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THE DILUTION OF THE FIRST AMENDMENT AND THE EQUALITY OF IDEAS

*William P. Marshall**

THE INFLUENCE OF Professor Thomas Emerson's work on first amendment doctrine cannot be overestimated. His action/expression distinction remains one of the leading efforts to systemize first amendment theory, and his insights into the various areas of first amendment doctrine continue to influence first amendment scholarship and jurisprudence. It is no exaggeration for Professor Shiffrin to proclaim that Emerson's *Toward a General Theory of the First Amendment*[1] is the best book on the first amendment written in this century.[2]

What I wish to discuss, however, is a theme that runs through Emerson's work and first amendment theory generally. That theme is one which posits that in order to adequately protect first amendment interests, certain categories of speech must be excluded from constitutional coverage or, if not wholly excluded, must at least be allocated a lesser degree of protection than that afforded "core" first amendment activity.

The major class of speech which Professor Emerson considers unprotected by the first amendment is commercial speech; and I will discuss the arguments he presents on behalf of this exclusion as a point of departure for my overall thesis. I will not (to our mutual delight) present yet another argument that commercial speech either should be, or should not be, protected by the first amendment. Instead, this Article questions why scholars such as Emerson, who otherwise adhere to the premise that there is an equality in the realm of ideas and who seek broad and expansive protection under the first amendment, feel compelled to exclude certain types of speech from first amendment coverage. As part of this process, I

* Professor of Law, Case Western Reserve University; B.A., University of Pennsylvania (1972); J.D., University of Chicago (1977).

1. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1963).

2. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1283 (1983).

will also examine the inconsistencies created by Emerson's exclusion of commercial speech with his inclusion of offensive and obscene speech within first amendment protection.

The purpose of this comparison, however, is not simply to illustrate a doctrinal anomaly. Rather, I will attempt to show that the inconsistency is the necessary result of trying to reconcile two fundamentally irreconcilable pressures: the desire to have a strong first amendment doctrine which subjects "core" speech to regulation only in extraordinary circumstances, and the desire to avoid inquiries into content, class of speech, or similar factors which place the courts and the government in the business of evaluating the social importance of various types of expression.

The question of which types of speech should be included or excluded from first amendment coverage is an essential inquiry in any effort to systemize first amendment theory.[3] It may be true that almost everything we do is expressive in one way or another.[4] It is equally true, however, that not everything we do, including all our forms of verbal communication, is entitled to first amendment protection.[5] The Supreme Court has long agreed with the latter position. Thus, in *Chaplinsky v. New Hampshire*, the Supreme Court uttered its famous dictum that "[t]here are certain well-defined and narrowly limited classes of speech . . . which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[6] While the Court has since retreated from this position,[7] the proposition that there are types of speech which are not "speech" has never been wholly eradicated. Emerson thus falls within tradition when he argues that commercial speech shall not

3. Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). As Schauer points out, one's analysis may lead to different results depending on whether the analytic approach is one of "defining in" or one of "defining out" matters which pertain to first amendment coverage. *Id.* at 279-80.

4. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968); *see also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 495 (1970) (concedes that essentially all activity could be considered expression, yet the core first amendment issue is "whether the action element in the conduct predominates; and whether the person is trying to *tell* something or *do* something.").

5. *See* T. EMERSON, *supra* note 4, at 495. *But see* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 629 (1982).

6. 315 U.S. 568, 571-72 (1942).

7. The retreat has been particularly apparent in the area of libel law, *see, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 280 (1964) (substantial constitutional protection for libelous statements not made with "actual malice"). *See also* Hess v. Indiana, 414 U.S. 105 (1973) (holding "fighting words" conviction unconstitutional); Cohen v. California, 403 U.S. 15 (1971) (holding offensive language conviction unconstitutional).

be considered "speech" under the first amendment.[8]

Professor Emerson offers three reasons why commercial speech should be excluded from first amendment coverage. The first is that it "has historically been treated on an entirely different basis from all of the other forms of communication that make up the system of freedom of expression."[9] Second, he argues that "[c]ommercial speech does not promote the underlying values of the system in the same manner as does other expression."[10] Third, he argues that inclusion of commercial speech within the coverage of the first amendment poses "certain dangers to the system of freedom of expression."[11] Citing Justice Powell, he worries that inclusion of commercial speech may tend "to dilute and devitalize first amendment doctrine."[12]

The first two of these arguments are not well taken and certainly do not distinguish commercial speech from obscene or offensive speech. The historical argument is particularly weak. For one, it was not until 1919 that some members of the Court began to recognize that speech was to have any significant protection at all,[13] so any historical tradition is extremely short-lived. Moreover, as Professor Christie argues, the problem with supporting an argument for protection or non-protection of certain types of speech on historical grounds is that certain core areas of speech were unprotected until recently.[14] Finally, from a historical perspective, the non-speech status of commercial speech is equivalent to that of offensive or obscene speech.[15] Thus, to include commercial speech in the scope of

8. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 458-61 (1980); *see also* T. EMERSON, *supra* note 4, at 414-17; *see also infra* text accompanying notes 9-12 (for Professor Emerson's reasoning excluding commercial speech from first amendment protection). Emerson is not at odds with *Chaplinsky* in arguing that commercial speech is "not speech." Although commercial speech was not mentioned in the *Chaplinsky* dictum, its exclusion from first amendment coverage was quickly announced in Valentine v. Christensen, 316 U.S. 52 (1942).

9. Emerson, *supra* note 8, at 460.

10. *Id.*

11. *Id.*

12. *Id.* at 459-60 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

13. Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting) (argued that under most conditions, the first amendment protected individual speech from regulation by the state).

14. *See* Christie, *Why the First Amendment Should not be Interpreted from the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L.J. 683, 687-88.

15. *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (offensive and obscene speech not within the scope of first amendment protection) *with* Valentine v. Christensen, 316 U.S. 52 (1942) (regulation of commercial speech not prohibited by the first amendment).

the first amendment is no more a reversal of tradition than to include obscene or offensive speech.

Emerson's second argument, that commercial speech does not promote the underlying values of freedom of speech, is more interesting.[16] To support this claim Emerson cites Professor Baker, who argues that commercial speech, unlike other types of speech, is not a manifestation of individual freedom of choice but is rather a function of market pressure, and therefore, "lacks the crucial connections with individual liberty and self-realization which exist for speech generally."[17] Whether this argument is empirically true, of course, is a matter of some debate. Speech asserted for the purposes of pursuing economic power may be as much a manifestation of self and individual liberty as is speech that is purely political or social.[18] As Professor Redish explains, Baker's exclusion of commercial speech "fails to deal adequately with the inseparability of the profit motive from the desire for self-expression."[19] Indeed, from the other side, Baker's theory, as Professor Schlag has argued, does not acknowledge that social and political speech may be as much a product of market forces as is commercial speech.[20]

Moreover, even if we accept that commercial speech has no first amendment value for the speaker, eliminating it from coverage ignores other critical policies underlying the protection of speech that Emerson himself has carefully documented. Specifically, Emerson has argued that in addition to protecting individual concerns, the first amendment promotes the discovery of truth and participation in decision-making by all members of society.[21] Indeed, outside the area of commercial speech, Emerson has seriously criticized Baker's first amendment theory for ignoring these societal values and for solely defining the value of expression in terms of individual liberty.[22] Emerson's exclusion of commercial speech is then particularly groundless since there is little question that commercial speech

16. Emerson, *supra* note 8, at 460. As an initial matter, it should be pointed out that this argument is essentially one of "defining in" and, as such, may be inconsistent with the tradition that Emerson is normally associated with which presumes that all speech has value. *See* Schauer, *supra* note 3, at 280-81.

17. Emerson, *supra* note 8, at 460 (citing Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976)).

18. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 U.C.L.A. L. REV. 671, 713 (1983).

19. Redish, *supra* note 5, at 621.

20. Schlag, *supra* note 18, at 713.

21. Emerson, *supra* note 8, at 423. Emerson also argues that a fourth value of the first amendment is the "maintenance of the proper balance between stability and change." *Id.*

22. *Id.* at 476.

promotes these societal values. Professor Redish is correct when he argues that commercial speech may "lead individuals to think about not merely what purchasing decisions are best for them [search for truth], but also [about] what level of political regulation of the economic system would be appropriate [decision-making]."[23]

Finally, Emerson's approach is inconsistent with his treatment of obscene speech where he has again argued that the motivations of the speaker is not controlling as to the first amendment issue. With respect to obscene speech, Emerson has mentioned that to withhold first amendment protection because of commercial exploitation by the disseminator "ignores the constitutional rights of the reader. It makes the rights of the individual to see or hear expression dependent, not upon the material, but upon the motives or methods of the publisher or distributor."[24] This argument, of course, could be and has been made with respect to commercial speech.[25] Thus, even if we accept Baker's premise that there is no individual self-expression value in protecting the commercial speaker's speech, that does not mean, according to Emerson's own theory, that such speech has no first amendment value. Ultimately, Emerson's rejection of commercial speech from first amendment coverage must rest on other grounds.

Emerson's third and final argument is that the first amendment may become diluted by the inclusion of commercial speech. This argument, unlike the previous one which examines whether the speech in question is *worthy* of first amendment coverage, examines the *harm* that the inclusion of such speech might cause other types of speech protected by the first amendment.

There are two aspects of this dilution argument. The first, which I will call "trivialization," argues that treatment of "lesser value" speech on par with full value speech demeans the status of the latter, ultimately detracting from the first amendment's importance in promoting a free and robust exchange of ideas.[26] The second, termed here "devitalization," contends that the first amendment is doctrinally weakened by including material within its

23. Redish, *supra* note 5, at 632.

24. T. EMERSON, *supra* note 4, at 490.

25. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("the protection afforded is to the communication, to its source, and to its recipients").

26. *See, e.g.*, Miller v. California, 413 U.S. 15, 34 (1973) ("commercial exploitation of obscene material demeans the grand conception of the First Amendment").

scope whose regulation is likely to be upheld by the courts.[27] Both the trivialization and devitalization arguments appear, at least implicitly, to be behind Emerson's rejection of commercial speech as being within the scope of the first amendment.

The trivialization point brings to fore a central precept in first amendment theory and places Emerson in a position where he is not usually found. Usually, advocates like Emerson steadfastly argue that evaluating types of speech in terms of social value is an improper function for the government and the courts.[28] There is an equality in the realm of ideas which prohibits their being ranked according to levels of importance.[29]

On the other hand, failure to categorize among types of speech is, in the words of Professor Schauer, "frightfully counter-intuitive."[30] As he states, "most people believe that some categories [of speech] are more important than others, with great agreement about many questions of relative worth. Political argument is simply more important than 'Specified Sexual Activities,' and *Hamlet* is simply better literature than 'Dance With the Dominant Whip.' "[31] The problem, of course, with categorization is separating the wheat from the chaff or, if I may invent a word or two, the problem is determining which types of speech are the "trivializers" and which are the "trivialized." This, of course, is the problem that the adherents to the equality of ideas principle wish to avoid. For them, categorization according to relative worth is simply too subjective and too value-laden to adequately protect socially controversial or offensive types of speech. Categorization replaces Justice Harlan's value-neutral "one man's vulgarity is another's lyric,"[32] with Chief Justice Burger's value-laden "to equate the free and robust exchange of ideas with commercial exploitation of obscene material demeans the grand conception of the First Amendment."[33]

The definitional problem with the trivialization argument is apparent when one analyzes the inconsistencies resulting from its application. Emerson, for example, (although to be fair he is not

27. *See* Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 499, 513-14 (1985).

28. T. EMERSON, *supra* note 4, at 326.

29. *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 201-02 (1983).

30. Schauer, *supra* note 3, at 287.

31. *Id.* at 288.

32. Cohen v. California, 403 U.S. 15, 25 (1971).

33. Miller v. California, 413 U.S. 15, 34 (1973).

explicit on the point) appears to contend that commercial speech demeans the first amendment because of its emphasis on materialism. Approving the (then-existing) commercial speech exclusion, he states, "[I]t speaks well for a society that it accords greater freedom to the exchange of ideas than it gives to the exchange of material things."[34] Similar arguments, however, could be made with regard to categories of speech that are protected. Chief Justice Burger, for example, has made strong trivialization arguments in relation to obscenity and nude dancing,[35] and Professor Nagel has forcefully argued that protecting silly or offensive speech has a demeaning effect.[36]

I suppose an argument could be made supporting a distinction in favor of obscene and offensive speech over commercial speech on trivialization grounds. Such an argument, however, is tenuous at best. Baker's theory, which belittles commercial speech because it is market-influenced and aimed at commercial enrichment,[37] could equally be applied to obscenity, which is primarily, if not solely, aimed at commercial exploitation. Moreover, even if obscenity could be characterized as involving political overtones,[38] the same could be said for commercial speech.[39] Finally, there is little to suggest that commercial speech is any less idea-laden than obscene or offensive speech. Certainly epithets and obscenities promote no more reasoned discourse than do advertising slogans—does " 'g[od]-d[amn]-m[other]-f[ucker]' police"[40] implicate the exchange of ideas more than a Chrysler commercial which announces "The Pride is Back—Born in America"? Is a profane epithet of more notable first amendment consequence than an ad slogan?[41]

The trivialization argument is therefore unsatisfactory for theorists like Emerson for two reasons. First, it is inconsistent with one

34. T. EMERSON, *supra* note 4, at 415.

35. *See* Miller v. California, 413 U.S. 15, 34 (1973) ("[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 88 (1981) (Burger, C.J., dissenting) ("To invoke the First Amendment to protect the activity involved in this case trivializes and demeans that Amendment.").

36. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 329-30 (1984).

37. *See* Baker, *supra* note 17.

38. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 545 (1979).

39. Redish, *supra* note 5, at 621.

40. Lewis v. New Orleans, 408 U.S. 913, 913 (1972).

41. *See* Stone, *supra* note 29, at 244 (analogizing offensive language to noise rather than ideas).

of Emerson's central tenets—the equality of speech. Second, it cannot be consistently used to exclude one category of speech without seriously hampering the inclusion of another. While the previous discussion does not resolve the question of whether commercial, obscene or offensive speech is less trivial, it establishes how such a judgment is unsupported by any rationale other than subjective evaluation.[42] The important question remaining is why would Emerson exclude commercial speech from coverage, given the inconsistency that this exclusion creates for his overall theory? To resolve this problem we must address the devitalization argument.

The devitalization theory generally stresses that by extending first amendment coverage to too many types of speech, core speech interests are afforded less protection.[43] The regulation of commercial speech could not be effectively or even meaningfully maintained, for example, if it were subject to the exacting scrutiny of *Brandenburg v. Ohio*.[44] The concern voiced by Emerson and others is that the absolute, or close-to-absolute, protections applied to "core" speech will be abandoned in order to accomodate the competing interests presented by the regulation of commercial speech. Extending first amendment protection to commercial speech, warns Emerson, "justifies and solidifies full-scale ad hoc balancing in a way that is bound to affect the whole [first amendment] structure."[45]

There is strength to this position. As Professor Blasi explains, "[t]he wider the reach of first amendment coverage, the greater seems to be the judicial affinity for instrumental reasoning, balancing tests, differential levels of scrutiny, and pragmatic judgments."[46] Professor Schauer may also be correct when he argues:

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42. It is possible to distinguish commercial from obscene and offensive speech on other grounds. First, commercial speech is capable of greater regulation than other types of speech because it is easily verifiable and less likely to be chilled. *See, e.g.*, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968 (1986). It could also be argued that regulation of obscene or offensive speech is suspect because government motivations are aimed at communicative impact rather than non-speech concerns. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 789-94 (2d ed. 1988); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213 (1972). For an intriguing analogy between commercial speech and obscenity, see Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372, 383-84 (1979).

43. *See, e.g.*, F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 134-35 (1982); Blasi, *supra* note 27, at 449.

44. 395 U.S. 444, 449 (1969) (subversive speech is protected unless it constitutes "incitement to imminent lawless action"); *see* Schauer, *supra* note 3, at 270-71.

45. Emerson, *supra* note 9, at 460.

46. Blasi, *supra* note 27, at 479.

> The scope of a right and the strength of that right . . . most often occur in inverse proportion to each other . . . . The broader the scope of the right, the more likely it is to be weaker, largely because widening the scope increases the likelihood of conflict with other interests, some of which may be equally or more important.[47]

On the other hand, whether devitalization can be avoided by categorizing certain types of speech as outside the first amendment or as lesser-value speech has been the center of much controversy. First, as Professor Redish has argued, a balancing, rather than absolutist, approach need not harm core speech interests. If there are more persuasive reasons to regulate commercial speech than political speech, the application of a balancing approach will not necessarily subject political speech to government restriction even if particular regulations of commercial speech are upheld.[48] Second, it may be argued that, there is in any event, an inherent balancing in the categorization process such that the claim of absolutism for the protection of "core" speech by those seeking to exclude "non-core" speech is unfounded. Under this view, the categorical exclusion of commercial speech, for example, presumes its own balance.[49] Finally, the point can be ably asserted that judicial expansion of protected speech in recent years has not led to a "dilution" of the first amendment, suggesting that the fears of the absolutists have been misplaced.

In any event, the question of whether expanded coverage necessarily leads to first amendment dilution is probably unresolvable.[50] Nonetheless, if it is conceded that first amendment doctrine will not be devitalized by including previously omitted categories of speech within constitutional coverage, some harm to "core" speech may still occur. There could be different results under existing, fully-vitalized doctrine, which would be less sympathetic to speech interests. For example, current doctrine indicates that speech can be restricted on a time, place or manner basis only when the regulation is supported by an important governmental interest.[51] Often in a

47. F. SCHAUER, *supra* note 44, at 134-35.

48. *See* Redish, *supra* note 5, at 624.

49. *But see generally* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 997-1001 (1987) (rejecting the proposition that all categorical roles are the products of an inherent balance).

50. Professor Shiffrin has argued that the devitalization problem stems from a false premise—that there is one unifying theory of free speech. Once it is recognized that there are varieties of speech, argues Shiffrin, treating different categories dissimilarly will not harm "core" speech concerns. Shiffrin, *supra* note 2, at 1282.

51. As Dean Stone suggests, the exact level of importance needed to sustain a restriction

time, place or manner case, the state interest involved is the reduction of noise and congestion. Where access to a bus terminal is sought for leafletting and solicitation of funds, these interests may not be significant if there are relatively few persons seeking to engage in the activity (for example, religious adherents or political activists).[52] If the range of first amendment speakers, however, were to include all those seeking to advertise their products, the state's interest in preventing noise and congestion may become compelling simply because of the increased number of persons involved. The greater the state interests at stake could, in short, lead to upholding the regulation. In this manner, a true harm to core speech interests could result if political or religious speakers are denied access to a bus terminal *because* of the inclusion of commercial speakers. The key, in short, is not that first amendment doctrine will necessarily be devitalized. Rather, the results in the cases may lead to first amendment adherents prevailing less often.

Thus, the fear of dilution of first amendment interests by inclusion of commercial speech in the protected speech category is a real concern. While the question of whether first amendment doctrine would actually be devitalized by an expansive notion of first amendment coverage is debatable, the fact that results in specific cases would change is not. Ardent first amendment defenders like Thomas Emerson are therefore instinctively correct when they suggest that some first amendment values may be better served if certain categories of speech are either excluded from, or assigned second-level status in, first amendment coverage.

The problem, however, is that such exclusion cannot be reconciled with the central tenet that there is equality among ideas. Strict adherence to the equality principle leads to a "diluted" first amendment, whereas strict protection *against* dilution leads to the creation of hierarchies of speech grounded in problematic inquiries into the relative value of various forms of speech. In the end, one of these concerns must give way to the other.

is not clear in current case law. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 46 (1987).

52. *See* Wolin v. Port Authority of New York, 393 F.2d 83, *cert. denied*, 393 U.S. 940 (1968).