

TAKING ECONOMIC EQUALITY OFF THE TABLE

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I have a good deal of interest in the topic of this panel, “Clinton Administration and Individual Rights.” Given that, it was difficult to choose between the two papers for comment. There is a good deal to agree with in Professor Volokh’s effort—particularly the notion that, even in these new arenas, traditional First Amendment concerns have real merit.¹ It is likely, though, that Professor Volokh and I would set up shop at different places on the slippery side of the slope.

Professor Volokh himself acknowledges that the harassment issues he focuses on have not actually been major sources of attention for the Clinton Administration.² Indeed, it is remarkably hard to believe that one of President Clinton’s principal legacies will be that Americans talk less about sex in the workplace than they did before he came to office.

It might have been preferable, therefore, to explore the President’s willingness to go along with the Communications Decency Act (“CDA”).³ Alternatively, we might have delved into the Administration’s efforts to defend the CDA in *Reno v. ACLU*⁴—efforts that reduced Justice Stevens to sounding like he had borrowed Justice Scalia’s word processor. Stevens characterized the government’s position as “singularly unpersuasive,”⁵ seriously flawed,⁶ based on “incorrect factual premises,”⁷ reaching “a breadth of . . . coverage . . . wholly unprecedented,”⁸ and “casting a . . . dark shadow over free speech”⁹ in the United States.

We might also productively have criticized the President’s hugely unfortunate “don’t ask, don’t tell” policy.¹⁰ Even if well motivated, “don’t ask” now results in about twice as many exclusions of lesbians and gay men from the

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1. See Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 304 (Winter/Spring 2000).

2. See *id.* at 302-03.

3. Pub. L. No. 104-104, 110 Stat. 133-145 (codified as amended at 47 U.S.C. § 223(a), (d)).

4. 521 U.S. 844 (1997).

5. *Id.* at 885.

6. See *id.* at 872.

7. *Id.* at 876.

8. *Id.*

9. *Id.* at 882.

10. See, e.g., Cass R. Sunstein, *At Unease*, NEW REPUBLIC, Sept. 6, 1999, at 41.

Armed Forces as occurred before its implementation.¹¹ In stark terms, it tells people who are not unfit to serve their country that they are.¹² Now, “don’t ask” is apparently being applied against a gay, Republican Arizona legislator—effectively punishing him for statements made in open debate, on the floor of the statehouse.¹³ One wonders what Alexander Micklejohn would have thought of that.¹⁴ Unlike the harassment strains Professor Volokh decries, the embrace of the CDA and the development and enforcement of “don’t ask, don’t tell” are clear Clinton Administration policies aimed at dramatically curtailing freedom of expression.

There is also much to applaud in Professor Wax’s paper.¹⁵ She presents powerful arguments, for example, that the brief against government involvement in welfare is overblown.¹⁶ However, as she indicates, the focus of her effort is to defeat the normative claim that a right to basic economic security should be included in the federal Constitution.¹⁷ People can accuse President Clinton of many things, and they have, but attempting to privilege and to constitutionalize welfare entitlements is surely not one of them. I am a notoriously bad political pundit, but even I am confident that few political movements in the United States enjoy a more profound and unshakable dormancy than the effort to constitutionalize a right to subsistence welfare. The argument that Professor Wax goes to such profound lengths to defeat, partially based somehow on her reported perceptions of actual popular sentiment, has about as much vitality in American political discourse as the move to establish a monarchy on this side of the Atlantic. It is unlikely that it even rises to the level of a straw man.

11. See *Verdict Is In For “Don’t Ask,”* L.A. TIMES, Dec. 14, 1999, at B10.

12. See RICHARD POSNER, *SEX AND REASON* 321 (1992).

13. I refer to the surprising case of Republican Arizona legislator Steve May. May had an accomplished career in the Army and, upon retirement, was elected to the Arizona legislature. During the heat of debate over an anti-gay measure, May made statements indicating that he is gay. May was subsequently recalled to active status—he had remained a reservist. The Army is now considering both May’s superior’s recommendation that he be promoted for outstanding service, and whether he should be discharged from the military for violating “don’t ask, don’t tell.” See *Military Inquiry Targets Lawmaker Reservist: Steve May Focus of Gay-Policy Rule*, ARIZ. REPUBLIC, Aug. 13, 1999, at A1; *Gay State Lawmaker Speaks Out—Assails Military’s Don’t Tell Rule*, ARIZ. REPUBLIC, Aug. 28, 1999, at A1; *Comment*, ARIZ. DAILY STAR, Aug. 16, 1999, at 12A. If May is excluded from the military for speaking out on the floor of the Arizona legislature, it may be the clearest violation of the First Amendment in American history.

14. See generally A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT* (1948); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR. FOUND. RES. J. 521; Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191 (each arguing for the highest protection for political expression); see also FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

15. See Amy Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257 (Winter/Spring 2000).

16. See *id.* at 282-88.

17. See *id.* at 261, 292-97.

In my opinion, it might have been more useful to discuss the President's decisions on welfare reform. More specifically, it would have been interesting to explore the Administration's feverish efforts to defend Governor Pete Wilson's scheme to discriminate against newly arrived California welfare recipients.¹⁸ The Wilson plan, which relegated welfare candidates who had lived in California less than one year to the amount of funding they could have obtained in their prior state of residence, was thrown out rather unceremoniously by the Supreme Court in *Saenz v. Roe*.¹⁹ There, the Court found that the government's arguments were directly at odds with the foundational notion that "citizens of the United States, whether rich or poor, have the right to choose to be [full] citizens of the state wherein they reside."²⁰ The Administration's position, in the Justices' view, "would impose the most severe burdens on the neediest members of the disfavored class."²¹

Justice Ginsburg, a President Clinton appointee, was "astonished" at aspects of the Administration's argument.²² Justice Souter found them incomprehensible.²³ In the Court's view, this welfare reform was really just ganging up on those least able to defend themselves—poor people who typically had not even arrived in the state yet. No one, of course, wants to look soft on the poor in an election year. Still, this was too much even for Justice Scalia.²⁴

There are, though, a couple of notions in Professor Wax's article worthy of highlighting. In crafting arguments against the constitutionalization of welfare rights, she warns that "[f]actions that believe in vigorous welfare rights might arise and gain undue influence."²⁵ This claim is akin to arguments made in earlier drafts of her article that groups in power may pay insufficient attention to "maintaining the background economic conditions" that generate ample wealth to sustain the "common resource pool."²⁶

Of course, these are, in some sense, possibilities. However, in reading the article, it occurred to me that at this particular point in our history our problem is almost exactly the opposite. Getting elites and political decisionmakers to pay sufficient attention to maintaining background economic conditions to maintain the resource pool seems not to be our principal difficulty.

18. See 526 U.S. 489 (1999).

19. See *id.* at 510 ("The states . . . do not have any right to select their citizens.").

20. *Id.*

21. *Id.*

22. Oral Arg. at 29, *Anderson v. Roe*, No. Civ. A. 98-97, 1999 WL 22762 (Jan. 13, 1999).

23. See *id.* at 26.

24. Justice Scalia joined the majority opinion invalidating the California scheme. See *Saenz*, 526 U.S. at 491-93. See generally *Clinton Turns on the Least of These*, DENV. ROCKY MOUNTAIN NEWS, May 28, 1999, at 62A.

25. See Wax, *supra* note 15, at 301 n.109. As these papers go to press, I am in the somewhat uncomfortable position of offering comments on what has become a much reduced sentiment in the final version of Professor Wax's paper. In earlier drafts, she outlined a "perversity" argument, noting that strong public welfare programs can work to kill the goose that laid the golden egg. There she claimed that "groups in power may pay insufficient attention to maintaining the background economic conditions that generate ample wealth to maintain the common resource pool."

26. See note 25.

Consider the landscape. First, politically speaking, as we veer between New Democrats and New Republicans, it seems clear that one thing will remain constant—questions of poverty, exclusion, and the economic interests of the bottom half will be left off the table.²⁷ The Republicans' compassionate conservatism and the Democrats' conservative compassion cast their gaze away from some of the most difficult problems of American life. "Politics by the polls" is no great friend to poverty issues or civil rights.²⁸

Related to that, of course, and surely causing a good deal of it, we employ a method of campaign finance that systematically favors those with substantial economic power over those without it. This is not the place to rehearse arguments about campaign finance reform,²⁹ but, to put it simply, as Justice White wrote many years ago, the "candidate may be forced to please the spenders rather than the voters, and the two groups are not identical."³⁰ A system in which those who seek to obtain certain governmental policies are allowed to give essentially unlimited amounts of money to the people who make the policies, may be called many things, but "democratic" and "fair" should not be high on the list.³¹

27. See generally JOHN KENNETH GALBRAITH, *THE GOOD SOCIETY: THE HUMANE AGENDA* (1996); JIM HIGHTOWER, *THERE'S NOTHING IN THE MIDDLE OF THE ROAD BUT YELLOW STRIPES AND DEAD ARMADILLOS* (1997); MICKEY KAUS, *THE END OF EQUALITY* (1992); ROBERT B. REICH, *LOCKED IN THE CABINET* (1997); see also ANNE PHILLIPS, *WHICH EQUALITIES MATTER* 13 (1999) ("Politicians who once placed themselves on opposite ends of the political spectrum now seem united in their defense of wide-ranging income differentials and their condemnation of 'simple' or 'leveling' equality.").

28. See Gene Nichol, *Candidates Play It by the Numbers*, *DENV. ROCKY MOUNTAIN NEWS*, July 9, 1999, at 60A.

29. See Lilian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 *CALIF. L. REV.* 1045 (1985) (arguing against campaign finance reform); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 *HOFSTRA L. REV.* 301 (1989); Martin Shapiro, *Corruption, Freedom and Equality in Campaign Financing*, 18 *HOFSTRA L. REV.* 385 (1989).

30. *Federal Election Comm. v. National Conservative Political Action Comm.*, 470 U.S. 480, 517 (1985) (White, J., dissenting).

31. Briefly put, American campaigns for important national office begin with a money primary—only those with great wealth or access to wealth qualify as serious candidates. Imagine explaining that as a matter of democratic theory. Next, federal candidates embark upon a remarkable money chase—spending half or more of their time in office asking people for money. These are, of course, full-time jobs. The nation is ill-served by officials spending so much time and energy on matters other than their official jobs. It is also clear to almost all Americans that if something becomes that important to an official, amounting to half of the job or more, and so obviously tied to likelihood of continuing in office, it will have a massive impact on job performance. We may like to pretend that our legislators approach total strangers, ask them for thousands or now hundreds of thousands of dollars, get it, and are completely unaffected by it—achieving a state of near-total ingratitude. However, we know it is not so. As a result, the output of the legislative process is strongly affected by campaign financing. This need not, of course, amount to bribery, but if incumbents and challengers take positions that are congenial to powerful economic interests, they receive dramatic benefits in the electoral process through substantial campaign contributions. If candidates, on the other hand, pursue agendas emphasizing poverty, welfare rights, and the like, prospects for campaign funding are dramatically diminished. This substantially distorts the political process in favor of the economically privileged. It does not mean, of course, that the wealthiest or best-funded candidate wins every race, but it effectively abridges rights of equal political participation.

Next, even among political philosophers, arguments for economic equality have largely disappeared. The current preoccupation with issues of cultural domination has seemed to crowd out questions of economic justice. It is almost made to seem as if one cannot explore difference without rejecting, or at least ignoring, economic egalitarianism. Modest claims of universal entitlement to public services or government benefits are regarded as anachronistic. Extreme differentials of income and wealth are viewed as either non-problematic or inevitable.³² The notion that some concept of economic equality might have a relationship to political equality has dropped from view. As Anne Phillips recently wrote, "tainted as it is by the failures of socialism, and made to seem hopelessly out of kilter with celebrations of diversity and choice, economic equality is now [completely] off the agenda."³³

The academic left has been largely undisturbed. Richard Rorty said last year in the Massey Lectures that "we now have, among many American students and teachers, a spectatorial, disgusted, mocking Left; rather than a Left which dreams of achieving our country."³⁴ That is strong language, but a Left that has no projects to offer, no vision of our national life, no affirmative program to be achieved by building a consensus on specific reforms, is not much of a Left at all.³⁵

This near abandonment of equality seems a surprising result in a country of such unparalleled wealth. Unfortunately, in this country, unparalleled wealth is coupled with shockingly high infant mortality rates, huge numbers of children living in poverty,³⁶ ever growing numbers of Americans without health care,³⁷ and tremendous gulfs between the wealthiest and poorest members of society.

In truth, we actually pay a good deal of attention, in the ebb and flow of ordinary politics, to the background economic conditions that generate the resource pool.³⁸ What we now pay far less attention to is the question of economic equality. The Clinton Administration has not been alone in taking economic

32. See PHILLIPS, *supra* note 27, at 12-13.

33. *Id.* at 1.

Equality is now off the political agenda; nobody these days believes people can or should be made equal. That is true enough in one sense, very far from true in another. Economic equality has fallen into disuse, tainted as it is by the failures of socialism, and made to seem hopelessly out of kilter with celebrations of diversity and choice.

Id.

34. RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH CENTURY AMERICA* 35 (1999).

35. See *id.* at 15.

36. See Paul Campos, *Poor People Pay Bills for the Rich*, DENV. ROCKY MOUNTAIN NEWS, Nov. 16, 1999, at 63A ("One out of every four children in America lives below the poverty line. One out of every six American workers has no health insurance."); Gene Nichol, *Equality Has Been Taken Off The Table*, DENV. ROCKY MOUNTAIN NEWS, Jan. 29, 1999, at 59A.

37. See NATIONAL COALITION ON HEALTH CARE, *THE EROSION OF HEALTH INSURANCE COVERAGE IN THE UNITED STATES* (May 9, 1999); Gene Nichol, *Unhealthy Times for Have Nots*, DENV. ROCKY MOUNTAIN NEWS, May 14, 1999, at 55A. The most recent census figures indicate that about 45 million Americans now have no health care coverage. See Gene Nichol, *Health Care Isn't There For Too Many*, RALEIGH NEWS & OBSERVER, Oct. 7, 1999, at A23.

38. *Supra* text accompanying note 26.

fairness off the political agenda. They have not been alone, but they have clearly done their part. That may not be the legacy of which they are the most proud. It may not even have been the legacy that they had in mind when they started, but it is theirs nonetheless. Ultimately, it may make matters like the Antiterrorism Act,³⁹ or the Defense of Marriage Act,⁴⁰ the Immigration Act,⁴¹ or the Communications Decency Act⁴² seem quite small by comparison.⁴³

39. Antiterrorism and Effective Death Penalty Act of 1996, PUB. L. NO. 104-132, 110 Stat. 1214.

40. 1 U.S.C. § 7 (1997) and 28 U.S.C. §1738C (1997).

41. 8 U.S. C. § 1601 et seq. (1994); Immigration and Naturalization Act §§ 242(b)(a), 235(b)(1), 501 et seq.

42. 47 U.S.C. §§ 230, 560, 561 (1996).

43. *But see* Gene Nichol, *Clinton Civil Rights Record Lousy*, DENV. ROCKY MOUNTAIN NEWS, Feb. 5, 1999, at 61A (arguing that President Clinton's record on gay rights, privacy, free speech, and due process issues is lackluster).