

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

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### 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.<sup>1</sup> 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

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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.<sup>2</sup> 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.<sup>3</sup> 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.

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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."



































































































































































