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Recommended Citation

Allen Kamp, Vertical Flip, 13 Tex. Wesleyan L. Rev. 729 (2007).

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VERTICAL FLIP

Allen Kamp

This article grew out of my ongoing attempt to understand conservative ideology. Thinking about the topic for the 2006 Gloucester conference, I remembered William F. Buckley, Jr.'s *Up from Liberalism*¹ (1959) and simultaneously thought of a function on my Adobe Photoshop, the "Flip." (The "Flip" produces a mirror image of your photo, either vertically or horizontally.) It struck me that Buckley's *Up from Liberalism* equated liberalism with slavery. In it, he describes the conservative as a slave to liberal hegemony: liberal society is an "engine for the imposition of liberal orthodoxy." In an essay, "Why Don't We Complain," (1961, reprinted in *Miles Gone By*²), he describes the situation of the American citizen as one of helplessness:

Our notorious political apathy is a related phenomenon. Every year, whether the Republican or the Democratic Party is in office more and more power drains away from the individual to feed vast reservoirs in far-off places; and we have less and less say about those decisions which shape our future. From this alienation of personal power comes the sense of resignation with which we accept the political dispensations of a powerful government whose hold up to us continues to increase.³

But the first three chapters of his "literary autobiography," *Miles Gone By* (2004), describing his life as an adolescent, hardly seem to be about one oppressed and exploited. He describes sailing, races on his own sailboat;⁴ horse shows, plunging into the pool after galloping through the estate's woods; private music lessons; and being tutored at home. This idyll was punctuated by one year at an English boarding school.⁵

He typifies himself and those like him as oppressed by the liberal regime, with their power draining away and his wealth being robbed by the state is a "vertical flip." The privileged are transformed into the oppressed.

Buckley's "vertical flip" is not unique; it is a rhetorical devise used in several, often surprising contexts, ranging from affirmative action to abortion. Equating an opponent's position with slavery demonizes the position; it is rhetoric that has gone ballistic.

1. WILLIAM F. BUCKLEY, JR., *UP FROM LIBERALISM* (1959).

2. WILLIAM F. BUCKLEY, JR., *MILES GONE BY: A LITERARY AUTOBIOGRAPHY* (2004).

3. *Id.* at 564.

4. *Id.* at 13.

5. *Id.* at 3-35.

I. RHETORICAL INSTANCES

A. *Affirmative Action*

The device is used most often in the context of affirmative action, which is seen as not helping disadvantaged groups but as enslaving them or, in the case of African Americans, re-enslaving them. We see this in Justice Thomas's concurring opinion in *Adarand Constructors, Inc. v. Pena*,⁶ in which he states that affirmative action programs "not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society."⁷

The earliest use of the device that I have found is *Yick Wo v. Hopkins*.⁸ The City and the County of San Francisco had required laundries to be built of brick and stone. Chinese owned laundries were the only laundries not made of brick and stone, and thus the ordinance had what we call today a disparate impact. The Court held that the laws prevented the laundry owners from earning a living, which was the usage of slavery.

For the very idea that one man may be compelled to hold his life, or the means of living, or any material is essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.⁹

Later, in *Grutter*, Justice Thomas begins his dissent from the Court's validation of the affirmative action progress of the Michigan Law School by quoting Frederick Douglass.¹⁰ The practical import of the program was to boost minorities in the entering class about 10% higher than under a race blind scenario.¹¹ With an entering class of about 350,¹² this yields an immensely small number of students. This modest result is then equated with racism, which is demeaning to us all, and violates the Equal Protection Clause.¹³ Justice Scalia sees minority businesses' set asides as the source of racial discrimination "which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin."¹⁴

6. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995).

7. *Id.*

8. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

9. *Id.* at 370.

10. *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part).

11. *Id.* at 320.

12. *Id.* at 313.

13. *Id.* at 353 (Thomas, J., concurring in part and dissenting in part).

14. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1988); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990).

B. *Economic Regulation*

We have seen how Buckley equated taxation with robbery; similarly, Justice Janice Rogers Brown speaks of the deprivation of economic liberty in “A Whiter Shade of Pale.”¹⁵

In *Up From Liberalism*, Buckley states that he would prefer to live under a regime that had economic liberty rather than without political freedom rather than the reverse.¹⁶ Justice Brown starts by equating true “conservatives” with an endangered species or prisoners in a gulag:

There are so few *true* conservatives left in America that we probably should be included on the endangered species list. That would serve two purposes: Demonstrating the great compassion of our government and relegating us to some remote wetlands habitat where — out of sight and out of mind — we will cease being a dissonance in collectivist concerto of the liberal body politic. In truth they need not banish us to the gulag.¹⁷

Big government, centrally planned economics, the collectivist impulse has led to slavery:

Writing 50 years ago, F.A. Hayek warned us that a centrally planned economy is “The Road to Serfdom.” He was right, of course; but the intervening years have shown us that there are many other roads to serfdom. In fact, it now appears that human nature is so constituted that, as in the days of empire all roads led to Rome; in the heyday of liberal democracy, all roads lead to slavery. And we no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is *the* opiate. The drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens.¹⁸

Justice Brown describes American constitutionalism as being diverted into collectivism and away from the protection of property rights:

Protection of property was a major casualty of the Revolution of 1937. The paradigmatic case, written by that premiere constitutional operative, William O. Douglas, is *Williamson v. Lee Optical*. The Court drew a line between personal rights and property rights or economic interests, and applied two different constitutional tests. Rights were reordered and property acquired a second class status.¹⁹

15. Janice Rogers Brown, Assoc. Justice, Cal. Supreme Court, “A Whiter Shade of Pale”: Sense and Nonsense—The Pursuit of Perfection in Law and Politics, Address Before the Federalist Society, University of Chicago Law School (April 20, 2000), available at http://www.constitution.org/col/jrb/00420_jrb_fedsoc.htm.

16. BUCKLEY, *supra* note 1, at 179.

17. Brown, *supra* note 15.

18. *Id.*

19. *Id.*

The situation is comparable to that of an airplane captain blown out of the cockpit, held only by his feet that were inside the plane:

We find ourselves, like the captain, in a situation that is hopeless but not yet desperate. The arcs of history, culture, philosophy, and science all seem to be converging on this temporal instant. Familiar arrangements are coming apart; valuable things are torn from our hands, snatched away by the decompression of our fragile ark of culture. But, it is too soon to despair. The collapse of the old system may be the crucible of a new vision. We must get a grip on what we can and hold on. Hold on with all the energy and imagination and ferocity we possess. Hold on even while we accept the darkness. We know not what miracles may happen; what heroic possibilities exist. We may be only moments away from new dawn.²⁰

Justice Brown interpreted a case arising under California Proposition 209, the initiative that banned preferences in California.²¹ Her opinion invalidated a state program that encouraged participation by minority business enterprise in a public works programs. Her opinion starts with a recounting of *Dred Scott* and goes on to give a brief history of law and race from the Civil War through *Brown*.²² Originally courts enforced laws against discrimination, but then a change occurred and the law moved away from equal opportunity to entitlement: Our own decisional law has mirrored this change in focus from protection of equal opportunity for all individuals to entitlement based on group presentation.²³

Brown equates this “prevailing social norm” of “proportional group representation” with the “laws antedating, The Civil Rights Act, when government could legally classify according to race.”²⁴ In Proposition 209, according to her, the voters intended to reinstitute the interpretation of the Civil Rights Act and equal protection that predated “. . . such cases as *Weber*.”²⁵ Thus Proposition 209 goes back to the original teachings of the Fourteenth Amendment, which reversed the slave-based decision of *Dred Scott*.

C. *The Second Amendment*

The rhetoric of slavery is also found in the unlikely area of the Second Amendment, where those advocating an unrestricted individual right to bear arms and those in favor of regulation each characterizes their opponents' position as pro-slavery.

20. *Id.*

21. CAL. CONST. art. I, § 31.

22. *Hi Voltage Wire Works, Inv. v. City of San Jose*, 12 P.3d 1068, 1073 (Cal. 2000) (citing *Dred Scott v. Sandford*, 60 U.S. 393 (1856)); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

23. *Id.* at 1079.

24. *Id.*

25. *Id.* at 1103 (citing *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979)).

Professor David C. Williams argues that one of the amendment's main purposes was to control slaves.²⁶ The Southern States wanted to maintain the militia for purposes of slave control.²⁷ American law based gun control on race: "White citizens, whatever their class or religious status, had a right and usually a duty to be armed, but African-Americans enjoyed only a limited right to keep guns. The reasons for this change are clear. As America was becoming a society deeply divided by race, white Americans felt threatened by Native Americans on their borders and black slaves in their midst."²⁸

Professor Williams sees the Second Amendment "as an icon of the imperial expansion of northern European culture."²⁹ "Americans, in other words, came to love guns through hating Indians. Later, these same militias became instruments of slave control."³⁰

Supporters of reading the Second Amendment to guarantee an individual's right to bear arms also use slavery rhetoric to support their cause. Professors Robert T. Cottrol and Raymond T. Diamond argue that control of guns was a means of racial oppression.³¹ "To forestall the possibility that free blacks would rebel either on their own or with slaves, the southern states limited not only the right of slaves, but also the right of free blacks, to bear arms."³² After the Civil War, the southern states passed the "black codes" in order to maintain control over the former slaves, prohibiting "blacks from carrying firearms without licenses."³³ In the twentieth century, many blacks used firearms to protect themselves from race riots and lynching.³⁴ The authors conclude from their history of white racism's disarming of blacks that individuals should have a right to self-protection:

The history of blacks, firearms regulations, and the right to bear arms should cause us to ask new questions regarding the Second Amendment. These questions will pose problems both for advocates of stricter gun controls and for those who argue against them. Much of the contemporary crime that concerns American is in poor black neighborhoods and a case can be made that greater firearms restrictions might alleviate this tragedy. But another, perhaps stronger case can be made that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them. Perhaps a re-examination of this history can lead us to a modern realization of what the framers of the Second Amendment under-

26. David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387 (1999).

27. *Id.* at 512.

28. *Id.* at 450.

29. *Id.* at 469.

30. *Id.*

31. Robert T. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

32. *Id.* at 336.

33. *Id.* at 344.

34. *Id.* at 349-59.

stood: that it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also a civil right.³⁵

D. *Anti-Abortion Speech*

In yet another area, Professor Lynn D. Wardle likens anti-abortion speech to that of abolitionists and the attempts to restrict that speech to the effort to suppress abolitionist speech:

This article reviews some of the major consequences of *Roe* for American law, our legal system, and also for our society. The primary focus is up on the growing threat to First Amendment values, the dwindling free speech rights of anti-abortion protesters, and a remarkably similar historical episode in which the free speech rights of an unpopular, agitating, moralistic minority were seriously restricted by the federal government and many states. . . . The thesis of this Article is that we face another crisis in the current history of the First Amendment like that presented by the efforts to suppress anti-slavery speech 150 years ago, and that officials who control our legal institutions, especially our courts, need to take to heart the lessons from the abolitionists' experience about the crucial importance of protecting the rights of expression of unpopular political activists.³⁶

Once again, we see the ubiquity and the power of the comparison. Whatever one's position is, it comparable to those opposing slavery, and one's adversaries are therefore essentially pro-slavery.

E. *Gay Marriage*

Professor Katherine M. Franke uses the slavery argument to critique the battle for gay marriage.³⁷ Drawing a parallel to the experiences of liberated blacks, she describes the social controls put on freed slaves. She argues that there is something wrong with marriage:

I want to interrogate a paradox lurking in virtually all modern civil rights movements. The struggles of abject groups to emerge from the obscurity of the legal margins into the mainstream of civil society often materialized through demands for legal recognition by the state, and inclusion in the dominant legal and political institutions of society. Marriage is a good example, but surely not the only one. Ignored in these struggles is the degree to which these institutions are highly regulatory in nature: They are the sites in which the state is actively involved in creating social and legal statuses for both men and women in highly raced and gendered terms. Thus, an institution like marriage accomplishes a kind of colonialism by domesticating more 'primitive' sexuality. Insofar as "sexuality . . . provides the principle [sic] categories for a strategic transformation of behav-

35. *Id.* at 361.

36. Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 855-56 (1999).

37. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 253 (1999).

ior into manipulable [sic] “characterdogical” types,” husbands and wives—the primary adult units of civilized society—are the product of this cultural positioning.³⁸

She recounts how “the robust enforcer of bigamy, fornication, and adultery laws served to domesticate African-American people” and make them conform “to the dictates of positive marriage laws.”³⁹ Thus a rights-based strategy is problematic: “we should appreciate the inherent complexities that lie in such strategies.”⁴⁰

F. *What It's Not*

Finally, we have an example of the non-application of slavery rhetoric to a legal problem. Justice Brown, dissenting in *Stevenson v. Sup. Ct.*,⁴¹ (finding a common law cause of action for age discrimination), argued that age was not equivalent to race: “discrimination based on age is *not*, however, like race and sex discrimination.” It does not mark its victim with a “stigma of inferiority and second class citizenship;” it is the unavoidable consequence of that universal leveler—time.⁴² Old people do not have a history of being purposefully discriminated against or being subject to stereotyping, it is not a status one is locked into at birth.⁴³ Thus age deserves no common law protection.

II. AN EVALUATION

As we have seen, the rhetorical characterization of one’s opponents’ position as being tantamount to slavery is ubiquitous, found in fields as diverse as affirmative action and gun control. It crops up everywhere—a recent example is Representative Sensenbrenner, who equated employers hiring illegal aliens with nineteenth-century slave masters.⁴⁴ Even so, it is not an ordinary legal argument. It is not an argument from authority; it relies on neither case law nor statute. It is not the usual logic-based argument relying on such traditional legal policies as “between two innocents he who caused the damage should pay” or “no liability without fault.”⁴⁵

It is a “social welfare argument,” but it is one taken to such an extreme that is almost unrecognizable as such. Kennedy gives as an example of such an argument, “immunity will discourage the plaintiff’s

38. *Id.* at 254.

39. *Id.* at 256–57.

40. *Id.* at 308.

41. *Stevenson v. Superior Court*, 941 P.2d 1157, 1176 (Cal. 1997) (Brown, J., dissenting).

42. *Id.* at 1187.

43. *Id.* at 1188.

44. *Face the Nation* (CBS television broadcast May 28, 2006).

45. Duncan Kennedy, *A Semiotics of Legal Argument*, 42 *Syracuse L. Rev.* 75, (1991).

desirable activity.”⁴⁶ Saying that the opposing view leads to slavery, however, is saying that the behavior will destroy social welfare.

It is an extreme form of “flipping,” the claiming that the central idea of your opponent’s argument actually leads to the opposite result from the one she proposes.⁴⁷ (E.g., Reverse unequal bargaining power: interfering with freedom of contract will lead to pass-through of the cost and impoverish the people you are trying to help.)

Thus affirmative action, far from helping blacks, will reinstate slavery, and taxation of the wealthy does not re-distribute income from those most able to pay, but rather it robs them. Liberalism does not further human freedom; instead it enchains the mind and makes slaves of citizens.

It is an argument that has gone ballistic. By labeling the end product of the foe’s position as slavery, it creates a picture of ruthless exploitation, based on killing and torture, a denial of humanity, a world of horror. The opponent’s position is not just mistaken, not just logically wrong, or based on a misreading of case or statutory law, but it is part of an ideology of evil.

There are a few things wrong with this argument. One is that it is a no-brainer: find some analogies or similarities between your opponent’s position and slavery, embellish with a quote from Frederick Douglass, and you’re off to the races.

It is also an exaggeration. Let’s say that given an admission system based on LSATs, a law school would admit ninety whites and ten minorities. With “affirmative action,” it will be ninety whites and ten minorities. There may be policy, legal, and constitutional problems with the “affirmative action plan,” but it is hardly recreating the socio-economic system of the Antebellum South.

Lastly, and most importantly, it does not advance the ball in terms of understanding, negotiation, and compromise, the functions of free debate and argument. One side is righteous and the other evil. This rhetorical choice has been effective but works only to divide society.

46. *Id.* at 79.

47. *Id.* at 87.