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LIMITS ON SCIENTIFIC EXPRESSION AND THE SCOPE OF FIRST AMENDMENT VALUES: A COMMENT ON PROFESSOR KAMENSHINE'S ANALYSIS

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I. INTRODUCTION: FASHIONING THE BURDEN OF PRODUCTION IN FIRST AMENDMENT ANALYSIS

As in most cases in which free speech interests must be reconciled with competing societal concerns, governmental regulation of scientific expression may be resolved by means of one of three basic analytical models. Initially, once we have conceptually categorized the subject of regulation as "speech" falling within the protection of the first amendment, we might focus exclusively on the nature and intensity of the asserted governmental interest for regulating the expression. Under this model, we take the value of the expression as a given, and decide whether we will demand that the justification for regulation meet a "compelling interest" test, how that concept is to be defined, and whether we will fashion our constitutional analysis of regulation in an ad hoc fashion or by means of a less flexible categorical approach.¹ Secondly, we might blend our analysis of governmental justification and expressive value. In other words, we could first demand that the governmental interest reach a threshold level of substantiality, and then shift the burden of production to the speaker, requiring a showing of the value served by the regulated expression. Under this analysis, the two competing interests would be matched in a proportional manner: the more compelling the governmental interest, the greater must be the value of the speech to invalidate the regulation. Finally, we could place the initial burden of production on the speaker: unless and until it is determined that the challenged expression serves

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1. See M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 119-20, 193-201 (1984); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975):

some or all of a set of narrowly defined categories of first amendment values, we will not even ask the government to explain its justification, with the possible exception of a demonstration that the regulation is not totally irrational.

In his Article in this symposium considering the constitutionality of limitations on scientific and technological expression,² Professor Robert Kamenshine appears, if only implicitly, to adopt the third mode of constitutional analysis. Not once in his article does Professor Kamenshine ever seriously examine the specific nature of possible governmental justifications for regulating scientific or technological expression. Instead, the overwhelming portion of his intellectual energy is devoted to a detailed analysis of such speech in terms first of three conceivable first amendment values—self-governance, marketplace of ideas and self-fulfillment³—and then in terms of his “alternative” theoretical analysis, which focuses upon “the legitimate role of government toward the mind of each individual.”⁴

Such a mode of constitutional analysis effectively stands the first amendment on its head, in total disregard of the amendment’s strongly protective language⁵ and the fundamental role that free expression was designed to play in American society. Not surprisingly, Professor Kamenshine’s analysis leads him to a grossly underprotective result: communication that looks like speech, smells like speech, and tastes like speech, is effectively treated as if it is not speech at all; in most cases, according to Professor Kamenshine, regulation of scientific and technological communication “should be reviewed as ordinary regulations of liberty under a standard requiring only a rational relationship to a legitimate governmental objective.”⁶ It is only where scientific and technological speech is regulated with the purpose or effect of skewing debate on public policy issues that the regulations must be subjected to strict

2. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863 (1985).

3. *Id.* at 867-73.

4. *Id.* at 876-81.

5. “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” U.S. CONST. *amend* 1.

6. Kamenshine, *supra* note 2, at 876.

review.⁷ Professor Kamenshine reaches this conclusion, despite the facts that scientific inquiry and expression are, in every intuitive sense, easily categorized as protected speech, and that whatever important governmental interests that may exist could most likely be accommodated by a traditional first amendment “compelling interest” standard.

Even if one were to accept Professor Kamenshine’s decision to place the initial burden of production on the speaker, one still need not accept his underprotective conclusion. For in making his initial examination of scientific and technological expression in terms of the list of first amendment values as he sees them, Professor Kamenshine engages in several logical fallacies, discussion of which forms the basis for the remainder of this commentary. Briefly, these fallacies are the following:

1. Professor Kamenshine incorrectly assumes that the goal of avoiding governmental control of the individual’s mind exhausts the interests the first amendment should be thought to serve.
2. He fails to explain why scientific expression having an impact on public policy is deemed to be more worthy of first amendment protection than similar expression that does not have such an impact.
3. Even if one were to assume that speech having an impact upon public policy is somehow more worthy of first amendment protection, he has failed to provide an operational or functional definition of the concept of “public policy.”
4. Even if one were to assume that speech related to matters of “public policy” is more valuable, he has failed to explain why the determination of which factors are important to issues of public policy is to be made by an organ of the government, rather than by members of the public themselves.

In addition to these four criticisms of Professor Kamenshine’s analysis, I will also discuss an additional theoretical obstacle to a proper understanding of the role of the first amendment in monitoring regulation of scientific expression—one which Professor Kamenshine describes but does not openly endorse. This is the

7. *Id.* at 879-81.

view that scientific expression disseminated in a commercial context or for commercial motives is to be treated as less protected "commercial speech."

II. VIEWPOINT REGULATION AND FIRST AMENDMENT THEORY: AVOIDING THE "NECESSARY-SUFFICIENT" FALLACY

Though Professor Kamenshine appears to recognize the relevance to first amendment theory of several traditionally recognized first amendment values,⁸ his central theoretical assumption is that "it is almost always invalid for the government either as an end in itself or as a means to an end, to shape the public's thinking by regulating communication. . . . The business of government does not include using its regulatory power to shape a political viewpoint."⁹ This theoretical assumption leads Professor Kamenshine to the logical conclusion that if government regulates expression for some reason unrelated to the desire to control the individual's mind, for example, for the purpose of protecting national security, first amendment interests are generally not implicated.¹⁰

Professor Kamenshine never explains why he believes avoidance of governmental control of the mind is central to the first amendment. He apparently believes he can avoid this task, simply by describing his claim as a "premise."¹¹ But it is not difficult to understand why governmental attempts to control the individual's mind by regulating the expression of particular viewpoints would be thought to violate the first amendment: governmental control of the individual's mind violates the principle of individual integrity and free will that the concept of individual self-realization—itsself inherent in the structure of the first amendment and modern liberal democratic theory—dictates.¹² The first amendment stands as a barrier between the individual and government; it is therefore not surprising that it prohibits governmental interference with the individual's mental processes.

8. Kamenshine, *supra* note 2, at 867.

9. *Id.* at 876.

10. *Id.*

11. *Id.*

12. See M. REDISH, *supra* note 1, at 19-26; Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 103 (1978).

To the extent that Professor Kamenshine employs his premise for purposes of inclusion, then, no first amendment scholar could have serious quarrel with his position. However, to the extent that Professor Kamenshine employs his premise to exclude from effective first amendment protection all expression regulated for some noncensorial purpose, his analysis suffers from what can only be described as the "necessary-sufficient" fallacy.¹³ At most, all Professor Kamenshine has established is that a censorial purpose for governmental regulation is a "sufficient" condition for first amendment invalidation; he has not logically established that a censorial purpose is a "necessary" condition for such invalidation. The point is that grounds wholly apart from censorial governmental motivation may exist for invalidating governmental regulation of expression. Indeed, as I have argued in greater detail elsewhere,¹⁴ whatever values are served by protecting free expression are undermined by the end *result* of a limitation on expression, regardless of the purpose for the governmental regulation. To be sure, if the asserted governmental justification establishes a truly compelling interest, regulation of expression may be constitutionally permissible, notwithstanding a negative impact on expression. But this no way frees such noncensorial regulations from the strict scrutiny of the first amendment. For example, an ordinance prohibiting anyone from saying anything about anything, in order to preserve the quiet of the neighborhood, surely undermines first amendment values, despite the absence of a censorial motivation for the regulation.

In his oral comments at this symposium, Professor Frederick Schauer argued that the dichotomy in the level of first amendment protection is more appropriately viewed as one between governmental regulations aimed directly at the communicative impact of expression and those aimed at noncommunicative factors but having an incidental impact on expression. He suggested that only the former truly undermines first amendment interests.

This dichotomy represents a significant modification of the traditional "content-based/content-neutral" division; regulations aimed directly at communicative impact may be unconcerned with

13. See generally M. REDISH, *supra* note 1, at 102-14.

14. *Id.*

the content, or viewpoint, being regulated. For example, the hypothetical ordinance prohibiting all expression at all times¹⁵ would be subjected only to limited scrutiny under the content distinction, yet presumably would receive a much stricter form of scrutiny under Professor Schauer's dichotomy, because the ordinance is clearly aimed directly at expression. In contrast, an example of a law having only an incidental impact on expression, under Professor Schauer's dichotomy, would be an ordinance prohibiting anyone from stepping on the flowers in the park, applied to would-be picketers. Thus, Professor Schauer's dichotomy actually would provide a strict level of scrutiny to a considerably larger portion of expression regulation than would the viewpoint dichotomy, largely endorsed by Professor Kamenshine.

Ironically, however, in extending the reach of first amendment protection Professor Schauer has effectively given away the store. Although the viewpoint dichotomy has the support of at least an arguably valid premise—that governmental rejection of expression solely due to distaste for the viewpoint expressed is somehow deemed fundamentally more offensive to first amendment values than other forms of regulation¹⁶—there would seem to be absolutely no logical basis to support Professor Schauer's dichotomy. Of course, I have argued that not even the arguably valid premise behind the strict content distinction should be accepted.¹⁷ But any dichotomy premised on whether the effect on speech of a governmental regulation is direct or incidental places form over substance. As long as the regulation of speech is not motivated by disagreement with the substance of the communication, it is difficult to imagine why regulation aimed directly at expression is more invidious than regulation having only an indirect impact on expression. In both situations, government might have a compelling justification for limiting expression, and in both situations the harm to the values served by free expression could conceivably be substantial. Perhaps one might attempt to fashion a linguistic argument, contending that by its terms the first amendment prohibits only laws "abridging" the freedom of speech. But no reason exists to

15. See *supra* note 13 and accompanying text.

16. See *supra* notes 9-12 and accompanying text.

17. M. REDISH, *supra* note 1, at 102-14.

believe that laws not aimed directly at, but having a negative impact on, expression are not conceptually classifiable as "abridgements" of speech.

Perhaps one might argue that Professor Schauer's dichotomy derives from a concern that government not gratuitously discriminate against expression. Under this analysis, first amendment interests are satisfied, as long as government gives expression treatment that is no worse than that given other interests.¹⁸ Surely the first amendment requires more of government than treatment of expression that is no worse than that given other interests. In fact, the whole point of the first amendment was to make clear that expression is deserving, not of equal treatment, but rather of *special* treatment from government. Otherwise, the interests in speech could easily have been left to the considerably more diluted protection of the fifth amendment.¹⁹ That it was not, but instead was given the obviously much stronger protection of the first amendment,²⁰ clearly indicates the Framers' understanding that speech must receive more protection than simply the prevention of governmental discrimination against speech. Thus, neither Professor Schauer's "direct-incident" dichotomy nor Professor Kamenshine's viewpoint distinction can ultimately withstand theoretical analysis. Therefore any conclusion that regulation of speech is permissible because it is justified by the interest in national security (as Professor Kamenshine believes), or because it regulates interests other than speech as well (as Professor Schauer believes), must be rejected.

III. AVOIDING THE "PUBLIC POLICY" TRAP

Though Professor Kamenshine's theory leads him to conclude that much regulation of scientific expression justified on national security grounds is permissible if it meets the extremely deferen-

18. Professor Schauer appears to adopt a similar analysis in his treatment of the "public figure" issue in defamation, where he compares legislative regulation to regulation of the manufacture of pharmaceuticals, in total disregard of the fact that the former is protected by the first amendment while the latter is not. See Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 925-28 (1984).

19. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend V.

20. See *supra* note 5.

tial "rational basis" standard,²¹ in certain instances he would extend such expression greater protection. He would do this in a situation in which "no illicit purpose can be established but where the information to be suppressed. . .has a relationship to existing issues of public policy or would tend to create such an issue, especially by discrediting a position advanced by government spokesmen."²² However, where there is "no adverse impact on any debate involving public policy"²³ (which, he suggests, includes "most scientific and technological information"),²⁴ "subject to a rational basis review by the courts, the government appropriately may balance the adverse impact on scientific development and self-fulfillment against the national security interest."²⁵

As is unfortunately true of much of Professor Kamenshine's analysis, he fails to explain in any detail why scientific expression linked to a "public policy" debate is thought to be so much more worthy of first amendment protection that it alone receives the benefit of the strict scrutiny test. He does argue that "regulation suppressing a political view, regardless of the regulation's objective, poses a direct and immediate threat to the process by which the people maintain some check on all government activities."²⁶ But nowhere in his article does Professor Kamenshine explain why speech that fosters a popular check on government is so much more valuable than expression fostering intellectual development.

Perhaps Professor Kamenshine intended implicitly to incorporate the theories of Judge Bork²⁷ and Professor Meiklejohn,²⁸ both of whom believed that speech related to the political process is the sole form of expression worthy of first amendment protection. However, as I have demonstrated in previous writing,²⁹ both theories are defective, and even Professor Meiklejohn ultimately acknowledged that the concept of "political" could not be so nar-

21. Kamenshine, *supra* note 2, at 879.

22. *Id.* at 880.

23. *Id.* at 879.

24. *Id.* at 880.

25. *Id.*

26. *Id.* at 879.

27. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

28. A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

29. See M. REDISH, *supra* note 1, at 14-26.

rowly defined as to exclude such subjects as literature and science.³⁰ The writings of both Bork and Meiklejohn have been subjected to such substantial criticism over the years,³¹ that if Professor Kamenshine actually intends to rely on their analyses, it is incumbent upon him at least to attempt to respond to those criticisms.

However, even if one were to accept Professor Kamenshine's assumption that in theory speech related to "public policy" debate is more worthy of first amendment protection, he has failed to provide even the most basic definitional structure of the concept. Indeed, it is highly unlikely that one could be effectively fashioned. The problem is that speech does not come in neatly packaged segments.

This is especially so when the issue is whether particular expression has relevance to an issue of public policy. Even if one could fashion some objective standard for defining the concept, any governmentally imposed measure of what is probative on matters of public policy is inherently violative of the concept of individual integrity and free will, upon which democracy and free speech are premised.³² The Supreme Court has recognized as much in the area of first amendment protection of defamation of public officials.³³ It is simply inappropriate for government to dictate to members of the public what should or should not influence their political judgments.³⁴

IV. SCIENTIFIC EXPRESSION AND THE COMMERCIAL SPEECH PROBLEM

Though Professor Kamenshine does not himself endorse the position, he describes the view of other commentators who, while extending considerably greater protection to scientific expression than Kamenshine himself does, nevertheless reduce that protection when scientific expression is disseminated for commercial rea-

30. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245.

31. See, e.g., Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1162-67 (1983); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 317 (1978).

32. See M. REDISH, *supra* note 1, at 9-86.

33. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274-75 (1971).

34. See M. REDISH, *supra* note 1, at 9-86.

sons.³⁵ Such an approach misconceives the concept of commercial speech and unduly dilutes the level of protection given to speech that is worthy of the full reach of the first amendment.

Of all first amendment commentators, I am perhaps the most extreme in my views on the constitutional protection of commercial speech. As my previous writing has indicated,³⁶ I am of the opinion that even pure commercial speech—i.e., advertising for commercial products—is deserving of full first amendment protection, because it facilitates the exercise of one's private self-government and aids in the development of one's intellectual capacities, and thus contributes as much as other forms of protected expression to the first amendment value of self-realization. But one need not go nearly so far to reject the view that fully protected scientific expression somehow loses first amendment value when disseminated for commercial purposes. Such an analysis obviously proves too much: once it is accepted, it is difficult to distinguish books, newspapers, and magazines, published and sold for profitmaking purposes. Yet such a conclusion would effectively gut the first amendment, for many people make their living by engaging in first amendment activity.

The Supreme Court has not accepted this position. In response to the argument, made in *New York Times Co. v. Sullivan*,³⁷ that the advertisement in the *Times* constituted unprotected commercial speech, the Court responded that the fact that the *Times* was paid for the ad was as irrelevant for first amendment purposes as the fact that books are sold.³⁸ From whatever theoretical perspective one adopts, such a conclusion clearly was correct. The position that scientific expression becomes commercial speech when disseminated for commercial purposes, then, is directly contrary to precedent, logic, and first amendment policy.

V. CONCLUSION

The constitutional issues surrounding governmental regulation of scientific expression are by no means unimportant. Government

35. See Kamenshine, *supra* note 2, at 879-81.

36. See M. REDISH, *supra* note 1, at 60-68.

37. 376 U.S. 254 (1964).

38. *Id.* at 266.

conceivably may assert interests of national security that, in certain instances, are far from insubstantial, and which the courts may have considerable difficulty questioning. Yet if the judiciary is to serve any role as an independent protector of first amendment rights against incursion by the majoritarian branches of government, surely the conclusory assertion of national security as a justification for governmental limitation of expression cannot end the inquiry. The Supreme Court implicitly recognized as much in the *Pentagon Papers* case.³⁹ Thus, any scholarly effort that hopes to contribute to our understanding of first amendment limitations on governmental power to regulate scientific expression should focus upon the nature of the specific conceivable justifications for regulation and upon the task facing the judiciary in attempting to monitor such regulations.

Because Professor Kamenshine improperly reverses the burden of production in first amendment analysis, however, he never escapes the constitutional trap that he has unwittingly set for himself. For the analytical mode he adopts forces him to focus primarily, if not exclusively, on the issue of the first amendment value of the expression sought to be regulated. As a result, he fails to focus upon the difficult, nitty-gritty issues inherent in the balancing process, and therefore fails significantly to advance the constitutional inquiry.

39. *New York Times Co. v. United States*, 403 U.S. 713 (1971).