

5-1-2006

Free Speech and Public Health: A Population-Based Approach to the First Amendment

Wendy E. Parmet

Jason A. Smith

Recommended Citation

Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 Loy. L.A. L. Rev. 363 (2006).

Available at: <https://digitalcommons.lmu.edu/llr/vol39/iss1/12>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

FREE SPEECH AND PUBLIC HEALTH: A POPULATION-BASED APPROACH TO THE FIRST AMENDMENT

*Wendy E. Parmet**

*Jason A. Smith***

I. INTRODUCTION

It is banal, but true, to say that we live in an information age. Today, more than ever, information and the speech that conveys it are critical currencies as well as sources of wealth and influence. They help to shape the social, cultural, and political environment in which we live. They also serve as health determinants.

The role of speech in determining health is especially salient in the case of childhood obesity. In multiple complex and subtle ways, speech influences individual behavior, cultural norms, public policies, and social relationships, all of which form part of the environment that affects children's weight. This creates a challenge for both public health advocates and the law. The challenge is how to shape the informational environment, formed by speech, to one that retards the epidemic without running afoul of the First Amendment and its strong preference for free speech. That challenge is not simple. In recent years, the Supreme Court has enhanced and enlarged the protections given to speech, including so-called commercial speech.¹ As a result, it may be more difficult for government today to regulate speech that affects obesity than it would have been in the past. Moreover, even if the government can constitutionally regulate

* Matthews University Professor of Law, Northeastern University.

** Adjunct Professor, Northeastern University School of Law; Associate Executive Director, Public Health Advocacy Institute. The authors thank Matthew McHugh,¹ Deborah Thorpe, Robin Ackerman, Sarah Klosner and Julie Ciollo for their invaluable assistance and research efforts.

1. See discussion *infra* Part V.B.

speech, public health advocates should pause before they embrace an overly loose interpretation of the First Amendment. Although speech may harm public health, it can also serve as a tool for protecting it.

How then can we reconcile the First Amendment's protection of speech with safeguarding health in an information age? This Article examines that question in the context of the obesity epidemic. We begin in Part II by situating the role and regulation of speech with respect to public health in an historical context. We argue that throughout our constitutional history, society's attempt to protect and preserve public health has led to conflicts with those interests most highly valued and respected at the time. In the past, this has included conflicts between public health and rights of property, contract, or personhood.² Today, an increasingly prominent form of the conflict is that between the right of free speech and public health. Understanding that the tensions we witness today between speech and public health have parallels in prior constitutional controversies sheds light on the nature of today's conflict and is instructive about its possible reconciliation.

In Part III we turn to a discussion of the role that speech plays in determining health.³ We begin by examining three different pathways by which speech can influence a population's health. In undertaking this examination, we demonstrate that the most important pathways rely upon the interaction and intervention of social, population-level factors. In other words, while speech can sometimes influence health by motivating individuals to undertake or not undertake particular behaviors, speech's greatest influence upon health comes from its interactions with other social forces to influence the environment in which populations live.

2. See discussion *infra* Part II.

3. We prefer the word "information" because it is more comprehensive and encompassing than "speech." First Amendment cases and commentary, however, tend to use the term "speech." As a result, a key question under First Amendment law is whether the activity in question constitutes "speech." See, e.g., *Texas v. Johnson*, 491 U.S. 397, 403 (1989). However, the Supreme Court has held that activities that are not speech in the common sense of the term, such as burning a draft card, may nonetheless constitute speech because they are undertaken to convey a message or information. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). We use the term "speech" interchangeably with the term "information."

In Part IV we discuss the obesity epidemic. We begin by briefly outlining the scope and nature of the epidemic. Then we turn to the role that speech, especially commercial speech, has played in influencing the weight of children. To a large degree, this speech has impacted public health by influencing the social, cultural, and political environments affecting children.

Part V introduces relevant First Amendment law. We begin by reviewing the Supreme Court's commercial speech and compelled speech cases and suggest that in applying its stated tests, the Court has at times recognized and at other times overlooked the myriad social pathways in which speech affects the informational environment and hence public health.

Part VI argues that were the Court to recognize consistently that speech acts not only upon individuals, but also upon the social and political environments in which they exist—that is, if the Court were to consider the way that speech affects populations—the First Amendment would not present quite as formidable a barrier to limited regulations of commercial speech as it now does. Moreover, if the Court employed a population-based perspective,⁴ it would more carefully ensure that the protection it affords individuals and corporations from compelled speech does not extend so far as to seriously threaten public health.

Finally, Part VII concludes that employing a population-based perspective will help to balance the application of the values of free speech with the protection of public health. In other words, this approach will help courts appreciate that in an information age, rights of free speech, like other Constitutional rights, can and must coexist with the state's interest in protecting public health.⁵

4. A population-based perspective is the defining vantage point of the discipline of public health. See JO FAIRBANKS & WILLIAM H. WIESE, *THE PUBLIC HEALTH PRIMER* 80–81 (1998). For a discussion of what it means to apply this perspective in legal analysis, see *infra* text accompanying notes 455–95.

5. In this Article we do not attempt to reconcile our discussion of the First Amendment with different theoretical and interpretative constructs prevalent in First Amendment jurisprudence. Instead, we approach the problem from a perspective outside of traditional First Amendment discourse, a public health perspective. For a further discussion of what we mean by “public health perspective”, see Wendy E. Parmet, *Liberalism, Communitarianism, and Public Health: Comments on Lawrence O. Gostin's Lecture*, 55 FLA. L. REV. 1221, 1233–37 (2003).

II. PUBLIC HEALTH, HEALTH DETERMINANTS, AND THE POLICE POWER

Societies have always sought to protect themselves against epidemics and to safeguard the health of their populations. In the United States, the critical job of protecting public health is entrusted, in the first instance, to the states, which since the founding of the Constitution have used their police power to enact "health laws of every description."⁶ Moreover, although the federal government lacks a general police power, its enumerated powers have long served to enable it to promote and protect public health.⁷

Understandably, regulations aimed at protecting public health generally target what people, at the time, believe is (but often is not) causally related to the health threat at hand. As a result, the nature and goals of health regulations vary over time. During the Puritan era, for example, colonial and local governments mandated prayer and fasting, believing that the people's lapse of piety was responsible for the epidemics they faced.⁸ The colonies, and subsequently the states, also imposed quarantines and other regulations that seemed justified by the medical understandings of the era.⁹

A century later, when people believed that miasma caused horrific epidemics, states and cities responded by regulating the disposal of dead animals and waste.¹⁰ After the bacteriological revolution of the late nineteenth century, states and municipalities used laws to prevent the spread of germs.¹¹ For example, New York relied upon its health regulations to isolate "Typhoid Mary," a carrier of

6. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

7. See Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 203-04 (2002). Because the courts have tended to treat First Amendment claims against the federal government identically to those against the states, for the purposes of this Article we shall overlook issues of federalism and treat the interests of the federal government and the states identically when discussing the tensions between public health protection and constitutional rights. Compare *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down state law prohibiting flag burning), with *United States v. Eichman*, 496 U.S. 310 (1990) (striking down federal flag mutilation statute).

8. Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 286 (1993).

9. See *id.* at 287-88.

10. See *id.* at 290-91.

11. See *id.* at 292.

typhoid.¹²

In each case, the interventions infringed upon the personal or business interests of individuals and entities. Not surprisingly, these conflicts often made their way to court, where judges had to reconcile the government's efforts to protect public health with the interests of the individuals affected.¹³

Over the years, litigation challenging public health regulations has taken many forms and has implicated numerous legal doctrines. A full recounting of such legal conflicts is well beyond the scope of this Article. For present purposes, only a few points require discussion. First, at least since Reconstruction, challenges to public health regulations have often been framed as constitutional contests, in which individuals have claimed that a putative public health law violates a protected constitutional right.¹⁴ Second, these challenges have invoked many constitutional rights.¹⁵ While many factors have influenced which constitutional claim was raised, claims that were dominant in the legal discourse of a period were especially apt to appear in public health litigation.

A. *Rights Related to Real Property and Contract*

Consider, for example, the age of sanitation, the mid-1800s. During this early industrial period, public health laws focused on the sanitary conditions of property as governments sought to regulate the sanitary environment.¹⁶ In order to implement these reforms, governments relied upon legal tools, such as nuisance abatement, which allowed governments to regulate the use of property.¹⁷ This forced courts to consider the scope of a landowner's property right in opposition to a state's claim to protect public health.¹⁸

12. See JUDITH WALZER LEAVITT, *TYPHOID MARY: CAPTIVE TO THE PUBLIC'S HEALTH* at xvii–xviii (1996).

13. See, e.g., *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 670 (1878) (holding that a corporation charter did not provide exemption from a nuisance ordinance).

14. See Parmet, *supra* note 7, at 201–02.

15. See, e.g., Parmet, *supra* note 8, at 303 n.270.

16. See GEORGE ROSEN, *A HISTORY OF PUBLIC HEALTH* 214–15 (1955).

17. Lawrence O. Gostin et al., *The Law and the Public's Health: The Foundations*, in *LAW IN PUBLIC HEALTH PRACTICE* 3, 14–15 (Richard A. Goodman et al. eds., 2003).

18. See Parmet, *supra* note 7, at 202.

An interesting example of such a dispute is *Fertilizing Co. v. Hyde Park*.¹⁹ In that case, the state legislature had granted a fifty-year charter to a fertilizing company.²⁰ Subsequently, the legislature delegated to the village of Hyde Park the power to abate nuisances with a proviso that could not take any action against the fertilizing company for two years.²¹ After the period ended, the town sought to apply its sanitary ordinances against the company and abate the nuisance the town believed the fertilizing company was causing.²² The company claimed that the town violated its contract rights.²³ The Supreme Court disagreed, basing its interpretation in part on its reading of the charter and the legislation granting police powers to the village.²⁴ The Court read the documents as it did in large measure due to its belief that real property rights are limited by the police power and nuisance law.²⁵ In an opinion by Justice Swayne, the Court stated:

That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.²⁶

19. 97 U.S. 659 (1878).

20. *Id.* at 663.

21. *Id.* at 664–65.

22. *Id.* at 665.

23. *Id.* at 666.

24. *Id.* at 667, 670. The actual constitutional claim the plaintiffs brought was a breach of the contract clause. *Id.* at 666. The plaintiffs claimed that the charter acted as a contract that exempted it from the city's sanitary regulations. *Id.* Although the Supreme Court rejected the contracts clause claim, much of its analysis focused on nuisance law and the police power, and the extent to which they limited property rights. *See id.* at 667, 670.

25. *Id.*

26. *Id.* at 667.

The Court went on to note that common law permitted the destruction of buildings without compensation to stop the spread of fire.²⁷ Thus, despite the importance of property, the Court viewed the individual's contract and property rights as bounded by and co-existing with the states' police power.²⁸

B. Due Process Rights

During the epidemiological transition underway at the end of the nineteenth and start of the twentieth centuries, the dramatic epidemics of infectious disease that plagued the earlier era declined drastically.²⁹ As they did, chronic diseases and occupational health hazards took on a new salience as major targets of public health intervention.³⁰ This led public health advocates to turn their attention to a different set of interventions, including those that pertained to the workplace.³¹

It was during this period that the clash between public health and individual interests focused on the "rights" of contract, which the Fourteenth Amendment's due process clause supposedly protected.³² *Lochner v. New York*³³ is, of course, the most famous example. In that case, the state of New York limited the number of hours that bakers could work to sixty hours a week.³⁴ The state argued, and the

27. *Id.* at 669–70.

28. *See id.* A classic articulation of this understanding of the relationship between rights of property and the police power derives from Justice Shaw's opinion in *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851).

29. THEODORE H. TULCHINSKY & ELENA A. VARAVIKOVA, *THE NEW PUBLIC HEALTH: AN INTRODUCTION FOR THE 21ST CENTURY* 42 (2000).

30. *Id.* at 251. This does not mean that courts did not continue to face cases challenging sanitary regulations as a violation of property rights. They did, and most often, they continued to uphold the constitutionality of such laws. *See, e.g.,* *Cal. Reduction Co. v. Sanitary Works*, 199 U.S. 306, 325 (1905) (holding that the local government had the power to make regulations necessary for the protection of the public health).

31. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905).

32. *PUBLIC HEALTH LAW AND ETHICS* 257 (Lawrence O. Gostin ed., 2002). This is not to say that other disputes did not continue. For example, during this period, public health officials focused new attention on the role that individuals as carriers could play in the spread of epidemics. This clash led to cases, such as *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), that raised claims of individual bodily integrity and liberty against the police power.

33. 198 U.S. 45 (1905).

34. *Id.* at 52.

New York Supreme Court agreed, that the law was designed to protect the health of workers and the public that ate their bread.³⁵ The United States Supreme Court disagreed, and found that the public health rationale was pretextual and that the New York law violated the liberty of workers to contract for a longer workday.³⁶

Volumes have been written about *Lochner*. We need not repeat an extensive discussion of the case here. For present purposes, only three points warrant emphasis. First, as we already suggested, *Lochner* exemplifies how litigation over new forms of public health protection (such as occupational regulations) focus on the constitutional doctrines dominant at the time. While *Lochner* is an especially famous example of this phenomenon, it is hardly the only one. For example, during the twentieth century, there were challenges under the due process clause to numerous public health laws that conflicted with important social and economic interests.³⁷ While each case is unique, and while due process law rightly commands attention for its own particularities, it is also useful to note that due process claims covered many issues and conflicts similar to those that arose under different doctrines in an earlier era.

Second, *Lochner* dramatizes how public health interventions often conflict with interests that seem especially critical at the time. This should not be surprising. In order for public health protections to have a meaningful impact on population health, they must necessarily target those activities and interests that affect a broad spectrum of a population and touch the health of many.³⁸ Regulations that affect only a few, or only those activities peripheral to society, are unlikely to significantly impact health across a population.³⁹ Hence, to have a broad impact, public health litigation necessarily implicates many of the central activities and concerns of a society.

35. *People v. Lochner*, 76 N.Y.S. 396, 402 (App. Div. 1902), *rev'd*, 198 U.S. 45 (1905).

36. *Lochner*, 198 U.S. at 57–59.

37. *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908) (challenging the state's restrictions on the amount of hours female employees could work).

38. *See* GEOFFREY ROSE, *THE STRATEGY OF PREVENTIVE MEDICINE* 53–76 (1992).

39. *Id.* at 73.

Third, *Lochner* reveals that despite the high value that different constitutional claims may command, courts have rarely regarded the state's interest in protecting public health lightly. Indeed, despite the outcome in *Lochner*, the majority of the Court never questioned that the state could limit liberty of contract to protect public health.⁴⁰ Rather, the Court clearly accepted that states could reasonably regulate and limit that right to protect public health.⁴¹ The Court, however, simply did not believe that the legislature enacted the statute to protect public health.⁴² Thus, even in the case that most clearly epitomizes the pre-New Deal Court's laissez-faire jurisprudence, the Supreme Court accepted that public health protection could justify limiting highly cherished rights.

C. *The Era of Individual Rights*

In the middle of the twentieth century, different constitutional rights became the favored vehicles for challenging public health regulations. For example, during the Warren Court era, courts gave a great deal of attention to the protections that the Bill of Rights afforded to criminal defendants.⁴³ It was in this climate, when substantial litigation and attention centered on the Fourth Amendment, that the Court undertook the question of whether health or safety inspections required warrants under the Fourth Amendment.⁴⁴

More notably, with the decline of infectious diseases by the mid-twentieth century, society began to see health as the result of individual lifestyle choices and behavior rather than of public or environmental risks.⁴⁵ At the same time, with the advent of the social

40. See *Lochner*, 198 U.S. at 57.

41. *Id.*

42. *Id.* at 58.

43. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (holding that the police must inform suspects in custody about their rights to remain silent and to consult counsel); *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (holding that indigent criminal defendants have the right to counsel in state courts); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that evidence obtained through unconstitutional search and seizures is inadmissible in state courts).

44. *Camara v. Mun. Court*, 387 U.S. 523, 525 (1967).

45. See JAMES F. MCKENZIE & ROBERT R. PINGER, AN INTRODUCTION TO COMMUNITY HEALTH 200 (2d ed. Jones & Bartlett Publishers, Inc. 1997) (1995).

revolutions of the 1960s, constitutional jurisprudence began to focus less on the regulation of industry and more on the regulation of individual choice. In this atmosphere, the Supreme Court began to articulate a constitutional right of privacy that included the right of individuals to control (at least to some degree) reproductive and health care decisions that concerned their own bodies.⁴⁶ As a result, the Court during this period often viewed the battles between health regulations and individual interests as struggles over individual autonomy.⁴⁷ Yet, even during this period, when courts were especially solicitous of individual autonomy, attempts by the state to protect public health prevailed more often than not.⁴⁸ Claims that the right to privacy precluded state laws that mandated motorcycle helmets,⁴⁹ closed gay bathhouses,⁵⁰ or banned physician-assisted suicide were not successful.⁵¹

Today, of course, we still suffer from the chronic diseases and accidents of the 1960s, as well as new infectious diseases that we could not have imagined three decades ago.⁵² So, too, we continue to debate the extent to which the right to privacy limits the states' ability to protect public health.⁵³ But, increasingly, other constitu-

46. The first important case in this line was probably *Griswold v. Connecticut*, 381 U.S. 479 (1965). This Fourteenth Amendment privacy jurisprudence is certainly best known, however, in connection with *Roe v. Wade*, 410 U.S. 113 (1973). Although these cases first became prevalent in the 1960s, their antecedents go back to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), decided shortly before *Lochner v. New York*, 198 U.S. 45 (1905).

47. See, e.g., *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990); *Roe*, 410 U.S. at 153.

48. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 797 (1997) (upholding the state's physician assisted-suicide ban because it sought to preserve human life and also uphold the integrity and ethics of the medical profession). This begs the question of what is meant by public health, an issue not taken up here. For a discussion of the meaning of public health, see PUBLIC HEALTH LAW AND ETHICS, *supra* note 32, at 1-6.

49. *State v. Fetterly*, 456 P.2d 996 (Or. 1969); *State v. Vaughn*, 29 S.W.3d 33 (Tenn. Crim. App. 1998).

50. *City of New York v. New St. Mark's Baths*, 562 N.Y.S.2d 642 (App. Div. 1990).

51. *Glucksberg*, 521 U.S. at 797.

52. See TULCHINSKY & VARAVIKOVA, *supra* note 29, at 42-43.

53. This discussion has been particularly noticeable in debates about state regulation of HIV positive pregnant women. See, e.g., Elizabeth B. Cooper, *Why Mandatory Testing of Pregnant Women and Newborns Must Fail: A Legal, Historical, and Public Policy Analysis*, 3 CARDOZO WOMEN'S L.J. 13

tional doctrines are becoming more prominent, both because they have come into judicial favor and because they appear to respond to the regulatory and public health goals of the time. With globalization and the development of the Internet, public health regulations increasingly clash with marketplace imperatives as well as with federalism doctrines.⁵⁴

Moreover, as we have moved from an industrial, brick and mortar economy to an information age in which intellectual property, data, and the ability to persuade have become increasingly important assets, efforts to protect public health will necessarily target and clash more frequently with the flow of information.⁵⁵ As a result, in the information age, legal doctrines pertaining to intellectual property and speech, often implicating the First Amendment, will inevitably become more central to public health law.⁵⁶ Moreover, just as courts have in the past had to reconcile interests of property, contract, and privacy with efforts to protect the health of populations, they will now have to resolve tensions between free speech and state efforts to protect citizens from the health threats posed by speech.⁵⁷ This clash will be especially relevant to efforts to protect children from obesity.

III. THE INFORMATIONAL ENVIRONMENT AND PUBLIC HEALTH

Over the last several decades, epidemiologists have realized that the determinants of population health are usually multifactorial.⁵⁸ In

(1996).

54. See Wendy E. Parmet & Christopher Banthin, *Public Health Protection and the Commerce Clause: Controlling Tobacco in the Internet Age*, 35 N.M. L. REV. 81, 108–12 (2005).

55. See *id.*

56. The increasing prominence of intellectual property to public health is evident in the heated debate about the role of patents in preventing access in the developing world to HIV medication. See, e.g., Amit Gupta, *Patent Rights on Pharmaceutical Products and Affordable Drugs: Can TRIPS Provide a Solution?*, 2 BUFF. INTELL. PROP. L. J. 127, 128 (2004); Alicia Ely Yamin, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 B.U. INT'L L.J. 325, 326–27 (2003).

57. Cass Sunstein has argued that a “New Deal” should be applied to the First Amendment. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 262 (1992). By that, he suggests that the First Amendment should be reconciled with other governmental interests just as rights of property and contract were during the New Deal period. See *id.* at 263–64.

58. See T. KUE YOUNG, POPULATION HEALTH: CONCEPTS AND METHODS

the late nineteenth century, during the period of the bacteriological revolution, scientists searched for, and often found, single, bacterial "causes" for disease. However, since the middle of the twentieth century, epidemiologists have appreciated that complex relationships between individuals, pathogens and toxic substances, or agents, and the social, cultural, economic and legal environment all play a role in influencing the incidence of disease within a population.⁵⁹ Thus, even the incidence of diseases that can be said to be caused by a single pathogen, such as AIDS (which is caused by the HIV retrovirus), is actually determined by many factors. In the case of HIV, multiple social and cultural factors, including a population's access to and willingness to use condoms, its propensity to share needles, its ability to screen blood for transfusions, its treatment of women and gays, and its rate of sexual activity can all significantly affect the incidence of the disease.⁶⁰ These environmental factors offer targets for public health interventions, including legal interventions.⁶¹

Noninfectious diseases and conditions, such as obesity and the diseases with which it is associated (especially type II diabetes), are especially suited to such an analysis.⁶² With these diseases there is no single pathogen; indeed, there is likely no single factor that is both necessary for and sufficient to explain the disease's prevalence within a population.⁶³ Instead, there are multiple factors, embedded within human genetics, physiology, individual behaviors and choices, and the environment that determine the susceptibility of various populations to a disease such as obesity.⁶⁴ Public health efforts to reduce the threats of such diseases, therefore, cannot

95-120 (1998).

59. See *id.* at 95-97. Young quotes Morris as defining the environment for this purpose as "living conditions, technology, human groups and institutions, social networks, values and culture." *Id.* at 95.

60. See Scott Burris, *Education to Reduce the Spread of HIV, in AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC* 82, 82-88 (Scott Burris et al. eds., 1993) (describing the behaviors that HIV education should focus on in order to lower the risk of infection).

61. See *id.* at 92-96 (suggesting that the government could pass laws requiring HIV education).

62. For an overview of the obesity epidemic and its causes, see *infra* text accompanying notes 179-94.

63. Garry Egger & Boyd Swinburn, *An Ecological Approach to the Obesity Pandemic*, 315 BRIT. MED. J. 477, 477-80 (1997).

64. *Id.*

promise a magic bullet. They must instead seek to alter individual behavior and the environments in which people operate.

Speech operates both directly upon individuals and indirectly upon them via their environment. Speech helps to determine what people know and what information is widely known and/or believed in the social environments in which individuals exist. As a result, speech helps to mold the informational environment, which itself serves as one of the many factors that influence a population's health.⁶⁵ For conditions such as childhood obesity, for which there can be no easy fix, and for which environmental causes are multifactorial, speech must be viewed as a prime target for public health interventions.

A. *Speech Targeting Individual Behaviors*

The most obvious and direct way that speech can influence health is via the behavior or decisions of individuals. This pathway has drawn significant attention in recent years as epidemiologists have "recognized that many personal behaviors or *lifestyles* are associated with the development of a variety of diseases and health problems."⁶⁶ Speech, public health advocates hope, can inform individuals about the risks they face and thereby influence them to change their behavior and make healthier choices. Thus, with respect to smoking, the lifestyle "choice" most clearly responsible for increased mortality, early public health efforts, such as the 1964 Surgeon General's report on smoking⁶⁷ and the Cigarette Labeling and Advertising Act of 1965,⁶⁸ sought to provide individuals with information about the dangers of smoking.⁶⁹ This information, it was hoped and presumed, would enable individuals to make an informed choice about the dangers associated with smoking and thereby influ-

65. Kasisomayajula Viswanath & John R. Finnegan, Jr., *Reflections on Community Health Campaigns: Secular Trends and the Capacity to Effect Change*, in PUBLIC HEALTH COMMUNICATION: EVIDENCE FOR BEHAVIOR CHANGE 289, 306–09 (Robert C. Hornik ed., 2002).

66. YOUNG, *supra* note 58, at 110.

67. See generally U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) (describing the adverse health effects that can result from smoking).

68. 15 U.S.C. §§ 1331–1340 (2000).

69. *Id.* § 1331.

ence people to break the habit.⁷⁰ Likewise, with respect to HIV, public health efforts have centered to a large degree on providing individuals, both through the media and via individual counseling, with information about their own HIV status, how they can and cannot transmit HIV, and how they can reduce their chance of contracting the disease.⁷¹ Again it was hoped and presumed that this information would lead individuals to make safe choices for themselves and their sex partners.⁷² In this context, in particular, public health advocates argued for open and uncensored speech, battling with opponents who objected to the dissemination of sexually explicit information.⁷³

Despite the difficulties assessing the evidence,⁷⁴ little doubt remains that information influences health by prompting individuals to assess their situation and alter their behavior. Certainly we can all recall circumstances in which we have made a decision to engage in or to cease a dangerous behavior after learning about its risks. Advertisers also attempt to utilize this direct-to-individual pathway. For example, the phenomenon of direct-to-consumer marketing of drugs depends, in part, on this approach. Advertisers tell individuals that their products are powerful, effective, safe, or even just desirable, and people go out and seek prescriptions for them.⁷⁵ Likewise, one of the rationales for informed consent is that individuals will make decisions based on information that they receive as individuals.⁷⁶ Some studies support that assumption: information

70. *See id.*

71. *See* JAMES MONROE SMITH, AIDS AND SOCIETY 126–28 (1996).

72. *See* Vicki S. Freimuth, *Theoretical Foundations of AIDS Media Campaigns*, in AIDS: A COMMUNICATION PERSPECTIVE 91, 106 (Timothy Edgar et al. eds., 1992).

73. *See infra* notes 285–87 and accompanying text.

74. For a discussion of the methodological problems pertaining to the determination of the efficacy of public health campaigns, see Robert C. Hornik, *Evaluation Design for Public Health Communication Programs*, *Epilogue to PUBLIC HEALTH COMMUNICATION: EVIDENCE FOR BEHAVIOR CHANGE*, *supra* note 65, at 385, 385–405.

75. This is clearly an over-simplification. Advertising operates on many levels, many of which are not rational. *See infra* text accompanying notes 338–76. Nevertheless, there can be little doubt that some advertisements do work to convey information, whether true or false, to individuals.

76. *See* Ann Bostrom, *Vaccine Risk Communication: Lessons from Risk Perception, Decision Making and Environmental Risk Communication Research*, 8 RISK 173, 180 (1997).

given by physicians can influence the choices patients make.⁷⁷ Of course, those findings suggest another point about the impact of individually-targeted information: its strength depends, to a degree, on the traits which listeners associate with the speaker.⁷⁸ The influence, trust, and expertise associated with the speaker will help to determine the impact of the message on the listener.⁷⁹

Although little doubt exists that individuals can make decisions based upon information that they directly receive, controlled studies have failed to show significant efficacy of public health campaigns premised on this pathway.⁸⁰ It turns out that the simple act of conveying information to an individual seldom suffices to change that individual's behavior.⁸¹ To change behavior, frequent exposure is also required.⁸² In addition, people do not always, or usually, respond rationally to the information they receive.⁸³ In most cases, other pathways or influences are necessary to change behavior.

Behavioral analysts suggest that individuals fail to change their behaviors and opinions when directly presented with information in part due to the bounded nature of rationality.⁸⁴ Individuals do not act solely in a rational manner, nor do they act in a completely irrational manner.⁸⁵ Rather, "individuals are *predictably* irrational."⁸⁶ Human

77. See, e.g., Annette E. Clark, *Autonomy and Death*, 71 TUL. L. REV. 45, 117-18 (1996).

78. See R. S. DOWNIE ET AL., HEALTH PROMOTION: MODELS AND VALUES 46 (1990).

79. See *id.* at 112.

80. See Robert C. Hornik, *Public Health Communication: Making Sense of Contradictory Evidence*, in PUBLIC HEALTH COMMUNICATION: EVIDENCE FOR BEHAVIOR CHANGE, *supra* note 65, at 1, 13.

81. See *id.* at 12. Hornik believes that one reason for this failing is the methodological flaws of the controlled studies that have been undertaken. See *id.* at 16. But he and other researchers also recognize that the pathways for changing human behavior are complex and that campaigns that simply provide individuals with information are often poorly suited to induce behavioral change. See *id.* at 13.

82. *Id.* at 13.

83. See Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 6 (2003).

84. See *id.* at 12. Horwitz writes that human rationality is inherently a "bounded rationality" because humans are limited by finite memories that are subject to failure and distortion, time constraints, and imperfect information. *Id.* As a result, decisions lead to sub-optimal outcomes. See *id.*

85. See *id.*

86. *Id.* at 6.

beings cannot process the vast amount of information presented to them and often do not have access to perfect information.⁸⁷ Instead, they often take cues from their environment and culture to assist in their decision making.⁸⁸ These cues, or heuristics, affect human behavior.⁸⁹

The availability heuristic is particularly relevant to the impact of speech pertaining to health.⁹⁰ According to behavior analysts, individuals tend to consider a possibility as more likely to occur, depending upon the ease in which it comes to mind.⁹¹ Simply, the more vivid, emotional, extreme, or common speech is about an event, the more people are apt to think the event is commonplace or likely to occur, even if there is evidence to the contrary.⁹² This availability heuristic highlights the importance of considering the other pathways by which speech influences health.

A public health campaign targeting Sudden Infant Death Syndrome (SIDS) illustrates both the possible strengths and limitations of the direct-to-individual approach. Over ten years ago, the National Institute of Child Health and Human Development, the American Academy of Pediatrics, the SIDS Alliance, and other groups launched the "Back to Sleep" (BTS) campaign.⁹³ They developed this campaign after studies showed that sleeping prone is associated with an infant's increased risk for SIDS.⁹⁴ The BTS campaign mailed brochures and educational materials to physicians, clinics, and other healthcare providers asking them to discuss sleep position with pregnant women and new mothers and to urge them to place their infants on their sides or backs.⁹⁵ The BTS campaign also staffed a hotline and produced consumer brochures and public service announcements urging parents to reduce the risk for SIDS by

87. *Id.* at 12.

88. *Id.* at 13.

89. *Id.*

90. *Id.* at 14.

91. *Id.*

92. *Id.* at 15.

93. See National Institute of Child Health & Human Development, SIDS: "Back to Sleep" Campaign, <http://www.nichd.nih.gov/sids/sids.cfm> (last visited Aug. 22, 2005).

94. *Id.*

95. See National Institute of Child Health & Human Development, Clinton Administration Announces Expanded *Back to Sleep* Campaign, <http://www.nichd.nih.gov/sids/clinton.htm?from=women> (last visited Oct. 31, 2005).

placing their children in the supine or side position for sleeping.⁹⁶

Evidence suggests that the campaign was remarkably effective. Between 1992 and 1999 the incidence of SIDS in the United States dropped 40% as a result of the BTS campaign's introduction in 1994.⁹⁷ By providing "just the facts" to individuals, in other words, by relying upon the rationality of individuals receiving relevant information, the BTS campaign was able to reduce infant deaths, showing that direct-to-individuals speech can have an important effect on behavior.⁹⁸

Despite its overall success, the BTS campaign also highlights some of the limits of public health informational campaigns that seek to alter behavior simply by giving individuals information. First, researchers have hypothesized that the BTS campaign achieved the success it did in part because the information conveyed was relatively simple to comprehend, the danger the campaign sought to help people avoid was great (an infant's death), and the behavioral change suggested was relatively simple and easy to adopt.⁹⁹ Additionally, because the greatest danger to infants from SIDS is in the first six months of life, the required behavioral change did not have to be put in place for very long.¹⁰⁰ Had the intervention required long-term attention, the campaign may have been less effective. Moreover, information that is about more complex problems or that is more nuanced may also be less apt to change behavior.¹⁰¹ Behaviors that are addictive, habitual, or result from deeply ingrained social patterns may also be harder to change.¹⁰²

96. *See id.*

97. Rachel Y. Moon et al., *Back to Sleep: An Educational Intervention with Women, Infants, and Children Program Clients*, 113 *PEDIATRICS* 542, 542 (2004).

98. Another campaign that may have been similarly successful was one aimed at getting parents to stop giving their children aspirin when they have the flu or chicken pox in order to reduce the risk of Reye's Disease. *See* Stephen B. Soumerai et al., *The Effects of Professional and Media Warnings About the Association Between Aspirin Use in Children and Reye's Syndrome*, in *PUBLIC HEALTH COMMUNICATION: EVIDENCE OF BEHAVIOR CHANGE*, *supra* note 65, at 265, 266.

99. *Id.* at 283 (discussing the simplicity of the information and behavior change at issue in the Reye's campaign).

100. Moon et al., *supra* note 97, at 545.

101. Soumerai et al., *supra* note 98, at 283.

102. *See id.*

These types of difficulties in changing behavior result in what has been termed "bounded willpower."¹⁰³ Bounded willpower acknowledges the effect that addiction, habit and physiology can have on decisions and individuals' ability to act.¹⁰⁴ Thus, it is far easier for individuals to hear information about SIDS and change their infant's sleeping position than it is to hear information about HIV and alter their own sexual behavior.

Despite its strengths, the BTS campaign was not uniformly successful across populations. For example, deaths from SIDS did not decrease in minority communities or among mothers who did not graduate from college.¹⁰⁵ Further studies emphasized the importance of cultural context and media in sharing information with targeted communities.¹⁰⁶ In other words, the campaign failed to reach some mothers when it only conveyed factual information to individuals directly through brochures and pediatricians.¹⁰⁷ Only after the campaign altered the materials and information it conveyed and targeted more complex social pathways, did the speech concerning SIDS begin to impact minority communities and mothers without college degrees.¹⁰⁸ By targeting the information to the correct social networks, emphasizing the extreme nature of the event (death of an infant), and repeating the message, the campaign took advantage of the availability heuristic to influence behavior.

B. *Speech and Culture*

Speech influences culture, including social and legal norms. This may be an obvious and simple statement, but it is one worth exploring in order to understand how speech influences public health. Smoking, mentioned briefly above, offers an excellent example. In the mid-twentieth century, smoking was very prevalent in the United States. In fact, the majority of adult American men were smokers.¹⁰⁹

103. Horwitz, *supra* note 83, at 13.

104. *Id.*

105. Michael J. Corwin et al., *Secular Changes in Sleep Position During Infancy: 1995–1998*, 111 *PEDIATRICS* 52, 57 (2003).

106. *See* Moon et al., *supra* note 97, at 546.

107. *See id.*

108. *See id.*

109. In 1965, 52% of adult men in the United States smoked cigarettes. *See* Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in*

Cultural and social norms, and the public policies they initiated and reflected, help to explain both the rise and fall of the incidence of smoking.¹¹⁰ For many decades, tobacco companies sought to influence cultural attitudes by taking advantage of the availability heuristic and the bounded nature of rationality. At the height of its advertising, the tobacco industry saturated the culture with commercial speech lauding the supposed benefits of smoking.¹¹¹ The branding images from the period have become iconic: Joe Camel, the Marlboro Man, and the women of Virginia Slims.¹¹² Tobacco companies sold lifestyle and image while touting “personal responsibility” and “personal choice.”¹¹³ This speech made smoking appear glamorous, cool, and very “in,” creating a cultural acceptance of smoking.¹¹⁴ Studies suggest that this approach was effective. For example, smoking surged measurably among young women in 1967, corresponding precisely with the launch of the 1967 Virginia Slims campaign.¹¹⁵

On the other hand, speech has also altered the culture in ways that have led to a decline in smoking. In 1964, Surgeon General Terry released *Smoking and Health*.¹¹⁶ This report was the first official report by the federal government showing a causal relationship between cigarettes and lung cancer and chronic bronchitis.¹¹⁷ The passage of the Cigarette Labeling and Advertising Act of 1965¹¹⁸ rapidly followed the report’s release. Thereafter, an “anti-

the United States, in REGULATING TOBACCO 11, 11 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

110. Many scholars have discussed the role that culture plays in influencing law and public policy, as well as the role that law may play in influencing culture. See, e.g., LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998).

111. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 172 (2000) (Breyer, J., dissenting).

112. John Slade, *Marketing Policies, in* REGULATING TOBACCO, *supra* note 109, at 72, 77.

113. *Id.* at 73, 77.

114. Kagan & Nelson, *supra* note 109, at 11 (noting the prevalence and glamorization of smoking in motion pictures during the 1940’s and 1950’s).

115. Slade, *supra* note 112, at 77.

116. See U.S. DEP’T OF HEALTH, EDUC. & WELFARE, *supra* note 67.

117. See Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., History of the 1964 Surgeon General’s Report on Smoking and Health, <http://www.cdc.gov/tobacco/30yrsgen.htm> (last visited Nov. 13, 2005).

118. 15 U.S.C. §§ 1331–1341 (2000).

smoking” movement began.¹¹⁹ It reflected and created new cultural connotations about smoking as well as new public policies that reflected and reinforced those negative images.¹²⁰

The relationship amongst speech, culture, and smoking is complex and multidirectional.¹²¹ There has been no single, unified, public health campaign that has led to a major reduction in smoking.¹²² But clearly, cultural norms, and hence attitudes and individual behaviors, have changed. According to a report by Robert Kagan and William Nelson:

In many ways, the public health-oriented reformers and lawyers have been remarkably successful [in diffusing information], [and] bringing about three broad transformations in public understanding of the nature of the cigarette problem—first as a product harmful to smokers, then as one harmful to nonsmokers as well, and finally as a problem of corporate malfeasance and fraud too. One sign of their success has been the decline in the social popularity of smoking.¹²³

In other words, cultural perception changed behavioral norms and thereby individual decisions. Many individuals who decided to refrain from smoking did not do so simply because they learned of its danger. Rather, they decided to abstain or were able to decide to do so because they lived in a culture in which smoking had ceased to be what everyone does.¹²⁴ The fact that in 1995, only 25% of adults in the United States smoked, made smoking a less socially typical behavior, and therefore one that fewer individuals would adopt.¹²⁵

119. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL (EXECUTIVE SUMMARY) 14 (2004), http://www.cdc.gov/tobacco/sgr/sgr_2004/pdf/executivesummary.pdf.

120. See *id.* at 13–14.

121. For some discussion of the changing attitudes about smoking, see *id.*

122. Rather, over the years, private organizations and public agencies have responded on numerous occasions to the Advisory Committee's call for “appropriate remedial action.” See Ctrs. for Disease Control & Prevention, *supra* note 117.

123. Kagan & Nelson, *supra* note 109, at 14.

124. The phenomenon of peer pressure and influence is especially powerful with adolescents. See Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 229–30 (1995).

125. See Kagan & Nelson, *supra* note 109, at 11.

The changing cultural climate also made smoking a behavior that more individuals and associations could feel free to limit or condemn. For example, anecdotal work suggests that more public facilities, work places, and residences are adopting restrictions on smoking.¹²⁶ In addition, as information led to cultural changes, legislatures increased tobacco taxes and enacted, in many states and localities, indoor smoking bans.¹²⁷ Both of these legislative strategies altered the environment in which would-be-smokers decided whether to smoke.¹²⁸ As a result, smoking rates declined.¹²⁹ Hence, speech affected rates of smoking and health not so much by directly influencing individual choices but by inciting a process that altered the cultural and public policy environments.

The Harvard Alcohol Project and its Designated Driver campaign provide another example of how speech can spark community dialogue and thereby cultural and political responses to a problem. In 1988, the Harvard Alcohol Project partnered with major television networks, writers and advertisers to launch a concerted campaign to introduce the concept of “designated drivers” in the United States.¹³⁰ Over a year, popular television shows such as *L.A. Law*, *Mr. Belvedere*, and *Family Ties* incorporated scenes and dialogue into episodes that showed characters at parties or bars drinking and introduced the “designated driver” concept.¹³¹ The project coupled these television shows with a large, nationwide informational campaign on designated driving.¹³² In 1990, the Harvard Project was even able to persuade the first President Bush to record

126. Another example comes from a recent jury verdict in a housing court in Massachusetts. The jury found smoking in a rented condominium, even one without a smoking restriction, to be a legal nuisance. *Harwood Capital Corp. v. Carey*, No. 05-00187 (Mass. Housing Ct. June 8, 2005).

127. Peter D. Jacobson & Lisa M. Zapawa, *Clean Indoor Air Restrictions: Progress and Promise*, in *REGULATING TOBACCO*, *supra* note 109, at 207, 215.

128. Taxes were especially effective in arresting smoking among young people. Frank J. Chaloupka et al., *Taxing Tobacco: The Impact of Tobacco Taxes on Cigarette Smoking and Other Tobacco Use*, in *REGULATING TOBACCO*, *supra* note 109, at 39, 54; Jacobson & Zapawa, *supra* note 127, at 227; Nancy A. Rigotti, *Reducing the Supply of Tobacco to Youths*, in *REGULATING TOBACCO*, *supra* note 109, at 143, 162.

129. *See* sources cited *supra* note 128.

130. Randall Rothenberg, *TV Industry to Fight Against Drinking and Driving*, *N.Y. TIMES*, Aug. 31, 1988, at A1.

131. *Id.* at A1, D1.

132. *Id.*

public service announcements to air during the holidays, urging party-goers to select designated drivers.¹³³ This campaign emphasized the seriousness of drunk driving, the severity of its consequences, and repeated, throughout the media, the same idea: the designated driver.¹³⁴

It worked. Studies showed an association between the Designated Driver campaign and a decrease in alcohol-related auto deaths and injuries.¹³⁵ In a 1993 survey, 64% of adults in the United States reported assigning a designated driver when going out drinking.¹³⁶ While the campaign was associated with a decrease in deaths and injuries, it did not achieve its results merely by providing individuals with relevant information or even by altering the cultural environment. It also changed public policy.¹³⁷ The Designated Driver campaign, in conjunction with additional media coverage of drunk driving, focused policymakers on the problem. Since the campaign began, the number of legislative and regulatory initiatives introduced to deter drunk driving has increased.¹³⁸ These legislative and regulatory policies have been, in contrast to the Designated Driver campaign alone, directly associated with and have caused a decrease in drunk driving.¹³⁹ Moreover, scholars have demonstrated the relationship between media coverage of drunk driving in the culture and policy formation.¹⁴⁰ Greater awareness of the problems associated with alcohol-impaired driving has provided the grounds for improved regulations, stricter sanctions, and stronger law enforcement policies that have measurably affected drunk driving. The campaign powerfully demonstrated the use of information to set health policy.

133. Randall Rothenberg, *Bush to Lead Televised Plea on Sober Driving on Holidays*, N.Y. TIMES, Dec. 20, 1990, at B20.

134. *Id.*

135. Itzhak Yanovitsky, *Effect of News Coverage on the Prevalence of Drunk-Driving Behavior: Evidence from a Longitudinal Study*, 63 J. STUD. ALCOHOL 342, 349 (2002).

136. William DeJong & Jay A. Winsten, *The Use of Designated Drivers by US College Students: A National Study*, 47 J. AM. C. HEALTH 151, 151 (1999).

137. *See id.*

138. Yanovitsky, *supra* note 135, at 345.

139. *Id.* at 349.

140. *Id.*; *see also* Toben Nelson et al., *Factors Associated with Planned Avoidance of Alcohol-Impaired Driving in High-Risk Men*, 60 J. STUD. ALCOHOL 407, 407 (1999).

The Designated Driver campaign also demonstrated the sometimes unexpected consequences of altering the informational environment. While studies are ongoing, it appears that the designated driver campaign had some unintended and harmful effects.¹⁴¹ Specifically, preliminary data suggested that use of designated drivers is associated with an increase in binge drinking.¹⁴² Additionally, among college students and younger drivers, preliminary data indicates that the campaign may put women at risk for increased violence.¹⁴³ If not properly trained and supported, women who attempt to intervene with an intoxicated male partner may risk physical or verbal abuse.¹⁴⁴ As this example reminds us, the informational environment is complex and multifactorial, and the relationship between speech and health is not always easy to predict.

C. Information, Trust, and Population Health

So far, we have discussed the role that speech and information can have on a population's health by influencing individual decisions and behaviors, the social environment in which individuals make decisions, and the public response to health threats. There is another, perhaps more subtle way that speech and information can affect public health: by promoting or undermining trust, a major component of the social capital that is critical for effective public health.

In recent years, scholars and theorists have explored the inter-related concepts of trust and "social capital." According to Francis Fukuyama, "[t]rust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms"¹⁴⁵ At the individual level, trust may be critical to establishing an effective therapeutic relationship between patient and health care provider.¹⁴⁶ At the population level, trust may be

141. See Nelson et al., *supra* note 140, at 411.

142. DeJong & Winsten, *supra* note 136, at 155.

143. Nelson et al., *supra* note 140, at 411.

144. *Id.*

145. Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280, 280 (2002) (quoting FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 26 (1995)).

146. L. Ebony Boulware et al., *Race and Trust in the Health Care System*, 118 PUB. HEALTH REP. 358, 359 (2003); David Mechanic, *The Functions and Limitations of Trust in the Provision of Medical Care*, 23 J. HEALTH POL. POL'Y & L. 661, 662 (1998).

essential to the formation and maintenance of social capital,¹⁴⁷ or the “features of social organization, such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions.”¹⁴⁸

Social epidemiologists have documented that social capital and trust may be associated with population health. For example, lack of trust among African Americans with the medical profession and the public health system, derived from a history of discrimination and mistreatment, has been implicated in the existence of significant racial health disparities.¹⁴⁹ Likewise, Kawachi, Kennedy, and Lochner report that mortality within communities in the United States is positively associated with lack of trust within those communities.¹⁵⁰ They also note a “striking correlation” between social capital within a state and the reported response of state residents as to their health status.¹⁵¹

Numerous hypotheses have been advanced to explain the correlations between social capital, trust, and public health. For example, researchers have surmised that a lack of social cohesion may be biologically stressful on individuals.¹⁵² In other words, as social animals, humans are stressed by being isolated or living in disharmonious relationships. Another possibility is that societies with low amounts of social capital are less apt to invest in or accept taxation for the public goods that may be critical for public health.¹⁵³

147. Macey, *supra* note 145, at 280.

148. Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 420 (2002) (quoting ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 167 (1994)).

149. Boulware et al., *supra* note 146, at 363–64.

150. Ichiro Kawachi et al., *Long Live Community: Social Capital as Public Health*, in *ETHICAL HEALTH CARE* 45, 46–47 (Patricia Illingworth & Wendy E. Parmet eds., 2006).

151. *Id.* at 46–47.

152. Lisa F. Berkman & Thomas Glass, *Social Integration, Social Networks, Social Support, and Health*, in *SOCIAL EPIDEMIOLOGY* 137, 151 (Lisa F. Berkman & Ichiro Kawachi eds., 2000).

153. Lisa F. Berkman & Ichiro Kawachi, *Social Cohesion, Social Capital, and Health*, in *SOCIAL EPIDEMIOLOGY*, *supra* note 152, at 174, 185–86. In the wake of Hurricane Katrina, the lack of investment in disaster planning or prevention (including investment in the levee system) would seem to bear out the statement that everyone may be at risk due to a lack of social capital. On the other hand, the Hurricane also reveals the sad but obvious fact that the poor

When individuals feel little connection to others they may be more inclined to see health issues as individualistic and to resist investment in public health resources.¹⁵⁴ This privatization of healthcare obviously disadvantages those who are poor and lack the assets to invest in their own health, but it also may disadvantage those who are economically well off but find that they have health problems that individual efforts cannot alone resolve. Consider, for example, a wealthy person who has a coronary attack in a community that lacks a good public emergency medical response or well-supplied emergency room.

A closely related reason why social capital may be positively associated with public health is that social capital can diminish collective action problems.¹⁵⁵ In communities in which individuals are connected to and trust one another, collective action problems become less costly to solve.¹⁵⁶ Individuals can predict, with greater assurance, that others will also act in ways that maximize the community's well being.¹⁵⁷ In these circumstances, it makes more sense for individuals to act in ways conducive to the public good.¹⁵⁸

Public health frequently implicates collective action problems; indeed, one can understand public health to be at least a partial public good.¹⁵⁹ The public nature of public health is most obvious with respect to infectious diseases and the techniques for preventing or retarding their spread. For example, vaccination confers a public benefit because it extends protection to the community at large rather

are disparately impacted by a lack of social capital and public investment.

154. *Id.*

155. Mazzone, *supra* note 148, at 420.

156. *See id.* at 427. David Mechanic states that "trust is an essential 'glue' that holds communities together and allows us to pursue our affairs without excessive suspicion, policing, and regulation. The erosion of trust, therefore, damages the effectiveness of medical interventions, and invites legislative and regulatory micromanagement of health affairs." Mechanic, *supra* note 146, at 662.

157. *See* Mazzone, *supra* note 148, at 421; Mechanic, *supra* note 146, at 662.

158. Mazzone, *supra* note 148, at 421.

159. *See* David Woodward & Richard D. Smith, *Global Public Goods and Health: Concepts and Issues*, in *GLOBAL PUBLIC GOODS FOR HEALTH: HEALTH ECONOMIC AND PUBLIC HEALTH PERSPECTIVES* 3, 9 (Richard Smith et al. eds., 2003). Illingworth notes that trust is also a public good. *See* Patricia Illingworth, *Bluffing, Puffing and Spinning in Managed-Care Organizations*, in *ETHICAL HEALTH CARE*, *supra* note 150, at 271, 278-79.

than simply to those who are vaccinated.¹⁶⁰ This is because an individual decision to be vaccinated reduces the chance that the disease will spread. If enough individuals are vaccinated, a herd immunity develops which stops the transmission of a disease within the community.¹⁶¹ Yet, if vaccination rates within a community are relatively high, individuals will face a low risk of contracting the disease at issue, and, if they act as rational individualists, they may well resist vaccination.¹⁶² By binding individuals to others, making them care about others within their community and internalize the community's norms, social capital and trust may make each individual more willing to seek vaccination, not only for his or her own good, but also for the common good.

Similar, though less obvious examples may exist with respect to health problems presented by noninfectious sources. Decisions that individuals make with respect to driving (for example, whether to obey a speed limit when there are no police in sight), to smoke in public, to dispose of hazardous materials safely, or to keep a gun in their homes can all raise collective action problems. In each case, a choice that appears to be rational from an atomistic perspective may entail significant externalities. In societies with sufficient social capital, individuals may consider those externalities because they feel connected to others and because they feel confident that others will so regard their own interests. When the community lacks social

160. See Wendy E. Parmet, *Informed Consent and Public Health: Are They Compatible When it Comes to Vaccines?*, 8 J. HEALTH CARE L. & POL'Y 71, 74 (2005).

161. *Id.*

162. *Id.* In these examples, we are employing the assumptions of rationality used by welfare economics. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.3 (6th ed. 2003). Our use of rationality should not be seen as incompatible with our critique of rationality and adoption of behavior analysis above. See *supra* text accompanying notes 81–92. The behavior analysis critique does not contend that rationality never exists, nor that populations cannot exhibit individually selfish behavior when the social, legal, and economic incentives are conducive for such behavior. Indeed, the collective action problems we discuss can be understood as examples of situations in which individuals, believing they are acting in their own interest, are actually acting in an irrational manner. Moreover, to the extent that social capital and trust ameliorates social action problems, they may be understood as helping to override an atomistic rationality by establishing a heuristic of social trust. In communities with robust social capital, people trust one another whether or not they should.

capital, individuals may decide to ignore the interests of others, presuming that others will do likewise. In this “each person for themselves” milieu, individuals may be more apt to endanger the health and safety of others.

The trust and social capital that nurtures public health depends, in many ways, upon both the existence and nature of speech.¹⁶³ This is so for several reasons. First, the very act of speech operates as a sign of respect. By speaking to someone, by providing them with information, a speaker is signaling his or her respect for the dignity and agency of the listener. This display of respect and dignity can help the listener trust the speaker. Of course, as we shall discuss shortly, deceitful or harmful speech undermines trust.

The literature pertaining to the relationship between physicians and patients and the role of informed consent has frequently noted and discussed the relationship between speech and trust. For example, in *Canterbury v. Spence*,¹⁶⁴ one of the seminal informed consent cases, the court characterized the physician’s obligation to provide patients with information about medical procedures as an obligation arising from the physician’s fiduciary or trust relationship with the patient.¹⁶⁵ To merely act upon a patient, without providing the patient with information sufficient to make an informed choice, demonstrates disrespect for and undermines the agency of the patient and constitutes a breach of trust. Perhaps for this reason, patients are more apt to trust and follow interventions suggested by physicians who take the time to explain clinical benefits and risks.¹⁶⁶

Likewise, populations may be more likely to trust and comply with public health suggestions when information is provided to them about the need for and reasons behind public health recommendations.¹⁶⁷ Few people and fewer communities, are willing to accept

163. In turn, trust facilitates speech, as people are more apt to speak with and reveal more information to those in whom they trust. See Illingworth, *supra* note 159, at 278.

164. 464 F.2d 772 (D.C. Cir. 1972).

165. *Id.* at 782.

166. Ronald M. Epstein et al., *Communicating Evidence for Participatory Decision Making*, 291 JAMA 2359, 2359 (2004); Parmet, *supra* note 160, at 82; David H. Thom et al., *Measuring Patients’ Trust in Physicians When Assessing Quality of Care*, 23 HEALTH AFF. 124, 124–26 (2004).

167. Likewise, at the individual level, trust in physicians seems to facilitate compliance with their orders. Thom et al., *supra* note 166, at 124.

“just do it,” or “trust me” for long. Thus, studies of Toronto’s experience with the SARS virus highlight the role of public health information and public health hotlines in promoting compliance with voluntary quarantines.¹⁶⁸ Had public health officials not given the population sufficient information to understand the importance of quarantines, and had social capital been weaker in the area in the first place, many more people may have been unwilling to accept public health requests to stay at home. Likewise, people are generally more willing to follow recommendations and vaccinate their children if they are given information about the benefits of vaccination.¹⁶⁹

Speech can also foster trust by allowing individuals to engage with one another, promoting reciprocity and the development of common norms. As Ellen Goodman reminds us, “[c]ommunication is . . . embedded, lexically and conceptually, in community, communion, and common.”¹⁷⁰ The social process includes communication and the sharing of ideas, which are among the ways in which individuals within democratic societies connect to each other and develop their cultural and legal norms. Indeed, many scholars have identified speech as an integral part of the deliberative process that helps to constitute democracy.¹⁷¹ Cass Sunstein goes further and sees this deliberative aspect of speech as an animating rationale for the First Amendment.¹⁷² He writes: “The belief that politics lies at the core of the [First] [A]mendment is an outgrowth of the more general structural commitment to deliberative democracy.”¹⁷³

People in a democratic state debate and deliberate about policies affecting public health, in addition to other issues and interests. In this sense, speech helps to shape the contours of public health policy, and thereby public health. As a result, the very process of communicating and exchanging ideas can itself promote cooperative behavior and trust,¹⁷⁴ which, as we have seen, can affect public

168. Parmet, *supra* note 160, at 99–100.

169. *Id.* at 104.

170. Ellen P. Goodman, *Media Policy out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1405 (2004).

171. See, e.g., *infra* note 459.

172. See Sunstein, *supra* note 57, at 314.

173. *Id.*

174. Mazzone, *supra* note 148, at 429.

health.¹⁷⁵

Of course, to note that speech can influence health by promoting trust is not to say that it cannot also undermine trust. Some types of speech, such as hate speech, may destroy both community and trust.¹⁷⁶ In other circumstances, false or manipulative information, as well as information that reveals falsehoods or trust-depleting behaviors, may undermine trust. For example, Patricia Illingworth notes that patients may lose trust with their physicians and managed care organizations when they learn about the conflicts of interest inherent in reimbursement mechanisms.¹⁷⁷ Likewise, when the public comes to learn via the media that yesterday's expert advice was erroneous, the public may become more skeptical of so-called health experts. Even more problematic are revelations that health officials have based health information on concealed or ulterior motives, such as when the public learns that public health officials have received financial rewards from pharmaceutical companies.¹⁷⁸ Although such revelations may increase trust in the long run if they lead to reform and reduce conflicts of interest, in the short run such revelations may induce cynicism and distrust.

The relationship between speech, information, trust, and public health is thus complex and multifaceted. To some extent, speech and information are critical to trust and, hence, the protection of public health. But they can also serve as the basis for the betrayal of trust and, hence, the erosion of the public's health. In either case, they influence population health, a fact that is especially evident when we focus on the problem of childhood obesity.

175. See *supra* text accompanying notes 145–69.

176. *Id.* at 451.

177. Illingworth, *supra* note 159, at 276 (quoting Sheryl G. Stolberg, *Now Prescribing Just What the Patient Ordered*, N.Y. TIMES, Aug. 10, 1997, at E3).

178. For example, much has been written about the influence of the pharmaceutical companies on government drug research and hence the health advice that is communicated to the public. See, e.g., Denise Grady, *Medical Research Dealings Explored by a Senate Panel*, N.Y. TIMES, Jan. 23, 2004, at A20. As scandals erupt and the public legitimately becomes suspicious about health information, trust may be threatened. See *id.*

IV. INFORMATION AND OBESITY

Overweight and obesity are pressing threats to public health.¹⁷⁹ In the past two decades, there has been a steady and striking increase in the prevalence of overweight and obesity in the United States.¹⁸⁰ In 1999, 34% of US adults were overweight and 27% were obese.¹⁸¹ The increase in the prevalence of childhood obesity has caused significant alarm in the public health community:

Over the past three decades since the 1970s, the prevalence of childhood obesity... has more than doubled for preschool children aged 2 to 5 years and adolescents aged 12 to 19 years, and it has more than tripled for children aged 6 to 11 years. Approximately nine million American children over 6 years of age are already considered obese.¹⁸²

Overweight and obesity are associated with myriad diseases and conditions.¹⁸³ Most troubling among children is the explosive rise in type 2 diabetes.¹⁸⁴ The number of children developing this condition is staggering. It is estimated that children born in 2000 in the United States have between a 30% and 40% chance of being diagnosed with diabetes at some point in their lives *if obesity rates level off*.¹⁸⁵ Left unaddressed, the pediatric obesity epidemic is expected to produce a population in which amputation, heart disease, stroke, metabolic

179. The Centers for Disease Control and Prevention define obesity, for adults, as having a BMI greater than or equal to 30 kg/m². CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., OVERWEIGHT AND OBESITY: DEFINING OVERWEIGHT AND OBESITY, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Nov. 13, 2005). They define overweight, for adults, as having a BMI between 25 kg/m² and 29.99 kg/m². *Id.* While overweight and obesity are distinct clinical conditions, we will refer generally to the "obesity epidemic" by which we mean to include the epidemics of overweight and obesity unless otherwise specified.

180. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 10 (2001), <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

181. *Id.*

182. INST. OF MED. OF, PREVENTING CHILDHOOD OBESITY 22 (Jeffrey P. Koplan et al. eds., 2005) (citations omitted).

183. *See id.* at 67.

184. *See id.*

185. *Id.* at 67-68.

syndrome, and hypertension will be commonplace among adults.¹⁸⁶ Obesity and overweight are also poised to directly affect life expectancy in the United States.¹⁸⁷

The economic and social costs of obesity are difficult to compute. Socially and psychologically, obesity takes a great toll on children. Obese adolescents are more prone to emotional and behavioral problems and are more likely to develop psychopathologies in both adolescence and adulthood.¹⁸⁸ Also, overweight and obese children are more likely to be the victims of verbal bullying and physical aggression.¹⁸⁹ Overweight and obesity in children can disrupt social development and facilitate the disruption of social relationships and interactions.¹⁹⁰

186. *Id.* at 69.

187. See Katherine M. Flegal et al., *Excess Deaths Associated with Underweight, Overweight, and Obesity*, 293 JAMA 1861, 1863–65 (2005). There was some controversy in 2005 when the researchers at CDC reported that earlier studies estimating deaths related to obesity at approximately 365,000 were probably too high, and that the actual number of excess deaths associated with obesity was only about 111,000. See *id.* The new study also indicated that being overweight may have a slight protective effect. *Id.* at 1864. Needless to say, the food industry and others promoted the study suggesting that previous public health warnings were exaggerated and that overweight might even be “good for you.” See, e.g., The Center for Consumer Freedom, http://www.consumerfreedom.com/news_detail.cfm/headline/2790 (last visited Nov. 13, 2005). This perspective was not based on a careful reading of the study. The prevalence of obesity remains unchanged, and obesity and overweight are serious public health problems. The slight protective effect described is associated more with the elderly overweight where underweight is a serious problem and where slight overweight can be beneficial. See Flegal, *supra* at 1864. The study also is unable to account for the availability of advanced medical technology in the clinical treatment of overweight and obesity. See, e.g., Bruce M. Wolfe & John M. Morton, *Weighing in on Bariatric Surgery: Procedure Use, Readmission Rates, and Mortality*, 294 JAMA 1960 (2005) (discussing the increased use and popularity of bypass procedures in the treatment of obesity). The issues around these studies are complex. The recent symposium at Harvard on these studies provides an in-depth analysis. See *Weighing the Evidence: Symposium on Overweight, Obesity and Mortality* (May 26, 2005), http://www.hsph.harvard.edu/weighing_the_evidence/.

188. See Serpil Eremis et al., *Is Obesity a Risk Factor for Psychopathology Among Adolescents?*, 46 PEDIATRICS INT’L 296, 296, 298, 300 (2004).

189. See *id.* at 300.

190. *Id.*

Analysts expect the economic costs of obesity to be hundreds of billions of dollars.¹⁹¹ The prevalence of obesity drives increased private health insurance spending.¹⁹² Direct costs associated with overweight and obesity totaled \$75 billion in 2003.¹⁹³ Increases in the rate of obesity among children would only increase costs associated with the condition.¹⁹⁴ Given the seriousness of this epidemic, it is worth examining all the environmental factors affecting children, including information.

Speech influences overweight and obesity. The contemporary environment faces a deluge of speech relating to food, diet, activity, and body image. Some of this speech comes from the government, including health agencies. Some of this speech comes from individuals, family members, and friends. The press and popular media are also sources of speech. More speech comes from industries that have a particular economic interest in influencing how people think about food and their bodies, as well as how they eat. In the sections below, we survey some of this speech and demonstrate the different pathways by which it affects the population's risk of obesity. In so doing, we focus particular attention on the commercial speech of the food industry. We do so not because it is the only speech in the informational environment, but because it is both a critical health determinant and a likely target of government regulation.

A. *The Cultural Impact of Food Advertising*

As we discussed in Part III, speech can influence health via multiple pathways. Culture is one important pathway. Speech

191. See INST. OF MED., *supra* note 182, at 70.

192. See Interview by Larry Levitt, kaisernetwork.org, with Kenneth E. Thorpe, Emory University, (June 27, 2005), in W5 HEALTH AFF. 317 *available at* http://www.kaisernetwork.org/health_cast/uploaded_files/062805_ha_thorpe_transcript.pdf.

193. Allison C. Morrill & Christopher Chinn, *The Obesity Epidemic in the United States*, 25 J. PUB. HEALTH POL'Y 353, 357 (2004).

194. We note here that obesity and overweight are not public health problems merely because of their social costs. Obesity is a public health problem, as opposed to only a clinical, individual problem, because, as we discuss below, its causes are social and ecological. The environmental effects of a growing prevalence of overweight and obesity further exacerbate the epidemic. The ecological model and obesity as a public health problem are nicely described in Egger & Swinburn, *supra* note 63, at 477–80.

influences and becomes part of the culture, influencing people's actions.¹⁹⁵ Advertisers understand this and use this pathway to create a culture that persuades people to use their products. As the National Cancer Institute noted, "[c]ommercial advertisers have learned that a consistent and prominent presence in the marketplace is key to achieving and holding market share."¹⁹⁶ This has been particularly evident with respect to food advertising.

The food industry spends great sums of money on advertising, much of it aimed at children.¹⁹⁷ All types of advertising directed at children have increased significantly over the past thirty years.¹⁹⁸ In 1983, analysts estimated that advertising and marketing directed at children totaled \$100 million.¹⁹⁹ Today, it is \$15 billion.²⁰⁰ In the late 1970's, experts estimated that children saw about 20,000 television ads per year.²⁰¹ They saw 30,000 advertisements in the 1980s and 40,000 in the 1990s.²⁰²

The majority of advertisements directed at children pertain to food.²⁰³ Most of these advertisements promote highly processed foods that are of poor nutritional quality.²⁰⁴ In 1997, 47.5% of food advertising in the United States promoted pre-prepared foods,

195. See *supra* text accompanying notes 124–34.

196. CAL. PAN-ETHNIC HEALTH NETWORK & CONSUMERS UNION, OUT OF BALANCE: MARKETING OF SODA, CANDY, SNACKS AND FAST FOODS DROWNS OUT HEALTHFUL MESSAGES 8 (Sept. 2005) [hereinafter OUT OF BALANCE] (quoting National Cancer Institute, 5 a Day for Better Health Program Evaluation Report, http://www.cancercontrol.cancer.gov/5ad_exec.html), available at <http://www.asu.edu/educ/eps1/CERU/Articles/CERU-0509-140-OWI.pdf>. Advertisers are not the only speakers who seek to influence culture. The popular press and media certainly do that. See *supra* text accompanying notes 130–34.

197. See OUT OF BALANCE, *supra* note 196, at 1.

198. See JULIET B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE 21 (2004).

199. *Id.*

200. *Id.*

201. THE HENRY J. KAISER FAMILY FOUND., THE ROLE OF MEDIA IN CHILDHOOD OBESITY 4 (Feb. 2004), available at <http://www.kff.org/entmedia/upload/The-Role-Of-Media-in-Childhood-Obesity.pdf>.

202. *Id.*; see also OUT OF BALANCE, *supra* note 196 (describing network TV as the most popular advertising media for the food industry in 2004).

203. THE HENRY J. KAISER FAMILY FOUND., *supra* note 201, at 5 (explaining that 32% of food advertising is for candy, 31% is for cereal, and 9% is for fast food).

204. *Id.*

candies, soft drinks and bottled water.²⁰⁵ Of the remaining 37.3% of food advertising, only 2.2%, costing \$159 million, was spent promoting fruits, vegetables, grains and beans.²⁰⁶ In a study of advertising, researchers found that if children consumed the foods in children's advertising, their diets would include a daily intake of sugar exceeding one cup and very high amounts of fat and salt.²⁰⁷ But do these advertisements influence children and affect their health?

Modern theories of consumption and culture suggest they do. Since the industrial revolution, the difference between products in the same category has become practically nonexistent; for example, one dishwasher detergent works as well as another.²⁰⁸ This mass production of goods led to a shift in advertising. Unable to draw distinctions between goods, marketers began to associate products with lifestyles.²⁰⁹ Ads persuaded consumers to buy a particular product because of its associations with certain values, attributes, lifestyles and cultural roles.²¹⁰ The primary function of advertising ceased to be transmitting information about a product. Instead, advertising sought to sell a cultural sensibility.

Several examples illustrate this new approach. Burger King recently launched its "Coq Roq" Internet campaign.²¹¹ The Coq Roq Web site tells the story of a rebellious singer who starts a band and refuses to be a "slave to the record industry."²¹² Where did he find inspiration? According to the Web site, his inspiration came from another Burger King Web campaign.²¹³ Burger King's previous

205. Anthony E. Gallo, *Food Advertising in the United States*, in AMERICA'S EATING HABITS: CHANGES AND CONSEQUENCES 173, 178 (USDA/Econ. Research Serv. ed., 1999).

206. *Id.* 15.3% of the advertisements were for alcohol. *Id.* We are not suggesting that the industry purposefully intends to increase overweight and obesity.

207. Kristen Harrison & Amy L. Marske, *Nutritional Content of Foods Advertised During the Television Programs Children Watch Most*, 95 AM. J. PUB. HEALTH 1568, 1572 (2005).

208. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 704 (1993).

209. *Id.*

210. See Daniel Robinson, *Marketing Gum, Making Meanings: Wrigley in North America*, 5 ENTERPRISE & SOC'Y 4, 21-22 (2004).

211. See Burger King Brands, Inc., Coq Roq Web site, <http://www.coqroq.com> (last visited Aug. 24, 2005).

212. *Id.*

213. *Id.*

advertising for chicken sandwiches inspired him to found his band.²¹⁴ The Web site has news, clippings, music videos, and images from concerts.²¹⁵ The entire site sells an image, a cultural role. Only by drilling down into the site does one find a link to Burger King's main Web site. The entire Coq Roq site is advertising, yet it transmits no information about the product.²¹⁶ The purpose of this advertisement is not to convey information about Burger King chicken sandwiches, but to associate the product with rebellion, independent music, grunge bands from the 90's, and sexual and artistic independence. Purchasing Burger King sandwiches will communicate these ideas to others.²¹⁷

Wrigley gum provides an historic example. When Wrigley began selling his gum in the early twentieth century, there were generally negative associations with chewing.²¹⁸ It was associated with the lower classes and with those who rode "street cars" and attended "burlesque house[s]."²¹⁹ Using advertising and promotional giveaways, Wrigley was able to turn chewing gum, traditionally a purely discretionary purchase, into a major industry and an icon of American advertising.²²⁰ Wrigley associated the gum with health, vitality and innocence.²²¹ The Wrigley "Spearman" was an especially useful marketing tool and was used to target children and mothers:

The Spearman first appeared in a Mother Goose promotional booklet that Wrigley issued in 1915. The 16-page booklet featured the Spearman in various Mother Goose settings, complete with chewing gum and Wrigley

214. The previous advertising was the "Subservient Chicken" campaign. *Id.*; see also Burger King Brands, Inc., Subservient Chicken Web site, <http://www.subservientchicken.com> (last visited Oct. 31, 2005).

215. Burger King Brands, Inc., *supra* note 211.

216. *See id.*

217. This association of products with cultural roles has been identified as a "Diderot Unity." See GRANT MCCracken, CULTURE AND CONSUMPTION 119 (1988). Simply, the Diderot Unity is the unification of cultural roles with products. *See id.* at 119. The theory of Diderot Unities, and by implication the Diderot Effect, are driving principles of modern commercial speech. *See id.* at 118.

218. Robinson, *supra* note 210, at 22.

219. *Id.*

220. *See id.* at 5.

221. *See id.* at 39.

references in the reworked nursery rhymes Teachers requested them for classroom use, a source of considerable surprise and delight to Wrigley: "if any man would have told [me] that the time would come when [I] would get chewing gum advertising into the schools [I] would have called the man crazy."²²²

To counter negative social associations with chewing gum, Wrigley targeted retailers with promotions offering cameras, watches and furniture based on sales.²²³ Wrigley specifically chose the items he offered because they were associated with the middle and upper classes, and he hoped the associations would change retailer and customer perceptions of his gum.²²⁴

Both Burger King's and Wrigley's advertisements illustrate the new character of advertising. The associations of advertising, marketing, and cultural meaning have serious impacts across cultures. Our concern, though, is to examine how this new "advertising of meaning" impacts overweight and obesity in children.

This type of advertising affects children's culture and, consequently, their health. While much remains unknown about the causal relationships between food advertising and the health of children, several facts are well established:²²⁵

1) studies of food preferences using experimental designs have consistently shown that children exposed to advertising will choose advertised food products at significantly higher rates than children who were not exposed; 2) findings from food purchase request studies based on surveys, diaries, experimental trials, and direct observation of mother-child pairs shopping have consistently shown that children's exposure to food television

222. *Id.* at 31.

223. *Id.* at 19.

224. *See id.* at 21-22.

225. *See* Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 1 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 1, 11 (2004). Although we do not address the issue here, there are indications that the *activity* of using media (for example, watching television or using the computer) does have a direct relationship to overweight and obesity regardless of the content. Aetna IntelliHealth, *Being Overweight or Obese*, <http://www.intelihealth.com/IH/ihtIH/WSIHW000/32833/32856/357943.html?d=dmChildGuide> (last visited Nov. 13, 2005).

advertising increases the number of attempts children make to influence food purchases their parents buy; 3) purchase requests for specific brands or categories of food products also reflect product advertising frequencies²²⁶

Food marketers understand this, and they understand modern children, targeting them accordingly.²²⁷ Children spend more money than ever as consumers, and marketers target their individual behavior to capture that spending power.²²⁸ Children influence adult purchasing (e.g., “the nag factor”), and marketers target these social relationships and cultural characteristics.²²⁹ While more research is required, it is clear that advertising works: “Based on children’s commercial recall and product preferences, it is evident that advertising achieves its intended effects, and an extensive systematic literature review concludes that food advertisements promote food purchase requests by children to parents, have an impact on children’s product and brand preferences, and affect consumption behavior.”²³⁰

Building brand recognition and preference is also important, as establishing brand preference is often sufficient to affect consumption behavior.²³¹ As noted above, modern advertising and consumption seeks to sell cultural roles, rather than products, by associating a product/brand with a particular cultural attribute.²³² These associations are important because of the “Diderot Effect.”²³³ Advertising imbues meaning in things and these meanings are conceptually grouped together.²³⁴ The effect is a “force that encourages the individual to maintain a cultural consistency in his/her complement of consumer goods.”²³⁵ On the one hand, this

226. Story & French, *supra* note 225, at 11.

227. *Id.* at 3. We use the term “target” to describe advertising to children because it is the advertising industry term for directing a message at a particular population. See Best Knows, Target Audience, http://en.mimi.hu/marketingweb/target_audience.html (last visited Nov. 13, 2005).

228. See SCHOR, *supra* note 198, at 23.

229. See *id.* at 23–24.

230. INST. OF MED., *supra* note 182, at 173 (citations omitted).

231. See SCHOR, *supra* note 198, at 125–26.

232. See *supra* text accompanying notes 208–24.

233. MCCracken, *supra* note 217, at 118–19.

234. See *id.* at 119.

235. *Id.* at 123.

works to maintain consistency for the individual.²³⁶ On the other hand, the effect can institute a radical change in behavior in the individual.²³⁷ In what is known as the “departure purchase,” an individual buys a product that is associated with a cultural role that is inconsistent with his current possessions.²³⁸

For example, I might have a wardrobe that consists of simple bargain outlet clothes. These possessions suit my needs. Yet, for some reason, one day I purchase a pair of expensive designer shoes. My new purchase may have a radical effect on my perception of my old clothing. Research has shown that, because of my need for a certain semiotic consistency in my goods, I may soon launch into a process of consumption, replacing my older bargain clothes for designer labels that are in harmony with the cultural significations of Prada.²³⁹ Modern advertising, regardless of the audience targeted, seeks to induce the departure purchase.²⁴⁰ The importance of the departure purchase lies in the spiraling quality of the Diderot effect.²⁴¹ If marketers can induce this phenomenon, observers have noted, it will tend toward continual consumption in a fashion that spirals up.²⁴² The goals of advertisers and marketers are to continually re-brand, re-associate, and induce increasing consumption of their products.²⁴³ In the sections below, we begin by offering examples that explore how the food industry targets commercial speech directly to children to alter both their behavior and culture to induce consumption.

236. *See id.* at 124. Apple computer users are a good example of how the Diderot Effect maintains continuity. The cultural roles associated with Apple computers have been so strong that they make alteration of the individual's behavior around computer purchasing difficult to alter. *See* Leander Kahney, *Apple: It's All About the Brand*, WIRED NEWS, Dec. 4, 2002, <http://www.wired.com/news/print/0,1294,56677,00.html>. Apple computers have created extreme loyalty to what the Apple brand “means.” *See id.* Some users have had Apple logos and icons tattooed onto their bodies. Leander Kahney, *Tat's the Way Mac Heads Like It*, WIRED NEWS, Aug. 5, 2002, <http://www.wired.com/news/print/0,1294,54202,00.html>.

237. *See* MCCracken, *supra* note 217, at 125.

238. *Id.*

239. *Id.* at 126–29.

240. *Id.*

241. *See id.* at 127.

242. *Id.*

243. *See id.* at 129.

*B. Advertising Directed to Children in Schools:
Targeting Purchasers via Their Culture*

Schools provide important environments for children. In school, children not only study a prescribed curriculum; they socialize, they acculturate, they eat, and they become active or inactive. The school environment, which includes the informational environment within a school, shapes children socially, intellectually, and physically.²⁴⁴ Importantly, children face limited options as to how they will interact with their school's environment. Schools are relatively closed environments that limit what children can do and how they can respond to their environment.

Recently, food companies have played an increasing role in influencing the informational environment within schools, taking advantage of the opportunity that schools present to influence the behaviors of the captive population of children.²⁴⁵ For example, exclusive contracts that place vending machines in schools not only provide students with beverages that directly influence their health, they also send students a message about what should be consumed and the meaning of particular brands.²⁴⁶ In addition, many companies provide scholarships to students to attend college, sponsor clubs and activities, and integrate themselves into every facet of the school community.²⁴⁷ At the end of a child's public schooling, the

244. Susan Harter, *Teacher and Classmate Influences on Scholastic Motivation, Self-esteem, and Level of Voice in Adolescents*, in SOCIAL MOTIVATION: UNDERSTANDING CHILDREN'S SCHOOL ADJUSTMENT 11, 11 (Jaana Juvonen & Kathryn R. Wentzel eds., 1996).

245. See, e.g., NICOLA PINSON, SCHOOL SODA CONTRACTS: A SAMPLE REVIEW OF CONTRACTS IN OREGON PUBLIC SCHOOL DISTRICTS, 2004 (2004).

246. Contracts require that brands and anything with a soda brand on it be visible at all times, that is, vending machines cannot be covered with posters or hidden. *Id.* at 12. The soda companies may also donate scoreboards, soda, and other materials to the schools, all of which are heavily branded. *Id.* Exclusivity combined with the heavy advertising and restrictions essentially capture the culture of the school in terms of soda vending. See *id.* at 6-7. Contract terms provide further incentive for the school district to promote sale of the soda. *Id.* at 7-11; see also contracts on file with authors.

247. See, e.g., The Coca-Cola Scholars Foundation, <https://www.coca-colascholars.org/cokeWeb/jsp/scholars/Index.jsp> (last visited Nov. 14, 2005); General Mills Foundation, <http://www.generalmills.com/corporate/commitment/foundation.aspx> (last visited Nov. 14, 2005); Hormel Foods, 10 Hormel Foods Charitable Trust Scholarships Awarded (Apr. 21, 2005), <http://media.hormel.com/templates/knowledge/knowledge.asp?catid=2&id=284>

child will come to associate a particular brand with his or her school sports teams, after-school activities, yearbook, school dances, and graduation. The soda brand will be associated with the student's education, school experience, adolescence, first school dances, and other key moments in development. Ultimately, the "good old days" of an individual's youth will be synonymous with "Coke" and "Pepsi." In addition, the child will carry knowledge of the brand to adulthood, affecting future choices.

Contracts between soda companies and schools are not the only way that food advertising enters schools. Channel One, which produces twelve minute "news broadcasts," is piped into 12,000 middle and high schools throughout the country, reaching eight million students.²⁴⁸ Schools with Channel One contracts are required to show the twelve minute broadcast in its entirety—which includes two minutes of commercials.²⁴⁹ The majority of this advertising on Channel One is for junk food.²⁵⁰ Studies indicate that Channel One advertising affects students' brand preferences, and students often incorporate brands and commercial images into their assignments and school activities.²⁵¹ The messages of food companies become part of the school's fabric and the children's environment.

Of course, food company messages are not the only information children receive about food and nutrition while at school. Many schools attempt to provide meals and instruction that comply with dietary guidelines.²⁵² While nutritional counseling is important, it cannot completely counteract industry influence. As Marion Nestle notes, the food industry is heavily involved in drafting the guidelines that influence the curriculum.²⁵³

(last visited Nov. 14, 2005).

248. Channel One Network, About Channel One, <http://www.channelone.com/common/about/> (last visited Sept. 26, 2005).

249. SUSAN LINN, CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD 81–82 (2004).

250. SCHOR, *supra* note 198, at 129.

251. LINN, *supra* note 249, at 84.

252. See MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 192 (2002).

253. See *id.* at 193–94.

C. Advertising, Obesity, and Trust: Co-opting Social Networks

The social networks in place between children and their parents, between children and their peers, and between children and other adults, influence the type and amount of food that children consume. Take children's influence over household purchases. "[C]hildren aged four to twelve directly influenced \$330 billion of adult purchasing in 2004 and 'evoked' another \$340 billion."²⁵⁴ Companies research the relationships between children and their parents and capitalize upon it to influence adult purchases.²⁵⁵ In particular, companies have noted, and taken advantage of, the commonly known fact that children nag their parents.²⁵⁶ Nagging is a major part of childhood development and is related to the necessary separation of children from their parents and development of a child's autonomy.²⁵⁷ As Susan Linn has observed, marketers seek to capitalize on this developmental stage and rely upon the parent-child relationship to promote their products.²⁵⁸ Linn argues that we should be concerned about this intrusion and the erosion of trust and relationships.²⁵⁹ Corporate use of nagging can exacerbate stress in the family, can often cause parents to overindulge their children, and has led to financial strain for families.²⁶⁰

Heinz ketchup provides an excellent example of the use of the nag factor. While it has now discontinued its line of color ketchups, Heinz at one time introduced ketchup that came in green, purple and blue colors.²⁶¹ Heinz intended this transformation of ketchup to spark nagging by kids for the product: "All our advertising is targeted to kids. You want that nag factor so that seven-year-old Sarah is nagging Mom in the grocery store to buy Funky Purple. We're not sure Mom would reach out for it on her own."²⁶²

254. SCHOR, *supra* note 198, at 23.

255. *See id.* at 23–24.

256. LINN, *supra* note 249, at 35–36.

257. *See id.* at 32.

258. *See id.* at 35–36.

259. *Id.* at 31–32.

260. *Id.* at 32.

261. *See* H.J. Heinz Company Corporate Profile 2003, http://www.heinz.com/jsp/di/corp_pro2003/corpProfile4.jsp (last visited Nov. 8, 2005).

262. LINN, *supra* note 249, at 35 (quoting Kelly Stitt, Senior Brands Manager for Heinz's Ketchup, Condiments & Sauces Division).

Kraft Foods has also taken advantage of the nag factor with its Lunchables. Blurring the line between toys and food, Kraft promotes Lunchables heavily to children and has tried to market the product both as a toy that children can nag parents for and as a healthy alternative for overworked parents.²⁶³ The recent promotion of Lunchables ties the popular food to the recent release of “The Fantastic Four.”²⁶⁴ The Fantastic Four promotion was tied to an online game that allowed the child to advance to higher levels with special codes that are found in the Lunchables packaging. To advance, the child had to purchase the Lunchables (or have Mom or Dad do it).

Juliet Schor points to the revitalization of the Kool-Aid brand as a prime example of not only industry reliance on nagging but of industry mining of parent-child relationships. Kool-Aid created two sets of ads.²⁶⁵ The first, directed at children, espoused the “cool and magical” character of Kool-Aid.²⁶⁶ The ads created desire in children for the product.²⁶⁷ A second set of ads, run during adult television-viewing hours, appealed to mothers.²⁶⁸ These ads touted the Vitamin C in the product and its health advantages “because mothers can control the amount of sugar they put into it.”²⁶⁹ Both ads ran during the same time period.²⁷⁰ The first ad created the desire in the child.²⁷¹ The second provided the reasons for mothers to acquiesce to the child’s demand.²⁷²

263. *Id.* at 36–37. Recent ads for Lunchables tout the benefits of Lunchables and extol their new “fun” activities for improving the food, for example, the more the child shakes the chicken in the bag, the more spicy it will become. Kraft Foods, Inc., Newsroom, <http://164.109.46.215/newsroom/08032005.html> (last visited Nov. 18, 2005). Shaking the chicken becomes a form of entertainment to “shake up” a boring lunch, which Kraft describes as the “brown bag routine.” *Id.*

264. Jonathan Bing, *The Doom-Defying, Two-Fisted Marketing of Fantastic Four*, WIRED, http://www.wired.com/wired/archive/13.07/fantastic_pr.html (last visited Nov. 14, 2005).

265. SCHOR, *supra* note 198, at 59.

266. *Id.*

267. *See id.*

268. *See id.*

269. *Id.*

270. *See id.*

271. *See id.*

272. *See id.*

To develop these ads, advertisers conduct enormous amounts of ethnographic research in homes.²⁷³ They aim to understand the goals of parents in feeding their children, to understand parental concepts of “healthy foods,” and to document the relationships between parents and children.²⁷⁴ This information then becomes the basis for the food industry’s advertising that seeks to exploit familial relationships to sell products.²⁷⁵ Schor recounts the experience of one marketing researcher doing research for cookies.²⁷⁶ The researcher spent time with the families, learned what mothers considered “healthy,” and examined how families interacted around Oreo cookies.²⁷⁷ This information was later used to design campaigns that associated the products with words like “*health*” and “*wholesome*.”²⁷⁸

As noted above, the goal of such research is not to learn how to convey information about the product itself.²⁷⁹ The research is used to create images of a culture that children rely upon when they define themselves and interact with others. Food becomes a communicative symbol for the parents and children as industry capitalizes on the trust in the parent-child relationship in order to facilitate consumption. By targeting the parent-child relationship, food advertisers risk straining a relationship that is critical not only for the well being of individual children but for society writ large.

Moreover, research on commercial speech demonstrates that it affects obesity by influencing the cultural and social environment.²⁸⁰ As a result, speech is not simply a determinant of individual health; it is a social determinant of population health. Hence, serious discussions of potential interventions aimed at retarding the obesity epidemic will understandably include policies that may affect speech. Whether the First Amendment may permit such policies is discussed in the next Part.

273. *Id.* at 131.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *See supra* text accompanying note 210.

280. *See SCHOR, supra* note 198, at 126.

V. THE FIRST AMENDMENT AND PUBLIC HEALTH

A. Free Speech and Health

Over the last several decades, the Supreme Court has increasingly read the First Amendment as providing broad and robust immunity for speech.²⁸¹ This protection permits an information environment in which health information may be disseminated and health policies can be debated.²⁸² It also enables the public dialog about health and health policies that are critical to the maintenance of trust and social capital.²⁸³ Thus, broad First Amendment protection may be supportive, if not necessary, for the development of an informational environment that safeguards public health. Arguably, that has been the case with respect to many health threats.

For example, when the AIDS epidemic developed in the 1980s, there were no medical treatments available to counter the impact of the HIV virus.²⁸⁴ Control of the epidemic and prevention of death required that individuals adopt less risky behaviors, that cultural norms change, public policies be developed, and communities at heightened risk trust health and public health workers.²⁸⁵ For each of

281. Modern First Amendment jurisprudence dates less than fifty years, to *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Previously, the Supreme Court's approach to the First Amendment was far more guarded, leaving government with considerable latitude for prohibiting many forms of speech. *Id.* at 447 (discussing *Whitney v. California*, 274 U.S. 357 (1927)). In the years since *Brandenburg*, the Court has decided many important cases expanding the swath of protection afforded by the First Amendment. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As discussed in Part III, this heightened degree of protection for speech can be understood in light of the increasing importance of speech to our economic and social life and the varying degrees of protection given different constitutional rights in different eras.

282. *See* LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 146 (2000).

283. *See id.* at 147. In this way, First Amendment protection for speech relating to health can be justified for the same reasons given to justify First Amendment protection for political speech.

284. *See* U.S. Food and Drug Administration, Approval of AZT (Mar. 20, 1987), <http://www.fda.gov/bbs/topics/NEWS/NEW00217.html> (announcing the first FDA-approved treatment of AIDS).

285. *See* Larry Gostin, *Traditional Public Health Strategies, in AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC*, *supra* note 60, at 59, 77-78.

these to occur, all of the pathways through which speech influences health populations had to be utilized. But given the sensitive, and often sexually explicit, nature of the information, many objected to the public conveyance of HIV-related information.²⁸⁶ In this case, the broad protections offered by the First Amendment helped to ensure the availability of information that the public needed to protect health.²⁸⁷

However, free speech has not always benefited public health. As discussed in Part IV, the informational environment includes much information that may exacerbate the obesity problem. In particular, the food industry and media have used speech in ways that appear to have increased the incidence of overweight and obesity among children, altering their culture and the public policies that affect them.²⁸⁸ Much, if not most, of this health-harming speech has been commercial speech, in that it has been aimed directly at promoting the sale of a product.²⁸⁹ Hence, an absolutist position on the First Amendment, particularly as it applies to commercial speech, may interfere with and impede the ability of governments (state and/or federal) to intervene and protect children from a health-impairing information environment.

In this Part, we explore how First Amendment law applies to public health protection with respect to obesity as well as what it would mean to integrate into First Amendment analysis a population-based perspective that is cognizant of the multi-factorial, population-based pathways by which speech affects public health. We focus our

286. For a discussion about these debates and the attempts that were made to limit HIV-related speech, see RONALD BAYER, *PRIVATE ACTS, SOCIAL CONSEQUENCES* 211–13 (1989); Burris, *supra* note 60, at 96–107.

287. See, e.g., *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 3 (1st Cir. 1994) (holding that the Transit Authority's refusal to run certain ads providing HIV information was a violation of the First Amendment). In some situations, the First Amendment proved less efficacious in ensuring free speech in the HIV context because governments attached conditions limiting speech supported by government grants. Burris, *supra* note 60, at 100. As Burris notes, at the time, governments were given wide latitude in attaching limitations on speech as a condition for receiving funding. *Id.* For further discussion on government sponsored speech, see *infra* text accompanying notes 420–26.

288. See *supra* text accompanying notes 182–252.

289. As many have recognized, it is often difficult to distinguish commercial speech from other forms of speech. For a discussion of that problem, see *Nike, Inc. v. Kasky*, 539 U.S. 654, 665–84 (2003) (Breyer, J., dissenting).

analysis on two aspects of First Amendment doctrine: those that pertain to commercial and compelled speech, as they are the most salient for the discussion of the application of First Amendment law to efforts to limit the obesity epidemic. First, we introduce the commercial speech doctrine. We then look at the law that pertains to compelled speech, especially in a commercial context, because it is also critical for public health efforts that use speech to reduce the obesity epidemic.

B. Commercial Speech and the First Amendment

Since its inception thirty years ago, the contemporary commercial speech doctrine has had a close association with issues related to health care and public health.²⁹⁰ The current doctrine has its roots in *Bigelow v. Virginia*,²⁹¹ in which the Supreme Court overturned a publisher's conviction for carrying advertisements in violation of a Virginia statute making it illegal for any publication in the state to encourage or promote an abortion.²⁹² In finding the Virginia statute unconstitutional, Justice Blackmun, writing for the majority stated that "[t]he central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form."²⁹³

290. Many of the initial cases concerned state regulation of medical services in one form or another. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (regulation of advertising contraceptives); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (regulation of advertising drug prices); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (regulation of advertisements pertaining to abortion). Later cases often concerned commercial speech regulations that aimed at protecting the public health from dangerous goods. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (regulation of cigar and smokeless tobacco marketing); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (regulation of liquor advertising).

291. 421 U.S. 809 (1975).

292. *Id.* at 811, 829.

293. *Id.* at 818 (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 367, 384 (1973); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)). The Court then went on to distinguish an earlier case, *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942), in which the Court reached the opposite conclusion and upheld the issuance of an injunction against the distribution of handbill advertisements. *Id.* at 819.

Despite the clarity of the majority's pronouncements, the fact that *Bigelow* concerned an advertisement for abortion services and that the Supreme Court had only recently articulated a woman's right to an abortion,²⁹⁴ left many uncertain whether the Court was signaling wide-scale protection for commercial speech or simply providing extra scrutiny for abortion regulations.²⁹⁵

The Court provided the answer the following term in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*²⁹⁶ In striking down a Virginia law limiting the advertisement of health care services, the majority explained that speech should not lose its protection merely because the speaker utters it with an economic intent.²⁹⁷ In support of this conclusion, the majority noted the difficulty of distinguishing commercial speech from other forms of speech²⁹⁸ and pointed out that "[t]he interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute"²⁹⁹ In addition, the majority argued, consumers may have "as keen, if not [a] keener" interest in receiving commercial

294. See *Roe v. Wade*, 410 U.S. 113 (1973).

295. See *Va. State Bd. of Pharmacy*, 425 U.S. at 760.

296. *Id.* (striking down a Virginia law prohibiting pharmacists from advertising drug prices).

297. *Id.* at 762.

298. The difficulty in distinguishing commercial speech from other forms of speech is certainly real, especially in today's informational environment in which commercial products are marketed in forums other than traditional advertising while traditional non-commercial sources of information, such as the press, are increasingly owned by large conglomerates that exercise influence over what is and is not said. See *Collins & Skover*, *supra* note 208, at 698. In this environment, it would truly be difficult to determine what speech is commercial and what is not. Another alternative approach to the issue is to distinguish speech by the nature of the speaker. More precisely, commentators have questioned whether the First Amendment should apply to corporate speech, because corporations are state-created entities and should not qualify for many of the personal, autonomy-based rationales that have been used to explain the First Amendment's preference for speech. See Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 B.U. PUB. INT. L.J. 389, 411 (2003). The problem with this approach, besides its lack of support by the Court, is that it might fail to provide full First Amendment protection for many organized advocacy groups, permitting the government to ban clearly political discourse.

299. *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

information than other forms of information.³⁰⁰

In finding the Virginia law unconstitutional, the majority also relied heavily on the supposed benefits that commercial advertising could provide to individuals.³⁰¹ For example, the Court pointed out that a ban on drug pricing information could hurt the poor, sick, and aged who could gain the most from learning where they could purchase less expensive drugs.³⁰² In addition, the majority contended that "society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial,' may be of general public interest."³⁰³ Finally, in perhaps the most telling part of the opinion, the majority noted that:

[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.³⁰⁴

Nevertheless, the majority recognized that pharmacy advertising might create some harm in that customers may be persuaded by advertisements to choose discount pharmacists, who might not necessarily serve them the best.³⁰⁵ But to take such concerns into account and ban advertising, the majority charged, would be "highly paternalistic."³⁰⁶ Instead, the state should assume that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."³⁰⁷ Thus, the majority

300. *Id.* at 763.

301. *See id.* at 764-66.

302. *Id.* at 763.

303. *Id.* at 764.

304. *Id.* at 765.

305. *Id.* at 769.

306. *Id.* at 770. In the context of this case, the majority's disdain for paternalism can be understood as an example of the anti-paternalism, patient rights ethos that was ascendant in the 1970s and came (somewhat inaptly) to be exemplified by Justice Blackmun's own opinion in *Roe v. Wade*, 410 U.S. 113 (1973). For a discussion of the patient rights, anti-paternalism movement, see David J. Rothman, *The Origins and Consequences of Patient Autonomy: A 25-Year Retrospective*, in *ETHICAL HEALTH CARE*, *supra* note 150, at 91, 91-97.

307. *Va. State Bd. of Pharmacy*, 425 U.S. at 770. These assumptions, that

focused on the direct pathway, seeing advertisements as providing information directly to individual, presumably rational, consumers who could use that information to make their own, best, individual choices.

Despite these arguments for placing commercial speech under the umbrella of the First Amendment,³⁰⁸ the *Virginia Board of Pharmacy* Court recognized that “commonsense differences” exist between commercial speech and other protected forms of speech thereby justifying different degrees of constitutional protection.³⁰⁹ In particular, the majority noted that the truth or falsehood of commercial speech may be more easily determined by the speaker than is the case with other forms of speech.³¹⁰ Moreover, they opined that commercial speech might be more “durable” and less easily chilled than other forms of speech.³¹¹ As a result, while the First Amendment protected commercial speech, the Court left open the degree, the extent, and the nature of permissible regulations under the First Amendment.

In the years immediately following *Virginia Board of Pharmacy*, the Court frequently confronted the question that case left unanswered: under what circumstances would regulations of commercial speech be upheld?³¹² In 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,³¹³ the

advertisements inform individuals and that they can use this information in a rational way to act in their own best interest, have been subject to substantial critique. For a particularly powerful repudiation, see Collins & Skover, *supra* note 208.

308. In doing so, the Court was deciding to treat commercial speech differently from other forms of speech that the Court had held were “unprotected” and therefore outside of the scope of the First Amendment. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that “fighting words” are not protected by the First Amendment); *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that obscenity is not protected by the First Amendment).

309. *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24.

310. *Id.* The Court also made it clear that commercial speech that is false is not protected. *Id.* at 771.

311. *Id.* at 772 n.24.

312. See, e.g., *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (addressing a State’s ability to regulate a lawyer’s solicitation of clients); *Bates v. State Bar*, 433 U.S. 350 (1977) (addressing the regulation of advertisements for routine attorney services).

313. 447 U.S. 557 (1980).

Court provided an approach to answer the question. In a case considering the constitutionality of a New York law banning electric utilities from advertising to promote the use of electricity, Justice Powell offered a four-pronged test for determining the permissible scope of commercial speech regulations.³¹⁴ Under the *Central Hudson* test, the Court begins by asking whether the speech regulated promotes legal activity and, if so, whether the speech is truthful and not misleading.³¹⁵ If the answer to both questions is yes, the Court finds the speech worthy of protection and moves on to additional parts of the test.³¹⁶ The second prong asks whether the government regulation serves a substantial interest.³¹⁷ Under the third prong, the Court asks whether the regulation directly advances that interest.³¹⁸ Finally, the fourth prong asks whether the regulation is more expansive or burdensome than necessary.³¹⁹

From the outset, justices and commentators have criticized the *Central Hudson* test. In a separate opinion in *Central Hudson*, Justice Blackmun took issue with the test's endorsement of the idea that the government could have a legitimate or substantial interest in influencing an individual's economic decision.³²⁰ Focusing on how speech influences individuals directly, rather than how it alters their culture and environment, Justice Blackmun argued that the state cannot "manipulate" individual choices or regulate speech, "absent clear and present danger," because of speech's effect on the public.³²¹ As Justice Blackmun saw it, bans on truthful advertising keep individuals ignorant—something the state simply may not do.³²²

In contrast, Justice Rehnquist found the Court's approach overly restrictive of the state's ability to regulate.³²³ After arguing that a state had a special right to restrict the activities of a regulated

314. *Id.* at 566.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 573 (Blackmun, J., concurring).

321. *Id.* at 575 (Blackmun, J., concurring).

322. *Id.* at 579 (Blackmun, J., concurring) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

323. *Id.* at 584–85 (Rehnquist, J., dissenting).

monopoly, Rehnquist questioned the majority's faith in an unregulated "marketplace of ideas."³²⁴ Suggesting that commercial speech should not be considered completely different from other commercial activities, he noted that "[t]here is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market."³²⁵ To Justice Rehnquist, the majority had gone too far in treating commercial speech akin to political speech, thereby depriving states of their ability to promote the interests of their citizens.³²⁶

In subsequent years, other justices have joined the criticism. For example, Justice Thomas has adopted the critique of Justice Blackmun and argued that by accepting the idea that a state can seek to keep consumers ignorant in order to "manipulate" their behavior, *Central Hudson* violates the First Amendment.³²⁷ Justice Scalia, on the other hand, has suggested that the test has "nothing more than policy intuition to support it."³²⁸ These criticisms of *Central Hudson* have taken their toll. Litigants have frequently asked the Court to reconsider the test.³²⁹ Moreover, the Court's application of the test has been notably inconsistent. At times, the Court has applied the test in a relatively loose way, suggesting that the Court would grant the states considerable latitude in regulating commercial speech.³³⁰

324. *Id.* at 592.

325. *Id.*

326. *Id.* at 594.

327. 44 *Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring); see also *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring). Justice Kennedy has also suggested that the test gives "insufficient protection to truthful, nonmisleading commercial speech." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Kennedy, J., concurring).

328. 44 *Liquormart, Inc.*, 517 U.S. at 517 (Scalia, J., concurring). Commentators have shared the view that the test is unprincipled and untenable. See, e.g., Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 COMM. L. & POL'Y 237 (2004).

329. See *Lorillard Tobacco Co.*, 533 U.S. at 554.

330. See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 618 (1995) (upholding a state bar rule prohibiting lawyers from sending communications to prospective clients soliciting representation in personal injury matters); *United States v. Edge Broad. Co.*, 509 U.S. 418, 419-20 (1993) (upholding a federal law prohibiting the broadcast of lottery advertisements unless the

At other times, especially in recent years, the Court has applied the test with greater rigor, making it difficult for state regulations of commercial speech to pass constitutional muster.³³¹

Two relatively recent cases are especially indicative of both the trajectory of the commercial speech doctrine as well as its potential impact on public health regulations. The first case, *Lorillard Tobacco Co. v. Reilly*,³³² questioned the constitutionality of a comprehensive set of regulations designed to shield children from advertisements for cigars and smokeless tobacco.³³³ In an opinion by Justice O'Connor, the Court first re-affirmed and then applied the *Central Hudson* test.³³⁴ The Court began by noting that only the third and fourth parts of the test were actually at issue as the parties had conceded both that the regulations pertained to truthful speech about a legal product and that the state had an important interest in preventing tobacco use by minors.³³⁵ The debate concerned the relationship between the regulations and that state interest—whether the state could show that the regulations directly advanced its interest and were no broader than was needed to do so.³³⁶

In analyzing these prongs of *Central Hudson*, the majority acknowledged and reviewed the considerable empirical evidence that demonstrated that advertising stimulated demand among minors for

lottery is state-run and the broadcaster is licensed by a state that runs a lottery); *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 328–30 (1986) (upholding a ban on the advertising of casino gambling).

331. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 476–77 (1995) (striking down a state law prohibiting the display of alcohol content on beer labels). Commentators have noted the increasing rigor with which the Court has reviewed commercial speech regulations. *See* Lawrence O. Gostin & Gail H. Javitt, *Health Promotion and the First Amendment: Government Control of the Informational Environment*, 79 MILBANK Q. 547, 557–59 (2001).

332. 533 U.S. 525 (2001).

333. *Id.* at 533–36. The state also promulgated regulations aimed at cigarette marketing. *Id.* at 532. These regulations were struck down by the Court as preempted by the Federal Cigarette Labeling and Advertising Act. *Id.* at 551.

334. *Id.* at 554–55.

335. *Id.* at 555. In his dissent, Justice Thomas questioned whether a state had a legitimate interest in regulating speech aimed at children. *Id.* at 581 (Thomas, J., dissenting). He noted, “We have held consistently that speech ‘cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.’” *Id.* (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975)).

336. *Id.* at 555–56.

cigars and smokeless tobacco.³³⁷ In so doing, the majority seemed to recognize that advertising does not only speak to individuals rationally and directly, by offering them information, but also indirectly and irrationally, by forming associations between products and images such as Joe Camel.³³⁸ In accepting this preference-formation effect of advertising, the majority came close to understanding that speech operates not only directly on individuals, but also indirectly, by changing cultural patterns and associations.³³⁹ What the majority did not see, however, was that its analysis cast doubt on the rationale the Court had given in *Virginia Board of Pharmacy* for providing strong constitutional protection for commercial speech.³⁴⁰

After concluding in *Lorillard Tobacco Co.* that the state had passed the third part of the *Central Hudson* test, the majority nevertheless found the Massachusetts law unconstitutional, largely on the theory that the regulations were overly broad and would place an unnecessary burden on the interest of tobacco retailers and manufacturers “in conveying truthful information about their products to adults, and adults [who] have a corresponding interest in receiving truthful information about tobacco products.”³⁴¹ In reaching this conclusion, the majority noted that regulations “cannot unduly impinge on the speaker’s ability to propose a commercial transaction and the adult listener’s opportunity to obtain information about products.”³⁴² The majority then found that the regulations did just that because the ban on outdoor advertising within 1,000 feet of a school or playground would prevent advertising in the vast majority of locations in urban areas and would prohibit indoor displays visible through windows as well as traditional outdoor billboards.³⁴³ As a result, tobacco purveyors would have little ability to advertise or communicate to adults about their goods.³⁴⁴

337. *See id.* at 560–61.

338. *See id.* at 561.

339. *Id.* at 558–61 (citing evidence in FDA studies of a direct correlation between increased tobacco consumption among various population groups and advertising efforts targeting those groups).

340. *See supra* text accompanying notes 300–07.

341. *Lorillard Tobacco Co.*, 533 U.S. at 564.

342. *Id.* at 565.

343. *Id.* at 562.

344. The Court found that the regulations barred oral communication in the

Moreover, the majority concluded, the state's ban of point-of-sale advertisements less than five feet high was both overbroad and underbroad (because children can be taller or shorter than five feet) as well as poorly targeted, since children could see advertisements above their eye level.³⁴⁵

As we shall discuss below, from a public health perspective, the majority's application of the fourth part of the *Central Hudson* test was perplexing and problematic. It was perplexing because it followed the Court's earlier conclusion that the state was pursuing a legitimate goal as well as the recognition that advertising does far more than provide rational consumers with useful information about legitimate products; it shapes consumer preferences and creates irrational associations for products. Yet, when the majority turned to the fourth prong, they seemed to lose sight of those points and instead saw advertising merely as helpful information that consumers rely upon to make rational decisions.³⁴⁶ As a result, the majority expressed great concern about the burdens the state regulations imposed on advertisers and consumers and took pains to demand a tight fit between the regulations and the state's asserted, and determined-to-be-legitimate, goal.³⁴⁷ Had the majority recalled that the advertising at issue operated not to provide information, but to create demand and alter the environment in which both adults and children make their decisions, the concerns about the regulations' overbreadth should have been diminished.

The analysis was problematic for another reason. Traditionally, when a court asks if a regulation is overly burdensome, it does so in relationship to the stated goal.³⁴⁸ In other words, the question is not whether a regulation is burdensome against some abstract, external

forbidden zones as well. *See id.* at 564.

345. *Id.* at 566. The Court did uphold regulations barring self-service displays, finding that these regulations were not content-based speech regulations. *Id.* at 568-69.

346. *Id.* at 565.

347. *Id.* at 561-65.

348. In other words, the fourth part of the test cannot be considered in isolation from the second. The question is not whether a regulation is burdensome in and of itself but whether it is more burdensome than necessary to achieve its goal. *Lorillard Tobacco Co.*, 533 U.S. at 565. As the Court stated in *Lorillard Tobacco Co.*, the fourth part of the test "requires a reasonable fit between the means and ends of the regulatory scheme." *Id.* at 561.

metric of burdensomeness, but whether it is overly burdensome in relation to the state's regulatory interest.³⁴⁹ When public health protection is the state's goal, this means that the state should be allowed to regulate only as far as is necessary to achieve the public health goal. It does not and cannot mean that *no* burdens are permitted, otherwise the state could never achieve its goal.

When looking at the outdoor advertising regulations, however, the majority never inquired as to whether their breadth was necessary to achieve the state's goal. They looked instead only at the extent of the burdens the regulations imposed upon tobacco sellers and customers.³⁵⁰ For example, they noted that the regulations would bar outdoor advertising in most urban areas.³⁵¹ This was too burdensome, they posited, because it would keep advertisers from being able to convey information to adult consumers.³⁵² However, the majority did not ask whether there were other less burdensome ways that the state could achieve its goal of shielding minors from the preference-forming impact of outdoor advertising. If one accepts, as the majority did, that that goal was a legitimate goal for a state to pursue, and if one recalls that the goal was protecting not just an individual child, but the state's population of children, then it stands to reason that the state might have to implement fairly broad and wide-spread regulations that require advertisers and adults to communicate through other media (for example, inside stores, or in adult-oriented print media).³⁵³ Thus, despite the opinion's initial acceptance of limited regulations of commercial speech, the analysis the Court applied was highly protective of commercial speech. Indeed, it is difficult to imagine any regulation of cigar and smoke-

349. In *Lorillard Tobacco Co.*, the majority accepted that the regulations were sufficiently well-founded to survive the third part of the *Central Hudson* test. *See id.* In other cases, the Court has accepted that the speech regulations could in fact advance their stated goal. *See, e.g.,* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505–07 (1996) (Stevens, J., plurality opinion); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488–89 (1995).

350. *Lorillard Tobacco Co.*, 533 U.S. at 561–66.

351. *Id.* at 562–64.

352. *Id.* at 562.

353. The Court's conclusions regarding the regulations barring indoor advertisements under five feet seem more supportable. It is difficult to deny that children could view advertisements that are 5.2 feet off the ground. Hence, in contrast to the outdoor regulations, the point-of-sale regulations were probably unlikely to have a major public health impact.

less tobacco advertising significant enough to have a population-health impact that could have survived the Court's review.³⁵⁴

The Court's rigorous application of the *Central Hudson* test is also evident in *Thompson v. Western States Medical Center*.³⁵⁵ That case concerned section 503A of the Food and Drug Administration Modernization Act of 1997 (FDAMA),³⁵⁶ which exempted compounded drugs³⁵⁷ from the standard Food and Drug Administration process so long as the providers of such drugs did not advertise them.³⁵⁸ In an opinion again written by Justice O'Connor, the Court found that the proviso barring advertisements failed the *Central Hudson* test.³⁵⁹

Once again, the Court assumed that the speech at issue was truthful and that the government was seeking to promote a legitimate purpose: assuring the availability of compounding drugs without opening them up to commercial exploitation.³⁶⁰ The problem, as the Court saw it, came from the fourth prong of the *Central Hudson* test,

354. In order for a regulation to have a substantial health-improving impact across a broad population, it must necessarily be wide enough in its scope to affect many people. Indeed, as Geoffrey Rose has shown, policies that affect many people in minor or subtle ways may have a greater population effect than those that affect a few at-risk people significantly. See Geoffrey Rose, *Sick Individuals and Sick Populations*, in *ETHICAL HEALTH CARE*, *supra* note 150, at 37, 37–44.

355. 535 U.S. 357 (2002).

356. 21 U.S.C. § 353a (2000).

357. According to the Court:

Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient. Compounding is typically used to prepare medications that are not commercially available, such as medication for a patient who is allergic to an ingredient in a mass-produced product.

Thompson, 535 U.S. at 360–61.

358. 21 U.S.C. § 353a(c).

359. *Thompson*, 535 U.S. at 368–77.

360. Because they are individualized, compounding drugs cannot readily be subject to the typical FDA approval process. See *id.* at 362. On the other hand, the government was concerned that their exemption could be misused by manufacturers to attempt to bypass FDA approval. See *id.* The government argued that by barring advertising, the FDAMA drew a line, making it likely that compounding would be used only in small-scale, individualized operations, and that manufacturers would not seek to exploit the compounding exemption because they would not want to lose their ability to advertise. See *id.* at 370.

which the Court stated required the government to show that it could not achieve its purpose by any manner less restrictive of speech.³⁶¹ In the instant case, the Court hypothesized several nonspeech related approaches that the government could use to advance its goal.³⁶² For example, the Court suggested, the government could ban the use of commercial scale manufacturing or testing equipment by compounding pharmacists, or it could ban the sale of compounded drugs to wholesale or retail establishments.³⁶³ Likewise, the government could prohibit pharmacists from compounding drugs except in response to a specific prescription.³⁶⁴

In his dissent, Justice Breyer explained why the methods suggested by the majority would not suffice to achieve the government's goal of limiting the demand for compounded drugs to those patients who actually need them.³⁶⁵ According to Justice Breyer, compounding was inherently dangerous, as it offered customers drugs that were unapproved and not tested for safety.³⁶⁶ For patients who have contraindications for commercially-available drugs, the added risks of using an untested compounded drug may well be worth the benefit.³⁶⁷ That would not be the case for most individuals.³⁶⁸ Yet, as Justice Breyer explained, "[t]here is considerable evidence that consumer oriented advertising will create strong consumer-driven demand for a particular drug."³⁶⁹ By banning that advertising, the FDAMA could prevent the creation of such a (medically unnecessary and dangerous) demand for compounded drugs, leaving the consumer demand to that created by medical need.³⁷⁰

361. *Id.* at 371.

362. *Id.* at 372.

363. *Id.*

364. *Id.*

365. *See id.* at 378–79 (Breyer, J., dissenting).

366. *Id.* at 382 (Breyer, J., dissenting).

367. *Id.* at 380 (Breyer, J., dissenting).

368. *Id.* at 383 (Breyer, J., dissenting).

369. *Id.* (Breyer, J., dissenting).

370. *Id.* at 384–85 (Breyer, J., dissenting). Justice Breyer noted that the creation of this demand was not an individualistic or atomistic process, nor did it affect only individuals. *Id.* at 387 (Breyer, J., dissenting). He noted, "Those consequences flow from the adverse cumulative effects of multiple individual decisions each of which may seem perfectly reasonable considered on its own. The Government fears that, taken together, these apparently rational individual

In response, the majority dismissed Justice Breyer's explanation, noting first that the government had not argued the point in its brief, and second that the argument was based on "a fear that people would make bad decisions if given truthful information about compounded drugs."³⁷¹ Quoting from *Virginia Board of Pharmacy*, the majority reiterated that bans on truthful advertising cannot be sustained based on paternalistic principles.³⁷² The majority also reasserted that as long as advertising was not misleading, the government could not seek to keep the information from people.³⁷³

In rejecting Justice Breyer's concerns about advertising's ability to create demand, and in resting upon the *Virginia Board of Pharmacy* assertion that the government cannot keep individuals from access to truthful information, Justice O'Connor and the *Western States* majority³⁷⁴ focused the *Central Hudson* test squarely on the first, direct-to-individual pathway of speech.³⁷⁵ Commercial speech was understood as information that individual, rational actors could use to make decisions they believed to be within their own interest.³⁷⁶ The other, population-based ways that information affects individuals and populations, and thus public health, were either overlooked or dismissed. As a result, the Court left us with not only a very stringent test for commercial speech, but with one that, as it is now being applied, appears poorly suited to discern the myriad ways in which speech can harm public health and unable to appreciate the limited options that government has to fulfill its traditional role of protecting public health in an information era.

decisions will undermine the safety testing system, thereby producing overall a net balance of harm." *Id.* (Breyer, J., dissenting).

371. *Id.* at 374.

372. *See id.* at 375.

373. The Court also claimed that the regulations went too far, in that they would preclude advertising even in those situations in which individuals would benefit from compounded drugs. *See id.* at 376.

374. Justice O'Connor was joined in her opinion by Justices Scalia, Kennedy, Souter, and Thomas. *Id.* at 359. Justices Rehnquist, Stevens, and Ginsburg joined with Justice Breyer in dissent. *Id.*

375. *Id.* at 366-67 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976)).

376. *Id.* at 367 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

C. Compelled Speech

Speech influences health not only by its presence but also by its absence. The absence of some information, especially in the presence of other information, can be incomplete or misleading. It can give false impressions and undermine trust. It can deprive individuals and the body politic of information that can positively influence public health.

Governments have long sought to counter the negative impact of the absence of information by compelling individuals and entities to disclose information when they engage in particular risk-creating actions. For example, the common law doctrine of informed consent requires that health care providers inform patients about the risks and benefits associated with medical procedures.³⁷⁷ While that body of law largely reflects concerns for individual autonomy,³⁷⁸ the common law requirement that health care providers inform patients about the risks associated with their medical options also has public health ramifications, as informed consent can help improve the chances that patients will make appropriate treatment decisions.³⁷⁹ In addition, the provision of information from provider to patient, or from public health official to community at risk, can instill trust and increased compliance with and support for recommended actions.³⁸⁰

The common tort law principle that manufacturers must provide warnings about the dangers associated with their product may also be viewed as a legal measure that compels speech in order to protect the public health.³⁸¹ By holding manufacturers liable when injuries have resulted from undisclosed dangers, this obligation provides manufacturers with an additional incentive to make their products less dangerous.³⁸² At the same time, it provides consumers with infor-

377. For a review of the law of informed consent, see FURROW ET AL., *HEALTH LAW* 310–43 (2d ed. 2000).

378. See Alan Meisel, *A "Dignitary Tort" as a Bridge Between the Idea of Informed Consent and the Law of Informed Consent*, 16 L. MED. & HEALTH CARE 210, 210 (1988).

379. See Parmet, *supra* note 160, at 92–97.

380. See *id.* at 97–100.

381. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998).

382. The question whether tort law actually deters injuries is well beyond the scope of this article. For a discussion, see Edward A. Dauer, *When the Law Gets in the Way: The Dissonant Link of Deterrence and Compensation in the Law of Medical Malpractice*, 28 CAP. U. L. REV. 293, 295–97 (2000)

mation that they can use when making decisions as to how or whether to use a product. This information can enter the public realm, and, at least in some circumstances, affect not only the health of the individual consumers who see the warnings, but others, as the information enters the culture and influences social norms and public policies.³⁸³

Legislative and regulatory laws aimed at protecting public health have also frequently included mandates to disclose information or provide warnings.³⁸⁴ As Lawrence O. Gostin recounts:

[G]overnment requires businesses to label their products by specifying the content or ingredients (e.g., foods and cosmetics), the potential adverse effects (e.g., pharmaceuticals and vaccines), and the hazards (e.g., warnings on packages of cigarettes, alcoholic beverages, or pesticides). Second, government provides a "right to know" for consumers (e.g., performance of managed care organizations), workers (e.g., health and safety risks), and the public (e.g., hazardous chemicals in drinking water). Third, government mandates counter-advertising whereby industry or the media must provide health education as a counterbalance to advertisements of hazardous products (e.g., forced dissemination of anti-drinking or anti-smoking messages).³⁸⁵

(discussing literature pertaining to the deterrent effect of malpractice law); Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115 (1993) (discussing social learning theory as applied to tort law and suggesting the need for a modification of the tort system to increase deterrence of undesirable behavior); Frank A. Sloan et al., *Effects of Tort Liability and Insurance on Heavy Drinking and Drinking and Driving*, 38 J.L. & ECON. 49, 49-50 & n.1 (1995) (discussing an empirical study of the deterrent effect of tort liability and noting the dearth of such studies).

383. Thus, warnings for commonly used products can become part of the common knowledge within a society and influence its views and customs with regard to a product, as well as the policies it enacts. Moreover, warnings read by an individual user of a product can reduce the chance that the user's use of the product will harm a third party. For a further discussion of how information to individual consumers can operate at this social or population level, see *supra* text accompanying notes 109-40, 145-62.

384. GOSTIN, *supra* note 282, at 165.

385. *Id.* (footnotes omitted).

In each of these instances, and many others, governments compel speech in order to influence the informational environment to be conducive to public health.³⁸⁶

Applying the First Amendment to such public-health oriented compelled speech is both problematic and unsettled. Although both the common law and state and federal regulations have long compelled warnings and disclosures, the Supreme Court has never squarely considered whether or when such public health mandates violate the First Amendment. Moreover, the trajectory of the Court's First Amendment jurisprudence suggests that such requirements may face substantial constitutional hurdles.³⁸⁷

The first Supreme Court case to hold that the First Amendment limits the government's ability to compel speech was *West Virginia State Board of Education v. Barnette*.³⁸⁸ In that case, the Supreme Court, per Justice Stone, struck down a state statute that required schoolchildren to salute the flag while saying the Pledge of Allegiance.³⁸⁹ Locating the issue in the core of the First Amendment, the Court observed that:

386. Governments also attempt to shape the informational environment by engaging in speech, for example, by issuing reports and studies, providing sources of public information (Web sites, handbills, etc.), and sponsoring advertisements. Like other forms of speech, government speech can influence health via multiple pathways. At times government may seek not simply to inform, but, like other forms of advertising, to manipulate, create associations, and alter social meanings. See *id.* at 151. Government may also use its ability to disseminate information in ways that may be harmful to public health. Hence, governments have sponsored advertising campaigns to increase the consumption of beef, despite concerns about the high level of fat in most Americans' diets. See *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2058, 2072 n.7 (2005). Courts, however, have not found the First Amendment's speech provisions (in contrast to its religious provisions) to limit governments' own speech. See, e.g., *id.* at 2062 (holding that an assessment of funds from the beef industry to pay for beef advertising is not unconstitutional because it supports government speech). For an especially interesting discussion and rejection of a First Amendment challenge to a government-sponsored counter-advertising campaign, see *R.J. Reynolds Tobacco Co. v. Shewry*, 384 F.3d 1126 (9th Cir. 2004) (upholding a California law that applied a cigarette surtax to finance anti-tobacco advertising).

387. The First Amendment applies to common law, as well as statutory law. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

388. 319 U.S. 624, 642 (1943).

389. *Id.*

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.³⁹⁰

The Supreme Court revisited the application of the First Amendment to government-compelled speech over thirty years later in *Wooley v. Maynard*,³⁹¹ in which the Court held that the state of New Hampshire could not compel drivers to display the motto "live free or die" on their license plates.³⁹² Once again, the Court saw the state's action as violating core principles of the First Amendment.³⁹³ According to the majority, "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."³⁹⁴

Subsequent cases expanded upon the type of compelled speech protected by the First Amendment. For example, in *Schaumburg v. Citizens for a Better Environment*,³⁹⁵ and later, in *Riley v. National Federation of the Blind of North Carolina, Inc.*,³⁹⁶ the Court applied full First Amendment protection to state laws requiring charities to make certain disclosures about their financial solicitations.³⁹⁷ In *Riley*, while rejecting the state's claim that compelled speech should be treated differently from prohibited speech, the Court asserted that "the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."³⁹⁸ Taken at face value, this statement would raise serious constitutional

390. *Id.*

391. 430 U.S. 705 (1977).

392. *Id.* at 717. Another early compelled speech case relied upon in *Wooley* was *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), in which the Court struck down a law that required newspapers to publish the replies of political candidates they had criticized. *Id.* at 241, 258.

393. *Wooley*, 430 U.S. at 717.

394. *Id.* at 715.

395. 444 U.S. 620 (1980).

396. 487 U.S. 781 (1988). Another case raising similar issues was *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

397. *Riley*, 487 U.S. at 795-97; *Schaumburg*, 444 U.S. at 624, 636.

398. *Riley*, 487 U.S. at 796-97.

questions for laws (statutory, regulatory or tort) that compel the disclosure of health information.

However, several factors have created uncertainty in the application of these cases to most compelled public health disclosures. First, as was noted above, although the Supreme Court finds that commercial speech is entitled to First Amendment protection, the Court has also recognized (over the objection of some Justices) that differences exist between commercial speech and other forms of speech and has continued to adhere to the *Central Hudson* test when commercial speech is at issue.³⁹⁹ As seen in our discussion of *Lorillard Tobacco Co.* and *Western States*, courts can apply this test in such a manner as to approach the rigorous strict scrutiny they utilize for non-commercial speech cases, but the *Central Hudson* test, on its face, also leaves courts with more “wiggle room” to uphold compelled speech in commercial speech cases.⁴⁰⁰ That the Court might take advantage of this wiggle room in cases concerning compelled speech was evident in *Zauderer v. Office of Disciplinary Counsel*,⁴⁰¹ in which the Court considered a state law regulating attorney advertising.⁴⁰² After finding that the First Amendment barred the state’s attempt to ban the inclusion of certain information in attorney ads, the Court rejected the claim that the same outcome was required with respect to the state’s demand that attorneys include information about fee arrangements in their advertisements.⁴⁰³

Distinguishing *Barnette* and *Wooley*, the Court held that the state’s interests in the case at hand were dissimilar to those at issue in the Court’s other compelled-speech cases.⁴⁰⁴ The state was not trying to compel orthodoxy or force an opinion on anyone.⁴⁰⁵ Instead, the state was simply demanding that certain factual information be included in advertising.⁴⁰⁶ Because the protection given to commercial speech was justified, in part, by the fact that advertising can provide consumers with information, the Court treated requirements that commercial parties provide such infor-

399. See *supra* text accompanying notes 308–35.

400. See *supra* text accompanying notes 332–74.

401. 471 U.S. 626 (1985).

402. *Id.* at 629.

403. *Id.* at 647, 653.

404. *Id.* at 651.

405. *Id.*

406. *Id.*

mation differently than other forms of compulsory speech.⁴⁰⁷ In addition, the Court noted that in many commercial speech cases, the justices had pointed to the possibility of requiring information or labels as a less restrictive approach to the advertising bans that were before the Court.⁴⁰⁸ In other words, compelled speech might be understood as the preferred alternative that a party challenging a speech ban could point to when asserting that a ban on speech violates the fourth prong of *Central Hudson*.⁴⁰⁹ If that were the case, and if states were to have any *viable* less restrictive means of protecting the public from harms associated with advertising, compelled speech might at times have to be accepted.⁴¹⁰

An additional rationale for the idea that the Court may be, at least in some circumstances, more tolerant of compelled commercial speech than bans on such speech comes from the Court's decision in

407. *Id.* In an opinion concurring in part and dissenting in part, Justice Brennan agreed that a state may impose advertising disclosure requirements that are “‘reasonably related to the State’s interest in preventing deception’” but disagreed that the State had met that standard. *Id.* at 656 (Brennan, J., concurring in part and dissenting in part) (quoting *id.* at 651).

408. *Id.* at 651. Commentators have also argued that “‘between suppressing certain commercial messages altogether and permitting them with mandatory disclosures to guard against fraud, the First Amendment supports the use of disclosure requirements in the first instance.’” George W. Evans & Arnold I. Friede, *The Food and Drug Administration’s Regulation of Prescription Drug Manufacturer Speech: A First Amendment Analysis*, 58 FOOD & DRUG L.J. 365, 379 (2003). The Court of Appeals for the District of Columbia seems to have adopted this reasoning, noting in a case rejecting the FDA’s demand that it approve health claims on dietary supplements that “‘when government chooses a policy of suppression over disclosure—at least where there is no showing that disclosure would not suffice to cure misleadingness—government disregards a ‘far less restrictive’ means.” *Pearson v. Shalala*, 164 F.3d 650, 658 (D.C. Cir. 1999).

409. In a separate opinion, Justices Brennan and Marshall agreed with the majority that disclosure requirements should be assessed differently from bans on speech. *See Zauderer*, 471 U.S. at 656 (Brennan, J., concurring in part and dissenting in part). Nevertheless, they did not believe that the state’s “‘vague” requirements were reasonably related to the state’s goal. *Id.*

410. In an opinion dissenting from the denial of a writ of certiorari in *Borgner v. Florida Board of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., dissenting), Justice Thomas questioned a broad reading of *Zauderer* and argued that the Court’s opinions “‘have not presumptively endorsed government-scripted disclaimers or sufficiently clarified the nature and the quality of the evidence a State must present to show that the challenged legislation directly advances the governmental interest asserted.’” *Id.* at 1082.

*Glickman v. Wileman Bros. & Elliott.*⁴¹¹ In that case, the Court reviewed a First Amendment challenge to Department of Agriculture regulations that assessed fruit growers to finance generic advertising for the industry.⁴¹² In upholding the regulations, the Court distinguished the marketing orders from others it had struck down on several grounds.⁴¹³ First, the Court noted, the marketing orders imposed “no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.”⁴¹⁴ The Court then argued that its compelled speech doctrine only applied when the compelled speech required parties to express messages and associate themselves with ideas to which they do not subscribe.⁴¹⁵ Because the advertising at issue would not be “attributed” to the growers, it could not be viewed as compelled speech.⁴¹⁶ Finally, the *Glickman* Court noted that the assessments under challenge were part of a complex regulatory scheme that tied together the economic interests of fruit growers.⁴¹⁷ Because of the comprehensiveness of the regulations, the Court suggested that the assessments could be viewed as part of an economic regulation that contraindicated the traditional heightened standard for First Amendment challenges.⁴¹⁸ This “context” leaves open the possibility that other regulations compelling speech as part of a complex regulatory scheme may be distinguished from “simple” compelled speech cases.⁴¹⁹

411. 521 U.S. 457 (1997).

412. *Id.* at 460–61.

413. *Id.* at 469–70.

414. *Id.* (citations omitted). To understand this case, it is important to note that the Court had previously accepted the proposition that laws compelling parties to financially support private speech also fell within the purview of the First Amendment. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). In other words, the compelled speech doctrine extends not simply to laws that compel speech itself, but to laws that compel the support of speech. It does not, however, extend to laws that assess or tax individuals to pay for the government’s own speech. See *Johanns v. Livestock Mktg. Ass’n*, 125 S. Ct. 2055, 2062 (2005).

415. *Glickman*, 521 U.S. at 470–71.

416. See *id.* at 471.

417. *Id.* at 469.

418. *Id.*

419. Evans and Friede make this point in arguing that some, but not all, of

The Court's approach in *Glickman*, however, may not endure. In *Johanns v. Livestock Marketing Ass'n*,⁴²⁰ the Court utilized a different approach questioning upholding the Beef Promotion and Research Act, which, like the statute at issue in *Glickman*, assessed producers in order to pay for generic advertisements.⁴²¹ Despite the fact that the speech at issue seemed to contradict the government's own public health messages that advise the public to reduce the intake of trans fats that come from animal fat,⁴²² the majority found that the speech at issue was the government's own speech and that individuals have no right to refuse to pay taxes that support government speech.⁴²³ Thus, as long as the government is the speaker, parties can be compelled to provide financial support for the message whether it is beneficial or harmful to public health.⁴²⁴

Johanns should make clear that government attempts to influence the information environment by sponsoring speech should be relatively free from First Amendment attack.⁴²⁵ This would

the Food and Drug Administration's regulations pertaining to the labeling and marketing of prescriptions could withstand constitutional muster. *See* Evans & Friede, *supra* note 408, at 367, 387.

420. 125 S. Ct. 2055 (2005).

421. *Id.* at 2061. Another similar case undermining *Glickman* was *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). In that case, the Court distinguished *Glickman* and *Zauderer*, and held that the Mushroom Promotion, Research, and Consumer Information Act violated the First Amendment by compelling growers to pay an assessment for food advertisements for mushrooms. *Id.* at 415–16.

422. *See* *Johanns*, 125 S. Ct. at 2067–68 (Ginsburg, J., dissenting).

423. *Id.* at 2062.

424. *See id.* In dissent, Justice Souter agreed with the principle that in general, there could be no First Amendment objections to government speech. *See id.* at 2071 (Souter, J., dissenting). However, he argued that unless the speech was put forth as the government's, so that the government would stand clearly accountable for its content, it could not be viewed as government speech. *See id.* at 2071–72. Because the advertisements at issue in the case were marked simply with the logo "Beef" and did not identify themselves as the product of the United States government, the advertisements could not be considered government speech. *See id.* at 2072 n.6.

425. This statement is, perhaps, overly broad. When government speaks, it does so through the voices of its employees or grantees. Attempts by the government to influence their message may be the subject of an entirely different sort of First Amendment challenge, pertaining to the rights of government employees, or the imposition of so-called unconstitutional conditions. *See, e.g.,* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (upholding a restriction on grants given by the National Endowment for

appear to give governments fairly wide purview to use their own tax dollars in attempts to influence the information environment to protect public health (or to convey messages harmful to public health). Thus, with respect to obesity, governments may include nutrition education in the public school curriculum and sponsor public service announcements aimed at encouraging children to eat healthy foods and be physically active. *Johanns* does not, however, clarify the constitutional status of regulations that seek to protect public health by compelling accurate labeling or the disclosure of warnings.⁴²⁶ Indeed, the *Johanns* Court's failure to follow the approaches laid out in either *Glickman* or *Zauderer* may indicate some discomfort with their potentially broader protection for regulations compelling speech.⁴²⁷ If so, in the years to come, *Central Hudson*, in all of its rigor, may be applied more frequently to public health laws compelling speech.⁴²⁸ If so, the information environment's impact on public health may well depend upon an application of the *Central Hudson* test that is sensitive to public health and the ways in which it is affected by speech.

the Arts); *Elrod v. Burns*, 427 U.S. 347 (1976) (upholding a preliminary injunction against a county for firing employees because of their political affiliations).

426. Some lower courts have considered the application of the First Amendment to anti-fraud laws. *See, e.g.*, *United States v. Wenger*, 292 F. Supp. 2d 1296 (D. Utah 2003) (upholding a Securities Act conviction for failure to disclose and finding that the disclosure demands were a justified limitation on commercial speech).

427. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), distinguished both *Glickman* and *Zauderer*. *Id.* at 412–16.

428. This discussion assumes that the Courts will deem that these laws compel commercial speech. However, the definition of commercial speech is uncertain, and it will not always be easy to decide whether courts should treat the particular speech at issue as commercial speech or pure speech. *E.g.*, *Wenger*, 292 F. Supp. 2d at 1296, 1302. In the case of compelled speech relating to public health in general or to obesity, there may be many circumstances in which challengers could claim that the speech at issue is not commercial, but scientific or policy-oriented, and therefore should not have to include mandated warnings or labels. *See Evans & Friede, supra* note 408, at 404–05; *see also* PUBLIC HEALTH LAW AND ETHICS, *supra* note 32, at 353–55 (pointing to paid editorials or “advertorials” by tobacco companies as examples of speech that is hard to classify).

VI. A POPULATION-BASED PERSPECTIVE ON PUBLIC HEALTH

Public health and the First Amendment may be on a collision course. As we have suggested, speech is an important determinant of population health. In the case of childhood obesity, both commercial speech and compelled speech play critical roles.⁴²⁹ Thus, if government is to intervene and protect children from the dangers of obesity, it must intervene in the information environment both by compelling truthful and informative speech and by containing the impact of speech that alters the culture, social trust, and public policy in health-threatening ways.

The First Amendment, however, is increasingly viewed as a favored right, and recent applications of the commercial speech doctrine suggest that future government efforts to regulate the information environment are more likely than those in the past to face very stringent, if not fatal, review.⁴³⁰ If so, government will be denied a key tool for protecting the public's health.⁴³¹

This outcome is unnecessary. We do not need to abandon respect for the First Amendment to enable government to protect public health. Instead, we must apply existing doctrine with a recognition of the enduring relationship between constitutional rights and public health, as well as with an appreciation of the many ways that speech affects the health of populations.⁴³² By applying existing

429. See *supra* Part IV for a discussion of commercial speech and its effect on the obesity epidemic. See *supra* Part V.C for a discussion of the possible governmental use of compelled speech to affect the obesity epidemic.

430. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

431. We do not claim that First Amendment doctrine will prevent the government from asserting any influence over the information environment pertinent to obesity. As we have noted previously, the First Amendment leaves the government wide room to engage in its own speech. See *supra* text accompanying notes 418–25. Hence, the government can participate in the information environment and disseminate information, including counter-advertising, that it believes to be helpful. In addition, the government can support, via grants, the speech efforts of public health advocates who attempt to influence the informational environment. While not trivial, we suspect that these efforts would prove in themselves insufficient, especially if courts read the compelled speech doctrine to limit labeling requirements and disclosures.

432. It is important here to recall, as we have previously noted, that speech can be beneficial to public health. If we did not have some protections for the dissemination of controversial information, we might, thereby, jeopardize public health. See *supra* text accompanying notes 58–108, 167–69. Moreover,

doctrine from a population-based perspective, courts can protect speech while leaving government with enough room to protect children from the health dangers posed by the information environment. In the sections that follow we sketch what that would mean.

A population-based perspective can be understood as comprising several normative and methodological elements, including a recognition that public health protection is an appropriate and important role for law, an understanding of the agency and nature of populations, and a reliance upon empirical observation to inform legal decision making.⁴³³ As we demonstrate below, these elements are not foreign to extant First Amendment doctrine. Rather, they can be understood as required, but not consistently applied, by existing First Amendment case law. Below, we consider each of these elements, explain what they entail and suggest how they can help to modulate the potential clash between contemporary First Amendment jurisprudence and efforts to curtail the obesity epidemic.

A. *Public Health as a Norm*

The essential attribute of population-based legal analysis⁴³⁴ is

scientific discourse, and therefore progress, may be stymied. See Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1435 (1990) (arguing for the concept of epistemological humility, because “whatever the currently prevailing beliefs may be, history teaches us that scientific or moral advances may at some future point make those beliefs appear either silly or monstrous”). Finally, the lack of access to such information may diminish trust and social capital. See *supra* text accompanying notes 145–78.

433. For further discussion, see Wendy E. Parmet & Anthony Robbins, *Public Health Literacy for Lawyers*, 31 J.L. MED. & ETHICS 701, 706–08 (2003).

434. See Parmet, *supra* note 5, at 1233–37. Under this approach, public health plays the role that efficiency or welfare plays under an economic approach to the law. See *id.* at 1234. The idea that public health should be one of the goals of the law is neither new nor surprising. Not only can it be recognized in the common law maxim, *salus populi suprema lex* (the health or well-being of the people is the supreme law), but it is expressed frequently, if not explicitly, in the legions of cases and legal commentary that accept that the attainment of public goals and “policy” outcomes constitute a legitimate aim of legal analysis.

the recognition that protecting and improving public health is an appropriate, if not essential, goal of legal and policy decision making.⁴³⁵ This does not mean that public health is the only goal that judges or legislatures should consider. Other values, such as individual autonomy, equality, fidelity to precedent, and respect for democratic decision making are also of critical importance.⁴³⁶ A population-based legal analysis does not denigrate those values or argue that they should be sacrificed in the name of public health. It merely asserts that protection of public health is one among the many goals that need to be taken into account in deciding difficult cases and determining the course of doctrine.

Such an approach is compatible with and may demand respect for freedom of speech. Indeed, this approach closely aligns with the leading arguments for protecting free speech as well as the *Central Hudson* test.⁴³⁷ In American law, the classic justification for First Amendment protection came from a series of opinions by Justice Holmes in 1919.⁴³⁸ In these cases, he formulated the now commonplace notion of a "marketplace of ideas," arguing that speech should not be easily censored precisely because we cannot know a priori which ideas are true and which are false.⁴³⁹ Given uncertainty, Holmes argued, we should be wary about limiting speech or ideas that popular opinion now sees as false but which may later prove to be true.⁴⁴⁰ In addition, it is only by allowing the airing and, indeed, competition between ideas that falsehoods can be exposed and society can move closer to the adoption of true or perhaps simply sensible policies.⁴⁴¹

435. *Id.* at 1234.

436. Indeed, it may well be that many, if not most, of these other goals are generally compatible with public health protection. One should not fall into the law school trap of assuming that life presents nothing but dichotomies and difficult choices, where one must make tragic decisions.

437. See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980); *supra* text accompanying notes 313–428.

438. See *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47, 48–53 (1919).

439. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

440. *Id.*

441. *Id.*

Importantly, Holmes' justification for free speech was consequentialist. Holmes did not suggest that courts should give broad protection to speech because speech itself is special or exceptional.⁴⁴² Nor did he suggest that speech be given greater deference than other constitutionally-protected rights.⁴⁴³ Rather, he argued that courts should give speech considerable constitutional protection because that is the best way, in a fallible world, to test ideas and adopt those most worthy.⁴⁴⁴ Moreover, according to Holmes, the government could override claims of free speech, like other claims for other rights, when the speech at issue creates a "clear and present" harm to others.⁴⁴⁵ Thus, Holmes saw the right to free speech not as a trump on public policy, but as its handmaiden; not as a right apart from and above our constitutional traditions, but one very much in alliance with them.

Holmes' consequentialist argument for free speech left unanswered a major question: what are the ends that necessitate or justify free speech? Writing at the end of World War I, in the wake of the Bolshevik Revolution, Holmes clearly contemplated that a nation's security during a time of war was among those ends that would benefit from judicial protection of speech.⁴⁴⁶ However, the security and wellbeing of a population does not only depend upon its military strength, or even its economic and political systems. It is also a function of the health of the populations that comprise it. Indeed, writing as he did immediately after the influenza pandemic of 1918, which killed far more people than did the Great War,⁴⁴⁷ Holmes was probably well aware of the impact that epidemics can wreak upon

442. *See id.* at 624–31.

443. *See id.*

444. *Id.* at 630.

445. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Holmes' approach to the issue in *Abrams*, however, was far more protective of speech than was his approach in *Schenck*. Compare *Abrams*, 250 U.S. at 629–30 (arguing that the defendants had as much of a right to publish the leaflets in question as the government had to publish the U.S. Constitution), with *Schenck*, 249 U.S. at 52–53 (holding that the defendants violated the Espionage Act of 1917 by mailing circulars to obstruct recruiting and enlistment, and this conviction did not violate their First Amendment rights).

446. *See Debs v. United States*, 249 U.S. 211 (1919).

447. *See* GINA KOLATA, *FLU: THE STORY OF THE GREAT INFLUENZA PANDEMIC OF 1918 AND THE SEARCH FOR THE VIRUS THAT CAUSED IT* 7 (1999).

communities.⁴⁴⁸

Justice Brandeis offered an alternate, but also influential, rationale for the First Amendment in his concurrence (which Holmes joined) in *Whitney v. California*.⁴⁴⁹ In that case, Justice Brandeis reminded us that “[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.”⁴⁵⁰

On its face, this quote would seem to proffer a non-consequentialist rationale for free speech. Free speech is not only valuable because it can lead to truth or beneficial public policies, but also because it is an aspect of the liberty that the founders created the state to preserve. From this perspective, speech may rightly be understood as an end unto itself.

Nevertheless, Justice Brandeis did not suggest that free speech was the highest or ultimate end of the state. The end of the state, he argued, “was to make men free to develop their faculties.”⁴⁵¹ That implies that the state needs to protect not only speech, an important vehicle for the expression of human faculties, but also human life and health, which are also essential for the development and expression of human faculties.⁴⁵² This suggests that the protection of speech should not be so absolute as to jeopardize the development of human health and, thereby, human autonomy.

That speech must co-exist with protection for public health is evident in the Supreme Court’s own commercial speech cases. In cases such as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, and even *Lorillard Tobacco Co. v. Reilly*, the Court recognized that governments could limit speech to protect a substantial state interest and that protection of public health was

448. See Mark P. Painter, *From Revolution to Reconstruction, Biographies: Justice Oliver Wendell Holmes, Jr.* (May 5, 2005), <http://odur.let.rug.nl/~usa/B/oliver/oliverxx.htm> (noting that Holmes’ father was a doctor).

449. 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

450. *Id.* at 375.

451. *Id.*

452. See Norman Daniels & James E. Sabin, *Last Chance Therapies and Managed Care: Pluralism, Fair Procedures, and Legitimacy*, 28 HASTINGS CENTER REP. 27, 27 (1998).

such an interest.⁴⁵³ Hence, the Court has always insisted that reasonable, and not overly burdensome regulations of commercial speech aimed at promoting public health are constitutional.⁴⁵⁴ The problem has been the Court's determination of whether a state regulation, in fact, meets that standard. A population-based approach offers the tools and methods for making such a determination.

B. A Population Perspective

Population-based legal analysis adopts a population perspective.⁴⁵⁵ In contrast with the individualism predominant in American law, a population-based perspective recognizes that populations, or groups, are important subjects for legal analysis and that decisions and actions occur and impact differently within a group context.⁴⁵⁶ As a result, population-based legal analysis does not treat populations merely as the sum of their individual members, but as entities with their own, important-to-understand, dynamics.⁴⁵⁷

A population focus brings two critical elements to the application of the First Amendment to health-impairing speech. First, in complement with the normative treatment of population health discussed above, a population perspective views the First Amend-

453. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570–71 (2001); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976).

454. See GOSTIN, *supra* note 282, at 166.

455. A population perspective is generally taken to be the hallmark of the discipline of public health. See Parmet, *supra* note 5, at 1234. For a prime and influential example of what it means to adopt a population approach, see Rose, *supra* note 354, at 37–44.

456. See Parmet, *supra* note 5, at 1234–35. In this regard, there are important commonalities between population-based legal theory and a communitarian approach to the law. Both understand that individuals are situated within groups of people and that care must be given to appreciate the importance of those groups. *Id.* Nevertheless, there are important differences between the approach discussed here and communitarianism. For a discussion of those differences, see *id.* at 1233–37.

457. In addition, a population-based perspective recognizes that there are multiple, overlapping populations. See *id.* at 1234 n.78. Thus, public health focuses not on the health of any single, all encompassing, reified “public,” but on the health of different populations. See *id.* In the case of the obesity epidemic, children constitute a critical population whose vulnerabilities, interests, and risks must be recognized as distinct from those of adults. See James O. Hill & Frederick L. Trowbridge, *Childhood Obesity: Future Directions and Research Priorities*, 101 PEDIATRICS 570, 573 (1998).

ment as designed to protect groups or populations, rather than merely individual interests.⁴⁵⁸ As discussed in Part III, many theorists view speech as a critical ingredient for the maintenance of social capital, trust, and democratic deliberation. For example, Cass Sunstein and Alexander Meiklejohn have each postulated that the First Amendment aims to ensure this public role for speech.⁴⁵⁹ As a result, the speech most worthy of First Amendment protection is public debate, discourse, and communication. According to Meiklejohn:

If men are engaged, as we so commonly are, in argument, or inquiry, or advocacy, or incitement which is directed toward our private interests, private privileges, private possessions, we are, of course, entitled to "due process" protection of those activities. But the First Amendment has no concern over such protection.

....

... The First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare.⁴⁶⁰

The recognition that we must understand the First Amendment not only to serve a private purpose, but also in light of the public impact of speech, is evident in much of the Supreme Court's commercial speech doctrine. Indeed, a principal tenet of *Central Hudson*, that government may regulate commercial speech to serve a state interest, assumes that the First Amendment does not create an individualist trump upon state power. Rather, the First Amendment reconciles the need of populations to engage in discourse and receive information with the interests of populations in having the state protect them from harms that speech can cause. The interests of populations, rather than simply individuals, are present and important on both sides of the equation.

458. *See id.* at 1234.

459. *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94, 104 (1948); Sunstein, *supra* note 57, at 259, 277.

460. MEIKLEJOHN, *supra* note 459, at 94, 104.

A population-based perspective, however, does not simply recognize that the First Amendment takes account of population-based interests. It also insists that we consider how speech affects populations *qua* populations, both negatively and positively.⁴⁶¹ In so doing, it reminds us that actions and policies affect populations differently than they affect individuals, and that “the public” is comprised of multiple, overlapping populations.⁴⁶² Thus, both speech and laws that seek to limit it may have different effects upon different populations. For example, speech and laws affect children differently than adults.⁴⁶³ School children are yet another sub-population, inhabiting a unique, restricted environment. If we want to understand how speech affects populations, we must be sensitive to the composition and environment of the population at issue. Moreover, we cannot assume that speech speaks only to individuals; we must understand how it alters environments.

In its commercial speech cases, the Supreme Court has at times shown sensitivity to the dynamics of populations. For example, in evaluating restrictions of outdoor tobacco advertising in *Lorillard Tobacco Co.*, the Court referenced population studies in its application of the third prong of the *Central Hudson* test.⁴⁶⁴ The Court cited population studies to note that:

children smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands. Another study revealed that 72% of 6 year olds and 52% of children ages 3 to 6 recognized “Joe Camel,” the cartoon anthropomorphic symbol of R.J. Reynolds’ Camel brand cigarettes. After the introduction of Joe Camel, Camel cigarettes’ share of the youth market rose from 4% to 13%. The FDA also identified trends in tobacco consumption among certain populations, such as young women, that correlated to the introduction and marketing of

461. See *Parmet*, *supra* note 5, at 1234.

462. For a fuller discussion of this point, see *id.* at n.78.

463. The Supreme Court has recognized that the rights of children with respect to speech may differ from those of adults, but it has also rejected the idea of restricting speech that adults say or hear on the theory that it is necessary to protect children. *Reno v. ACLU*, 521 U.S. 844, 875 (1997). A population-based perspective may provide greater attention to the differing interests of different populations.

464. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 558–61 (2001).

products geared toward that population.⁴⁶⁵

The Court relied upon such studies which emphasized the effect of marketing on specific populations of children to provide ample justification for the restriction by the state.⁴⁶⁶ The Court's discussion focused entirely on different groups of children *as populations* rather than on the effect of advertising on any particular child.⁴⁶⁷

Yet, as discussed previously, the Supreme Court has not consistently adhered to a population-based approach. For example, in *Lorillard Tobacco Co.*, as it analyzed the state's outdoor advertising restrictions under the fourth prong of the *Central Hudson* test, the Court reverted to an individualistic perspective, focusing on the impact of the ban on an autonomous adult.⁴⁶⁸ In effect, the Court worried that, by restricting advertising, the state had limited the ability of individual adults to obtain useful information.⁴⁶⁹ Yet, in its prior analysis, the Court had made clear that the point of the advertising *was not the transmission* of information to individuals.⁴⁷⁰ Advertising sought to create increased demand within a population, in effect, to utilize population dynamics to alter demand. Why the Court failed to recall the way that advertising alters demand (especially among children) when it moved to its analysis of the fourth prong is unclear.

Likewise, in his plurality opinion in *44 Liquormart, Inc. v. Rhode Island*,⁴⁷¹ Justice Stevens invoked the specter of paternalism in rejecting a state restriction on alcohol advertising.⁴⁷² Justice Stevens argued that, in contrast to adopting a paternalistic approach that sought to protect individuals from advertisements that might induce them to make bad decisions, the state could "assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication

465. *Id.* at 558–59 (citations omitted).

466. *See id.* at 561.

467. *See id.* at 558–61.

468. *See id.* at 561–66.

469. *See id.* at 564.

470. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (noting that the purpose of advertisements was a "purely economic one").

471. 517 U.S. 484 (1996).

472. *Id.* at 497–98.

rather than to close them.”⁴⁷³

In treating paternalism as an inherent wrong, and by assuming that advertising regulations necessarily seek to prevent individuals from making poor choices for themselves, Justice Stevens ignored the fact that advertising influences the social and informational environment that populations inhabit.⁴⁷⁴ However, as we have seen, speech can change the culture and world in which people reside.⁴⁷⁵ This altered environment can harm individuals regardless of their own a priori preferences. As a result, by regulating the influences upon the information environment, states are not necessarily being paternalistic in the sense of protecting people from themselves. Instead, states may be protecting people from an exogenous environmental threat.⁴⁷⁶ By recalling that people are situated in populations and environments and that speech acts upon individuals through those media, a population-based legal analysis reminds us that speech regulation is not necessarily a restraint upon individual autonomy. At times, it is the expression or precondition for population autonomy.⁴⁷⁷

473. *Id.* at 497 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 770).

474. Justice Stevens also seemed to assume, as the Court has in other commercial speech cases, that more speech is always better because it provides individuals with information. See *Lorillard Tobacco Co.*, 533 U.S. at 564; *Va. State Bd. of Pharmacy*, 425 U.S. at 762. But in the information age, people may be overwhelmed with speech, much of it designed not to provide information, but to influence culture and policy. In these circumstances, people need government to regulate the amount of information they receive for “what seems to be government regulation of speech actually might promote free speech, and should not be treated as an abridgement at all. . . . [W]hat seems to be free speech in markets might, in some selected circumstances, amount to an abridgement of free speech.” Sunstein, *supra* note 57, at 267.

475. See *supra* text accompanying notes 210–24.

476. By altering the environment, commercial speech can affect not only individual preferences, but also the external risks that individuals face. When we understand that individual health is caused not simply by what individuals choose, but also by the environment in which they operate, efforts to regulate health-harming speech appear not as paternalistic, but as a way of protecting against harms from which individuals cannot protect themselves.

477. Moreover, sensitivity to the environmental impact of speech would help courts to see that, in many environments, such as public schools, commercial speakers so heavily influence the information environment pertaining to food and consumption that they may exclude other voices. Scholars have noted that this effect is widespread and extends beyond mere advertising to children. For example, advertising puts enormous pressures on news media and affects its

A population-based approach to the First Amendment would also permit the state to safeguard the informational environment not only by permitting government-sponsored speech, which is permissible by law but often of limited efficacy,⁴⁷⁸ but also by undertaking other, limited regulations aimed at preventing the exclusionary and health-impairing impact of some types of speech in schools. As we discuss in the final section, such regulations may also compel fuller disclosures by commercial speakers, and seek to reduce children's exposure to environment-altering speech that has little or no informational content.⁴⁷⁹ However, to determine when speech sufficiently harms population health to justify regulation, as well as whether regulations have the potential to protect the populations, both the *Central Hudson* test and a population-based approach to the First Amendment require reference to empirical data. It is to this final component of a population-based approach that we now turn.

C. Empiricism

A population-based legal analysis incorporates the methodologies and approaches of public health, particularly its key sub-discipline, epidemiology.⁴⁸⁰ Simply, epidemiology is "the study of health events in a population."⁴⁸¹ It studies "the incidence, prevalence, distribution, and etiology of disease" by utilizing a variety of empirical, observational, and statistical methodologies.⁴⁸² By paying attention to epidemiological teachings, population-based legal analysis accepts that empirical observation can help inform legal analysis. Moreover, it understands that our knowledge about the world is partial and changing. Legal decisions need to reflect not simply the verities of legal deduction, but also the contingent and

content. LAWRENCE SOLEY, *CENSORSHIP, INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES* 195 (2005). Corporate ownership of media, coupled with corporate saturation of the channels of speech, has also affected the content of the informational environment and speech. *See id.* at 19; Sunstein, *supra* note 57, at 280–85.

478. *See supra* text accompanying notes 81–83.

479. *See infra* text accompanying notes 502–04.

480. TULCHINSKY & VARAVIKOVA, *supra* note 29, at 114.

481. *Id.*

482. Parmet & Robbins, *supra* note 433, at 705.

testable information that comes from empirical observation.⁴⁸³

Using and understanding empirical data and epidemiology can assist courts in determining whether and how speech affects different populations as well as whether a contested regulation can survive the third and fourth prongs of the *Central Hudson* test. For example, epidemiological studies can help courts determine the association or relationship between an event and a result.⁴⁸⁴ This is the first step in determining causation, which epidemiologists usually establish by applying certain principles.⁴⁸⁵ Understanding epidemiological causation and the criteria for establishing it can be key in determining whether there is a “substantial government interest”⁴⁸⁶ within the meaning of the second prong of *Central Hudson*, as well as whether a regulation “directly advances”⁴⁸⁷ that interest, as required under the third prong.⁴⁸⁸ It may also help a court to understand whether the regulation is more burdensome than is necessary to achieve the governmental interest.⁴⁸⁹

As we have seen, the Supreme Court has frequently referred to epidemiological studies and other similar studies in applying the *Central Hudson* test.⁴⁹⁰ But the Court’s treatment of such studies has often been inconsistent and half-hearted. For example, after referring to numerous health studies about the impact of tobacco

483. It is important to note that this is not law as social science. Rather, it is a call to adopt some of the methodologies and approaches of public health to supplement and clarify legal reasoning and the deduction of legal principles.

484. See Parmet & Robbins, *supra* note 433, at 705.

485. Most common are the Henle-Koch principles. These are the first set of criteria established and tend to focus heavily on infectious diseases. TULCHINSKY & VARAVIKOVA, *supra* note 29, at 254. The Evans Criteria, developed later, provide a more modern approach which is applicable to public health problems that are not necessarily associated with a pathogen. See *id.* at 254–55.

486. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

487. *Id.*

488. Thus, epidemiology can tell us if a particular type of speech is improving or worsening the health of a population. It cannot give us any information about the impact of the regulation on a particular individual within that population.

489. See *supra* text accompanying notes 318–19.

490. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 558–61 (2001) (citing FDA findings of a correlation between cigarette ads and an increase in smoking).

advertising on children in *Lorillard Tobacco Co.*, the Court seemed to ignore the studies and their lessons when it asserted that the state's regulation was overly broad.⁴⁹¹ Moreover, in many of the commercial speech cases, the Court has treated empirical studies, not so much as sources of information to guide the analysis, but as evidentiary burdens that the state must meet. Thus, in *44 Liquormart*, the plurality appeared to demand a type of singular and absolute proof about the relationship between alcohol advertising and public health that misunderstands the nature of science.⁴⁹² Because the causes of disease in a population are complex and multifactorial, and because our observations are always partial, epidemiological evidence is seldom either complete or totally conclusive.⁴⁹³ Instead of providing "slam dunk" proof of causation, most studies add to our understanding and provide further proof or refutation of a causal relationship between a particular factor and the incidence of disease in a population.⁴⁹⁴ Only after multiple studies or in very clear cases, such as that which exists between cigarette smoking and lung cancer, can final answers be given early in the study of an epidemic.

The accumulative and partial nature of epidemiological evidence presents a challenge for courts.⁴⁹⁵ If they do not insist upon empirical evidence, they risk judicial decisions that have little bearing upon the actual risks that populations face in the real world. If they insist too strongly, they risk demanding a type of comprehensive and irrefutable proof that is not possible, especially when epidemics are new and our knowledge of them still growing. To demand such proof leads exactly where it led in *Lochner v. New York*⁴⁹⁶—it disables the government from responding to new health threats.⁴⁹⁷

491. See *supra* text accompanying note 341.

492. See *supra* text accompanying notes 472–73.

493. See TULCHINSKY & VARAVIKOVA, *supra* note 29, at 119.

494. See *id.*

495. This has led some commentators to argue that commercial speech should be given very wide protection. See Redish, *supra* note 432, at 1437. We do not believe that the contingent and developing nature of epidemiological knowledge demands that the government cease attempting to protect public health. Were that the case, the great sanitary achievements of the nineteenth century would not have occurred.

496. 198 U.S. 45 (1905).

497. See *id.* at 64.

A population-based approach to the First Amendment would seek to avoid both extremes. Instead, it would look closely at, and take seriously, the empirical and epidemiological evidence that exists. It would also require the state to provide a well-founded, empirically-based rationale for its regulation. But it would not require the state to conclusively establish a causal relationship between a particular type of speech and a public harm, nor between a particular regulation and the successful protection of public health. Instead, a population-based approach would assure that review was careful, but not necessarily fatal.

VII. CONCLUSION

Constitutional law faces many great challenges. As the Federalist Papers taught us, one is to ensure that government is both robust enough to protect populations while preventing it from overreaching and harming populations and their individuals.⁴⁹⁸ We must face that challenge when speech threatens public health, as increasingly seems to be the case with respect to the epidemic of obesity and overweight among children.

As we have suggested, there are no simple answers. An absolutist view of the First Amendment that privileges speech, including commercial speech, above all other human activities, risks an informational environment that alters culture in health-impairing ways, saps public trust, and undermines the health of populations. It also replicates an error of *Lochner*, that is, it would excessively privilege one type of right without understanding that all rights must co-exist within civil society.

On the other hand, we must value free speech, not only because the Bill of Rights and our constitutional jurisprudence say so, but also because, as we have discussed, speech is an important tool for creating community and protecting public health. Too light an application of the First Amendment thus threatens health as much as it may help it.

498. See THE FEDERALIST NO. 10, at 42, 45 (James Madison) (Garry Wills ed., 1982). As we write this, the tragedy of Hurricane Katrina and the failure of the government's response unfolds, and we are reminded, yet again, of why governments are needed and why we cannot assume that atomistic individuals can help themselves.

To navigate between the Scylla of First Amendment absolutism and the Charybdis of excessive deference to the state, we have proposed the application of a population-based perspective. This approach values the state's role in protecting public health and takes account of the role of populations and the teachings of epidemiology. It is consistent with the First Amendment and the *Central Hudson* test. In addition, it would return commercial speech doctrine to the mainstream of constitutional law, placing First Amendment rights among others that are protected, indeed cherished, but applied with sensitivity to the imperatives of population health.

What would this approach mean with respect to the childhood obesity epidemic? We have suggested above that it would first and foremost take account of the ways that speech alters the environment to affect the health of populations. By recognizing that speech is not simply the conveyance of factual information to rational, isolated individuals, it would appreciate the social, environmental, and population dimensions of commercial speech. This would enable both regulators and courts to take account of the ways in which commercial speech has changed children's environment, leading to more obesity.

More specifically, a population-based approach would follow both *Zauderer v. Office of Disciplinary Counsel*,⁴⁹⁹ and *Glickman v. Wileman Bros. & Elliott*⁵⁰⁰ and look favorably upon regulations that compel truthful warnings and labeling, insuring that some factual information accompanies those advertisements and promotions that are designed simply to change the cultural association of food products or alter social relationships, such as those between parents and children. However, based upon what the empirical evidence tells us today, a population-based approach would not assume that tolerance of compelled speech will necessarily suffice as the sole regulatory tool. As we have shown, public health communications that rely simply on providing individuals with the facts have seldom had substantial positive effects.⁵⁰¹ They are not usually sufficient to change the powerful culture-altering impact of commercial speech.⁵⁰²

499. 471 U.S. 626 (1985).

500. 521 U.S. 457 (1997).

501. See *supra* text accompanying notes 74–87.

502. It is important here to recall that public health programs are less likely to be effective when they seek to change culturally-driven behavior. See *supra*

The recognition of the multiple environmental ways that speech affects population health suggests that some limited regulation of commercial speech may be appropriate and constitutional in order to lower the incidence (or stop the increasing incidence) of childhood obesity. In other words, we should take *Central Hudson* at its word and treat it, not as an elaborate ruse for the erection of uncrossable barriers to the regulation of commercial speech, but as a template for carefully reviewing the rationale and appropriateness of commercial speech regulations. Such an approach would take into account the population-effect of speech and would rely heavily, but with sophistication, upon epidemiological evidence. This approach would permit some regulation of food advertising, particularly the advertisements aimed at schoolchildren.

Without specific regulations and evidence before us, and mindful of the importance of empirical evidence and context, we are reluctant to suggest what types of advertising regulations would pass muster. However, regulations that limit the amount of non-informational food advertising aimed at children, or promotions that rely upon branding in schools, come readily to mind. Such regulations would not censor as much as they would reduce the volume of, and exposure of children to, commercial speech,⁵⁰³ seeking to ensure that such speech relies less on the alteration of image and culture and more on the provision of information which, after all, is the supposed rationale for protecting commercial speech in the first place.⁵⁰⁴

text accompanying notes 99–124. Thus, “plain vanilla” warnings about the dangers of certain foods or of overeating are in themselves unlikely to be effective in the face of the food industry’s powerful marketing campaigns aimed at children.

503. First Amendment jurisprudence has long treated the time, place, and manner regulations differently from content-based regulations. *See, e.g.,* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–95 (1984). To some extent we are suggesting that certain regulations that seek to limit the exposure of children to food marketing may be viewed as akin to such regulations. However, as a doctrinal matter, because the regulations would differentiate speech initially by their content, such regulations should rightly be analyzed under *Central Hudson* and not as time, place, or manner regulations.

504. *See supra* text accompanying notes 281–89.

Of course, courts would need to review all regulations of commercial speech on their own merits and with sensitivity, not just to public health, but also to the values of free speech. By applying a population-based approach, courts can begin that task and ensure that our First Amendment does not undermine the health of our children.