
THE MANY FACES OF THE STATE

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The author examines the state's role in ensuring freedom of speech. Because what is at stake is less the expressive interest of the speakers than the interest of the citizenry hearing debate on issues of public concern, the state, primarily through the judiciary, should act to ensure equal access to the debate. In the controversial areas of hate speech, pornography and campaign finance, the state should serve as a parliamentarian, using its power to guard against the silencing of less powerful voices. A too rigid adherence to the requirement that regulation of speech be content-neutral would seriously impair the state's capacity to serve in this way as a friend of freedom.

L'auteur examine le rôle de l'État dans la garantie de liberté d'expression. Comme l'intérêt expressif des intervenants importe moins que l'intérêt des citoyens à entendre les débats sur les préoccupations publiques, l'État — essentiellement au moyen du pouvoir judiciaire — devrait assurer le même accès à ce débat. Dans le cas de sujets controversés comme la littérature haineuse, la pornographie et le financement des campagnes, l'État devrait adopter un rôle de parlementaire, utilisant ses pouvoirs pour protéger ceux et celles qui ont des voix moins fortes. L'adhérence trop stricte à l'exigence que le contenu du discours doit rester neutre nuirait sérieusement à la capacité de l'État d'être vu comme un ami de la liberté.

Freedom of speech has always been of great interest to constitutional lawyers in the United States. Today is no exception. Although the issues have changed — from the communist menace and subversion in the 1950s to recent debates about pornography, hate speech and campaign finance — the divisions and passions they arouse seem similar to those we have encountered in the past.

It is thus tempting to see the current free speech controversies as a replay of the past, but my claim is that something much deeper and more significant is occurring. Americans are being invited, indeed required, to re-examine the nature of the state and to wonder whether it should play an active role in securing freedom of speech.

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I.

The debates of the past assumed that the state was the natural enemy of freedom. It was the state that was trying to silence the individual speaker and it was the state that had to be curbed. The First Amendment of the United States Constitution provides that "Congress shall make no law abridging the freedom of speech," and has long been taken as an expression of classical liberalism's demand for limiting state power. Liberalism was never an absolute. Some regulation of speech was always allowed, and as a result specific boundaries had to be drawn around the state. The precise location of those boundaries was the product of a dialectical process that accorded weight both to the values of free speech and the interests advanced by the state to support its regulation, for example, public order or national security. Liberals took these countervalues seriously — as Harry Kalven once put it, free speech is not a luxury civil liberty¹ — but somehow always managed to come out in favour of speech.

Today, however, liberals are divided over the regulation of hate speech, pornography and campaign finance. The countervalues have changed and so has liberalism. While the liberalism of the past sought to expand individual liberty and limit state power, the liberalism of today embraces a plurality of values. Contemporary liberalism is committed to equality as well as liberty and recognizes the role of the government in furthering those rights.

The transformation of liberalism can be traced to a multitude of factors, many of which have no connection to the law. But within the law itself, the most significant factor is the United States Supreme Court's 1954 decision in *Brown v. Board of Education*.² In this case, black students sued to gain admittance to all-white schools, and the Court ruled in their favour. As a purely technical matter, the decision declared that racial segregation violated the equal protection clause of the Fourteenth Amendment. More broadly, however, it reshaped the Constitution by granting equality a place in the American constitutional order as prominent as that given to liberty and by acknowledging the state's affirmative role in securing that value. Over the last forty years the courts, along with the executive and legislative branches, acted in a coordinated manner to broaden the field of equality and thus to extend *Brown*. As a consequence, more and more spheres of human activity — voting, education, housing, public accommodations, employment, transportation — have come to be covered by

¹ See H. Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, J. Kalven, ed., (New York: Harper & Row, 1988) at xxii.

² 347 U.S. 483 (1954); 349 U.S. 294 (1955).

antidiscrimination law. Now there is virtually no public activity of any significance that is beyond the reach of the equality principle. In addition, the protection of the law has been extended to a wide array of disadvantaged groups — racial, religious and ethnic minorities, women and the disabled. Groups that are defined by their sexual orientation are now demanding inclusion as well. In 1996 these groups won an important victory when the Supreme Court invalidated a state constitutional provision that had barred local laws protecting gays, lesbians and bisexuals.³

The current welfare policies of the United States fall short of the lofty ambitions that were proclaimed when the “War on Poverty” was launched in the 1960s. Today we seem more tolerant of economic inequalities, specifically, the concentration of wealth in the hands of a few. But norms protecting the poor against discrimination still have force in select domains, such as the electoral processes and some civil and criminal proceedings.⁴ Liberals also remain committed to satisfying the minimum needs of the economically downtrodden. Food, housing and medical care are provided by statutory enactment, though often inadequately and with ever-increasing limitations. Against this background, it is no surprise that in confronting the regulations that generate the free speech controversies of today, many liberals find themselves in a quandary. The liberal commitment to speech remains strong, but it is being tested by exercises of state power on behalf of another defining goal: equality.

The regulation of hate speech, for example, is defended on the theory that such expression denigrates the value of the various minority groups.⁵ Equality can also be found at work in the feminist campaign against pornography that attacks pornography not for religious or moral reasons, but on the ground that it reduces women to sexual objects and eroticizes their domination. The claim is that pornography leads to violence against women, including rape, and causes a pervasive pattern of social disadvantage — both in the public sphere and in

³ *Romer v. Evans*, 517 U.S. 620 (1996).

⁴ See *Griffin v. Illinois*, 351 U.S. 12 (1956) (criminal appeal); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (parental termination proceeding); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (voting). See generally F. Michelman, “In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice” (1973) 121 U. Penn. L. Rev. 962; “The Supreme Court, 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment” (1969) 83 Harv. L. Rev. 7; “Welfare Rights in a Constitutional Democracy” (1979) Wash. U. L. Q. 659.

⁵ See M.J. Matsuda *et al.*, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993).

matters most intimate.⁶ Similarly, although some defend the regulation of campaign finance as a means of preventing corruption, it can also be understood as a way of enhancing the political power of the poor. Such regulation puts the poor on a more equal footing with the rich, enables them to advance their interests and gives them a fair chance to enact measures that improve their economic position. One should be careful not to overstate the significance of the present moment as each generation tends to overstate its own uniqueness. Regulations similar to the ones that concern Americans today have been considered by the courts in earlier times. In the case of pornography, for example, the legal framework limiting the censor's jurisdiction over sexually explicit material was primarily forged during the civil rights era of the 1960s.⁷ Yet I believe that an important difference can be found in the depth of the legal system's commitment to equality today. In the 1960s, equality was but an aspiration — capable of stirring the nation, but still fighting to establish itself in the constitutional arena. Today, equality has another place altogether in our jurisprudence — it is one of the central beams of the legal order. It is architectonic.

Many liberals readily acknowledge the pull of equality but refuse to capitulate to it. They honour the countervailing values, as Kalven once put it, but resolve the conflict between liberty and equality in favour of liberty. The First Amendment should be first, they argue. This position makes claim to the classical conception of liberalism, in which freedom is defined in terms of individual liberty and limited government. But this position seems vulnerable because no reason is given for privileging liberty over equality — for preferring the First Amendment to the Fourteenth. Those privileging liberty often refer to the role that free speech played in securing equality during the civil rights era, suggesting that democratic politics is a precondition for achieving true and substantive equality. That much can be granted, but the converse may also be true: A truly democratic politics will not be achieved until conditions of equality have been fully established.

⁶ See C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987) at 127–213 [hereinafter *Feminism Unmodified*]; *Only Words* (Cambridge, MA: Harvard University Press, 1993); *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989). See also A. Dworkin & C.A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988).

⁷ Kalven, *supra* note 1 at 35–44.

II.

We can thus understand why liberals are divided, almost at war with themselves: some favour liberty, some equality, but all are without a principled basis for choosing between these defining values. A common ground might be found, however, once we recognize that equality is not just a separate value but also a part of free speech itself. If we consider the ways that hate speech, pornography and campaign finance regulations further speech values, it will become clear that what has been presented as a conflict between liberty and equality is actually a conflict within liberty. Such a reformulation will not eliminate all disagreement, but rather place that disagreement within a framework that acknowledges that both sides are pursuing the same value: free speech.

In the history of free speech, the U.S. government has sometimes defended the regulation of speech in the name of liberty. During the height of the Cold War, for example, suppression of the Communist Party and its leadership was often justified in terms of saving America from Stalinism. The fear was that communist propaganda would, in time, be persuasive and lead to the overthrow of the government or the establishment of a totalitarian dictatorship. Liberals responded that the remedy was more speech, not state regulation.⁸ With pornography, hate speech and campaign expenditures, however, the threat to freedom that speech produces is more direct and immediate. There is no intermediary. It is not only that the speech may persuade listeners to act in a certain fashion — contributing, for instance, to the establishment of social institutions that subjugate certain groups. There is also the danger that the speech will make it impossible for such groups even to participate in public discussion. As a result, the classic remedy of more speech rings hollow. Those who need to respond cannot.

Underlying this theory is the view that hate speech tends to diminish the victims' sense of worth and thus impedes their full participation in many of the activities of civil society, including public debate.⁹ The victims of hate speech withdraw into themselves. When they do speak, their words lack authority: it is

⁸ The doctrine comes from *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis J., concurring).

⁹ See O.M. Fiss, "The Right Kind of Neutrality" in *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder: Westview Press, 1996) 111 [hereinafter *Liberalism Divided*].

as though they had said nothing. The same silencing effect has been attributed to pornography. The claim is that pornography silences women by reducing them to sexual objects, which not only subordinates them but also impairs their credibility and their capacity to contribute to public discussion.¹⁰ Similarly, unlimited political expenditures might drown out the voices of the poor.¹¹ The rich might so dominate advertising space in the media and other public domains that the citizenry, in effect, hears only their messages. Admittedly, in each of these cases the agency threatening speech values is not the state itself. But there is no need for the threat to come from the state for it to be a legitimate subject of regulation. The call for state intervention is based not on the theory that the activity to be regulated is itself a violation of the First Amendment, but rather on the idea that protecting the fullness of public discourse — making certain that the public hears all sides of the debate — is a permissible regulatory goal for the state. Accordingly, even if the silencing dynamic that I have described is wrought solely by private hands — for example, by the person who hurls racial epithets, publishes pornography or uses superior economic resources to dominate political campaigns — there is full and ample basis for intervention. The state is merely exercising its police power to further a worthy public end, as it does when it enacts gun control or speed limit laws. In this instance, the end happens to be a conception of democracy that requires that the speech of the powerful not drown out or impair the speech of the less powerful.

The promotion of democratic values is a worthy and compelling public purpose, but a question can be raised about the method by which that goal is pursued, specifically, whether the intervention of the state is consistent with the First Amendment. State regulation of the type proposed might promote the speech of minorities, women and the poor, but only by silencing racists, pornographers and the rich. What gives the state the right to privilege the speech rights of one group over the rights of the other? The answer to this question depends in large part on how we conceive of the speech interests at stake. If nothing more were involved than the self-expressive interests of each group — say, the desire of the racist and the interest of the would-be victim each to speak

¹⁰ See O.M. Fiss, "Freedom and Feminism" in *Liberalism Divided*, *ibid.* at 67; C.A. MacKinnon, "Francis Biddle's Sister: Pornography, Civil Rights, and Speech" in *Feminism Unmodified*, *supra* note 6, 163; R. Langton, "Speech Acts and Unspeakable Acts" (1993) 22 Phil. & Pub. Aff. 293.

¹¹ See *Buckley v. Valeo*, 424 U.S. 1, 257 (1976) (White J., concurring in part and dissenting in part); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (White J., dissenting); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 303 (1981) (White J., dissenting). See generally O.M. Fiss, "Money and Politics" (1997) 97 Colum. L. R. 2470.

his or her mind — then there would be something arbitrary about the state choosing one side over the other. In fact, something more is involved: the quality of public debate. The state is not merely arbitrating between the self-expressive interests of various groups, but pursuing a public interest. It is seeking to establish the preconditions necessary for collective self-governance by making certain that all sides are presented to the public.¹² Sometimes that objective can be achieved by affirmative measures, such as the grant of subsidies, which would empower disadvantaged groups and enhance their voices. Sometimes, however, such strategies are not effective and the state might need to lower the voices of some in order to hear others.

In conceiving of state regulations of hate speech, pornography and campaign finance in this manner, equality once again makes an appearance. But the value is now rooted in the First Amendment, not the Fourteenth. The concern is not with the social status of the groups that might be injured by the speech whose regulation is contemplated. Rather, the concern is with the claim of those groups to a full and equal opportunity to participate in public debate — the right of disadvantaged groups to free speech. In defending this right we must remember that what is at stake is less the expressive interest of the speakers than the interest of the audience — the citizenry — in hearing a full and open debate on issues of public importance.

III.

Analyzing the problems presented by hate speech, pornography and campaign finance in this way might seem to accord easily with the traditional framework that analyzes every speech issue as a conflict between value and countervalue. In this case, it turns out that the countervalue is not a familiar state interest such as public order or national security, nor the more alluring equality, but speech itself. Thus, one way of describing the conclusion we have arrived at is simply to say that now speech appears on both sides of the equation — as the value threatened by the regulation and the countervalue furthered by it. This way of putting the matter, however, radically understates the challenge we confront, for we are not simply reconceptualizing the countervalue and acknowledging that it might be speech itself; we are also reconfiguring the role of the state. While the traditional framework rests upon the classical liberal idea that the state is a natural enemy of freedom, liberals are now beginning to imagine the state as a friend of freedom.

¹² See O.M. Fiss, "Why the State?" in *Liberalism Divided*, *supra* note 9, 31.

The resistance in the U.S. to this reversal of the role of the state is considerable. Some is founded on an absolutist reading of the First Amendment, which treats the free speech guarantee as a bar to any state regulation of speech whatsoever. This view of the First Amendment, long associated with Justice Black,¹³ proclaims that "no law" means "no law," and although it has considerable rhetorical sweep, there is little else to recommend it. The First Amendment, Meiklejohn reminded us, prohibits laws abridging "the freedom of speech," not the freedom to speak.¹⁴ The phrase "the freedom of speech" implies an organized and structured understanding of freedom and the need for the rational elaboration of the limits on speech. The First Amendment is not reducible, in Meiklejohn's phrase, to a protection of "unregulated talkativeness."¹⁵ The Court has allowed the state to regulate speech for such public purposes as the protection of national security and public order and should be of a similar mind when the state seeks to promote the robustness of public debate. Indeed, one can go further and say that the Court should embrace such regulation because it seeks to further the value that underlies the First Amendment itself: collective self-determination.

A majority of the Court has never taken kindly to Black's absolutism. Indeed, with the exception of William O. Douglas, no other justice has ever supported it. Over the last two decades, however, the Court has forged a more general principle — the requirement of content neutrality — that would seriously impair the state's capacity to protect freedom. According to this principle, a very strong presumption arises under the First Amendment against any regulation that is structured in terms of the content of speech.

In the case of campaign finance, the Court has used the concept of content neutrality to bar Congress from placing ceilings on political expenditures. In its 1976 decision *Buckley v. Valeo*,¹⁶ the Court invalidated major portions of a federal campaign reform act on the ground that the First Amendment prohibits the state from restricting the voice of some so as to enhance the voice of others. Although no justification was offered for this stance when it was initially proclaimed, in later cases the Court explicitly linked *Buckley* to the principle of

¹³ See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (Black J., concurring); H.L. Black, "The Bill of Rights" (1960) 35 N.Y.U. L. Rev. 865.

¹⁴ See A. Meiklejohn, "The First Amendment is an Absolute" (1961) *Supreme Court Rev.* 245 at 255.

¹⁵ A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper, 1960) [hereinafter *Political Freedom*].

¹⁶ 424 U.S. 1 (1976).

content neutrality.¹⁷ On the issue of hate speech, the Court has not been so coy. In its 1992 decision *R.A.V. v. St. Paul* — a case in which a teenager had been convicted of burning a cross on a black family's yard — the Court struck down the City of St. Paul's hate speech ordinance on the ground that it was not content-neutral.¹⁸ The Court assumed the ordinance proscribed only "fighting words," a category of expression that is within the power of the state to regulate or even suppress. Yet the Court invalidated the ordinance because those advocating tolerance were allowed more freedom than those opposed to it. Only the fighting words of the intolerant were prohibited.

Although the Supreme Court has long allowed the regulation of obscenity, provided that such regulation stays within narrowly defined bounds,¹⁹ it has not yet had occasion to review a regulation specifically structured to respond to the feminist campaign against such material. Its analysis of hate speech regulations, however, may be read as an indication of how it would rule. In writing for the majority in *R.A.V.*, Justice Scalia presumed that a partial regulation of obscenity — a law that proscribed only obscenity that was critical of the city government — would be unconstitutional because it transgressed the rule requiring content neutrality.²⁰ Several years earlier a similar line of reasoning was used by Judge Frank Easterbrook in the Seventh Circuit Court of Appeals to strike down an Indianapolis ordinance aimed specifically at sexually explicit material that subordinated women.²¹ Clearly, there are many situations in which the principle of content neutrality has powerful appeal. It would, for example, violate democratic principles if the state protected the demonstrations of people favouring the right to an abortion, while clamping down on pro-life forces.²² In such a case, the state would simply be choosing sides — favouring certain outcomes by manipulating debate — and thus interfering with the free and sovereign choice of the public. But content neutrality is not an end in itself and should not be read to bar interventions that enhance choice, even though they regulate content. Some regulation of content may be necessary to make certain that all sides are heard. In such cases, the state would be acting in much the same way as a fair-minded parliamentarian might and should thus be seen as a friend

¹⁷ See *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986).

¹⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹⁹ See *Miller v. California*, 413 U.S. 15, 24–25 (1973).

²⁰ *Supra* note 18 at 384.

²¹ *American Bookseller Ass'n. v. Hudnut*, 771 F.2d 323 (1985).

²² See *Madsen v. Women's Health Center*, 512 U.S. 753 (1994); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); O.M. Fiss, "The Unruly Character of Politics" (1997) 29 *McGeorge L. Rev.* 1.

of speech. In an earlier period, scholars such as Alexander Meiklejohn and Harry Kalven acknowledged that the state might have to act as a parliamentarian. But, by and large, it was assumed that the state would discharge that function by simply following Robert's Rules of Order — a predetermined method of proceeding based not on what was transpiring in the debate, but rather on some universal principle like temporal priority.²³ Today, such a policy might not be sufficient. Account has to be taken of a wide variety of factors that curtail debate, such as the scarcity of speech opportunities and the inequalities of resources. The parliamentarian might have to say, "We heard a lot from that side already. Perhaps others should get a chance to speak before we vote." A parliamentarian might also have to be sensitive to the excesses of advocacy and the impact that they have on the quality of debate. At times the chair might have to interrupt: "Can't you restrain yourself? You have been so abusive in the way you have put your point that some have withdrawn from the debate altogether."

Of course, any regulation of debate, including the ones just mentioned, may have an impact upon decision-making processes. Regulation of process always affects outcome. In that sense, the breach of the content neutrality principle in the regulation of pornography, hate speech and campaign finance might therefore seem similar to the state intervention in the abortion protest cases mentioned. But there is a critical difference. When the state acts as a parliamentarian, making sure that all sides are heard, the impact upon outcome is derived from the fact that both sides of the issue are heard rather than one and thus democracy is furthered. What democracy exalts is not simply choice by the public, but rather choice made with full information and under suitable conditions of reflection. In characterizing the state as a parliamentarian, and seeing this as a way of understanding regulations of pornography, hate speech and campaign finance, I am treating society as if it was one gigantic town meeting. In that respect I am following Kalven and, before him, Meiklejohn.

Recently, Professor Robert Post insisted that such a view of society rests on antidemocratic premises.²⁴ According to Post, while town meetings take place against a background in which the participants agree — sometimes implicitly or informally — to the agenda and the procedures of debate, no such assumptions can be made about civil society. In the constant conversation that is civil society, no one is ever out of order and no idea is ever beyond consideration. When the

²³ See *Political Freedom*, *supra* note 15 at 24–28; H. Kalven, Jr., "The Concept of the Public Forum: *Cox v. Louisiana*" (1965) *Supreme Court Rev.* 23.

²⁴ R.C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, MA: Harvard University Press, 1995) at 268.

state intervenes in public debate, even when it does so to improve its quality, it must impose upon the citizens a certain conception of what should be discussed and who must be able to speak. Post believes that such action by the state forecloses the radical individualistic — almost anarchic — premises of democracy. Genuine democratic principles, he argues, require that citizens be permitted to set the public agenda themselves and always remain free to reset it. They must also be able to set their own rules of procedure. Every town meeting does indeed presuppose an understanding about the agenda and the rules of procedure. There must be some standard of relevance and an order of proceeding. Yet these understandings have their counterpart in society at large. They are not the product of an agreement among citizens or dictatorial action by the state. Rather, they evolve organically, as do most shared understandings. Of course, when the state acts upon any such understandings, as it must when it seeks to enlarge public discussion, to enhance the voice of some or to focus attention on issues of public importance, it must foreclose some of the anarchic possibilities celebrated by Post — the freedom of any single individual, for example, to redefine the agenda or to determine the rules of procedure. But to require the state to forgo such action does not further the freedom of the individual, but rather means that the individual will be controlled by the social forces that dominate society. The state is our common instrument and its power must sometimes be used to prevent social forces — represented by the cross-burner, the pornographer or the big spender — from foreclosing the right of other citizens to participate in the debate itself or collectively to determine the agenda and the rules of procedure.

Post's objection aside, there is always good reason to be wary of the state. The state is not just a parliamentarian. It is also an embodiment of distinctive substantive policies and those who possess its power have a vested interest in how debates are resolved. Sly politicians can say that they are regulating content solely to enrich public debate and to make certain that the public hears from all sides, but their purpose may in fact be to fix the outcome or further certain substantive policies. Although this danger is ever present, it is particularly acute in the campaign finance area, where the risk is high that incumbents may use their power to insulate themselves from the challenges of newcomers.

Those in charge of designing institutions should therefore place the power to regulate content — to act as parliamentarian — in agencies that are removed from the political fray. It is never a good idea to choose as your chair someone who is keenly vested in one outcome. For this reason the heavy burden of scrutinizing the action of the state should fall on the judiciary because it stands apart from the political fray. In discharging this task, the reviewing court must

ask itself: does the intervention enhance the quality of debate, or does it have the opposite effect? Even a vigilant judiciary may not be able to guard against all abuses of enlarged regulatory power. We should worry about possible judicial failures and the dangers they present to freedom of speech, but we must be careful not to exaggerate their significance. They will not unleash or otherwise validate a censorial power that is at war with the First Amendment. The judiciary may not always be able to prevent a devious politician from manipulating process to determine outcome. But statutes that regulate pornography, hate speech and campaign finance do not give the state the power to suppress speech arbitrarily. What Justice Brennan called the "bedrock principle" of the First Amendment²⁵ — no state official should have the power to suppress an idea because he or she disagrees with it — is preserved.

There is no denying that a more powerful state creates dangers, but the risk of these dangers materializing and an estimate of the harm that they could bring into being has to be weighed against the good that will be accomplished. The potential of the state for oppression should not be slighted. At the same time, however, we must contemplate the possibility that the state will use its considerable powers to promote goals that are an unqualified good — equality and perhaps even free speech itself. The current debate in the U.S. over hate speech, pornography and campaign finance forces us to acknowledge this possibility and thus to reflect in a new way on the nature of the state and what we have a right to expect from it.

²⁵ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

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