

# The First Amendment and Public Health, At Odds

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*“We must not mistake absolutism for principle.”*  
Barack Obama, Second Inaugural Address

## I. INTRODUCTION

At the turn of the last century, allies of industry on the Supreme Court deployed a novel constitutional doctrine to thwart government regulations aimed at improving public health and safety. During the *Lochner v. New York* era, the Supreme Court discovered a right to “freedom of contract” in the Due Process Clause of the Fourteenth Amendment that advanced the “economic liberty” of businesses to conduct their affairs without government oversight.<sup>1</sup> The newfound freedom of contract forbade, for example, public policies aimed at improving factory conditions by setting maximum working hours,<sup>2</sup> forbidding child labor,<sup>3</sup> or setting a minimum wage.<sup>4</sup> The Court later somewhat abashedly changed course, finding that government in fact had great leeway to implement economic regulations protecting and promoting general welfare.<sup>5</sup>

Today, seventy-five years after the Supreme Court repudiated the doctrine of economic substantive due process, the Court has backtracked to the notion that the Constitution significantly impedes the government’s ability to safeguard public health and safety by regulating commercial activities. The old result has been achieved, however, with a new instrument. Rather than the Fourteenth Amendment and freedom of contract, the Supreme Court has now turned to the First Amendment and freedom of speech.

Business interests and their allies have successfully advanced an interpretation of the Free Speech Clause that elevates product advertising—deemed in this new

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<sup>1</sup> *Lochner v. New York*, 198 U.S. 45, 64 (1905) (“[T]he freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.”).

<sup>2</sup> *Id.*

<sup>3</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>4</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

<sup>5</sup> *See W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

incarnation “commercial speech”—to a level nearly commensurate with core political, religious, and artistic expression. Traditionally, the First Amendment was invoked to shield individuals who criticized the government or otherwise expressed unpopular views.<sup>6</sup> Commercial advertising received no protection because it was simply considered a species of business activity.<sup>7</sup> The First Amendment had no more to say about advertising regulations than about laws governing workplace hygiene or product safety.

In the 1970s, however, the Supreme Court began to extend moderate First Amendment protection to commercial messages, recognizing consumers’ strong interest in information about the price, availability, and characteristics of products and services for sale.<sup>8</sup> Importantly, advertising was accorded a lesser degree of protection than core speech.<sup>9</sup> The Court reasoned that advertising is heartier than core speech, because marketers should be able to verify the accuracy of what they are claiming and because economic self-interest makes it unlikely that even broad regulation will deter advertisers from communicating to potential customers.<sup>10</sup>

Over the course of the past thirty-five years, however, the First Amendment “commercial speech doctrine” has expanded to afford a significantly “heightened” level of protection to advertising.<sup>11</sup> In fact, it has now been eighteen years since the Supreme Court last upheld a law restricting commercial speech.<sup>12</sup> Moreover, the doctrine has shifted focus from the right of consumers to hear commercial information to the right of corporations to express their own viewpoints, regardless of whether the audience benefits.<sup>13</sup> In effect, the commercial speech doctrine has become a means of guaranteeing companies unfettered access to their potential customer base—even when they are peddling products that may lead to illness and early death.<sup>14</sup>

These developments are particularly troubling given what it means for the Supreme Court to afford advertisers a *constitutional* right to free speech.<sup>15</sup> Not only is there no appeal, there is also, effectively, no way to change the law. The political

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<sup>6</sup> See, e.g., *Stromberg v. California*, 283 U.S. 359 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting).

<sup>7</sup> See *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 176-77 (1999); *United States v. Edge Broad. Co.*, 509 U.S. 418, 421-22 (1993); *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Ex parte Rapier*, 143 U.S. 110 (1892); *Ex parte Jackson*, 96 U.S. 727, 736-37 (1878).

<sup>8</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The fact that the advertising in the early cases was often for products like contraceptives and abortion services may have enhanced the Court’s sense that it was furthering the cause of civil liberties. See, e.g., *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>9</sup> *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562 (1980).

<sup>10</sup> *Id.* at 564 n.6.

<sup>11</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667-68 (2011). *Sorrell* suggests that an amalgam of strict scrutiny and intermediate scrutiny applies to restrictions on commercial speech. Traditionally, however, the *Central Hudson* test has applied only an intermediate standard: restrictions on truthful, nondeceptive commercial speech that is not concerned with illegal activity must (1) directly and materially advance a substantial government interest, and (2) restrict no more speech than needed so that there remains a reasonable fit between the government’s ends and its means. See *id.*; see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *Cent. Hudson*, 447 U.S. 557.

<sup>12</sup> The last Supreme Court commercial speech restriction case in which the Court ruled in the government’s favor was *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding Florida bar rules forbidding attorneys from using direct mail to solicit personal injury or wrongful death clients within thirty days of an accident).

<sup>13</sup> See, e.g., *Lorillard*, 533 U.S. at 525.

<sup>14</sup> See *id.*

<sup>15</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

branches at every level of government—the representatives of the people—are powerless to undo the ruling.<sup>16</sup>

Neither the press nor the public has paid much attention to the revolutionary expansion of corporate speech rights that the enhanced commercial speech doctrine embodies. There has been nothing comparable to the uproar over the Supreme Court's granting corporations broader speech rights in the political campaign arena, as it did in the infamous case *Citizens United v. Federal Election Commission*.<sup>17</sup> Although some Supreme Court Justices have dissented from the key decisions, citing a litany of health and safety regulations that the expanded doctrine might invalidate,<sup>18</sup> these catalogs have generally been met with no more than passing concern.<sup>19</sup>

It is time—well beyond time—for those who work to protect the health and safety of the American people to develop an understanding of what is at stake. From graphic warning labels on cigarette packages<sup>20</sup> to restrictions on the promotion of untested off-label uses of prescription drugs,<sup>21</sup> a broad range of government initiatives to prevent threats to public health could stand or fall depending on the outcome.

## II. FOUR LOOMING PROBLEMS POSED BY THE COMMERCIAL SPEECH DOCTRINE

There are grave problems with the Court's current approach to the protection of commercial speech. This essay highlights four of the most salient for public health. These issues suggest the need to look closely at how consumers actually behave; to question and, if necessary reject, doctrine grounded in abstract theory rather than economic, psychological, and scientific reality; and to reassess the role that government should properly play in regulating the marketplace of commercial communication.

### A. THE MYTH OF THE RATIONAL CONSUMER

The first problem involves a foundational assumption of the commercial speech doctrine: that human beings behave as rational economic actors. In fact, they do not. Current research in fields as diverse as neuroscience, behavioral economics, developmental psychology, and addiction studies paints *homo sapiens* as a very different creature from *homo economicus*.<sup>22</sup> This research strongly suggests that the commercial speech doctrine is built on a flawed foundation. Constitutional protection for commercial advertising arises from the assumption that human actors make rational economic decisions based on the information provided in that advertising. But human beings often do not make “intelligent and well informed”

<sup>16</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>17</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that, at least with respect to campaign expenditures, corporations have essentially the same First Amendment rights as human beings); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) (critiquing the majority opinion); John Paul Stevens, *Beyond Citizens United*, 13 J. APP. PRAC. & PROCESS 1 (2012) (same).

<sup>18</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2678 (Breyer, J., dissenting).

<sup>19</sup> See, e.g., *id.* at 2672 (largely ignoring issues raised by dissent).

<sup>20</sup> See *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), *petition for cert. filed*, 2012 U.S. Briefs 59508 (U.S. Oct. 26, 2012) (No. 12A102).

<sup>21</sup> See *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

<sup>22</sup> See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

purchasing decisions,<sup>23</sup> and a great deal of commercial advertising contains no information that could aid in rational decisions even if they were being made. If consumers are being manipulated rather than informed, and if some of the products they are being manipulated into buying may lead to severe health problems and premature death, then there is a profound problem with a doctrine that stymies government efforts to regulate commercial advertising in the interest of public health.

#### B. THE TROUBLE WITH KIDS TODAY: THE UNIQUE VULNERABILITY OF CHILDREN AND ADOLESCENTS

The second problem with current commercial speech doctrine concerns a particularly vulnerable—and *irrational*—audience for commercial advertising: children. The new iteration of the First Amendment makes it very difficult to shield children from marketing that they are ill-equipped to handle.

An extensive body of scientific literature confirms that children up to the age of twelve are generally unable to understand the bias and self-interest of advertising messages and then to apply that understanding as a cognitive filter to moderate commercial influence.<sup>24</sup> The commercial speech doctrine currently provides no constitutional protection for commercial speech that is false or actually or inherently misleading.<sup>25</sup> Even under existing doctrine, then, in theory the First Amendment should not stand in the way of government efforts to protect children from advertising targeted to them—especially ads designed to attract them to hazardous products that may eventually shorten their lives.<sup>26</sup>

But what about the substantial proportion of ads that are allegedly aimed at adults but that incidentally (or, perhaps, intentionally) reach large audiences of children? The Supreme Court has consistently struck down regulations that restrict any significant amount of speech to adults, even if those laws were designed to protect children.<sup>27</sup> For example, the Court invalidated a Massachusetts ban on tobacco advertising near schools and playgrounds because the law unduly restricted the tobacco companies' ability to convey their messages to adults and adult listeners' opportunity to obtain information about tobacco products.<sup>28</sup> In recent years the television show watched by the greatest number of children has not been *SpongeBob SquarePants*—the top-rated *children's* show—but *American Idol*.<sup>29</sup> It might be constitutionally permissible to restrict junk food ads on Nick Jr. or the Cartoon

<sup>23</sup> *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

<sup>24</sup> *See, e.g.*, Dale Kunkel & Jessica Castonguay, *Children and Advertising: Content, Comprehension, and Consequences*, in HANDBOOK OF CHILDREN AND THE MEDIA 395 (Dorothy G. Singer & Jerome L. Singer, eds., 2012).

<sup>25</sup> *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

<sup>26</sup> *See, e.g.*, Samantha Graff, Dale Kunkel & Seth E. Mermin, *Government Can Regulate Food Advertising to Children Because Cognitive Research Shows that It Is Inherently Misleading*, 31 HEALTH AFF. 392 (2012).

<sup>27</sup> *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001) (“The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”).

<sup>28</sup> *Id.* at 555.

<sup>29</sup> Brooks Barnes, *Limiting Ads of Junk Food to Children*, N.Y. TIMES, July 18, 2007, <http://www.nytimes.com/2007/07/18/business/18food.html?pagewanted=all&r=0> (“An episode of Nickelodeon’s ‘SpongeBob SquarePants,’ for instance, is viewed by an average audience of 876,000 children age 6 to 11, according to Nielsen Media Research, and falls in the category of shows that are off-limits to ads for junk food. But ‘American Idol’ from Fox, which qualifies as a family show, attracts 2.1 million children in the age group.”).

Network.<sup>30</sup> But it would be constitutionally impossible to do the same for a show that was also for seven years the top-rated show in the nation among *adults*.<sup>31</sup>

Emerging research suggests that teenagers—not just younger children—are particularly vulnerable to at least some types of marketing. Studies indicate that most adolescents are not only more susceptible than adults to advertising for tempting but harmful products, but also that the tobacco, alcohol, and food industries are strategically exploiting this susceptibility.<sup>32</sup> Furthermore, companies are deploying forms of peer-based and immersive marketing that take advantage of uniquely adolescent vulnerabilities.<sup>33</sup> The Supreme Court, however, is moving in the direction opposite to that of the developing scientific evidence. In a recent case involving age restrictions on violent video games, the Court held that—at least in the context of core noncommercial speech—older minors have free speech rights to be exposed to offensive digital images and ideas.<sup>34</sup> The trend of the Court’s recent decisions suggests that it might well apply the same approach to the right of adolescents to be exposed to commercial advertising. The problem, for children of all ages, is stark: Are the deeper values of American society really reflected in a doctrine that—as a *constitutional* matter—elevates the ability of profitmaking corporations to reach young consumers over the health and welfare of those very children?

### C. THE PREVENTION OF PREVENTION: EVIDENTIARY HURDLES

A third public health problem arising from the current commercial speech doctrine involves the increasingly frequent requirement in commercial speech cases that the government prove the effectiveness of advertising regulations *ex ante*. The Supreme Court has often maintained that the First Amendment does not require the government to adduce empirical evidence of the effectiveness of a speech restrictive measure,<sup>35</sup> but in recent years the Court has looked for and evaluated such evidence anyway.<sup>36</sup>

In compelled disclosure cases, recent decisions involving smoking and other public health topics have moved in the same direction.<sup>37</sup> Courts have shown little recognition of the practical constraints on both government and social science when imposing these requirements. For example, the U.S. Court of Appeals for the D.C. Circuit recently rejected the Food and Drug Administration’s (FDA’s) proposed new graphic health warnings for cigarette packages because the FDA had not quantified “with statistical precision” how much the graphic warnings would reduce smoking rates.<sup>38</sup> Apparently the second-most-influential court in the land has held that the FDA—and perhaps by extension other agencies like the Consumer Product Safety

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<sup>30</sup> Whether it would be politically feasible is another question entirely. *See, e.g.*, M. Neil Browne et al., *Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations*, 58 *DRAKE L. REV.* 67 (2009).

<sup>31</sup> *See Lorillard Tobacco Co.*, 533 U.S. at 565.

<sup>32</sup> *See* Jennifer L. Harris & Samantha K. Graff, *Protecting Young People from Junk Food Advertising: Implications of Psychological Research for First Amendment Law*, 102 *AM. J. PUB. HEALTH* 214, 216-19 (2012).

<sup>33</sup> *Id.*

<sup>34</sup> *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2735-42 (2011).

<sup>35</sup> *See, e.g., Lorillard Tobacco Co.*, 533 U.S. at 555.

<sup>36</sup> *See id.*

<sup>37</sup> *See, e.g., Brown*, 131 S. Ct. at 2739; *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1219 (D.C. Cir. 2012).

<sup>38</sup> *See R.J. Reynolds Tobacco*, 696 F.3d at 1221.

Commission and the Environmental Protection Agency—cannot require any particular warning on a new product until *after* the agency has gathered detailed evidence of the effectiveness of the particular warning in averting the identified harm. This is simply not a blueprint for success in addressing public health concerns as they arise rather than long after they have caused harm.

#### D. THE EXPANDING SCOPE OF “SPEECH”

The fourth problem concerns the commercial speech doctrine’s growing breadth. It is not just the level of protection for commercial speech that has increased markedly in recent years; it is also the scope of business activity that is considered protected “speech.” A key strategy of industry advocates has been to try to take business practices that were never considered expressive and to re-characterize them as protected speech.

Free product samples provide an illustrative example. The 2009 federal law restricting tobacco marketing<sup>39</sup> limits where tobacco samples may be distributed, in order to ensure that an addictive, deadly product does not end up in the hands of children.<sup>40</sup> The first court to review this provision saw it as a straightforward restriction not on communication, but on where a product may be circulated in commerce.<sup>41</sup> The Court of Appeals, however, viewed handing out a free sample as an inherently expressive activity and thus assessed the constitutionality of the regulation using the more stringent standard applied in commercial *speech* cases.<sup>42</sup>

The Supreme Court has also recently derived a “rule that information is speech,” and indicated that a database containing a record of prescriptions should be considered a form of protected communication.<sup>43</sup> If this is indeed the “rule,”<sup>44</sup> the government’s ability to continue regulating large portions of the “information economy” is up for grabs. How can securities laws or credit reporting statutes, for example, continue to be enforced as they have been for decades if what they regulate is now protected speech?<sup>45</sup> If companies increasingly consider everything that they do to be marketing (and they do<sup>46</sup>), and the courts increasingly consider marketing to

<sup>39</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

<sup>40</sup> See 21 U.S.C.A. §§ 333, 372, 387a-1, 387f(d) (West 2012).

<sup>41</sup> *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 538 (W.D. Ky. 2010), *aff’d in part, rev’d in part sub nom. Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

<sup>42</sup> *Discount Tobacco City*, 674 F.3d at 539. The court ultimately upheld the measure under the *Central Hudson* test, but the point remains that treating the distribution of samples as an expressive activity points toward a troubling expansion of the commercial speech doctrine. *See id.*

<sup>43</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) (“There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.”). The Court cited cases to illustrate its proposition, but those decisions generally found that the disclosure of information, rather than the information itself, qualified as protected speech. *Id.*

<sup>44</sup> The rule established by precedent is more nuanced, granting less constitutional protection to commercial information flowing from businesses to their customers than to commercial speech addressing matters of public concern. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion); *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001).

<sup>45</sup> *See, e.g., King v. General Information Servs., Inc.*, No. 10-6850, 2012 WL 5426742 (E.D. Pa. Nov. 6, 2012) (upholding constitutionality of section of Fair Credit Reporting Act, 15 U.S.C.A. § 1681c (West 2012), prohibiting dissemination of criminal arrest records after a certain number of years).

<sup>46</sup> *See Regis McKenna, Marketing Is Everything*, HARV. BUS. REV., Jan.-Feb. 1991, available at <http://hbr.org/1991/01/marketing-is-everything/ar/1>; *see also Philip J. Kitchen et al., The Emergence of IMC: A Theoretical Perspective*, 44 J. ADVERTISING RES. 19, 21 (2004), available at

be protected speech, then the portion of business activity that government is able to regulate will be significantly diminished—and the revived *laissez-faire* dream of the *Lochner* era will, to a significant extent, have been realized.

### III. CALL TO ACTION

So, what can be done? Quite a bit, as it turns out. And there is no time to lose in doing it. The United States faces a continuing crisis of tobacco addiction among youth, an epidemic of childhood obesity, and no shortage of other marketing-driven public health emergencies. The Supreme Court's recent interpretation of the First Amendment has made it more difficult for the government to act, but there remains much that can—and should—still be done.

#### A. ON THE MYTH OF THE RATIONAL CONSUMER

To those who believe people need more, not less, protection from harmful products and the marketing campaigns that promote them, a lot of good could come from the application of research in behavioral economics, developmental psychology, and other fields investigating actual consumer behavior. The emerging science undermines the foundational assumption of the commercial speech doctrine that advertisements contain concrete, useful information and that consumers rationally process this information before making purchasing decisions.<sup>47</sup> The science supports government interventions aimed at facilitating understandable, actionable disclosures and at quashing deceptive advertising messages and techniques.

Some zealous defenders of the First Amendment will counter that our constitutional system must presume that people are rational actors, because the dangers are too great when government assumes power to substitute its judgment for that of its citizens. They will point out—not without reason—that political advertisements also tend to manipulate listeners without providing solid information, and they will query whether that is a sound justification for the government to start censoring the expression of public speakers. There is validity to their points about political speech, but there is less to their argument than meets the eye. In the American democratic system there exists a vital distinction—a chasm, not a slippery slope—between individual political expression and corporate advertising. It cheapens the truly vital ideals at the heart of the First Amendment to invoke soaring rhetoric about liberty when what is actually at issue is the ability of prescription drug marketers to use databases of physician's prescription records.<sup>48</sup> Is it truly a "necessary cost of freedom" for a doctor to have to tolerate drug marketers combing through her prescribing records without her knowledge and using this information to barrage her with eerily well-targeted sales pitches?<sup>49</sup>

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[http://homes.ieu.edu.tr/euzunoglu/BA23%20Marketing%20Communications/OKUNACAK%20MAKALE\\_Emergence%20of%20IMC.pdf](http://homes.ieu.edu.tr/euzunoglu/BA23%20Marketing%20Communications/OKUNACAK%20MAKALE_Emergence%20of%20IMC.pdf)

<sup>47</sup> See, e.g., KAHNEMAN, *supra* note 22.

<sup>48</sup> See *Sorrell*, 131 S. Ct. 2653; *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 n.5 (1980) (“[T]he failure to distinguish between commercial and noncommercial speech ‘could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.’”).

<sup>49</sup> See Tamara R. Piety, “A Necessary Cost of Freedom?” *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 47-55 (2012).

## B. ON THE UNIQUE VULNERABILITY OF CHILDREN AND ADOLESCENTS

Public health and child advocates could be taking better advantage of opportunities consistent with current commercial speech doctrine for regulation that is protective of children. The commercial speech doctrine permits regulation—even prohibition—of commercial speech that is either (1) involved with illegal activities, or (2) false or actually or inherently misleading.<sup>50</sup> For example, tobacco advertising targeting youth can be banned because sales of tobacco to minors are unlawful.<sup>51</sup> As another example, advertising of junk food even to very young children remains rampant, despite the documented health impacts of a poor diet on obesity and related diseases.<sup>52</sup> But as noted, there is a strong argument to be made that this advertising is unprotected by the First Amendment because it is inherently misleading to its intended audience. In other words, the First Amendment should not stand in the way of well-tailored restrictions on online “advergames” aimed at children, ads and product placements on children’s TV, and the use of cartoon characters to promote obesogenic food.<sup>53</sup>

Further, regulators have significant leeway to limit commercial messages in child-oriented domains that are the government’s own property.<sup>54</sup> So school authorities have the power to set policies establishing what marketing, if any, should be allowed on school property.<sup>55</sup> No constitutional principle requires that junk food ads be permitted in schools.

## C. ON EVIDENTIARY HURDLES

As for the trend toward requiring government to muster scientific data proving the efficacy of proposed advertising regulations, policymakers can and should work more skillfully within the existing doctrinal framework. For example, since the test for restrictions on commercial speech requires the government to show its effort will directly advance its goal,<sup>56</sup> the more modest the goal (as long as it is “substantial”<sup>57</sup>), the easier it is to meet. It is much more difficult to prove that an ordinance restricting in-store tobacco advertising during after-school hours will decrease smoking-related diseases than it is to show that it will reduce kids’ exposure to cigarette marketing. Regulators would therefore often be well advised to resist the temptation to frame legislation as advancing the most compelling possible goal: ending the scourge of tobacco use, for instance, or stopping the epidemic of obesity and diabetes among children. In the commercial context such lofty goals are rarely necessary, and they may be counterproductive.

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<sup>50</sup> See *Cent. Hudson*, 447 U.S. at 557.

<sup>51</sup> *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

<sup>52</sup> See Jennifer Harris & Samantha K. Graff, *Protecting Children from Harmful Food Marketing: Options for Local Government to Make a Difference*, 8 PREVENTING CHRONIC DISEASE, no. A92, 2011 at 1.

<sup>53</sup> See Samantha K. Graff, *First Amendment Implications of Restricting Food and Beverage Marketing in Schools*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 158 (2008).

<sup>54</sup> *Id.* at 172. This leeway does not extend to government property that is a “public forum.” *Id.* at 165. But it does leave government room to issue public service messages embodying the government’s own speech; regulate advertising on government property not open to the general public, like commissaries and hospitals; and require government procurement contracts to include clauses restricting certain types of ads (on vending machines, for example). *Cf. id.*

<sup>55</sup> *Id.* at 170.

<sup>56</sup> See *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

<sup>57</sup> *Id.* at 566.

Meanwhile, public health attorneys have an obligation to educate courts about the limits of scientific evidence. No double-blind study will conclusively isolate the causes of the obesity epidemic, and it would be unethical to conduct a controlled experiment establishing that a group of children fed exceptionally large amounts of sugar develop diabetes at a higher rate than a control group. Imagine the consequences if judges demanded controlled studies proving the efficacy of a given warning—for example, a skull-and-crossbones on a bottle of poisonous liquid—before allowing the government to require warning labels regarding serious and established risks. Complex, multi-causal problems like childhood obesity require a risk-factors approach, not an approach that handcuffs the government by insisting on a statistical precision that cannot be achieved.<sup>58</sup>

#### D. ON THE EXPANDING SCOPE OF “SPEECH”

The effort by industry to characterize ordinary business activities as protected expression is less developed than the push to enhance the level of scrutiny applied to restrictions on commercial speech. It is true that industry advocates have in some cases convinced courts that what were once ordinary business activities and products should now be considered constitutionally protected expression.<sup>59</sup> But an expansion of the doctrine is not a foregone conclusion, and government has an opportunity to hold the line in the policymaking and litigation spheres.

Policymakers, for example, can continue to pursue measures that common sense would dictate do not implicate industry’s free speech rights. For example, the city of Providence, Rhode Island recently enacted an ordinance forbidding merchants from redeeming coupons or accepting two-for-one deals for tobacco products.<sup>60</sup> The stated purpose of the ordinance was to prevent youth smoking initiation.<sup>61</sup> The tobacco industry and a retailers’ association sued, arguing that the coupon redemption ban was a restriction on protected speech.<sup>62</sup> The court, however, rejected industry’s invocation of the First Amendment, finding that the restriction “regulates the commercial activity itself” rather than communication about the activity, and the act of setting a price is “not so inherently expressive” as to merit constitutional protection.<sup>63</sup>

Moreover, policymakers need not necessarily shy away from regulations of business operations or products just because the regulations might have an incidental impact on commercial speech. Government attorneys can plausibly develop and advance a viable alternative to the “heightened scrutiny” now afforded commercial speech. As the Supreme Court recognized a decade ago, even much business activity that *does* have a communicative component is better assessed as commercial “expressive conduct” under *United States v. O’Brien*—a more lenient standard for

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<sup>58</sup> See Samantha Graff & Tamara Piety, *The New First Amendment and Its Implications for Combating Obesity Through Regulation of Advertising*, in *ADVANCES IN COMMUNICATION RESEARCH TO REDUCE CHILDHOOD OBESITY* 101, 113 (Jerome D. Williams et al. eds., 2013) (describing the troubling implications of court decisions demanding proof of a one-to-one causal relationship between a regulation and the problem it is trying to address).

<sup>59</sup> *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 538 (6th Cir. 2012).

<sup>60</sup> See *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, No. 12-96-ML, 2012 WL 6128707, at \*1 (D.R.I. Dec. 10, 2012).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*4.

government to meet.<sup>64</sup> Few courts have yet addressed the *O'Brien* standard in the commercial context,<sup>65</sup> but the test's record in the Supreme Court, at least, has been as successful for the government in the recent past as the standard for regulation of commercial *speech* has been bleak.<sup>66</sup>

#### IV. CONCLUSION

In sum, government and those advocating robust regulation of harmful business activity need to recognize that this is not a time to sit back and watch. Industry has managed to convince courts that the integrity of the entire First Amendment is at stake: If the government is able to regulate commercial speech about hazardous products, then—the slippery slope argument goes—what's to stop policymakers from choosing to silence whatever speech they deem offensive or threatening? Yet this absolutist stance categorically, and unjustifiably, prioritizes free speech concerns to the exclusion of other foundational civic values—values like safety and public health.

There is room in society for both liberty and safety, for both the First Amendment and public health. It is time the balance was restored.

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<sup>64</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”)).

<sup>65</sup> See *Lorillard*, 533 U.S. at 567 (considering regulation of retailers’ “particular means of displaying their products” to be subject at most to the standard for expressive conduct); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 538 n.10 (6th Cir. 2012).

<sup>66</sup> As noted, since 1995 no Supreme Court case has upheld a government restriction on commercial speech; in the same period, no Supreme Court case has struck down a measure restricting expressive conduct. See *supra* note 12.