

CENTER FOR ARTS AND CULTURE

**FORUM ON
FREEDOM AND DIVERSITY
OF EXPRESSION**



CULTURAL COMMENT SERIES

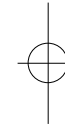
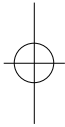
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moderated by **James Fitzpatrick**

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THE FIRST AMENDMENT**



November 2001

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In an increasingly connected world in which ideas have become as economically valuable as goods and as socially porous as the next click of a mouse or flick of a screen, issues of free and diverse expression will continue to be vital components of an evolving and vigorous climate conducive to continued creativity and the public goods that should result from that creativity. At the same time, these issues are becoming more layered. In today's world, our attention is increasingly focused on first amendment issues surrounding the dissemination of words and images.

The Center for Arts and Culture convened a panel of experts on June 25, 2001 in Washington DC to discuss major issues regarding the First Amendment and free expression. James Fitzpatrick, a senior partner of the Washington law firm of Arnold & Porter, where he specializes in constitutional public policy issues, moderated the panel.

The panelists:

JAMES EARLY
*Director of Cultural Heritage Policy
Center for Folklife and Cultural Heritage
Smithsonian Institution*

MARK LLOYD
*Executive Director of the Civil Rights Forum
on Communications Policy
a project of the Tides Center*

JOHN ROMANO

writer and producer of movies and television

GIGI SOHN

Executive Director

Public Knowledge

**a new non-profit organization on
intellectual property issues affecting digital content**

BEN WATTENBERG

Senior Fellow

American Enterprise Institute

INTRODUCTION:

CREATIVITY AND THE CONSTITUTION

The creative arts in our country are enhanced by two constitutional principles. One is the First Amendment that guarantees freedom of speech. Broadly, neither the federal government nor any state or other governmental entity can enact laws or regulations that restrict freedom of speech. This principle has undergirded the nation's basic commitment to free and open discussion and extends, not only to political speech, but also to literature, film, television, cable, the Internet and other forms of distribution of ideas and creative content. The second foundational principle is the Copyright Clause which authorizes Congress to protect, for a limited period of time, the fruits of one's creative labors. This has guaranteed authors and inventors a measure of economic security over the market created by their creative endeavors.

This colloquy, convened by the Center for Arts and Culture, considered at some length a variety of issues relating to creativity and the First Amendment. Copyright issues were only touched upon toward the conclusion of the discussion and deserve separate, thoughtful consideration.

The discussion of First Amendment legal and policy issues was what one would have hoped for – a robust and spirited exchange, and healthy disagreement on some of the most difficult and significant issues of creative freedom facing our nation. The transcript provides a thoughtful and informed discussion – one that demonstrates once again that any First Amendment proposition can prompt differing points of view.

A large part of the discussion focused on the "culture wars," a time of great ferment and debate on the appropriate role of the federal government in sponsoring the creative arts. The latest iteration of the culture wars was initiated by intense public debate over the propriety of the National Endowment for the Arts supporting, in the late 1980s, two controversial photographic exhibitions, one by Robert Mapplethorpe, which included a series of photographs depicting the largely hidden view of male homosexual behavior, and a second exhibition of the photographs of Andres Serrano, whose work "Piss Christ" pictured a crucifix in a vial of the photographer's urine. Both shows provoked a huge public debate and led to serious retaliatory action in Congress, cutting the NEA's appropriations by over a third and significantly tightening the rules for federal grant applications.

Recently, the Congress has seemed to reverse course and after ten years of intense debate on the proper role of the federal government in funding the arts, the House of Representatives increased the NEA's appropriation. For the first time in many years, there was no serious effort in the House to eliminate the Endowment. This led to the question of whether culture wars are now over.

All the participants felt that a single victory in the Congress does not signal the surrender of conservative efforts to rein in the federal government's involvement in the arts. One of the panel participants took a long view of America's Puritan past and said: "When has this Nation not had a culture war?"

But the reality is, in my view, that the intensity of the debate over the federal government's funding of the arts has diminished significantly. However, the heat has gone out at a very severe price. Many kinds of

creative activities (e.g., individual performance artists) are no longer eligible for grants. I fear that the tension focused on the NEA has led to much more conservative and restricted funding applications. Today, it's fine to fund a big city symphony or opera, but what's happened to cutting edge work? Indeed, for many years, it was widely thought that the role of the NEA included support for those artistic projects that displayed excellence, but did not in fact enjoy market success. But a return to those yeasty days when the government could fund projects that might appear provocative seem gone.

That issue led into a broader discussion whether it is appropriate for the federal government to fund only those projects that have widespread public support. Under First Amendment principles, should a governmental entity fund artistic projects which offend a portion of our populace? Ben Wattenberg argues strongly that it is not appropriate – that the issue is not censorship, but simply a question of sponsorship. Why should one's tax dollars be used for artistic activity that some portion of the populace finds offensive? But that approach reflects, in my view, a fundamental shift of First Amendment values away from the primacy of protecting the rights of the speaker and creates veto power in the listener. Historically, the First Amendment has taught that governmental power be used to protect the voice of the speaker – even though the audience might find that message offensive. This phenomenon of giving greater attention to the listener rather than the speaker reflects a disturbing trend, by my lights, toward a "sensitive society" where debate, discussion and artistic presentation are less robust simply because some portion of the populace is offended. John Romano describes the ideal condition to maximize First Amendment values as a country

with "noisy, healthy chaos."

That's where I come out. First Amendment law is clear that the government, even when it is using its spending power, cannot deny government funds to projects in an attempt to punish or stifle unpleasant ideas. And that's the rule even when there is a public outcry against government spending. The government can make judgments in terms of excellence, but it cannot fund only orthodoxy that it is comfortable with.

That point was most dramatically made in the recent events at the Brooklyn Museum of Art, where the Mayor of New York City threatened to deny funding to the Brooklyn Museum, replace its Board of Trustees, and even shut that public museum down, because there was an image – Nick Ofali's "The Holy Virgin Mary" – which mightily offended the Mayor and the Catholic hierarchy. The courts made absolutely clear that punitive action by the City denying funds to the museum because the Mayor found one of the pictures offensive was a gross violation of the First Amendment.

The discussion turned to an overarching question – to what degree are the protections of the First Amendment an essential condition of creativity? A number of the panelists acknowledged that the First Amendment has been fundamental to creative endeavors in this country but noted that there are many totalitarian or repressive countries around the world with no First Amendment protection but that nevertheless produce a constant outpouring of creativity. Russia under the Czars produced some of the richest literature in the Western canon. Today, works of great imagination and creativity are coming from Cuba. Indeed, many democratic countries have for

centuries been at the center of the Western creative world, but have no formal constitutional protection for free speech; that's the situation in the United Kingdom where Parliament can largely make its own rules dealing with creative content, without the restrictions of any court telling them no. It appeared to most that the First Amendment protections are beneficial, but not essential, to a flourishing artistic community. That view drew a sharp dissent from Ben Wattenberg, who asserted that the protection of creativity afforded by the First Amendment is in fact an essential element of a healthy, creative process.

The discussion also touched on two issues where free speech can segue into conduct. One deals with hate speech; the distinction was properly drawn between speech that might reflect a hateful attitude and criminal conduct based on blind and intense prejudice on racial, religious or sexual grounds. Another portion of the discussion looked at the issue of television programming encouraging violent behavior – a matter that is under close scrutiny by the Congress and the Executive Branch at this point. The consensus seemed to be that the scientific data does not provide clear evidence of a causal relationship between TV programming and violent behavior.

This summary can only suggest the richness and provocative nature of the discussion that follows. For one who is interested in savoring the clash of ideas over these fundamental issues of freedom of expression and popular will, this colloquy will provide interesting reading.

James F. Fitzpatrick

**FORUM
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Jim Fitzpatrick

I want to kick off with a broad and general question about an issue that has preoccupied a lot of Washington, and many people who have been involved in the intersection of free speech, government responsibility, government obligation, the Constitution and the arts. The issue is this. This phenomenon is called the cultural wars, and it has been in high flight at least since the Mapplethorpe show at the end of the 80s and moved forward in great debate with a lot of energy through the 1990s.

There was, one might think, a rather seminal decision last week in the House of Representatives when 33 Republicans left the leadership and voted for the first time in a decade for a major increase in the funding for the National Endowment for the Arts. It had been the House that had been the toughest of all on funding for the NEA. Does this vote demonstrate and manifest the fact that the cultural wars are over? Are any of us going to be able to find something else to write about and think about, or was this just a blip? Who would like to kick off on their views of the cultural wars and where they might be in terms of popular concerns and interests? James.

James Early
Center for Folklife and Cultural Heritage
Smithsonian Institution

I don't think the cultural wars are over, and I think the break with the Republican leadership just gives us a more realistic sense of where the engagement is. It emerges from the more liberal folk going to their constituents and saying please step forward and tell us where you stand on this issue. That has also leveraged moderate Republicans to step forward in the same way and seek the advice of their constituents. So we have a more realistic sense of where citizens are engaged around this, and we're getting a better index of politicians' actual relationships. Citizens were sort of watching this in a soap opera fashion waiting for the next episode. Their politicians were running amuck basically in a very broad ideological divide of either/or. Now we have a more real politic manifestation. But the cultural wars are very much alive.

One other example where I think the cultural wars are alive and expanding. If you look at any of the religious denominations in the country, there is a major cultural war going on over the role of women as representatives of deities, of homosexuals as full participants in the eyes of deities. This is a spreading event that is now more reflective of the changing nature of the country than of politicians as an index of where the country is going.

Ben Wattenberg
American Enterprise Institute

The argument over the NEA was never about money. After a big cut, it went up —

Jim Fitzpatrick

It went from \$160 million down to less than a \$100 million. Gradually it went from a little over a \$100 million up to around \$115 million.

Ben Wattenberg

But the argument was never about money. It was about what the NEA was funding. Serious people had a problem with the NEA, (and I would include myself), not because out of the thousands of grants they gave some were offensive, but because the NEA refused ever to say, "We made a mistake." And, they conflated the idea of sponsorship with censorship. You just have to turn the shoe on that thing. If the NEA had ever given grants to say homophobic or anti-Semitic artists, no one at this table, in my judgment, would be on the side they're on. Everybody would flip. So it was about what they were funding.

They conflated the idea of sponsorship with censorship.

The fact is that when they were challenged on a few grants they refused to say, "Well, look, this is the kind of thing that because there is such a divide in the country—be it about homosexuality or race or gender, or religion—we are going to butt out. We take taxpayer money." But instead they said that by criticizing those of us in "the arts community," you are censoring us. That's where this argument came from, and it was not about censorship. It was about sponsorship. I would submit there is a huge difference between those two things. So they'll get their extra \$10 million, and I think there will be a big change and there has been in recent years about the NEA in terms of how they will justify the money they are spending. If they

go over the line, they'll say we made a mistake, and that's all that anybody asks of them.

John Romano

When the NEA responded, when Jane Alexander responded, to the pickle it found itself in, one of the things it did was start to promote development of programs of the arts on the regional and local levels. It went national with those programs. This was a response to the soundest aspect of the conservative attack on NEA, which is that it could easily be perceived as being controlled by New York and Washington artistic elites. And, in response to that, Jane took the NEA programs and made them regionally based.

In the last month, we have read about the deposing of William Ferris at NEH whose whole program was about the regionalization of the arts. Ferris came there because the Center for Southern Culture had been so successful. He wanted to bring to the nation at large a replication of that, so that every region would have its own nourishment. This had just a few years ago been a successful way for Jane to respond to the problems NEA faced.

But the climate has turned to a value-vetting of arts and scholarship in the country so sharply in the other direction, even at a time of a mollifying program of going regional rather than breaking up the New York elite, whatever that may have stood for in people's minds. Even that program has been an insufficient defense against a sense that when people read and write too much it's fundamentally dangerous unless we get a look at it beforehand.

So I think the fact that Ferris will now be deposed is a sign that, if anything, the culture wars have quietly—and I agree with Ben that it's not on the front page anymore—have quietly stepped up their attack. I now think we are seeing the kind of an ideological insistence that you can find in the work of Bill Bennett or Lynne Cheney which is going to be reasserting itself on the arts and humanities front. It's time to again become concerned, alert, pay attention to whether progress in these areas toward the truly open sound of American discourse in arts and humanities is going to be safe under the current —

Ben Wattenberg

The current chairmanship of the NEA is a presidential appointment. There was an election. We have a sitting president who was sworn in and those are his choices. I just think it's unfair to say we have an appointee of a previous president who was deposed, because that's not the way our system works. There are new appointments made when new presidents come in to executive branch agencies.

John Romano

That's a good point. I guess one hangs on to a kind of hope that there is autonomy for the arts and humanities, but there's no reason to start worrying about that now.

Jim Fitzpatrick

And there's no history of that. I mean the reality is an art team came in with Clinton's election. [simultaneous conversation]

John Romano

But the terms under which a Ferris is felled — or however one wants to put it — suggests that one must be

even more accommodating to the genteel tradition. You had to do this even in the Mapplethorpe era, so I'm more worried about it rather than less.

James Early

There is a genteel tradition versus a more popular democratic perspective —

John Romano

If you want to look at a single harbinger of the acceleration of the cultural wars — and by the way, one can feel that it's good news or that it's bad news. But the empirical question is: is a cultural war going on? The sharpest sign probably is George Will's spectacularly interesting and frightening proposal that we define excellence in the arts.

James Early

That the government defines it.

John Romano

That government defines excellence in the arts. To understand how bad an idea that is, one needn't know a great deal about American history and American culture. It's very exciting to find that argument appearing. It goes way beyond Mapplethorpe. Mapplethorpe is about, "are we free?" Will's proposition is about, "are we good enough to go to heaven when we die"?

Ben Wattenberg

Does the NEA have excellence as one of its criteria when it gives out grants?

Jim Fitzpatrick

But it is a very different thing, isn't it Ben, because their concept of excellence is something that emerges for better or worse from a peer review process? There is no definition. Let me go to Gigi.

Gigi Sohn
Public Knowledge

Well, this is not my area of expertise, so I'll just be really brief in answering the main question. I agree with everyone here that said there is no way that \$10 million more means the cultural wars are over. Indeed, the grant of the extra \$10 million just shows that folks who believe that NEA had gone too far and weren't remorseful enough really have won. They've won, yet there's a significant part of the population that thinks that actually the NEA doesn't go far enough.

So I find it kind of interesting why we continue to talk about just pushing back. Responsibility is important. Accountability is important. These are taxpayer dollars. But it seems to me that in a lot of ways the Lynne Cheney's of the world have already won. Is anybody talking about trying to move forward and having a more progressive agenda? That's not even on the table as far as this is concerned.

Mark Lloyd
Civil Rights Forum on Communications Policy

It's not clear to me that we've ever not had a so-called cultural war. We've had a strong streak of Puritanism in this country and that fundamentally is what at least some of this is about. There are a couple of sides to the argument. One is that there is an important question

about the role of government in funding artists. The other question is: how do you decide which artists to fund? But these are two different questions, and it's important to separate them to make any sense at all of these slogans.

In a very generic sense, the degree to which the so-called cultural wars were fought or lost was done in the Reagan administration. They were certainly lost by the folks who supported the idea that the government ought to fund not only art but also controversial art that can't find its place in the commercial market.

Whether the argument was made by those who wanted to support ballet, for example, or whether the argument was made by people of color or homosexuals, these two distinct groups were looking to support other things that weren't finding support in the commercial marketplace.

Many of those people and many of those arguments have been damaged by the notion that somehow there ought to be some level of accountability to the taxpayer. I'm not sure accountability is the right word where the arts are properly concerned or even where this limited notion of accountability intersects with notions of the importance of culture in a democracy.

Part of the goal really was the idea that we had important contributions that artists could make to society but those artists weren't being supported or encouraged in a way that we thought was appropriate to the United States. This argument was simply lost in the Reagan administration. Instead, we have had more conversations about that from a producer's point of view. Does this play to the crowd or not? If it doesn't, you know, why are we funding it?

Now, excellence is another one of those nonsense terms. It means nothing. Every different person has some idea of excellence.

Jim Fitzpatrick

Mark has touched on something that's very significant because one of the things that got lost was that there's been a drive for acceptability and for NEA grants to be within a range that people are going to find acceptable. That argument has turned its back on part of the history that where the market doesn't supply encouragement, the NEA was going to. You are absolutely right. That thought has gotten lost in the NEA's attempt to reconstruct itself politically.

James Early

We should be very cautious about accepting the premise about either of these endowments as espoused either by liberal Democrats or by moderate or conservative Republicans. Secondly, we should be very careful not to fall into this measurement of cosmic distinctions between one four-year period and the next four-year period. Let's consider the trends very quickly over the history of the endowments since the mid 1960s.

One, you had liberal Democrats basically running those endowments with almost no members of communities of color (to put it in that term) or no focus on the intrinsic intellectual or artistic perspectives of women or regionalism of those kinds of things. These were liberals running the endowments.

I worked at the Humanities Endowment. It was during Joe Duffy's period. I will not give him credit for being a proactive person, but I will give him credit for

not standing in the way. We began to see a kind of democratization within the Humanities Endowment. During those same years just prior to Duffy coming to NEH, we saw what happened at the NEA with “expansion arts.” Expansion arts meant all the communities of color, the blacks, the browns, the folklore, the regional, the women.

John Romano

The gays and lesbians.

James Early

Well, not that early, but gays and lesbians finally did arrive. The actual trend has been an inclusion, a pluralistic perspective about arts and culture, looking at how communities intrinsically validate what is both beautiful and true in their own communities, while struggling with what that means about our common national identity.

I would disagree with Ben that this was a question of whether the government should sponsor. The government has never been a sponsor of arts and humanities in this country since the founding of the endowments. The arbiter of that has been the citizen artist and the citizen intellectual sitting on a peer review panel.

Ben Wattenberg

They use federal money.

James Early

But federal money is our money. It belongs to all of us; it does not belong to the federal government. It belongs to the citizens of the United States, and the

democratic trend over the last 25 years is that we have seen scholars and artists validated in their communities and in the public space as expressing excellence. And, in many instances, the communities have diversified those panels, brought different aesthetic conditions and different intellectual conditions to bear. We have had a wonderful struggle over our common identity and the sort of crosscutting issues of values and standards.

The fact of the matter is that the grants to which conservatives have objected have been far and few between. So this has been a struggle over morality in which actually the government has been called to make the decisions for the citizens rather than recognize the validity of the citizens making the determinations themselves.

Ben Wattenberg

Let me just ask a question. To use the earlier phrase, if an artist can't find a market and he happens to be a Nazi and that's what his art reflects — he's a good Nazi artist — should the NEA fund it?

James Early

If a peer review panel —

Ben Wattenberg

Who picks the peer review? That's what the argument is about.

James Early

But that *is* what the argument is about. See, your argument is to let the presidential appointee determine for

the diverse citizens. My argument is to let the diverse people on a peer review panel decide. Now, I would personally object to a Nazi artist and be disappointed, but I have to look at the trends. There is no perfect government, Democrat or Republican, no perfect appointee, but the trend has been that sound judgment has informed funding a grant. To hold up one or two instances in order to indict a whole process seems to be wholly undemocratic and disingenuous.

John Romano

But Ben asks an interesting question that we ought to look in the eye a bit. The value of asking whether you fund a Nazi points to how very difficult it is to do such a simple sounding thing as support the arts. If I express this right, it will offend everyone [laughter].

My point of view is that the arts thrive in an environment that I'd like to call Mencken's America, an environment that's noisy, offensive, crowded, in which I piss you off and you piss me off. Every time NEH gives someone dissertation money to work on Ernest Hemingway, they are funding and underscoring the importance of a writer who was anti-Semitic and homophobic. And so be it. Let them.

But what we need is for art to thrive. Historically speaking, we need an environment in which there is true ferment, there is true openness, a willingness to put a painting on the wall at the Brooklyn Museum that offends my mother - which is an example of a

***The arts thrive in an environment that I'd like to call
Mencken's America, an environment that's noisy,
offensive, crowded, in which
I piss you off and you piss me off.***

kind of anti-religious art that damn well ought to be there. So you need an environment that welcomes that kind of offensiveness and noise. One must watch (as the Supreme Court wants us always to watch) for the effect of fire in a crowded theater. One always wants to watch whether there is any particular expression of art which is going beyond the expression of art, but short of that hard-to-use, but still imaginable and useful, standard — the fact is that you can't prohibit — you can't say about the environment that it shouldn't have any Nazis or homophobic artists in it without all art being thereby impoverished.

And it follows from that — very uncomfortably for us as policy makers and policy critics — that, yes, in supporting the arts, we must support these awful people. And, one can make that point, as Ben does very well, by saying, "Would you, John, support a Nazi artist?" You're making me feel the cost, the difficulty of being free, of supporting free arts in a free society, but the goal is the sound of people making art that disturbs. There is no other reason to take up pen or brush.

Ben Wattenberg

But the argument is that there is more free expression in the United States in my judgment than there ever has been.

John Romano

Yet not enough, surely.

Ben Wattenberg

Well, you can argue about that. There is more than there ever has been. And the argument —

Mark Lloyd

But less freedom of thought. [laughter]

Ben Wattenberg

That's preposterous, but the argument is about censorship versus sponsorship, even in the Brooklyn Museum, because no one is saying you can't express this view or the NEA would openly frown. They're arguing whether it's public money or private money. The question is, if you have 100 million Catholics in this country and you do a "Piss Christ" and they say, "How dare you use my money to trash my religion", you're getting into a ground which is perfectly reasonable for any sort of private art. Whether you like it or not, you're going to get into a big public pissing match about it if it's public money. And the question about all these boards and peer reviews, the whole conservative argument is that these peer review panels were run by New York elites. The traditional aspects, the figurative aspects, the representational aspects, the classical aspects of the arts, as I understand it, have not been proportionally represented or well represented or even represented at all.

James Early

Not true. And you should talk to Gertrude Himmelfarb and all of those really well educated, globally acknowledged humanists with whom I disagree.

Where was this argument when there were no African Americans working at these endowments? No African Americans on these peer review panels. No proposals being funded. People being turned away. Women or, in some instances, Jews or homosexuals. This argument was not around.

Rather than respect the peer review process, what you are calling for is for the government to determine. Why does it have to be 100 million Catholics? What if only one Catholic objected? What about the qualitative assessment of what we're talking about rather than this power-in-numbers kind of issue?

The trend is the conservatives are losing the argument on the ground among the citizenry of America. Everywhere you go, every state arts council, every state humanities council, every corporate office has a vice president for diversity.

Ben Wattenberg

I didn't know we were going to talk about diversity. I thought we were talking about funding for the arts.

John Romano

It does not follow that because I am offended by a work of art that I should not want my tax money spent in that direction. There simply is no logic in that argument. I would be mistaken to think that I do not prosper with the polis as a whole when its arts thrive. All one needs to say is that the arts can only thrive where the environment of the art is in turmoil and offensive and diverse and heterodox and I think that is the case historically. And, if the public doesn't know that, the public is mistaken.

Ben Wattenberg

I agree with that in the private market. There is no question about that. I agree with it. I flourish in it. I perform in it. But the idea of using people's taxpayer money to fund things homophobic or pro-homosexual, that's not going to fly politically with the Congress.

Mark Lloyd

Let me make one small point. Once you begin to say that my taxpayer dollars should not be used for things that I disagree with, or that my group disagrees with, then you begin to essentially eliminate the idea of the public. If I don't want one more cent of my taxpayer dollars to be used on a B-1 bomber or on a submarine, should I be able to say, "Well, listen I don't want my dollars beings used in that fashion"?

Ben Wattenberg

You can't build a private submarine.

Mark Lloyd

The difficulty here is understanding art and culture as a public good, and understanding that the wide range of controversy present in a vital art and cultural environment as a public good. So it is not for me to say my taxpayer dollars shouldn't be used for that if it's good for the public. The issue is whether we want to support a vibrant cultural environment as a good for the public.

Ben Wattenberg

If I found that 90 percent of my taxpayer dollars going to the arts were to encourage racist art, I would be against it.

Mark Lloyd

As a citizen, you should have a say in what's in the public good or what isn't. But, if the process determining whether an artist should be supported is conducted through a peer review panel that makes a determination about what's in the public good, then

the idea of "my taxpayer dollar shouldn't be used" doesn't really apply. Again, this framework confuses and through confusion erodes support for the broader idea of a vital cultural environment as a public good.

John Romano

Lurking behind this is a sense in America, which is imbedded in our culture, that the arts aren't really very important, that they are a candy box for Sunday. If we knew how important it is that people truly be creative and express themselves in paintings, draw and make music and write, if we knew in fact that our ability to think and create and survive freely depends on that, we would spend all our time thinking of it as a public good, all of our time nourishing the cultural foundations of that creativity. We would find that we have to do a lot of funding of offensive things because we know that there is an emergency and that art is vital. We don't think art is vital. We think it's what girls do.

Ben Wattenberg

Ninety-nine point ninety-nine percent of the money spent on the arts is vital. We are talking about the tip of the tip of the tip of the iceberg. Period. It goes to everything for which there is a market, good, bad and indifferent. A lot of it is bad and crappy, I must agree, and a relatively small percentage of it is good. But 99.99 percent of this funding for the arts, if we're talking about the First Amendment, not in theory but about government funding, is expressed privately. And it should be. You wouldn't want 99.99 percent of the money for the arts being dictated by politicians even if you pick the politicians. Trust me. You would not.

James Early

The market argument is the same. We have watched a racist, homophobic, anti-Semitic, metropolitan oriented, Eastern establishment market. Now, is that good for the common good? No, obviously it is not. So this principle about the market, I mean, government, is being turned into a market. You're right. We will likely see submarines being funded. Cheney's \$73 million to Iraq was directly tied to military contracts. Most of the money that is given in aid goes back to corporate entities here. We don't have this civil society movement across the U.S. and across the world and economic globalization. This is simply because people are misinformed. Democracy is being eroded by this over-indulgence of the market.

Jim Fitzpatrick

The issues here have been well defined and articulately stated. I'd like to shift gears for a moment to a theoretical question in terms of the First Amendment and its importance to creativity in this country. What are your views about the significance of the First Amendment, both in the letter and the spirit and the idea of creativity in arts and culture? How central and seminal is it to the way creativity works in this country?

James Early

What we see around the country and around the globe is that the First Amendment is not the *sine qua non* for creativity and intellectual flowering. It will come. It is an inherent part of human existence for people to want to be able to express, and they will find ways to express. I think the virtue of this country relative to other countries of the world is that when you have a First Amendment, it enhances the human capacity to

flower all the more naturally, if you will. But it is not the *sine qua non*. We have any number of examples around the world where extraordinary art comes out of the most oppressive and economically exploited situations. But when you do get a broadening of democracy there, you find more people engaged both as artists, intellectuals and as consumers.

Jim Fitzpatrick

It's a beneficial condition but not an essential condition?

John Romano

Well, let me respond. It is essential to what I think of as American art. If you think of what it means to be American historically speaking, it means to not live under the aegis of any given theology, of any given sets of ideas except the idea that we don't have to live under any given set of ideas. It seems to me innately American that we should thrive through a kind of noisy healthy chaos and, therefore, if there is to be an art that reflects that kind of energy and vitality, then it is essential that it be free.

One knows that under Louis XIV fabulous Catholic art flourished. That art we take pains to go look at and stand before and we admire. It is very beautiful and very un-American in that it reflects a consonance with its public, the public for which it was designed—the artist, the patron and so forth. That kind of art is achieved that way. One does not even want American art to be that way. When American art resembles that kind of conformance and orthodoxy, there's something un-American about it. That's why T.S. Eliot, another great anti-Semitic artist, left America. Because he wanted an environment of orthodoxy.

James Early

That's why James Baldwin left, because he wanted freedom from that idealism that liberals attract and the principle that we actually live. The principle is a wonderful principle, but let's be honest about it. Both conservatives and liberals have not lived very honestly about this. It's only been [simultaneous conversation]

Ben Wattenberg

He never had any problems getting published.

James Early

Well, sure, he had problems getting published.

Ben Wattenberg

He was on the best seller list.

James Early

Numerous artists — and I am not just talking about African Americans, long before we wanted to acknowledge that there were Native American writers, there were even wonderful white women writers who were not a part of the kind of iconic acceptance in America. So let's not trap ourselves that we live the ideal. We live for the ideal, and it's a great ideal that did originate in these United States, and we should be proud of it on the globe. But let's not delude ourselves and then hide behind the discrimination that still goes on.

Look at the major galleries in the country today. Where is the diversity of talent being expressed? Look at the major publishing houses of the day. Where is

the major diversity of talent being expressed? We still have a living democracy to achieve. We have made great progress, but let's not delude ourselves that somehow we are living that ideal.

John Romano

It is essential to American art that freedoms be maximal.

Gigi Sohn

Is it essential to all art? I agree with James that creators will create regardless of whether there's a First Amendment. I also think creators will create whether or not there's intellectual property protection. Creators create because that's what they do.

Creators will create regardless of whether there's a First Amendment. Creators will create whether or not there's intellectual property protection. Creators create because that's what they do.

Ben Wattenberg

Show me the creative artists in North Korea and in Burma and even in the old Soviet Union who weren't shot.

Gigi Sohn

I am about to agree with you. But how the art ultimately develops does have to do with the kind of regime that they're living under. Chinese film is a perfect example of how the final product is not necessarily what the creator created. It's what the government told them to take out and put in and slice and dice.

I don't think there's anything quite flourishing under present political regimes.

Ben Wattenberg

I agree with you.

James Early

As an example, how do you explain Cuba?

Ben Wattenberg

How do I explain Cuba? I explain Cuba by the fact that an awful lot of people are in jail and an awful lot of people are —

James Early

So —

Ben Wattenberg

Let me finish. You asked the question, and a lot of people are in jail, and a lot of their creative artists felt that they had to leave. It happens to be a viciously anti-homosexual society, and it's a dictatorship and it's very, very hard to do any... I mean, I would grant you, as was said, some art can come out of an oppressive society. I agree with you that America is a work in process, but the idea of saying that the First Amendment is not a *sine qua non* of artistic expression is in my judgment incorrect. It absolutely is, and the thrust toward it is.

Jim Fitzpatrick

If one has it, let me just ask this: if one starts with the

proposition that the First Amendment is essential to creativity, what limits should there be on this? Let's talk about hate speech for the moment.

John Romano

Well, let's talk about the idea of limits for a second. I've used the analogy in thinking about this from Talmudic scholars that if it is illegal on a certain day to touch a light switch, it might become illegal to come within ten yards of a light switch. One needs to have that kind of hyperbolic anxiety about the First Amendment. When we look at a case of hate speech, we ought to have that ten yard mentality in mind and ask ourselves whether in fact in ruling against it, in censoring it, it's actually the thing itself, the act of hate itself, or whether it's language about hate. If it's language about hate, one ought to be very slow to rule out —

Gigi Sohn

Or thoughts about hate —all the hate crime laws.

John Romano

My position, which is neither left nor right in this respect, would be that whenever we censor an act or a work of art or even fail to support it (because I think for me the censorship/support line is trickier in the area of the arts than it is in defense spending), we are killing some live thing. We are doing damage to the public good, and there may be cases in which we throw that switch. But we ought to be anxious about it.

Gigi Sohn

My thought is that government should never be involved in limiting speech, should only be involved in making opportunities for more speech. Categorically, you want to get to the Madisonian vision of having the thousand flowers bloom. The problem is we live in a society where some people can afford to have a lot louder voices, a lot more channels for speech than others.

Jim Fitzpatrick

Well, you talk about no limits at all. It's at least been my observation that in terms of First Amendment doctrine, we are becoming increasingly what I call a sensitive society, that which is appropriate is governed by the audience. Historically, the First Amendment has given primacy to the speaker. You had hecklers veto laws. You couldn't stop a speaker.

Gigi Sohn

It's more broadly about the listener's right to get the kind of information that allows him or her to participate in a civil society, in a democratic society. I think that's an important policy goal, but I don't think the court says anything about guarding people's various and sundry sensitivities and whether that's a First Amendment goal.

John Romano

What you say is true and I think it is saddening. It's sad to think of an America that needs to be shielded. It's sad to think of Americans so vulnerable that to a Catholic the sound of someone saying something anti-Catholic would be so disturbing that one might toss out part of the Bill of Rights to keep their ears. It

reminds you of sort of the weakest, most effete side of Victorian culture eliminating the whole category of —

Ben Wattenberg

Public funding is what it's about. You're allowed to be anti-Catholic. The question is: is it wise for the government to fund anti-Catholic art?

John Romano

The answer is yes, if it's wise for the government to support the artistic environment.

Ben Wattenberg

Okay, but that's what the argument is about. It's not about the right to be anti-Catholic. You're allowed to be anti-Catholic. You're allowed to be anti-anything you want in this country. The question is whether the government should fund it.

Jim Fitzpatrick

That is indeed a question, but I would like to broaden it out to questions of the First Amendment and the issues of violence.

John Romano

That came up in the TV context a lot. In my experience, in writing as an intellectual on TV, most of the sensitive listeners, by the way, for the record, are on the left. In doing a couple of hundred hours of television, when I've encountered a call from the network or the studio saying, "You know what, you're going to piss too many people off, don't go there", they were actually concerned about offending blacks or Jews or

homosexuals. They were concerned about offending minorities at that moment. They used a variety of the same language and said what you're saying, that we should be less concerned about the rights of listeners than the right to express ourselves. Give a black a television show. Don't go through a television show erasing all things that might offend him.

James Early

But, John, were they concerned in some humanistic sense about the feelings of these people, or were they concerned about market share?

John Romano

Well, they were concerned about market share. But I am a capitalist and I believe that the fact that market share ties networks to a concern about people's feelings is viable. Here's the good news and the bad news, James. If you could show NBC tomorrow that you have a miniseries that you want to do showing that Jesus was a black lesbian but it was going to get a 55 share, they would discover a tremendous willingness to go with your vision.

Gigi Sohn

Are you sure that's not already on? (laughter)

John Romano

So that is the good news, and to a certain extent it shows the poverty of their morals — and yet that's freedom. If you've shown there's dollars out there, you can say any darned thing.

James Early

That's sad commentary on the high ideals that we have been talking about.

John Romano

Why? Why is it sad?

James Early

Let me just go back to your question. This abstract principle that's sort of spoken transcendently about the First Amendment "the government shall not enter into anything that abrogates the freedom of expression of individuals." What we are witnessing is that there is no fixed, static America. America, as all countries, is always a dynamic country. Some countries change more imperceptibly than others because of the lack of democracy, but it doesn't mean that change and creativity are not going on. It means that they cannot blossom up in the public space. People are writing on toilet paper even if it's in prison. Or people are praying where they are forbidden by government from having religion. It's going on. It's just not being foregrounded in a very open way in the public space.

It's quite a significant development that we're announcing a recalibration between the speaker's right and the listener. Why does a speaker speak? Because she or he wants to be heard. They are not talking to themselves. That's what makes us social, and the fact that we now see this calibration between how we value the speaker and how we value the listener is a wonderful development. But we were not raising this issue during the years of segregation, in which no matter how much my community spoke, it did not have access or when we were called three-fifths of a man. We don't want to face those nuances, and the

virtue of this country is really that we have been able publicly to confront these things and to break through them. And, the fact that we still have contradictions in our society is problematic for us because we want to live in the ideal.

Let me just conclude by saying that crass economics over these wonderful values, these humanistic values that we've been talking about, show us just how human and just how common we are, like everybody else in the world, when you get down to us as real individuals in this wonderful construct called America. But this wonderful construct called America is not manifest simply because we were born here or simply because we are naturalized citizens.

Jim Fitzpatrick

I would like to talk about television and the media and their responsibilities under law and policy. These issues are very much on center stage in Washington today. What are the facts and what policy ought there to be toward violent content in motion pictures, records, and games?

Joe Lieberman has now a bill that presumes there is a connection between violent images and violent behavior. The FTC looked at this and made a very clear distinction between the fact that there was some correlation and the fact that there was no causality.

How does a society look upon what government policies ought to be and what private policies ought to be, admitting that private decisions are not directly First Amendment affected though they can be through a regulatory regime? How does one deal with problems of violence? Are they there? What is the fair way?

Mark Lloyd

Yes, there are problems associated with violence in the media. Whether there is causality, I think, depends upon the question you're asking. I think if you ask the question, "Will my child watch this program and then go out and reenact this murder that they saw on television or in the movies," the answer is no. There are studies that demonstrate some increased insensitivity to violent behavior among children to the degree that they are exposed to acts of violence in media. If it's the question, "Do I want my child insensitive to violence?" the answer is it's probably not best to expose your child to a lot of TV or movies.

What's fair for government to do? We wrestle with these issues both as broadcasters and broadcast attorneys on a fairly regular basis. It is my view that they ought to be wrestled with on a community by community level. To some extent national policies that seek to dictate particular standards for national communities are probably not appropriate. There may be, unfortunately, some children in Los Angeles and New York who might be able to handle violent programs or *Natural Born Killers* a little more easily than folks in some other communities. Our policies are to license local television stations to or radio stations on a local basis. We don't provide licenses to NBC or to networks.

Ben Wattenberg

Community standards.

Mark Lloyd

Community standards, exactly. An interesting example about this was the program *NYPD Blue*. When that program came out, there were a number of folks in

communities across the country who were quite upset about the fact that we were watching Andy Sipowitz's rear end.

Gigi Sohn

That was offensive. (laughter)

Mark Lloyd

They didn't think that this was appropriate for their communities. As a result of that, there were quite a few local stations, ABC affiliates, that decided not to carry that program. I think that's perfectly appropriate. I don't see there's anything wrong with that. The folks in New York and Chicago and Los Angeles expressed apparently some fondness for Andy Sipowitz, and those programs were carried in those markets. So I think that works to some extent. The difficulty is the lack of accountability that local stations have to their local communities now as a result of the so-called deregulation that occurred in the mid-80s.

Jim Fitzpatrick

Switch that to movies where it's more complicated. I guess a local movie house can say yes or no, but certainly when you have content that is nationally created, how does that work to have a community by community response?

Gigi Sohn

I just want to make a couple of points. First of all, I firmly believe that excessive violence, indecency, and obscenity does lead to coarseness in our society. Whether there's a direct correlation again between violence and movies and somebody taking a gun and blowing somebody away, I doubt it. Just look at Japan

where they probably have the most violent television and film fare in the world, and some of the lowest rates of murder and extreme violence.

Now, the problem is government could never define what violence is in any way that would make any sense. Tom bopping Jerry over the head could be...Violence could just about be anything. So, the notion that government can even get involved in defining this is to me is a pipe dream. So what do you do?

We talk a lot about the marketplace. People can actually express themselves in the marketplace, and there are things called boycotts. People used to get annoyed when the Reverend Wildmon tried boycotts unsuccessfully (which I was happy for because I didn't agree with him). Why can't people express themselves in the marketplace and say "I don't want this, I'm not going to go to this movie, I'm not going to watch this television show. I am going to call Procter & Gamble and tell them"? It sort of worked with Laura Schlesinger and the anti-gay stuff. Why can't people express themselves in the marketplace? Now, I might add that they don't want to. I mean, look at the V chip, all this Sturm und Drang over this V chip and nobody uses it. There's a parental responsibility tool, and nobody wants to use it. So I'm skeptical. I don't think that Joe Lieberman really has his pulse on what American people care about, because American people actually have tools to express themselves and they're not doing it.

Look at the V chip -- all this Sturm und Drang over the V chip -- and nobody uses it. There's a parental responsibility tool, and nobody wants to use it.

John Romano

Let me come at that from the network TV perspective, and I'm not always into defending these people. But what we're looking at here covers up a dirty little fact about the American public: its taste is essentially depraved and low.

I remember when they were doing *I'll Fly Away*, a marvelous show. They hung with that thing. They couldn't get anyone to watch. Now, they said, and I was certainly among them that say, "They're cowards." They deserted a great show and then put on junk about kids with ray guns or a talking shark that eats its children, and they let a show like *I'll Fly Away* go." They tried everything to get people to watch that show. Our tastes in this country have a lot to answer for. Now, this is an industry, for better or worse, that is wedded to a kind of capitalistic nexus that is not going to succeed if people don't buy the product. As part of this argument, I would not say that we in Hollywood are making wonderful TV shows and movies that the public is turning its nose up at. But I would say you can only expect them to make so many such shows that the people are not buying and —

Gigi Sohn

Advertisers are not buying. Let's be clear about that.

John Romano

But advertisers only succeed or fail as they are right in their guess about what people really want. I have a friend, Robin Swicord. She wrote "Little Women." Everything she writes makes the world a better place. I have another friend, who shall be nameless. Everything he writes, if it could make you violent, it would. Guess what? Robin's freedom to do what she

does depends absolutely on Nameless' freedom to do what he does. Now, that is a response to Lieberman.

In addition, for the correlation to cause things, the data is terrible. An example: I was at a meeting of network, studio creators, TV show creators, and they told us one of the great reasons not to do violent TV is that a lot of kids are latchkey kids, and they are watching television. Well, let's think about it for a second. A latchkey kid has so many gosh darned problems already. Right? He's probably poor. He probably has one parent. They can't afford a babysitter. Think about what life must be like in other respects. The chances that this kid turns out to be violent may have very little to do with what's on that TV. How about the fact that he's locked up for six hours a day?

So very often a politician, Democratic or Republican, liberal or conservative, can blame the content of TV for what is really caused by social problems that go far beyond it, such as the fact that there are so many poor kids. So deal with that.

Gigi Sohn

And they don't want to deal with it. It's an easy target.

James Early

You agree with Snoop Doggy Dogg who says, "Hey, don't blame me. Have the parents tell them not to buy the record?"

John Romano

I can agree with that position and hold the opinion that he makes atrocious and degrading art.

Ben Wattenberg

I have several thoughts on this. One is historical. I think it's important to remember that within the memory of people at this table the American movie system was under the Hays code, that's what movies were. And some of them were great, but there were these very firm self-imposed strictures. And there was, until fairly recently, a three-major-network system that produced all the drama we saw— again very tightly restricted.

So from there we have come to the madness that is movies plus the 500-channel universe. For the record, for good or for ill, I think probably for good although with some qualifications, the place that has become America has become — and the world has become — more open to more ideas in more venues than anything we have ever seen before in the history of air-time. That's number one.

Number two is that there is still so much crap out there, and I have some arguments about it. My sister was an actress actually. But it's not the conditions of creativity that are at fault, because there is plenty of openness and plenty of venues. It is that you look at Hollywood, you look at television networks, and they are not very good at what they do.

James Early

By what criteria?

Ben Wattenberg

By mine. [laughter] Even when they try to make good movies, (and some of them are great, I love movies) some of them are still such resounding flops, so bad. I saw something the other night, a movie with Ben

Kingsley called *Sexy Beast*. It was so bad. It was a bad movie. It tried all these new effects. Then it was in Cockney, and you couldn't understand anything. They ought to just remember that you can have an open society and people who aren't very creative.

James Early

Maybe we're fooling ourselves about the criteria —

Ben Wattenberg

And the taste of Americans... That's got to be plural, it's got to be "tastes". There's a lot of degradation. There's a lot of crap. People like a lot of crap. They like porno. They like this. They like that. They like violence. There are a lot of other people who like other things. But you have a multiplicity here of both creators and viewers. You talked about a noisy society. That's all you're ever going to get.

And the taste of Americans. . . That's got to be plural, it's got to be 'tastes.' . . . You talked about a noisy society. That's all you're ever going to get.

Jim Fitzpatrick

Though we talk about multiplicity, and you've got a lot of these cable networks, numbered 410 to 505, should we be concerned about the core of the creative system with a distribution system where you now have AOL/Time Warner? Is one increasingly getting to a point where the central elements of creativity and distribution are becoming more and more consolidated, admitting the fact that you have a lot of opportunities on the margin? Is that something that is happening? Is it something we should be worried about?

Gigi Sohn

I hate this talk about the 500-channel universe because, number one, we don't have 500 channels. If you do have 500 channels, 300 of them are pay per view, so the same thing over and over. The argument that was always thrown against me when I was at the Actors Project was "Oh, well, look, we have DBS and we have cable." Well, the problem is, if you look at the ownership of those channels, and now the DC Circuit and Time Warner case is going to make this even easier, you really have about 10 or 12 companies that own the vast majority of those cable channels. Time Warner has been limited up until this recent case a couple of months ago to having an ownership interest in 30 percent of the channels on its system. That now has been repealed, and Judge Williams has said they can have up to 60 percent.

So it's only going to get worse, and it's only going to get worse in a broadband society where we see the Internet as this sort of panacea for all our problems with concentration of cable and broadcast. But the fact of the matter is that Time Warner and AT&T, now joined by the Bell companies who have historically had a duty to open up their systems as common carriers to everybody, say: "No, no, no, we want to control." The cable companies say, "Well, we have always had this control over our video, we want control over broadband as well." And the telephone companies are saying, "Well, if they want it, if they're going to get it, we want it, too." It's the same technology, just over different wires. It's not over coaxial cable; it's over fiber or copper wires.

Jim Fitzpatrick

Does that mean we should be careful and have a new set of policies for the way the courts, the Antitrust

Division and the FTC respond to media mergers, because we are losing diversity and we are having concentration? If that's a problem, should it be translated into some sort of government action?

James Early

It's just like the monopolies. This is homesteading for future control. One of the problems of crass capitalism is that they're making so much money that they can control the future just in case they need to control it, although in the future and the present they are producing absolutely nothing. That is concentration. We are now having the privatization of what should be the commonwealth, and we're getting absolutely nothing.

We have to ask ourselves the question: so how do we mediate this? Do we mediate through government, or do we mediate it through the fostering of more voices? I would hope that we would mediate it through the fostering of more voices where people would take critical interaction by saying, "We're not going to watch your movies." Now, that doesn't mean that there won't still be 500 channels out there that they control because they have just that much capital. We have a whole history of imbalance here. Now we are privatizing Social Security. We are now becoming a corporate democracy. We're no longer a people-centered democracy, whether it's in the arts and creativity or anything else.

It seems necessary to me to give some circumstances where the people can recalibrate— not absolutely push capital out or push government representatives out, but recalibrate this relationship of "government of the people, by the people and for the people" and not the people as the object of politicians and the object of capital, which is what is going on right now.

John Romano

Let me address and be specific with respect to what you said about getting more voices and points of view on the air. I think one should have very high and very specific hopes for that project. What one should hope is that, for instance, there should be women and African Americans writing on television shows and creating them and so forth. There is to my eye, in 12 or 15 years of running shows out there, a lot of progress on that front. There should be more.

What progress we see tells us already, however, that when blacks are creating their own shows or women have their own shows, they are going to be a lot like the shows that are on. If you're running a show like *Moesha*, gone is the hope, gone is the notion, that a show like that is kind of pandering and mediocre simply because it is owned by large corporations or by whites or any of these reasons. These guys have a completely clear run on anything that they want to do. And guess what? It's not very good. Guess what? It makes money. Expect to see a lot of it.

That's what freedom looks like: the chance to do such things. You know, freedom looks like Maggie Thatcher, but let's draw a limit on what we can hope for from that product of liberation, and let's work very hard towards it.

There is a business question. I completely endorse Ben's notion that people who run networks and studios are not very good at what they do. There is a business crisis and challenge that comes up in terms of AOL Time Warner in a very sharp way. There's a lot of money to be made out there. It is a very diverse, and rich and crazy, country with all types and kinds of people in it. If you are a businessman and you own your network/studio/ Internet company and only

know how to make money by doing the mega-hit that everyone wants to see, you do not know how to make the shoe for five bucks and sell it for ten and earn that \$5 profit. You can only make the one shoe that everybody wants. Then you are going to fail to provide America with a rich and diverse TV, and you're going to be a bubble. You've failed your shareholders. You're a bad businessman. People have diverse tastes. There should be a way of taking money out of their pockets by giving them what they want and it should not all look like *Titanic*.

It's very clear in the business right now that every studio project wants to be a mega-hit, to cost \$200 million and bring in \$400 million. You know what's wrong with that? They're not capitalistic enough. They're not good enough for us capitalists because a good capitalist would say, "Hey, I can make a movie for \$2 million that will bring in \$8 million. That's a better return and I'll just make 400 of them."

Ben Wattenberg

I go back in this argument to the early 1960s when the paperback companies were buying up the hardcover book companies and everyone said, "Oh my God, there's going to be one company called Doubleday." Of course, Doubleday was bought by Bertelsmann, and everybody was bought by everybody. And you still have 50,000 new titles published every year, and about 150,000 people saying "I can't get my book published." So you've got to figure there are some really bad things being written that you can't get in under the threshold of 50,000.

Secondly, with respect to the idea that there are going to be ten competitors and they're going to gobble up everything in terms of anti-trust law, you can correct

me, but ten competitors are a lot of competitors. You know, two, three, four are a lot of competitors. But, more important than that, in my experience, in this business, the real competition is so frequently *within* one of these companies. Everything that's good in this field comes out of somebody sitting at a typewriter in a small room somewhere and ultimately taking it to the suits and saying "I got a good idea," and these suits don't know shit about what is good. Somebody has got to tell them that and there's a fight within the company. That's where the competition occurs. You know, John has brought in a really good script. I never would have thought of it. This is a really good script and we're going to have to shove something else out. So, you know, you paid your money, you take your choice. But a lack of competition — that's not what's going on.

Gigi Sohn

We're not talking about competition for widgets or can openers. We're talking about competition for the marketplace of ideas. If you've got ten voices in the marketplace of ideas, I think that's pretty poor. Let's talk about competition. Ninety-nine percent of the people in this country have a choice between their cable operator and their cable operator.

Ben Wattenberg

But there's competition within those ten companies. Of course, each channel has 30 shows on it.

Gigi Sohn

How many choices do you have from a multi-channel video provider?

Ben Wattenberg

I'm not talking about the provider. I'm talking about the channel.

Gigi Sohn

But the provider is the gatekeeper. The provider chooses, often based on the financial interest they have in the channels, what gets on and what doesn't. It's that gatekeeping function.

You said you'd rather not have government involved and have this sort of worked out in the marketplace. But the market place of ideas? The problem is that cable companies and telephone companies are given a government monopoly to have control over this speech. So, in order for anybody else to have access and not have this gatekeeper problem, government has to act to open it up.

The anti-trust authorities actually did a good job in the AOL/Time Warner case. They actually imposed conditions that required AOL/Time Warner to allow Internet service providers other than their own to get on their system. The problem is the sun sets after five years.

James Early

Giving it back to the people in other words.

Gigi Sohn

Right, right.

James Early

Public ownership. The argument that Ben is putting

forth goes against the notion of the public, that the public is synonymous with the views of capital and politicians. This notion that ten people, ten companies, even with the competition within that, is problematic. Five million people in those companies or 20 million people in those companies would be problematic. Our ultra-American perspective is problematic. There's too much value placed on what America is.

We have an entire globe fighting this issue. In fact, at the end of September, more than 50 ministers of culture will meet in Switzerland to talk about what — U.S. dominance in the World Trade Organization over these creative issues. And here, we are narrowly talking about what's going on in the United States. We are talking about four or five companies now that control the entire globe. That's why the elite of France, who have no interest in the real culture diversity, and the new colored people in Europe are talking about it. That's why they are fighting the U.S. in the World Trade Organization.

Ben Wattenberg

Why do 80 percent of the European movie tickets go to American movies? That's a free market.

James Early

That is a free market. Now, this is the value question about aesthetics and the notion of humanity that we want to produce. Hollywood does a very good job at what it wants to produce. It produces crap. It makes money off of crap. Now to talk about America, this is where you have the greatest substance for what we would all agree is a real struggle and mediation for some higher notion of aesthetics and some higher notion of intellectual.

Ben Wattenberg

Which should be put forth by government? I mean, if it's not private, it's government.

James Early

No, no, no. Now, we are beyond the question of whether it's simply government. I think we all agree. Government should not be controlling this. But then we all find fairly common cause in saying we think we're living in a fairly coarse period. While we may differ on which way out of that coarseness, that's not a question of government and it's not a question of money. That's a question of releasing something deeper or fostering something deeper about our very humanity. Those are not issues that we can structurally get at beyond this principle that America has been foremost in. Open up a public space, a very informed public space, where we can have a multiplicity of voices which often is the cacophony of noise, but out of that cacophony is our greatest hope rather than government intervention.

While we may differ on which way out of that coarseness, that's not a question of government and it's not a question of money. That's a question of releasing something deeper or fostering something deeper about our very humanity.

Jim Fitzpatrick

I'm going to interrupt. Mark has a point, and then I want to segue into two of the things that have just come up. One is the degree to which copyright law is an element of how you get it balanced between protecting an artist and giving an artist access. And the second issue, through the WTO, is how we deal with

the United States exporting its regimen of intellectual property to the underdeveloped or to the less developed world.

Mark Lloyd

Two small points. One is that it seems to me that one of the greatest dangers related to concentration of ownership really is not its impact on the national marketplace of ideas and not about whether or not Fox or UPN or CBS or Disney or anybody else is going to compete, but whether or not the local voices are drowned out.

Part of what is happening, and certainly we have seen this in radio, is that you have fewer local voices because national voices begin to dominate. The entire idea is to create greater efficiencies, to create greater product with less money being spent. If you can cut costs by producing one program, say Howard Stern, in one place and spread it out as opposed to doing things in 200 or 1,000 places, obviously it's a lot cheaper.

The second point is that part of what we're having this debate about really is the clashing of two ideas. We have this large idea about the need to be efficient in markets and that we ought to encourage competition within that particular framework while encouraging the efficiency because you probably get better services. I actually think the networks are doing a pretty good job of putting on programs that most people want to watch.

But then we have this other idea of what's important for our democracy. This is a separate question, and the degree to which we confuse these things, the degree to which we apply competition theory and

economic theory to the suggestion that somehow this is going to solve our needs as a nation in our democracy. As I said before regarding public good, this confusion erodes the notion that we must place a priority on determining what is important for democracy.

What's important for democracy is certainly competition in the market, but then there are things outside of the market, which we suppose will lead to a stronger economy. James earlier asked a question about whether we ought to leave support for controversial art up to competition or whether we ought to promote more voices (and I think he voted for promoting more voices), my vote is for promoting more voices. This gets back to why we have the NEA. That gets back to establishing the public good in a democracy as opposed to trying to figure out what I am doing with my taxpayer dollars and if this so-called "government" is treating me with the respect a consumer is due."

It is important for us to support PBS even though they carry Ben Wattenberg's *Think Tank*. Somehow the diversity of these ideas on this channel supported by public dollars, (note that I am not calling them private taxpayer dollars, but public dollars), is very useful. PBS is where *I'll Fly Away* can find a home. It is where other programs like *Sesame Street* can find a home. After they kicked Captain Kangaroo off CBS, there was a viable market on PBS for children's programs because it wasn't in the commercial marketplace.

And so part of the discussion is not necessarily only about whether the marketplace can bear controversial art or children's programs. I think we can leave the marketplace alone. The question is what speech do we want to promote in advance? The answer to that is certainly a much healthier, more vibrant, much more

accountable system of public broadcasters that pay attention not only to national voices but to local voices.

Ben Wattenberg

Let me make a point about PBS. It's one of the few things that I do know something about. It's very interesting. Now, I'm on PBS. I own my own program. I don't get any public funding. Some of my colleagues are concerned and call it socialist television. On the other hand, it is very interesting. It is the only place in America where you can be an entrepreneur in a public affairs program.

In other words, I can go to CNN and say, "I've got this great idea for a show," and they'll say, "Good, we'll pay you a salary." And then once they pay your salary, they'll say, "It's a little too left, a little too right. Why don't you get John on your show? Why don't you get whoever on your show?" And, I don't own my show anymore. Now, that's the upside of public broadcasting. It is the last, the only bastion of public affairs entrepreneurialism. I find it extremely ironic. It is extremely ironic.

This started out with a discussion of localism. On the other hand, it is not a network. They claim to be a network. They've got 320 moron stations out there, each of whom says, "Your show is not on. Your show is on at 2:00 in the morning. Your show is on at a really good time." I can walk in and know when my show is on. People come up to me and say "I like your show." Nobody says they don't like the show, by the way.

Gigi Sohn

At least not to your face.

Ben Wattenberg

And the local stations, alas, are, for the obvious reasons, into the same kind of warfare as every other station. They knock off public affairs shows in order to get cooking shows on, to get, you know, animal shows. Animals eating animals are surpassed only by animals eating people. Animals eating people, that's your —

Gigi Sohn

Or people eating animals.

Ben Wattenberg

People eating animals. That's another story.

John Romano

People eating people. That's CBS. [laughter]

Ben Wattenberg

So you have this extreme localism which knocks off a lot of good stuff on television. It is finally, though, about localism generally. I hate to be saying "on the other hand," but in America you have local news radio which cannot be done nationally, you have local newspapers. You've got the rise of city magazines. I mean, there's a lot of localism. You've all drawn a dichotomy between more voices and more and more competition. The fact of the matter is that more competition yields more voices.

Gigi Sohn

It can.

Ben Wattenberg

There are a lot of glitches in the system, but the way you get more voices is to have more channels, more people, more niche groups, more so that everybody gets everything.

Jim Fitzpatrick

We're not going to be able to talk about whether blasphemy is emerging as the great irritant, in terms of free speech, rather than sexuality which had been the irritant in the past. We are not going to be able to give the issue of copyright its due. I would like to just end with one question. It's not localism but internationalism. Given the fact that we have a system of copyright laws that gives significant protection to creators in this country, to what extent are we on the right grounds trying to extend that policy around the world into many countries that don't have that kind of policy internally? Are they disadvantaged economically with the U.S. expanding the authority of its intellectual property law abroad? Does anybody have a reaction to that?

John Romano

For the foreseeable future, people do the art they do for money. Samuel Johnson said that only a fool writes for any other reason. Insofar as the foreseeable future of the globe, and all business of this kind is becoming international business, we had better guarantee and preserve the safety of that motive. Preserve the money one can make as an artist on an international scale and teach other countries to do likewise. Is it cultural imperialism? Yes, of the finest sort.

Gigi Sohn

If intellectual property laws in this country were all rational, I might agree with you. But they are completely skewed. You should know, as an artist yourself, that intellectual property laws in this country are not written by artists. They are written by the contract companies that usually burn the artists and keep their copyright forever and a day. Tell me how it promotes the sciences and the useful arts, as the Constitution says, for Margaret Mitchell's estate to have a copyright long after she's buried in the ground. Patent, copyright and trademark laws in this country are so beyond the historical and constitutional meaning of what intellectual property rights are given for, that exporting it anywhere else is disastrous.

Jim Fitzpatrick

I want to thank everyone. I think we have had a yeasty, interesting discussion that's had enough disagreement and agreement. And I think each one of you has brought a perspective and thoughtful comments. I am confident that you have contributed to one of our more thoughtful colloquies.

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CENTER FOR ARTS AND CULTURE

The Center for Arts and Culture is an independent think tank which seeks to broaden and deepen the national conversation on culture. Founded in 1994, the Center began its work by establishing the Cultural Policy Network, a confederation of scholars working on cultural policy research at 28 colleges and universities.

Through its cultural policy reader, *The Politics of Culture* (The New Press, 2000), the Center set out to provide the foundation for a national conversation on issues in cultural policy. The Center's second full-length set of essays, *Crossroads: Art and Religion* (The New Press, 2001), provides the context for understanding the relation of religion and the arts in the United States of America.

A public series, *Calling the Question*, examined the intersection of cultural and other national public policy areas. The Center has also sponsored critical inquiry into arts and cultural policy through its support of the annual Social Theory, Politics and the Arts conference and a 2001 grants program to individual scholars and graduate students.

We welcome your comments on this symposium on freedom of expression and have set up a discussion area on our web site at www.culturalpolicy.org for your comments. Through its web site and listserv, the Center provides news, information, and ideas about art and culture to a wide public.

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