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National Nanny, Meet The First Amendment

**Bert W. Rein and
John E. Barry**

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Free markets are driven by consumer choice. Just as the right to vote is the core of our political democracy, the right to choose how our dollars are spent is central to economic liberty and the best allocation of productive resources. While no one questions that government should stay out of our political choices, government routinely intervenes in our individual economic choices. Government limits consumer choice directly by banning or regulating products and services, and pushes preferred outcomes by using taxes and subsidies to change price relationships between lawful alternatives. In addition, government influences consumer choice between lawfully available alternatives indirectly by restricting the information that businesses can convey about disfavored products and services, or requiring businesses to use their valuable advertising and labeling resources to disseminate government-composed messages.

Two recent judicial decisions have invoked the First Amendment's freedom of speech guarantee to impose significant limits on the government's ability to use information management to regulate the lawful exercise of consumer choice. In *Sorrell v. IMS Health Inc.*, the Supreme Court overturned a

Bert W. Rein is a Founding Partner of Wiley Rein LLP in Washington. He specializes in using constitutional law issues, such as First Amendment and due process, to challenge emerging legislative and regulatory policy. Mr. Rein filed an amicus curiae brief in Sorrell v. IMS Health Inc. on behalf of patient advocacy groups. He can be reached at (202) 719-7080. John E. Barry is a Litigation and Appellate Partner at Wiley Rein. Mr. Barry has 20 years of experience representing clients in complex civil litigation matters and appeals before federal and state courts and in arbitration proceedings. He can be reached at (202) 719-7239.



Bert W. Rein



John E. Barry

Vermont law that sought to limit the consumption of branded drugs by prohibiting branded drug manufacturers from acquiring data about the prescribing histories of individual physicians to enhance their direct marketing or "detailing" efforts. Vermont claimed that by handicapping branded drug promotion to prescribing physicians, the law would render the counter-detailing of less expensive generic drugs by insurance companies and others more effective, and thus reduce health care costs. Applying an analytical framework that echoed First Amendment decisions on the sanctity of political speech, the Court held that Vermont could not discriminate against branded drug manufacturers by prohibiting them from using prescriber data in their promotional communications while allowing unfettered use of the same data by virtually anyone else. In particular, the Court reasoned that Vermont had no right to restrict commercial speech to promote the state's preferred public policy agenda: "In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles."

More recently, in *R.J. Reynolds Tobacco Co. v. FDA*, Judge Richard Leon of the federal district court in the District of Columbia relied on the First Amendment to reject the FDA's effort to require cigarette manufacturers to display "graphic images such as diseased lungs and a cadaver bearing chest staples ... on the top 50% of the front and

back panels of every cigarette package." Judge Leon determined that the FDA packaging rule was not designed to enhance consumer choice by requiring "factual and uncontroversial disclosures" but was intended instead to use provocative images to "evoke emotion" to deter smoking. The judge expressly questioned whether government has any constitutionally cognizable interest in restricting or compelling speech to influence individual economic choices.

Taken together, *Sorrell* and *Reynolds* are a judicial rallying point for economic liberty and consumer sovereignty. As Judge Leon put it, "[o]ne can only wonder what the Congress and the FDA might conjure for fast food packages and alcohol containers if ... they were not compelled to comply with the intricacies of our First Amendment jurisprudence." While the liberal establishment at *The New York Times* was quick to condemn the decisions as examples of deregulatory, anti-consumer judicial activism, the *Sorrell* and *Reynolds* courts are on solid ground as guardians of constitutional liberties. The government has numerous ways to regulate the consumer marketplace directly and to police fraud and deception. Handicapping or hijacking private advertising and marketing initiatives to propel government-preferred outcomes, however, violates the First Amendment's free speech guarantee, which protects the free flow of information and, concomitantly, the freedom of businesses to compete and the freedom of consumers to decide. Government interference with commercial speech also distorts the political process and reduces political accountability by obscuring the true source of the message. Government may use its bully pulpit to encourage people to eat properly, exercise often, save money and avoid bad habits, but it cannot force businesses to act as its unwilling spokesman. As the Supreme Court observed ten years ago in *Thompson v. Western States Medical Center*, in our constitutionally ordered society, government has no legitimate interest "in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions."

Please email the authors at brein@wileyrein.com or jbarry@wileyrein.com with questions about this article.