To the White Man's Altar *Garrett Epps*

In his book, To an Unknown God, Garrett Epps describes a peyote ceremony held in Al Smith's honor after his Supreme Court case had been decided.

The staff passed from hand to hand as old friends talked about Al Smith. First was June [Smith's wife].... She told his children yet again how their father had stood fast and how Stanley Smart [a medicine man] had been the one Indian elder to counsel him to take the case to the white man's altar of justice and determine once and for all whether the Constitution was big enough to include peyote as well as bread and wine....

One speaker told of his vision of Al Smith as a culture hero. Such a hero is not a warrior who goes forth seeking enemies to kill. A real hero, said the speaker, is one who seeks only to make life—to nurture a family, to pass on knowledge to those who will come after. But when the battle comes uninvited to his doorstep, the hero does not turn away. Others may warn him that he cannot win or that he should not win or that he is too unimportant to fight the giant with only his five smooth stones [the story of David and Goliath]. But the hero knows that no good comes from running away. He calls for water to wash his face, then stands to fight.

...or abridging the freedom of speech,...

Democracy is very difficult without freedom of speech. Unless there is a free exchange of opinions and ideas, the people do not have the information they need for effective self-government. Some legal scholars believe that the First Amendment only protects the political speech necessary to democratic government. Others argue that the right of self-expression—through art, literature, advertising, and even bad taste—makes a society truly free. Another free speech issue is whether the First Amendment safeguards spoken words alone, or also includes symbolic speech such as flag burning. Freedom of speech is not unlimited, and the Supreme Court has restricted expression such as obscenity and defamation.

"Jazz music is freedom of expression with a groove."
—Wynton Marsalis

Free Speech in American History. The first written protection of free speech in America was the Massachusetts Body of Liberties in 1641. This document was a great step forward from the English charters of liberty because neither the Magna Carta in 1215, nor later the English Bill of Rights in 1689, included freedom of speech or the press. After the American Revolution, the newly independent states formed constitutions, several of which mentioned freedom of speech. However, only three states added freedom of speech to their list of proposed amendments when ratifying the U.S. Constitution.

Only seven years after the First Amendment was approved in 1791, the nation erupted in a controversy over the extent of free speech. Under English law, the mere act of criticizing the government was a form of treason known as **sedition.** During a period of intense political rivalry, President John Adams and his Federalist allies in Congress enacted the Sedition Act of 1798, which essentially outlawed criticism of the U.S. government. The

sedition
the act of inciting people to change the government

"It is proper to take alarm at the first experiment on our liberties."
—James Madison

law was enforced primarily against Adams's political opponents. Thomas Jefferson and his Democratic-Republican Party. The first person convicted under the act was Rep. Matthew Lyon of Vermont, who won reelection to Congress from his jail cell. Lyon had accused Adams of "an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." Another man was fined for making a derogatory comment about Adams's seat end.

Although truth was technically a defense against sedition in American law, colorful metaphors were difficult to prove factually before the Federalist-dominated judiciary. Consequently, the Democratic-Republicans never challenged the Sedition Act before the Supreme Court. Instead, Jefferson and James Madison wrote the Virginia and Kentucky Resolutions, which asserted that states had the power to declare laws like the Sedition Act unconstitutional. With the help of the unpopular Sedition Act, Jefferson and his party won both the presidency and Congress in the election of 1800. The Sedition Act expired in 1801, and not until 1917 was another national sedition law passed.

However, state and local governments limited free speech in several ways between 1800 and 1917. During this time, the First Amendment did not apply to the states. Southern states censored the mail throughout the antebellum period to keep out abolitionist materials. Proslavery legislators also prevented Congress from hearing petitions opposing slavery. After the

To Defend the Bill of Rights *Elizabeth Gurley Flynn*

Cities often banned public speaking on street corners during the early 1900s in order to stop union organizing. The Industrial Workers of the World, or Wobblies, led many free speech fights in the West to oppose these laws. Elizabeth Gurley Flynn helped organize such a protest in Missoula, Montana, in 1908.

We sent out a call to all "footloose rebels to come at once—to defend the Bill of Rights." A steady stream of I.W.W. members began to flock in by freight cars.... As soon as one speaker was arrested, another took his place....

There were some humorous aspects to our efforts. Not all the I.W.W. workers were speakers. Some suffered from stage fright. We gave them copies of the Bill of Rights and the Declaration of Independence. They would read along slowly, with one eye hopefully on the cop, fearful that they would finish before he would arrest. One such was being escorted to jail, about two blocks away, when a couple of drunks got into a pitched battle. The cop dropped him to arrest them. When they arrived at the jail, the big strapping I.W.W. was tagging along behind. The cop said in surprise: "What are you doing here?" The prisoner retorted: "What do you want me to do—go back there and make another speech?"

Flynn was imprisoned for being a member of the Communist Party during the 1950s.

Civil War, the labor movement led the battle for free speech. Using permit systems, local governments closed streets and public parks to labor activists. Labor unions also claimed that picket lines for striking workers were protected speech, but businesses regarded them as coercive action. Courts often issued injunctions to prevent strikes.

During World War I, Congress passed another sedition law to restrict criticism of the war. The Espionage Act of 1917 prohibited any interference with the draft, as well as "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States." The federal government convicted more than two thousand people of violating the Espionage Act. Many of them appealed their convictions to the Supreme Court, and for the first time in its history the Court ruled on free speech issues. In *Schenck v. United States* (1919), the Supreme Court held that the Espionage Act did not violate the First Amendment. With that case, the Court began a long process of answering two questions: what is free speech, and what are its limitations?

What Is Free Speech? The Supreme Court has repeatedly ruled that freedom of speech consists not only of spoken words but also other types of expression. The Court categorizes free speech activities as either **pure speech,** such as debates and public meetings that involve spoken words alone, or **speech-plus,** such as demonstrations and picketing that combine speech with action. Pure speech receives the highest form of First Amendment protection; government may regulate the action components of speech-plus. In *Thornhill v. Alabama* (1940), the Supreme Court ruled that nonviolent picketing is included in freedom of speech.

Symbolic Speech. Another type of speech is **symbolic speech.** Also known as "expressive conduct," symbolic speech consists of actions that are themselves a message, without spoken words. Some examples of symbolic speech are burning a draft card and burning an American flag. The Supreme Court has treated these two examples very differently.

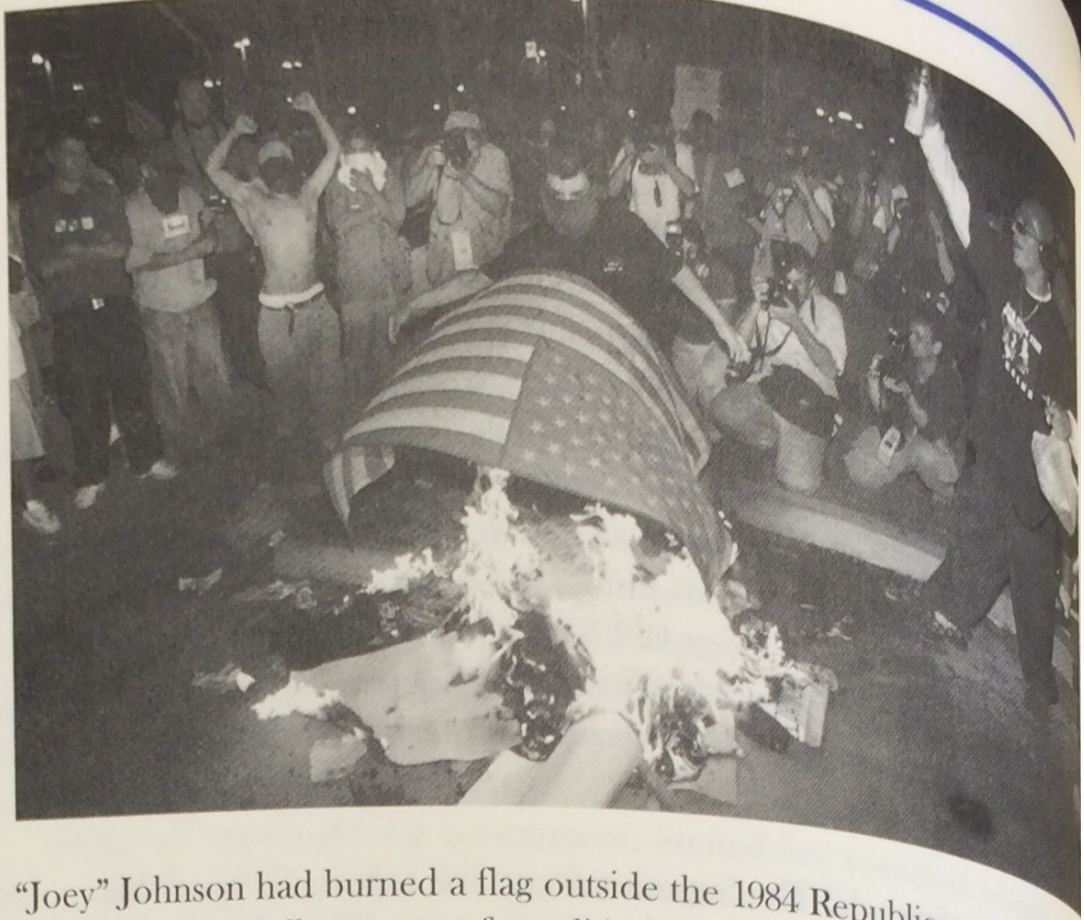
In *United States v. O'Brien* (1968), the Court ruled that burning a draft card was not protected by the First Amendment, even though intended as a form of protest against the Vietnam War. The Court held that the government had a valid purpose in punishing the destruction of draft cards, which were necessary to raise and support an army. The goal of the government's action was to maintain the draft, not prevent dissent, said the Court.

But in *Texas v. Johnson* (1989), the Supreme Court ruled that burning the U.S. flag was protected by the First Amendment. The Court struck down a Texas law that prohibited the desecration of the American flag in a way "the actor knows will seriously offend" other people. Gregory Lee

pure speech
speech that involves only spoken words, without actions

speech-plus
speech that combines spoken words with action, such as demonstrations and picketing

symbolic speech
actions that are themselves a message, without spoken words; also known as "expressive conduct"



Protesters burn a flag at the Democratic National Convention in 2000.

"The flag is a special symbol for our country, but it is certainly no more than the Constitution itself."

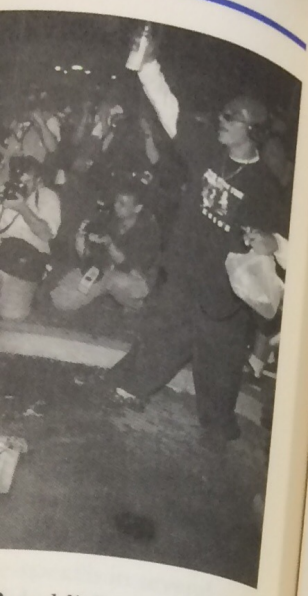
—Rep. Jim Kolbe

"Joey" Johnson had burned a flag outside the 1984 Republican National Convention in Dallas as part of a political demonstration. The Court held that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

To counteract the Court's decision, Congress passed the Flag Protection Act of 1989. That law prohibited flag desecration regardless of whether bystanders were offended. Nonetheless, in *United States v. Eichman* (1990), the Court held that the law violated the First Amendment because it punished any person "who knowingly mutilates, defaces, physically defiles,... or tramples upon any flag." Such terms, the Court said, outlawed disrespect for the flag, not the physical destruction of it. The Court noted that burning is the proper way to dispose of a tattered flag. Thus, argued the Court, the Flag Protection Act was punishing a person for the reason he burned the flag, which violated freedom of speech. Congress has repeatedly attempted to pass a constitutional amendment to outlaw flag desecration since the

Joey Johnson: An Exploiter's Vision of Freedom

Flag-burner Joey Johnson compared his Supreme Court case to a slam-dunk in basketball. Said Johnson: "It was a chance to really go up in the enemy's face and express enormous contempt for their system and their holy symbol—the American flag and the whole empire it presides over." A member of the Revolutionary Communist Youth Brigade, Johnson has referred to the Constitution as "an exploiter's vision of freedom." He argued that the First Amendment protects media conglomerates, not individual citizens. "My point was not to wrap myself in the First Amendment or the Constitution," he said. "The First Amendment is as much about the rights of property as it is the rights of individuals."



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Eichman decision in 1990. As of 2002, all fifty states had passed resolutions saying they would ratify such an amendment if Congress passed it.

Public Forums. One of the concepts most fundamental to freedom of speech is the **public forum,** a venue such as a street or public park that is normally open to free speech activities. In such places, the government cannot ban the right to freedom of expression, although it can regulate the "time, place, and manner" of such speech. These regulations must be "content neutral" and cannot discriminate based on the nature of the message being expressed. For example, the government can prohibit amplified speech in public parks after dark, but it cannot make the rule apply only to antiabortion activists.

The Right Not to Speak. The government cannot compel a person to speak. The Supreme Court upheld this principle in *West Virginia State Board of Education v. Barnette* (1943), ruling that Jehovah's Witness children could not be expelled from school for refusing to salute the flag. In another case involving a Jehovah's Witness, *Wooley v. Maynard* (1977), the Court held that citizens do not have to become "mobile billboards" for the state. Maynard was arrested for repeatedly covering up the words "Live Free or Die" on his automobile's license plate. Maynard argued that the New Hampshire motto violated his religious beliefs about salvation.

Campaign Finance Laws. The Supreme Court ruled in *Buckley v. Valeo* (1976) that in political campaigns "money is speech" protected by the First Amendment. In that case, the Court struck down campaign finance laws that restricted how much an individual could spend on behalf of a candidate through independent expenditures. However, the Court upheld limits on direct contributions to the candidate's campaign, ruling that large donations could give the appearance of corruption.

public forum
a place such as a public park or street that is normally open to First Amendment activities

"Purging money from politics is like trying to stop water rushing downhill. Dam one stream and another quickly forms."
—Paul Gigot, *Wall Street Journal*

Greater Power for Wealthy Candidates *Senator Mitch McConnell*

A vigorous opponent of restrictions on "soft money," or campaign contributions to political parties, Senator Mitch McConnell (R-Ky.) argues that such laws violate the First Amendment and undermine democracy.

The parties are vital institutions in our democracy, smoothing ideological edges and promoting citizen participation.... If special interests cannot give to parties as they have, they will use their money to influence elections in other ways: placing unlimited, unregulated, and undisclosed issue advertisements; mounting their own get-out-the-vote efforts; forming their own action groups....

The power of special interests will not be deterred or diminished. Their speech, political activity, and right to "petition the government for a redress of grievances" (that is, to lobby) are protected by the First Amendment. Political spending will not be reduced; it will just not flow through the parties.

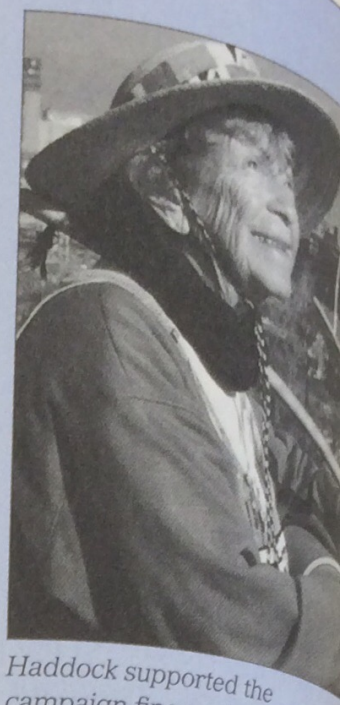
Do we really want the two-party system, which has served us so well, to be weakened in favor of greater power for wealthy candidates and single-issue groups? [Soft money limits] will not take any money out of politics. It just takes the parties out of politics.

No True Free Speech *Doris "Granny D" Haddock*

A retired shoe-factory worker and great-grandmother, ninety-year-old Doris "Granny D" Haddock walked 3,200 miles to advocate campaign finance reform. Her fourteen-month trek from Los Angeles to the nation's capital concluded on February 29, 2000.

In my long walk, I am trying to get some new laws passed that will make it easier for people to be responsible for their own communities and their own government. I worry that the influence of very rich companies and very rich people make it difficult for regular people to feel they are in charge of their own affairs. We need to get the big, special interest contributions out of our elections. Those contributions shout down you and me, and there is no true free speech nor true political equality so long as this condition persists....

A flood of special interest money has carried away our own representatives, and all that is left of them—at least for those of us who do not write $100,000 checks—are the shadows of their cardboard cutouts. If you doubt it, write a letter to them and see what rubber stamp drivel you get back. For all we know, they might all have died ten years ago and the same letters continue to be sent out.



Haddock supported the campaign finance bill Congress passed in 2002.

"As long as we live in a democracy, there is one basic truth that gives me hope: the chairman of Exxon has the same number of votes as you or I—one."

—Michael Moore, author

Some critics of the Court's decision argue that campaign expenditures are property, not speech, and can be regulated by the government. Others believe that the First Amendment fully protects both contributions and expenditures—and a candidate should be punished only for actual corruption, not implied corruption. During the 1999–2000 election cycle, congressional candidates spent more than one billion dollars, according to the Federal Election Commission—the largest amount in its twenty-five-year history. Advocates of campaign finance reform want to curtail the unlimited "soft money" that can now be donated to political parties, which they say evades the purpose of the restrictions on "hard money" contributions directly to political candidates. Opponents of campaign finance laws argue that the very purpose of the First Amendment is to protect political speech as fully as possible. And, they add, limits on individual contributions merely give incumbents and wealthy candidates an unfair advantage in elections.

Speech? Certain categories of speech are

Obscenity. The Supreme Court has had difficulty developing a legal definition for **obscenity,** which in general is speech or action that portrays sex or nudity in a manner contrary to societal standards of decency. In *Miller v. California* (1973), the Court held that speech or conduct was obscene if it met all three of the following guidelines:

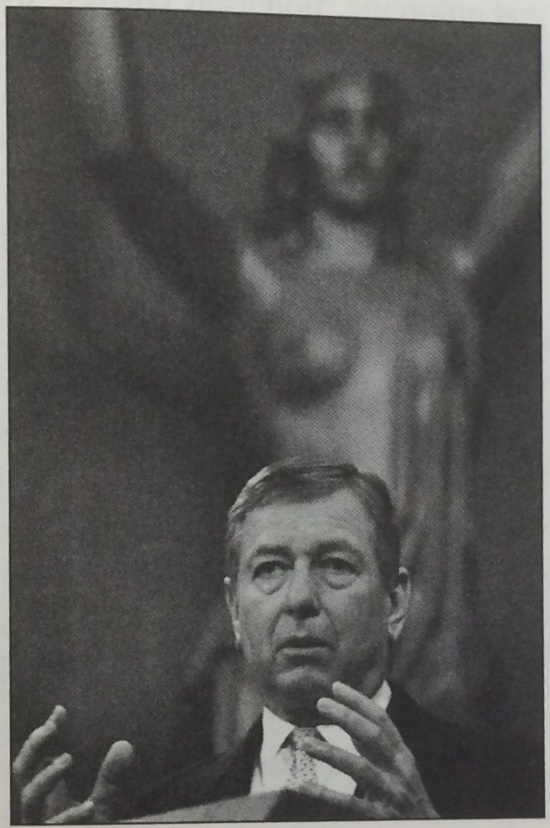
1. "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient [obsessively sexual] interest;"
2. "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and
3. "whether the work, taken as a whole, lacks serious artistic, political, or scientific value."

obscenity
speech or action that portrays sex or nudity contrary to societal standards of decency

"I know it when I see it." —Justice Potter Stewart, on hard-core pornography

The standards for obscenity are the only criteria regarding the First Amendment that vary from community to community, rather than a uniform national standard. For instance, under the First Amendment, flag burning must be allowed in every state. However, Chief Justice Warren Burger wrote in his majority opinion in Miller: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."

Speech can be "indecent" without being legally obscene. The Supreme Court has struck down several laws that attempt to regulate indecent but not obscene speech. In *Reno v. American Civil Liberties Union* (1997), the Court held that the federal Communications Decency Act violated the First Amendment. Congress had passed the law in 1996 in order to keep children from accessing indecent material via the Internet. But the Court ruled that the law was vague and overbroad, thereby unconstitutionally limiting adults' free speech. And in *Ashcroft v. Free Speech Coalition* (2002), the Supreme Court also struck down the



Attorney General John Ashcroft appears in front of The Spirit of Justice, *a statue at the Justice Department auditorium. In 2002, the department erected a screen in front of the statue to avoid pictures such as this one.*

defamation
hurting a person's reputation by spreading falsehoods

slander
defamation using spoken words

libel
defamation using written words

fighting words
abusive and insulting comments delivered face-to-face to a specific individual

"Governments that begin by burning books end up by burning people."
—Alan Dershowitz

Child Pornography Prevention Act of 1996, which made it illegal to produce or possess "virtual" child pornography that is created by computer images but does not involve actual children.

Defamation. The First Amendment does not protect **defamation,** or hurting another person's reputation by spreading falsehoods. Defamation using spoken words is **slander;** defamation using written words is **libel.** A person cannot prove defamation if the statements at issue are true. Lawsuits alleging defamation can exercise a chilling effect on free speech. Therefore, in cases involving public officials and public figures, the Supreme Court has erected very high thresholds for defamation. Such cases are usually brought against the print or broadcast media, so they are discussed in greater depth under freedom of the press.

Fighting Words. Another type of speech that is not protected by the First Amendment is known as **fighting words,** abusive and insulting comments delivered face-to-face to a specific individual. In *Chaplinsky v. New Hampshire* (1942), the Supreme Court upheld the conviction of Chaplinsky, a Jehovah's Witness, for calling a police officer "a damn Fascist and a racketeer." Such "fighting words," the Court said, "have a direct tendency to cause acts of violence."

Hate speech. Some legal scholars maintain that racial and ethnic slurs are a type of "fighting words" that should be included among limitations on free speech, just like slander and libel. Certain colleges and cities have enacted "hate speech" codes that prohibit derogatory remarks on the basis of religion, gender, sexual orientation, or race. Critics of the codes charge that enforcing "politically correct" speech does not end bigotry. They argue that such codes punish any speech that hurts someone's feelings.

In *R.A.V. v. St. Paul* (1992), the Supreme Court struck down a city ordinance in St. Paul, Minnesota, that prohibited the use of certain symbols "that arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." The statute applied to both public and private property. A white juvenile, R.A.V., was convicted under the statute for burning a cross in the yard of a black family. The Supreme Court overturned the conviction because the St. Paul law punished speech based on its content, but the Court noted that R.A.V. could be prosecuted for arson instead. However, in *Wisconsin v. Mitchell* (1993), the Supreme Court upheld a law that increased the penalties for "hate crimes" committed due to such factors as the victim's race, religion, or sexual orientation. An assault was not expressive conduct under the First Amendment, said the Court, and different motives often lead to increased punishment in the criminal law.

Unlawful Action. Through a long line of cases, the

unlawful action is not protected by the First Amendment. Originally, in *Schenck v. United States* (1919), the Court ruled that speech that creates a "clear and present danger" of illegal acts was not covered by the First Amendment. In that case, the Court upheld the conviction of Schenck under the Espionage Act for distributing pamphlets that encouraged young men to resist the draft during World War I.

In the 1950s, the Court ruled on several laws designed to prohibit membership in the Communist Party. Congress passed the Smith Act in 1940, which outlawed advocating the violent overthrow of the U.S. government. The Supreme Court upheld the Smith Act under the First Amendment in *Dennis v. United States* (1951), but in *Yates v. United States* (1957) the Court ruled that the law did not prohibit advocacy of violent revolution as an abstract idea, rather than as a specific action.

Finally, in *Brandenburg v. Ohio* (1969), the Court articulated its current standard for punishing speech that incites illegal action. Such action must be "imminent," said the Court, and probable. Thus, the Supreme Court ruled that a Ku Klux Klan leader's cry at a rally for members to violently oppose civil rights laws was protected speech. However, a specific call to bomb churches at a designated place and time would not be.

Speech in Schools. Students do not have the same free speech rights as adults. However, the Supreme Court ruled in *Tinker v. Des Moines School District* (1969) that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In that case, thirteen-year-old Mary Beth Tinker and her older brother John wore

"Free speech is intended to protect the controversial and even outrageous word; and not just comforting platitudes too mundane to need protection."

—General Colin Powell

The Nastiest Word in the English Language *Randall Kennedy*

Harvard Law professor Randall Kennedy, an African American, examines the history of a hateful epithet in his book Nigger: The Strange Career of a Troublesome Word. *Kennedy concludes that censorship is not the appropriate response.*

Why does nigger generate such powerful reactions? Is it a more hurtful racial epithet than insults such as kike, wop, wetback, mick, chink, and gook? Am I wrongfully offending the sensibilities of readers right now by spelling out nigger instead of using a euphemism such as N-word? Should blacks be able to use nigger in ways forbidden to others?…

Protecting foul, disgusting, hateful, unpopular speech against government censorship is a great achievement of American political culture.… There is much to be gained by allowing people of all backgrounds to yank *nigger* away from white supremacists, to subvert its ugliest denotation, and to convert the N-word from a negative into a positive appellation. This process is already well under way, led in the main by African American innovators who are taming, civilizing, and transmuting "the filthiest, dirtiest, nastiest word in the English language" [according to O. J. Simpson prosecutor Christopher Darden]. For bad and good, nigger is thus destined to remain with us for many years to come—a reminder of the ironies and dilemmas, the tragedies and glories, of the American experience.