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A Reply to the Comments

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EMBARGOES ON EXPORTS OF IDEAS AND INFORMATION: A REPLY TO THE COMMENTS

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I. ASKING WHETHER FIRST AMENDMENT VALUES APPLY

It is surprising that Professor Redish and General Counsel Rindskopf find virtually sacreligious the discussion of whether first amendment values apply to export of scientific and technological information. If a "speech is speech" approach answers all, then recent commentary on first amendment values, including that of Professor Redish, is irrelevant. It is unlikely that this is being suggested. Rather, both commentators are offended by what they regard as advocacy of an improper allocation of burden of proof. But this misconceives the thrust of my discussion.

The proper question is whether there is anything about dissemination of scientific and technological information to foreign recipients sufficiently distinct to warrant a theoretical inquiry into the applicability of first amendment values. There is no doubt that the information communicated is "speech." The article simply entertains the hypothesis that here the dissemination of such "speech" may not advance the values customarily discussed.

Normally, of course, there is a valid presumption that such values are furthered if the communication qualifies as "speech." Perhaps the commentators' bemoaning an alleged lack of respect for the first amendment simply reflects their view that prima facie, nothing about foreign dissemination of "speech" suggests that the presumption might be inoperative. This is a legitimate difference in perception. However, neither commentator seriously questions the specifics of the values analysis once undertaken. General Counsel Rindskopf, however, does argue that the purely foreign versus mixed foreign-domestic dissemination line often will be unclear. The article acknowledges this but points out the categories of cases where the distinction is reasonably workable—dissemination to a particular foreign person, government or corporation.

II. The Alternative Analysis

My alternative analysis of the first amendment as primarily an anti-mind control instrument is no more conclusively provable than Professor Redish's self-realization position. But the antimind control analysis, by not virtually equating any detriment to speech with a violation, does offer a more sensible comprehensive rationale for first amendment interpretation. Rather than arguing over the various benefits which may derive from freedom of speech, as he and others have done, the analysis addresses the first amendment's role as a restraint on government power. It views the amendment within the context of the entire constitution, particularly the other bill of rights guarantees, all of which reflect a concept of limited government.

The key question under the first amendment is: "What do we fear from government regulation of speech?" If we focus on all the identifiable benefits which speech produces, i.e., self-realization, then certainly any governmental action which consequentially diminishes the quantity of available speech is highly suspect. However, this perspective is not in accord with the overall structure of the Bill of Rights dealing with specific types of possible governmental abuses. As applied to the first amendment, this involves the well known tendency of government to try to regulate speech for the purpose of imposing its own views on the public. Freedom of speech maintains freedom of thought, keeping the mind free of government manipulation. It is this function rather than maintenance of a particular quantity of speech, no matter how beneficial, that ensures governmental respect for the dignity of the individual.

The commentators, however, erroneously perceive my analysis as seriously reducing existing first amendment protection. Moreover, Professor Redish talks about the logical fallacy of equating that which is necessary to produce a result—a given scope of first amendment protection—with that which also is sufficient. However, there can be such a fallacy only if we agree on what the resulting scope of protection should be and if he is correct in claiming that the protection cannot be obtained absent a broader theoretical foundation. Neither of the prerequisites is fully satisfied here.

The alternative analysis supports a high level of protection, i.e., strict review, against almost all regulation of speech, including ar-

eas where current Supreme Court doctrine either affords no protection (obscenity) or applies a reduced level of protection (commercial speech). Putting aside the commentators' rhetorical flourishes praising the first amendment, the precise disagreement here is whether the normal high level of protection should be applied to *all* regulation of scientific and technological expression. I advocate strict review of regulation aimed at distorting the progress of scientific inquiry or the course of discussion on matters of public policy. Further, I support strict review if the regulation has the effect of distorting debate on public issues. As the Article notes,[1] I did not discuss the application of strict review to legitimate national security regulation because this important topic had been adequately dealt with by others.

Therefore the important difference of opinion between Professor Redish and me pertains to regulation of scientific and technological speech where neither the purpose nor the effect criterion is satisfied. He continues to apply strict review, while I recommend a rational basis level of scrutiny. The difference with General Counsel Rindskopf is less clear. She alone accepts the dichotomy between commercial and other forms of speech. Under her analysis, scientific or technological material may start out as "noncommercial" but gradually metamorphose into "commercial" and therefore eventually qualify for less protection. This makes it difficult to say whether her position is more or less speech protective than mine.

III. Why the Special Concern for Adverse Political Effect?

Where the government seeks to keep scientific or technological information out of hostile hands it acts for a legitimate purpose, one consistent with the first amendment. However, under the amendment there is still a serious question as to the significance of the regulation's adverse effect first, on advancement of science and second, on public decisionmaking. The article evokes controversy by differentiating between these two effects, attaching little freedom of speech significance to the first and predicating strict review on the second. While the commentators suggest this is in line with Judge Bork's position, the political-nonpolitical dichotomy is im-

1. *See* Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 Wm. & Mary L. Rev. 863, 880 n.75 and accompanying text (1985).

portant here only as to regulation of scientific and technological speech. It is not, as Judge Bork argues, a basis for limiting first amendment protection to speech in the political process.

A. Adverse Political Effect as a Basis for Inferring Illicit Purpose

Confining strict review to regulation suppressing scientific or technological information bearing on public issues comports with the article's emphasis on legitimate regulatory purpose. Neither commentator challenges the conclusion that government tends to stifle information discrediting its public position but has no comparable inclination to censor scientific debate for nonpolitical reasons. Therefore it is sensible to presume illicit purpose from governmental suppression only where the material relates to public issues.

There is, however, Professor Redish's criticism that it would be difficult to determine which material relates to a public policy issue. Further, he is uncomfortable with the courts, as government agencies, making this finding. In a sense this is a strange criticism since every day, courts make subtle judgments on the scope of first amendment rights. The real question is whether this particular category of decisionmaking is appropriate. His fear is that either an imprecise definition of "public policy issue" or a court's possible excessive sensitivity to national security needs will produce unwarranted holdings favoring suppression.

The concept of speech "on matters of public concern" or on "public issues" is well known in first amendment law. This was most recently summarized in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[2] just decided by the Supreme Court at the end of the 1984 term. The *Pentagon Papers*[3] case, a "national security" case not involving scientific or technological material, is an excellent example of a judicially thwarted attempt to suppress information relevant to a public issue[4]—the legitimacy of United States involvement in the Vietnam war.

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2. 105 S. Ct. 2939, 2945-46 (1985).

3. 403 U.S. 713 (1971).

4. For a discussion of a related problem pertaining to the scope of first amendment restraints on government speech, see Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1113-15 (1979).

Nevertheless, there is merit to Professor Redish's concerns. Respect for the first amendment does require that strict review be applied to suppression of material that is even *rationally* related to what *arguably* is a public issue. In other words, there should be only a low burden on the party asserting that the case is a proper one for strict review. Admittedly, however, a legal standard, no matter how favorable to a constitutional guarantee, whether the first amendment or any other, cannot alone ensure a high level of protection. It cannot eliminate the human factor. But his problem is faced whenever an individual rights issue is litigated. It is not peculiar here.

B. Adverse Political Effect and the Paramount Nature of the Democratic Process

The second basis for requiring strict review of regulations having an adverse political effect is the threat such effect poses to the democratic process. Here I admittedly rely on an identified paramount constitutional value. This troubles Professor Redish. He asks why speech's contribution to the democratic process, which he regards as simply an outgrowth of the first amendment's unitary self-realization value, should be given primacy.

The first amendment facilitates the democratic process but that process, which antedates the amendment, is itself a distinct fundamental constitutional value. It transcends the amendment's specifics and is basic to our constitutional structure. That structure provides the means by which our society confers power on public officials and checks their abuse of power once it has been obtained. Therefore strict review of any regulation which may damage the democratic process, whether or not that regulation limits speech, is singularly justified.[5] Thus the fact that the government may have entirely proper objectives in suppressing scientific and technological information should not immunize the suppression from strict scrutiny where the ability to understand and debate a public issue may be impaired.

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5. J. ELY, DEMOCRACY AND DISTRUST 73-77, 105 (1980).

C. Content Discrimination and the Problem of the Total Ban on Speech

The emphasis of the alternative analysis on mind control and the special concern with politically discriminatory effect triggers Professor Redish's restatement of his attack on the "content distinction in first amendment analysis." He makes the irrefutable observation that a total ban on speech—one involving no content distinction—suppresses more speech than does a more narrowly tailored regulation. He argues from his self-realization premise that a "total ban" type regulation therefore needs scrutiny at least as close as a more limited regulation.

Assuming that the central thrust of the first amendment is anti-mind manipulation rather than self-realization, how does this affect the analysis of a total ban? Professor Redish's impression is that the result would be completely different since such a ban involves no element of viewpoint distortion. However, the actual difference is not that great.

Consider a bit more realistic hypothetical than Professor Redish's ban on "anyone saying anything about anything." Suppose there were a total ban on speech in the public streets and parks. The Supreme Court has categorized these types of governmental property as traditional public forums in which the right of free speech, particularly political dissent, has been historically exercised. A sudden governmental move to cut off *all* expression in such places would be highly suspect no matter what plausible objective—noise pollution, litter prevention, etc.—the government cited. While, on the surface this would be a neutral government act, experience suggests a high likelihood of an impermissible governmental purpose to suppress certain ideas. This inference is buttressed by the usual availability of less restrictive means of obtaining the stated legitimate objective.

Such bans, even if unrelated to the exercise of free speech in a traditional public forum, also would be suspect. For example, what if the government outlawed all private mass media, leaving government media as the only source of news on matters of public concern. Again, an illicit purpose would be likely.[6] Moreover, there

6. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S.Ct. 3439, 3454-55 (1985)

would be a politically discriminatory effect assuming only official government viewpoints were disseminated. Thus Professor Redish's total bans concern is answered not by reliance on an admitted detriment to self-realization, but by the probability that such bans stem from objectives inconsistent with the first amendment's anti-mind control thrust.

As for Professor Redish's "don't step on the flowers" type regulation, there is less reason to suspect an improper governmental objective. However, additional factors radically could transform this picture. These factors are: (1) actual evidence of improper purpose, (2) selective enforcement of the regulation, or (3) evidence that in practical effect the regulation tended to thwart the expression of particular ideas. An example, discussed at the symposium by Professor Schauer, is the embargo on importation of Cuban products into the United States. These products range from cigars to books, magazines, and newspapers. If there is no evidence of a purpose to suppress particular ideas emanating from Cuba and the enforcement of the ban is evenhanded, the only remaining line of inquiry would relate to its possible effect. Assuming that whatever unpopular political ideas there might be in Cuban publications could enter the country as long as the physical product were produced elsewhere, the USSR for example, there would be no serious first amendment problem.

(Supreme Court remanded a first amendment case for inquiry into the government's purpose).