

Toward Flawlessness

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These reflections are inspired by reading Rebecca L. Brown's contribution to this Symposium, which is entitled, "Confessions of a Flawed Liberal." So since this essay is in some ways an attempted response, I would like to call it "Aspirations to Liberal Flawlessness" or just "Toward Flawlessness."

The question is whether it is a form of apostasy from the liberal creed to think (a) that the Constitution might permit (or indeed require?) the legal limitation of hate speech, and/or (b) that federal or state law may constitutionally limit financial contributions and expenditures in electoral campaigns in a significant number of instances. It could be argued that both propositions represent the abandonment of basic liberal positions on the importance of the broadest possible scope for the freedom of speech.

Speech and Equality

The basic conceptual problem arises from an apparent contradiction between two liberal values. What we seem to confront — both on the question of hate speech and also on the question of "money as speech" — is a clash between two sets of values that most liberals have always held in the highest esteem: on the one hand, the values of the freedom of speech and on the other hand the values of equality.

In the history of the Supreme Court these two sets of values came to maturity at approximately the same time. The Court's decision in *Brown v. Board of Education*, the great school desegregation case of 1954,¹ brought the theme of equality to the forefront of popular, political and scholarly attention for the first time in the history of the Supreme Court — notwithstanding earlier partial steps in cases involving racially restrictive land covenants,² segregation in graduate education,³ and racially restrictive party primaries.⁴ (Of course, the Court had long since turned away from using the equal protection clause to protect businesses against regulation — by asserting, for example, the "equality" of manufacturers and agriculturalists — in such cases as *Tigner v. Texas* in 1940.⁵) It is often said that equality was the principal *leitmotiv* of the Warren Court — an assessment that owes as much to the reapportionment cases, such as *Baker v. Carr*⁶ and *Reynolds v. Sims*,⁷ as it does to *Brown*. But for the anchoring of equality as a prime liberal achievement of the Supreme Court, the post-Warren Court development of gender discrimination jurisprudence — from *Reed v. Reed*⁸ to the VMI case⁹ — also plays an essential part; and the Court's recent decision in *Lawrence v. Texas*¹⁰ may eventually take its place, as

well, in any roll call of the major steps in the liberal jurisprudence of equality.

It was only ten years after *Brown* — in *New York Times v. Sullivan*¹¹ in 1964 — that the Supreme Court made absolutely clear that it was according serious weight to the freedom of speech as a fundamental constitutional value. This development was confirmed in 1969 in *Brandenburg v. Ohio*,¹² which drew together earlier notable contributions by Justices Holmes, Brandeis and Harlan, and Judge Learned Hand, in order to formulate a test that considerably narrowed the circumstances in which "inciting" speech could be constitutionally punished. Slightly later cases like *Cohen v. California*¹³ (Harlan again) and the *Pentagon Papers Case*¹⁴ (Black, Douglas, Brennan — but not Harlan) represented further confirmation of the central role that freedom of speech had finally assumed in the jurisprudence of the Supreme Court.

For liberals, it is an important fact that the decision of *New York Times v. Sullivan* marked a majestic moment in which the values of speech and the values of equality coincided and reinforced each other: the speech that was protected in *Sullivan* was speech that was directed toward overcoming racial discrimination. The same thing could be said about several other important cases of the Civil Rights era, such as *NAACP v. Alabama*¹⁵ and *NAACP v. Button*.¹⁶

The problems that we face today, in an attempt to secure a flawless liberalism, arise because these two values perhaps most prized by liberals — speech and equality — seem to weigh on separate sides of the scale in a number of contemporary constitutional problems. In hate speech legislation, for example, the desire to achieve equality in society seems to run contrary to the broadest protection of speech. And in the context of electoral regulations, the legislative attempt to avoid gross inequalities through limiting massive electoral contributions is said to violate a concept of the freedom of speech that would result in the most numerous instances of the promulgation of political opinion.

In an attempt to achieve flawlessness, I tend to choose the speech side on "hate speech" and the equality side on the problems of electoral regulation. But actually I think that the equality side on electoral regulation is, at bottom, the speech side as well.

Hate Speech

With respect to hate speech, I tend to favor broad constitutional protection against criminal penalization, because it seems to me that this sort of legislation fosters an atmosphere of

suppression which threatens to go much farther than the suppression of any specific kind of hate speech that a particular author of legislation or proponent would want to penalize. Each of us perhaps has a visceral sense of what sort of hate speech could be suppressed without endangering “true” speech values; but the relaxation of speech protections — if allowed — will not be controlled by any particular individual, and the risks of undue extension of the exceptions are, in my opinion, unduly great. Moreover, I doubt that the criminal suppression of hate speech will really make any significant contribution toward the achievement of social equality. I think, rather, that its benefits will be little more than symbolic, and that its burdens will fall whimsically upon particularly annoying individuals.¹⁷

Sometimes the more vigorous criminalization of hate speech in the Federal Republic of Germany is cited in favor of a similar approach in the United States.¹⁸ But having observed how some of these rules work in Germany, I am very skeptical about whether such constitutional doctrines should be adopted here. First, let me say that I have no doubt that rules of this kind may be appropriate for Germany — for obvious historical reasons — and in this respect I am not a “universalist” in constitutionalism. But the prohibition of hate speech in Germany is also very closely connected with a general view of the freedom of speech that is considerably narrower than anything that American liberals would tolerate in the United States. For example, the limitation of hate speech in Germany is closely connected with the view that extreme political parties and other forms of “extreme” political speech can also be suppressed. Indeed the German Constitutional Court did “prohibit” two political parties in the 1950s (including a neo-Nazi party.¹⁹ and the historic German Communist Party in the West²⁰), and the government has tried (as yet without success) to ban a far right-wing party in recent years. It may be said that effectively the same thing occurred in the United States in the 1950s, in the *Dennis* case among others.²¹ But is this really the kind of model that we would like to emulate today?

The German suppression of hate speech is also very closely connected with a form of constitutional balancing that I think many American liberals would find particularly unsettling. It is true that in the last few years many results in the German Constitutional Court on freedom of speech have approximated the results that would have been reached in the United States also; and it may well be that further liberalization is in the wind. Yet the technique applied by the Constitutional Court — and the doctrine acknowledged by the Court — would allow the penalization of much political speech that would be protected here.

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The current doctrine of the Constitutional Court would, for example, allow penalization of certain speech on grounds that come perilously close to what would be viewed as the doctrine of seditious libel in the United States. For example, it appears that, under the current doctrine of the Constitutional Court, the statement “all members of the German army are murderers or potential murderers” — a provocative and hyperbolic remark the likes of which were commonly heard in the United States in the Vietnam era — could be subject to criminal penalization.²²

Indeed, as late as the 1970s, the German Constitutional Court upheld an injunction against a novel by Klaus Mann (because it supposedly insulted or libeled the well-known actor Gustaf Gründgens, who was both Mann’s former brother-in-law and a prominent cultural official under the Nazi regime).²³ The Court also imposed a prior restraint against the showing of a documentary drama about a terrorist attack on a German Army unit, on the grounds that the film might interfere with the rehabilitation of a convicted accomplice in the crime, who had recently been released from jail.²⁴ In 1980, furthermore, libel damages were upheld in favor of the writer Heinrich Böll against a TV critic who had issued a bitter attack against Böll’s writing, on the grounds that (as Böll claimed) his views were misquoted or cited out of context.²⁵

Moreover, in more recent German legislation we can see the perils of such an approach as it specifically relates to hate speech. In a statute, intended to broaden the criminalization of Holocaust denial, language was also inserted in order to impose penalties for denial that German-speaking people had been expelled from Eastern European countries after the Second World War.²⁶ If we prohibit the denial of the undeniable, can we be certain that government will refrain from punishing other views of history? Do we really want to fight these battles? Rather, we should have the degree of confidence in our society that would allow us to protect — as Holmes admonished — even the thoughts “that we loathe and believe to be fraught with death.” This is the path of free speech, and I do not think that the prosecution of an occasional hapless hater — probably a “puny anonymity” as was Keegstra in Canada²⁷ — will actually move us in any significant way toward the goal of social justice in a more egalitarian society.

Electoral Regulation – Money and Speech

On the other hand with respect to the problems of *Buckley v. Valeo* and its successors²⁸ — the question of whether Congress may impose limits on electoral contributions and expenditures —

I tend to come down on what seems to be the side of equality. The government ought to be able to regulate the expenditure of funds in order to achieve a degree of equality or proportionality in political power. Here I hold with those who emphasize the equality principle of *Reynolds v. Sims*.²⁹ In *Reynolds*, the Court held that the government may not structure the electoral system so that particular individuals are granted a substantially higher degree of voting power than others. The general principle is one of equality of each individual within the electoral system. As Deborah Hellman indicates in her essay in this Symposium, we certainly would not allow a financially strapped state to sell more extensive voting rights to the highest bidder.

In the same way, it seems to me that the government should be allowed to act affirmatively to preserve this general principle of electoral equality — to the extent that it finds it possible to do so — through the regulation of expenditures that might distort the effective political power that a particular individual or group may have. Here it might be said that the values of equality are being preferred over the values of speech, but I am not sure that that is really the best way to look at this result. I would prefer to view limitations on electoral expenditures — which, after all, are *not* regulations on the content of speech, but rather regulations of the circumstances of speech — as more closely analogous to regulations that might allocate opportunities to speak in a particular public forum, or might limit overbearing uses of speech, such as sound trucks, etc.³⁰ Such regulations have always been viewed as supplementing and protecting the freedom of speech, rather than impairing it.

Perhaps one could imagine certain egalitarian positions that might indeed raise substantial free speech concerns. For example, some might argue that the government has an obligation under the First Amendment to provide affirmative support for the views of “marginalized” groups in certain contexts, in order to present “ideas and positions otherwise absent from public discourse.”³¹ Or, perhaps more radically, it might be asserted that some minority views deserve special governmental assistance and support to compensate for “false consciousness” among the citizenry.³²

To the extent that these arguments assert that certain views should be accorded governmental preference because of their content, the arguments may well run into significant difficulties under First Amendment doctrine. But I do not believe that support for congressional limitations on electoral contributions and expenditures is subject to the same objections. Rather, because the campaign financing regulations are limits on the amount of expenditures — and are not intended to provide support for any particular opinion — I believe that a view of this kind can avoid the difficulties associated with any argument based on “false consciousness,” etc.

In any case, I think that if equality in voting power is a fundamental aspect of voting, some degree of equality or proportionality in effective political power should also be viewed as an essential component of the political process — and therefore of the effective freedom of speech — as well.³³

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Endnotes

1. 347 U.S. 483.
2. *Shelley v. Kraemer*, 334 U.S.1 (1948).
3. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).
4. *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).
5. 310 U.S. 141, *overruling Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902).
6. 369 U.S. 186 (1962).
7. 377 U.S. 533 (1964).
8. 404 U.S. 71 (1971).
9. *United States v. Virginia*, 518 U.S. 515 (1996).
10. 539 U.S. 558 (2003).
11. 376 U.S. 254.
12. 395 U.S. 444.
13. 403 U.S. 15 (1971) (First Amendment protection for a “scurrilous epithet”).
14. *New York Times v. United States*, 403 U.S. 713 (1971) (dissolving injunction against publication of classified government documents).
15. 357 U.S. 449 (1958) (freedom of association in the context of civil rights struggle).
16. 371 U.S. 415 (1963) (First Amendment protection for “group activity leading to [civil rights] litigation”).
17. On the other hand, it might be argued that in relatively closed communities, like universities, schools, and offices, certain forms of hate speech may be subject to some degree of regulation (without criminal penalties) on the grounds that a minimal level of basic civility is necessary for the functioning of those specific institutions. See, e.g., Weinstein, “A Constitutional Roadmap to the Regulation of Campus Hate Speech,” 38 *Wayne Law Review* 163 (1991). Moreover, speech that may otherwise be constitutionally punished — like threats of violence directed at specified individuals — certainly do not gain constitutional protection by being uttered in a context of racial hostility. See *Virginia v. Black*, 538 U.S. 343 (2003).
18. For relevant German legislation, see, e.g., StGB 86a (prohibiting the use of Nazi symbols, etc.); cf. 90 BVerfGE 241 (1994) (upholding prohibition of Holocaust denial).
19. 2 BVerfGE 1 (1952).
20. 5 BVerfGE 85 (1956).
21. *Dennis v. United States*, 341 U.S. 494 (1951) (upholding Smith Act convictions of Communist Party leaders); see also, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959) (congressional investigations of Communist Party association).

22. See 93 BVerfGE 266 (1995). The German Constitutional Court also upheld a criminal conviction in the case of a cartoon that caricatured a famous political figure as a pig engaged in sexual activity. 75 BVerfGE 369 (1987). Obviously, there is a “striking contrast” with the *Falwell* case in the United States, which found constitutional protection for a similar tasteless satire. David P. Currie, *The Constitution of the Federal Republic of Germany* 206 n. 128(1994); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); see Nolte, 1988 EuGRZ 253.

23. 30 BVerfGE 173 (1971) (*Mephisto*).

24. 35 BVerfGE 202 (1973) (*Lebach*).

25. 54 BVerfGE 208 (1980).

26. See Stein, “History Against Free Speech: The New German Law Against the ‘Auschwitz’ — and Other — ‘Lies’”, 85 *Michigan Law Review* 277 (1986); StGB §194.

27. *R. v. Keegstra*, [1990] 3 S.C.R. 697.

28. 424 U.S. 1 (1976); see also, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

29. See, e.g., Wright, “Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?”, 82 *Columbia Law Review* 609 (1982); see also Strauss, “Corruption, Equality, and Campaign Finance Reform,” 94 *Columbia Law Review* 1369, 1382–89 (1994); Sunstein, “Political Equality and Unintended Consequences,” 94 *Columbia Law Review* 1390, 1392 (1994).

30. See Wright, “Politics and the Constitution: Is Money Speech?”, 85 *Yale Law Journal* 1001, 1006 (1976); cf. Sunstein, 94 *Columbia Law Review* at 1394.

31. Fiss, “State Activism and State Censorship,” 100 *Yale Law Journal* 2087, 2102 (1991).

32. Cf. Fried, “The New First Amendment Jurisprudence: A Threat to Liberty,” 59 *University of Chicago Law Review* 225, 252 (1992) (rejecting such arguments).

33. See, e.g., Wright, 82 *Columbia Law Review* at 637–42.