

LIBERTY, EQUALITY, FRATERNITY: RECONCILING NATIONAL VALUES AND HUMAN RIGHTS

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The American Civil Liberties Union (ACLU), founded in 1920, works in fourteen different areas of civil rights and civil liberties.¹ For the past year, since the presidential election, we have been frantically busy because the Trump Administration is active in the same fourteen areas, only in the opposite direction. In recent speeches I have been called upon to talk about how we have fought against three iterations of an anti-Muslim travel ban, demonisation of minority ethnic groups such as Mexicans, unlawful attempts to prevent teenage girl refugees from exercising their right under federal and state law to have an abortion, and the transgender ban in the military, among many other areas of action. Many of the rights we are now fighting to preserve were hard-won through decades of litigation and public education. However, as ACLU founder Roger Baldwin liked to remark, no civil liberties battle ever stays won.

In this lecture, I want to take the opportunity to dig deeper and to talk about how the White House became a black hole for civil liberties and human rights, despite the fact that a majority of Americans disagree with many of the Administration's current or proposed policies, and that these policies frequently conflict with our vaunted fundamental values.

I will begin with the question of how a nation frames its fundamental values, and how the expression of those values shapes our national positions on human rights. How do we define our values, and how do we reconcile our values and our deeds when we are acting inconsistently with our aspirations?

Perhaps the most famous national credo is the French triumvirate of ideals: Liberty, Equality, and Fraternity. American articulations of values include our Pledge of Allegiance, which speaks of 'liberty and justice for all.' The Star-Spangled Banner, our national anthem, declaring the US to be 'the land of the free and the home of the brave', has been much in the news lately, as professional football players have knelt during this ritual display of patriotism in order to call attention to the disparity between our idealistic words and the reality of life for African-American men. The Declaration of Independence enshrined 'life, liberty, and the

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¹ These fourteen areas are divided among the ACLU's three centers.

- 1) The Center for Liberty works on LGBT & AIDS issues, reproductive freedom, women's rights, religious freedom, and disability rights.
- 2) The Center for Equality and Justice includes a National Prison Project, a Criminal Law Reform Project, a Racial Justice Program, and a project working against capital punishment in both theory and practice.
- 3) The Center for Democracy works on national security-related issues, speech, privacy and technology issues, voting rights, and immigrants' rights. This Center also contains a Human Rights Program which works to apply international law principles to any area of our domestic work.

The ACLU's mission does not include promoting human rights in other countries, although as part of an International Network of Civil Liberties Organisations (INCLO) we do work on parallel or common problems with peer groups in other countries, including Liberty in the UK and the Irish Council for Civil Liberties.

pursuit of happiness' alongside the assertion that 'all men are created equal.' The Constitution followed up by providing guarantees for many forms of liberty, from freedom of speech (in the First Amendment), to freedom from incarceration without due process (the Due Process Clause), to freedom from unreasonable searches and seizures (the Fourth Amendment). The American and French revolutionaries agreed on the primacy of liberty.

Neither the original Constitution nor the Bill of Rights, on the other hand, included any provisions guaranteeing or even mentioning equality. It was not until the nineteenth century, after the Civil War, that the Constitution was amended to include an Equal Protection Clause.

Nowhere in any American declarations of ideals is there any mention of fraternity.

I. AMERICAN LIBERTY

My first proposition is that, although what we say isn't always what we do, Americans are best at living up to the promise of respecting liberty.

The First Amendment to the US Constitution, in the 1791 Bill of Rights, puts liberty of conscience first and foremost: freedom to exercise one's chosen religious beliefs, followed by freedom of speech, assembly, and the press. This is a profound statement of the framers' understanding of the ideal relationship between the individual and the state. As Supreme Court Justice Robert Jackson once said, 'every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.'²

ACLU cases during the twentieth century played a major role in persuading the US Supreme Court to give teeth to the freedom of speech by protecting individual choices of expression against government orthodoxy. When the ACLU was founded in 1920, it was not uncommon for the government to punish people for dissenting speech. During World War I, the 1918 Sedition Act permitted the prosecution of individuals who spoke out in opposition to the war, the draft, or the form of government. American courts had not yet assumed responsibility for the implementation of the First Amendment by prohibiting the federal or state governments from 'separat[ing] the true from the false', or the patriotic from the unpatriotic. The ACLU and other organisations litigated many cases during the 1920s and the 1930s, seeking to promote judicial protection of the freedom of speech.

The success of this campaign is shown by the fact that the Court eventually became willing to defend actions state legislatures deemed unpatriotic, such as not showing respect for the American flag. In the 1943 case, *West Virginia State Board of Education v Barnette*,³ which was adjudicated during the height of American involvement in World War II, the Court declared that schoolchildren (Jehovah's Witnesses in that case) could not be punished for refusing to salute the flag. In the 1989 case of *Texas v Johnson*,⁴ the Supreme Court announced that any punishment against Gregory Lee Johnson for his burning of the American flag would be contrary to the First Amendment. Even though the Texas legislature and later Congress believed that a majority of Americans would be offended by this conduct, the Court declined to fetishise the flag and gave practical meaning to the principle that each member of the body politic must be the watchman of his or her own truth.

² *Thomas v Collins* 323 US 516, 545 (1945).

³ 319 US 624 (1943).

⁴ 491 US 397 (1989).

The recent events of the 2017 neo-Nazi protests in Charlottesville, Virginia, illustrate how fundamental the constitutional commitment to the freedom of speech is to most Americans. Charlottesville had rescinded a permit allowing white supremacists to demonstrate in front of a statue of Robert E Lee; the ACLU (despite disagreeing with the views of the demonstrators) argued that government officials cannot suppress speech simply because they do not approve of its content. The court reviewing the case agreed with the ACLU's position. American courts have rigorously interpreted the First Amendment to be content-neutral, in part out of fear of the potential slippery slope of censorship. One person's idea of hate speech (or flag desecration) is another person's idea of dissent. Hate speech laws, or censorship of extremist views, are therefore considered intolerable.

By way of contrast, very different attitudes towards hate speech prevail in France. French hate speech laws penalise 'insulting' an individual or group based on their race, gender, or sexual orientation, or for inviting discrimination against an individual or group. Thus, there are frequent instances of threatened or actual prosecutions for conduct like advocating for or against an anti-Israel boycott, for using racist epithets, or for calling someone a homophobe. This different attitude towards offensive speech is an example of the ideological potency of the French ideal of fraternity. The French government reserves the right to tell people what they can and cannot say where speech seems to threaten the inclusion of everyone in a fairly homogeneous community.

Another telling example of the difference between American and French values choices is the level of acceptance of expressions of religious identity in public. In the United States, the ACLU has often litigated and won the right of Muslim women, for example, to wear hijabs in public – as part of the liberty to choose and express one's religion. In France, the right to wear a hijab or the so-called burkini in public is contested. 'They must accept our way of life', said one French mayor about a ban on women wearing burkinis on the beach. It evidently is a higher value to be French, to be a member of the community, than to be one's own watchman in deciding how and where to express one's religious beliefs or other viewpoints.

The American preoccupation with liberty at the expense of community can have unfortunate consequences. The Supreme Court that treats First Amendment rights as beyond the limitation of government has also interpreted the Second Amendment as guaranteeing an individual right to bear arms. This makes it difficult (although not constitutionally impossible) for federal or state legislatures to pass reasonable gun control laws, even in the face of recent mass shootings in schools and other venues.

However, the privileging of liberty over other constitutional values has also facilitated the recognition of a right for individuals to make their own choices about their way of life. The Supreme Court's 2015 decision in *Obergefell v Hodges*,⁵ that there is a constitutional right to marry someone of the same sex, regardless of one's state's or neighbours' opinions, is the culmination of a line of cases declaring that government may not prohibit individuals from using contraceptives, having an abortion, or educating their children as they see fit. In many respects, Americans are now also the watchmen of their own morality.

The Trump Administration has been adopting policies that would cut back on some of these liberties, including reproductive freedom and the right to determine one's own sexual identity. The Administration has also spoken disparagingly of freedom of the press (referring to mainstream media as the 'enemy of the people') and the right to dissent. It is encouraging to note that a majority or supermajority of Americans disagree with many of the Administration's policies, pronouncements, and proposals as inconsistent with American values. However, what

⁵ 576 US __ (2015).

is less encouraging is that a minority of Americans have been able to bring into power people with views hostile to civil liberties.

The ACLU has turned to the courts in many instances where the Administration's actions have violated constitutional guarantees (including challenging the Muslim ban as violating the First Amendment's Establishment Clause). However, there is a limit to what courts can or will do in countering governmental actions, no matter how misguided or unpopular those actions are. The only effective antidote to an unpopular administration is regime change. But regime change is an uphill battle because our elected officials are not accountable to all, or even a majority, of the American people.

II. AMERICAN EQUALITY

How has it come to pass that the United States has an administration supported by only about 40 per cent of American voters?

The principal reason – and my second proposition – is that Americans are not as good at equality as they are at liberty. And it appears that it is difficult to preserve liberty in the face of democratic inequality.

Democratic Inequality

In contrast to their many provisions protecting liberty, neither the eighteenth-century Constitution nor the Bill of Rights provided any guarantee of equality. This is not surprising, as the framers and ratifiers of the Constitution were only a fraction of the population, and all (to my knowledge) white men. The vast majority of Americans – virtually all of the women, people of colour, and some men without sufficient property – were not afforded the right to vote in federal or state elections. In fact, a number of provisions of the Constitution were intentionally designed to make state electoral power unequal, often as part of the compromise over toleration of slavery.

The Constitution did not set out to create a democracy, where everyone would have equal voting power, but a republic. Powerful colonies, ceding part of their autonomy to the federal government, sought to maintain as much control as possible under the circumstances. Of the branches of the federal government, only the House of Representatives was to be elected by the voters (i.e., the small segment of the population entitled to vote). Each state was awarded two Senators, regardless of population, and the Senators for each state were chosen by the state legislatures (that selection authority was changed in 1913, when the Seventeenth Amendment provided for the popular election of Senators).

Article II provided that an Electoral College, not the voters, would select the President. Each state was awarded a number of electors equal to its delegation to Congress: its Representatives (whose number is determined by population – plus, under the original Constitution, three fifths of a state's enslaved population) plus two Senators. State legislatures were allowed to decide whether the legislature itself would appoint the state's electors or whether the state's voters would be invited to make that choice. All states ended up deciding to allow their voters to choose electors. State laws also required each elector to cast their vote for the winner of the state's popular vote, something the Constitution did not require.

Under this system, each voter in less populous states like Wyoming can have over three times as much voting power as a voter in a more populous state like California, because their state gets a base of three electors regardless of population. Much of this design, like the infamous Three Fifths Clause itself, was designed to appease the slave states, which were concerned that, because they did not allow so many residents of their states to vote, they could be outvoted by abolitionists and forced to end slavery.

The consequence of having the Presidential election depend on the number of states a candidate wins rather than the number of voters can be seen in a map of the 2016 presidential election. Donald Trump won a majority of states, including almost all of the states of the former Confederacy, where slavery had been an integral part of the economy. Hillary Clinton won the popular vote by some three million votes.

My article, ‘Can We Fire the Electoral College? Probably Not, But We Can Put It Under New Management’,⁶ sought to explain why, despite the problematic origins of the Electoral College, it seems politically impossible to democratise the vote for President. A constitutional amendment, which would be required to eliminate the Electoral College, must be approved by three-quarters of the states. States getting more than their equal share of power under the current system are unlikely to vote to change a system that benefits them. In other words, the inequity in the system is the very feature that prevents the inequity from being corrected.

In addition, the Constitution allowed states, as part of the compromise over the allocation of power, to control who gets to vote in federal as well as state elections, and how elections are to be conducted. This delegation of authority has allowed the states to put many thumbs on the scale to minimise the political power of the party not currently in control of the state government. In the current historical moment, Republicans control many more state governments than the Democrats and have frequently used their power to distort democracy – a practice which is just as problematic when Democrats in power try to minimise the Republican vote.

One of the most effective ways to prevent regime change in Congress is for states to draw their states’ congressional districts so as to maximise the power of the party currently in control. In North Carolina, for example, the voters of the state were fairly evenly split between the Democratic and Republican parties: the congressional delegation in 2012 was composed of seven Democrats and six Republicans. After Republicans took control of all branches of the state government, the district map was redrawn so manipulatively that in the 2016 election, the congressional delegation consisted of ten Republicans and three Democrats. Similar extreme gerrymandering, as the practice of designing result-oriented districts is known (after the infamous Elbridge Gerry), has taken place in Pennsylvania, Wisconsin, and other states. The Supreme Court heard arguments in *Gill v Whitford*,⁷ challenging this partisan rigging of elections as unconstitutional. We are awaiting the Court’s opinion but, even if the Court impose some limitation on this practice, it is unlikely that the courts will go so far as to ensure that districting will be nonpartisan.

If the United States were serious about democracy and making elected officials accountable to the people, it would, among other measures, declare Election Day to be a holiday, which might help to increase the low percentage of Americans who vote, especially in midterm

⁶ Susan Herman, ‘Can We Fire the Electoral College? Probably Not, But We Can Put It Under New Management’ (*Huffington Post*, 19 December 2016) <www.huffingtonpost.com/entry/can-we-fire-the-electoral-college-probably-not-but-we-can-put-it-under-new-management_us_585849dce4b08debb78a8b95?guccounter=1>accessed 25 June 2018.

⁷ 585 US __ (2018).

elections. In the 2014 midterm elections, less than 37 per cent of those eligible to vote actually voted.

Given the extent of electoral inequality and the prospect of additional voter suppression measures being adopted, it is difficult to characterise the United States as an effective democracy. The framers of the Constitution, who did not insist on or expect democratic equality, might also regard the current United States as an ineffective Republic, because political partisanship has led elected officials to consider themselves only accountable to their base – the party faithful they hope will reelect them – rather than to all Americans.

Racial Inequality

As I mentioned earlier, much of the democratic distortion in the original Constitution was the result of the accommodation of the institution of slavery. After the Civil War, the constitutional amendments of the Reconstruction Era changed some but not all of the provisions that previously enabled the existence of slavery.

The Thirteenth Amendment prohibited slavery; the Fourteenth Amendment declared the former slaves to be ‘persons’ and citizens, thus overriding the Three Fifths Clause. The Fifteenth Amendment prohibited the states from denying the vote to anyone on the basis of ‘race, color, or previous condition of servitude.’ However, the Jim Crow South developed many creative ways to neutralise these amendments and preserve the supremacy of white voters, even where they were in the minority in certain electoral districts. The Civil Rights Museum in Memphis, Tennessee, has a Wheel of Fortune showing some of the multitude of reasons prospective black voters in the Jim Crow South could not register to vote. ‘You underlined the answer to question number 4 instead of circling it’, ‘You fail to find the Registrar’s office, which changes location every month’, and ‘You are told your family will be evicted from your home if you register’ all feature prominently among these reasons.

The Constitution offered Congress the opportunity to enact federal legislation to prevent state campaigns of voter suppression. Congress did not use this power until 1965, when it adopted a historic Voting Rights Act which prohibited covered jurisdictions (those with a history of racial discrimination) from adopting measures restricting the right to vote without federal government pre-clearance. However, that legislation has been eviscerated by a 2013 Supreme Court decision⁸ requiring Congress to revise and update its list of covered jurisdictions – something that is not politically feasible at the present time. The Court expressed more concern about what it saw as unfairness directed at the states than about unfairness directed at prospective voters. Congress has never countered other state strategies for depressing the black vote. State felon disenfranchisement provisions, for example, strip the right to vote from a person who is convicted of a felony, in some cases permanently. These provisions, in statutes and state Constitutions, are largely an artifact of Reconstruction. Former Confederate states intentionally harnessed their racist criminal justice systems to suppress the non-white vote. Nation-wide, 6.1 million former felons cannot vote. One in every thirteen African-Americans is affected by this scheme, as opposed to one in every 56 of all Americans. The ACLU is working to amend the state Constitution to remove this discriminatory provision in Florida, an important swing state where 1.6 million people are disenfranchised.

In addition, states have increasingly used their power to regulate registration and voting procedures in a manner that significantly disempowers minority voters. In 2008, the most

⁸ *Shelby County v Holder* 570 US __ (2013).

diverse electorate in American history elected Barack Obama as President. Before the next presidential election, in 2011-12, states adopted 27 measures suppressing minority turnout: by eliminating same day registration, complicating registration procedures, closing Motor Vehicle Bureaus (a common venue for voter registration) in minority neighborhoods, ending early voting, and requiring state-issued voter identification credentials which make voter registration onerous for those who don't have a driver's license or passport.

The Supreme Court thus far has allowed the states to get away with the institution of these voter suppression tactics,⁹ even though the discriminatory impact of such measures is clear. A Wisconsin study showed that a strict voter ID law had deterred 11.2 per cent of the state's eligible voters from voting in 2016, although 80 percent of those voters had voted in the previous presidential election. Three times as many African-American and low-income registrants were deterred from voting.

On the federal level, President Trump announced in the face of all contrary evidence that he would have won the popular vote if not for (three million) fraudulently cast votes. The President created a 'Presidential Advisory Commission on Election Integrity' in a transparent attempt to provide a platform for encouraging further proliferation of purportedly anti-fraud state voter suppression laws and cutting back on federal statutes from 1993 (the National Voter Registration Act) and 2002 (the Help America Vote Act) that promoted expansive registration. Kris Kobach, who had a track record in his home state of Kansas of trying to suppress voter turnout and of losing lawsuits to the ACLU, was named co-head of the Commission. Beset with procedural and political problems, this commission has now been disbanded. However, the problem of result-oriented voter distortion remains.

One of the ACLU's current priorities, in litigation and lobbying as well as through the new People Power program enlisting volunteers around the country as part of the 'Let People Vote campaign', is to make American elections more equal and democratic. We have a long way to go.

Socioeconomic Inequality

The U.S. Constitution's silence about socioeconomic rights has bred severe economic inequality.

Charles Beard, in his well-known critique, *An Economic Interpretation of the Constitution of the United States*, argued that the framers prioritised protection of property to serve their own economic interests. The Fifth Amendment, for example, provides that private property cannot be taken for public use without just compensation.

By way of contrast, the Constitution of the Republic of South Africa articulates as a fundamental goal to 'improve the quality of life of all citizens and free the potential of each person.'¹⁰ While one may question whether South Africa is seriously attempting to meet that goal, its inclusion in the country's founding document is a significant statement of aspirational values against which governmental actions can be measured. The US Constitution contains no such statement.

Unlike some parliamentary systems, the United States does not provide guaranteed representation of different economic classes – like a House of Lords and a House of Commons.

⁹ *Crawford v Marion County Election Board* 553 US 181 (2008).

¹⁰ Constitution of the Republic of South Africa (1996).

The current administration contains quite a number of extraordinarily wealthy Cabinet officials – billionaires and mega-millionaires. Other Cabinet officials who are not themselves billionaires have been acting as if they were, lavishly spending taxpayer dollars on travel and other perquisites of office. The President himself has had extensive and intimate connections with great wealth, personally, through his business, and through his family and social circles.

According to recent federal data, the most affluent ten percent in the United States now own 77 per cent of the country's wealth. In an interesting recent book,¹¹ Professor Ganesh Sitaraman questioned whether the US Constitution can continue to operate as intended without a solid middle class. The lack of equality may threaten the potential of the Constitution to 'promote a more perfect union', in the words of its Preamble.

At the other end of the social ladder, the poor, like racial minorities, are victimised by inequitable criminal justice systems at the state and federal level. The ACLU has been challenging state laws that allow incarceration of people who are unable to immediately pay the entire amount of outstanding fines – the modern equivalent of debtors' prisons. Furthermore, current federal policy, including the recent tax law revision, seems intent on rolling back the economic safety net and worker protections, while favoring the interests of the wealthy and big business. When the island of Puerto Rico was suffering devastating hurricane damage, the President initially declined to suspend the provisions of a law that prohibited non-American ships from ferrying goods between American ports. A prompt suspension would have helped speed food, medicine, fuel, and building supplies to the island. The President's reason for his delay was that people in the US shipping business did not favor even a temporary suspension of their monopoly.

Attitudes about treatment of the poor, like attitudes about racial equality, tend to correlate with political affiliation. A majority of Americans, aligned with the Democratic Party in this instance, would preserve the social safety net and seek to promote greater economic and racial equality. However, people with generally opposing viewpoints, even though they are in the minority, are in power in the White House and Congress, as well as in most of the states.

III. AMERICAN FRATERNITY

I realise that my portrait of America today has been a discouraging one. The United States of America is not a true democracy. The current federal government and the governments of most states are putting some of our most valued liberties at risk and those governments don't act as if they believe in equality. Due to our manipulable electoral systems, political accountability and regime change can only be achieved through a supermajority.

The good news is that mobilising that supermajority may be possible. This is because it now seems that Americans do believe in a form of fraternity. The American version of fraternity is not focused on homogeneity, but on mutual support and toleration of difference.

When the President's travel ban first went into effect, thousands of Americans – including many lawyers – spontaneously showed up at airports across the country to protest the policy, and offer their support to beleaguered immigrants. Businesses and individuals have protested the President's demonising of Muslims, Mexicans, and immigrants by posting signs saying, 'All are welcome here', or 'I love my Muslim neighbors'.

¹¹ Ganesh Sitaraman, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* (Alfred A Knopf 2017).

Many organisations and companies joined the efforts of the ACLU and other organisations (and a number of states) to have the travel ban declared unconstitutional. One of the plaintiffs in an ACLU challenge to the travel ban was the Hebrew Immigrant Aid Society (HIAS), which was formed in 1881 to help Jews escaping European pogroms. HIAS President Mark Hetfield said, 'We cannot remain silent as Muslim refugees are turned away just for being Muslim, just as we could not stand idly by when the U.S. turned away Jewish refugees fleeing Germany during the 1930s and 40s.' Japanese-Americans have urged Americans not to forget the lessons that should have been drawn from the cruel and unnecessary internment of their ancestors during World War II. Hundreds of Christian evangelical leaders from all over the country called on the President to support refugees. About a hundred businesses, including many of the largest tech companies from Apple to Zynga, joined in filing a brief opposing the travel ban. Muslim activists raised money online to help restore a vandalised Jewish cemetery in St. Louis, Missouri.

Artists of all genres have entered the battle for our fundamental values. New York's Museum of Modern Art mounted a special show featuring works by artists from the countries listed in the travel ban. A twelve-year old cartoonist named Sasha Matthews raised over \$11,000 for the ACLU by drawing 'Everyday Superhero Caricatures' on commission. Lin Manuel Miranda, in the musical Hamilton, created a re-vision of the founding brothers of the United States of America as a multi-ethnic, multi-cultural group of immigrants, 'young, scrappy, and hungry.' In the original cast, Alexander Hamilton was played by a Puerto Rican actor (Miranda himself); George Washington and Thomas Jefferson by African-American actors. The line consistently getting the most applause, at least on Broadway, was Hamilton and the Marquis de Lafayette remarking, 'Immigrants – we get the job done.'

I think it is on acceptance of this heterogeneous version of American fraternity that the future of civil liberties and human rights, at least in the United States, will depend. We are not likely to break the hold of political hyper-partisanship without embracing some form of fraternity – or what the framers of the Constitution called 'civic virtue': valuing the good of all over one's individual interests.

As much as we value our liberty, liberty cannot be our sole value. Just because individuals have a constitutional right to express racist sentiments, for example, does not mean that they should. Empathy should lead individuals to forego the epithet, and to tolerate expression of even unfamiliar religions in the public square.

That cannot happen unless we define our fundamental values to include a value other than liberty and elusive equality. Including an aspiration to tolerance, to empathy, to civic virtue, in our pantheon of fundamental values can offer us a way to stop regarding equality as the enemy of liberty in a zero sum game.

Perhaps the lesson here is that the French are right, and we cannot hope to have both liberty and equality without fraternity.