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## Testing Free Speech in the Crucible of the Real World

Robert S. Peck

**W**ill the next generation of Americans enjoy the same level of expressive freedom we relish today? As in much of life, nothing about free speech is certain. Despite its venerated status in the pantheon of American freedoms, freedom of speech still generates ambivalence, even as new technologies challenge our existing understandings and make issues previously thought settled as salient as ever.

In the calculus that will define the future of free expression, it matters little that no human right commands greater allegiance than the freedom to speak one's mind and gather others to that cause. Even the confirmation of experience, as recent events in Serbia have highlighted once again, provides no guarantee that free speech, the most powerful enemy of tyranny, will survive in any recognizable form well into the future.

Most countries have the misfortune of knowing expressive freedom only as an aspirational goal, enjoying its ambrosial fruits only sporadically or in some narrowly circumscribed fashion. These nations

can also claim a commitment to free speech that is spelled out in constitutional language no less compelling than our own, even if the guarantees are generally unavailing.

Our own history demonstrates how inadequate reliance on inert words can be. Less than a decade after the Bill of Rights was ratified, Jeffersonians found themselves paying Federalist fines for having the temerity to criticize the Adams administration. Later, abolitionists were jailed for encouraging rebellion by their anti-slavery speech. War protesters throughout history often found that dissent enjoyed only limited tolerance.

Only if the commitment to free speech resides in the hearts and minds of a people can it survive. Part of that baseline exists in the United States. Americans have an instinctive allegiance to the concept of free speech, understanding at some basic level its importance to a free society. They embrace expressive freedom as both a birthright and a necessity—a fundamental article of faith. In short, to be an American is to believe in free

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speech — whether one traces his or her ancestors back to the revolutionaries of 1776 who established a nation conceived in liberty, or is the proud recipient of freshly minted naturalization papers.

One could take comfort that free speech will survive based on polling data that confirm the high regard Americans have for free speech, at least when considered in the abstract. Surveys taken as far back as the 1930s consistently show that more than four-fifths of the American public believe in “free speech for all no matter what their views might be.” Today, the news appears even better.

An April 2000 First Amendment Center poll, reflecting numbers consistent with surveys taken the last three years, finds that 87 percent of respondents support free speech. The right to express unpopular opinions is endorsed by 95 percent of respondents. Even the kind of march that caused a huge loss of membership for the ACLU in the late '70s — that time by neo-Nazis through Skokie, Ill., where a large population of Holocaust survivors lived — is generally tolerated as an expression of free speech. Two-thirds of respondents understood that marches by unpopular groups, even hateful groups, are within the First Amendment's guarantee.

The 2000 poll reveals that the right of newspapers to publish stories without government review is accepted by 76 percent of respondents. The editorial discretion to choose stories freely wins approval from 67 percent. And the right of newspapers to criticize public officials obtains support from 77 percent.

Most interesting in this new media age, 74 percent of respondents agree that the Internet should enjoy the same broad First Amendment protection accorded books and newspapers, even when this

means wide access to material that is offensive to some people.

As ideas, free speech — and a free press — are unassailable, even as the public indicates discomfort with some of its progenitors' inevitable excesses. Yet, other poll results demonstrate that there is no reason to relax in smug self-satisfaction.

When push comes to shove, when the idea of free speech must be tested in the crucible of real-world application, the broad support for speech seems to dissolve with all the rapidity of an ice cube placed in the blistering sun. In 1949, a poll found 90-percent approval for the idea that every viewpoint must be protected by the constitutional guarantee. Yet, the same survey found fewer than half of all respondents would protect the right of people to

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express views that a majority would ban. The apparent inconsistency between these two positions was lost on those surveyed.

In the late 1970s, polls found similar results. Even after experiencing the protests against the Vietnam War that successfully changed the nation's outlook on that military effort, only 23 percent said a group intending to denounce the government should be permitted to use public grounds for its meeting.

Another modern survey found 82 percent of the public willing to take away a newspaper's right to publish if it twisted the facts. A majority (55 percent), in the same poll, would have authorized the government to stop publication of information or ideas at odds with majority moral values, and 83 percent would have restricted newspaper opinions based on contorted facts. Today's poll results demonstrate a similar duality in public attitudes; 51 percent say the press has *too much* freedom.

Consider as well what the 2000 poll also reveals about other hot First Amendment issues, some of which have crept into this year's presidential campaign:

■ **Campaign Financing.** Although 65 percent believe that campaign contributions are a form of free speech protected by the Constitution, 57 percent support government restrictions on contribution amounts. Even so, the exact same percentage would not support a constitutional amendment to give the government authority over campaign contributions.

■ **Media Violence.** A majority, 54 percent, endorse government involvement in the rating of television programming, and 56 percent support government ratings of Internet material, even though 74 percent would give the Internet the same degree of First Amendment protection accorded books. Some 83 percent believe violence on television contributes to real-life violence, while nearly three-quarters of the respondents hold the same belief about the effect of violent video games and violent music lyrics.

■ **Flag Burning.** In recent years, there have been numerous attempts by Congress, with the support of the vast majority of state legislatures, to prohibit flag burning. In 1989, the U.S. Supreme Court held that the punishment of flag burning as a form of political dissent violates the First Amendment. Since then, many politicians have found support of an anti-flag-desecration constitutional amendment to be a no-cost political stance. Despite the high profile that such an effort would normally guarantee, 61 percent of respondents did not know that flag burning as a means of political protest is legal, and 74 percent believe such an act should be illegal. Nevertheless, 51 percent oppose a constitutional amendment to authorize flag-burning laws.

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■ **Offensive Speech.** A bare majority do not believe art offensive to some should be displayed in public. Just under a majority, 46 percent, would ban speech offensive to religious groups; 67 percent would banish racial hate speech. Yet, when given a chance to endorse a law that would make it a crime to engage in racial hate speech, 60 percent say no.

It is clear that the public, so solicitous of free speech on a broad plane, is prepared to give the government significant authority over speech that is actually expressed. At the same time, the public's instinctive high regard for free expression stops it from endorsing laws when it would mean changing the Constitution or making speech criminal. That is

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a substantial reservoir of instinctive support for the First Amendment. Yet, it is one that cannot last without a better understanding of the meaning and scope of our expressive liberty.

It is not difficult to imagine that in times of seeming crisis free speech could be made a scapegoat, blamed for whatever evil appears to plague society at the time. The regulation or restriction then proposed would be characterized as a small one that hardly affects the broad freedom of speech we enjoy in the United States.

That possibility recalls the 19th century warning that Alexis de Tocqueville issued: "If the lights that guide us ever go out, they will fade little by little, as if of their own accord. Confining ourselves to practice, we may lose sight of basic principles, and when these have been entirely forgotten we may apply the methods derived from them badly; we might be left without the capacity to invent new methods and only able to make a clumsy and an unintelligent use of wise procedures no longer understood."



The reservoir of good feeling about freedom of speech makes it highly likely that efforts to educate the public about the First Amendment will meet with success. Today, 60 percent of respondents remember that the First Amendment protects freedom of speech, a very good starting point. Moreover, 62 percent think that Americans have about the right amount of freedom to speak freely, while a quarter of respondents would expand that freedom.

There can be little doubt that free speech is the essential freedom. Justice Benjamin Cardozo, for example, called the freedoms of speech and assembly “the very essence of a scheme of ordered liberty ... the matrix, the indispensable condition of nearly every other form of freedom.”

His colleague on the U.S. Supreme Court, Oliver Wendell Holmes, Jr., wrote that the Constitution presupposes “that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” So, as Justice William Brennan added, the Constitution’s free-expression guarantee represents “a profound

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”

We must begin the effort to assure that that commitment will remain as solid in the future as it is today. We must also assure that the new technologies that are quickly becoming the predominant modes of communication enjoy the same unfettered legal status enjoyed by more traditional vehicles of public discourse. There is no better legacy.

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