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Toward a Healthy First Amendment

Introduction

Elizabeth Sepper*

In recent years, businesses have bought claims under the Free Speech Clause of the Constitution to challenge restrictions on the use of drug prescription data, labeling of tobacco products, and disclosure of calorie counts.¹ Across these areas, an increasingly robust commercial speech doctrine has come to constrain legislation and regulation. Businesses now also invoke freedoms of religion and of association to resist mandated employee health insurance benefits.² At the same time, physicians face expanded regulation of their patient counseling. Legislatures seek to restrict and to compel physician

* Associate Professor, Washington University School of Law. I am grateful to the editors and staff of the *Washington University Journal of Law & Policy* and to the authors and participants in the Healthy First Amendment panel at the American Society of Law, Medicine, and Ethics Health Law Professors Conference 2015.

1. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (striking down Vermont's law that prohibited selling or using records of doctor prescribing practices for marketing purposes without the doctor's consent); *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012) (striking down the FDA's proposed graphic warnings for cigarette packages); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (involving First Amendment challenge to calorie disclosures for chain restaurants).

2. *See, e.g.*, Complaint at Counts I, III, IV, & VI, *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 4009450 (W.D. Okla. Sept. 12, 2012).

speech on the subjects of abortion,³ fracking,⁴ reparative therapy for gay teens,⁵ and firearms.⁶

At the 2015 Health Law Professors Conference of the American Society of Law, Medicine and Ethics, a panel of health law scholars came together to examine the topic of a healthy First Amendment. The participants explored cutting-edge questions at the intersection of health law and the Constitution: How does the Supreme Court's interpretation of the First Amendment conflict with goals of public health and medical professionalism? In what ways does contemporary doctrine safeguard space to promote health? How might we reimagine the First Amendment to allow public health, medical professionalism, and free speech to flourish?

To this volume, the participating scholars bring a rich understanding of the health context in which many questions of First Amendment interpretation arise. Their combined experience as practitioners includes litigation of reproductive rights cases, practice of medicine, analysis of biotech and bioethical issues, and service to the Food and Drug Administration, National Institutes of Health, American Society for Bioethics and the Humanities, and the Hastings Center. Their constitutional expertise as scholars is manifest in their many publications addressing constitutional issues from physician aid-in-dying to abortion, and from bodily autonomy to religious freedom.⁷

3. See, e.g., *Planned Parenthood v. Rounds*, 686 F.3d 889, 894, 906 (8th Cir. 2012) (upholding requirement that physicians tell patients abortion leads to "increased risk of suicide ideation and suicide," which is disputed by scientists).

4. Susan Philips, *Pennsylvania Doctors Worry Over Fracking 'Gag Rule'*, NPR (May 17, 2012), <http://www.npr.org/2012/05/17/152268501/pennsylvania-doctors-worry-over-fracking-gag-rule?ft=1&f=1128> (reporting on state law that grants physicians access to information about trade-secret chemicals used in natural gas drilling to allow them to treat patients exposed to chemicals, but bars them from disclosing to anyone else the chemicals used).

5. *Pickup v. Brown*, 740 F.3d 1208, 1236 (9th Cir. 2014) (upholding California's ban on sexual orientation conversion therapy for children).

6. *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 901 (11th Cir. 2015) (upholding law limiting physicians' ability to inquire about patients' gun ownership).

7. For a small selection of their scholarship, see Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497 (2015); Micah L. Berman, *Commercial Speech Law and Tobacco Marketing: A Comparative Discussion of the United States and Canada*, 39 AM. J.L. & MED. 218 (2013); B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, 43 J.L. MED. & ETHICS 59 (2015); B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277 (2007); David

The contributions to this volume analyze constitutional doctrine pertaining to public health initiatives, pharmaceutical regulation, reproductive healthcare, and professional practice of medicine. With a focus on commercial speech and professional speech, they expose a remarkable lack of clarity in Supreme Court jurisprudence. They raise, and begin to answer, questions left open in current doctrine. Sensitive to the health setting in which free speech issues arise, each contributor identifies where First Amendment doctrine suffers from infirmity and where it is healthy—that is, potentially or actually hospitable to health promotion.

The volume begins with a wide perspective. Nadia Sawicki and Micah Berman take the reader through the past, present, and future of professional and commercial speech regulation, respectively. David Orentlicher and Jessie Hill then provide a deeper examination of First Amendment issues specific to off-label marketing of pharmaceuticals and to reproductive healthcare.

THE DOCTRINAL LACUNA AND THE EFFECTS ON HEALTH PROMOTION

In their articles, Nadia Sawicki and Micah Berman assume the task of finding and filling the lacunae in existing Supreme Court doctrine. While Sawicki focuses on professional speech, Berman calls for clarifying standards for commercial speech. Each surfaces critical open questions for constitutional interpretation and health promotion. They explore the purposes of protecting speech, seeking to understand who the relevant rights holder is—the professional, the business entity, or the consumer/patient.

In her article, Nadia Sawicki shows that the Supreme Court has provided little guidance as to the constitutional standard governing

Orentlicher, *Abortion and Compelled Physician Speech*, 43 J.L. MED. & ETHICS 9 (2015); David Orentlicher, *The FDA's Graphic Tobacco Warnings and the First Amendment*, 369 NEW ENG. J. MED. 204 (2013); DAVID ORENTLICHER, MATTERS OF LIFE AND DEATH: MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW (2001); Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 MD. L. REV. 458 (2014); Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J.L. & PUB. POL'Y 1 (2011).

physician speech, and the lower courts have struggled with the doctrine. She describes the Supreme Court's leading decision on compelled commercial speech, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, which upheld a state law requiring certain disclosures in attorney advertising.⁸ Following *Zauderer*, the state may compel the disclosure of "purely factual and uncontroversial information" in the commercial (and professional) contexts.⁹ As Sawicki reviews, the meaning of "uncontroversial" recently has been contested by litigants in litigation involving requirements that crisis pregnancy centers disclose whether they provide referrals for reproductive health services and that meat products bear country-of-origin labels. Some courts have concluded that compelled speech cannot be "uncontroversial" where it touches on a matter of public debate—with significance for regulation of professional speech related to, for example, abortion or gun ownership.¹⁰

Sawicki helpfully untangles the facts and fictions of compelled physician speech. She shows that contrary to widely held beliefs, professional speech is not excluded from constitutional protection, but enjoys some measure of protection. She explains that *Whalen v. Roe*, involving a state law requiring physicians to report patients' prescription drug information, led to "a common misconception" that physicians' rights derive entirely from their patients' rights.¹¹ *Whalen's* holding, however, related to the Fourteenth Amendment, not the First Amendment, and thus, Sawicki argues, left the status of physician speech unclear and unsettled.¹² She then provides a comprehensive review of the ways in which constitutional doctrine safeguards physician speech and the many questions that the doctrine leaves open.

8. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

9. *Id.* at 651.

10. Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions*, 50 WASH. U. J.L. & POL'Y 11, 11–14 (2016).

11. *Id.* at 18–21.

12. *Whalen v. Roe*, 429 U.S. 589, 604 (1977) (rejecting physicians' claim under the Fourteenth Amendment as derivative of patients' Fourteenth Amendment privacy claims).

Drawing on her review of the case law from the lower courts and Supreme Court, Sawicki offers a path forward that balances professional practice, state interests, and speech. She suggests that “[i]n order to pass constitutional muster, a state law compelling physician speech would have to be reasonably related to the regulation of the medical professional, and would have to compel factual, uncontroversial, and non-ideological speech” and would be subjected to additional requirements where patients’ Fourteenth Amendment rights coincide with physicians’ speech rights.¹³ Compelled physician speech, however, may venture into more protected political or ideological speech—as when a physician must make ideological statements (“Obamacare is a bad law.”). Under such circumstances, Sawicki argues, strict scrutiny applies to professional practice as it would to private contexts.

Like Sawicki, Micah Berman offers the reader a comprehensive overview of constitutional doctrine—this time in the area of commercial speech. Because the Supreme Court’s First Amendment doctrine has come to largely prohibit restrictions on commercial speech, public health initiatives have sought to combat negative health consequences of various products through compelled speech. Berman traces the commercial speech doctrine from its origins. He shows the ways in which legal tests related to restrictions on speech are being imported into the compelled speech doctrine in ways that make little sense.¹⁴ Due to the mismatch, courts employ a “free-floating, standardless means/ends test” that allows them to engage in “essentially unrestrained second-guessing” of scientific conclusions underlying regulation.¹⁵

Having identified the “critical open questions” with regard to the commercial speech doctrine and health-related warnings or disclosures, Berman proposes to answer them in a way that both reflects existing Supreme Court case law and protects public health. First, he argues that *Zauderer*’s “factual and uncontroversial” language, which has plagued courts’ analysis, is best understood as

13. Sawicki, *supra* note 10, at 52.

14. Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL’Y 53, 61–64 (2016).

15. *Id.* at 64.

requiring that mandated disclosure be “factually accurate,” or “factually uncontroversial.”¹⁶ Such a rule would authorize the government to require factual disclosures on subjects that are ideologically contested—such as abortion, gun control, and genetically modified organisms, provided that the disclosure reflects factual claims. Second, the governmental interest in mandated speech should be scrutinized differently from restrictions on speech. Because of the interests of consumers in receiving information, Berman says, rational basis scrutiny is the most appropriate standard of review for mandated commercial speech. Third, mandated disclosures should undergo more rigorous constitutional scrutiny where they require ideological or political speech.¹⁷ Finally, state and local governments might pursue and defend mandated warnings on the ground, not that they mandate commercial speech, but that they represent government speech.¹⁸ Ultimately, Berman concludes that given its state of flux, the compelled speech doctrine has room to develop so as to ensure both Free Speech and public health.

THE BLURRING CATEGORIES OF SPEECH: APPLICATION OF
CONSTITUTIONAL DOCTRINE TO OFF-LABEL MARKETING AND
REPRODUCTIVE HEALTHCARE

As Sawicki and Berman suggest, the boundaries between commercial, professional, and ideological speech have blurred. In their contributions to the volume, David Orentlicher and Jessie Hill highlight two specific areas of contestation among these categories of speech.

At the intersection of commercial and professional speech is David Orentlicher’s contribution to the volume. While the government frequently requires the flow of information to protect public health, it sometimes prohibits disclosure that is harmful. In his essay, Orentlicher examines restrictions on speech in the form of the U.S. Food and Drug Administration’s regulations prohibiting

16. *Id.* at 65.

17. *Id.* at 78 (citing *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 16 (1986)).

18. *Id.* at 81–84.

pharmaceutical companies from advertising a drug for uses that the FDA has not approved and for which the drug is not labeled. Off-label uses, however, are not illegal, and doctors may recommend and prescribe drugs for uses not designated on the labels. By contrast, pharmaceutical companies may not market their products to doctors or consumers for such uses. This prohibition on “off-label marketing” thus presents a puzzle.

Through federalism principles, Orentlicher provides a novel explanation for the different regulatory treatment of off-label prescribing and off-label marketing of drugs.¹⁹ He argues that the seemingly asymmetrical regulatory regime safeguards a federal system in which the practice of medicine has traditionally been an area of state concern and the development of pharmaceuticals has long been regulated at the federal level. The alternative to prohibiting off-label marketing by drug companies would be the federal government’s regulation of the conduct of professionals and its policing of their interactions with patients. Such a system, Orentlicher argues, would sacrifice federalism and its potential to protect liberties more broadly. Through the frame of federalism, he criticizes the Second Circuit’s recent decision in *United States v. Caronia*, which calls into question the FDA’s authority to prohibit off-label marketing.²⁰ Orentlicher concludes that the goal of balancing societal values in individual liberty and public health is better served through restrictions on off-label marketing by drug companies and freedom to advise patients on off-label uses by doctors.

Jessie Hill turns her attention to the tensions between reproductive rights and First Amendment rights.²¹ She argues that constitutional doctrine reflects a divide over the meaning of reproductive services, such as abortion and contraception. As Hill shows, litigation under both the Free Speech clause and the Religious Freedom Restoration Act (RFRA), a quasi-constitutional religious liberty statute,

19. David Orentlicher, *Off-Label Drug Marketing, the First Amendment, and Federalism*, 50 WASH. U. J.L. & POL’Y 89 (2016).

20. *United States v. Caronia*, 703 F.3d 149, 162–68 (2d Cir. 2012).

21. B. Jessie Hill, *The First Amendment and the Politics of Reproductive Health Care*, 50 WASH. U. J.L. & POL’Y 103 (2016).

categorizes reproductive care as a part of comprehensive healthcare or—alternatively—as a political, moral, or ideological choice separate from health. Skepticism of women’s reproductive healthcare has extended from Free Speech to religious free exercise. Employers mounting religious objections to contraceptive coverage required by the Affordable Care Act and the courts siding with them portrayed contraception as only minimally related to health.²²

Like Berman, Hill goes back in history to early reproductive rights and commercial speech cases. She shows that a number of early commercial speech cases involved reproductive healthcare and took the perspective that speech advertising condoms or abortion services was political, rather than health related, and could not be restricted.²³ Today, as Hill demonstrates, the framing of reproductive care as political or moral choice shapes both the standard of constitutional scrutiny and, frequently, the ultimate outcome of a case. It has led courts to contradictory results—rejecting (or closely scrutinizing) compelled disclosures by crisis pregnancy centers yet upholding them with regard to medical providers.²⁴ Hill concludes with a defense of a doctrinal approach to Free Speech and religious liberty that understands reproductive healthcare to be “essential, necessary, and therapeutic rather than merely the elective product of a moral choice.”²⁵

CONCLUSION

In many ways, health promotion is the canary in the coal mine of First Amendment jurisprudence. From the regulation of pharmacies that gave birth to the commercial speech doctrine²⁶ to the coverage of contraception that led to corporate religious exemption,²⁷ health promotion has been at stake. Today, ongoing debates and litigation

22. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (distinguishing contraception from other medical care because “[o]ther coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases)”).

23. Hill, *supra* note 21, at 114–15.

24. *Id.* at 110–13.

25. *Id.* at 105.

26. *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

27. *Hobby Lobby*, 134 S. Ct. 2751.

over big healthcare data, labeling of unhealthy foods and beverages, disclosures by crisis pregnancy centers, vaccine mandates for school children, and restrictions on doctors' counseling of patients on issues like gun ownership and chemical exposure squarely implicate the public's health and the state's authority to protect it. The work of Sawicki, Berman, Orentlicher, and Hill responds to this now-urgent need for health expertise in constitutional decision-making to ensure a healthy First Amendment. Approaching constitutional interpretation with a firm footing in the dynamic area of public health and healthcare, they reimagine Free Speech doctrine with sensitivity to the constitutional purposes furthered or impeded by the speech.