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Seana Shiffrin

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COMPELLED ASSOCIATION, MORALITY, AND MARKET DYNAMICS

*Seana Shiffrin**

Given the occasion, it seems appropriate to begin on a personal note. It should come as no surprise that my father has influenced me enormously. It may seem a little more unusual that his work on commercial speech had a formative effect on me as a teenager.

My father, Steve, as I will call him so as not to get overly familial, was working on his Northwestern article on commercial speech[1] when I began looking at colleges. We took a driving trip to look at some East Coast campuses. Every day in the car, he mooted the article to me, seemingly seeking my views and testing my intuitions. Of course, he was really working out the ideas by speaking them aloud to himself and teaching them to the most inexperienced of audiences. That trip and that article had a strong intellectual and personal impact. Intellectually, I can trace the origins of my interest in the trifecta of intellectual property, privacy, and freedom of speech to hours of conversation about one particular example: whether Frank Sinatra should be able to prevent Mercedes or even *Time* magazine from reporting what car he drives.[2] The personal part: on the trip, a male Dartmouth tour guide casually mentioned to Steve, in front of me, the great losses to the school occasioned by gender integration. The fireworks of Steve's outrage coupled with his genuine interest in my reactions to his ideas,

* Seana Shiffrin holds a joint appointment with the UCLA Department of Philosophy and the UCLA School of Law. She has taught in the UCLA Department of Philosophy since 1992, where she teaches courses on moral, political and legal philosophy. Since 1996, she has taught courses at the Law School on contracts, free speech theory, constitutional rights and individual autonomy, and seminars on legal theory, contracts, distributive justice, remedies, and feminism. She is an associate editor of *Philosophy and Public Affairs* and on the advisory board of *Legal Theory*. Her research addresses issues in contracts, freedom of speech, constitutional law, intellectual property, criminal law, torts and family law.

1. Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

2. *See id.* at 1257 n.275.

especially when they dissented from his own, conveyed how deeply and sincerely his feminism ran and that he could be counted on to be a solid ally in the feminist cause. If only through the propinquity of attention, the episode together with our talks oriented me toward another lifelong interest: the interactions between commitments to equality—social and economic—and freedom of speech. Finally, the actual article delivered some lessons in humility. When the article came out, I sat down to read it, expecting to reminisce with a familiar friend. Not only did I emerge thinking commercial speech was a thicket (one of its intended lessons), but even the vocabulary eluded me. I still remember learning the terms "insouciant"[3] and "*ipse dixit*"[4] that day.

That article still has the ability to pull me up short, but in a good way. To Steve's mild chagrin, my attraction to philosophical thinking comes hand-in-hand with an instinct toward trying to locate general, unifying principles.[5] Among the virtues of the Northwestern article: it lays bare how the many complexities of commercial speech pose substantial obstacles to discovering useful and true comprehensive principles in this area.

So, in the spirit of Steve's message of necessary eclecticism,[6] I want to voice some musings and worries about the broader applicability of an approach to commercial speech for which I have sympathy, but which might profit from the sort of disruption delivered by Steve's attention to context and his openness to non-architectonic design. Specifically, I want to address some neglected complications raised by the compelled commercial speech and association cases for those interested in integrating ethical behavior and motivations into market activities.

As Kathleen Sullivan has noted, we are justifiably wary of trusting the government on speech and more comfortable trusting the government on market regulation.[7] The question of compelled

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3. *Id.* at 1217.

4. *Id.* at 1221.

5. *See* STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 125 (1990) ("[T]o have a system is to lack integrity." (citing FRIEDRICH W. NIETZSCHE, *Twilight of the Idols*, *in* THE PORTABLE NIETZSCHE 463, 470 (W. Kaufmann trans., 1968))).

6. *See* Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1192–1216 (1983).

7. *See* Kathleen M. Sullivan, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 23–24, 2007), *in Thoughts on*

commercial associations that produce compelled speech is possibly so hard because it hits both bases: it involves straightforward forms of market regulation and social engineering, as well as compelled speech. Through what lens should we view it?

In a prior defense of freedom of voluntary association as a direct form of freedom of speech, I used considerations about freedom of thought as a touchstone to argue that voluntary associations should be able to exclude potential or actual members for any reason whatsoever, including discriminatory reasons, or for no reason.[8] Individuals, I contended, should have access to some social, extra-familial space in which they feel they may let down their guard and be influenced by others;[9] this in turn may require complete discretionary powers to exclude unwanted members.[10] I claimed that the free speech protection to exercise these powers should not depend on the powers being wielded in an articulate way or to protect an already formulated message.[11]

I argued, however, that at least some commercial entities and other institutional associations operating in the market were different.[12] Given the structure of competitive economic markets and commercial agents' typically narrow aims, the market forum is typically not a propitious space for individuals' exercise of freedom of thought irrespective of governmental regulation.[13] Further, employment markets represent an especially important site for the distribution of basic social resources.[14] Since the freedom of thought and other associational values I championed could be satisfied in the space of voluntary associations, strict inclusive regulations on access to employment seemed for these reasons insulated from the First

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Commercial Speech: A Roundtable Discussion, 41 LOY. L.A. L. REV. 333, 338 (2007); Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 950–51 (1995); Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 214 (1994).

8. Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 851–73 (2005).

9. *Id.* at 873–74.

10. *Id.* at 874.

11. *Id.* at 875–76.

12. *Id.* at 877.

13. *Id.*

14. *Id.*

Amendment concerns that drove my analysis of the individual right of voluntary association.[15]

These arguments bear some affinity with Ed Baker's broader thesis that commercial speech may be handled differently and regulated more hardily than non-commercial speech because market activity and market agents do not support and engage in the sort of autonomous activity that is at the core of the free speech protection.[16] A caricatured way of putting the point is that the market's structure already compels or at least very strongly determines speech content. So, in upholding regulations of commercial speech, one is not choosing between compelled and free speech, but between two forms of regulation: private, self-interested, but uncoordinated regulation by the market's incentive structure versus public, coordinated, and (possibly) accountable speech regulation within the context of the distribution of public goods.

To be sure, these are over-generalizations. There are degrees of market imperfection that create room for motives, action and expression that are not fully dictated by rational strategies of profit maximization. Sometimes these opportunities are taken up. Nonetheless, there is enough truth to the claims to render me sympathetic to them as justifications for anti-discrimination laws in the employment and consumer context. The relative impingement on individuals' free association interests seems minimal, especially given the distribution of access to significant basic resources. Moreover, the associational claim of having social space to interact with others of one's choosing can be met elsewhere in the context of voluntary associations.

However, the compelled commercial speech and association cases give me pause about how far these arguments extend and whether they lend support the sorts of schemes addressed in the following cases. Let me start with some specific concerns about these cases. Then I will circle back to some of the larger theoretical problems from which they emanate.

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15. *Id.*

16. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194–224 (1989); C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in* Nike, 54 CASE W. RES. L. REV. 1161, 1163 (2004).

United States v. United Foods, Inc.[17] held that the First Amendment invalidated a scheme of the Department of Agriculture that required mushroom producers to join a commercial association and to contribute funds to be used toward compelled generic advertising promoting mushrooms.[18] It came just five years after *Glickman v. Wileman Brothers & Elliott, Inc.*,[19] which upheld a similar scheme involving stone fruit growers from constitutional challenge.[20] The Court distinguished the two by reasoning that where the government regulates associational membership and compels speech as part of a comprehensive economic system of industry regulation, it more easily passes constitutional muster than when the regulation is more sporadic, discrete, and speech-focused.[21] The stone fruit program involved a more comprehensive system of economic organization, whereas the mushroom regulations seemed primarily organized around the production of advertisements.[22]

I am sympathetic to a differently reasoned version of the outcome in *United Foods* and unlike many commentators, amenable to the Court's own account of the distinction between *United Foods*[23] and *Glickman*[24] (though not necessarily to its application of that distinction). I want here to sketch the basis for these stances. I will put aside the government speech angle alighted upon in the third case of the series, *Johanns v. Livestock Marketing Ass'n.*[25] Like other critics,[26] I find it an unsatisfying solution because the government's identity as speaker is kept subterranean and the publicly presented speaker is an association of farmers.

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17. 533 U.S. 405 (2001).

18. *Id.* at 415.

19. 521 U.S. 457 (1996).

20. *Id.* 476–77.

21. *United Foods*, 533 U.S. at 415.

22. *Id.*

23. *Id.*

24. *Glickman*, 521 U.S. at 469–70 (noting that the generic advertising campaign was part of a broader regulatory scheme).

25. 544 U.S. 550 (2005) (discussing whether the compelled funding of government speech in the form of generic beef advertisements raises First Amendment concerns).

26. *Id.* at 570–80 (Souter, J., dissenting); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 989 (2005) (noting that *Johanns* failed to account for the "private nature of the speech at issue"); Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195, 197, 208–09 (arguing that compelled speech funded by taxation should come under constitutional scrutiny).

Glickman and *United Foods* did not feature especially sympathetic facts. In both cases, large growers objected to joint advertising schemes because they thought they could do better on their own by differentiating their products from the crowd and thereby avoiding subsidizing their smaller competitors. Their other complaints about the content of the advertising unfortunately looked like an afterthought. It is hard to detect much of a free speech pull here when it seems as though the objectors are merely attempting either to free-ride or to retain their competitive advantage. To find a real freedom of speech issue here, on these facts, as Robert Post points out,[27] one must emphasize the idea that compelled money contributions to any speech to which one does not prefer to support raises substantial free speech concerns.

But these are not the most interesting versions of these cases we can imagine. Suppose the moral and political objections to the advertising were more developed and sincere. Some examples have appeared in the lower courts.[28] Suppose we did not have economic self-interest dressed up as constitutional principle, but solid moral and political speech appearing in market garb. Suppose these objectors were small organic farmers objecting to the undifferentiated product descriptions, not because they wanted to differentiate their product as such for self-interested purposes. Rather, they objected to state efforts to regulate the market for other economic ends. Consider those who farm organically for moral and political reasons, from concern for the environment, the health of consumers, or the humane treatment of animals.[29] Their market

27. *See* Post, *supra* note 26, at 218–26; *see also* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555, 578 (2006) (noting that one potential reading of *United Foods* suggests that the First Amendment prohibits compelled subsidies unless "the state is justified in forcing them to affiliate with an expressive association"); Robert Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169 (2007).

28. *See, e.g.*, Cochran v. Veneman, 359 F.3d 263, 266–67 (3d Cir. 2004), *vacated*, 544 U.S. 1058 (2005) (involving dairy farmers who used traditional family farming techniques because they believed those methods led to "healthier cows, a cleaner environment and superior milk," and who challenged a generic milk advertising campaign); Charter v. U.S. Dep't of Agric., 230 F. Supp. 2d 1121, 1122 (D. Mont. 2002), *vacated*, 412 F.3d 1017 (9th Cir. 2005) (involving cattle growers who did not use growth hormones challenged generic beef promotion advertising); Michigan Pork Producers v. Campaign for Family Farms, 229 F. Supp. 2d 772, 775 (W.D. Mich. 2002) (involving pork farmers who implemented traditional farming techniques challenged generic advertising campaign as antithetical to their beliefs).

29. *See, e.g.*, PHILIP CONFORD, THE ORIGINS OF THE ORGANIC MOVEMENT 98–114 (2001); JULIE GUTHMAN, AGRARIAN DREAMS, THE PARADOX OF ORGANIC FARMING IN CALIFORNIA 23

activities are concrete expressions of these political, non-self-regarding (and need I mention dissenting?[30]) stances. Subsidizing advertising efforts and forced membership in a professional association that elides the distinction between organic and non-organic produce has a rather different feel at that level of description. It may seem more like being forced to refute oneself rather than simply having to contribute to a beneficial organization whose methods are not one's style or that diminish an aspect of one's competitive advantage.

These cases are not best described in the general terms of having taxes spent on causes and speech with which one disagrees. I do not aim here to give a full account of the difference or how exactly I would analyze these cases. Briefly, though, it strikes me as important that the compulsion is directed at univocal speech as opposed to a diverse forum as in *Board of Regents of University of Wisconsin System v. Southworth*;[31] that the compulsion is not directed toward flushing out direct and specific factual information (as do some forms of compelled testimony); that the compulsion is not directed at articulating information about the product to educate or to prevent consumer misapprehension otherwise to enable basic individual safety and functioning; and that it is not one aspect of a more comprehensive regulatory scheme of economic cooperation. Finally, it strikes me as relevant that the compelled speech is presented as the expression of a particularized compelled association that observers might also reasonably think represents the compelled party. That is, this association presents itself as speaking on behalf

(2004) (noting that a "generation of growers entered into organic production because of deeply held political, environmental, philosophical, and/or spiritual values"); Molly O'Neill, *Organic Industry Faces an Ethics Question*, N.Y. TIMES, May 17, 1995, at C1 (reporting that a surge in interest in organic farming has highlighted various motives for becoming organic farmers, from environmental to capitalist, and has questioned authenticity of organic products).

30. STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 1–34 (1999); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 86–109 (1990). The dissenting posture of organic farmers has in recent years, however, been partly supplanted by the entry of large agribusiness into the market for organic goods. *See, e.g.*, Carolyn Dimitri & Catherine Greene, *Organic Food Industry Taps Growing American Market*, AGRIC. OUTLOOK, Oct. 2002, at 4; Jake Whitney, *Organic Erosion: Will the Term Organic Still Mean Anything when It's Adopted Whole Hog by Behemoths Such as Wal-Mart?*, S.F. CHRON., Jan. 28, 2007, at CM-13.

31. 529 U.S. 217, 229–33 (2000) ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.").

of the very party who disclaims this relation of representation, who disclaims that affiliation with the others so represented, and objects because of moral and political grounds that cannot be reduced to assertions of economic self-interest.

Rather than trying to develop a full account of these distinctions, I want to return to the more theoretical argument with which I began, to draw some loose connections between my allegiance to the organic farmer and discomfort I have with these arguments and their general extension, despite my simultaneous attraction to them.

In brief, I will suggest the power of the argument for regulating commercial speech depends on other economic and political decisions. Within our own current economic and political scheme, the argument may underestimate the dynamic structure of the market, its interplay with morally motivated citizen consumers, and the importance of using those degrees of freedom available to pursue moral and political causes.

Recall that I am concerned with the particular argument that the market is already an amoral space of amoral actors acting and speaking for financial gain, with relatively few degrees of freedom of the prized sort. If its structure already determines content—either in a quite scripted way or in a way that at least undermines or distorts sincerity sufficiently—then it is tempting to think that governmental regulation, even compelled speech, does not restrict or displace prized freedom but rather substitutes one form of (potentially superior) regulation for another. A fairly well-functioning market directed at maximizing production and profit is then well-suited to comprehensive regulation, including regulation of speech, by an (potentially) accountable public democratic authority so as to direct its efforts toward superior distributive outcomes and other public purposes.

This argument imagines, at its ideal, that there is or will be a fair amount of comprehensive benign government regulation of economic markets. However, where we forgo that opportunity—whether for good reasons or because the government's democratic aspects do not function as they should and markets are spottily regulated—it is less clear that the amoral model of the market is one we should endorse solely within the speech context.

That is, conceiving of commercial speech as devoid of significant expressive content works best when we have or are

priming to organize market interactions well in a morally sensitive but more comprehensive way. When we elect not to do that and instead treat participants as independent agents, there are detractions to this view, at least if it is a view that we put to the test of asking whether we would wish it to be publicly known and accepted. I'm not sure it is wise or desirable to adopt a theory that if publicly known, accepted, and implemented would not only treat market actors as amoral, but would encourage market actors—whether producers, advertisers, or consumers—to adopt this as a self-conception (that is, to think of themselves as amoral, apolitical agents).

If our lives are going to be dominated by a more decentralized market, then we should encourage morally motivated market activity and recognize forms of market activity that attempt to moralize the market from within, given the absence of a well-organized, coherent, comprehensive form of external morally motivated regulation. This is, in part, the turn taken by some parts of the Left (as well as some parts of the Right, and religious groups of varying political orientations) to develop forms of concrete political activity pursued through market activity to provide viable options for consumers who are also politically motivated but lack options because of regulatory failures, deliberate omissions, or lapses.[32] These are political stances that cannot be fully realized by individuals alone, but require collective action. I take it this is the point, or at least the original ambition, of the organic farming movement, the locally produced movement, and a variety of emerging businesses, such as TerraPass,[33] that attempt to provide products and services to enable environmentally sound forms of living. These enterprises are not best understood as amoral businesses aiming to maximize profit. They are attempting to integrate, express, and infuse moral and

32. *See, e.g.*, Nicholas J. Gould, *Fair Trade and the Consumer Interest: A Personal Account*, 27 INT'L J. CONSUMER STUD. 341, 343 (2003) (arguing that Fair Trade has been successful by sparking consumer interest via an emphasis on psychic benefit); Anil Hira & Jared Ferrie, *Fair Trade: Three Key Challenges for Reaching the Mainstream*, 63 J. BUS. ETHICS 107, 107 (2006) (defining fair trade as a movement to insert ethical decision making into consumerism and focusing on the challenges to expanded growth of fair trade markets); Robert J.S. Ross, *No Sweat: Hard Lessons from Garment Industry History*, 53 DISSENT 50 (2006) (chronicling efforts to promote fair labor practices through garment labels like "No Sweat").

33. TerraPass is a for-profit organization that sells "passes" to fund renewable energy programs which reduce greenhouse gasses. *See* TerraPass, http://www.terrapass.com (last visited Oct. 6, 2007).

political concerns into commercial interactions: by transforming the market from within through political activism achieved in part through commerce. To be clear, I do not claim that such private efforts are purely altruistic, that they will be successful, or that they will approach the success that governmental regulation could produce. I do mean to claim, however, that the law should make space for and accommodate moral agents and moral activity, where possible.[34] Such activities have a place even in (especially in?) market domains and are connected to core First Amendment interests of moral and political expression.

The interest in creating space for morally motivated market activity suggests a more accommodationist approach to commercial speech in cases of compelled association with other commercial agents. On such an approach, we should, in First Amendment analysis, be sensitive to the degree to which the objection to compelled association for the purposes of compelled speech stems from a core aspect of a commercial entity's substantive, non-self-interested mission or message, as defined and evident in contexts other than the occasion of objection.

To be sure, in the voluntary association context, I have been critical of the requirement that compelled association *must* disrupt a particular message for it to be objectionable from a First Amendment perspective because of concerns about individuals' general interest in comfortable social havens for the *development* as well as the expression of thoughts.[35] In the commercial context, those concerns are not at the forefront. Here, there is reason to return to and place emphasis on a more message-oriented approach, but one that differentiates between purely self-interested messages and messages with broader moral and political content. Such a distinction would be unthinkable in the individual context, but may have a home in some corners of the commercial context because individual speech interests are not at stake and our joint social product is being created, albeit in a decentralized way. Creating more breathing space for the

34. *See* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 711–13 (2007); *see also* Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, *in* REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ, 270, 288-95 (R. Jay Wallace & Samuel Scheffler eds., 2004); Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 208 (2000).

35. *See* Shiffrin, *supra* note 8.

development and expression of conscience within the market domain may be a form of content non-neutrality worth fighting for.

To return to my opening concession to Steve's eclecticism, the approach I have been sketching is one in which the approach we should take to compelled commercial speech and compelled commercial association may depend upon other, contingent decisions we have made about economic and political structure. Hence, it seems as though the correct First Amendment analysis is not dictated purely by the sort of speech at hand, but on a variety of non-speech-related factors. In this domain at least, our First Amendment jurisprudence should be sensitive to and perhaps vary with the facts and other decisions we make about economic context and climate. Our approach should be sensitive to the degree and level of enterprise regulation more generally.

This explains my sympathy toward the distinction articulated to defend the pair of results in *Glickman* and *United Foods*. Where we otherwise, in other aspects of our economic policy, incline toward treating the relevant agents as relatively free and unconnected agents who happen to share an industry rather than as parts of a well-regulated and coordinated industry, then we should be more open to treating them as free agents in the speech context. We should recognize and protect the degree to which they aim to introduce economic considerations that are not purely self-interested into our public discourse and into our market interactions as well as the degree to which they aim to respond to these same impulses in consumers.