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There's No "One Weird Trick" Around the Constitution: Analyzing the Attempts to End DTC Pharma Marketing

by Zac Morgan

A Bipartisan Legislative-Executive Coalition Wants to End Pharmaceutical Ads

From both ends of Pennsylvania Avenue have come the murmurs: "Now is the time to ban prescription pharmaceutical advertising."

HHS "Secretary Robert F. Kennedy, Jr. has made no secret of his disdain" for those familiar cheery messages urging viewers to "ask their doctor about" a specific drug.[1] During his (brief) campaign for the White House, Secretary Kennedy vowed to use executive action to ban so-called direct-to-consumer (DTC) ads.[2] Now ensconced in his oversight role at HHS, Secretary Kennedy is reportedly considering executive action "to require greater disclosures of side effects of a drug within each ad—likely making broadcast ads much longer and prohibitively expensive."[3]

Meanwhile, a growing bipartisan coterie of U.S. senators, ranging from Josh Hawley (R-Missouri) to Bernie Sanders (I-Vermont), have joined Kennedy's chorus. Both Hawley and Sanders have introduced their own legislation to, as the gentleman from Missouri candidly put it, "ban prescription drug commercials."[4]

What About the First Amendment?

The Supreme Court has repeatedly ruled that "business or economic activity"[5] is "entitled to the protection of the First Amendment."[6] That right includes not just generally "paid advertisement[s] of one form or another,"[7] but the "speech of pharmaceutical marketing."[8] DTC ads just cannot be banned—even if they "affect[] treatment decisions,"[9] increase demand (and therefore undercut government efforts to control prices), or are merely "'unpopular, annoying[,] or distasteful.'"[10]

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[1] Brownstein Client Alert, "The First Amendment and Direct-to-Consumer (DTC) Prescription Drug Ads," July 7, 2025; https://perma.cc/MW2G-5DSU.

[2] *Id.*

[3] Rachel Cohrs Zhang, "RFK Jr.'s Drug-Ad Crackdown Threatens a $10 Billion Market," Bloomberg Law, July 17, 2025.

[4] Office of U.S. Senator Josh Hawley, "Hawley, Shaheen Introduce Legislation to End Taxpayer-Funded Pharma Ads," (May 15, 2025); https://perma.cc/573A-R54H.

[5] *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

[6] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 576 (2011).

[7] *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

[8] *Sorrell*, 554 U.S. at 576.

[9] *Id.*

[10] *Speiser v. Randall*, 357 U.S. 513, 536 (1958) (Douglas, J., concurring) (quoting *Murdock v. Pa.*, 319 U.S. 105, 116 (1943)).

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Cognizant of this settled constitutional law, none of these efforts come cloaked as traditional prior restraints. Senator Sanders' proposal, which comes the closest, deems a drug "misbranded" if the holder of the relevant approval or license engages in any kind of commercial advertising.[11] (Pharmaceutical companies selling misbranded drugs are at risk of civil and criminal liability, but the initial advertising itself would not be technically prohibited.)[12] By contrast, Senator Hawley's bill "merely" forecloses a tax deduction for business expenses related to DTC advertising.[13] And Secretary Kennedy's bruited efforts are designed to "cut[] down on the practice by adding legal and financial hurdles," not by banning speech directly.[14]

In short, it remains as true today as it was for Justice Robert Jackson in 1945, that we rarely "meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate," such as the tax code, misbranding of drugs, or disclosure rules, "so as to bring the whole within official control."[15]

Enter the Unconstitutional Conditions Doctrine

Fortunately, there is no "one-weird-trick" exception to the First Amendment. "The Constitution's protection is not limited to direct interference with fundamental rights."[16] The Supreme Court has long held "in a variety of contexts that the government may not deny a benefit to a person because he exercises a constitutional right."[17] This is the unconstitutional conditions doctrine which "'limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits"—like FDA approval to legally sell a drug or a tax subsidy—"are fully discretionary."[18]

This makes sense. After all, "if the government could deny a benefit" in response to "constitutionally protected speech,"[19] it would function like a tax or fine. And just as "the Government may not impose a tax upon the expression of ideas,"[20] even economically motivated ones like "buy this drug,"[21] it cannot indirectly compel what it "could not command directly."[22]

Senator Sanders's fig leaf—that his bill simply withdraws permission to legally sell a drug if it is promoted through advertising—should fall quite easily before this rule. The whole purpose of "the unconstitutional conditions doctrine" is to "vindicate[] the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[23] Misbranding a drug if a company exercises its First Amendment right to advertise is precisely the highwayman's choice that the doctrine forbids.

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[11] S. 2068, *End Prescription Drug Ads Now Act*, 119th Congress (2025).

[12] 21 U.S.C. § 333.

[13] S. 1785, *No Handouts for Drug Advertisements Act*, 119th Congress (2025).

[14] Zhang, *supra* note 3.

[15] *Thomas*, 323 U.S. at 547 (Jackson, J., concurring).

[16] *Healy v. James*, 408 U.S. 169, 183 (1972) (capitalization altered).

[17] *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (internal quotation marks and citation omitted).

[18] *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006).

[19] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[20] *Speiser v. Randall*, 357 U.S. 513, 536 (1958) (Douglas, J., concurring).

[21] *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) ("[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged").

[22] *Speiser*, 357 U.S. at 526.

[23] *Koontz*, 570 U.S. at 604.

The Supreme Court is likely to hold the line here. Not only has the Court squarely affirmed the First Amendment's protection for pharmaceutical marketing,[24] but it recently rejected just such a license-for-silence bargain in *Americans for Prosperity Foundation v. Bonta*.[25] While not commonly thought of as an unconstitutional conditions case, the trade-off there was a classic of the genre: cough up your First Amendment-protected donor list[26] in exchange for a license to solicit charitable funds in California.[27]

Are Tax Exemptions Different?

Senator Hawley's proposal, by contrast, stands on somewhat firmer precedent. If his No Handouts for Drug Ads Act became law and was challenged in court, the Justice Department would likely point to *Regan v. Taxation With Representation*[28] to defend the law. In *Regan*, a § 501(c)(3) nonprofit corporation, Taxation With Representation, challenged the Internal Revenue Code's prohibition on significant lobbying by such groups. It did so explicitly on unconstitutional conditions grounds, which the Court flatly rejected. So far, so good for Senator Hawley.

Taxation With Representation's unsuccessful argument was straightforward. Under Section 501(c)(3), tax-exempt organizations may accept tax-deductible contributions.[29] "A tax exemption has much the same effect as a cash grant to the organization in the amount of tax it would [otherwise] have to pay on its income. Deductible contributions are similar to cash grants in the amount of a portion of the [donor]'s contributions."[30] But there's a catch—a condition, if you will. Section 501(c)(3) groups are capped in how much lobbying they may do,[31] while § 501(c)(4) groups are not.[32] Donations to § 501(c)(4) groups generally aren't tax-deductible, while donations to § 501(c)(3) groups are. And while "[l]obbying is, of course, a pejorative term . . . another name for it is petitioning for the redress of grievances. It is under the express protection of the First Amendment."[33] So we have a subsidy that has been conditioned on the forfeiture of a fundamental right. Slam dunk, right?

Not quite. Despite the unconstitutional conditions doctrine's command that "the government 'may not deny a benefit to a person . . . to protect a result which it could not command directly,'"[34] the *Regan* Court upheld the tax code's bargain of "cash grants" in exchange for a cap on lobbying.[35] And isn't the Hawley proposal that exact pitch? One can either have their tax exemption, or they may have their drug ads—but not both. Nor does *Regan* stand alone, as the Court noted by citing *Cammarano v. United States*, where it "upheld a Treasury Regulation that denied business expense deductions for lobbying activities."[36]

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[24] *Sorrell*, 564 U.S. at 576. This merely reiterated the Court's prior holding protecting commercial speech about prescription drugs. *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

[25] 594 U.S. 595 (2021).

[26] *NAACP v. Ala.*, 357 U.S. 449 (1958).

[27] *Ams. for Prosperity Found.*, 594 U.S. at 600-02.

[28] 461 U.S. 540 (1983).

[29] 26 U.S.C. § 501(c)(3).

[30] *Regan*, 461 U.S. at 544.

[31] *Compare with Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (*per curiam*) (First Amendment forbids expenditure limits on First Amendment activity).

[32] 26 U.S.C. § 501(c)(4).

[33] *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1201 (D.C. Cir. 1974) (commas supplied).

[34] *Autor v. Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2014) (quoting *Perry*, 408 U.S. at 597) (parentheses omitted).

[35] *Regan*, 461 U.S. at 544; *id.* at 551.

[36] *Id.* at 546 (citing *Cammarano*, 358 U.S. 498 (1959)).

Thankfully, that's not the end of the story. Yes, *Regan* was unanimously decided, but came along with an unusually vociferous concurrence by Justice Blackmun, joined by Brennan and Marshall. Their opinion acknowledged the discordance between *Regan* and other unconstitutional conditions cases. (One cornerstone of the doctrine, *Speiser v. Randall*, literally involved a tax exemption.[37]) Blackmun's concurrence admitted that "[i]f viewed in isolation, the lobbying restriction contained in § 501(c)(3) . . . denie[d] a significant benefit to organizations choosing to exercise their constitutional rights."[38] But Justice Blackmun pointed to 26 U.S.C. § 501(c)(4) as a constitutional escape hatch, declaring that the "constitutional defect that would inhere in § 501(c)(3) alone is avoided" by the fact that a group "may use its . . . § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying."[39]

Blackmun's concurrence, standing alone, is obviously not law. But it was given real force in 2013, when the Court narrowed the scope of *Regan* on Blackmun's terms in *Agency for International Development v. Alliance for Open Society International*.[40] There, the Court presented the "not unduly burdensome" c3-and-c4-affiliate arrangement as the core of the *Regan* decision.[41] Having sufficiently narrowed *Regan* down to its bare facts,[42] the Court set the unconstitutional conditions doctrine back on firm footing, re-affirming that the doctrine prevents the government from "go[ing] beyond defining the limits of the federally funded program to defining the recipient," by "'plac[ing] a condition on the recipient of the subsidy'" which "'effectively prohibit[s] the recipient from engaging in . . . protected conduct.'"[43] (This accords, incidentally, with *Cammarano*, which found that "Petitioners [were] not being denied a tax deduction *because* they engage[d] in constitutionally protected activities.")[44] The Court then struck down a statutory condition requiring recipients to affirmatively oppose prostitution to access federal funds "combat[ting] the spread of HIV/AIDS around the world."[45]

Since the No Handouts for Drug Ads Act similarly "place[s] a condition on the recipient of a subsidy"[46]—don't engage in First Amendment protected commercial speech—if *Regan* is truly limited to the particulars of nonprofit corporations, it should not survive review.

How About Expanding Disclaimers?

Finally, we come to Secretary Kennedy's proposal, modifying the (already bloated) disclaimers on DTC ads to crowd out the ad's content, making "broadcast ads much longer and prohibitively expensive."[47] As with any legal analysis, the final details will matter, and we don't have more than public reporting to draw on. But even with limited knowledge, there's enough blood in the water to caution against the Secretary's gambit.

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[37] *Perry*, 408 U.S. at 597 ("We have applied this general principle to denials of tax exemptions") (citing *Speiser*).

[38] *Regan*, 461 U.S. at 552.

[39] *Id.*

[40] 570 U.S. 205 (2013).

[41] *Id.* at 215 (internal quotation marks and citation omitted).

[42] It's also plausible, given *Cammarano*, that the Court simply thinks of lobbying in a different way than other First Amendment expressive rights. Plausible, but unknowable: the Court has not decided a case about the constitutionality of lobbying regulation in over 70 years. *United States v. Harriss*, 347 U.S. 612 (1954).

[43] *Agency for Int'l Dev.*, 570 U.S. at 218-219 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis omitted)).

[44] 358 U.S. at 513 (emphasis supplied).

[45] *Agency for Int'l Dev.*, 570 U.S. at 208.

[46] *Rust*, 500 U.S. at 197.

[47] Zhang, *supra* note 3.

True enough, the Food, Drug, and Cosmetic Act (FDCA) minutely regulates drug advertising, including a mandate that such ads "in brief summary" provide "information . . . relating to side effects, contraindications, and effectiveness" under regulations "issued by the [HHS] Secretary."[48] But this statutory grant has its limits, some of which are of constitutional origin.

Let's take just two immediate issues. First, the statute requires any disclaimer to be "brief"—while Secretary Kennedy is reportedly intending to craft intentionally unwieldly content requirements. Worse for him, in the compelled disclaimer context, the Supreme Court has rejected "[s]peaker-based laws" designed to "drown[] out" the speaker's "own message."[49] Second, in *Americans for Prosperity Foundation*, the Court was adamant that disclosure laws be "narrowly tailored" to an acceptable governmental interest.[50] Deterrence of protected speech, Secretary Kennedy's avowed aim, is obviously not an acceptable interest.[51] And even if the Secretary could come up with a legitimate interest, an intentionally kludgy disclaimer is highly unlikely to be "narrowly tailored."

Typical statutory interpretation and First Amendment rules, then, strongly caution the Executive against imposing friction-for-friction's sake on DTC ads. Beyond that, the unconstitutional conditions doctrine would work as a further backstop—expansive "demands of this sort" on a private actor's speech "frustrate the [First] Amendment right."[52] The unconstitutional conditions doctrine "prohibits" such "frustrat[ions]"—whether they are accomplished ham-fistedly or shrewdly.[53]

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Pharmaceutical marketing, including DTC advertising, is protected by the First Amendment—full stop. And such speech is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[54] Deeming a drug misbranded, imposing a tax penalty, or larding up private speech with bulky restrictions and mandates may not immediately resemble a classic prior restraint on speech. But our First Amendment rights "rest on firmer foundation"[55]—and cannot be coerced away with one weird trick or another.

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[48] 21 U.S.C. § 352(n).

[49] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 778 (2018).

[50] *Ams. for Prosperity Found.*, 594 U.S. at 608-09.

[51] *Speiser*, 357 U.S. at 526 (unacceptable for government to "result in a deterrence of speech which the Constitution makes free").

[52] *Koontz*, 570 U.S. at 605.

[53] *Id.*

[54] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

[55] *Thomas*, 323 U.S. at 530.

