teachings on sexuality. For example, he discusses a case of a recruit for a faculty job who lost her shot because, when signing her agreement with the statement of faith and community standards (which call for "chastity among the unmarried and the sanctity of marriage between a man and woman") she added a "clarification."

She stated: "It isn't clear to me that the Bible unambiguously condemns monogamous same-sex relationships."

While she added that she wasn't endorsing such relationships or asserting that God did so, her statement that the issue wasn't unambiguous was enough to end her job candidacy, Chignell writes.

The article talks about a fear at Wheaton that even the slightest deviation from very detailed views would leave the college "on a slippery slope towards Oberlin," which is seen as the ultimate example of a college that strayed from its religious mission.

In an interview, Chignell said that he does not want for Wheaton to become secular. His father taught there for 25 years and he grew up "on the campus doorstep." He remains proud of the education he received there and close to the friends he made. But he said that he rejects the idea that the only choices for Wheaton are to stay exactly as it is or to become Oberlin.

Litfin, Wheaton's president, has spoken frequently of the difference between religious colleges that are "umbrella institutions" (where a sponsoring faith may be more visible, but other faiths are welcome to be visible as well) and "systemic institutions" like Wheaton, where a single faith is omnipresent in the entire institution. Chignell said he completely affirms the value of institutions like Wheaton. "I think systemic places are really important, and I don't think you can't have credal commitments on the part of faculty," he said.

But he said that "disagreements over what prepositions mean" in the statement of faith or "slightly different takes on what the virgin birth amounts to" are treated as major theological disagreements. "Anybody who has a slightly variant position is either fired or questioned," he said.

In this approach, Wheaton is "going far beyond what it needs to do" to preserve the faith of the college, and is limiting the rights of professors to explore ideas, he said.

Litfin, in an interview, said that it was frustrating to respond to the article. He said that he couldn't speak to any details about the cases discussed in the article without violating confidentiality rules, and he said that he feared having his views on Christian colleges—which he has outlined in a book—reduced "to sound bites."

But he did make several points. First, he rejected the idea that Wheaton has "seen some sort of tightening" on views under his leadership. "I do not represent a departure from anything that has gone before at Wheaton College. This is about Wheaton being the kind of institution that it is," he said.

Second, he said that statements of faith (at least at Wheaton) aren't meant as a starting point for debate. "The underlying issue here is that if you have a statement of faith, who determines what a statement of faith means?" To Litfin, the answer is the college.

"It is the institution's task to make clear what the statement is, to clarify it for anyone who needs clarification. That is the whole point of having a statement of faith," he said. The obligation of a college with a statement of faith is not to ask for everyone's opinion on it, but to be "clear and public and explicit about what it is."

John Wilson, the editor of *Books & Culture* throughout its history, said he was as surprised as anyone that he was barred from publishing Chignell's article. Wilson, who was involved in editing the piece, said that while he didn't necessarily agree with all of the opinions in the piece, the story was "accurate" in all of its substance and he would stand behind it.

Early on in the reporting process, Wilson recalled, Chignell asked him if the direction of the piece would be problematic. "Perhaps it was naïveté on my part, but I didn't foresee that, or expect that," Wilson said. "Andrew asked me if this would be a problem and I waved that off."

While the publication treats issues of faith as central, it has never restricted itself to a single point of view, he said. "We publish so many articles with incompatible views," he said, that readers know that the editors aren't endorsing positions so much as providing a forum for a range of views.

Litfin, the Wheaton president, said that college officials "had zero contact" with Christianity Today International officials about the article. "Even if I had the ability to stifle the article, I would not have done so," he said. "It goes against the grain of everything I believe."

He added: "I disagree with the article, but I don't think the article is something we need protection from." Reported in: insidehighered.com, January 20.

Minneapolis, Minnesota

Social scientists who study illegal activities periodically face criticism for their commitment to protecting the confidentiality of their research subjects, who regularly break the law. Supporters of Scott DeMuth, a University of Minnesota graduate student in sociology, say that his recent prosecution by federal authorities is an extreme and dangerous example of such criticism.

Professors are organizing on his behalf, saying that federal authorities are using inappropriate measures to try to get DeMuth to reveal what he knows about underground animal rights groups. The case may be a difficult one for some in academe because the victims of the criminal activities DeMuth may have studied are academics: The legal dispute involves an investigation into an attack on research laboratories at the University of Iowa in 2004. The attack—for which the Animal Liberation Front claimed responsibility—included vandalism of facilities, the removal of rodents being studied, and the trashing of faculty offices. Many professors and graduate students lost years of work as a result of the attack.

A grand jury is hearing testimony about the attacks, and DeMuth was ordered to appear before it in November, after authorities came to believe he had knowledge of the attacks, based on a journal he had that was seized in the

investigation of protests that occurred during the 2008 Republican National Convention.

DeMuth—whose research is about radical animal rights and environmental groups—was briefly jailed for refusing to reveal whatever he may know about the University of Iowa incident. He maintains that his knowledge of animal rights groups is based on his pledges of confidentiality to the individuals who talk to him. After he was released from jail, he was indicted on charges that he conspired to commit "animal enterprise terrorism" and to cause "damage to the animal enterprise." These charges are under a new federal law designed in part to give authorities more tools to go after those who vandalize animal research facilities.

David Pellow, a professor of sociology at Minnesota and DeMuth's academic adviser, is involved with a petition drive for DeMuth and the creation of a new group of professors—Scholars for Academic Justice—that is organizing scholarly opposition to the prosecution. Pellow said that the indictment for animal rights terrorism is a sham, designed to force DeMuth—who was in another state at the time of the Iowa incident—to reveal what he knows about those who may have been present. Pellow said that DeMuth received immunity offers when he was asked to testify, suggesting that authorities know he played no role in the incident himself.

Pellow said that the use of the animal research law in this way poses a threat to DeMuth's academic freedom as well as that of anyone whose research involves interviews with people who may commit illegal acts. "Confidentiality is foundational to so much of the academic research we do," he said. "Without that, we would find future potential research participants losing trust."

DeMuth may be an attractive target for authorities because he is politically active, working with groups that have sympathies with the radical environmental and animal rights groups he studies. But Pellow said that DeMuth's activism is legal and doesn't change his obligation to protect his research subjects. "This is very much about public sociology, about the idea that sociology isn't just about studying society, but about improving it," he said.

The American Sociological Association's code of ethics, Pellow noted, specifically stresses the importance of confidentiality. The introduction to its section on confidentiality reads: "Sociologists have an obligation to ensure that confidential information is protected. They do so to ensure the integrity of research and the open communication with research participants and to protect sensitive information obtained in research, teaching, practice, and service." The ethics code stresses that this obligation extends even when "there is no legal protection or privilege to do so."

The only category of exception that the ethics code recognizes is when confidentiality could create harm going forward—and even in these cases, the association is cautious on any breach of confidentiality. "Sociologists may confront unanticipated circumstances where they become aware of information that is clearly health or life threatening to research participants, students, employees, clients, or others. In these cases, sociologists balance the importance of guarantees of confidentiality with other principles in this code of ethics, standards of conduct, and applicable law."

Christopher Uggen, chair of sociology at Minnesota, called the prosecution of DeMuth "extremely troubling, made all the more troubling and confusing by the secrecy of these grand jury proceedings." Uggen said he considered DeMuth a very talented young scholar and said he was worried that the federal actions could hurt him "at a very important time for his professional development."

The issue of confidentiality of sources is a crucial one, Uggen said. "To the extent he's being asked to breach the confidentiality agreements he's established, this has been just a nightmare," Uggen said. He stressed that it's "not unusual at all" for a sociologist to interview—with pledges of confidentiality—people who break the law.

A criminologist, Uggen said that work in his field and many others would be endangered if research subjects had cause to worry about whether their information would be shared with others. Many people have difficulty separating the research subject from the researcher, and this is unfair to the researcher, he said. "There is a reflected stigma that attaches to researchers," especially if their subjects involve illegal acts that many people are horrified by, such as sex offenses. But people who are concerned about various activities also need to learn about them, he said.

"As a social scientist, I really believe one needs to first understand such acts and motivations and that it's not at all a bad thing to be involved in studying them," he said.

If a graduate student in his department actually vandalized an animal research facility, that would be a problem, Uggen said. But learning about and talking with those who do so—and giving them confidentiality—is different, he added. Asked whether this principle was more difficult when the animal research facility in question was run by fellow academics, Uggen said that "it's difficult for me to place one class of criminal victims above another class, even when I'm very close to that class."

At Iowa, the impact of the attack was significant. David Skorton, then the president at Iowa and now president at Cornell University, outlined some of the consequences in Congressional testimony the following year, noting that when the Animal Liberation Front claimed responsibility for the act, it also sent out e-mail messages that had the names, home addresses, and phone numbers not only of psychology faculty members who work with animals, but of their spouses and partners.

"Publicizing this personal information was blatant intimidation," he said. "It was also successful, as these individuals are still being harassed and are still concerned about their own safety, as well as their families'. To cite one example of harassment, five faculty members as well as some of their spouses received a total of over 400

unsolicited magazine subscriptions under the 'bill me later' option. In terms of safety issues, numerous researchers are even concerned about allowing their children to play in their own yards. In addition to the human cost to the researchers, their colleagues and families, the total direct costs for the incident are approximately $450,000."

Frankie Trull, founder and president of the Foundation for Biomedical Research, which supports scientists who use animals in their work, said she didn't know the details of the DeMuth case. But she said that it is appropriate for the government to prosecute those who vandalize animal research facilities. "Anybody has the right to express dislike or disdain for what someone else is doing, but breaking into a research facility, smashing up labs, stealing lab animals and ruining people's data, that's not the First Amendment, that's illegal activity," she said.

She also said that researchers who work with animals are having limits placed on their academic freedom by the threat of attacks. The professors who work with animals "are pursuing knowledge" and should be protected, she said. "Researchers should not have to think about whether the research they are doing is going to endanger themselves or their families." Reported in: insidehighered.com, December 4.

Eugene, Oregon

A group seen to have pro-Nazi, anti-Semitic sympathies could soon be booted from the University of Oregon's student union building, if not the campus altogether.

Meetings of the Pacifica Forum, a group that on its Web site describes itself as offering "information and perspective on the issues of war and peace, militarism and pacifism, violence and non-violence," have been held in the Eugene institution's Erb Memorial Union for years.

But it was news of a "Sieg Heil" salute, performed at a December 11 meeting advertised as "An Insider's View of America's Radical Right" and led by a member of the National Socialist Movement, that has driven students to protest and administrators to reconsider the policy that lets Pacifica meet on campus in the first place.

While Pacifica has faced plenty of criticism since its founding in the early 1990s by now 94-year-old Orval Etter, an associate professor emeritus, the Nazi salute and the rest of the content of that meeting have galvanized students to speak out against what the group's members are saying and where they're saying it.

"It's not a new situation," said Charles Martinez, Oregon's vice president of institutional equity and diversity. "They've been meeting on campus for a long period of time." The difference, he said, is that the group's meetings have begun to include "a lot of very overt hateful comments and gestures that have gotten to students to the point where they felt the need to take action."

A few days after students returned from winter break, a few dozen students and community protesters sat in on the forum's January 8 meeting. By the group's next meeting, on January 15, a crowd of 300 interrupted a scheduled debate on the symbolism of the swastika, estimated the *Daily Emerald*, the student newspaper

In the week between those two meetings, Devon Schlotterbeck, a sophomore, founded a Facebook group to rally protesters. Most of the nearly 2,000 members of the group, "U of O students and community members against the Pacifica Forum," appear to be students or alumni. Another protest is scheduled for Friday, to coincide with a Pacifica meeting on "Neo-Communism and the Anti-Hate Task Force," a group that organized in opposition to Pacifica.

On its Web site, Pacifica described the January 15 session as a "meeting on 'The Symbolism of the Swastika' (the point being that the swastika is a symbol in diverse cultures, not just Nazism)" that garnered so many protesters because, "by this time, Facebook had been employed to spread disinformation about the Forum, and hundreds turned out to protest."

Administrators, Martinez said, face the "dilemma that on the one hand we believe and hold very close this idea that institutions of higher education like ours and others must be a bastion of free speech, while at the same time engaging in scholarly review and … true academic inquiry."

Pacifica is able to use campus space for its event because of Etter's affiliation with the university, under a policy that gives retired faculty and staff access to certain facilities and services. Provost James C. Bean and other academic leaders are now "undertaking a very careful consideration of those policies and practices," Martinez said. "They're tackling a narrow set of issues: free use of space by retired professors and university employees."

Emma Kallaway, president of the Associated Students of the University of Oregon, said her group, the student government, respects that privilege but hopes to see the meetings moved out of the student union. "The EMU is home to groups like the Women's Center, the Black Student Union and the LGBTQA," she said. "It's supposed to be a place where students can build a community, feel safe, but it's not with a group like this meeting there."

Though Schlotterbeck said she and other student activists "started off mostly protesting the use of a room in the student union since they're not a student group," many now hope to "preferably get them off the campus entirely." Members of Pacifica may not be violent and may wish no harm to Oregon's students, she said, "but bringing in people who have ties to a very violent organization, giving those people a legitimate reason to be here, seems not to make sense"—referring to the National Socialist Movement.

The issue "is not telling them that they can't exist or can't have the right to exist—it's more about use of a space rather than blocking their freedom of speech," she added. "There's nothing against people trying to stop other people

from saying things just by speaking out."

Kallaway said that Pacifica's movement toward "pro-Nazi, anti-Semitic messages in the last few years has made students feel unsafe, like they can't go to class and study in the EMU if these groups are there." That, she said, "is not at all okay from a student government perspective.… We were elected to keep students safe, to fight for their interests."

Richard Lariviere, the university's president, lauded the protest movement in a speech marking Martin Luther King Jr. Day. "I am intensely proud of the students and the community and the way they stood up to that hateful speech," he said, referring to last week's demonstration.

Martinez said he was proud to see "our students exercising their free thinking and speech in response to events that have clearly been hate mongering, as I've seen for myself at events I've attended."

But Michael A. Olivas, a law professor at the University of Houston and director of the university's Institute of Higher Education Law and Governance, said the student protesters approached the situation in the wrong way. "While I applaud their enthusiasm, the students took the bait," he said. "This group wanted attention and by protesting, the students have now given national press to an issue that wouldn't otherwise be getting attention."

Had students opted to organize a debate of their own or some other kind of "rationed, reasoned, arm's-length discussion," they would have brought scrutiny to Pacifica but done so in a way that "didn't play into the hands of the bad guys."

While events where "violence is genuinely and legitimately urged" could justifiably be forced off campus, Olivas said, "that does not seem to be the case here." Reported in: insidehighered.com, January 20.

privacy

Palo Alto, California

A group that advocates Internet privacy has filed a formal complaint with the Federal Trade Commission over Facebook's decision to open more of its members' information to public view unless they actively take steps to limit their data's exposure.

"More than 100 million people in the United States subscribe to the Facebook service. The company should not be allowed to turn down the privacy dial on so many American consumers," said Marc Rotenberg, executive director of the Electronic Privacy Information Center, in a statement.

Rotenberg said the changes will make too much user information available to the public, and also to third-party application developers that create games, contests, and other programs for Facebook.

In filing the case, EPIC said it received support from the American Library Association, the Center for Digital Democracy, the Consumer Federation of America, Patient Privacy Rights, and other advocacy groups.

Users' biggest complaint about the changes is that the default privacy setting on Facebook now opens their status updates to the entire Web, unless they proactively take steps to modify the settings.

Facebook claimed that it's implementing the changes in an effort to make it easier for members to control who can see which pieces of information they post. "Facebook is transforming the world's ability to control its information online by empowering more than 350 million people to personalize the audience for each piece of content they share," said Facebook communications VP Elliot Schrage, in a statement.

Facebook added a tool that lets users select privacy settings for literally each post they place on the social networking site. Via a new dropdown menu, users can specify whether the post should be made to the general public, all their Facebook friends, or a list of particular friends, family members, or work colleagues.

Facebook also launched a "transition tool" to guide members through the new settings. Additionally, Facebook is eliminating regional networks—user groups that allow members within a given geographical region to automatically share content with other network members. Facebook operates such networks around the world, including far-flung areas like India and China.

Facebook founder Mark Zuckerberg has said the regional networks are becoming too large to ensure members' privacy. Reported in: *Information Week*, December 17.

telecommunications

New York, New York

Under a new system set up by Sprint, law enforcement agencies have gotten GPS data from the company about its wireless customers 8 million times in about a year, raising a host of questions about consumer privacy, transparency, and oversight of how police obtain location data.

What this means—and what many wireless customers no doubt do not realize—is that with a few keystrokes, police can determine in real time the location of a cell phone user through automated systems set up by the phone companies.

And while a Sprint spokesman told Talking Points Memo that customers can shield themselves from surveillance by simply switching off the GPS function of their phones, one expert said that the company and other carriers almost certainly have the power to remotely switch the function back on.

To be clear, you can think of there being two types of GPS (global positioning system). One is the handy software on your mobile device that tells you where you are and

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success stories

library

North Kansas City, Missouri

The North Kansas City school board voted December 21 to keep a children's book in school libraries despite the concerns of a parent. Board members decided to retain *And Tango Makes Three*, by Peter Parnell and Justin Richardson, in a 3-2 decision after more than an hour of discussion. However, they also agreed to place the elementary library card catalog online so that parents can view which materials are in their child's library and decide whether they would like to request any individual restrictions for their child.

And Tango Makes Three came into question after parent John Dixon requested that the story be removed from circulation in all North Kansas City schools. The book tells the story of two male penguins living at the zoo who care for and raise a penguin chick together.

Dixon, who addressed the board the previous week, said he opposed the book because he didn't believe it was age-appropriate for young children and didn't follow the district's policy on human sexuality education. He also said he thought the book tried to indoctrinate children about homosexuality.

Two previous committees had voted to retain *And Tango Makes Three* before Dixon appealed the decision to the entire school board.

At a special meeting December 21 board members voiced differing opinions on the issue. While none of the board members present supported banning the book from libraries, some thought the book should be restricted unless a child had parental approval to read it.

"I continue to believe that this book is not educationally suitable," said board member Phil Holloway. He argued that the book was not age-appropriate for young children and said the subject of same-sex attraction was clearly being interjected into the children's story.

"We are naive if we say this is just a book about penguins, because it's not," he said. He also said he didn't want the district to be forcing parents like Dixon to be discussing issues such as human sexuality with their children before they were ready. They didn't get to make that decision, he said, adding that placing the book on a restricted list would allow parents to make the decision for themselves.

Board member Spencer Fields also voted against keeping the book in general circulation and said he thought it contained some questionable material. But board member Chace Ramey said the district could be opening itself up to liability if the board restricted the book.

"I fail to see any grounds that we have the ability to really limit access," Ramey said.

Board member Melissa Joy Roberts said she thought parents had the responsibility to decide what was appropriate for their own children, but said they shouldn't be making those decisions for other children in the district. Board member Kathleen Harris also voted to retain the book and said although she didn't think the book was appropriate for early elementary-age children, she was against restricting any one title without looking at other books in district libraries.

She suggested reviewing the district's current policy on selecting library materials and said the district should seek input from staff and the community to determine clear standards about the age appropriateness of reading materials. "I think we can be smarter about how we allow titles into our libraries," she concluded. Board members Terry Ward and Jan Kauk were absent.

Although the book will still remain in school libraries, the district does plan to place each elementary library's card catalog online for parents. Superintendent Todd White said each parent would receive his or her own username and password to access the system and could request that books with certain titles or themes be restricted for their child. Reported in: *Kansas City Star*, December 23.

colleges and universities

Washington, D.C.

Secretary of State Hillary Clinton signed orders January 20 that lifted previous orders by the Bush administration denying entry to the U.S. to two prominent scholars. While the two must now re-apply for visas, the past rationales for rejecting them can't be used, and they are expected to receive speedy approval.

Several academic groups had been in a protracted legal battle with the government over the visa denials to Adam

Habib, the deputy vice chancellor of research, innovation and advancement at the University of Johannesburg, and Tariq Ramadan, chair of contemporary Islamic studies at the University of Oxford. In separate lawsuits, the American Association of University Professors, the American Civil Liberties Union, and other organizations had challenged the denial of visas to Habib and Ramadan.

"With the welcome decision to cease excluding Adam Habib and Tariq Ramadan from entering the United States, the State Department puts an end to one of the more shameful episodes in recent American history—the practice of preventing invited foreign scholars from meeting with American faculty and students on the basis of their political beliefs," declared AAUP president Cary Nelson. "We may hope that such ideological exclusions are now entirely in our past, that our freedom of association and intellectual exchange will never again be compromised."

In January 2006, the AAUP joined the American Academy of Religion and the PEN American Center in a suit contesting the exclusion of Tariq Ramadan. The lawsuit, which was litigated by the ACLU, sought to compel the government to admit Ramadan to the country so that the Association's members could meet with him and hear his views. Over the years, Ramadan had visited the United States frequently to lecture, attend conferences, and meet with other scholars. Ramadan had accepted a tenured position at the University of Notre Dame in January 2004 and made arrangements to move from Switzerland when the government revoked his visa, apparently on the basis of what is known as the ideological exclusion provision of the USA PATRIOT Act. Ramadan was subsequently invited to address the AAUP's annual meeting and had to do so by video after again being denied a visa.

While the government refused for a long time to say why Ramadan was excluded, it eventually cited his donations, between 1998 and 2002, to Association de Secours Palestinien (ASP), a charity that has provided some support to Hamas. While the Bush administration barred support for the charity after the period in which Ramadan donated, the organization was (and is) completely legal in Switzerland. Ramadan has testified that he did not know that any of the donation could have been used inappropriately, and that he thought he was providing funds to help Palestinian refugees.

Ramadan issued a statement that he was "delighted" by the news. "After more than six years, my exclusion from the United States has come to an end," he said. "At no time did I equate the American government (and particularly the Bush administration) with American civil society, its academic institutions and intellectuals. I am duty bound to thank all those institutions and individuals that rallied to my support and worked to end unconstitutional ideological exclusion over the years. I am very happy and hopeful that I will be able to visit the United States very soon and to once again engage in an open, critical and constructive dialogue with American scholars and intellectuals."

In October 2006, Adam Habib was intercepted at John F. Kennedy International Airport and denied entry to the United States, where he was scheduled to meet with officers of the Social Science Research Council, Columbia University, the National Institutes of Health, and the World Bank. The denial was based on a portion of the USA PATRIOT Act that excludes aliens who have "engaged in a terrorist activity"; the government did not, however, provide any evidence for its determination that Habib had engaged in terrorist activity or define the type of activity in which Habib supposedly engaged.

Habib, who earned a degree from the City University of New York, initially thought he might have been denied entry because of bureaucratic error stemming from the fact that he had once been a political prisoner under South Africa's apartheid regime.

The AAUP joined the ACLU in filing suit on behalf of the AAUP and other organizations that had invited Habib to speak in the United States, including the American Sociological Association, the American-Arab Anti-Discrimination Committee, and the Boston Coalition for Palestinian Rights. Habib eventually addressed the AAUP annual meeting by telephone.

Through the ACLU, Habib released this statement: "My family and I are thrilled by Secretary Clinton's decision, and we are thankful to the many organizations that put pressure on the Obama administration to stop excluding people from the United States on the basis of their political views. This is not only a personal victory but also a victory for democracy around the world, and we hope this signals a move by the administration to begin restoring the liberties and freedoms that have been so badly eroded in recent times."

In both the Ramadan and Habib suits, AAUP contended that censorship at the border prevents U.S. citizens and residents from hearing speech that is protected by the First Amendment. It asked the court to rule that the government's exclusion of Ramadan and Habib violated the First Amendment and that neither should be denied a visa on the basis of protected speech. The orders signed by Secretary Clinton state that, in the future, professors Habib and Ramadan will not be denied visas for the same reasons. Reported in: AAUP Online Member Newsletter, January 20; insidehighered.com, January 21.

Minneapolis, Minnesota

The Foundation for Individual Rights in Education (FIRE) claimed a victory in December, saying that the group's pressure forced the University of Minnesota-Twin Cities to back away from what critics saw as a political litmus test for students in the education school. In a letter to the group, the university's general counsel wrote that "no university policy or practice ever will mandate any particular beliefs, or screen out people with 'wrong beliefs' from the university."

According to FIRE, plans from the university's College of Education and Human Development (CEHD) involved redesigning admissions and the curriculum to enforce an ideology centered on a narrow view of "cultural competence." Those with the "wrong" views were to receive remedial re-education, be weeded out, or be denied admission altogether.

"We are relieved that the University of Minnesota has finally committed itself to upholding the freedom of conscience of its students," FIRE President Greg Lukianoff said. "Prospective teachers will keep the right to have their own thoughts, values, and beliefs. FIRE will continue to monitor the situation to make sure that the university does not define 'cultural competence' or 'dispositions' requirements in a way that interferes with individual rights."

The proposal, initiated by the college's Race, Culture, Class, and Gender Task Group, sought to require each future teacher to accept theories of "white privilege, hegemonic masculinity, heteronormativity, and internalized oppression"; "develop a positive sense of racial/cultural identity"; and "recognize that schools are socially constructed systems that are susceptible to racism . . . but are also critical sites for social and cultural transformation." They were to be judged by their scores on the Intercultural Development Inventory, a test of "Intercultural Sensitivity." In one assignment, they were to reveal a "pervasive stereotype" they personally held and then demonstrate how their experiences had "challenged" it. They also were to be assessed regarding "the extent to which they find intrinsic satisfaction" in being in "culturally diverse situations."

FIRE wrote University of Minnesota President Robert H. Bruininks about these plans on November 25. In response, General Counsel Mark B. Rotenberg promised that "[n]o University policy or practice ever will mandate any particular beliefs, or screen out people with 'wrong beliefs' from the University."

"The next version of the college's plans must reflect this promise," said Adam Kissel, Director of FIRE's Individual Rights Defense Program. "To learn about other cultures is one thing, but the college may not demand that future teachers hold certain moral and political 'dispositions' or specific views about pedagogy. Not all great teachers have the same views about politics or education."

In his letter to FIRE, university General Counsel Mark Rotenberg wrote: "Many of the fears you expressed in your letter are based on an unfortunate misunderstanding of the facts. Let me state them plainly. Neither the University nor CEHD has adopted or implemented any 'new policies' discussed in the particular Teacher Education Redesign Initiative (TERI) Task Force report submitted in July 2009 from which you quoted extensively. The task force report at issue was one of seven separate task force reports; none of them has been adopted as CEHD policy, nor is there any commitment by CEHD to adopt all the myriad faculty ideas contained in the various reports. Far from articulating CEHD or University policy, the various task group reports reflect the creative thinking of many faculty members charged with exploring ideas to improve P-12 education and student achievement. CEHD created TERI for the purpose of re-exploring the designs of our teacher education programs and involved more than 50 faculty members and Minnesota educators in the initiative. CEHD Dean Jean Quam has characterized the various task group reports as 'faculty brainstorming' on how best to accomplish this curricular redesign."

The letter also defended the faculty's right to consider such proposals, even if they violate university policy. Rotenberg wrote: "Surely FIRE can acknowledge and support the right of our faculty to engage in a robust exchange of viewpoints and proposals . . ., including controversial proposals and perspectives that may well require further refinement in the coming months. Academic freedom means little if our teaching faculty is inhibited from discussing and proposing currculum innovations simply because others find them 'illiberal' or 'unjust.'"

Some conservative pundits had criticized the proposed requirement using even harsher language than that employed by FIRE. Chris Baker, the host of a talk show on the local radio station KTLK-FM, referred to the education school as "the University of Minnesota Adolf Hitler School of Education" and said the school was "one step away from advocating gas chambers for conservatives" and having students with views that did not comport with its ideology "culled from the herd and eliminated."

The Manhattan Institute for Policy Research published an article urging readers to pressure Minnesota lawmakers and Gov. Timothy Pawlenty, a likely Republican candidate for president in 2012, to remove teacher training in that state "from the grips of ideologues."

Dean Quam said the education-school panel had come back with "some pretty strong language about what it wanted to see." She added, however, that she supported its underlying goal of preparing prospective teachers to deal with students from diverse backgrounds, and noted that about 70 languages and dialects are spoken by students in the Saint Paul school system alone.

The controversy over the Minnesota proposal echoed a recent debate over whether it is appropriate for colleges of education to require prospective teachers to display certain professional "dispositions" showing an ability to work with diverse students - a requirement that schools view as ensuring teachers are effective, and critics regard as thinly disguised ideological litmus tests. In response to such criticisms, the governing board of the National Council for Accreditation of Teacher Education voted in 2007 to stop suggesting that teacher-preparation programs take their students' views on "social justice" into account. Reported in: *Chronicle of Higher Education* online, December 2, 23; www.thefire.org. □

FTRF report to ALA Council . . . from page 45)

Second Circuit Court of Appeals had upheld key parts of the federal district court decision in *John Doe and ACLU* v. *Holder* that struck down the National Security Letter statute as unconstitutional. As you may recall, the Second Circuit found the NSL statute unconstitutional to the extent that it imposed a gag order requirement on NSL recipients without requiring the government to obtain judicial review of the gag order. It also overturned the statutory provision that required courts reviewing the propriety of a gag order to treat the government's certification concerning the necessity for the gag order as conclusive.

The Obama administration chose not to appeal the decision to the Supreme Court, and the Second Circuit subsequently returned the lawsuit to the district court so that the government could develop procedures consistent with the Second Circuit's decision.

Back at the district court, the government said the gag order should remain in force, since there were circumstances that required keeping the gag order in place. In support of its argument, it filed a classified brief and affidavit that was only seen by Judge Marrero as an ex parte filing. Based on the materials in that classified filing, Judge Marrero ruled that the government had demonstrated the necessity of keeping the existence of the NSL secret and ordered the gag order to remain in effect. He then ordered the case to be closed despite the ACLU's protests and its demand to be able to view the government's filings. The ACLU has filed a motion asking Judge Marrero to reconsider his decision, a motion that is rarely granted by the courts.

To say we are disappointed with the outcome of this lawsuit would be an understatement. We have long argued that the government should not be able to silence an individual without providing an opportunity to evaluate and challenge the reasons for the gag order. A system which allows the government to justify its actions in secret serves neither justice nor democracy.

FTRF will continue to support John Doe and the ACLU in their effort to preserve our civil liberties.

Preserving the Freedom to Read

Consistent with our name and purpose, the Freedom to Read Foundation works to preserve the right to read and receive ideas free from government censure or censorship by supporting and participating in a broad array of litigation intended to vindicate this fundamental constitutional right.

Among these lawsuits is *American Civil Liberties Union of Florida* v. *Miami-Dade School Board*, which challenged the Miami-Dade School Board's decision to remove from its classrooms and libraries all copies of the book *Vamos a Cuba* and its English-language companion book, *A Visit to Cuba*, on the grounds that the children's picture book did not accurately convey the harsh political realities of life in Cuba. The federal district court in Miami swiftly overturned the school board's decision on the grounds that the claimed inaccuracies were a pretext for imposing political orthodoxy on the school library.

As we reported this summer, the Eleventh Circuit Court of Appeals overturned that decision, ruling that the district court erred in finding that the book had been removed for political reasons, and that the book's factual inaccuracies justified the book's removal from Miami-Dade school libraries. The ACLU of Florida appealed this decision to the U.S. Supreme Court, arguing that the Eleventh Circuit panel reached its decision by revisiting the factual findings of the district court and reexamining the credibility of witnesses—matters traditionally left to the discretion of the trial court.

On November 16, the Supreme Court denied the petition for certiorari, upholding the Eleventh Circuit's decision. As a result, *Vamos a Cuba* is censored and the students of the Miami-Dade School District will not ever find the book in the school library.

Though this is very bad news, there is a silver lining. In reaching its decision, the Eleventh Circuit did not decide the issue of whether book censorship complaints should be decided under the standard enunciated in *Board of Education* v. *Pico*, nor did it decide whether school library books should be considered part of the curriculum. Instead, it conducted its own review of the factual evidence presented in the case under the *Pico* standard and simply reached a different conclusion about the Miami-Dade school board's motivations for removing *Vamos a Cuba* from its school libraries, thus preserving the legal standard set forth in *Pico*.

Protecting First Amendment Rights

In addition to its work defending the right to read, FTRF also participates in litigation that defends fundamental First Amendment free speech rights. That is why we chose to join an *amicus curiae* brief in support of former CIA agent Valerie Plame Wilson, who was prohibited by the CIA from including her pre–2000 dates of service in her published memoirs, even though those dates were included in an unclassified letter from the CIA published in the *Congressional Record*. At trial, the federal district court held that the CIA's prohibition on publication did not violate the First Amendment, and Plame Wilson appealed the decision to the Second Circuit Court of Appeals.

On November 12, the Second Circuit affirmed the district court, stating that classified information retains its classified status even if there is public disclosure of the information. It further held that the CIA can require Plame Wilson to keep her dates of service classified. Plame Wilson thus becomes the only person in the United States who cannot publish or discuss her dates of service with the CIA.

In a critical Supreme Court case, our participation as *amicus curiae* in *U.S.* v. *Stevens* is based on our opposition

to any statute that chills free expression by creating new categories of unprotected speech. As you may recall, *U.S.* v. *Stevens* addresses a statute that criminalizes depictions of the killing, maiming, and torture of live animals—but not the act of animal cruelty itself. While the statute provides an exception for any depiction that has serious religious, political, scientific, educational journalistic, historical, or artistic value, the determination of whether a work has "serious value" is left to a judge and jury, thereby leaving artists, photographers, journalists and filmmakers uncertain about just what depictions of animal cruelty are illegal, thus chilling their speech out of fear of prosecution. Certainly they would not want to find themselves in the place of the defendant in this case (a pit bull enthusiast), who was convicted and sentenced to thirty-seven months in prison because his documentaries about pit bulls contained footage of pit bull dog fights.

FTRF joined in an *amicus* brief that argues that the statute unconstitutionally criminalizes depictions of violence that are protected under the First Amendment. The Supreme Court heard oral argument on October 6, 2009, and we anticipate a decision in the near future.

40th Anniversary Gala and Judith F. Krug Fund

This past summer, the Freedom to Read Foundation observed its 40th anniversary with a gala event that celebrated the life and achievements of the Foundation's founding executive director, Judith F. Krug. The gala, which took place in the Art Institute of Chicago's new Renzo Piano-designed Modern Wing, was an enormous success by every measure. I am very pleased to report that the revenues generated by the gala allowed FTRF to add over $35,000 to its endowment, thereby helping to secure the Foundation's future.

In addition to the gala, a substantial amount has been donated to the Freedom to Read Foundation in memory of Judith Krug. Over the last several weeks, the Executive Committee and Judith's husband Herb have discussed how to use these funds, with the intent of establishing a project or program that would embody Judith's lifelong devotion to educating librarians, library workers, and the public about the importance of intellectual freedom. The Board has decided to explore two of the proposed projects.

The first project would commission the creation of a book and lesson plan directed toward students and teachers with a focus on the importance of the freedom to read. As envisioned, the text and its accompanying lesson plans would tell the story of the First Amendment with a focus on the right to receive ideas and information, including book banning and efforts to stop it. The book would make the case for the importance of exercising the right to read freely as a foundation of a well-functioning democracy. The book would include her writings and speeches along with the FTRF mission statement.

The second project would launch a First Amendment lecture series that would incorporate webinars and similar interactive online technologies to reach students at library and information schools across the country. The lectures would feature acknowledged experts on advanced First Amendment issues related to libraries, publishing, the Internet, and the media, and would highlight FTRF's sponsorship and include Judith's name prominently in the title. As the event becomes established, additional components could be added, such as a juried competition of student papers regarding topics surrounding the First Amendment and libraries and staff development opportunities.

Diversity

At our meeting, FTRF's task force on diversity delivered a list of suggestions as to how the organization can increase its diversity. Among the recommendations were inviting ALA's ethnic caucuses to send liaisons to the Freedom to Read Foundation, and encouraging the Nominating Committee to expand the diversity of nominees for election.

FTRF Authors' Event

Last night (following the submission of this report), FTRF held its fifth annual authors' event. This year's event was held in conjunction with the Gay, Lesbian, Bisexual, and Transgendered Round Table's Midwinter Social and featured Michael Willhoite (*Daddy's Roommate*) and Lesléa Newman (*Heather Has Two Mommies*). Funds raised will benefit the Conable Scholarship Fund, which sponsors a library student or new professional to attend Annual Conference. Many thanks especially to the Harvard Medical School's Countway Library of Medicine for opening its doors at the last minute following a burst pipe at the original location.

Developing Issues

Our Developing Issues Committee identified issues that are of emerging concern from an intellectual freedom perspective, and that might inform future litigation. These are the Anti-Counterfeiting Trade Agreement, "national" community standards applying to obscenity and harmful-to-minors cases involving Internet and electronic communications, "cyberbullying" legislation, and the increasing occurrences of school districts policing students' off-campus postings on social networking sites. The religious defamation resolution at the United Nations sparked a discussion of how this could affect library collections in the US and beyond, and certainly warrants our considered attention.

LIS Graduates' Free Membership Program

We are very pleased to announce that FTRF's offer of free memberships to recent (since August 2009) graduates of LIS programs has been very successful. Nearly 100

graduates applied for memberships, and the FTRF trustees agreed to extend the program for another year. If you are connected with an ALA-accredited library school or a school library media program recognized by AASL, please help us spread the word about this offer!

Membership in the Freedom to Read Foundation provides a great opportunity to support the important work of defending First Amendment freedoms, both in the library and in the larger world. Your support for intellectual freedom is amplified when you join with FTRF's members to advocate for free expression and the freedom to read freely. I strongly encourage all ALA Councilors to join me in becoming personal members of the Freedom to Read Foundation, and to have your institutions become organizational members. Please send a check ($35 minimum dues for personal members, $100 for organizations) to:

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611

Alternatively, you can join or renew your membership by calling (800) 545-2433, ext. 4226, or online at www.ftrf.org/joinftrf. ☐

(press freedom in Russia . . . from page 50)

This created a vicious circle: opposition papers don't even bother to compete for state funding, so the pool of applicants has decreased; thus the loyal large-circulation dailies get an ever-larger sum of federal money, which ultimately allows them to undersell their competitors. And the resulting wider circulation means they're more attractive to advertisers. The Kremlin's approach to print media is simple, Richter says: "If the press wants to help us, we shall help them. If the press doesn't want to help us or it's against us, let them die."

Meanwhile, access to information and sources within the government has greatly diminished. This is particularly true with the intelligence community. Andrei Soldatov, the founder of the investigative Web site agentura.ru, has covered the FSB and national security issues for more than a decade. In the early 1990s, he says, intelligence agencies feared that they would be disbanded, as happened to the East German Stasi. In an attempt to preserve their power, they established press offices to deal with journalists and the public in the name of transparency.

But under Putin, a career intelligence officer and head of the FSB from 1998 to 1999, those fears subsided and "the FSB just decided to forget about this filter," Soldatov said. Today, the FSB gives out an annual award for the best book or film about the security services and has been behind the production of at least one major movie, *Countdown*, that was little more than propaganda. According to Soldatov and others, the FSB's Center for Public Communications refuses to answer media queries, despite a 2006 law that says they must.

Several high-profile journalists have been murdered in spectacular contract killings, none of which have been successfully prosecuted. In 2004, just three months after the first issue of *Forbes Russia* was published, its founding editor, Paul Klebnikov, was shot on a quiet street outside of the magazine's editorial offices. Two years later Anna Politkovskaya, the reporter for *Novaya Gazeta* who wrote about war crimes and human rights abuses in Chechnya, was shot in the elevator of her apartment building. During her trial, human rights lawyer Stanislav Markelov and Anastasia Baburova, a twenty-five-year-old *Novaya Gazeta* freelancer, were gunned down in broad daylight on a busy Moscow street (in November two suspects, alleged to be members of an ultranationalist group, were apprehended in the killings).

And those are only the most well-known cases. The Committee to Protect Journalists, whose estimates tend to be somewhat conservative, has identified seventeen journalists killed because of their work in the last nine years across Russia. In only one of those cases have the killers been convicted, and the masterminds remain at large. In that same period, at least forty journalists have been deported or refused entry to the country. According to the committee, Russia is the third most dangerous country in the world for journalists, trailing only Iraq and Algeria. Executive Director Joel Simon says that in most countries where press freedom is deeply compromised, it is usually the result of state repression (China) or violence and impunity (Mexico). Rarely do the two merge as they have in Russia.

Yet lately the faint outlines of a new paradigm seem to be emerging. Several independent magazines and newspapers, including *Newsweek, Forbes, The New Times, Vedomosti*, and *Novaya Gazeta*, have survived longer than might have been expected given the circumstances. And they usually publish what they want, free of interference from the state. At the same time, Russia's president, Dmitry Medvedev, has made a point of reaching out to critics, even granting *Novaya Gazeta* the first full-length interview of his presidency, an unimaginable gesture under Putin.

"We live on islands in Russia," Maxim Trudolyubov, the opinion-page editor of Vedomosti says. He's referring to the large body of state-controlled media–what he calls a continent–and the small handful of independent newspapers and magazines that publish freely. Last June, Vedomosti launched an investigative desk, headed by Irina Reznik, a leading expert on Gazprom, who writes frequently about

Putin's circle of friends. "If you do it the right way, usually you can do it and get away with it," Trudolyubov says.

Outside of Russia, the best known of these "islands" is probably *Novaya Gazeta*, a thin paper published three days a week. *Novaya Gazeta* has a small but stable readership, and focuses largely on investigations of abuses of power and human rights, as well as corruption. Since its founding in 1993 by a group of about thirty journalists who parted from *Komsomolskaya Pravda*, an influential and widely read tabloid, the paper has taken a sharply adversarial tone. Four of its reporters, including Anna Politkovskaya, have been killed.

In 2006, the paper sold 49 percent of its shares–to pay salaries and debt–to Mikhail Gorbachev and Alexander Lebedev, a former KGB spy who recently acquired the *London Evening Standard* and has served in the Duma as a member of the pro-Kremlin United Russia party. Lebedev invested $3.6 million of his own fortune in the paper. So, like *The New Times, Novaya Gazeta's* livelihood is largely tied to a single investor. In May, Lebedev announced that he was unable to pay staff salaries for a week after financial problems with his German airline venture (though he had no problem paying staff at the *Evening Standard*). At the same time, very few tycoons are willing to risk their personal fortune on highly politicized publishing ventures. For most, it would mean the end of their business careers.

The most promising venture of the past decade appears to be Trudolyubov's *Vedomosti*, launched in 1999, not long after the collapse of the ruble, with the backing of the *Financial Times*, *The Wall Street Journal*, and Independent Media, which also publishes the English-language daily, *Moscow Times*. "The appearance of *Vedomosti* has changed things and moved them forward in a way Russian journalists were not doing before," says Arkady Ostrovsky, The *Economist's* Moscow bureau chief. "Some of the reporting that *Vedomosti's* done on people with Kremlin connections who have serious financial interests has been outstanding." *Vedomosti*, he says, has achieved what few publications have been able to do in Russia: create a documentary record of the Putin years.

In addition to *Vedomosti*, several Russian Web sites have become increasingly important as both sources of information and public forums. Newsru.com and grani.ru are the pet projects of Vladimir Gusinsky and Boris Berezovsky, respectively, exiled oligarchs and media moguls who were early casualties of the Putin era. According to a 2008 Reuters Institute report on the Web in Russia, both sites "carry generally reliable and often critical information and comment." Meanwhile, other large news sites, including gazeta.ru and the liberal-leaning lenta.ru, have expanded their presence.

For now the Web is a largely unregulated and open space. In 2007, when the FSB unofficially tried to force Moscow Internet providers to block access to a host of Web sites, including kasparov.ru, a political news site founded by Garry Kasparov, the chess legend, only a handful acquiesced. Oleg Panfilov, director of Moscow's Center for Journalism in Extreme Situations, who is working on a study of the Internet and freedom of speech in Russia, says that even though the authorities are starting to use legal measures, such as a relatively new law against extremism, to intimidate and even silence bloggers, it is too late for them to turn the Web into a kind of state-run media monopoly.

"It is technically impossible to control the Internet in Russia," he told me. Unlike China, Panfilov says, Internet service providers in Russia are privately owned, and have largely resisted efforts on the part of the state to manipulate content.

The Web is also becoming an increasingly important platform for print media. One of Russia's most promising publishing ventures, both online and in print, is *Bolshoi Gorod* (Big City), a city paper devoted to art, culture, and politics. Owned and published by *Afisha*, a successful arts and entertainment weekly, *Bolshoi Gorod* is openly liberal but far less antagonistic than *The New Times*. The paper's founders imagined *Bolshoi Gorod* as a kind of Moscow *Village Voice*: a free, black-and-white weekly. Nearly eight years later the paper, published in an oversized art-house format, comes out every two weeks, in color, and costs about forty rubles (about $1.30), and is accompanied by a simple, appealing Web site.

Alexey Munipov, at thirty-two the oldest editor at *Bolshoi Gorod*, says that the publishers are generally supportive of what they do–long-form narrative journalism–but would prefer if they focused more on lifestyle issues. "Nobody tells you that you cannot write something," Munipov says. "But you know that if you write about certain things, there will be problems."

In August 2008, two weeks after Russia's war with Georgia came to an end, *Bolshoi Gorod* published a striking twenty-four-page collection of first-person accounts of the conflict that Munipov says people still reference. He doesn't feel the issue was particularly dangerous, nor was it overtly political, but it challenged the monochromatic view of the war that the Kremlin put forward on state-run television and online through its own army of paid bloggers (a relatively new phenomenon). According to Thomas de Waal, the author of two books on Chechnya, it provided some of the best eyewitness reporting on the war.

The paper's editor in chief, Philip Dzyadko, is twenty-seven, and its style and content reflects a youthful sensibility. Like Barabanov, Dzyadko is part of the first truly post-Soviet generation of journalists; they've come of age under both the rise of Vladimir Putin and the Web.

"They definitely are in conflict with the older generation. They're in conflict with both the Soviet approach and the corrupt, paid-up-to-the-gills, nineties approach," Michael Idov, a contributor to *Bolshoi Gorod*, said. "And this is why I'm really optimistic about magazines like *Bolshoi*

Gorod. What they do is they tell individual stories instead. A mosaic of what Russian life is really like does gradually reveal itself from the stories that they tell."

In a recent column, *Forbes Russia* editor Maxim Kashulinsky wrote that, "The dynamics of Russian media are hard for outsiders to understand." He was referring to the dichotomy that has emerged between the increasingly powerful state-controlled media and the handful of independent newspapers, magazines, and Web sites that usually publish without interference. There is little to suggest that this imbalance will change soon, but Kashulinsky remains optimistic. Reported in: *Columbia Journalism Review*, January-February 2010. □

(censorship dateline . . . from page 58)

officials make decisions that impact Californians, the public deserves to know any information that could influence them. In these two cases involving Harris Ranch, there is little doubt that their influence resulted in official actions by CSU officials, yet there is no transparency of the factors into that decision. This practice will change after SB 330 is signed into law."

Last year, Governor Arnold Schwarzenegger vetoed similar legislation. Reported in: *San Luis Obispo Tribune*, January 11; *California Chronicle*, January 21.

foreign

Beijing, China

China has banned individuals from registering Internet domain names and launched a review of millions of existing personal websites in the toughest government censorship drive so far on the Internet.

As of December 14, people applying to register a domain name in China must present a company chop and a business licence, the China Internet Network Information Center, a government-backed body, said in a statement. Internet service providers said they had started to review their client base for potentially fraudulent or "harmful" individually owned sites. The term "harmful" is often used by the government as a catch-all that covers everything from pornography to anti-state activity.

As with many other issues considered sensitive by the government, individual domain name ownership has always been a legal grey area in China. The government considered twice over the past ten years whether to explicitly allow personal websites but with no result. So far, however, individuals could simply sign up for domain name ownership on the web. This has now been replaced by the stricter application process outlined in the CNNIC notice.

Individuals are estimated to account for the majority of all registered domain names globally. But China does not disclose domain name statistics by ownership category. According to CNNIC, China had 16.3 million domain names as of June this year, 80 per cent of which have the ending ".cn". The rest use ".org", ".net" or ".com".

The move followed a string of other measures to crack down on Internet and media content as the government is showing signs of increasing unease, especially over user-generated Internet content, which it struggles to control.

Beijing controls the Internet through a sophisticated multi-layered system, which includes surveillance on all levels of government but also relies heavily on portals and other sites hosting content to censor on its behalf. This system has been increasingly strained by the fast rise of social media dominated by user-generated content.

In early December, the State Administration of Radio, Film and Television closed down a number of video sharing websites, citing copyright violations and lewd content. In the same week, the government said more than 3,000 people had been arrested nationwide for alleged involvement in posting pornographic content on the Internet.

Earlier last year, the authorities blocked a number of social media sites, including YouTube, Facebook and Twitter and some of their local clones.

This came against the background of a broader tightening in the political climate as the country has seen a rise in social unrest, some of which was allegedly organized or promoted through the Internet, peaking in ethnic riots in July in Xinjiang that killed almost 200 people, according to the government.

Hu Shuli, the founder and editor of Caijing, China's most freewheeling news magazine, quit in November following a spat with the magazine's publisher over commercial strategy and censorship. In December, the editor of *Southern Weekend*, another independent publication, was demoted after censors expressed dissatisfaction with a story speculating about personnel changes in the Communist party. Reported in: *Financial Times*, December 15.

Jakarta, Indonesia

Indonesia's transition to democracy has been so rapid and smooth that it's hard to remember the vagaries of Suharto-era repression. But a recent film ban serves as a reminder that certain freedoms are still under threat.

The Film Censorship Board in December ordered the Jakarta Film Festival to neither screen nor distribute Balibo, an Australian movie that accuses the Indonesian Special Forces of killing five foreign journalists when the army invaded East Timor in 1975. The Indonesian government

maintains the reporters were caught in cross-fire; an Australian coroner says they were intentionally shot. The censors dispute the movie's "subjective point of view" that they say "will potentially open old wounds."

A mature democracy would settle this question through open discussion and debate. Ordinary Indonesians certainly want to do so: They have rushed to purchase pirated DVDs of Balibo. The Association for Independent Journalists in Indonesia kicked off a 23-city screening tour. Hundreds have already attended four public screenings in Jakarta; at the first one, the theater owner had to set up an extra screen to accommodate the crowds.

The surge in public support shows the Indonesian public is far ahead of the government of President Susilo Bambang Yudhoyono, which has so far supported the censors. The day after the ban, the Foreign Minister told parliament the decision would protect Indonesia's public image. Yudhoyono, a former general, has remained silent.

This isn't the first time that Yudhoyono hasn't stood up for his people's constitutional rights. He has allowed censorship of the press and curbs on freedom of religion under his watch, too. A tacit endorsement of the Balibo ban would continue what is becoming a pattern. Reported in: *Wall Street Journal*, December 10.

Amsterdam, Netherlands

In order to protect the public's sensibilities, the conservative Netherlands-based Christian publisher WordBridge Publishing has reprinted Joseph Conrad's *The Nigger of the Narcissus* as *The N-word of the Narcissus*. According to the publisher's website, "the past needs to [be] translated into the present."

The book, now on sale via Amazon for $9.99, includes this description from the publisher: "WordBridge Publishing has performed a public service in putting Joseph Conrad's neglected classic into a form accessible to modern readers. This new version addresses the reason for its neglect: the profusion of the so-called n-word throughout its pages. Hence, the introduction of 'n-word' throughout the text, to remove this offence to modern sensibilities. *The N-word of the Narcissus* tells the tale of a fateful voyage of a British sailing ship, and on that voyage the ability of a lone black man to take the crew hostage. The ability of this man to manipulate an entire ship's crew can no longer be seen as a mere exercise in storytelling. Conrad in fact appears to have been the first to highlight the phenomenon of manipulation based in white guilt."

As hard as it is to swallow this latest version of Conrad's book, author John G. Peters makes a good point in *The Cambridge Introduction to Joseph Conrad*: "The unfortunately titled *The Nigger of the Narcissus* (titled *Children of the Sea* in the first American edition) is Conrad's best work of his early period. In fact, were it not for the book's title, it undoubtedly would be read more often than it is currently. At one time, it was one of Conrad's most frequently read books." Reported in: *Quill and Quire*, January 5.

Samara, Russia

An award-winning film about skinheads is causing a stir among Russian prosecutors who cannot seem to decide whether it should be banned as extremist. Samara prosecutors asked a local court last year to ban the film, *Russia-88*, because of numerous ethnic slurs made by its characters. But the Prosecutor General's Office ordered Samara prosecutors on January 14 to withdraw its court request ahead of a review of the case.

If a court were to declare the film as extremist, the Justice Ministry would automatically put it on a list of banned extremist materials. Distribution of extremist materials is punishable by a fine.

In their filing, Samara prosecutors cited an assessment from Samara State University professor Shamil Makhmudov, who said *Russia-88* contains hate speech and propagates race supremacy. The Prosecutor General's Office said in a statement that it has received two similar assessments from other experts. But the three assessments are incomplete and therefore require a review before the extremism request is sent to court, prosecutor's office spokeswoman Marina Gridneva said, "Since those findings were not presented in full, and parts of the findings do not correspond with one another, a further analysis is needed," she said.

Russia-88 director Pavel Bardin welcomed the order to pull the court case for a review and said he believed that the film would not be banned now. He said he had obtained assessments from specialists on extremism who found that the film was not extremist.

"There have been a number of different assessments, and no experts have considered this film extremist," he said.

The film, released in 2008, is a mock documentary about the daily lives of a skinhead gang. While it did not have a nationwide release, it was shown in a number of movie theaters around the country and won prizes at a Khanty-Mansiisk film festival in March and the Berlin Film Festival in June. The film's main protagonist is a young skinhead leader who hates and attacks dark-skinned people, only to find out that his sister is dating a native of the Caucasus. While the film is fictional, it is made in a mock documentary style and includes interviews between the actors and real Russians who speak against dark-skinned people in Russia.

"I wanted to make a film that presents conflicting opinions," Bardin said. "That means the movie had to touch on painful subjects."

Russia-88 is Bardin's first serious movie. The son of prominent animator Garry Bardin, he previously worked on pure entertainment projects including the "Club" series on Russian MTV. Reported in: *St. Petersburg Times*, January 19. □

(Citizens United v. Federal Election Commission . . . from page 61)

As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*. . . .

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship. . . .

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity. Before *Austin* Congress had enacted legislation for this purpose, and the Government urged the same proposition before this Court. In neither of these cases did the Court adopt the proposition. . . .

Austin interferes with the "open marketplace" of ideas protected by the First Amendment. It permits the Government to ban the political speech of millions of associations of citizens. Most of these are small corporations without large amounts of wealth. This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." *Austin* is not even aimed at amassed wealth.

The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." (*The Federalist* No. 10, p. 130.) Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false.

The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin's* antidistortion rationale all the more an aberration. "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies." Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. An *amici* brief filed on behalf of Montana and 25 other States notes that lobbying and corporate communications with elected officials occur on a regular basis. When that phenomenon is coupled with §441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may sometimes be voluntary, or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often unknown and unseen. The speech that §441b forbids, though, is public, and all can judge its content and purpose. References to massive corporate treasuries should not mask the real operation of this law. Rhetoric ought not obscure reality. . . .

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves. . . .

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process. . . .

Due consideration leads to this conclusion: *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental

interest justifies limits on the political speech of nonprofit or for-profit corporations. . . .

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA §203's extension of §441b's restrictions on corporate independent expenditures. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin* and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled. . . .

Following are excerpts (without citations) from the dissenting opinion in Citizens United v. Federal Election Commission *issued by Justice John Paul Stevens and joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor.*

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned." All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by for-profit corporations and unions to decide this case.

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process" and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*. Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law . . . .

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule *Austin* and part of *McConnell*, it is important to explain why the Court should not be deciding that question.

The first reason is that the question was not properly brought before us. In declaring §203 of BCRA facially unconstitutional on the ground that corporations' electoral expenditures may not be regulated any more stringently than those of individuals, the majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation. This procedure is unusual and inadvisable for a court. Our colleagues' suggestion that "we are asked to reconsider *Austin* and, in effect, *McConnell*," would be more accurate if rephrased to state that "we have asked ourselves" to reconsider those cases. . . .

It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United, without toppling statutes and precedents. Which is to say, the majority has transgressed yet another "cardinal" principle of the judicial process: "[I] f it is not necessary to decide more, it is necessary not to decide more." . . .

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle

is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.

The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*. The opinion "was not well reasoned," our colleagues assert, and it conflicts with First Amendment principles. This, of course, is the Court's merits argument, the many defects in which we will soon consider. I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of *Austin* . . . .

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." . . .

The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong. . . .

So let us be clear: Neither *Austin* nor *McConnell* held or implied that corporations may be silenced; the FEC is not a "censor"; and in the years since these cases were decided, corporations have continued to play a major role in the national dialogue. Laws such as §203 target a class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the views of individual citizens, and that may not even reflect the views of those who pay for it. Such laws burden political speech, and that is always a serious matter, demanding careful scrutiny. But the majority's incessant talk of a "ban" aims at a straw man. . . .

As we have unanimously observed, legislatures are entitled to decide "that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context. Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information." Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the "speakers" are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism.

If taken seriously, our colleagues' assumption that the identity of a speaker has no relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "'enhance the relative voice'" of some (i.e., humans) over others (i.e., nonhumans). Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw. . . .

A third fulcrum of the Court's opinion is the idea that *Austin* and *McConnell* are radical outliers, "aberration[s]," in our First Amendment tradition. The Court has it exactly backwards. It is today's holding that is the radical departure from what had been settled First Amendment law. . . .

The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even "the notion that business corporations could invoke the First Amendment would probably have been quite a novelty," given that "at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign." . . .

A century of more recent history puts to rest any notion

that today's ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, banning all corporate contributions to candidates. The Senate Report on the legislation observed that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." . . .

Over the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that threatened to displace the commonweal. Justice Souter recently traced these developments at length. The Taft-Hartley Act of 1947 is of special significance for this case. In that Act passed more than 60 years ago, Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. The bar on contributions "was being so narrowly construed" that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means. . . .

Against this extensive background of congressional regulation of corporate campaign spending, and our repeated affirmation of this regulation as constitutionally sound, the majority dismisses Austin as "a significant departure from ancient First Amendment principles." How does the majority attempt to justify this claim? Selected passages from two cases, *Buckley* and *Bellotti*, do all of the work. In the Court's view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970's; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded. . . .

In sum, over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to "'[p]reserv[e] the integrity of the electoral process, preven[t] corruption, … sustai[n] the active, alert responsibility of the individual citizen,'" protect the expressive interests of shareholders, and "'[p]reserv[e] … the individual citizen's confidence in government.'" These understandings provided the combined impetus behind the Tillman Act in 1907, the Taft-Hartley Act in 1947, FECA in 1971, and BCRA in 2002. Continuously for over 100 years, this line of "[c]ampaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries." Time and again, we have recognized these realities in approving measures that Congress and the States have taken. None of the cases the majority cites is to the contrary. The only thing new about *Austin* was the dissent, with its stunning failure to appreciate the legitimacy of interests recognized in the name of democratic integrity since the days of the Progressives. . . .

I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand. . . .

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets … that enhance their ability to attract capital and to

deploy their resources in ways that maximize the return on their shareholders' investments." Unlike voters in U. S. elections, corporations may be foreign controlled. Unlike other interest groups, business corporations have been "effectively delegated responsibility for ensuring society's economic welfare"; they inescapably structure the life of every citizen. "'[T]he resources in the treasury of a business corporation,'" furthermore, "'are not an indication of popular support for the corporation's political ideas.'" "'They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.'"

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.

These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. . . .

It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will conflict with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least. . . .

In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the *Austin* Court and the legislatures that have passed laws like §203: to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process. All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, "that there is no such thing as too much speech." If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.

None of this is to suggest that corporations can or should be denied an opportunity to participate in election campaigns or in any other public forum . . . or to deny that some corporate speech may contribute significantly to public debate. What it shows, however, is that *Austin's* "concern about corporate domination of the political process," reflects more than a concern to protect governmental interests outside of the First Amendment. It also reflects a concern to facilitate First Amendment values by preserving some breathing room around the electoral "marketplace" of ideas, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws

such as §203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other. There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to "First Amendment principles" depends almost entirely on the listeners' perspective, it becomes necessary to consider how listeners will actually be affected. . . .

The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today. . . .

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that §203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle "elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests." At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics. ☐

(from the bench . . . from page 66)

couldn't agree more that academic employment is different from employment in the district attorney's office. But to faculty leaders' dismay, not all judges applying the *Garcetti* decision seem to have noted Justice Kennedy's comments about academe.

For example, there is the case of Juan Hong, a professor of chemical engineering at the University of California at Irvine, who maintains that he was unfairly denied a merit raise because comments he made in faculty meetings offended superiors. Some of those comments concerned personnel decisions. More generally, Hong said that his department was relying too much on part-time instructors to teach lower-division courses, and that students were entitled to full-time professors.

A federal district court dismissed the suit, saying that these discussions were part of the "official duties" of professors, and thus under the *Garcetti* decision were not entitled to First Amendment protection. The case is currently on appeal, but rulings such as that one led the American Association of University Professors to issue a report saying that *Garcetti's* inappropriate application was eroding academic freedom.

But in the Sheldon case, Judge Whyte rejected the college's attempt to cite *Garcetti*, writing that "*Garcetti* by its express terms does not address the context squarely presented here: the First Amendment's application to teaching-related speech" and saying that, as a result, the college district's "heavy reliance on *Garcetti* is misplaced." And without an impact from *Garcetti*, "the [U.S. Court of Appeals for the] Ninth Circuit has previously recognized that teachers have First Amendment rights regarding their classroom speech, albeit without defining the precise contours of those rights," the judge wrote, leaving it to trial to determine how these rights would be applied in this case.

Rachel Levinson, senior counsel for the AAUP, said she was "cautiously" pleased with the ruling in the Sheldon case, and that she couldn't be fully pleased while other rulings continue to apply *Garcetti* to higher education. She added, however that "I was very pleased that the court did recognize that the majority in *Garcetti* expressly reserved the issue of First Amendment protection for speech related to teaching, among other things. It's heartening." Reported in: insidehighered.com, December 16.

Pocatello, Idaho

A bitter dispute over a tenured professor fired by Idaho State University has become the latest case in which a court has suggested that faculty members at public colleges and universities do not have First Amendment protection when criticizing their administrations. While the individual case

of Habib Sadid continues to be much debated at the university, the way the judge ruled in the case has advocates for faculty members concerned.

The language in the decision "eviscerates the identity and role that a faculty member plays" in public higher education, said Rachel Levinson, senior counsel for the American Association of University Professors. The decision applies to a higher education context several court cases that the AAUP believes should not be applied to higher education, and one case involving higher education that the AAUP believes was wrongly decided because of reliance on the other cases. In many respects, the ruling in Sadid represents an extreme form of a legal pattern the AAUP recently warned was eroding faculty rights at public colleges.

Sadid was a frequent, caustic critic of his university's administration—in ways that many at Idaho State (in particular the administration) believed crossed over lines of professionalism, but that he said represented the appropriate right to express dissent. He was fired despite a faculty panel's finding that there was not cause to do so, and his suit against the university charges that the university denied him his First Amendment rights.

Of particular concern to faculty members, Levinson said, is language in the ruling that suggests that professors at public colleges and universities have no more rights than employees of other institutions. In dismissing his suit, Judge David C. Nye cited several other cases that involve the right of employers to limit their employees' public statements. "Sadid should understand that he has limitations of his speech that he accepted when becoming a state employee," Nye wrote.

Further, Nye cited both the U.S. Supreme Court's decision in *Garcetti v. Ceballos*, and a lower court's decision based on it. In *Garcetti*, the Supreme Court ruled that First Amendment protections do not necessarily extend to public employees when they speak in capacities related to their jobs. Because that case involved a suit by a deputy district attorney in Los Angeles, and courts have traditionally accorded public college faculty members much more protection for their speech than other employees receive, faculty leaders hoped *Garcetti* wouldn't be applied to them, and the majority decision suggested it need not be (see above).

But some judges have started to do so, notably in a federal district court's ruling that Juan Hong, a professor of chemical engineering at the University of California at Irvine, could not raise First Amendment protections when he said he was unfairly denied a merit raise because comments he made in faculty meetings offended superiors. Hong said that his department was relying too much on part-time instructors to teach lower-division courses, and that students were entitled to full-time professors.

The district court dismissed the suit, saying that these discussions were part of the "official duties" of professors, and thus under the Garcetti decision were not entitled to First Amendment protection. Hong, with backing from the AAUP, is appealing that ruling. But Hong was cited several times by Judge Nye in dismissing the Sadid case. Based on the ruling in Hong's case, Nye wrote, "Sadid does not have a valid First Amendment claim."

Citing those cases "shows a profound misconception about the role public [college] faculty play," Levinson said. Questioning administrators on university policies is a matter of public interest that deserves First Amendment protection and has traditionally been seen that way, Levinson said. The shift in thinking by some courts, post-*Garcetti*, is why the AAUP has been urging faculty members to bolster their free speech rights in university documents or contracts. Reported in: insidehighered.com, December 23.

libel

Middlesex County, New Jersey

A New Jersey judge has ordered the shutdown of three H-1B opposition Web sites and seeks information about the identity of anonymous posters. On December 23, Middlesex County Superior Court Judge James Hurley ordered firms that register domains and provide hosting services—GoDaddy Inc., Network Solutions, Comcast Cable Communications Inc. and DiscountASP.Net—to disable the three sites, ITgrunt.com, Endh1b.com, and Guestworkerfraud.com. Facebook Inc. was also ordered to disable ITgrunt's Facebook page.

Hurley's order was made in response to a libel lawsuit filed by IT services and consulting firm Apex Technology Group Inc., based in Edison, N.J. against the three Web sites opposing the H-1B visa program.

The issue is creating a stir among H-1B opponents working in IT-related jobs who fear their posts could result in the loss of their jobs. The company is seeking the identity of a person who posted an Apex employment agreement on Docstoc.com, that has since been removed. A link to the document and comments critical of it had been posted on a variety of Web sites, including at least one in India, on Desicrunch.com. The comment broadly alleges that employees will find it difficult to leave Apex because of its contract terms.

Apex, in one legal filing, said the allegations by the anonymous posters are false and defamatory, and were hurting the company. In the filing, Apex said it "has had three consultants refuse to report for employment" as a result postings, according to legal documents.

Apex said it is also seeking "contact details of the individual who posted this legal agreement without permission since we are the copyright owner of the legal document."

DiscountASP.Net said it disabled Endh1b.com after it received the order from the New Jersey Superior Court. The order did not request any account information, only that the company "...immediately shut down and disable the website

www.endh1b.com until further order of this court..," a spokesman said in an email. GoDaddy is complying with the order and suspended the web hosting for ITgrunt.com, said Laurie Anderson of GoDaddy.

The web site Endh1b.com is registered but not hosted at Go Daddy, Anderson added. "Both domain names have been placed on registrar lock due to the pending litigation. When Go Daddy receives a court order, it is standard procedure to comply," she said.

Patrick Papalia, an attorney representing Apex, said that the company has already identified an employee who left the initial comment. But he said the issue goes well beyond the agreement and involves threatening and racist comments against company officials, as well as ongoing allegations that it is engaging in illegal activities. "Apex has an outstanding reputation in the information technology field," he said.

John Miano, who heads the Programmers Guild and is also an attorney, and who represented one of the parties involved in the dispute, said it is "rather chilling" to have a court in New Jersey ordering the shutdown of Web sites operated by people with no connection to New Jersey.

Donna Conroy, who heads Bright Future Jobs, an activist organization on the H-1B issue, detailed her concerns about the ruling in a post on her site. "I'm astonished that an American judge would force American web sites to rat on American workers who wouldn't snitch on an Indian H-1B. If this order stands, it will rob the security every American expects when they post complaints anonymously or express their opinions on-line," Conroy said. "It will create a credible threat that Americans could face retaliation from any current or former employer." Reported in: *Computerworld,* December 28.

video games

Chicago, Illinois

Is a public-transportation system allowed to turn away ads for all "mature" and "adult" video games? An Illinois court that has been grappling with that question says no—at least for now.

Since July, the Entertainment Software Association, an organization that represents the video game industry, has been embroiled in a lawsuit with the Chicago Transit Authority over the display of ads for violent video games on buses, subways, and other places where the CTA operates. The CTA contends that those ads have no business near its patrons. The ESA says the ban is unconstitutional.

Judge Rebecca R. Pallmeyer of the Northern District Court of Illinois granted the game group a preliminary injunction January 7 allowing violent ads to be placed within the CTA's operational control. Judge Pallmeyer said her concerns were rooted in the U.S. Constitution.

"The advertisements the CTA wishes to ban promote expression that has constitutional value and implicates core First Amendment concerns," Pallmeyer wrote in her ruling. "In an effort to avoid public controversy and to protect its riders from the effects of their own private choices, the CTA singled out for prohibition all advertising references to a solitary class of product—mature and adult video games, which (unlike alcohol and tobacco) are themselves forms of protected speech and which are legal for people of all ages to purchase," Judge Pallmeyer continued. "While the CTA would likely be entitled to enforce such a ban, were it serving solely as the proprietor of its own non-public-forum property, it cannot do so in a forum that this circuit has explicitly found to be a designated public forum for free expression."

A similar issue between the CTA and Grand Theft Auto publisher Take-Two Interactive erupted in 2008, when the CTA removed all GTA IV ads from its buses and display places. The parties eventually settled, resulting in Take-Two being allowed to display GTA ads for six weeks.

The ESA's battle with the CTA started in January of last year, when the transportation authority's Ordinance 008-147 took effect. That ordinance prohibited advertising that "markets or identifies a video or computer game rated 'Mature 17+' (M) or 'Adults Only 18+' (AO)." It was a direct response to the aforementioned GTA IV ads.

For its part, the ESA has said the ordinance "restricts speech in a public forum that is otherwise open to all speakers without a compelling interest for doing so." The ESA is also concerned that the ordinance "discriminates on the basis of viewpoint and ignores less restrictive means of achieving the supposed ends of the ordinance."

"This ruling is a win for Chicago's citizens, the video game industry and, above all, the First Amendment," Michael D. Gallagher, president and CEO of the ESA, said in a statement. "It is our hope that the CTA sees the futility of pursuing this case further. To do so will waste taxpayer money and government resources. Chicago deserves better, and we look forward to bringing this matter to an end."

The CTA disagreed. A spokesperson wrote that "the CTA disagrees with the decision to issue a preliminary injunction against the enforcement of CTA's ordinance barring the advertisement of "M-" and "AO-" rated video games. The CTA is currently reviewing the court's analysis, as well as its options for moving forward." Reported in: cnet.com, January 8.

public employee speech

Springfield, Illinois

An Illinois State Police officer who complained about elevated levels of lead in his workplace has no First Amendment protection, a federal appeals court recently ruled. The court reasoned that the officer's grievance, filed with his union, was private speech rather than speech on a matter of public concern.

Jimmy Bivens, an officer with the Illinois State Police, began working in October 2003 as the officer overseeing the firing range that provided gun training for officers. By all accounts, he did a good job at improving the facility and its operation.

However, in February 2004 Bivens began experiencing health problems that he thought might be caused by exposure to too much lead at the range. Subsequent tests in March 2004 proved Bivens correct, as his lead levels were highly elevated. He filed a grievance with his state police union about unsafe working conditions. Later in March, the range was closed for nine months.

Bivens continued suffering from health problems, leading him to file a workers' compensation claim. After receiving some benefits but not as much as he wanted, he filed a lawsuit in federal court, alleging a First Amendment violation. He claimed that state police officials retaliated against him because of his grievance by disciplining him for no reason, disclosing confidential information about him and disseminating false information that he was faking his illness.

The defendants asked a federal court for summary judgment, contending that Bivens' claim was ruled out by the U.S. Supreme Court's 2006 decision in *Garcetti v. Ceballos*. In that decision, the Court ruled that public employees have no First Amendment protection for speech made pursuant in the course of their official job duties. The defendants in Bivens' suit claimed that his speech about the unsafe lead levels was job-related speech.

U.S. District Court Judge William Stiehl ruled in favor of the defendants, basing his decision on *Garcetti*. Stiehl determined that Bivens's speech "was clearly related to and part of his official duties, and that he was speaking as a private citizen."

Bivens appealed to the U.S. Court of Appeals for the Seventh Circuit, which also ruled against him—though for a different reason—in a unanimous three-judge panel decision in Bivens v. Trent. Rather than relying on the *Garcetti* rationale, the Seventh Circuit panel concluded in its January 6 ruling that Bivens failed to show that his speech addressed a matter of public concern or importance. In order to establish a valid First Amendment claim, public employees must establish that their speech addresses matters of public interest rather than constituting merely a private grievance.

Courts look at the form, context and particular content of an employee's speech to make this "public concern" determination. The panel first noted that the form of Bivens' speech was a "union grievance that was entirely internal to the ISP [Illinois State Police]." With respect to context, the panel noted that "the grievance arose as a result of Bivens's own illness and detailed his own exposure to environmental lead at the firing range." With respect to content, the panel noted that the grievance "made no reference to potential safety issues for the public and did not even suggest that the lead levels were high enough to endanger the public during occasional use."

The panel concluded: "Because Bivens's internal grievance was on a matter of purely private interest, addressing only the effect of lead contamination on himself and his work environment, it did not raise a matter of public concern and is not protected by the First Amendment." Reported in: firstamendmentcenter.org, January 11.

prisons

Waupun, Wisconsin

Prisons can restrict the rights of inmates to nerd out, a federal appeals court has found. In an opinion issued January 25, a three-judge panel of the United States Court of Appeals for the Seventh Circuit rejected the claims in a lawsuit challenging a ban on the game Dungeons & Dragons by the Waupun Correctional Institution in Wisconsin.

The suit was brought by a prisoner, Kevin T. Singer, who argued that his First Amendment and Fourteenth Amendment rights were violated by the prison's decision to ban the game and confiscate his books and other materials, including a 96-page handwritten manuscript he had created for the game.

Singer, "a D&D enthusiast since childhood," according to the court's opinion, was sentenced to life in prison in 2002 for bludgeoning and stabbing his sister's boyfriend to death.

Prison officials said they had banned the game at the recommendation of the prison's specialist on gangs, who said it could lead to gang behavior and fantasies about escape. Dungeons & Dragons could "foster an inmate's obsession with escaping from the real-life correctional environment, fostering hostility, violence and escape behavior," prison officials said in court. That could make it more difficult to rehabilitate prisoners and could endanger public safety, they said.

The court, which is based in Chicago, acknowledged that there was no evidence of marauding gangs spurred to their acts of destruction by swinging imaginary mauls, but it ruled nonetheless that the prison's decision was "rationally related" to legitimate goals of prison administration.

"We are pleased with the ruling," said John Dipko, a spokesman for the Wisconsin Department of Corrections, who added that the prison rules "enable us to continue our mission of keeping our state safe."

News of the decision spread quickly though the network of blogs that discuss such games and to those devoted to the law, where many commentators revealed perhaps more of their own history as gamers than they might have intended. On The Volokh Conspiracy, a legal blog, a particularly rollicking discussion ensued, kicked off with a post by Ilya Somin, an associate professor of law at George Mason University, who asked, "Should prisons ban 'The Count of

Monte Cristo' on the grounds that it might encourage escape attempts?"

In an interview, Professor Somin said the prison's action was reminiscent of a media frenzy in the 1980s surrounding the supposedly pernicious effects of gaming. "Ideally, you should really have more evidence that there is a genuine harm before you restrict something," he said.

The comments accompanying Professor Somin's post ranged from hoots of outrage over the ban to constitutionally nuanced discussion, but they showed that there were many lawyers who at some point owned a pouch with some dice of more than six sides. And none of them seemed to think that the risk to the nation's prisons could be found in the works of Gary Gygax or other creators of the genre.

As Andrew Oh-Willeke, a lawyer in Denver, wrote, "If more inmates were über-nerdy D&D players, life would be good." Reported in: *New York Times*, January 27. ☐

(is it legal? . . . from page 72)

helps give driving directions. But there's also GPS capability in all cell phones sold today, required by a federal regulation so if you dial 911 from an unknown location, authorities can find you.

Sprint says the 8 million requests represent "thousands" of individual customers—it won't say how many exactly—and that the company follows the law. It's not clear, however, if warrants are always needed, or whether they have been obtained by police for all the cases.

We know the 8 million number thanks to an Indiana University graduate student named Christopher Soghoian, who has made headlines before for investigations of privacy and tech issues.

At a recent professional security conference attended—and taped—by Soghoian, Sprint Manager of Electronic Surveillance Paul Taylor revealed the 8 million figure. "[T]he tool has just really caught on fire with law enforcement," he said: "We turned it on the web interface for law enforcement about one year ago last month, and we just passed 8 million requests. So there is no way on earth my team could have handled 8 million requests from law enforcement, just for GPS alone. So the tool has just really caught on fire with law enforcement. They also love that it is extremely inexpensive to operate and easy."

It's useful to keep in mind that, as Sprint spokesman Matt Sullivan said, "every wireless carrier has a team and a system" through which police can access GPS data. Sprint is the company unlucky enough to find itself the focus of scrutiny, but it reportedly controls just 18% of the U.S. wireless market, making it the third largest carrier.

Sprint says the 8 million figure "should not be shocking given that Sprint has more than 47 million customers and requests from law enforcement and public safety agencies" include missing person cases, criminal investigations, or cases with the consent of the customer.

Privacy advocates, though, are alarmed. "How many innocent Americans have had their cell phone data handed over to law enforcement?" asked Kevin Bankston, senior staff attorney at the Electronic Frontier Foundation, in a lengthy response to the revelation. He goes on: "How can the government justify obtaining so much information on so many people, and how can the telcos justify handing it over? . . . What legal process was used to obtain this information? . . . What exactly has the government done with all of that information? Is it all sitting in an FBI database somewhere?"

Bankston called on Congress "to pull the curtain back on the vast, shadowy world of law enforcement surveillance and shine a light on these abuses."

Sullivan, the Sprint spokesman, said that for certain requests the police pay a fee to Sprint to cover costs. But it's not just a question of paying an entry fee to access the system; Sullivan said there's a legal process. "Before [law enforcement] can access any customer data, they have to show proper legal demand," and "the parameters of the information they can receive is extremely specific, including the duration they can look at it and the specific data."

It's not clear, according to EFF, that "proper legal demand" always means a search warrant.

Julian Sanchez of the Cato Institute concluded that it's "quite likely that it's become legally easier to transform a cell phone into a tracking device even as providers are making it point-and-click simple to log into their servers and submit automated location queries."

Another key question: can customers disable the GPS on their wireless devices? Sprint's Sullivan says its his "understanding" that privacy settings on phones can be set to turn off GPS, in which case, he said, police trying to conduct surveillance would not be able to track a phone.

But Jeff Fischbach, a California-based forensic technologist who has been a technical consultant on many criminal cases over the years, said he's seen empirical evidence that the privacy settings are essentially meaningless. Again and again, he said, "I've seen GPS data from defendants who told me [the function] was switched off."

Saying there's nothing technically sophisticated about switching on GPS capability remotely, Fischbach observes that if it's really possible to switch off GPS on a phone, "it would almost be like saying license plates are optional."

With buzz growing around Soghoian's report, first posted on his blog, Sprint has been forced to respond publicly. Fischbach believes it's only a matter of time before the company is forced to make more disclosures to the public. "Sprint's going to have to calm people down," he said. Reported in: talkingpointsmemo.com, December 4. ☐

intellectual freedom bibliography

Compiled by Angela Maycock, Assistant Director, Office for Intellectual Freedom

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