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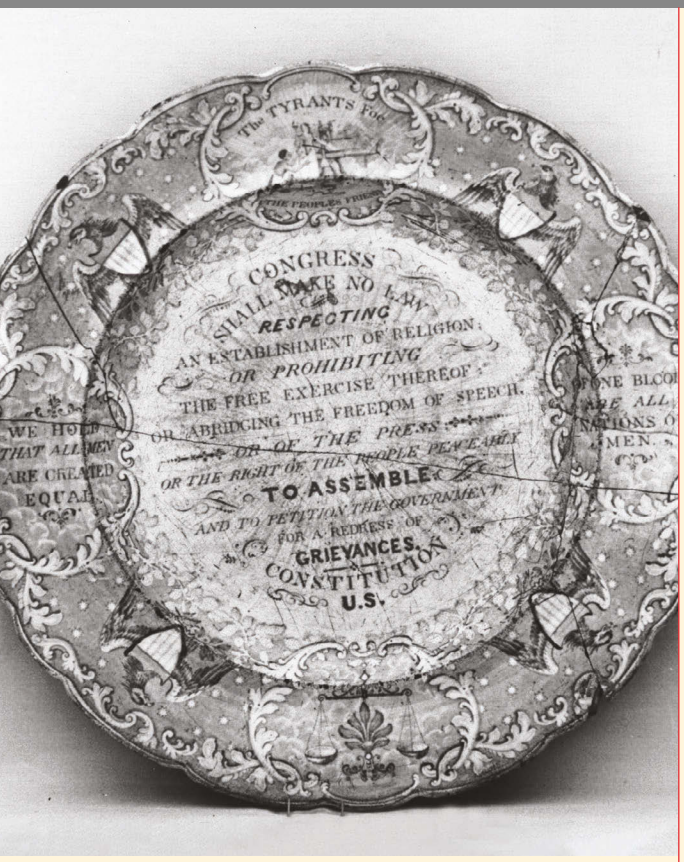

SYMPOSIUM

First Amendment Values in Health Care

GUEST EDITED BY Sonia M. Suter

Plus more inside...

INDEPENDENT ARTICLES

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VOLUME 49:4 • WINTER 2021

Symposium Articles

First Amendment Values in Health Care

Guest Edited by Sonia M. Suter

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The Supreme Court and lower courts have not articulated a clear or consistent framework for First Amendment analysis of speech restrictions in health care and with respect to abortion. After offering a coherent doctrine for analysis of speech restrictions in the doctor-patient relationship, this piece demonstrates how potential legislation restricting patient access to information from reproductive testing intended to limit "undesirable" reproductive choices would violate the First Amendment.

Access to reliable health advice can make the difference between life and death. But good advice is hard to come by. Within the confines of the professional-client or doctor-patient relationship, the First Amendment operates in a way that protects good and sanctions bad advice. Outside of this relationship, however, the traditional protections of the First Amendment prohibit content- and viewpoint discrimination. Good and bad advice are treated as equal. A core assumption of First Amendment theory is the autonomy of speakers and listeners. Another assumption, as this Article demonstrates in the health context, is the availability of access to professional advice. This assumption, however, is erroneous because access to health advice in fact is unevenly distributed.

This Article argues that assuming access to professional advice creates indefensible inequality. Lack of access to expert advice puts some listeners at much higher risk than others. Current First Amendment doctrine is largely unproblematic for those who can afford expert advice and makes expert advice much costlier where health provider access is needed to obtain good advice. Those who lack access must place a higher degree of trust in widely-available information because they have no more reliable alternative. In other words, First Amendment doctrine places a higher burden on those who can least afford expert advice and who are most dependent on experts in public discourse.

We argue that concentration of power in religious hospitals threatens disestablishment values. When hospitals deny care for religious reasons, they dominate patients' bodies and convictions. Health law should — and to some extent already does — constrain such religious domination.

This article argues that the Supreme Court should not require a religious exemption from vaccine mandates. For children, who cannot yet make autonomous religious decision, religious exemptions would allow parents to make a choice that puts the child at risk and makes the shared environment of the school unsafe — risking other people's children. For adults, there are still good reasons not to require a religious exemption, since vaccines mandates are adopted for public health reasons, not to target religion, are an area where free riding is a real risk, no religion actually prohibits vaccinating under a mandate, and policing religious exemptions is very difficult.

This article analyzes the Supreme Court's "shadow docket" Free Exercise cases relating to COVID-19. The paper highlights the decline of deference, the impact of exemptions, and the implications of the new doctrine for vaccine and other public health laws.

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Independent Articles

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Columns

Symposium articles *are solicited by the guest editor for the purposes of creating a comprehensive and definitive collection of articles on a topic relevant to the study of law, medicine and ethics. Each article is peer reviewed.*

Independent articles *are essays unrelated to the symposium topic, and can cover a wide variety of subjects within the larger medical and legal ethics fields. These articles are peer reviewed.*

Columns *are written or edited by leaders in their fields and appear in each issue of JLME.*

Next Issue:

Health Law and Anti-Racism: Reckoning and Response

A Symposium Guest Edited by Michele Goodwin and Holly Fernandez Lynch

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