Medical Education and our Worcester District *Continued*

turning out unqualified-and dangerous-doctors, the American Medical Association and the Carnegie Foundation sponsored a comprehensive review of all medical schools in the US and Canada. Published in 1910, the Flexner Report (named for the lead investigator, Abraham Flexner, a Johns Hopkins professor) applied the Johns Hopkins framework to the schools reviewed. He rated resources and structure of schools and summed things up in very compact, direct language.

At the time the report received tremendous publicity. As a result, over the following decade, about half of the medical schools in the US either closed or merged with others to strengthen their curriculum.

As medical education moved to medical schools and teaching hospitals and licensing to the Board of Registration, the Worcester District Medical Society continued to offer library resources until this was taken over by the UMass Medical School in 1971. We continue to offer medical education in niche areas such as health policy, quality and public health. The "motives of friendship and philanthropy" stated in the minutes of that first meeting carry through to the present to assure that the next generations of our profession remain connected to those values that brought us together as an organization and them to the dream of a career in medicine.✚

FURTHER READING:

1. A History of the Worcester District Medical Society. Paul Bergin, MD. 1954. WDMS.
2. From Humors to Medical Science. John Duffy. 1993. Univ of Illinois Press.
3. Carnigie Foundation Bulletin No. 4 Abraham Flexner, Herman Weiskotten. 1910.

Legal Consult

Constitutional Haberdashery

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A recent United States Supreme Court decision sought to put limits on the government's ability to compel the disclosure of donors' personal information in order to regulate charities. The Supreme Court decided a compelled disclosure regime must be narrowly tailored to the government's asserted interest in the information. On the one side is a government's legitimate interest in investigating fraud and other misconduct; on the other side is a donor's right to privately associate with a charity. For Massachusetts health care providers, many of which are tax-exempt organizations, this decision merits attention due to its possible effects on donor support for charitable health care institutions.

The case arose out of the California Attorney General's Office's efforts to require California charities to disclose the names and addresses of significant charitable donors as a condition of the, legally required, annual registration renewals in California. That information is found on Schedule B of the Internal Revenue Form 990 (The Internal Revenue Service redacts donors' information from this schedule when the Form 990 is publicly disclosed). The attorney general's office argued collection of donor information is critical to their efforts to combat fraud and misconduct – and that donors' privacy interests are protected because the information is not disclosed to the public.

The plaintiffs in the case, two politically conservative charities, argued compelling disclosure of donor information interfered with the charities' First Amendment right to free association and the rights of their donors, whose fear of reprisal would make them less willing to make donations. When they refused to turn over donor information, the attorney general's office threatened to suspend their registrations and fine their directors and officers. Although the attorney general's disclosure scheme did not include public disclosure, but only internal use in investigations, that office's case was adversely affected by the discovery during trial of nearly 2,000 Schedule Bs which had been inadvertently posted to the attorney general's website. Also unhelpful to the attorney general's case was the fact the trial court credited testimony from California officials that Schedule Bs were rarely used to audit or investigate charities.

The original trial court issued an order preventing the attorney general from collecting Schedule-B information. The case then wound its way up to the Ninth Circuit Court of Appeals and then back to the trial court on remand. Eventually, the Ninth Circuit ruled in favor of the attorney general, holding that the trial court had imposed too strict of a test requiring "narrow tailoring," that the disclosure regime was supported by the need for the up-front collection of information to promote investigative efficiency and effectiveness, and that disclosure would not unduly burden plaintiffs' associational rights because the attorney general had taken remedial measures to fix the identified confidentiality breaches. The U.S. Supreme Court granted certiorari.

Constitutional analysis of the matter begins with the implicit right under the First Amendment to associate with others. Government action may "chill" the exercise of that right by, for example, forcing a group to take in members it does not want, punishing individuals for their political affiliation or denying benefits to an organization based on the organization's message. In NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), an attempt by the Alabama attorney general to compel the NAACP to disclose its membership lists was rejected because of the demonstrated danger that such disclosure would subject

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NAACP members to reprisal for the group's advocacy efforts. In Shelton v. Tucker, 364 U.S. 479 (1960), an Arkansas statute required public school teachers to disclose every organization to which they belonged, in order to assess their competence and fitness. That statute was struck down because even a substantial governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." In the present case, the Supreme Court stated: "Shelton stands for the proposition that a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. This requirement makes sense. Narrow tailoring is crucial where First Amendment activity is chilled – even if indirectly – '[b]ecause First Amendment freedoms need breathing space to survive.' [citation omitted]."

The crucial issue in the present case was the appropriate standard of scrutiny to apply to the attorney general's disclosure requirement. Plaintiffs sought either the "exacting scrutiny" test, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest; or the "strict scrutiny" test, which requires the least restrictive means of achieving a compelling governmental interest. The Supreme Court settled on a compromise which might be called exacting scrutiny plus, in requiring a disclosure requirement have a substantial relation with a sufficiently important governmental interest and that the requirement be narrowly tailored to the government's asserted interest.

In applying this test, the Supreme Court noted what it called a "dramatic mismatch" between the state's interest in preventing wrongdoing by charitable organizations and a disclosure regime calling for universal production of information from all charities rather than, for example, relying upon targeted audits of suspect charities. It called California's true interest here one of administrative convenience and not one of investigating fraud. The Supreme Court stated: "We have no trouble concluding here that the attorney general's disclosure requirement is overbroad. The lack of tailoring to the state's investigative goals is categorical – present in every case – as is the weakness of the state's interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny." This is the case, the Supreme Court reasoned, even where the information disclosed is not re-disclosed to the public.

It is at this latter point – that governmental collection of information, without publication, can unduly chill associational rights – where the Supreme Court majority differs from the dissenters' position as articulated by Justice Sonia Sotomayor's dissenting opinion. In the dissenters' view, the plaintiffs did not show an actual burden resulting from the disclosure of information, and without that showing of burden, tailoring cannot match governmental means to Constitutional ends. (Note that the dissenters' tailoring is tied to the burdens imposed by disclosure on donors, while the majority's tailoring is tied to the nature and scope of the governmental interest furthered by disclosure.) In Associate Justice Sotomayor's words: "the Supreme Court requires plaintiffs to demonstrate that a requirement is likely to expose their supporters to concrete repercussions in order to establish an actual burden. It then applies a level of means-end tailoring proportional to that burden." The mere fact that the California attorney general's office has the donor information, without public re-disclosure or evidence of actual harm to donors, is in the dissenters' view insufficiently chilly to violate associational rights.

The dissent then asks whether the Supreme Court is now saying that all disclosure requirements impose associational burdens. Would the Supreme Court's decision support invalidation of the normal IRS collection of significant donor information in the Schedule B? The dissent also notes that no evidence was brought to light suggesting the government would use the disclosed information to retaliate against any donor, in contrast to the NAACP members or the teachers in the earlier cases. In the present case, the dissent argues, this relatively modest burden on donors' associational rights requires a correspondingly modest level of constitutional scrutiny.

This decision has generated a great deal of debate across the country – and not just among tax-exempt organizations. Some have noted if a donor is concerned about the disclosure of personal information to the attorney general's office, an easy expedient lies in the use of a donor-advised fund to anonymously support the charity. Others have argued that if the attorney general's office wants to investigate a charity, it can always issue a subpoena for the donor information. Some commentators have contrasted the IRS' tax compliance regulatory role, as to which donor information is crucial, to the states' function of regulating fundraising and charitable asset use, for which donor information is irrelevant. Still others have made the point that the opinion's uncompromising stance – "every demand that might chill association therefore fails exacting scrutiny" – is hostile to the notion that in the tax-exempt world, transparency is the price charities pay for tax exemption and tax-deductible contributions.

What is most striking, is the majority opinion in this case focuses on the danger of governmental bodies holding personal information, not on the danger that such information is publicly disclosed. It is the distrust of the government and how government may use personal information that seems to have motivated this decision. (Similar concerns do not appear to attach, at least not yet, to the collection and manipulation of personal information by large, powerful private actors such as social media platforms.) Given the fundamental, constitutional right of association involved in this case. The Supreme Court was right to acknowledge the exercise of that right requires "breathing space to survive." Roomy accommodation for free association is fostered by narrowly tailoring government intrusions on that right. In a government clothed only with limited and conferred powers, that cut seems to be the right fit. ✚

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