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Daniel O. Conkle
Indiana University Maurer School of Law, conkle@indiana.edu

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A "Conservative" Judge and the First Amendment: Judicial Restraint and Freedom of Expression

DANIEL O. CONKLE

"To whatever extent we err, ... it must be in favor of preserving the values of free expression ... ."

Judge Edward Allen Tamm

Edward Allen Tamm did not like labels. He saw himself as neither a "conservative" nor a "liberal," but only as a judge. In one important respect, however, Judge Tamm was indeed a "conservative" judge: he consistently advocated and practiced judicial restraint—a philosophy of judging built upon skepticism of one's own ability to formulate public policy and to make decisions that might be better made by others.2

Over the course of his judicial career, Judge Tamm authored opinions in four landmark first amendment cases: Red Lion Broadcasting Co. v. FCC,3 Buckley v. Valeo,4 Pacifica Foundation v. FCC,5 and Columbia Broadcasting System v. FCC.6 The United States Supreme Court ultimately decided each of these cases, but there was no Supreme Court precedent to dictate their resolution when they were before the District of Columbia Circuit. As a result, these cases provide a unique opportunity to evaluate the first amendment philosophy of Judge Edward Allen Tamm.7

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2. See, e.g., Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1547 (D.C. Cir. 1984) (en banc) (Tamm, J., dissenting) (arguing constitutional challenge to operation of military training center in Honduras nonjusticiable because "[t]he conduct of foreign affairs and the proper disposition of military power are, without question, subjects committed to the exclusive authority of the political branches of government"), vacated, 105 S. Ct. 2353 (1985); Wright v. Regan, 656 F.2d 820, 838-48 (D.C. Cir. 1981) (Tamm, J., dissenting) (noting importance of "case or controversy" limitation on judicial power and arguing public school students lacked standing to challenge Internal Revenue Service practices with respect to racial discrimination by private schools), rev'd, 468 U.S. 737 (1984); American Radio Relay League v. FCC, 617 F.2d 875, 879 (D.C. Cir. 1980) (Tamm, J.) (explaining and emphasizing importance of judicial deference to rulemaking by administrative agencies).
7. Although Judge Tamm participated in many first amendment cases, I have limited my focus to the four cases in which he authored opinions and in which the Supreme Court subsequently granted review and rendered its own decisions. I believe that this limitation is appropriate for several reasons. First, authored opinions are more likely to reflect a judge's own views than are opinions in which the judge merely joins. Second, Judge Tamm did not write on a clean slate even in most of his authored opinions, as the cases decided by a lower federal court usually involve questions that are resolved through analysis and application of Supreme Court precedent. Judge Tamm's opinions in these four cases, however, as suggested by the Supreme Court's subsequent grants of review, were written largely in the absence of controlling Supreme Court doctrine. They therefore are more likely to reflect the first amendment philosophy that Judge Tamm would have embraced in the absence of constraining Supreme Court precedents.

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1585
In his opinions in these four cases, Judge Tamm took an extremely speech-protective stance. His decisions never afforded less protection than that later granted by the Supreme Court. Indeed, in two of the four cases, Judge Tamm would have required a result that was later rejected by the Supreme Court as being overly protective of freedom of expression.\(^8\)

How could such a stance—a stance requiring frequent judicial invalidation of the policies adopted by other government officials—be reconciled with a philosophy of judicial restraint? In this brief article, I hope to demonstrate that despite this apparent contradiction, Judge Tamm's speech-protective position was in fact quite consistent with his general philosophy of judicial restraint, a philosophy much more sophisticated than the label "conservative" would ever suggest.

I. JUDICIAL RESTRAINT AS DEFERENCE TO MAJORITARIAN POLICYMAKING

A philosophy of judicial restraint requires that a judge take seriously the principle of majoritarian government.\(^9\) As an official who is both unelected and tenured for life, a federal judge is far removed from political accountability. He knows, or at least ought to know, that respect for the principle of majoritarian government should cause him to hesitate before invalidating, on constitutional grounds, the considered judgments of legislative or executive officials, whose decisions are more likely to reflect popular sentiments.

Judge Tamm's approach to first amendment doctrine was clearly influenced by a general respect for majoritarian decisionmaking. In *Red Lion Broadcasting Co. v. FCC*,\(^10\) he presaged the Supreme Court's ultimate ruling in the case by upholding the "right to reply" components of the "fairness doctrine," according...
to which the Federal Communications Commission could require broadcast licensees to air responses to "political editorials" and "personal attacks." Judge Tamm viewed the "right to reply" doctrines as ideologically neutral measures designed to further first amendment values:

The licensees' obligation to present both sides does not arise from the factual truth or falsity of the broadcast, because in the application of the Doctrine the ultimate determination of the merits of the issue will be made by the general public for whose information, presumably, the initial broadcast was originally made. "[T]he freedom of speech guaranteed by the First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[12]

"[R]ather than limiting the [broadcaster's] right of free speech," he wrote, a right to reply "recognizes and enforces the free speech right of the victim."[13] In the absence of an attempt to restrict the level of communication,[14] Judge Tamm believed that legislative and executive officials should not be precluded from adopting evenhanded regulations designed to structure our system of freedom of expression.[15]

II. THE LIMITS OF DEFERENCE: SELF-GOVERNMENT AND FREEDOM OF EXPRESSION

In Buckley v. Valeo,[16] following the reasoning of his opinion in Red Lion, Judge Tamm endorsed the financial disclosure provisions of the Federal Election Campaign Act.[17] "[D]isclosure increases the quantity of information reaching the body politic," he explained, "and furthers the first amendment goal of 'producing an informed public capable of conducting its own affairs.'"[18] He also made it clear, however, that his deference to structural regulations, even if ideologically neutral, would not extend to direct attempts by government to contract, rather than expand, the level of free expression. In particular, he would not

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11. 381 F.2d at 924.
13. Id. at 924.
14. Judge Tamm observed "that [the broadcasters] are not prohibited from broadcasting any program which [they] think suitable." Id. at 923; see id. at 929 ("no provision whatsoever requires the license applicant to waive, forego, or sacrifice the liberty to discuss, when licensed, publicly all matters of public concern").
15. See id. at 924 ("It would be strange indeed... if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.") (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
17. 519 F.2d at 913-14. Although he approved the disclosure requirements in general, he would have invalidated a disclosure provision that reached nonpartisan groups. Id.
18. Id. at 913 (quoting Red Lion, 395 U.S. at 392). On appeal, the Supreme Court generally agreed, finding the disclosure requirements constitutionally permissible. Buckley, 424 U.S. at 60-84.
defer to a decision of Congress to impose dollar limitations on either campaign contributions or expenditures.19

Given his philosophy of judicial restraint, Judge Tamm was troubled about making "judgments best left to Congress."20 With respect to freedom of expression, however, Judge Tamm believed that while the judiciary might well lack the competence to establish a "hierarchy" of free speech values,21 the other branches of government were equally incompetent. "No one, not even Congress, can ascertain the proper quantum of public discussion of issues; this type of paternalism in the area of ideas and political communication is, or should be, completely alien to our democratic system of government."22 Judge Tamm viewed his decision in Buckley not as substituting his judgment for that of Congress, but as removing the power to restrict free expression from all branches of government, those branches being equally without competence to "establish[ ] . . . government ceilings on first amendment activities."23 In the first amendment arena, Judge Tamm's philosophy of judicial restraint was part of a broader philosophy of governmental restraint, and his sense of skepticism toward judicial policy making was part of a broader skepticism about government in general.

Nevertheless, when a judge's skepticism about the policy making of legislative and executive officials translates into a judicial willingness to invalidate their decisions, the judge's commitment to the principle of majoritarian government is put into question. The principle of majoritarian government, however, may properly be understood to include a requirement of freedom of expression.24 In Buckley, Judge Tamm relied on this self-government rationale for protecting free expression. He referred to political communication as "the foundation of all our freedoms,"25 and quoted the famous words of Justice Brandeis in Whitney v. California: "[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . without free speech and assembly discussion would be futile; . . . with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine."26 Judge Tamm's general preference for deferring to majoritarian decisions outside the first amendment context was fully consistent with Brandeis' admonition. If freedom of expression "affords ordinarily adequate protection against the dissemination of noxious doctrine," it also affords ordinarily adequate protection against the formulation of noxious government policy. Thus, with a strongly

19. Buckley, 519 F.2d at 914-18 (Tamm, J., concurring in part and dissenting in part). On appeal, the Supreme Court drew a distinction between campaign contributions and campaign expenditures, upholding the Act's limitations on the former but invalidating its limitations on the latter. 424 U.S. at 12-59.
20. Buckley, 519 F.2d at 914 (Tamm, J., concurring in part and dissenting in part).
22. Buckley, 519 F.2d at 916 (Tamm, J., concurring in part and dissenting in part).
23. Id. at 921.
25. Buckley, 519 F.2d at 922 (Tamm, J., concurring in part and dissenting in part).
26. Id. at 917 (quoting Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)); see Red Lion, 381 F.2d at 928 (Tamm, J., separate opinion) ("The first amendment establishes an informed electorate as the foundation stone of a democracy.").
enforced freedom of expression, there might be little need for further judicial checks on the majoritarian process.

III. THE REQUIREMENT OF IDEOLOGICAL NEUTRALITY

As his opinion in Buckley demonstrates, Judge Tamm believed that government should not be permitted to impose direct restrictions on the quantity of expressive activity. He also identified in that opinion another fundamental requirement, which might be called a requirement of ideological neutrality. Judge Tamm believed that government could not constitutionally adopt measures favoring certain speakers or viewpoints over others. As he had written earlier, "[t]he basic concept of free speech is unfettered by any requirement that it be exercised only by those with a 'right' viewpoint." Under the doctrine he had embraced in Red Lion, government could adopt structural regulations designed to expand, rather than contract, the opportunity for free expression. In doing so, however, the government would have to proceed in a manner that gave no preference to particular speakers or to particular messages.

In Buckley, Judge Tamm relied upon this principle of neutrality in finding that Congress had violated the Constitution by adopting a scheme of public financing under the Federal Election Campaign Act. The Act provided for public funding of the presidential candidates of the two major political parties, but authorized funding for other presidential candidates only upon a showing of prior electoral success. Consistent with his position in Red Lion, Judge Tamm acknowledged that "Congress has the power to commit public resources to fund electoral campaigns," and suggested that he would have approved a system through which public monies were distributed to particular candidates or particular parties on the basis of individual taxpayer choice. Nevertheless, he found that the Act, by taking "a myopic two-party view of the political spectrum," had "impermissibly depriv[ed] minor and new party presidential candidates of their justifiable share of the public monies at a meaningful time." The Act thus violated the requirement of neutrality by "discriminating against minor and new party candidates."

27. I use the phrase "ideological neutrality" to describe this requirement, and "ideological partisanship" to describe its violation. This dichotomy is somewhat different from the more commonly invoked distinction between "content neutral" and "content based" regulation. See generally Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189 (1983). As the discussion below will demonstrate, Judge Tamm's requirement of ideological neutrality would preclude most types of regulation that might be said to involve purposeful governmental discrimination based on content, not only in the narrow sense of viewpoint discrimination, but also in the sense of discrimination based on subject matter or speaker identity. At least in theory, it would also preclude other regulation, even though content neutral in purpose, if the regulation were directed to expression as such and if it had the effect of preferring particular speakers or viewpoints over others.

28. Red Lion, 381 F.2d at 924 (Tamm, J., separate opinion).

29. Buckley, 519 F.2d at 918-20 (Tamm, J., concurring in part and dissenting in part).

30. Id. at 919.

31. Id. at 918.

32. Id.

33. Id. at 919.

34. Id. at 918.

35. Id. at 919. Judge Tamm grounded this conclusion on the equal protection component of the fifth
In *Pacifica Foundation v. FCC*, Judge Tamm applied the requirement of ideological neutrality to invalidate an attempt by the Federal Communications Commission to regulate "indecent" radio broadcasts. He noted that "when the government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." Judge Tamm extended the requirement of ideological neutrality beyond the context of expressly political speech and suggested that the requirement operated more generally to prohibit the selective regulation of expression on the basis of its content. He also rejected an argument that the FCC's order was a permissible "channeling" mechanism, designed not to prohibit but only to "channel" the offensive language to particular times of the day. "In fact," Judge Tamm concluded, "the Order is censorship, regardless of what the Commission chooses to call it.”

*Pacifica* involved an attempt by the government to evaluate expression on the basis of its content, and Judge Tamm implied that such efforts should almost never be tolerated. He broadly declared that "[a]ny examination of thought or expression in order to prevent publication of objectionable material is censorship." In the evaluation of ideas and the language chosen to express them, Judge Tamm believed that the forces of public debate and private choice were far superior to any selection of values either by the FCC or by the federal judiciary. And in case of doubt, Judge Tamm's presumption was clear: "To whatever extent we err, or the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste.”

amendment's due process clause, but it was a conclusion drawn largely from first amendment considerations.

On appeal, the Supreme Court disagreed with Judge Tamm's constitutional conclusion and found the public funding scheme permissible. *Buckley*, 424 U.S. at 90-108.

37. *Id.* at 11. At issue was the broadcast of a George Carlin "comedy routine that was almost entirely devoted to the use of seven four-letter words depicting sexual or excretory organs and activities." *Id.*
38. *Id.* at 16 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)). "Speech cannot be stifled by the government," he wrote, "merely because it would draw an adverse reaction from the majority of the people." *Id.* at 18.
39. *Id.* at 10-11.
40. *Id.* at 13. Judge Tamm grounded his decision in part on § 326 of the Federal Communications Act, which denies the Commission any "power of censorship" and prohibits regulations that "interfere with the right of free speech." 47 U.S.C. § 326 (1982).
41. *Pacifica*, 556 F.2d at 14 (Tamm, J., separate opinion).
42. *See id.* at 18 ("The Commission assumes that absent FCC action, filth will flood the airwaves. . . . [But the] corporate profit motive and the connection between advertising revenue and audience size suggest that the dike will hold as long as the community remains actually offended by what it sees or hears.").
43. *Id.* The regulatory effort at issue in *Pacifica* arguably violated not only the requirement of ideological neutrality, but also the independent principle that government cannot directly restrict the quantity of expressive activity, even in the absence of ideological partisanship.
IV. BALANCING THE CASE FOR DEFERENCE AGAINST THE NEED FOR NEUTRALITY

In Columbia Broadcasting System v. FCC (CBS), the D.C. Circuit addressed the constitutionality of a government-mandated right of access to the radio and television airwaves. Under section 312(a)(7) of the Federal Communications Act, individual candidates for federal elective office have a right of reasonable access for paid political broadcasts. Unlike the neutralizing "right to reply" doctrines considered in Red Lion, section 312(a)(7) had created an affirmative, initial right of access that applied without reference to whether a political opponent had previously secured time. As interpreted by the FCC, the statute required broadcasters to consider each request for access on an individualized basis, giving due regard to a variety of factors, including especially the candidate's "individual needs." Any denial of access was subject to FCC review, at which time the Commission would decide whether the denial was reasonable. The D.C. Circuit upheld the right of access provision against a first amendment challenge by affected broadcasters.

Although Judge Tamm concurred in this ruling, he found the case extremely difficult to resolve. The principle of Red Lion required deference to majoritarian attempts to further the cause of freedom of expression, and section 312(a)(7) enhanced the opportunity for important political speech. The FCC's standards, however, created a risk that the Commission would violate the requirement of ideological neutrality. In a separate concurring opinion, Judge Tamm argued that "broadcast regulation must be tailored to guard against government action that is nonneutral, i.e., government action that, by purpose or effect, tends to enhance the persuasive appeal of a particular speaker or viewpoint vis-a-vis opposing speakers or viewpoints." Judge Tamm feared that the presidentially appointed FCC might consciously or subconsciously violate the requirement of neutrality in policing the right of access created by section 312(a)(7), especially in the context of presidential elections. He was also concerned that a focus on the "individual needs" of the candidates exacerbated this problem.

Despite this danger, however, Judge Tamm could also see that "section 312(a)(7) makes a tremendous positive contribution to the cause of freedom of expression." He noted the importance of television and radio in modern cam-

46. CBS, 629 F.2d at 9-14.
47. Id. at 17-21.
48. Id. at 18.
49. Id. at 23-25. On certiorari, the Supreme Court affirmed the decision of the court of appeals. 453 U.S. at 394-97.
50. CBS, 629 F.2d at 31 (Tamm, J., concurring). In a footnote to this proposition, Judge Tamm observed that "whatever its application in other contexts, the principle of neutrality is at its zenith in the context of political speech." Id. at 31 n.8.
51. Id. at 32-33.
52. Id. Judge Tamm observed that the risk of ideological partisanship was much greater here than it had been in Red Lion. Id. at 31-32; cf. CBS, 453 U.S. at 419 (Stevens, J., dissenting) (FCC approach "creates an impermissible risk that the Commission's evaluation of a given refusal by a licensee will be biased—or will appear to be biased").
53. CBS, 629 F.2d at 33 (Tamm, J., concurring). Consistent with his position in Red Lion, he noted that government is "permitted to further the general cause of freedom of expression." Id. at 30 n.6.
campaign efforts and emphasized the general importance of candidate speech in a self-governed society. He observed, “To give increased play to ideas touching the very essence of our democracy,” he observed, “is a goal that surely lies near the heart of the first amendment.”

Thus, Judge Tamm was required to reconcile conflicting first amendment principles in CBS—the deference principle he had endorsed in Red Lion on the one hand, and the requirement of ideological neutrality on the other:

[Section 312(a)(7), as implemented by the Commission, stands precariously on the first amendment tightrope. It raises the serious danger of nonneutral government action favoring one speaker or viewpoint over another. Yet it also makes a great contribution to the cause of encouraging an “uninhibited, robust, and wide-open” discussion of issues central to our system of government.]

Stating that he “could not give effect to the statute’s positive contribution to first amendment values in the absence of adequate safeguards for controlling the danger of nonneutrality,” he found those safeguards in the FCC’s implementation of the right of access. In particular, Judge Tamm emphasized that the Commission was “strictly limited to the narrow role of overseeing broadcaster determinations concerning access, determinations that are entitled to great deference before the Commission.” He concluded that while the FCC’s implementation of section 312(a)(7) came “perilously close” to violating the first amendment, he would uphold the agency’s action as long as it maintained “a very limited ‘overseer’ role consistent with its obligation of careful neutrality.”

V. A “REstrained” Judicial Role?

Judicial restraint frequently implies judicial deference to the policy judgments of elected and administrative officials. This deference certainly was an element of Judge Tamm’s first amendment philosophy. Thus, he was quite willing to uphold structural regulations designed to foster freedom of expression. Efforts by government to restrict expression or to pursue ideologically partisan objectives, however, did not warrant the deference he ordinarily gave to the policy judgments of the popular branches. Although Judge Tamm was skeptical of his own ability as a judge to determine the propriety of such efforts, his skepticism extended to other government officials as well. As a result, his implementation of judicial restraint in the area of first amendment doctrine could not mean unquestioned deference to the judgments of elected and administrative officials.

54. Id. at 33-34.
55. Id. at 34.
56. Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
57. Id.
58. Id. Judge Tamm also noted that the equal time provision of § 315 of the Communications Act, 47 U.S.C. § 315 (1982), served “as an important safety net by mitigating the effect of any nonneutrality that might creep into the § 312(a)(7) decisionmaking process.” Id. at 34 n.22.
59. Id. at 34.
60. Three of the four cases discussed here involved broadcast regulation, and one could argue that this might color the first amendment philosophy that is reflected in Judge Tamm’s opinions. But his position concerning structural regulation was essentially the same in Buckley, a nonbroadcasting case, as it was in Red Lion and CBS. Likewise, Buckley was the case in which Judge Tamm first applied his theories concerning restrictions on expression and the requirement of ideological neutrality. His opinion in
CBS demonstrates that Judge Tamm’s first amendment philosophy was not always easy to apply. Nevertheless, what emerges from his opinions in Red Lion, Buckley, and Pacifica, as well as CBS, is a refreshingly simple vision of the first amendment: government may adopt ideologically neutral measures designed to expand the range of expression, but it may not directly limit the quantity of expressive activity, and it may not adopt regulations that are partisan in their treatment of different speakers, different viewpoints, or different uses of language. By contrast, the Supreme Court has developed an elaborate codification of first amendment doctrine, one that includes numerous categories and subtypes of unprotected or only partially protected expression. As Professor Merritt has observed, the Court has promulgated “increasingly complex first amendment categories and catchwords. First amendment lawyers today speak of public and private figures, actual malice or negligence, the four part Central Hudson test, the three step O’Brien analysis, and type one, two, and three public fora.”

Because Judge Tamm sat as a court of appeals judge, he encountered only a few freedom of expression cases of first impression; it is impossible to know how he might have responded to the vast array of cases that have reached the Supreme Court. Nonetheless, it seems clear that he endorsed a strong but simple reading of the first amendment, one that precluded legislative abridgments of expressive rights but that required little in the way of judicial policy making. When this interpretation of the first amendment is compared with the doctrine currently embraced by the Supreme Court, it becomes evident that the Supreme Court is willing to tolerate significantly more governmental regulation than Judge Tamm’s position would permit. But the Court upholds such governmental action only selectively, using a process of judicial decisionmaking that draws fine distinctions based upon the type of regulation involved and the perceived values and harms of various types of expression.

It may be fair to ask which view of the first amendment, Judge Tamm’s or the

Pacifica did expand the requirement of ideological neutrality significantly, but surely the speech-protective position that he endorsed in that case would have been applied with no less rigor outside the context of broadcasting—a context in which the government sometimes has been permitted to regulate in a manner that would not be permitted elsewhere. Compare Red Lion, 395 U.S. at 400-01 (upholding “right to reply” components of “fairness doctrine”) with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (invalidating Florida “right to reply” statute that granted political candidates newspaper space to answer criticism).

61. Note that each of these cases involved governmental regulation directed to expressive conduct as such, as contrasted with regulation directed to conduct generally but having an incidental effect on expression. Judge Tamm apparently believed that government must have greater leeway in adopting the latter type of regulation. See Community for Creative Non-Violence v. Watt, 703 F.2d 586, 608-22 (D.C. Cir. 1983) (en banc) (Wilkey, J., with Tamm, MacKinnon, Bork & Scalia, JJ., dissenting) (arguing that general ban on camping in designated parks could constitutionally be applied to camping that constituted expressive part of demonstration otherwise protected by first amendment), rev’d sub nom. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).


63. If I were to speculate on this question, I would guess that Judge Tamm might have tended toward an “absolutist” position akin to that often associated with Justice Black. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 293-97 (1964) (Black, J., concurring); Konigsberg v. State Bar, 366 U.S. 36, 56-80 (1961) (Black, J., dissenting).

64. Several recent books address the Supreme Court’s first amendment doctrine and related theoretical issues. E.g., L. Bollinger, The Tolerant Society (1986); M. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment (1984); M. Redish, Freedom of
Supreme Court’s, is more “conservative” and “restrained.” I think I know how Judge Tamm would have felt.