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FIRST AMENDMENT ENTITLEMENTS AND GOVERNMENT MOTIVES: A REPLY TO PROFESSOR MERRILL

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Professor Merrill makes a powerful argument for allowing tobacco advertising to be restricted or prohibited.[1] He convincingly demonstrates that, on the most plausible assumptions, tobacco advertising inflicts substantial costs and does not confer benefits of a sufficient magnitude to offset those costs. To a large extent, this argument stands on its own and does not depend on the interesting framework that Merrill develops in the rest of his article and that I will discuss here. A severe disparity between costs and benefits has to give anyone pause; one need not be committed to an explicit cost-benefit approach in order to agree that we should hesitate to recognize a constitutional right to do something that inflicts such large net burdens on society.

Many people believe, for example, that an approach focusing on monetizable costs and benefits does not fully capture the ways in which freedom of expression protects the autonomy of speakers or of potential consumers of speech.[2] To be sure, such autonomy-based approaches might not be very useful when applied to tobacco advertising. It seems unlikely that advertisers have a significant autonomy interest in speaking; and as Professor Merrill suggests, the autonomy interests of teenagers—the primary targets of tobacco advertising—might well be best protected by restricting advertising. But even assuming that important autonomy interests are significantly affected by a restriction on tobacco advertising, why shouldn't those interests be overridden if the net harm inflicted by tobacco advertising is as great as Merrill suggests?[3]

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* Harry N. Wyatt Professor of Law, The University of Chicago. This is an expanded and much-revised version of my oral comments on Thomas Merrill's paper. I am grateful to Professor Merrill and to the other participants and audience members at *Free Speech and Economic Power: A Symposium* for their comments. The Lee and Brena Freeman Faculty Fund and the Sonnenschein Fund at the University of Chicago Law School provided financial support for this project.

[1] Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143 (1999).

[2] On speaker autonomy, see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). On listener autonomy, see Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

[3] *See* Strauss, *supra* note 2, at 360-61.

At the same time, the kind of cost-benefit analysis that Professor Merrill uses does have a number of important virtues. Following others who have used a similar approach, Merrill suggests a plausible way of differentiating commercial speech from other kinds of speech. This distinction is notoriously hard to make in abstract terms, although few would deny that there is some "common sense" basis for it.[4] Merrill's suggestion is that commercial speech is different because—unlike, for example, speech on political matters, or artistic expression—commercial speech is unlikely to have significant external benefits.[5] This is not a flawless way of drawing the line between commercial and noncommercial expression, but it seems to be at least as good a basis for a distinction as anyone has come up with so far.

Perhaps the most intriguing idea in Professor Merrill's essay, however, is his suggestion that the framework developed by Guido Calabresi and Douglas Melamed might be applied to constitutional rights[6]—and particularly his novel and very interesting proposal that the right to engage in commercial advertising might, in certain cases, properly be condemned by the government and taken in exchange for just compensation. This condemnation proposal emphasizes the point that commercial speech more closely resembles economic activity of the kind the government is traditionally allowed to regulate, rather than speech that is generally immune from regulation.[7]

The use of the Calabresi and Melamed approach to free speech, like Professor Merrill's specific argument about tobacco advertising, can be useful even if one is not inclined to adopt an explicit cost-benefit framework. The Calabresi and Melamed categories might be used by someone who thinks that freedom of expression primarily protects autonomy interests, or even by someone who believes that the primary purpose of free speech is to ensure the proper functioning of democratic government.[8]

For example, to the extent that speaker autonomy is thought to be the basis for freedom of expression, the idea that the right to speak should be protected by a property rule—freely alienable, but only at the option of the speaker—is likely to be appealing. If the speaker's autonomy is the core interest being protected, then the speaker's willingness to give up the right to speak should ordinarily be decisive. By contrast, if the listeners' auton-

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[4] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (referring to "commonsense differences between" commercial and noncommercial speech).

[5] *See* Merrill, *supra* note 1, at 1182-84; *see also* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986).

[6] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[7] *See* Thomas H. Jackson and John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

[8] *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

omy is more important, then an inalienability rule becomes more attractive: the speaker's willingness to give up the right does not justify infringing the listeners' autonomy. If the most important purpose of free expression is to ensure that the government remains responsive to the people, then there is good reason to be suspicious of the liability approach that Professor Merrill identifies: it is risky to allow the government to silence its critics simply by paying a judicially-determined price.

Still, the Calabresi and Melamed framework was originally designed for common law entitlements, and Professor Merrill's fruitful idea of applying it to constitutional rights raises certain difficult issues. Those issues arise principally from the fact that, so far as we are concerned with them here, constitutional rights are rights against the government. As Merrill of course recognizes, the government is in many ways not like a private actor. But perhaps the government is so much unlike a private actor that the framework Merrill proposes does not, in the end, keep us from having to deal with the questions confronted in traditional First Amendment analysis, questions that Merrill's approach is intended in part to avoid—notably questions about government motivation.[9]

The root of the problem is that the government is not just a participant in market transactions. It is also a regulator. This means at least two things. First, the private actors to whom the Calabresi and Melamed model has traditionally been applied are assumed to have certain interests, which they pursue—and legitimately so. By contrast, when the government regulates, it has, in a sense, no legitimate self-interest. The government is supposed to act in society's interest. If it pursues the interests of particular government officials, or of interest groups whose interests deviate from society's as a whole, then it is not acting as it should.

As a result, anyone trying to determine what the government's prerogatives should be must confront the question whether, in any particular kind of case, the government is likely to be acting in society's interest. This is a traditional concern of First Amendment analysis. The Calabresi and Melamed model, when applied to private conduct, requires no comparable inquiry. Professor Merrill's effort to use that model to avoid the messy speculativeness of traditional First Amendment approaches is admirable; but it is unclear that it can succeed.

Second, because the government is a regulator, it determines the rights of others. Professor Merrill, following the Calabresi and Melamed frame-

[9] Although courts, in applying the First Amendment, do not always explicitly inquire into the motives of the government actor who has restricted speech, much of First Amendment doctrine seems pretty clearly to reflect a concern with the motivation of the government. This is true, for example, of the distinction between content-based and content-neutral regulation that is so prominent in First Amendment doctrine, and of the courts' general willingness to accept incidental restrictions on speech. For an extended argument to this effect—that an implicit concern with government motive is at the core of much of First Amendment doctrine—see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

work, supposes that the government is faced with essentially a binary choice: either it allows an individual to exercise a right, or it uses its own resources (if necessary) to try to prevent the exercise of the right. Again, though, in a sense the government does not have, or does not need to use, "its own" resources. As a regulator, the government is engaged in deciding who should bear the various costs of an individual's exercise of a right. A danger of Merrill's approach, therefore, is that it diverts attention from important questions about the extent to which individuals have to pay for the cost of exercising their constitutional rights. The point might be summarized by saying that "Rule Four" cases, regarded by Merrill as rare or nonexistent, are in a sense the norm. This point is also perhaps of the most direct relevance to the subject of this symposium, free speech and economic power.

I. THE IMPORTANCE OF MOTIVATION

Professor Merrill summarizes his theory as follows:

> [T]he transactional rule applied to any particular constitutional right will depend primarily on whether the exercise of that right generates significant net external benefits or significant net external costs. Constitutional rights that generate significant net external benefits above and beyond the value of the private right will be protected with inalienability rules . . . . At the other extreme, constitutional rights that generate net external costs that exceed the private value of the right are subject to being trumped by the police power . . . . The intermediate case between these two poles is where a constitutional right has no significant net external benefits or costs, either because there are no appreciable external effects or because the external benefits and external costs more or less cancel out. In these situations, we typically allow the individual rights holder to determine whether to invoke the right, or whether to waive the right in exchange for government benefits that have a higher value.[10]

Professor Merrill's principal example of the kind of First Amendment right that should be protected by an inalienability rule is the right of public employees to speak on subjects of public interest. Merrill certainly seems on solid ground in suggesting that such speech can have substantial external benefits—external in the sense that the speakers themselves will not be compensated for conferring them. Therefore, a speaker might choose to remain silent in exchange for a higher effective wage from the government, even in circumstances in which society would benefit more from having the speech uttered.

Two problems immediately arise, however. First, while the Constitution limits the government's ability to require its employees to give up their First Amendment rights, it imposes no limits whatever on private employ-

[10] Merrill, *supra* note 1, at 1154-55.

ees. Perhaps the speech of government employees will, all else being equal, tend to have more beneficial externalities than the speech of private employees. But it seems doubtful that the tendency is so pronounced that it justifies such a radical difference in the treatment of the two kinds of cases. If Professor Merrill's theory were the basis for the constitutional protection of government employees' speech, one would expect to see private employees' speech protected by the Constitution as well, and it indisputably is not. This suggests that the real concern about the government limiting its employees' speech might have to do not with the net balance of external benefits but with something about the government in particular—such as suspicion about the government's motivations.

Second, and more fundamental, it is unclear whether the assumptions Professor Merrill uses about the government's behavior at this point in his paper are consistent with the rest of his analysis. In his discussion of property and (potentially) liability rules for First Amendment rights, Merrill assumes that the government will act in a way that reflects the aggregate interests of the population:

> Under a liability rule, the government must compensate the rightsholder for the private value of the exercise of the constitutional right. Insofar as the government seeks to obtain the maximum benefit from its expenditure of public funds, the government will condemn and compensate only if the social benefits of extinguishing the right exceed the private value of the right. Thus, the government will condemn and compensate only when it is socially efficient to do so.[11]

The assumption here is that the government will act in a way that maximizes net social benefits. Of course, Professor Merrill is aware that this is a questionable assumption. According to well-known theories, governments respond to interest group pressure in ways that produce systematic deviations from socially efficient outcomes.[12] In addition, governments can be subject to agency problems; that is, government officials may act out of their own self-interest rather than the government's (or society's) interest.

The Calabresi and Melamed framework, however, does not address complexities like these when it discusses the motivations of the actors involved in exchanges of entitlements; it simply assumes that they will act in a fashion that rationally promotes their self-interest (or, if they do not, that paternalistic action by the government is appropriate). Professor Merrill has to make some assumption about government behavior, and there is no good comprehensive account of government behavior that he can draw on. In these circumstances, it is certainly reasonable for Merrill to adopt the assumption that underlies much of constitutional law, and indeed much of

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[11] *Id.* at 1201.

[12] The *locus classicus* of this theory is MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965).

democratic theory: that the decisions governments make reflect the overall interests of society.

The problem is that if we accept this assumption, then it is not clear how to support the conclusion Professor Merrill reached earlier, that constitutional rights should sometimes be inalienable. If the government's decisions reflect the overall good of society, the government will, by hypothesis, not ask an employee, or anyone else, to alienate a constitutional right unless it is socially beneficial for the employee to do so. Or, to put the point the other way, if (as Merrill realistically assumes) it is possible for the government to act in a way that is contrary to society's interests when it asks an employee to alienate the right to speak, then it is similarly possible for the government to act contrary to society's interests when it purchases (or condemns) tobacco companies' right to speak.

I share Professor Merrill's views both about government employees' speech—that in general the Constitution should fairly strictly limit the government's power over its employees' speech—and about potential restrictions on tobacco advertising, which I think generally do not violate the Constitution. But I share those views because I think the government is more likely to be acting for bad motives in the first case than in the second. The Calabresi and Melamed framework, which assumes rational, self-interested action by private actors, cannot straightforwardly accommodate such an assessment of government motives. By contrast, traditional First Amendment analysis is deeply concerned with assessing the circumstances in which government officials are likely to act for good or bad reasons. Differentiating among property rights, liability rules, and inalienability restraints can be a very helpful way to analyze First Amendment rights. But it will not avoid engaging the traditional First Amendment concern with government motivation.

II. THE UBIQUITY OF RULE FOUR CASES

"Rule Four cases" in the Calabresi and Melamed framework, as Professor Merrill calls them, are, roughly speaking, those in which a party has a right to engage in certain conduct but must pay the cost of doing so. Merrill deliberately omits Rule Four cases from his account on the ground that such cases—"situation[s] in which an individual can acquire a constitutional right against the government, but only by paying the government for the costs associated with its exercise"—are "rare" or perhaps nonexistent.[13]

Professor Merrill seems right in saying that it is rare for courts explicitly to describe constitutional rights in this way. But in fact the question whether a constitutional right should be a Rule Four right or some other kind of entitlement is often present—perhaps, at a deep level, always present—and omitting it from the picture obscures important issues. The fault,

[13] Merrill, *supra* note 1, at 1153.

however, does not lie with Merrill's particular, and understandable, lack of interest in Rule Four. Rather, it stems again from the fact that constitutional rights—rights against the government—are different from the kinds of rights to which the Calabresi and Melamed framework has usually been applied, and those differences greatly complicate the task of applying that framework in the constitutional context.

The celebrated case of *Gideon v. Wainwright*[14] illustrates this point. *Gideon* held that a defendant in a felony prosecution has the right to appointed counsel. Even before *Gideon*, there was no question that a criminal defendant had the right to the assistance of counsel that the defendant himself paid for. What *Gideon* held was that the defendant had a right to insist that the state pay for the lawyer. How would one describe the holding of *Gideon* in Calabresi and Melamed terms? One might say that, after *Gideon*, the right to counsel is a property right. (It is not inalienable, because a defendant can give it up by a knowing and voluntary waiver.) But then, what kind of entitlement was the right to counsel before *Gideon*? In the Calabresi and Melamed framework, the best way to describe it seems to be as a Rule Four entitlement. The defendant was allowed to have a lawyer, but he had to pay for it. *Gideon* turned that Rule Four entitlement into a property right.

Of course the pre-*Gideon* defendant did not have to pay the government; he paid the private lawyer. But why does it matter whether the holder of the entitlement has to pay the government or a private party? That did not make any difference to pre-*Gideon* criminal defendants. They still had to pay if they wanted to exercise the right. More to the point, if one does not describe *Gideon* as changing the entitlement from Rule Four entitlement to a property right, how does one describe what *Gideon* did, within the Calabresi and Melamed framework? Surely *Gideon* did something.

Once one goes this far, however, Rule Four entitlements are everywhere in constitutional law. If you want to exercise your First Amendment right to run a TV advertisement critical of the President, you have to pay for the broadcast air time. The government does not have to furnish you free air time, even if you can't afford it, in the way it has to furnish you a free criminal lawyer. There is a constitutional right to freedom of religion, to political association, to petition the government, and to have an abortion. But the government does not have to pay for the upkeep on your house of worship (in fact, it may be prohibited from doing so) or your political party clubhouse; it does not have to pay for solicitors to seek signatures on the petitions that the First Amendment gives you a right to present; it does not have to pay for an abortion. (This is a noncontroversial point; the controversy is whether the government must pay for an abortion if it is funding other, comparable medical procedures.)[15] All of these constitutional rights are in a sense Rule Four entitlements.

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[14] 372 U.S. 335 (1963).

[15] *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

The taxonomic question whether these are "Rule Four" cases hardly matters in itself. What matters is the possibility that the Calabresi and Melamed framework is simply not refined enough to be helpful in the analysis of these issues. The exercise of First Amendment rights (and many other constitutional rights) is costly. But there are many different kinds of costs. The constitutional rule is that the government is allowed to insist that the speaker bear certain kinds of costs, but the government must allocate some of the costs to someone other than the speaker. The definition of constitutional rights is often a matter of defining and limiting the power of the government to impose certain costs that are associated with the exercise of the right on the individual who holds the right.

The government may, for example, require that a speaker pay for her own air time and direct mail operation. But if the speech imposes psychic costs on listeners whom it offends—as constitutionally protected speech sometimes will—the government may not require the speaker to bear those costs. Those costs will fall on the victims, unless the government compensates the victims from tax revenues. Similarly, if criticism of a government policy makes the policy less effective (by prolonging an unpopular war, for example), the government ordinarily may not make the speaker bear those costs. The landmark First Amendment decision in *New York Times v. Sullivan*[16] amounted to a holding that a speaker may not be required to bear the costs that a false and damaging utterance imposes on the reputation of a public official, so long as the falsehood was negligent or innocent.

One upshot is that Professor Merrill's analysis of tobacco advertising could be expanded to include the Rule Four category. Even if the government may not forbid, buy out, or condemn tobacco advertising, perhaps it should be allowed to require tobacco advertisers to pay for the harm that their advertising inflicts. This would be a parallel to the highly publicized measures enacted by some jurisdictions (but subsequently declared unconstitutional) that made purveyors of pornography liable to alleged victims in a civil damages action.[17]

The deeper question, however, is whether the Calabresi and Melamed framework must be supplemented by some account of governmental motivation if it is to be an adequate approach to First Amendment rights. Why is the government allowed to impose some costs on speakers but not others? The net external costs or benefits of the speech cannot be the explanation. The fact that speech has certain external benefits may explain why it is subsidized, and may justify a subsidy of a certain amount; but it cannot explain why certain *kinds* of costs are systematically imposed on the speaker, while certain other kinds may not be. The explanation for that has to lie, again, with some assessment of the government's motives.

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[16] 376 U.S. 254 (1964).

[17] *See, e.g.*, Amercian Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

The point may be put concretely. Why can the government insist that speakers bear the costs of broadcast air time, but not the cost of the psychic injury they inflict or the harm they cause to the government's efforts to implement its policies? The answer must be that an across-the-board rule that everyone pay for broadcast air time does not give rise to a substantial concern about the government's regulatory motives. But a regime in which the government assessed costs for psychic injury or injury to the government's policy implementation would invite abuse. Here again, the underlying problem is that the government is acting as a regulator, and its regulatory actions must be evaluated. The fact that the government has taken a certain action cannot immediately be viewed as proof that the action is socially beneficial.

The Calabresi and Melamed framework that Professor Merrill skillfully develops in his article can indeed shed valuable light on First Amendment issues. But there are many differences between the allocation of entitlements among private entities and the definition of rights against the government—too many to allow that framework to supersede the traditional central concerns of First Amendment analysis. Those concerns are analytically unsatisfactory in many ways. Often they amount to relatively crude generalizations about government behavior supported by, at most, only the most rough and ready kind of empirical evidence, if that. But that kind of analysis, as unsatisfactory as it is, may be unavoidable for now.