1996

Book Review: Fighting Words: Individuals, Communities and Liberties of Speech. by Kent Greenawalt.

Michael E. Rosman

Book Reviews

FIGHTING WORDS: INDIVIDUALS, COMMUNITIES AND LIBERTIES OF SPEECH. By Kent Greenawalt.[1] Princeton, N.J.: Princeton University Press. 1995. Pp. 189. Hardcover, $29.95.

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In *Fighting Words: Individuals, Communities, and Liberties Of Speech*, Kent Greenawalt surveys a number of different free speech issues all of which revolve around a common question: What happens when a person's expression, through words or deeds, significantly disturbs another person or persons? The traditional civil libertarian answer to this question (with few exceptions) has been simple: Tough luck to those who are disturbed. But the traditional civil libertarian response has come under increasing attack in recent years both by those who perceive free speech as a means by which the dominant classes in society can continue to subjugate the rest, forestalling true equality, and by those who believe that dissident or iconoclastic expression should not undermine our traditional societal values.

It is to Mr. Greenawalt's credit that he sees the connection between hate speech and flag burning, workplace harassment and nude dancing, obscenity and campus speech codes.[3] He cov-

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Eugene Volokh, Michael McDonald, and Hans Bader all reviewed drafts of this review and provided me with insightful comments and thoughts, as did my editor, Michael Paulsen. I thank them, but take full responsibility for the various flaws that appear herein.

3. As he explains in the Preface, the book was based on four separate lectures that Mr. Greenawalt gave concerning hate speech, flag burning, a comparison of Canadian

ers all of these areas well; although lawyers have a tendency to overestimate the accessibility of writing on legal issues, I think the discussions can be followed by the average layperson, but will not bore the First Amendment specialist. (I fall somewhere in between.) Mr. Greenawalt also provides a comparison to Canadian rulings on similar First Amendment issues,[4] and tries to develop a theme (which I discuss briefly in Part III of this review) in the beginning and at the end of the book that emphasizes consideration of "communities" in First Amendment jurisprudence.

Mr. Greenawalt is a professor of law at Columbia Law School. Even if the jacket (which provides that information) of my copy of the book had somehow been misplaced, it would not have been a difficult thing to guess. His analysis is thorough, well-reasoned, and moderate. He sees many sides to the questions. He is concerned that the Supreme Court did not pay sufficient attention to interests being served by the Congressional flag burning statute, struck down in *United States v. Eichman*,[5] interests that differed from those served by the Texas flag-burning statute struck down in *Texas v. Johnson*.[6] (He thinks *Eichman* was correctly decided, mind you. It's just that the Court could have been more sensitive in its analysis.) He gives full consideration to each varying effort to defend hate speech laws, even some that probably do not merit such attention. His analysis of workplace harassment is so evenhanded, and so thorough in discussing the pro's and con's of each separate argument, that I am still not sure what his position is even after reading it several times. Finally, as I discuss shortly, his analysis frequently reflects the values of the class of which Columbia Law School professors are a part.

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and United States law, and the role that individuals and communities play in free speech issues.

4. Although I found it quite interesting, I will not dwell upon Mr. Greenawalt's discussion of Canadian law. Under the Canadian charter, virtually all forms of expression are considered free speech. But under Section 1 of that document, fundamental freedoms are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Kent Greenawalt, *Fighting Words: Individuals, Communities and Liberties of Speech* 13 (Princeton U. Press, 1995). The Canadian legislature can make a specific declaration that Section 1 is applicable to a certain piece of legislation or, even without that declaration, a court can declare that the limitation on freedom is "reasonable." Id. at 13. What all of this means, in essence, is that Canadian courts engage in far more "balancing" tests than do courts in the United States, which are either hamstrung or properly constrained (depending upon one's viewpoint) by categorical rules.

5. 496 U.S. 310, 318-19 (1990).

6. 491 U.S. 397, 418-20 (1989).

In Part I of this review, I consider Professor Greenawalt's analysis of hate speech and workplace harassment rules. In Part II, I look specifically at Professor Greenawalt's analysis of campus speech codes, and more generally at his efforts to consider more closely the role that government is playing in each different free speech context, an idea that I liked and wished he had developed more fully. Finally, in Part III, I briefly examine his analysis of the "individuals" and "communities" that are included in the subtitle of his book and conclude—as I think Professor Greenawalt does himself—that they are, at best, of only modest use in considering free speech issues.

I

In discussing what is loosely characterized as "hate speech"—the pernicious and derogatory use of bigoted epithets or symbols—Professor Greenawalt begins, as he should, with "fighting words."[7] Greenawalt wants to expand the definition of "fighting words" so as to include words which are designed to humiliate and which would be an invitation to fight to the "average" person. Thus, even if racial taunts are slung towards small African-American children by large white adults, Greenawalt considers them "fighting words" through an "equalization of victim" principle.[8] Greenawalt's admitted purpose is to separate the "fighting words" doctrine from its roots as a First Amendment exception designed only to avoid actual violence, and to broaden it to include words that are intended to, and which generally do, inflict deep psychological hurt.

The "equalization of victim" principle sounds interesting, although, as Greenawalt concedes, it is inconsistent with the Supreme Court decision in *Gooding v. Wilson*,[9] and stretches the rationale for prohibiting this type of speech to the point where

7. Greenawalt characterizes "fighting words," in the traditional sense of words likely to incite violence, as part of a category outside the First Amendment he calls "situation-altering" communications—a useful category, even if I did not always agree with Greenawalt's application of it. Greenawalt, *Fighting Words* at 48 (cited in note 4). "Situation-altering" communications are more a commitment to action than an expression of facts or values. Thus, two people who agree to commit a crime have engaged in a situation-altering communication; even though the agreement may have been effected through spoken words, it has no First Amendment protection. Since Greenawalt likens "fighting words" to an invitation to a fight, he believes that they, too, are "situation-altering." Id.

8. Id. at 53.

9. 405 U.S. 518, 526, 528 (1972) (conviction based on Georgia statute proscribing "opprobrious words or abusive language" set aside; Georgia courts had unconstitutionally permitted the statute to be applied where there was no likelihood "that the person addressed would make an immediate violent response"). See Greenawalt, *Fighting Words* at 163 n.28 (cited in note 4).

placing it under the "fighting words" rubric is a bit misleading. Greenawalt also recognizes two more serious problems. First, the use of "hate speech" carries some expressive value with it, even if the "messages" are ones of racial or ethnic inferiority that most of us would find distasteful. Second, an "intent to humiliate" will frequently be difficult to discern, particularly if it must be the *sole* motivation for the speech.[10] Greenawalt suggests that we limit a civil prohibition to "targeted vilification," where the speaker has sought out the victim and initiated contact for the purpose of humiliation and insult, much like laws prohibiting harassing telephone calls.[11]

Of course, there is the little matter of *R.A.V. v. City of St. Paul*,[12] in which the Supreme Court unanimously held that a similar law did not pass Constitutional muster. A five-person majority held that, even assuming that the municipal ordinance in that case precluding the use of "hate speech" involved only "fighting words," it created improper distinctions between "fighting words" which discriminated on the basis of viewpoint (permitting minorities to yell "fascist" and "Nazi" at their enemies, but not allowing those yelled at to respond in kind) and content (not reaching other fighting words because they are not insults based on race, ethnicity, or another forbidden characteristic).[13] A four-person minority found the statute unconstitutional simply because it reached beyond the "fighting words" category to protected speech. As the foregoing discussion should make plain, however, Greenawalt simply disagrees with both groups of justices; with the minority because they do not have a sufficiently expansive notion of "fighting words," and with the majority for using "strict scrutiny" to assess a statute which reached words with little expressive value. The intent to vilify or "humiliate" a

10. Greenawalt, *Fighting Words* at 53 (cited in note 4) ("[L]ine-drawing problems are severe. The speaker's motives may be mixed, and separating an intent to humiliate from an honest but vulgar statement of views is often difficult.")

11. Greenawalt likens this proposed rule to the tort of intentional infliction of emotional distress, although that tort usually requires more than a mere intent to humiliate. Id. at 54-55. Indeed, Greenawalt suggests that a law prohibiting "targeted vilification" using epithets could both stand as "symbolic statements" to our values and perhaps relieve plaintiffs from establishing all of the elements of the more general tort. Id. at 47.

12. 505 U.S. 377 (1992).

13. Greenawalt suggests that "some abusive expressions hurt so generally in face-to-face conversations that they should be singled out," and specifically identifies racial and ethnic epithets and slurs as the best candidates. Greenawalt, *Fighting Words* at 55 (cited in note 4). This seems a far more complicated question than Greenawalt's discussion suggests. Some people, at least, might feel far more pain when their physical handicap, obesity, or intelligence are derided in abusive terms. If "hurtful words" are placed outside the First Amendment, a law which deals with a particular subset is liable to rely upon arbitrary line-drawing and to be underinclusive.

private citizen, according to Greenawalt, is sufficient to take speech outside of the carapace of the First Amendment.[14]

There is, of course, a rather obvious irony in a law professor suggesting that words spoken with an intent to humiliate are entitled to little or no Constitutional protection. Perhaps we should consider laws which focus on excesses in the use of Socratic dialogue and "targeted humiliation" within law schools. No doubt Greenawalt would state that such speech is different; it has a didactic purpose and, consequently, a public importance. I would agree. But that only reflects who Greenawalt and I (and, presumably, most of the readers of this review) are: people who would never use the kind of epithets that were the subject of the statute in St. Paul and who would be the target of a Greenawalt hypothetical statute, people who simply do not believe in the underlying messages that such epithets convey. On the other hand, people who would use such epithets—to, for example, "browbeat" minorities back towards their "proper" place of subservience in our country—might wonder why it is necessary to publicly humiliate law students in front of their classmates.

In short, our understanding of what is "valuable" speech (even with an intent to humiliate) tends to reflect our own backgrounds and values. And that is precisely the opposite of what a value-neutral First Amendment requires, and precisely why we employ categorical rules when analyzing regulations of speech. I do not mean to suggest that Professor Greenawalt is ultimately wrong with respect to his targeted vilification proposal; only that we must be very careful about adopting arguments that certain kinds of expression are less valuable than others.

Professor Greenawalt's discussion of workplace harassment also reflects his values. Although this is an area which has been well-trod by others,[15] Professor Greenawalt starts by posing the right choice: either the workplace setting provides support for censorship which the government does not otherwise possess, or workplace harassment rules are inconsistent with fundamental

14. Id. at 53-54.

15. See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481 (1991); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision In Sight*, 47 Rutgers L. Rev. 461 (1995); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 Rutgers L. Rev. 563 (1995); Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 Rutgers L. Rev. 579 (1995); Suzanne Sangree, *A Reply to Professors Volokh And Browne*, 47 Rutgers L. Rev. 595 (1995); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 Nw. U. L. Rev. 1009 (1996).

First Amendment freedoms. Moreover, he does a fairly good job of going through the various arguments that support the proposition that the government can censor speech in the workplace that it otherwise cannot. He, quite properly I think, rejects arguments based upon the special nature of the workplace, a "captive audience" rationale, or the suggestion that restrictions of workplace speech constitute a "time, place or manner" restriction.[16] He spends time discussing the possibility that speech itself can sometimes discriminate, although I do not think this constitutes a particularly difficult or significant problem.[17]

Ultimately, though, Professor Greenawalt relies primarily on another "low value" argument to support government regulation of workplace speech that is both crude and intended to demean or humiliate. Such speech—very much like his "targeted vilification" speech in discussing "hate speech"—is properly regulable, according to Greenawalt, with only a minimal showing of need by the government. But he goes further here and suggests that (1) repetitious, personally-directed speech in the face of a complaint by the recipient is punishable just as one might

16. Professor Greenawalt does employ "captive audience" analysis to justify regulation of a very specific problem, *viz.*, the situation where the recipient of directed, personal speech has told the speaker that (s)he prefers not to hear it. He appears to reject a "captive audience" analysis for overheard conversations, calendars on the wall, and other, more run-of-the-mill harassment situations. Greenawalt, *Fighting Words* at 86-87 (cited in note 4).

17. Professor Greenawalt's example of "speech that discriminates" is a supervisor telling a female employee that she should not apply for a job because it will not go to a woman. Id. at 84. While I think that Professor Greenawalt's characterization of such speech as "situation altering" is correct, it deserves mention that speech of this kind is usually treated by the courts as a form of commercial speech, both entitled to less protection in general and regulable when (like a prostitute's "speech" offering her services) it is related to an illegal activity. E.g., *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388 (1973) (sex-segregated want ads not protected by First Amendment where it relates to illegal sex discrimination in hiring); *Ragin v. The New York Times*, 923 F.2d 995, 1002-03 (2d Cir. 1991), cert. denied, 112 S. Ct. 81 (1991) (all-white advertisements sufficiently related to illegal housing sales to eliminate any First Amendment protection). Liability for the speech in Greenawalt's example, then, also could be justified on the ground that it is commercial speech related to an illegal commercial transaction (viz., a sexually-discriminatory promotion).

I have previously argued that the Supreme Court has not defined with sufficient specificity how commercial speech must "relate" to an illegal transaction for its First Amendment protection to disappear. See Michael E. Rosman, *Ambiguity and the First Amendment: Some Thoughts On All-White Advertising*, 61 Tenn. L. Rev. 289, 346 (1993). Using the broadest description the Court has used for this unprotected category—commercial speech that "concerns" an illegal transaction—one could argue that *other* kinds of workplace speech (e.g., sexist speech by an employer) might be commercial speech sufficiently related to an illegal commercial "transaction," viz., disparate treatment in a continuing employer-employee relationship. Personally, I think this is far too broad a conception for "commercial" speech, but it cannot be said that current Supreme Court doctrine on commercial speech eliminates this defense of regulating workplace speech.

punish the "speech" of someone on the street who refuses to honor a request by someone else to be left alone and (2) even crude speech not intended to humiliate or intimidate (like crude sexual innuendo or the display of pornography) should be regulated on a showing of something less than "compelling need" because it is "low value" speech.[18] I pass over the first situation because Greenawalt is probably right in his analysis, and wrong in suggesting that such situations constitute any significant portion of workplace harassment claims based upon speech.[19]

The second category (crude innuendo, pornographic calendars, and the like) warrants closer attention. Greenawalt very tentatively characterizes such speech as "low value,"[20] but it is far less clear than he suggests that the Supreme Court recognizes such a category. The Court occasionally has referred to the idea of low-value speech but, outside of the "fighting words" context, it has not upheld a content-based restriction of low-value speech, and it seems unlikely to do so after *R.A.V.*[21]

More importantly, the new "low value" category Greenawalt suggests raises two additional problems. First, as I have already mentioned, using concepts like "low value" speech is a dangerous thing. We have a grave tendency to identify modes of communication that *others* use as "low value," and the modes that we use as "high value."[22] Expressing sexual desire in a

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18. Greenawalt, *Fighting Words* at 87-88 (cited in note 4).

19. See Volokh, 39 UCLA L. Rev. at 1839 n.219 (cited in note 15).

20. He is not completely consistent. At first, he states that "[a] plausible claim of 'low value' speech for [crude] comments . . . must rest not alone on crudeness and offensiveness but on the purpose to demean." Greenawalt, *Fighting Words* at 88 (cited in note 4). Two pages later, however, he states that speech other than that designed to humiliate, including "[p]rovocative nude calendars" and "crude sexual innuendo" may also "be deemed of low value." Id. at 90. I take it that Greenawalt may have various levels of "low value" speech in mind, some of which require only a minimal showing of governmental need, and others of which require some middle-level scrutiny which Greenawalt does not define very well.

21. Greenawalt mentions two cases, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Greenawalt, *Fighting Words* at 104, 173 n.20 (cited in note 4). Both cases involved the zoning of adult movie theatres and, in each instance, the Court upheld restrictions not based upon the content of the communication, but rather based upon the "secondary effects" which the speech ostensibly involved. On the other hand, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court struck down an ordinance which precluded drive-in theatres from showing movies with nudity, the "low value" of such movies notwithstanding. Id. at 209 ("when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power").

22. See Volokh, 39 UCLA L. Rev. at 1856-57 (cited in note 15). In his most recent article, Professor Volokh notes the various occasions in which public art involving nudity, including a showing of Goya's *Naked Maja*, has been the basis of sexual harassment claims. Volokh, 90 Nw. U. L. Rev. at 1016 (cited in note 15). I submit that those who find

crude way (as opposed to a polite, refined, and repressed way) may or may not be less effective (a point on which I express no opinion), but it is hardly less expressive. Indeed, one would think quite the opposite. When we suggest that one form of communication is better than another, we are simply imposing our own upper-middle-class, elite-school values on Constitutional doctrine.[23]

Second, Professor Greenawalt has not really answered the question that he asked at the outset of his discussion on workplace harassment, *viz.*, why should protection of speech in the workplace be any less than protection outside of the workplace? He rejects the traditional justifications for a difference in treatment that most advocates of workplace harassment rules use. He believes targeted harassment, either through repetition or through an intent to humiliate, should be without protection in both the workplace and on the street. To the extent he believes that a lower level of scrutiny should apply to other kinds of "low value" speech, he seems to rely on a (somewhat questionable) "low value" doctrine used by the Court *outside* of the workplace. His unstated conclusion should be, I think, the other possibility he mentioned at the outset of his discussion: that "the law of workplace harassment is out-of-kilter with general First Amendment doctrine."[24]

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such claims distinguishable from sexual harassment claims based on pictures from *Playboy* and *Penthouse* are simply imposing their own personal conception of "art" on the law.

23. Cf. Robert H. Bork, *The Tempting Of America* 8, 130 (The Free Press, 1990); *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J. dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

24. Greenawalt, *Fighting Words* at 81 (cited in note 4). Greenawalt goes on to assert that even fully-protected speech can be considered as contributing to a hostile environment so long as there is other unprotected speech or conduct which also has contributed to that environment—*even if the unprotected speech or conduct alone would not have been sufficient to constitute a hostile environment.* Id. at 96. To say the least, I find this idea disturbing and wholly inconsistent with standard Supreme Court doctrine. If a state or federal employer, for example, were to base an adverse employment decision in part on unprotected speech or conduct, and in part on protected speech, it would have the burden of showing that it would have made the same decision without considering the protected speech. *Mt. Healthy Bd. Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Greenawalt offers no reason why the same standard should not apply to a federal or state law which covers both protected speech and other unprotected conduct or speech. Cf. *Street v. New York*, 394 U.S. 576, 587 (1969) ("we are still bound to reverse if the conviction could have been based upon *both* [defendant's] words and his act.") (emphasis in original); id. at 588 (reversal necessary "unless the record negates the possibility that the conviction was based on both alleged violations"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) ("While the State legitimately may impose damages for the consequences of violent con-

II

In regulating speech among and between citizens, either inside or outside the workplace, the government acts in its role as sovereign. In the modern age of expansive government, though, government has many roles aside from that of treating citizens *qua* citizens. Should the role the government plays affect its ability to restrict speech? Should the government that can put people in jail be more constrained than the government that sells advertising space[25] or the government that operates public high schools or the government that operates public universities?

At least in some cases, the Supreme Court certainly thinks so and has so held when government as employer restricts the speech of its employees.[26] Indeed, the fact that a government employee receives *any* protection for his speech from the First Amendment represents a step up from accepted doctrine in the nineteenth century, which was that government employees "may have a constitutional right to talk politics, but [they] ha[ve] no constitutional right to be [government employees]."[27] Today, to put the doctrine very roughly, a government employer can act in the same fashion that a typical and reasonable, viewpoint-neutral private employer would act.[28]

Greenawalt quite properly notes that when a government promulgates a campus speech code for its state-run universities, it is acting in a different role than when it promulgates statutes against "hate speech." Violation of rules against "hate speech" or "workplace harassment" can result in criminal penalties and civil damages, i.e., a restriction on one's freedom or a taking of one's property. Those who violate campus codes will simply have their status as students affected. Moreover, students at-

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duct, it may not award compensation for the consequences of nonviolent protected activity.").

25. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding general rule prohibiting political advertising); *Lebron v. National Railroad Passenger Corporation* (Amtrak), 69 F.3d 650 (2d Cir. 1995) (same).

26. *Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994) ("even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."). The Court noted that while citizens may have the right to wear a jacket in a courtroom which said "Fuck the draft," it "ha[s] never expressed doubt that a government employer may bar its employees from using [that] offensive utterance to members of the public, or to the people with whom they work." Id.

27. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

28. "Viewpoint-neutral," that is, with respect to things outside of its business. IBM need not be viewpoint-neutral about the future of computers, for example, and presumably might fire a Luddite employee publicly advocating their mass destruction. So, too, a governmental employer can fire an employee for speech which disrupts the workplace or undermines its mission.

tending state-operated public universities receive significant state subsidies for their education. If a state wishes to promote the "civic virtues" or civil discourse, it may have a reasonable interest in seeing that state monies are not used to undermine those goals.[29]

Thus, while it certainly cannot be said anymore that a student at a public university, who is punished for his speech, has a right to free speech, but no right to be a publicly-subsidized student, it does seem that the government's role as an educator is different than its role as sovereign. Certainly, this is true at the secondary school level.[30] And while universities and colleges usually do not have the same concern with the civic and moral development of their students as high schools do, I am unaware of any Constitutional principle which precludes them from taking *any* interest. Greenawalt notes that "what is right for Columbia or Stanford may not be right for Brigham Young or Liberty Baptist College;"[31] but the same is true of public universities. What is right for the University of South Carolina may not be right for the Citadel.[32] The few lower court cases that have considered campus speech codes cited free speech precedents wherein the government was acting in its role as sovereign, and did not give any special consideration to the government's role as educator.[33]

Professor Greenawalt suggests that "courts should look not only to the concept of government as regulator of citizens but

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29. *Rust v. Sullivan*, 500 U.S. 173 (1991).

30. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (school could constitutionally punish a student for making a tongue-in-cheek campaign speech at a school assembly). Greenawalt characterizes this decision as "highly questionable" (Greenawalt, *Fighting Words* at 59 (cited in note 4)), but I did not understand him to dispute the general proposition that high school students do not have the full panoply of free speech rights that citizens do.

31. Greenawalt, *Fighting Words* at 75 (cited in note 4).

32. Cf. *Parker v. Levy*, 417 U.S. 733, 758 (1974) (government given greater freedom to restrict speech of members of the armed services).

33. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); *UWM Post v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991). The Supreme Court, on occasion, also has given short shrift to any special role the State may have as educator. E.g., *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (enjoining the expulsion of a student who distributed a newspaper with a picture of a policeman raping the Statue of Liberty and the Goddess of Justice; "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'.").

Greenawalt is concerned about *R.A.V.* and its application to campus speech codes (Greenawalt, *Fighting Words* at 76 (cited in note 4)), but if the government's role as an employer permits it to fire employees who use racial epithets—and surely it does under some circumstances (see, e.g., *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986))—it is at least possible that the government's role as educator permits it to punish students who do so, despite *R.A.V.*

also to the concept of government as employer, in order to understand the proper relation of a state university to its students."[34] I would put it more simply: perhaps the courts should try to understand the unique role of the state as educator, and the particular mission that a particular state institution is trying to accomplish. If my rough shorthand description of what a government *qua* employer can do is correct, perhaps government *qua* public universities should be allowed to restrict speech to the same extent that a reasonable and typical, viewpoint-neutral private university with a similar mission would. This standard constrains government regulation of speech more than the government-as-employer standard would, although it might change over time as universities do; but it would not place public universities at a grave disadvantage in effecting their "missions" *viz à viz* private universities. At this time in our history, moreover, this standard, I believe, is not all that different from the resolution that Greenawalt reaches, which would permit campus speech codes to preclude directed verbal harassment of other students, but require the protection of honest expressions of opinion no matter how offensive.[35]

This would not save most modern campus speech codes. For the most part, they are *not* viewpoint-neutral and do *not* protect honest expressions of opinion. Moreover they are, in many instances, intolerably vague and overbroad. Indeed, perhaps the one common flaw in Greenawalt's analysis of both workplace harassment and campus speech codes is his failure to recognize this, and his insistence that instances in which protected expression is implicated by these rules are rare and unusual.[36] They are not. Indeed, with both Title VII and Title IX now permitting compensatory and punitive damages for the victims of harassment (as well as permitting attorneys' fees for the successful plaintiff; but not, in general, for the successful defendant), plaintiffs and their lawyers have every reason to push the harassment envelope.[37] Without any significant First Amendment

34. Greenawalt, *Fighting Words* at 98 (cited in note 4).

35. Id.

36. E.g., id. at 92.

37. Rick Meyer, *Boon For Lawyers (Letter To The Editor)*, Washington Post A26 (May 24, 1996) (noting increase of complaints to EEOC from 6,100 in 1990 to 15,549 in 1995, and noting that a significant legal change during that time was the passage of the Civil Rights Act of 1991). Cf. *DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995), cert. denied, 116 S. Ct. 473 (1995) (jury awards plaintiff $10,000 in compensatory damages and $50,000 in punitive damages for hostile environment created by articles written in union newsletter; judgment reversed on appeal).

limit on the size of that envelope, I have little doubt that they will.[38]

III

In his penultimate chapter, Professor Greenawalt discusses how a consideration of "communities" might affect Constitutional analysis of various important First Amendment issues. Unfortunately, Greenawalt finds it difficult to define what a community is and never quite explains why judges (as opposed to, for example, legislators) should be weighing these values.

Greenawalt insists that there are communities smaller than "all of society" or the "polity" which are deserving of our consideration and attention (although he specifically refuses to focus upon whether local levels of government might be, or represent, a "community").[39] He specifically cites cultural or religious groups that supply a strong sense of self-identification, like the Amish, but also wants to employ the term to include both units as small as families and collectives as large as "women."[40] It is a "functional" definition, he tells us, but the independent variables of this particular function remain murky.

Once we find a "community," what exactly should we do with it? If a men's club could prove that it was a "community," would that give it an extra claim to a right of association that permitted it to exclude women? Well, not exactly. Greenawalt concedes that "[n]ongovernmental associations may be contexts of unfairness, domination, even coercion," and agrees that intervention to rectify such unfairness "is often appropriate." But, on the other hand, that intervention must be "carefully calibrated to the kind of association that is involved" and "[s]ometimes the

38. Greenawalt concedes that the standards "are undoubtedly vague and open-ended," but nonetheless "about as precise as the subject allows." Id. I am unaware of any First Amendment doctrine which holds that vague laws are constitutional because clarity is impossible. In any event, the vagueness problem on college campuses is exacerbated far more than it needs to be by the haphazard and poorly conceived nature of most college judicial systems, in which decisions are often made by those ill-educated in harassment law and/or those favoring an interpretation of that law far broader than that established in the courts. The problems of vagueness and overbreadth has been well-documented by Professors Volokh and Browne. See Volokh, 39 UCLA L. Rev. at 1812 (cited in note 15); Browne, 52 Ohio St. L.J. at 502-03 (cited in note 15); Volokh, 90 Nw. U. L. Rev. at 1012-17 (cited in note 15). Professor Volokh's enumeration in the last-cited article demonstrates that the further development of harassment law has not diminished the vagueness problem.

39. Greenawalt, *Fighting Words* at 125-26 (cited in note 4).

40. Id. at 236-27, 131-33.

state must tolerate what most of its citizens deem to be unfair" in order to protect associational values.[41] Got that?

Things get no clearer when Greenawalt discusses specifics. The Court's decision in *Rust v. Sullivan*,[42] which upheld Department of Health regulations precluding doctors who received federal funding for family planning services from advising patients of abortion services, threatened the "community" of doctor and patient.[43] (Greenawalt does not mention the community of those who do not want their money spent to support abortions.) Although veterans may be a "community," their special interest in not having flags burned "should have little constitutional weight." Most colleges and workplaces are not communities in a "narrow" sense and, in any event, Greenawalt concedes that the arguments about communities do not provide simple answers when discussing abusive speech since it is not altogether clear that rules against such speech really benefit all or most minority groups, because individual members of such groups have been known to employ "abusive" speech to make their points.[44]

What Greenawalt does not discuss at all is the competence of the judiciary to analyze arguments about "communities." Surely, the courts can accept rational value-judgments made by other branches about communities. But it is less than clear that when an argument about, for example, the "community" of doctor and patient has been given no weight by a co-equal branch of government, that the judiciary should step in to make that argument. The judiciary does have some institutional competence, we hope, in understanding individual rights and interpreting the provisions of positive law which give substance to those individual rights. But it frequently has trouble doing even this, and Greenawalt's discussion of "communities" did not convince me that it is time for judges to branch out.

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The criticisms set forth in this review aside, Professor Greenawalt has written a readable, succinct book on the First Amendment issues that are of most concern to Americans today. Even where I disagreed with, or could not penetrate, his analysis, I found his discussion of relevant cases informative and enlightening, and his ability to tie together seemingly disparate strands of

41. Id.
42. 500 U.S. 173, 198-200 (1991).
43. Greenawalt, *Fighting Words* at 143-46 (cited in note 4).
44. Id.

First Amendment jurisprudence impressive. I plan to keep it handy as a ready reference.

THE CONSTITUTION AS POLITICAL STRUCTURE.

By Martin Redish.[1] New York: Oxford University Press. 1995. Pp. 229. Hardcover, $39.95.

Richard W. Murphy[2]

In *The Constitution as Political Structure*, Professor Martin Redish argues that the Supreme Court has ignored or mangled the Constitution's federalism and separation-of-powers requirements. He suggests that, contrary to the suggestions of some scholars, the Supreme Court has a duty to vigorously and consistently enforce these provisions for at least two reasons. First, the Court should enforce them because they are in the Constitution. If one values rule of law (and Professor Redish obviously does), then one should enforce the *whole* Constitution—it's cheating to pick favorite provisions. Second, he argues that the Constitution's structural provisions are a great bulwark against tyranny. To ignore them is to risk sliding down the slippery slope to loss of liberty.

In light of these reasons, Professor Redish contends the Supreme Court should: put real limits on the reach of Congress's Commerce Clause power (strongly foreshadowing the majority opinion of *United States v. Lopez*[3]) (p. 49-61); demolish the (mythical?) Dormant Commerce Clause (p. 63-98); abandon functionalist approaches to separation-of-powers in favor of a "pragmatic formalist" approach (p. 99-134); and adopt a "political commitment" approach that would put teeth (though, it turns out, not sharp ones) into the doctrine that the legislature cannot delegate legislative power (p. 135-61). Along the way, Professor Redish discusses the normative political theories that underlie the Constitution's structural provisions and offers quick critiques of competing scholarly views concerning their interpretation.

This book's greatest strength is its often devastating critique of the Court's federalism jurisprudence. Professor Redish per-

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3. 115 S. Ct. 1624 (1995).