Words to Live By: Public Health, the First Amendment, and Government Speech

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INTRODUCTION

A young woman is waiting for a train in a subway station. She notices an advertisement on the wall above the tracks. In bold red and white letters against a black background, it warns, "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer."[1] The state public transportation authority had received a copy of a letter from a federal health agency stating that this advertisement was misleading and scientifically inaccurate.[2] In response, the transportation authority removed the advertisements, but a court later ruled that the removal was unconstitutional.[3]

A 15-year-old boy rides public transportation to school. One morning as he boards a bus and looks for a seat, an advertisement above the window catches his eye. Below a photograph of a teen wearing a backwards baseball cap, it declares, "Smoking pot is not cool, but we're not stupid, ya know. Marijuana is *NOT* cocaine or heroin. Tell *us* the truth . . . ."[4] The transportation authority initially had refused to run this advertisement, claiming that it was concerned that the message could mislead teenagers into

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1. Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 245 (3d Cir. 1998).

2. *Id.*

3. *Id.* at 242.

4. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 73 (1st Cir. 2004).

believing that marijuana is relatively harmless.[5] A skeptical court believed that the real reason for the refusal was that the state disapproved of the legalization of marijuana.[6]

A couple is riding the subway with their young child. An advertisement across from their seats features a picture of a condom and asks, "Haven't you got enough to worry about in bed?"[7] The transportation authority had declined to accept these advertisements because it was concerned about exposing children to sexual content and offending a trapped audience of riders.[8] Citing numerous public health officials' support for its approach, the AIDS advocacy group that produced the advertisements asked a court to prevent the transportation authority from refusing to display them.[9]

For at least two centuries, the American legal system has recognized that the government is charged with the protection of public health.[10] Despite the government's considerable power to act on behalf of citizens' well-being, the United States Constitution limits government action when it infringes on constitutional rights such as the protection of free speech guaranteed by the First Amendment. How should courts evaluate situations that involve both public health and free speech? In many cases, simply adding the government's own viewpoint to a debate about health issues is not a satisfactory solution. Should the state's reason for limiting speech matter in a court's First Amendment analysis? Should the government have a greater ability to control false speech that may be mistakenly attributed to it, particularly when the message could potentially harm public health? What should courts do when the government's duty to protect public health gives it a motivation to suppress truthful as well as false information? What if the state has a reason for suppressing health information that is unrelated to its own duty to safeguard health? Such questions imply that courts need to consider more fully the public health implications of their decisions in free speech cases.

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5. *Id.* at 82-83.

6. *Id.* at 87-90.

7. AIDS Action Comm. of Mass. v. Mass. Bay Transp. Auth., 42 F.3d 1, 4 (1st Cir. 1994).

8. *Id.* at 5.

9. *Id.* at 5-6.

10. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 203 (1824).

Some legal scholarship has examined the First Amendment and government speech, and other work has explored the government's role in promoting public health, but few scholars have sought to integrate the two outside the narrow context of abortion. This Article seeks to fill this gap, establishing connections to existing scholarship by exploring how courts can consider the public health ramifications of free speech analysis. It does not suggest that traditional free speech models should be altered nor that public health is more important than free speech; rather, it seeks to integrate public health concerns into established free speech doctrine.

The scenarios above involve public health, free speech, and the role of the government in promoting or suppressing each. Judges often perform First Amendment analysis without fully considering the public health implications of their decisions. For example, if listeners attribute others' health speech to the government, this misperception can undermine the government's ability to protect public health. On the other hand, the government should not be able to use public health protection as a shield against First Amendment accountability. How should courts reconcile the government's need to send effective health messages with its potential for speech market domination? This discussion explains that, following established precedent, courts may give the government both more and less power as a public heath speaker. The government can and should have more power to dissociate itself from messages that conflict with or undermine its own. At the same time, courts can limit the government's ability to distort the speech market or mislead the public by suppressing the viewpoints of other speakers.

This Article identifies three general categories of speech and health cases, represented by the three scenarios above, that illustrate how better to protect public health without compromising free speech. In the first category, as in the abortion advertisement example, the First Amendment appears to present a barrier to the government's duty to protect the public. Seeking to promote public health, the government attempts to avoid the appearance of endorsing false or harmful viewpoints. In such cases the government might find that others' messages undermine the integrity of its own. This first category presents a direct conflict between public health and free speech.

In the second category, illustrated by the marijuana advertisement, the government resists another's viewpoint not because it is false or misleading but despite the fact that it is truthful or informative. In cases like these, the government seems to be violating the First Amendment by limiting the availability of complete health information. Free speech and public health may be aligned in some ways, but the government still has other interests, such as protecting children from harmful messages, that courts must consider in their analysis. Finally, in the third category, as in the situation with the condom advertisement, the government may attempt to restrict others' health-related speech for a reason unrelated to its own duty to protect public health. As in the AIDS awareness example, the reason is often to avoid controversy or offense. In this type of situation, free speech and public health values tend to be more easily aligned.

This discussion will consider each of these three types of cases as it examines how courts in First Amendment cases tend to disregard the effect of government speech on public health. Scientific information can be particularly difficult for listeners to evaluate, so they will turn to sources they trust for information. Because the government is empowered to regulate and promote health, can expend vast resources, and has historically played a central role in the promotion of health, government speech has a uniquely powerful influence on public health. However, the government's role in protecting public health can conflict with or complicate free speech considerations. If free speech and public health are conceptualized not as competing values but rather as values that further the same ultimate goals, such as self-realization, the government should have an interest in preserving both. A public health perspective enriches First Amendment analysis by considering multiple factors that impact citizens' ability to make free and informed choices.

Part I of this Article will provide readers with relevant legal background about both public health and First Amendment law. Part II will discuss the problems that health-related speech poses in a speech market and the unique role of government as a speaker in this context. Part III will explain the need for the government to avoid mistaken attribution of others' messages to itself and analyze specific examples of others' speech undermining the

government's own health message or goals. Part IV will explore how speech can create and influence both health decisions and the environment in which they are made. Part V will examine the problems with government control over health speech by providing specific examples of market distortion and deception. Finally, Part VI will consider situations in which the government's myriad other functions can impede both public health and free speech.

I. A BRIEF SUMMARY OF RELEVANT LEGAL DOCTRINE

A. *Public Health*

The U.S. Constitution grants states "police powers" to legislate in areas not specifically designated to the federal government. These powers include the ability to pass "health laws of every description" to protect the public health, safety, and morals.[11] Further, states may infringe on the rights of citizens and restrict their behavior to protect the public health.[12] The federal government typically derives its authority to pass health laws from the Commerce Clause, which grants Congress the power to "regulate Commerce . . . among the several States."[13] Another source of federal power is the ability to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."[14] Based on this "spending power," the Supreme Court has held that the federal government may further its goals, particularly public health objectives, by conditioning the receipt of federal money on compliance with federal mandates that seek to promote the general welfare.[15]

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11. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

12. Wendy E. Parmet et al., *Individual Rights Versus the Public's Health—100 Years After* Jacobson v. Massachusetts, 352 NEW ENG. J. MED. 652 (2005).

13. U.S. CONST. art. I, § 8, cl. 3.

14. U.S. CONST. art. I, § 8, cl. 1.

15. United States v. Butler, 297 U.S. 1, 65-66 (1936). One example is requiring all states receiving federal highway funds to raise the legal drinking age to twenty-one. South Dakota v. Dole, 483 U.S. 203 (1987).

B. *Free Speech*

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[16] This amendment has since been incorporated into the Due Process Clause of the Fourteenth Amendment, making it applicable to the states as well.[17] Because freedom of speech is a fundamental right, the government can infringe on it only in limited circumstances. The methods that courts use to analyze constraints on free speech depend on the type of forum in which the speech occurs. Traditional public fora are streets, sidewalks, and parks, which "have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[18] In these spaces, the government can regulate speech in some reasonable ways, but it may not prohibit their use for speech purposes.[19]

A designated public forum is public property that the government has opened to speech.[20] The government is not required to open non-traditional fora for speech purposes, but once it does so, it is bound by the same restrictions on governmental limitation of speech that apply in traditional public fora.[21] The exclusion of speakers from public fora may not be based on the content of the speech.[22] If the government does impose content-based regulations, it must demonstrate that the regulations are necessary to further a compelling government interest.[23] The government can impose content-neutral "time, place, and manner" regulations if they are narrowly tailored to serve a significant government interest and alternative channels of communication remain open.[24]

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16. U.S. CONST. amend. I.

17. Duncan v. Louisiana, 391 U.S. 145 (1968); *see also* Fiske v. Kansas, 274 U.S. 380 (1927).

18. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

19. *Id.* at 515-16.

20. Kaplan v. County of Los Angeles, 894 F.2d 1076, 1080 (9th Cir. 1990).

21. *Id.*

22. *Id.*

23. *Id.* at 1079-80. This standard is known as "strict scrutiny."

24. *Id.* at 1080.

A "non-public forum" is government property that is neither a traditional nor a designated public forum.[25] Although a non-public forum is public property, the government can prohibit its use for speech.[26] The public may be freely invited, although not for expressive purposes.[27] In such a forum, the government can discriminate among speakers and messages if it does so in a viewpoint-neutral manner and if the discrimination is reasonable in light of the purposes of the forum.[28] It is sometimes confusing to distinguish between content and viewpoint discrimination. Banning all political speech is an example of content discrimination; it would not be permitted in a public forum absent a compelling reason, but it could be permitted in a non-public forum. Banning only the speech of one political party is viewpoint discrimination and would not be permitted in either type of forum.

In general, private spaces are not subject to the First Amendment, which confers rights against the government rather than against private parties. Citizens usually may restrict speech on their own property, especially if they have not opened it to the public.[29] In addition, certain classes of speech are afforded less protection than others. Commercial speech, "expression related solely to the economic interests of the speaker and its audience,"[30] is protected under the First Amendment, but to a lesser

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25. *Id.* The term "non-public forum" is a misnomer because, although not an open forum, it is public space; a more accurate term would be "public non-forum." Despite this imprecision, this article will use "non-public forum" because it is the widely accepted terminology.

26. *Id.*

27. *See id.*

28. *Id.* The term "limited public forum" is frequently but inconsistently used. Sometimes it is used to mean "designated public forum" and other times to mean "non-public forum." *See, e.g.*, *Ridley*, 390 F.3d at 76 n.4. To avoid confusion, this article will not use the term.

29. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace [notion] that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. . . . Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.").

30. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

degree than other kinds of speech.[31] Because this Article focuses on non-commercial speech, a detailed summary of commercial speech doctrine is beyond the scope of this discussion.[32] Finally, the First Amendment does not protect obscenity, fighting words, child pornography, defamation, or incitement to illegal activity,[33] so the government may regulate or proscribe these kinds of speech without constitutional limitation.

II. PUBLIC HEALTH AND GOVERNMENT SPEECH

A. *Free Speech and Scientific Data*

The premise underlying First Amendment jurisprudence is that all views should have an equal chance to compete in a "marketplace of ideas," so it is particularly important to keep channels of communication open to all.[34] When all ideas are presented and compared, the best ideas will endure and be endorsed by others. As Justice Brandeis famously said, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[35]

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31. *Id.* at 563.

32. Recently there has been much scholarship about commercial speech and public health. The rationale behind protecting commercial speech—that its purpose is to communicate information to consumers—is becoming increasingly less true in the current atmosphere of building brands and associating products with certain lifestyles. As advertisements focus more on image, they convey less information about the products they attempt to sell. Given that the advertising of powerful industries can have a detrimental effect on public health and that advertising targeted at children has grown exponentially in recent decades, many public health advocates have asserted that commercial speech should be afforded significantly less First Amendment protection. *See, e.g.*, 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); David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507 (2006).

33. *See, e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 504 (1984).

34. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

35. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

In reality, ideas cannot always compete this way because listeners often lack sufficient knowledge to evaluate them fairly. The more sophisticated the analysis, the more difficult it becomes for listeners to link cause and effect and make judgments about the validity of speech. For example, can a state's economic problems be blamed on the current governor's policies? Though it may be an objective fact that they occurred during the governor's tenure, one would need detailed information about economics and politics to make an educated determination. The free flow of information can enhance listeners' abilities to understand complex problems, but it also can result in frustration and alienation if listeners are unable to evaluate competing arguments.

This problem is particularly significant when speech conveys scientific information. When a speaker makes a scientific statement, it can be difficult to evaluate its worth. Is it merely the speaker's opinion or a scientific consensus? The information needed to evaluate scientific claims is often neither accessible nor comprehensible to most participants in a general speech market. The consequence is that the balance of power shifts in favor of those with scientific expertise and leaves the public vulnerable to manipulation by those with social or political agendas disguised as scientific data. This problem overshadows discussion of public health and the First Amendment. The voluminous amount of health advice available on the internet—some scientifically sound and some quite dubious—means that consumers are faced with an abundance of undecipherable health information. Many patients might seek the advice of their individual physicians or consult private medical websites. It is likely that many citizens will also expect governmental health agencies to provide guidance and clarification.

B. *The Role of Government in Health Speech*

In the non-commercial context, government speech has a tremendous influence on public health. First, the government is uniquely charged with public protection; it alone possesses the power to regulate and promote health. Second, the government is positioned to marshal vast resources for public health purposes. Also, historically the government has played a principal role in developing public

health policy and disseminating public health information. For these reasons, the government's voice carries a special weight in the public health context.

Other opinions certainly also matter in debates about health issues. For example, private medical websites and the opinions of major professional organizations like the American Medical Association play a role in shaping public opinion. Patients typically ask their own doctors for specific health advice, but such interactions tend to be infrequent, brief, and limited to the most immediately pressing issues. Accustomed to government involvement in health issues, many people turn to the government for more general health information and assume that it will monitor potential health risks and warn the public of danger. Citizens expect the Food and Drug Administration to monitor drug safety, state medical licensing boards to ensure the quality of their doctors and nurses, reports of the Surgeons General to educate them about health issues, their local Board of Health to ensure that local restaurants are safe, Congress to struggle with health care reform, and all branches of government to respond to a pandemic. Government speech plays a critically important role in shaping public perception of health-related issues.

III. THIS IS YOUR GOVERNMENT SPEAKING: A MATTER OF ATTRIBUTION

A. *Government as Speaker*

Although the government does not itself possess rights under the First Amendment,[36] it is well-established that the government can choose and communicate its own message[37] to maintain its cohesion and functioning. It is less clear to what extent the government can limit others' speech to delineate the parameters of its own speech and prevent mistaken attribution of another's message to the government. As Helen Norton explains,

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36. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1502 (2001).

37. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992); Rust v. Sullivan, 500 U.S. 173, 193 (1991).

> [A] government's justifiable efforts to inform and persuade the public of its affirmative views are too easily undermined if [it] cannot take dissociative action to ensure that private opinions are not erroneously attributed to it. The more formidable challenge . . . is determining whether such government actions are a pretext for censoring private speech or are instead spurred by a sincere and reasonable concern that others' speech will be mistakenly understood as the government's own.[38]

Norton suggests that, to the extent that the government is politically accountable for its message, the government should be able to control its own message by dissociating itself from others' speech.[39] In the public health context, this concept might expand to encompass situations where the government is not just politically accountable but also responsible for protecting the public. In such situations, the government has a heightened interest in preserving the integrity of its message.

One way to view the government's power to separate itself from others' speech is to recognize that, by selecting among various speakers, the government is itself engaged in speech whose message would be suppressed if it were forbidden to engage in viewpoint discrimination.[40] When the government simply provides a forum for the expression of a wide variety of views, it does not seek to send a particular message of its own, but when it engages in a selection process, it may be attempting to communicate (or not communicate) a specific set of ideas or values. In such a situation, the practical effect of limiting viewpoint discrimination is restriction of governmental speech. Further, if the government were not permitted to discriminate, it might choose not to open a particular forum to speech, which would undermine overall speech opportunities. As the Supreme Court has observed, "we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all."[41]

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38. Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1326 (2004).

39. *Id.*

40. Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1375 (2001).

41. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998).

It is easier for the government to control its message if a court finds that the government itself is speaking; when the government speaks, it may exclude others' messages. In *Knights of the Ku Klux Klan v. Curators of University of Missouri*, the Ku Klux Klan ("KKK") sought to become a local sponsor of the public radio program "All Things Considered," which would have required the program announcer to read a sponsor acknowledgment of its contribution.[42] The Eighth Circuit held that sponsor acknowledgments were governmental editorial expression not subject to forum analysis, allowing the public university radio station to decline the sponsorship.[43] Likewise, in *American Civil Liberties Union of Tennessee v. Bredesen*, the Sixth Circuit held that it was constitutional for the state to issue specialty license plates saying "Choose Life" when no alternative pro-choice plates were available because the plates were state speech; the state was simply enlisting volunteers to disseminate its chosen message.[44]

The government has less control over messages when the court finds that the government is limiting mixed private/governmental speech or private speech. In contrast to the Sixth Circuit, the Fourth Circuit has held that a "Choose Life" specialty license plate is mixed governmental and private speech, so it is unconstitutional viewpoint discrimination for the state to offer it without also offering a pro-choice plate.[45] In another case, the Fourth Circuit found that the state could not ban the Confederate flag on

42. 203 F.3d 1085, 1089-90 (8th Cir. 2000).

43. *Id.* at 1086.

44. 441 F.3d 370 (6th Cir. 2006).

45. Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 795, 799 (4th Cir. 2004). While *Rose* found that specialty license plates were a "limited forum," *Bredesen* held that the plates were not a forum for expression. *Bredesen*, 441 F.3d at 370; *Rose*, 361 F.3d at 786, 798. This discrepancy in forum determination in two cases that seem factually indistinguishable suggests an inherent problem with the reliability and predictability of forum analysis. *See infra* note 90.

specialty plates designed by the Sons of Confederate Veterans because in that context the speech was private.[46]

Courts differ on the extent to which they will allow the government to dissociate itself from others' messages due to fear of attribution, and the outcome often depends on the type of forum analysis performed. In *Texas v. Knights of the Ku Klux Klan*, the Fifth Circuit addressed the state's adopt-a-highway program.[47] The KKK sought to adopt a stretch of Texas highway, but the state argued that it would frustrate the use of highways, interfere with desegregation, and intimidate residents of a nearby housing project.[48] The court held that the highway program was a non-public forum and that the state's exclusion of the KKK was reasonable in light of the purposes of the forum given the state's reasons for doing so.[49] It also found that the exclusion was viewpoint neutral because the purpose was to prevent the problems the state articulated, not to exclude the KKK's viewpoint.[50]

In contrast, dealing with a similar fact pattern in *Knights of the Ku Klux Klan v. Arkansas State Highway and Transportation Department*, a federal district court in Arkansas found the adopt-a-highway program to be a public forum whose point was to advertise good citizenship.[51] The court found that First Amendment concerns overrode the state's interest in preventing problems like citizen protests and in protecting its own image from harm.[52] The Eighth Circuit, which a month earlier had allowed the University

46. Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 611, 619-20 (4th Cir. 2002). The Fourth Circuit distinguished the two cases based on their facts. In *Sons of Confederate Veterans*, the state simply wished to generate revenue by selling specialty license plates, and the Sons of Confederate Veterans had designed the plate and sought to have it endorsed by the state, so the speech was private. *Id.* In *Rose*, the legislature had authorized and designed the pro-life plates specifically to promote a particular message, but motorists who chose to purchase the plate also had clearly endorsed the message, so the speech was mixed governmental and private. 361 F.3d at 793.

47. 58 F.3d 1075 (5th Cir. 1995).

48. *Id.* at 1079-81.

49. *Id.* at 1078-80.

50. *Id.* at 1080-81.

51. 807 F. Supp 1427, 1435-37 (W.D. Ark. 1992).

52. *Id.* at 1437-38.

of Missouri to decline the KKK's sponsorship of a radio program,[53] found that it was a violation of the First Amendment to deny its participation in Missouri's adopt-a-highway program.[54] The court concluded that the state's reason for denying the KKK's participation, its "history of unlawfully violent and criminal behavior," was a ruse for viewpoint discrimination.[55]

Noting that "[i]nconsistent outcomes are often driven by hard cases," Norton suggests that courts should ask why private speakers seek to participate in a government program.[56] For example, why do motorists prefer a specialty license plate when they could express themselves less expensively and with much greater flexibility on a bumper sticker? The answer may be that they "seek the added emphatic or symbolic value of the government's imprimatur for their speech. . . . In such situations, [the] government's interest in protecting its speech from being commandeered by others seems especially strong."[57] The government can promote its own view through its specialty license plate program, but courts should not compel it to provide a mechanism for promoting the views of others.[58]

This goal might be accomplished effectively without violating the First Amendment through disclaimers, but it is not always practical or possible to do so—for example, it is not clear how the government would issue a disclaimer on a license plate.[59] Further, there is a problem in these cases that transcends forum analysis. As Norton observes, "[b]ecause the government manufactures, erects, owns, and maintains the signs, the state can be seen as the literal speaker, and thus endorser, of the signs' content."[60] Requiring the government to print a Confederate flag on a license plate or to erect a sign recognizing the KKK for

53. Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1086 (8th Cir. 2000); *see supra* notes 42-43.

54. Cuffley v. Mickes, 208 F.3d 702, 703, 711 (8th Cir. 2000).

55. *Id.* at 705, 709-10.

56. Norton, *supra* note 38, at 1319-20.

57. *Id.* at 1338.

58. *Id.* at 1334-35.

59. *Id.* at 1339-40.

60. *Id.* at 1346.

maintaining a stretch of highway is more than just asking the government to allow expression of views it does not endorse; it is requiring it to take active steps to promote those views. Although it is doubtful that the average motorist would believe that the government shared the specific political beliefs of the KKK or the Sons of Confederate Veterans after seeing a sign by the highway or the Confederate flag on a specialty license plate, these state-produced means of speech nonetheless legitimize those views. Cases involving governmental association with others' public health messages pose a similar problem.

B. *Government as Health Protector*

In any discussion of free speech and public health, it is necessary to define what is meant by public health goals or values. It is not always obvious what an ideal public health outcome is, nor is there always a consensus about how to determine the public health perspective in a particular situation. Sometimes positive health measures have broad economic consequences. For example, curing or preventing a disease has obvious benefits to society, but if it results in more people living longer lives it may also burden the health care system by increasing the costs of medical care for the elderly. In other situations, two public health issues may conflict with one another, as when someone smokes to avoid gaining extra weight. In addition, sometimes safety measures like wearing a seatbelt or helmet can backfire if drivers engage in riskier behavior because they feel safer taking these precautions. While acknowledging such limitations, this discussion will assume that essential public health goals include avoiding misinformation, providing the full amount of information that is scientifically known, discouraging behaviors known to be risky or harmful, and protecting children from harm caused by themselves or others.

1. *Conflicting Messages:* Christ's Bride *and* Ridley. In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority,* the Third Circuit addressed a governmental attempt not to send certain health messages.[61] Christ's Bride Ministries ("CBM"), a religious

61. 148 F.3d 242 (3d Cir. 1998).

organization,[62] sought to place advertisements in train and subway stations, on buses, and in bus stops run by the Southeastern Pennsylvania Transportation Authority ("SEPTA") in the Philadelphia area.[63] The advertisements stated: "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer" and included an 800 number.[64] SEPTA requested that CBM identify itself as the sponsor on the advertisements, and after CBM agreed, SEPTA accepted the advertisements, displaying them in subway and railroad stations beginning in January 1996.[65] As soon as the campaign began, SEPTA received numerous complaints from riders, women's health groups, and Philadelphia-area government officials.[66] SEPTA then requested that CBM add a more prominent identification, and CBM complied by using larger, bolder font.[67]

The contract between CBM and TDI, the company with which SEPTA contracted to construct and sell advertising space, included a provision that the contract could be terminated without notice if SEPTA deemed the advertising "objectionable for any reason."[68] In February 1996, SEPTA obtained a copy of a letter from the Assistant Secretary of Health of the United States Department of Health and Human Services ("DHHS") stating that CBM's advertisements were "misleading, unduly alarming, and [did] not accurately reflect the weight of scientific literature."[69] The Secretary was concerned that callers to the 800 number were being referred to an article in the *Journal of the National Cancer Institute* that suggested a connection between abortions and breast cancer even though the same journal had stated in an editorial that the

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62. CBM describes itself as "dedicated to the Master's use, to communicate vital, life-saving truth, correct ruinous error, expose deadly lies, and direct people to eternal life, while precious, fleeting, temporal time remains." Christ's Bride Ministries' Mission Statement, http://www.christsbride-min.com/ (last visited Dec. 10, 2008).

63. *Christ's Bride*, 148 F.3d at 244-45.

64. *Id.* at 245.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

results of this study were not conclusive.[70] In response to the letter, SEPTA removed the advertisements in February 1996, due to concerns about their inaccuracy.[71] A month later, TDI informed CBM of the decision and refunded a pro-rated amount of CBM's money.[72] CBM sued TDI and SEPTA in May 1996, claiming, *inter alia*, that they had violated its First Amendment rights.[73] At trial, experts gave differing opinions about the relationship between abortion and breast cancer, but the trial court did not rule on this issue.[74] Rather, it found that SEPTA's advertising space was not a public forum and that the letter provided a "reasonable" ground to remove the advertisements.[75]

On appeal, the Third Circuit overturned the district court.[76] The court held that SEPTA's advertising space was a designated public forum because SEPTA had accepted a wide range of advertisements on many controversial topics in the past, its written policies excluded only a narrow range of advertisements, and it had a practice of providing "virtually unlimited" access to advertising.[77] SEPTA's actions would have to pass strict scrutiny, but SEPTA had not argued that it could meet this standard.[78] Without further discussion, the court concluded that the removal of the advertisements violated CBM's First Amendment rights.[79]

The court went on to say that even if the advertisements were outside the scope of the public forum, SEPTA's actions were not reasonable because the subject and manner of these advertisements were compatible with

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70. *Id.*

71. *Id.* at 246.

72. *Id.*

73. *Id.*

74. *Id.* at 246-47.

75. *Id.* at 246.

76. *Id.* at 257.

77. *Id.* at 251-52. The Third Circuit found that, although callers to the 800 number might receive information about medical malpractice attorneys, the advertisement was not commercial speech because CBM had only a very attenuated financial motive. *Id.* at 247.

78. *Id.* at 255.

79. *Id.*

the purposes of the forum.[80] A prohibition of "debated and dubious ads" might be reasonable, but SEPTA had no such policy.[81] In addition, when a SEPTA employee was asked at trial if he would run an advertisement saying "women who choose abortion live longer and have less breast cancer," he said that he would approve this advertisement only if there were "credible evidence to support it."[82] The court pointed out that this was not the standard used to evaluate CBM's advertisement because a debatable advertisement may be supported by some credible evidence.[83] It noted disapprovingly that SEPTA had not given CBM a chance to provide evidence, explain itself, or clarify its position.[84]

Similarly, in *Ridley v. Massachusetts Bay Transportation Authority*, the First Circuit considered the Boston-area public transit system's refusal of health-related advertisements.[85] Change the Climate, a non-profit organization advocating the legalization of marijuana, sought to place several advertisements on buses and in subway stations.[86] The Massachusetts Bay Transportation Authority ("MBTA") rejected the advertisements on the grounds that they promoted the use of marijuana and violated MBTA's drug and alcohol policy, although it had no advertising policy specifically addressing drugs.[87] The MBTA did have guidelines prohibiting advertisements promoting the use of illegal goods or unlawful conduct.[88] It claimed that Change the Climate's advertisements encouraged illegal use of marijuana by minors and particularly objected to an advertisement showing a teenager wearing a backwards baseball cap with the caption: "Smoking pot is not cool, but we're not stupid, ya

80. *Id.* at 255-56.

81. *Id.* at 256-57.

82. *Id.* at 257.

83. *Id.*

84. *Id.*

85. 390 F.3d 65 (1st Cir. 2004).

86. *Id.* at 72-73.

87. *Id.* at 73.

88. *Id.*

know. Marijuana is *NOT* cocaine or heroin. Tell *us* the truth . . . ."[89]

The court found that MBTA's advertising space was a non-public forum because it had consistently rejected advertisements that were not in compliance with its advertising guidelines,[90] so it analyzed whether the exclusion of the marijuana advertisements was constitutionally prohibited viewpoint discrimination.[91] Three witnesses who testified at the trial—two MBTA employees and the principal of a Boston high school whose students rode the MBTA to school—stated that the advertisement with the teenager led young people to view marijuana as relatively harmless and encouraged its use.[92] They also expressed concern about the advertisements advocating an illegal act.[93]

The court held that it was constitutional for the MBTA to reject advertisements that promoted illegal activity, but "[s]uspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government."[94] The court also expressed concerns about restricting information available to adults based on its suitability for children.[95] It ultimately concluded that banning Change the Climate's advertisements was

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89. *Id.* at 73, 83.

90. *Id.* at 77-82. The *Ridley* court recognized that its forum analysis differed from that in *Christ's Bride*. *Id.* at 80. It distinguished *Christ's Bride* because in that case SEPTA, unlike the MBTA, viewed its advertising space as a "'catalyst for change,'" the advertisement in question had been refused only after it had already run and caused controversy, and SEPTA did not have guidelines like those of the MBTA, as SEPTA "'virtually permitt[ed] unlimited access.'" *Id.* at 80-81 (quoting Christ's Bride Ministries, Inc. v. Se. Penn. Transp. Auth., 148 F.3d 242, 249-52 (3d Cir. 1998)). Nonetheless, the different forum determinations in these two factually similar cases, as well as legal scholars' general inability to predict which type of forum courts will find a particular setting to be, reveals the limited utility of forum analysis. Such inconsistencies only confirm Lawrence Tribe's statement, quoted in *Ridley*, that "whether or not a given place is deemed a 'public forum' is ordinarily less significant than the nature of the speech restriction." *Id.* at 75-76 (quoting LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 992 (2d ed. 1988)).

91. *Id.* at 82.

92. *Id.* at 82-84.

93. *Id.*

94. *Id.* at 85-86.

95. *Id.* at 86.

unconstitutional viewpoint discrimination on several grounds.[96] First, it suspected that the rejection was based on MBTA's "distaste" for Change the Climate's point of view.[97] Second, it found that banning the marijuana advertisements did not actually further the state's goal to protect children because the advertisements advocated changing the law rather than drug use, the MBTA ran many other advertisements discouraging drug use, and the MBTA had accepted advertisements advocating the use of alcohol that could have appealed to juveniles.[98] The court soundly rejected the MBTA's concern that the teenager advertisement might encourage drug use among teenagers: "[t]hat one advertisement, which on its face says use of marijuana is 'not cool,' would actually induce juveniles to smoke marijuana strikes us as thin to the point of implausibility."[99] Further, the court held that rejection of Change the Climate's advertisements was not "reasonable in light of the purpose of the forum" given that the advertisements were not likely to foster illegal use of marijuana among minors and there was not a strong connection between banning the advertisements and protecting children.[100]

In cases like these, it seems likely that the public would understand that the messages were paid advertisements, so riders would not attribute the speech literally to the government. Nonetheless, there is a subtle element of government endorsement loosely analogous to a highway sign recognizing the KKK's participation in an adopt-a-highway program. If a bus rider sees an advertisement saying "Acme is the best store in town," the rider would not likely assume that the government shared or endorsed this view. In contrast, advertisements saying "women who choose abortion suffer more and deadlier breast cancer" or "marijuana is not heroin or cocaine" fall into a different category because they convey purportedly scientific information that could potentially have a direct effect on riders' health decisions. It is not likely that the average

96. *Id.* at 87-90.

97. *Id.* at 87-88.

98. *Id.* at 88.

99. *Id.* at 89.

100. *Id.* at 90.

SEPTA customer has access to a cancer journal or the training to evaluate a scientific article. Riders may believe that the government's agreement to run this advertisement, even if a third party produced and paid for it, implies some degree of validity. Most riders likely would know that transportation companies have advertising policies and assume that a vetting process occurs before an advertisement is accepted. Surely the government would not accept an advertisement it knew or suspected might mislead riders or pose a danger to public health? This issue is critically important, but the government defendants do not seem to have raised it and the courts do not consider it. In these cases the government is forced to provide a vehicle for the dissemination of information it considers harmful to public health.

The sole reference to governmental attribution in these cases was a brief portion of testimony in *Ridley*, where the school principal acknowledged that her students might be exposed to similar advertisements elsewhere in the city but drew a distinction between the two situations because "she considered the MBTA to be an extension of the school house."[101] It seems unlikely that the court would have disregarded this issue if the case involved, for example, the local Department of Public Health rather than the MBTA. It is true that a transportation authority is not charged specifically with health responsibilities in the same way as the Department of Public Health, although in *Christ's Bride* SEPTA was responding to the concerns of a federal agency that did have public health as a central goal.[102] Even if a transportation authority's obligation to safeguard public health is more attenuated than that of other government agencies, the court can consider this fact in its analysis.

There are alternate solutions to this problem that do not involve infringing on First Amendment rights. For example, either the federal DHHS or SEPTA could run counter-advertisements next to each of Christ's Bride's advertisements bearing an explicit government imprimatur stating that there is no confirmed link between abortion and breast cancer. The MBTA could run a similar counter-

101. *Id.* at 84.

102. Christ's Bride Ministries, Inc. v. Se. Penn. Transp. Auth., 148 F.3d 242, 245-46 (3d Cir. 1998).

advertising campaign warning teens of the dangers of marijuana use. This type of solution would validate the traditional notion that the solution to speech is more speech.[103] However, it requires the expenditure of government resources, and the Supreme Court has explicitly disfavored this approach: "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. . . . [T]he choice to speak includes within it the choice of what not to say."[104] In addition, placing two opposing messages alongside one another in this way implies that there is an active controversy and may lead viewers to believe that scientists have not reached consensus about the issue, when in fact one side represents the views of the vast majority.[105]

A better resolution would be to incorporate the government's interest in protecting public health into traditional First Amendment analysis. If the situation involves a public forum, courts should consider the government's role in protecting public health when evaluating whether the government has a compelling reason for engaging in content-based discrimination. Likewise, if a non-public forum is involved, public health concerns can help a court discern whether a speech restriction is reasonable given the purpose of the forum. Public health concerns should not always trump First Amendment values; in some cases it might well be appropriate to sacrifice public health goals to safeguard basic human freedoms like expression. Nonetheless, too many free speech cases do not weigh these interests at all, focusing instead on less fundamental governmental

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103. *See supra* text accompanying note 35.

104. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986).

105. Daniel Givelber has discussed this problem in the context of tobacco litigation, where "the jury may see 2 witnesses for the plaintiff who say cigarettes cause cancer and 2 for the defendant who say 'we don't know that,'" implying that there is a controversy when in fact the overwhelming majority of scientists believe that smoking can cause cancer. Daniel Givelber & Lori Strickler, *Junking Good Science: Undoing* Daubert v. Merrill [sic] Dow *Through Cross-Examination and Argument*, 96 AM. J. PUB. HEALTH 33, 36 (2006). Through this side-by-side juxtaposition of statements, tobacco companies are "disputing . . . the epidemiological equivalent of the proposition that the earth is round." *Id.*

purposes that are more easily overridden by First Amendment concerns.[106]

In *Christ's Bride*, the appellate court performs a classic First Amendment analysis without fully considering the public health implications of the advertisements or the government's unique role in protecting and promoting the public health.[107] If alerted by health authorities, SEPTA presumably would have also removed an advertisement stating "women who choose abortion live longer and have less breast cancer," because this statement is even less supported by scientific evidence than the opposing one at issue in the case. *Christ's Bride* is an ideal example of a case in which public health concerns should have been prominent in the analysis.[108] Based on its court-described policy of "permitting virtually unlimited access,"[109] it is unlikely that SEPTA was using health arguments as a pretext to suppress anti-abortion views. Given its history of accepting advertisements about a variety of controversial subjects, SEPTA likely would have accepted advertisements saying "abortion is murder" or "abortion is a woman's

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106. Other public health advocates have made similar points in different contexts. For example, Richard Daynard has argued that courts do not accord enough weight to the government's interest in protecting the public from tobacco products, although he suggests that in the wake of September 11, 2001, courts might be more willing to recognize that "a major reason we need [government] is to protect the public's health." Richard A. Daynard, *Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon*, 30 J.L. MED. & ETHICS 281, 288 (2002). Likewise, Wendy Parmet has said in the context of federalism:

> Our courts do not remind us, perhaps because they do not remember, that federalism does not exist only for itself, that governments are instituted for purposes, and that among these purposes is the preservation of the common good, which is reflected in the ancient maxim *salus populi suprema lex est* [the welfare of the people is the supreme law]. If courts understood this, it might not change their holdings, but it would at least compel them to explain just how their federalism doctrines advance at least one goal of a federal republic, public health.

Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 208 (2002) (footnote omitted).

107. *Christ's Bride*, 148 F.3d 242.

108. *See id.*

109. *Id.* at 252.

right."[110] Rather atypically among defendants in these types of cases, SEPTA was responding to express governmental concerns about scientific inaccuracy when it discontinued the advertisement,[111] so it is not clear why it did not raise a governmental interest in protecting the public health as a defense. It is more accurate to view *Christ's Bride* not as a case of viewpoint discrimination but as a case in which the government sought to avoid promoting false health information.[112]

In contrast, *Ridley* is a clear case of viewpoint discrimination because the MBTA stated that it would have run advertisements stating that marijuana use was dangerous or should remain illegal.[113] From a public health standpoint, there is no clear consensus about whether marijuana should be legal. Because marijuana is harmful, keeping it illegal can make access difficult and send a clear message that the government does not approve of its use.[114]

On the other hand, if a drug is legalized, it can be taxed and regulated, people might be more willing to seek drug treatment, and a host of health risks related to black markets can be minimized. If the only issue in *Ridley* had been the legalization of marijuana, considering public health concerns might not have obviously favored a particular outcome.[115] The government certainly could argue that it has adopted one of these two viewpoints as its own and should be able to promote it, but in this case it appears that the MBTA defended its position about the legality issue based on its advertising policies about promoting illegal conduct rather than any government interest in protecting health.[116] When the health interest is

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110. In fact, in the past SEPTA had accepted advertisements advocating adoption and providing adoption services, an advertisement that said "[K]eep Abortion Legal and Safe," and an advertisement for a pro-life hotline. *Id.* at 251-52. It had also accepted many controversial advertisements about sex, sexuality, and STDs. *Id.*

111. *Id.* at 242, 245-46.

112. *See id.* at 242, 245-46, 257.

113. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 88 (1st Cir. 2004).

114. *See infra* text accompanying notes 218-35 (discussing the notable exception of medical marijuana).

115. *See Ridley*, 390 F.3d 65.

116. *See id.* at 69.

not considered, the court's "[s]uspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government"[117] becomes much more compelling.

Unlike SEPTA, the MBTA did raise a health-related government interest regarding the advertisements allegedly encouraging marijuana use among minors.[118] The court recognized that the MBTA had an interest in protecting children but was extremely skeptical that this interest was the reason the advertisement had been rejected, especially because the MBTA previously had accepted advertisements promoting alcohol that could have been appealing to children.[119] The court seemed to believe that the MBTA's real reason for rejection was disapproval of the legalization of marijuana rather than a genuine concern for the health implications of these advertisements, in which case First Amendment concerns would be paramount.[120] The question remains how the court should balance the issues if the MBTA had credibly asserted an interest in protecting the public health as the primary reason for rejecting the advertisements.

2. *Statutory Interpretation:* Ashcroft. When these conflicts arise in the context of statutory interpretation, courts can construe statutes in ways that protect both the First Amendment and public health concerns whenever possible. In *Ashcroft v. Free Speech Coalition*, the Supreme Court considered a pre-enforcement challenge to the federal Child Pornography Prevention Act of 1996 ("CPPA").[121] The CPPA banned any visual depiction (including virtual images) of minors engaged in sexually explicit behavior and any images "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" of being such material.[122] The Court found that the CPPA was vastly overbroad; it extended beyond the established

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117. *Id.* at 86; *see supra* note 94.

118. *Id.* at 82-85.

119. *Id.* at 87-90.

120. *Id.*; *see infra* text accompanying notes 301-06 (discussing further First Amendment problems in *Ridley*).

121. 535 U.S. 234 (2002).

122. *Id.* at 241-42.

legal definition of obscenity and could encompass films dealing with teenage sex or childhood sexual abuse and many popular Hollywood movies.[123] Although the First Amendment did not protect child pornography, the CPPA would have also encompassed images that the First Amendment did protect. The Court rejected the government's argument that virtual images might lead to actual child abuse because "the causal link is contingent and indirect."[124] The Court said there needed to be a direct connection between the speech and an imminent illegal act, not just a tendency to encourage illegal acts.[125] It pointed out that many products may be used for immoral purposes but concluded that the legal response should be to ban the conduct rather than the means.[126] Further, the Court was concerned about prohibiting adults from seeing images on the ground that the images were inappropriate for children and about suppressing lawful speech as a means of suppressing illegal speech.[127] The Court used many familiar free speech concerns to preclude enforcement of a law that was likely overbroad, but it de-emphasized a government interest that might have withstood a First Amendment challenge: the protection of children from physical and psychological harm.[128]

In her dissent, Justice O'Connor attempted to strike the balance that the majority would not.[129] She endorsed much of the majority opinion, agreeing that the law was overbroad and that banning images involving adults who merely appeared to be children was problematic because it could encompass speech protected by the First

123. *Id.* at 246-50.

124. *Id.* at 236.

125. *Id.* at 236, 253-54.

126. *Id.* at 251-53.

127. *Id.* at 236.

128. *Id.* at 234-73. Public health is only one aspect of the *Ashcroft* case. Protecting children from child pornography is no doubt a government interest, but it is related to law enforcement as well as to health. Nonetheless, child abuse is widely recognized as a public health problem and, as with other health issues, both government health agencies and medical professionals are involved in its prevention and treatment.

129. *Id.* at 260-67 (O'Connor, J., dissenting).

Amendment.[130] However, unlike the majority, O'Connor would have upheld a ban on virtual images that were indistinguishable from actual child pornography because not doing so could impede prosecution of child pornographers.[131] Further, she recognized congressional findings that the consequences of such images were similar to those of actual child pornography, stimulating pedophiles and allowing them to use the materials to convince children to participate in sexual activities.[132] Frequently referring to the congressional record, she explicitly acknowledged that the government had a compelling interest in protecting children and that a ban only on images indistinguishable from actual children would be narrowly tailored enough to meet First Amendment requirements.[133]

Because the statute in *Ashcroft* was overbroad and parts of it violated the First Amendment, the Court seemed unwilling to give weight to the government's interest in protecting children.[134] Justice O'Connor, on the other hand, recognized the protection of children as a compelling interest to balance against First Amendment concerns for a narrow subset of images covered by the statute.[135] As her dissent illustrates, *Ashcroft* did not have to be an all-or-nothing case.[136] It is not clear why the majority disregarded congressional findings about the potential for abuse; perhaps the serious constitutional deficiencies of some parts of the statute influenced the Court to adopt a First Amendment absolutist stance when evaluating the rest. In any case, like *Christ's Bride*, *Ashcroft* is a case in which a court did not properly weigh the government's interest in

130. *Id.* at 262-263.

131. *Id.* at 266-67.

132. *Id.* at 263-64.

133. *Id.* at 263-65. In his dissent, Chief Justice Rehnquist agreed with O'Connor but asserted that the entire statute could have been construed in a way consistent with the First Amendment. *Id.* at 267-73 (Rehnquist, J., dissenting).

134. *Id.* at 234 (majority opinion).

135. *Id.* at 263-68 (O'Connor, J., dissenting).

136. *Id.*

public health and safety against First Amendment concerns.[137]

IV. SPEECH AS ENVIRONMENT

Professor George Wright challenges the notion that these types of cases should be conceptualized as a conflict between free speech on one hand and another value on the other.[138] He argues that most free speech cases are in fact conflicts between two competing free speech values: "[o]n a deeper level, standard free speech values are always the only values on each side of any free speech case."[139] Wright describes three such values: the pursuit of truth; "a stable, progressive, uncorrupt, and responsive democratic government;" and self-realization in relation to personal development and autonomy.[140] The last value is of particular importance because it is "at the heart of both free speech and of government regulatory interests generally."[141] Furthermore, "[b]asic government purposes and free speech values do not, at some basic level, so much conflict as correspond."[142] Wright points out that the government does not protect free speech rights for an abstract theoretical reason but because they matter in everyday life.[143]

How should the practical effects of speech influence the balancing courts must perform in free speech cases? As an example, Wright discusses *Avis Rent A Car System, Inc. v. Aguilar*.[144] In this case, the California Supreme Court considered a situation in which an Avis employee engaged in racially-motivated harassment of Latino employees, who sued him under state employment law.[145] The court upheld a lower court's decision to grant the Latino plaintiffs'

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137. *See id.* at 234 (majority opinion); Christ's Bride Ministries, Inc. v. Se. Penn. Transp. Auth., 148 F.3d 242 (3d Cir. 1998).

138. R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335, 336 (2001).

139. *Id.*

140. *Id.* at 337-38.

141. *Id.* at 341.

142. *Id.* at 343.

143. *Id.*

144. *Id.* at 356-60; 529 U.S. 1138 (2000).

145. Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 848-49 (Cal. 1999).

request for injunctive relief and prohibit the harasser from saying in the workplace a specific list of words (to be written by the trial court) deemed offensive to Latinos.[146] The U.S. Supreme Court denied certiorari, but Justice Thomas dissented from the Court's decision not to consider the case, expressing his concern about the "troubling First Amendment issues raised by this injunction."[147] Even if the First Amendment does allow prohibiting certain speech if the speech violates a state workplace harassment law, Thomas argued, the remedy in this case should be financial damages rather than the constitutionally suspect prior restraint the injunction imposed.[148]

Wright suggests that Thomas's viewpoint does not adequately address the free speech values on the plaintiffs' side of the case.[149] Wright emphasizes the damage to the self-realization of the harassed employees and believes that it should be weighed at least as much as the free speech interests of the harasser:

> [I]t is difficult to put an approximate dollar figure on the negative value of the infliction of demeaning racial epithets. Even one such incident may, in subtle but important ways, impair the victim's quality of social and political life.
>
> . . .
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> To attempt to put a compensatory dollar figure on the possible forms of inhibition, withdrawal, anger, alienation, distraction, self-censorship, and other reactions to such ethnic slurs is an exercise as much in arrogance as in irresponsible speculation.[150]

To Wright, the prior restraint approach endorsed by the California courts is the preferred one in this situation because it prevents the impediment to the employees' self-realization from ever occurring.[151] With this observation, he considers the free speech implications on the "non-free

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146. *Id.* at 848-50.

147. Avis Rent A Car Sys., Inc. v. Aguilar, 529 U.S. 1138, 1140 (2000) (Thomas, J., dissenting).

148. *Id.* at 1142-43.

149. Wright, *supra* note 138, at 357-59.

150. *Id.* at 357-58.

151. *Id.* at 356-60.

speech" side of the case.[152] Wright's approach is similar to a social constructionist argument that Kathleen Sullivan describes.[153] The central idea of this argument is that "speech constructs us and conditions our actions; it makes us who we are. Culture determines power; it is not the other way around. Speech and conduct are continuous; ideas construct reality and reflect it back."[154]

This social constructionist view, though originally not developed in the health context, is particularly useful in framing public health issues. Public health is sometimes viewed as the aggregate result of individual choices. Under this model, the primary role of the government is to educate citizens about health-related issues so they will make informed personal decisions. The government only plays a more active role when, for example, an outbreak of contagious disease requires widespread coordination and planning. This view ignores the reality of the environments in which people actually make health decisions. For this reason, many advocates have called for a more population-based approach to public health.[155] A population-wide model recognizes that people do not make choices in a vacuum. Financial limitations, social constraints, and addiction may inhibit one's ability to act on health knowledge, and even those who face fewer direct obstacles may find it excessively difficult or inconvenient to resist unhealthy cultural norms. The physical, social, cultural, and political environment in which people live has a tremendous influence on health outcomes, and the health behaviors favored by this environment will become the "choice" of most people, so a key goal of law should be not to attempt to change individual health decisions, but to alter the environment in which such decisions are made.

Applying Wright's analysis in this context, public health can be imagined as a kind of self-realization.[156] Health is, in an essential way, the foundation of autonomy.

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152. *Id.* at 357-60.

153. Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203 (1994).

154. *Id.* at 210.

155. *See, e.g.*, Jess Alderman et al., *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90 (2007); Parmet & Smith, *supra* note 32.

156. *See* Wright, *supra* note 138.

The ability to make informed decisions about matters that directly impact one's well-being as well as to preserve the capacity to make such decisions in the future is one of the most basic human dignities. To the extent that certain speech makes the environment less favorable to health, this speech impedes self-realization, and courts might consider this effect when balancing competing interests.

Although there is no doubt that speech can and does affect health in this way, this argument has serious implications that might not be apparent in *Aguilar*.[157] If courts began to attach heavy weight to self-realization, they would likely decide cases in favor of the government, the usual defendant in free speech cases and the party that can most credibly assert protection of public health as a countervailing interest. The result would be largely unrestricted government power to regulate speech on public health grounds. As previously discussed, there are many reasons this power would be a positive development for public heath. However, such power also raises significant concerns. As Sullivan warns, "there might be special dangers in trusting government to change culture . . . [It is] a non sequitur . . . [to] move from the premise that we are socially constructed to the conclusion that we should give the state a monopoly on our reconstruction. Epistemology does not entail polity."[158] Though there are advantages to the government's primary role in the health speech market, it is also a situation fraught with the potential for abuse.

V. PROBLEMS WITH GOVERNMENT POWER OVER SPEECH

The government wields a tremendous amount of power in a speech situation. Streets, sidewalks, and parks are the only settings in which the government must allow speech.[159] In other kinds of fora, the government may determine which kinds of speech to permit and may control the parameters of the forum.[160] It is only when the government has chosen to allow speech that it becomes

157. *See* Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846 (Cal. 1999).

158. Sullivan, *supra* note 153, at 214.

159. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

160. Kaplan v. County of Los Angeles, 894 F.2d 1076, 1080 (9th Cir. 1990).

subject to constitutional restraints.[161] In addition, Randall P. Bezanson and William G. Buss point out that the government is the only speaker with the ability to regulate other speakers.[162] Although a government must speak and can enhance the marketplace of ideas, it is not possible to separate completely government speech and government regulation.[163] As Sullivan observes, "[t]he government alone has a monopoly of force. If Simon and Schuster rejects you, you can go to Random House. If the government bans your novel, you may have to move to France."[164]

Further, the government is not subject to the same market forces that influence other speakers:

> [I]ts speech can persist, even dominate, a forum in the face of indifference or disagreement. It can even . . . monopolize a created forum with the government's message. Government can do this because its right to speak effectively reverses the rule of the market, placing on individual citizens the burden of regulating the government's speech activity only through resort to full-scale democratic processes . . . . In this sense the government as speaker cannot claim that it is just a "participant" in the market. Government participation necessarily alters the market.[165]

Government speech is a distinct entity shielded from the natural restraints that limit other speech. Even in a democracy, government speech realistically cannot be characterized as a reflection of the ideas of individual citizens or a collective individual expression.[166] The risks of government speech derive not from the intentions behind it but from the mechanisms it uses to produce and distribute it.[167] When the government influences the distribution of speech, there is a significant risk of distortion—an altering of the speech environment to favor the government's own message[168]—and deception.

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161. *Id.*

162. Bezanson & Buss, *supra* note 36, at 1501.

163. *Id.*

164. Sullivan, *supra* note 153, at 207.

165. Bezanson & Buss, *supra* note 36, at 1507-08.

166. *Id.* at 1504-05.

167. *Id.* at 1384.

168. *Id.* at 1491.

A. *Distortion*

1. *Distorted messages:* Rust *and* Casey. In *Rust v. Sullivan*, the Supreme Court heard a facial challenge to the federal Department of Health and Human Services ("DHHS") regulations that prohibited projects receiving funding under Title X of the Public Health Service Act from discussing abortion in the form of counseling, referral, or advocacy.[169] Title X authorized the Secretary "'to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services'" but also prohibited the use of funds "'in programs where abortion is a method of family planning.'"[170] Eighteen years after Congress passed Title X, the Secretary issued new regulations to clarify that it was meant to cover "preconceptional" services only; the result was the exclusion of abortion, prenatal care, and childbirth.[171] Grantees were required to refer patients for prenatal care but forbidden to refer them for abortion even if a patient directly asked for a referral to an abortion provider.[172] The regulations also prohibited pro-choice lobbying, disseminating materials advocating abortion, providing pro-choice speakers, and paying dues to groups that primarily advocate abortion.[173] They required separate facilities, staff, and record-keeping between Title X-funded projects and other services.[174]

The Court found that the statutory language was ambiguous because it did not directly address counseling, referral, or advocacy, but it held that the Secretary's construction was acceptable and within his statutory authority.[175] The Court found no First Amendment violation because the government

169. 500 U.S. 173, 177-80 (1991).

170. *Id.* at 178 (quoting 42 U.S.C. §§300(a)-300a-6).

171. *Id.* at 179-80.

172. *Id.* at 180.

173. *Id.*

174. *Id.* at 187.

175. *Id.* at 173-74.

> can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[176]

The government was not "suppressing a dangerous idea" but simply making sure project funds were spent correctly.[177] Further, Title X grantees were free to engage in abortion-related speech outside the scope of the project.[178] The Court also rejected the plaintiffs' claim that there was no exception for a medical emergency; it held that an emergency abortion would not be considered family planning, so the statute did not prohibit an abortion referral in such a situation.[179]

In addition, the plaintiffs claimed that the government was denying a benefit on a basis that infringed on a constitutional right.[180] The Court found that the government was not giving a benefit to anyone and not requiring anyone to give up free speech rights outside of the program's context.[181] Finally, the Court recognized that the doctor-patient relationship might enjoy significant First Amendment protection even when the government funded the care.[182] It did not address that issue because it found that Title X did not require doctors to present opinions not their own and that in this context, the relationship was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice."[183]

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176. *Id.* at 193.

177. *Id.* at 194.

178. *Id.* at 183.

179. *Id.* at 195.

180. *Id.* at 195-96.

181. *Id.* at 196.

182. *Id.* at 200.

183. *Id.* The Court also held that the regulations did not violate the patients' due process rights under the Fifth Amendment because the government was under no obligation to fund abortion referrals or services and patients could receive information about abortion outside the context of Title X. *Id.* at 201-03.

In his dissent, Justice Blackmun protested that the Court had never before upheld viewpoint discrimination imposed on those dependent on government funding.[184] He also objected to the Court permitting limitations on patient-doctor dialogue "when that regulation has both the purpose and the effect of manipulating [the patient's] decision."[185] He added that the government could not condition receipt of government funds on the surrender of speech rights when the limitation was based on the substance of that speech.[186] He also disagreed with the Court that Title X did not force doctors to become instruments of a message they might not endorse: "Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition . . . ."[187] Title X prevented doctors from telling patients about "the full range of information and options regarding their health and reproductive freedom."[188] The restrictions also were not narrowly tailored because misuse of Title X funds could be prevented through stringent bookkeeping.[189] "Finally, it is of no small significance that the speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener. One can imagine no legitimate governmental interest that might be served by suppressing such information."[190]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court considered numerous constitutional challenges to Pennsylvania's amended abortion statute.[191] This discussion will address only the informed consent provision, which required health practitioners to provide women with certain information at least twenty-four hours

184. *Id.* at 207 (Blackmun, J., dissenting).

185. *Id.* at 204.

186. *Id.* at 207.

187. *Id.* at 213.

188. *Id.*

189. *Id.* at 214.

190. *Id.* at 215.

191. 505 U.S. 833 (1992).

before the abortion.[192] This information included the nature of the procedure, the risks of both childbirth and abortion, the estimated gestational age of the fetus, a list of agencies providing abortion alternative services, and the availability of child support from the father.[193] Practitioners also had to offer the patient state-produced materials about the fetus and medical assistance for childbirth, and the patient had to give written confirmation that she was offered these materials and that they were available if she had asked to see them.[194]

The Court overruled portions of its holdings in prior abortion cases and found it constitutional for the government to require "the giving of truthful, nonmisleading information" such as that required in Pennsylvania.[195] The Court stressed that this type of information was reasonably connected to making sure the woman was fully informed.[196] The Court also found that the state could require that information about the fetus be given even though it was not directly related to the patient's health, and it noted that doctors were exempt from these requirements if they could show (by a preponderance of the evidence) that they held a reasonable belief that doing so would have a "severely adverse effect" on the patient.[197] The Court dismissed the First Amendment concerns with little discussion, concluding that these requirements were no different than informed consent requirements for other procedures.[198] To the extent that the requirements implicated doctors' speech rights, they did so only as part of regulating the practice of medicine, an area long subject to state control.[199]

Dissenting from this part of the opinion, Justice Stevens argued that the materials were clearly meant to manipulate the patient's decision and that it was constitutionally problematic to require that the information

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192. *Id.* at 881.

193. *Id.*

194. *Id.*

195. *Id.* at 882.

196. *Id.*

197. *Id.* at 883-84.

198. *Id.* at 884.

199. *Id.*

be given to all patients when it was not necessarily useful to everyone; he believed the gestational age of the fetus was particularly irrelevant in most patients' decision making.[200] He agreed with the majority that informing the woman of the risks of abortion and childbirth was neutral medical information that was constitutional to require.[201] Justice Blackmun also believed that the information was designed to influence the woman's decision and did not allow the physician to exercise professional discretion.[202] "'Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list.'"[203] Further, requiring the provision of certain information "'is the antithesis of informed consent.'"[204]

Chief Justice Rehnquist, arguing to uphold the entire informed consent provision, emphasized that there had been no assertion that the information was untrue and found that the requirements were rationally related to a legitimate government interest.[205] He added:

> That the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids the provision of such information. Indeed, it only demonstrates that this information might very well make a difference, and that it is therefore relevant to a woman's informed choice.[206]

Many scholars have written about the free speech implications of *Rust* and *Casey*,[207] although typically in the

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200. *Id.* at 921-22 (Stevens, J., concurring in part and dissenting in part).

201. *Id.* at 917-18.

202. *Id.* at 933-36 (Blackmun, J., concurring in part and dissenting in part).

203. *Id.* at 935 (quoting Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 762-63 (1986)).

204. *Id.* at 936 (quoting *Thornburgh*, 476 U.S. at 764).

205. *Id.* at 967-68 (Rehnquist, J., concurring in part and dissenting in part).

206. *Id.* at 968-69.

207. *See, e.g.*, Paula E. Berg, *Lost in a Doctrinal Wasteland: The Exceptionalism of Doctor-Patient Speech within the Rehnquist Court's First Amendment Jurisprudence*, 8 HEALTH MATRIX 153 (1998); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724 (1995).

context of abortion rights rather than from a purely public health perspective. In many ways, it is regrettable that abortion sets legal precedent for so many other public health issues because it is a highly politicized and emotional issue involving rather unique ethical and legal circumstances. In many public health debates, experts eventually reach agreement about how to identify the key public health question: for example, does cigarette smoking cause cancer and other health problems? Disagreement centers on issues such as the extent to which government should attempt to influence individual behavior, the significance of a particular health risk when compared to others, the economic and social costs of public health programs, and similar questions. In contrast, there is no consensus about how to frame abortion as a public health issue: one side focuses on eliminating the high levels of maternal morbidity and mortality that occurred when abortion was illegal, while the other side measures injury and death to the fetus. In addition, although many public health issues raise ethical concerns, few so starkly place one party's life against another's autonomy. For these reasons, abortion has become a highly charged political issue.

Courts tend to conceptualize abortion as a conflict of individual rights rather than as a public health issue.[208] Because abortion cases often set precedent for laws governing doctor-patient interactions, government involvement in individuals' health decisions, and regulation of the practice of medicine, they have a tremendous but often unnoticed impact on other public health issues. Abortion has stymied public health law in the sense that no discussion of public health law is possible without first wading through the emotional and legal conundrum of abortion cases. This is unfortunate because abortion precedents can undermine public health goals if courts apply them to situations involving other public health issues. The abortion controversy is likely the reason that Justices on both sides of abortion cases seem to avoid acknowledging some of the larger public health implications of their opinions.

The majority opinions in *Rust* and *Casey* ignore a central problem with government-mandated health speech.

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208. *See, e.g.*, *Casey*, 505 U.S. 833; Roe v. Wade, 410 U.S. 113 (1973).

They are correct that the government may choose and sponsor its own message; the government may choose to disfavor abortion if it determines that such a message is in the public interest. However, this conclusion does not resolve the issue here, as both cases seem to imply. The majorities do not consider the distortion that results in these cases. In *Rust*, the patient population consists primarily of women who likely cannot afford to seek medical care elsewhere.[209] Although it is true that the Constitution does not require the government to fund abortions for indigent women, particularly when it has determined that abortion is against public policy, it is another matter entirely for the government to block their access to private messages about legal medical options. The Court's claim that the doctor-patient relationship here is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice"[210] is questionable. The patient population dependent on Title X funds is not likely to have the knowledge or resources to seek further information elsewhere, and in fact it might be questionable whether Title X patients would regularly see another doctor at all, even for care unrelated to reproductive issues. The *Rust* majority's disregard for this fact is problematic.

Likewise, in *Casey*, the Court ignores speech market distortion. The constitutional problem in this case arises not only from the information required, but also from the unanswered questions about what information is suppressed—is a doctor free to tell patients that she disagrees with the state's information and to present alternative information? Considering this question would at least begin to address Justice Blackmun's concerns about forcing doctors to become agents of the state and place their imprimatur on state speech. The Court could then analyze whether the doctor's counter-speech would be sufficient to remedy the constitutional problem.[211] Although this question would seem to be a key issue in *Casey*, the majority simply treats the information requirement as

209. *See* Bezanson & Buss, *supra* note 36, at 1397-98.

210. Rust v. Sullivan, 500 U.S. 173, 200 (1991); *see also id.*; *supra* note 183.

211. Probably not. *See supra* note 104 and accompanying text.

regulation of medical practice and disregards its First Amendment ramifications.[212]

The dissenting opinions in these two cases also seem not to consider some of the wider public health implications of their opinions. The dissenters object that the state information is clearly meant to manipulate women's decisions, a fact that is offensive to them in the abortion context.[213] Yet manipulation of public opinion is, in fact, a central feature of most governmental speech related to public health.[214] Anti-drug campaigns seek to persuade citizens that drug use is dangerous; vaccination requirements send a message that the risks of vaccines are preferable to the risk of contracting measles, mumps, or rubella; the Surgeon General's report warns citizens that, contrary to what some have believed in the past, second-hand smoke poses serious health risks. As Chief Justice Rehnquist observed, "this information might very well make a difference."[215] Would the dissenters in *Rust* or *Casey* consider it unconstitutional if doctors were required to provide patients with information about any of these governmental messages? The answer is uncertain. Such requirements would still raise free speech issues, but the analysis should not differ simply because the subject is abortion.

2. *Recognizing Distortion:* Conant *and* Rounds I. Some federal appellate courts have done a better job of recognizing potential distortion. In *Rose*, when the Fourth Circuit ruled that offering a pro-life but not a pro-choice plate was unconstitutional viewpoint discrimination, it noted that "[b]y granting access to the license plate forum only to those who share its viewpoint, South Carolina has provided pro-life supporters with an instrument for expressing their position and has distorted the specialty

212. *Casey*, 505 U.S. at 884.

213. *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part and dissenting in part), 926 (Blackmun, J., concurring in part and dissenting in part)*; Rust*, 500 U.S. at 204 (Blackmun, J., dissenting).

214. *See infra* text accompanying notes 293-94.

215. *Casey*, 505 U.S. at 968-69 (Rehnquist, J., concurring in part and dissenting in part).

license plate forum in favor of one message."[216] This distortion was of special concern because "the State's advocacy of the pro-life viewpoint may not be readily apparent to those who see the Choose Life plate, and this insulates the State's advocacy from electoral accountability."[217] Courts have recognized this problem in other cases as well.

In *Conant v. Walters*, the Ninth Circuit reviewed a permanent injunction against the federal government granted on First Amendment grounds.[218] In 1996, California voters approved an initiative legalizing the use of marijuana for specific medical purposes.[219] The law granted physicians immunity from state prosecution for recommending or approving the use of medical marijuana.[220] Federal marijuana policy promulgated in response to the California law held that recommending or prescribing marijuana to patients was "not consistent with the 'public interest'" and would result in a loss of the doctor's license to prescribe controlled substances.[221] The federal government sent a letter to various medical associations warning their members about this policy.[222] A federal court granted the plaintiff doctors' and patients' request for an injunction against investigating a doctor or revoking a doctor's license based solely on a recommendation of medical marijuana.[223]

The government argued that a doctor's recommendation of medical marijuana would lead to illegal drug use; a

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216. Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 795 (4th Cir. 2004).

217. *Id.* "The array of choices makes the license plate forum appear increasingly like a forum for private speech. As the citizen becomes less likely to associate specialty plate messages with the State, the State's accountability for any message is correspondingly diminished." *Id.* at 799.

218. 309 F.3d 629, 630 (9th Cir. 2002).

219. *Id.* at 632.

220. *Id.*

221. *Id.* (referring to the term "public interest" as defined in 21 U.S.C.A. § 823).

222. *Id.* at 633.

223. The federal government was permitted to revoke a doctor's license for prescribing or dispensing marijuana. *Id.* The Supreme Court later held that the federal government could prosecute the users and growers of medical marijuana even though their conduct was legal in California. Gonzales v. Raich, 545 U.S. 1 (2005).

medical recommendation was likely to imply that the use of medical marijuana was acceptable.[224] The court pointed out that recommending medical marijuana did not satisfy the legal elements needed to establish either aiding and abetting or conspiracy.[225] Doctors could not be held responsible for patient behavior simply because they could anticipate patients might engage in it at a later time.[226] The court recognized *Ashcroft*'s holding that speech cannot be banned to prevent potential illegal conduct.[227] In addition, illegal conduct was not the only patient action doctors might anticipate. If patients understood that they could not access a drug recommended by their doctors, their response might be to lobby for changes in the laws, which is at the heart of First Amendment protection.[228] As the district court reasoned, "the prohibition compromises a patient's meaningful participation in public discourse."[229]

Further, the court recognized that honest and open communication between doctors and patients was "[a]n integral component of the practice of medicine."[230] In sharp contrast to the Supreme Court's stance in many abortion cases, the Ninth Circuit found that "[b]eing a member of a regulated profession does not . . . result in a surrender of First Amendment rights" and that professional speech should be afforded strong First Amendment protection.[231] Prohibiting the expression of the idea that marijuana could help a specific patient was viewpoint discrimination.[232] Significantly, the court rejected the government's argument that *Rust* and *Casey* were controlling, finding that the federal marijuana policy, unlike the abortion information requirements, interfered with doctors' exercise of their professional judgment.[233] Also, in this case the situation

224. *Conant*, 309 F.3d at 634-35, 638.

225. *Id.* at 635-36.

226. *Id.*

227. *Id.* at 638.

228. *Id.* at 634, 636-37.

229. *Id.* at 634.

230. *Id.* at 636.

231. *Id.* at 637.

232. *Id.*

233. *Id.* at 638.

was too subjective: after a conversation with their doctors about the risks and benefits of medical marijuana, some patients might believe marijuana had been "recommended" and others might not.[234] It was a First Amendment violation to forbid speech based on such a subjective, individualistic standard.[235]

A panel of Eighth Circuit judges decided the abortion information case *Planned Parenthood v. Rounds* in October 2006 ("*Rounds I*").[236] Consistent with *Casey*, the Eighth Circuit had already upheld a South Dakota law requiring information very similar to that required in Pennsylvania, and, as in *Casey*, it did not address such requirements' potential distortion of the speech market.[237] In 2005, South Dakota expanded its information requirements to mandate that two hours before an abortion the doctor must give the patient written information stating that "the abortion will terminate the life of a whole, separate, unique, living human being," that she has a legally protected relationship with this human being, and that this relationship and associated legal rights will end with the abortion.[238] In addition, the written statement had to provide information about the psychiatric risks of abortion (depression and suicide) and the patient had to sign each page of the written disclosures.[239] Also, twenty-four hours before the procedure the patient had to be provided with contact information for a nearby crisis pregnancy center.[240] Planned Parenthood sought a preliminary injunction against enforcement of the law.[241]

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234. *Id.* at 639.

235. *Id.* The court also found that professional regulation was traditionally the province of the states and that, as a federal court, it should minimize conflict between federal and state law to the extent possible. *Id.*

236. *See generally* Planned Parenthood Minn., N.D., S.D. v. Rounds, 467 F.3d 716 (8th Cir. 2006), *vacated*, 530 F.3d 724 (8th Cir. 2008).

237. Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1467 (8th Cir. 1995).

238. *Rounds I*, 467 F.3d at 719-20.

239. *Id.* at 720.

240. *Id.*

241. *Id.*

In an unusual turn, the court evaluated the scientific validity of the information.[242] The court interpreted *Casey* as holding that the required information must be scientifically and medically accurate.[243] The Eighth Circuit found that the record supported the district court's conclusion that "the challenged disclosures express a value judgment rather than medical facts."[244] Also, the state had not shown that these requirements were the least burdensome way of furthering its interest in protecting fetal life and maternal health.[245] Significantly, in this case South Dakota argued that the court could construe the law to allow physicians to dissociate themselves from the state's message, but the court disagreed that the law could reasonably be read this way.[246] The court found that even if the statute did allow doctors to disavow the state's message, constitutional problems would arise if the generally neutral and truthful information would be misleading when applied to a specific patient. Also, if the message "primarily conveys a subjective political, ideological, or moral viewpoint rather than medical facts . . . the injury [to the doctor] which results . . . would not be eliminated by simply allowing her to add her own views."[247]

The court noted that *Casey* contained an exception if the doctor believed that providing information could result in a "severely adverse effect" on the woman, while South Dakota's only exception was when informed consent was impossible to obtain.[248] The court concluded that this portion of South Dakota's law unduly interfered with doctors' medical judgment.[249] Rather than promote informed decision making, the required information here "may actually exacerbate any adverse . . . consequences of the procedure."[250]

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242. *Id.* at 723-24.

243. *Id.* at 722-23.

244. *Id.* at 723.

245. *Id.* at 724-25.

246. *Id.* at 725-26.

247. *Id.* at 725.

248. *Id.* at 726.

249. *Id.* at 725-26.

250. *Id.* at 727.

These two cases recognize the potential for government policies to cause distortion in the marketplace of ideas. In *Conant*, the court sees that not allowing a doctor to tell a patient about all treatment options has not only medical but also political consequences.[251] Further, the court affords strong First Amendment protection to professional speech to reduce governmental interference with professional medical judgment.[252] *Rounds I* is one of the few cases to evaluate the truthfulness of mandated governmental speech, suggesting that "value judgments" create more constitutional problems than scientific facts.[253] Like *Conant*, it places a high value on professional judgment and seeks to minimize state interference in the doctor-patient relationship.[254] In addition, it considers whether counter-speech is a practical solution to the distortion problem, concluding that when the required speech is something other than objective facts it causes injury to the doctor to be forced to provide the information, even if she is then able to add her own opinion.[255]

Sitting en banc, the Eighth Circuit later reversed *Rounds I*.[256] In *Rounds II*, the court required a higher standard for determining the moving party's chance of success on the merits to grant a preliminary injunction against enforcement of a statute.[257] The court recognized that affidavits in the case presented conflicting testimony concerning whether the required language about "terminat[ing] the life of a whole, separate, unique, living human being" could be classified as scientific rather than "'statements of ideology and opinion.'"[258] However, the court

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251. Conant v. Walters, 309 F.3d 629, 634, 636-37 (9th Cir. 2002); see supra notes 230-31.

252. *Id.* at 636-38.

253. *Rounds I*, 467 F.3d at 722-23; *see supra* notes 242-47.

254. *Id.* at 725-26.

255. *Id.* at 725.

256. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008).

257. *Id.* at 731-32.

258. *Id.* at 726-28 (quoting S.D.C.L. § 34-23A-10.1; Ball Aff. ¶ 2.). In its analysis of the truthfulness of the state messages, the court focused on the "terminate the life of a whole, separate, unique, living human being" language and did not directly address the required warnings about psychological distress,

considered the statutory definition of "human being," which explicitly included embryos and fetuses, and concluded that when the required language was considered in light of this definition, "the truthfulness and relevance of the disclosure

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including depression and suicide. In the midst of its discussion of the former, it approvingly quoted *Gonzales v. Carhart*: "Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort . . . . Severe depression and loss of esteem can follow." *Id*. at 734 (quoting Gonzales v. Carhart, 550 U.S. 124 (2007)).

The Eighth Circuit failed to recognize that the Supreme Court's admission in *Gonzales* suggests that at least some of the South Dakota law's required language was based on conjecture rather than scientific data. While it is likely true that some women regret having an abortion or suffer psychological consequences from terminating a pregnancy, some measure of the percentage of patients so affected would be highly relevant to a First Amendment analysis of whether a warning about serious psychological consequences of the procedure (unaccompanied by information about the likelihood of occurrence) is truthful and non-misleading. As currently worded, the South Dakota law seems to imply that severe psychological consequences are common.

There is evidence that most women do not suffer long-term psychological damage from having an abortion. *See, e.g*., Anne C. Gilchrist et al., *Termination of Pregnancy and Psychiatric Morbidity*, 167 BRITISH J. PSYCHIATRY 243 (1995) ("Rates of total reported psychiatric disorder were no higher after termination of pregnancy than after childbirth."); Brenda Major et al., *Psychological Responses of Women After First-Trimester Abortion*, 57 ARCHIVES GEN. PSYCHIATRY 777, 780-81 (2000) (finding that in a study of abortion patients two years after the procedure, most women did not suffer psychological consequences; the minority who did tended to have a prior history of depression). Other studies have shown a correlation between abortion and poor mental health. *See, e.g*., David M. Fergusson et al., *Abortion and Mental Health Disorders: Evidence from a 30-year Longitudinal Study*, 193 BRITISH J. PSYCHIATRY 444, 444 (2008) ("[A]bortion may be associated with a small increase in risk of mental disorders."); Kaeleen Dingle et al., *Pregnancy Loss and Psychiatric Disorders in Young Women: An Australian Birth Cohort Study*, 193 BRITISH J. PSYCHIATRY 455 (2008) (concluding that pregnancy loss—both abortion and miscarriage—increased substance abuse and affective disorders in young Australian women). As at least one author has pointed out, it is extremely difficult to design a study of post-abortion psychological problems that will produce accurate results because of multiple confounding variables. Brenda Major, *Psychological Implications of Abortion -- Highly Charged and Rife with Misleading Research*, 168 CAN. MED. ASSOC. J. 1257 (2003). *Cf.* Nancy F. Russo & Jean E. Denious, *Violence in the Lives of Women Having Abortions: Implications for Practice and Public Policy*, 32 PROF. PSYCHOL. 142 (2001) (finding that abortion was not related to mental health problems when researchers controlled for variables like history of abuse and partner characteristics; mental health problems may be incorrectly attributed to abortion rather than to underlying violence in abortion patients' lives).

. . . generates little dispute."[259] Therefore, it concluded that South Dakota law did not compel doctors to speak in an unconstitutional way because the information required was truthful, non-misleading, and relevant to the woman's decision whether to terminate her pregnancy.[260] The court also held that because the required language was sufficiently objective, there was no need to analyze whether doctors had the ability to dissociate themselves from the message or whether this could present a constitutional problem.[261]

The dissent echoed points made by the majority in *Rounds I*. Arguing that the South Dakota requirements far surpassed those upheld in earlier decisions like *Casey*, the dissenting opinion concluded that "the Act expresses ideological beliefs aimed at making it more difficult for women to choose abortions. . . . [T]he Act force[s] physicians to advise their patients on metaphysical matters about which there is no medical consensus."[262] In the context of abortion, even the definition of the phrase "human being" becomes morally charged and subjective, as the question of when life begins is "indeterminable as a legal matter."[263] Further, the fetus could not objectively be a "separate" being if it is dependent on the woman to survive.[264] Such ideological requirements are "unrelated to any legitimate state interest in regulating the practice of medicine" and thus fail to pass constitutional muster.[265] The majority opinion "presupposes that all speech is demonstrably either true or false, overlooking the vast expanse of ideas that lie beyond means of proof."[266]

Finally, the dissent concluded that the law's requirement that doctors certify that the patient has understood the information "does not provide a realistic opportunity for the

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259. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735-36 (8th Cir. 2008).

260. *Id.* at 736.

261. *Id.* at 737.

262. *Id.* at 740-41 (Murphy, J., dissenting).

263. *Id.* at 745.

264. *Id.* at 744.

265. *Id.* at 743.

266. *Id.* at 746.

expression of alternate views" and thus limits their ability to dissociate themselves from a state message with which they might disagree.[267] Even if this were not the case, "[v]iews articulated by a doctor in the course of face to face contact with a patient . . . are, if anything, more likely to be attributed to the speaker than the well known slogan affixed to a state issued license plate."[268] Given this line of reasoning, there was a reasonable enough chance that Planned Parenthood would prevail to allow a preliminary injunction.[269]

Because *Rounds II* found that the information in this case was truthful and non-misleading,[270] it presumably did not contradict the *Rounds I* holding that requiring doctors to provide subjective information is more constitutionally problematic than requiring objective information.[271] However, the dissent's discussion of the subjectivity of the information required by the South Dakota law[272] raises questions about how extreme an information requirement must be before a court will recognize it as ideological. Without such recognition, it is more difficult to trigger constitutional scrutiny. In addition, the court is less likely to consider the question of opportunities for speaker disassociation or counter-speech if it finds the required information to be truthful. The promise of *Rounds I* was unfortunately lost when the *Rounds II* majority failed to recognize distortion and disregarded its consequences.

3. *Signaling Distortion.* In *Rounds*, regardless of whether leaving counter-speech as the only remedy to distortion was constitutionally sufficient, it was at least feasible under the circumstances. In other cases, it is often not practical or possible to expose distortion. For example, in *National Endowment for the Arts v. Finley*, a group of artists claimed, *inter alia*, that the federal law governing funding for the arts was overbroad under the First

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267. *Id.*

268. *Id.* at 747.

269. *Id.* at 753.

270. *Id.* at 735-36 (majority opinion).

271. *Rounds I*, 467 F.3d at at 722-24; *see generally* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008).

272. *Rounds II*, 530 F.3d at 740-46.

Amendment.[273] The standards used to award competitive artistic grants were merit, excellence, and "decency and respect for the diverse beliefs and values of the American public."[274] The Supreme Court upheld the funding scheme, finding that it did not constitute viewpoint discrimination and that the government was acting as patron rather than regulator.[275] Bezanson and Buss state that it seems less likely in *Finley* than in *Rust* that the government has monopolized a part of the marketplace of ideas.[276] Nonetheless, they observe:

> [T]he indecency consideration might influence the expression of artists who hope to receive federal subsidies. Yet the viewing public will ordinarily not know that such an influence has taken place and, thus, . . . [they] will assume that . . . [the art] represent[s] the unmodified expression of individual artists. . . . [T]he government's vague anti-indecency message, expressed through individual artistic authorship, would be effectively hidden.[277]

How could this distortion be communicated to the public? Bezanson and Buss suggest that artists or exhibit organizers might post signs next to funded works of art in exhibits.[278] It might also be possible to launch a media campaign or to run advertisements in major media outlets. "It is doubtful, however, whether there will be a strong motive to provide these clarifying communications or, if they are made, whether they would be effective in removing the distortion caused by the government's role."[279]

Given the constraints of Title X-funded projects, how might health providers in *Rust* make their patients aware of the distortion? Title X expressly forbade them from discussing abortion when using Title X funding.[280] One possibility might be meticulous bookkeeping (as Justice

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273. 524 U.S. 569, 569 (1998).

274. *Id.*

275. *Id.* at 571.

276. Bezanson & Buss, *supra* note 36, at 1460.

277. *Id.* at 1460-61.

278. *Id.* at 1462.

279. *Id.*

280. Rust v. Sullivan, 500 U.S. 173, 177-80 (1991).

Blackmun suggested in his dissenting opinion) and clear separation of Title X and non-Title X services.[281] Also, a non-Title X provider could make patients aware of her presence and tell them to speak to her if they wished to discuss abortion. Bezanson and Buss suggest that pro-choice advocates could stand outside clinics and distribute information about abortion services.[282] All of these methods are possible; it is less clear how much they will counteract the government's distortion of the marketplace of ideas.[283] Courts should monitor the potential of government speech to cause distortion in each case and evaluate whether there are practical ways to address it. Whenever possible, courts could choose a resolution that minimizes this impact.

Seeking to minimize distortion will not resolve the problem completely. A free and robust exchange of ideas exists only in theory; in real-life settings, factors like social inequality, power imbalances, and simple lack of will make it unlikely that removing specific government-imposed barriers to speech will guarantee that it is heard. In the specific context of abortion counseling, health care providers often have a personal motivation and professional obligation to present all options to patients, making it likely that more information would be available to patients in the absence of government-imposed limits. However, in many or even most situations, one cannot be sure that listeners would receive full information absent the specific government distortion in the case at hand.

Cass Sunstein has observed that courts often favor the common law status quo and government neutrality or inaction out of a sense that they are preserving a kind of "natural" social order whose manipulation would raise

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281. *Id.* at 214 (Blackmun, J., dissenting); *see supra* note 189.

282. Bezanson & Buss, *supra* note 36, at 1397.

283. Also, it would be useful to determine whether the amount of burden on the counter-speaker should affect the constitutional analysis; should some very high level of burden be considered constitutionally equivalent to banning counter speech outright? The *Rust* situation is also further complicated by the fact that the government is denying patients access not just to information about other options, but to information about an option that is itself a constitutionally protected right. *But see supra* note 183.

constitutional concerns.[284] This view does not recognize that current social conditions or organization may themselves be the product of past laws, policies, or cultural assumptions, so it is problematic to use common law as the baseline when analyzing constitutional challenges. In the context of the First Amendment, regulation of "powerful private speakers" could actually enhance freedom of speech, but such an approach

> would wreak havoc with existing first amendment doctrine . . . . [T]he central commitment of the first amendment . . . is to neutrality on the basis of content or viewpoint . . . . The problem of deciding who is powerful and who is not is too manipulable and too likely to be skewed by impermissible factors to be the basis for first amendment doctrine.[285]

Because there is no simple way to resolve this dilemma, the best workable solution remains for courts to minimize governmental exclusion of any speaker from the speech market.

4. *Dimensions of Distortion: Deep Capture.* The public may assume that a desire to protect public health based on objective evaluation of current scientific evidence motivates government speech. The public is also likely aware that if a health issue becomes controversial, the government also will have political motivations for its stance. Citizens might not be aware of the extent of external influence on the government about seemingly less controversial health issues. The term "capture" is used to describe situations in which a branch of government has a close relationship to third parties, often representatives of a large industry.[286] Due to industry lobbying and support in the form of

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284. Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 882 (1987). Sunstein suggests that this concept originated in the famous *Lochner* case (now overturned) in which the Court struck down a New York law limiting the working hours of bakers because it interfered with the right to contract and there was no direct relationship between the law and the state's health objective. Lochner v. New York, 198 U.S. 45 (1905).

285. Sunstein, *supra* note 284, at 914-15. This also invokes Kathleen Sullivan's point, discussed *supra*, that if social conditions are unjust it does not follow that the government should be the entity specially empowered to remedy the injustice. *See supra text accompanying* note 158.

286. GEORGE STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 8 (1988).

financial contributions or increased political power, government law and policies often reflect the interests of industry rather than of the people at large.[287] For example, the design and content of the United States Department of Agriculture's well-known "Food Pyramid" is heavily influenced by the meat and dairy industries and does not reflect objectively accurate nutritional information.[288]

The term "deep capture" refers to a scenario in which an outside entity has a powerful influence not only over the situation but also over the way in which the situation is analyzed and perceived.[289] An industry might strongly influence how the public perceives a public health issue, drawing attention away from "industry-shaped social conditions and beliefs" that actually cause health risks or impede solutions to health problems.[290] Governmental distortion of speech may obscure not only the government's hidden influence, but also that of unknown powerful entities completely immune from the political process, making it all the more compelling for courts to be aware of the potential for distortion and its effects on the speech market.

B. *Deception*

Underlying modern conceptions of the First Amendment is an assumption that more speech is always better. In the marketplace of ideas, bad ideas will eventually lose, so the harm they might cause is outweighed by avoiding the exclusion of good ideas from the marketplace, particularly when it is not always initially obvious which ideas are good or bad. At least in theory, a similar ideal guides scientific inquiry: all hypotheses are equal until some become accepted as theory after passing

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287. This why some commentators claim that political accountability to voters in general is an illusion. It also has serious implications for commercial speech because the government is unlikely to regulate the advertising of an industry that has "captured" it. *See, e.g.*, Yosifon, *supra* note 32.

288. MARION NESTLE, FOOD POLITICS 51-66 (2003).

289. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 218 (2003).

290. Alderman et al., *supra* note 155, at 102; *see also* Hanson & Yosifon, *supra* note 289, at 220-23.

the rigors of the scientific method. Because scientific data informs and shapes it, public health policy might follow a similar model of encouraging open debate about issues until a particular policy emerges as the successful one that the government should endorse. In fact, the goals behind public health policy often provide an incentive for the government to actively suppress ideas and engage in deception.[291]

When the government speaks in a public health context, it often does so in the role of health educator, both directly though the press, reports, and schools, and indirectly through its policies, laws, and programs. Improving the public's knowledge about health issues is a goal of such speech, but it is not the only goal. It would make little sense to have a public well-versed in health matters if the population remained unhealthy; ultimately, the goal of public health policy is actually to improve health. Leonard H. Glantz wonders if the goal of public health programs is "to have a citizenry that behaves the way public health agencies think people ought to behave or a citizenry that has enough information to make knowledgeable choices."[292] As Daniel I. Wikler explains, "when health education programs are evaluated, they are not judged . . . in proportion to their success in *inducing belief*. Rather, evaluators look at *behavior change*, the actions which, they hope, would stem from th[o]se beliefs."[293] This focus creates an incentive for the government not to be forthcoming with all relevant information because ultimately it wishes to create a change

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291. In their work, Bezanson and Buss use the term "deception" to mean "avoid[ing] fully disclosing that the government is behind the communication in question." Bezanson & Buss, *supra* note 36, at 1491. This article will use the term to describe a situation in which the government withholds information when developing policy or communicating messages to the public.

292. Leonard H. Glantz, *Control of Personal Behavior and the Informed Consent Model*, *in* KENNETH R. WING ET AL., PUBLIC HEALTH LAW 507, 511 (2007). As an example, Glantz asks, "[S]hould the goal of public health be to ensure that nobody smokes cigarettes, or should the goal be to ensure that everybody knows the risks of cigarette smoking . . . ?" *Id.* This example seems out of place in this context because smoking is addictive. When addiction is involved, people often cannot make their behavior conform to their knowledge, so a public health focus on behavior rather than education seems much more appropriate.

293. Daniel I. Wikler, *Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life-Styles*, 56(3) HEALTH & SOC'Y. 303, 328 (1978).

in behavior; it will have an incentive only to disseminate the information it believes is likely to induce the desired effect. Health education is merely the means employed to achieve this end rather than an end in itself. Health programs are not merely providing information but also "manipulating attitude and motivation."[294] Wikler even suggests that "health education may call for actual and deliberate *mis*information: directives may imply or even state that the scientific evidence in favor of a given health practice is unequivocal even when it is not."[295] Glantz agrees that if goals are behavioral, "truth-telling could be counterproductive."[296]

Compounding this problem, Wikler observes, is that the general consensus about public health measures tends to have a moral undertone.[297] "The intrusion of non-medical values is evidenced by the fact that of all of the living habits that affect health adversely, only those that are sins . . . are mentioned as targets for change. Skiing and football produce injuries as surely as sloth produces heart disease . . . ."[298] Likewise, Glantz notes that much of what we would now call health behaviors (for example, drinking alcohol) originally entered the legal realm as moral issues and that historically the two were often intertwined.[299] He states that public health interventions should be based on scientific evidence, which could minimize hidden or subconscious moral motivations.[300]

The marijuana advertisement in *Ridley* provides an example of these concerns.[301] Although experts have recently recognized drug addiction as a disease requiring treatment, the public historically condemned it as a moral failing and considered drug addicts to be "bad" people. In *Ridley*, the court believed that the real reason the MBTA rejected the advertisement was "distaste" for the views it

294. *Id.*

295. *Id.* at 329.

296. Glantz, *supra* note 292, at 511.

297. Wikler, *supra* note 293, at 316.

298. *Id.*

299. Glantz, *supra* note 292, at 508.

300. *Id.*

301. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004).

expressed;[302] the court may have suspected a moral judgment behind the MBTA's refusal to run the advertisement. In any case, even if the government had no moral motivation, its incentive for deception in this situation is high. As discussed earlier, from a public health standpoint there may be good arguments on both sides of the legalization issue, but there is strong scientific evidence that using marijuana is harmful to one's health.[303] If the government's goal is to discourage marijuana use and it determined that this advertisement undermined that goal, particularly by using a rational-sounding argument about legalization to disguise a more subtle pro-use message, then the government should logically reject it.

There may have been an even more compelling reason for the MBTA to reject this particular advertisement because the text read in part, "Marijuana is *NOT* cocaine or heroin. Tell *us* the truth . . . ."[304] If the government's goal is to prevent marijuana use, it would prefer not to tell the truth in this situation. Admitting that marijuana is not as harmful as other drugs might make it appear to be safer than it is or lead someone to believe that it is unlikely to cause the types of problems that heroin and cocaine cause. It is true both that marijuana is harmful and that marijuana is not as harmful as heroin or cocaine, but the government has an incentive to disseminate only the former message while suppressing the latter.[305] If the government wants to discourage marijuana use, especially among

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302. *Id.* at 87-88.

303. Using marijuana for specific medical purposes, as in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), could enhance health, but this type of use was not at issue in *Ridley*, 390 F.3d 65.

304. *Ridley*, 390 F.3d at 73.

305. The government is not the only public health speaker with a motive to deceive in this context. For example, the American Cancer Society's oft-quoted statistic that 1 in 8 women will get breast cancer is based on the risk that a female infant will get the disease at some point in her lifetime. WING ET AL., *supra* note 292, at 516. In comparison, the actual risk for women ages 30-39 is 1 in 229 and for women ages 60-69 is 1 in 26, leading some critics to charge that the society was manipulating the statistic to sound more alarming. *Id.* at 517. The American Cancer Society maintained that it was doing a public service by calling patients' attention to the disease, thus encouraging prevention and screening. *Id.*

teenagers prone to risk-taking, it has a strong motivation to resort to deception in this situation.[306]

In his dissent in *Rust*, Justice Blackmun observed, "It is crystal clear that the aim of the challenged provisions–an aim the majority cannot help noticing–is not simply to ensure that federal funds are not used to perform abortions, but to 'reduce the incidence of abortion.'"[307] Such a goal is hardly unique among public health measures, but Justice Blackmun was correct to be concerned about the First Amendment implications of this type of purpose. When a public health goal has a primarily moral dimension, First Amendment concerns are paramount and courts should apply them with full force. Even when there is no morality-driven motivation, courts must be alert for deception antithetical to the First Amendment.

This situation might seem to involve a direct conflict between free speech values, which favor full information and the free flow of ideas, and public health goals, which may justify deception with the equally valuable interest of protecting the public from danger and disease.[308] Upon further reflection, however, these two types of interests might not be in conflict after all. Free speech can promote public health as much as interfere with it, so the free flow of ideas may better serve public health in the long term.[309] Also, governmental deception exposed in one situation may undermine trust in the government in other contexts, which could have a negative net impact on health goals. Finally, there may be some public health issues in which there are both benefits to and risks of each potential course of action. In these circumstances, sharing full information is the only way to allow individuals to make an informed choice or to

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306. However, deception about one issue may decrease the government's credibility about other issues, potentially reducing its motivation to deceive. *See infra* text accompanying note 309.

307. Rust v. Sullivan, 500 U.S. 173, 216 (1991) (Blackmun, J., dissenting) (quoting 42 C.F.R. § 59.2 (1990)).

308. Also, justifications for public health interventions are often criticized as being paternalistic, a problem not faced by First Amendment absolutists.

309. Parmet & Smith, *supra* note 32, at 406-07 ("[B]road First Amendment protection may be supportive, if not necessary, for the development of an informational environment that safeguards public health. . . . [In the case of the AIDS epidemic], the broad protections offered by the First Amendment helped to ensure the availability of information that the public needed . . . .").

explain the circumstances under which one option is preferable to another.

C. *Abuse of Power*

Distortion and deception are closely related to underlying concerns about governmental motives. Trust plays a key role in the effectiveness of government speech.[310] Despite the primary role of the government as a public health speaker, overall public trust in the government may vary over time. Like any other speaker, the government is not always right, and to the extent that the public perceives that its messages are inaccurate or incomplete, its voice will carry less force. The government must always acknowledge and take responsibility for its factual mistakes if it is to retain its credibility and authority.

In addition, the United States government has a history of morally dubious programs carried out in the name of public health: Tuskegee,[311] Willowbrook,[312] the Jewish Chronic Disease Hospital study,[313] and mass involuntary sterilization of "undesirable" people[314] are among the unfortunate incidents that cast a shadow on the

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310. *Id.* at 391.

311. *See, e.g.*, JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT (1993) (describing a forty-year federal government project beginning in the 1930s that studied the progression of syphilis in a group of African-American men who were left untreated for decades, even after antibiotics became the widely available standard of care). President Clinton later apologized to the study survivors for the government's behavior. Press Release, The White House, *Remarks by the President in Apology for Study Done in Tuskegee* (May 16, 1997), *available at* http://www.cdc.gov/tuskegee/clintonp.htm.

312. *See, e.g.*, DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS (1984) (discussing how mentally retarded children in a New York State institution were deliberately infected with hepatitis in the 1960s).

313. *See, e.g.*, NATHAN HERSHEY & ROBERT D. MILLER, HUMAN EXPERIMENTATION AND THE LAW 6-7 (1976) (describing a federally funded study in 1963 in which live cancer cells were injected into indigent elderly patients without their knowledge or consent).

314. *E.g.*, Buck v. Bell, 274 U.S. 200 (1927) (authorizing forced sterilization of Carrie Buck, a "feeble-minded" woman). Carrie Buck was in fact of normal intelligence. In this case "feeble-minded" implied sexually promiscuous, but Buck was pregnant as the result of a rape. In the half century following this case, the U.S. government involuntarily sterilized more than 60,000 Americans. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 31, 53-54 (1985).

government's motivations. As a result of programs like these, some segments of the population remain highly suspicious of governmental health interventions and resist government involvement in community public health issues.[315]

Some commentators have also pointed out that, in the wake of fears about terrorism and governmental preparedness, plans to address a major public health issue like an infectious pandemic reveal an attitude that is at best disturbing and at worst unconstitutional. "Given the data from real world events, public opinion surveys, and mock exercises, it is quite remarkable that some public health officials are still at home with draconian nineteenth-century quarantine and compulsory treatment methods."[316] Public health officials often have a mindset that protecting the public effectively means erring on the side of restricting those who may not pose a threat to others, but this view is at odds with legal standards and cultural norms. "[A]buse of power will predictably destroy public trust and instill panic."[317]

A similar argument can be made in the context of free speech. Some public health authorities may believe that controlling information is the best way to protect citizens, and in a limited sense they may be right, but the potential for paternalism and abuse in such a situation is obvious. Further, if the public knows or suspects that the government is withholding information, trust in the government will erode, undermining both its authority and effectiveness. This loss of confidence in government will have long-term consequences that can only have an overall negative impact on public health. In times of public health emergency, the temptation to subvert other concerns to health will be strong, but it is in such moments that it is most important to recognize constitutional rights like free speech. Protecting these rights during a crisis is the way a

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315. For example, the media has reported that due to the legacy of incidents like Tuskegee, many African-Americans do not trust the government to protect their health. JONES, *supra* note 311, at 220. As a result, some African-Americans believe that HIV/AIDS and associated preventive measures "are part of a conspiracy to wipe out the black race." *Id.* at 221.

316. George J. Annas, *The Statue of Security: Human Rights and Post-9/11 Epidemics*, 38 J. HEALTH L. 319, 341 (2005).

317. *Id.*

culture expresses its conviction that such rights are fundamental rather than formalities.

VI. GOVERNMENT FUNCTIONS OUTSIDE THE PUBLIC HEALTH CONTEXT

The protection of public health is only one of the government's many functions. In some cases the government seeks to suppress the health messages of others not because they conflict with is own health goals but because they interfere with other governmental functions that it prioritizes in a particular situation. In *AIDS Action Committee v. Massachusetts Bay Transportation Authority*, the MBTA ran a series of seven AIDS prevention public service advertisements created by the AIDS Action Committee ("AAC"), a non-profit AIDS education organization.[318] These advertisements featured pictures of condoms and contained sexual innuendo in the text, and the MBTA received more than thirty-six complaints.[319] A year later, the MBTA developed an advertising guideline policy which stated, in part, that it would follow statutory guidelines for broadcast and private sector advertising, meaning that it would accept advertisements only if the average person applying contemporary community standards would not find that they appealed to a "prurient interest" and if the advertisements did not offensively describe sexual conduct as defined in the statute.[320] The MBTA also would not accept advertisements that contained graphic messages or representations of sexual conduct.[321]

Later that year, AAC submitted a new series of advertisements.[322] Under the new policy, the MBTA rejected some of these and requested revisions of others based on their sexual content.[323] AAC refused to make the revisions and sued the MBTA, citing First Amendment

318. 42 F.3d 1, 3 (1st Cir. 1994).

319. *Id.*

320. *Id.* at 3-4.

321. *Id.* at 4.

322. *Id.*

323. *Id.* at 4-5.

violations among its claims.[324] The MBTA defended its rejection of the advertisements based on not offending a captive audience of MBTA riders and on protecting children from their sexual content, although its policy did not mention either of these issues.[325] AAC said it had used a particular type of sexual humor because it had proven effective with the target audience, and it presented letters of support from the state Department of Public Health, the governor, and the Assistant U.S. Surgeon General affirming the value of its approach.[326] The court also pointed out that the MBTA had run advertisements for the movie "Fatal Instinct" with similar sexual innuendos around the same time that it rejected the AAC advertisements.[327]

The First Circuit did not determine which type of forum the advertising space was, but it rejected the MBTA's claim that the refusal was based on a content-neutral, narrowly tailored manner regulation.[328] A manner restriction must be content neutral, but this policy discriminated based on the content of the advertisements.[329] The court explained that it was difficult to forbid "sexually explicit or patently offensive" expression without banning content as well.[330] Most significantly, the MBTA had accepted other advertisements with sexual innuendo, which was a violation of content neutrality.[331] The court found that the "Fatal Instinct" advertisements were at least as explicit and more visually provocative than those of AAC.[332] The court believed that the MBTA had rejected AAC's advertisements because they generated controversy, but ultimately the

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324. *Id.* at 5.

325. *Id.* at 5-6.

326. *Id.*

327. *Id.* at 5.

328. *Id.* at 8-9.

329. *Id.* at 8-9.

330. *Id.*

331. *Id. at* 9-13.

332. *Id.* at 10. In addition, the court noted that the "Fatal Instinct" advertisements were less protected under the First Amendment because, unlike AAC's advertisements, they were commercial speech. *Id.* Neither the parties nor the court appeared to recognize that this film was a parody of other popular movies such as "Basic Instinct" and "Fatal Attraction" and thus the sexual content of the advertisements was meant to be tongue-in-cheek.

reason did not matter.[333] This kind of content discrimination gave the appearance of viewpoint discrimination, so it would be prohibited even if the MBTA's advertising space were a non-public forum.[334] The MBTA might be able to ban sexual innuendo, but it must do so in a neutral fashion.[335] Therefore, the court upheld the lower court's injunction against the MBTA policy.[336]

In *National Abortion Federation v. Metropolitan Atlanta Rapid Transit Authority*, the National Abortion Federation ("NAF") sought to place pro-choice advertisements on city buses run by the Metropolitan Atlanta Rapid Transit Authority ("MARTA").[337] MARTA refused to accept them based on its policy not to accept any advertisement that "supports or opposes any position in regard to a matter of public controversy," defined as an issue widely covered by media that "arouses strong feelings in a substantial number of people."[338] A federal district court in Georgia found that MARTA had consistently rejected political advertisements but had accepted a wide range of advertisements on socially controversial topics such as AIDS awareness and gay rights.[339] It had also accepted advertisements for pregnancy and adoption centers.[340] Therefore, the court found that MARTA's advertising space was a public forum.[341] MARTA claimed an interest in protecting passengers from violence, but the court found that the risk of violence was too remote to be compelling here because MARTA had not shown that there was a credible threat or that violence had erupted in other cities that had accepted the advertisements.[342] Therefore, MARTA's content-based rejection of the advertisements

333. *Id.* at 12.

334. *See id.* at 11-12.

335. *Id.* at 13.

336. *Id.*

337. Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F. Supp. 2d 1320 (N.D. Ga. 2000).

338. *Id.* at 1324.

339. *Id.* at 1326.

340. *Id.*

341. *Id.*

342. *Id.* at 1327.

could not stand.[343] The court also found that MARTA's policy was void for vagueness and implied that it was overly broad, granting NAF a permanent injunction.[344]

It does not appear in either of these cases that the government's motivation for rejecting the advertisements was related to an underlying health agenda; MARTA and the MBTA simply wanted to avoid controversy. In fact, in the MBTA case several other branches of government had endorsed the advertisements,[345] creating an unusual situation in which the MBTA stood in opposition to divisions of the government specifically charged with protecting the public health. In contrast to *Ridley*, here the MBTA is no "extension of the school house"[346] but simply a transportation authority trying to maximize revenue and minimize hassle by avoiding offending its riders; it felt no obligation to further AAC's public health goals. It is not clear why the MBTA took a different stance in *AIDS Action* than in *Ridley* a decade later, but in any case the different reasons it gave for rejecting the advertisements had very different public health implications. In both *AIDS Action* and *NAF v. MARTA*, First Amendment and public health values are in harmony with each other.

VII. SUMMARY

Of the many voices speaking about public health in the marketplace of ideas, the government's voice will always be distinctive. Because its opinion carries so much weight, and because it is specially charged with the protection of public health, the government must be able to determine its own message. The government needs not only the obvious ability to choose what it will say but also the ability to distinguish its message from those of others. Whenever it is constitutionally permissible, courts should allow the government wide latitude to decline to become a vehicle for speech that contradicts its own. In a case like *Christ's*

343. *Id.*

344. *Id.* at 1327-28.

345. AIDS Action Comm. of Mass. v. Mass. Bay Transp. Auth., 42 F.3d 1, 5-6 (1st Cir. 1994).

346. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 84 (1st Cir. 2004); *see supra* note 101.

Bride, where the government is trying to prevent the dissemination of inaccurate information to the public, it does not appear to be doing so as a pretext for viewpoint discrimination, and there is a reasonable fear that some form of government endorsement, however removed, may be implied, the state should be allowed to decline the use of its resources to broadcast another's message.

Courts must also recognize that the government alone can regulate others and isolate itself from market forces that constrain other speakers. The government as speaker has the power to distort the speech market and to deceive listeners. An ideal solution would be to require the government to alert listeners about distortion and deception, but such a requirement is not possible. There are no legal grounds for mandating such action by the government, and even if there were such grounds, there is not always an obvious way to indicate that distortion or deception might be present.

A more realistic approach is for courts to prevent the government from blocking other avenues of communication as it sends its own message. For example, in abortion information cases like *Casey* and *Rounds*, the government can mandate that truthful information be given, but it should not be able to prevent medical personnel from adding their own views. To the extent that courts find a requirement that medical personnel themselves deliver the state's message unconstitutional, the state might appoint a specific agent to deliver its own message. *Rust* is a more difficult situation because it involves government funding; courts could not require the government to pay for speech it does not endorse. Intricate physical arrangements and complex bookkeeping might be the only solution to this problem, although it would be of limited use in a situation in which third parties lack the inclination to call patients' attention to the message they are not hearing.

Cases like *Conant* and *Rounds I* are good examples of how courts can recognize the potential for distortion and, on free speech grounds, limit governmental restrictions or mandates on others' speech. *Ridley* demonstrates that, although a court should give a state's public health concerns due consideration, they will not always outweigh free speech concerns, particularly when there is viewpoint discrimination and a possible ulterior motive for the state

to suppress others' speech. As Justice O'Connor demonstrated in her *Ashcroft* dissent, sometimes a compromise between the two is possible.

Finally, because the government has many functions, it may sometimes suppress others' public health speech not because the government opposes the message or prefers to convey its own message but because it is asserting an interest other than protecting the public health. In such cases First Amendment and public health arguments tend to be aligned, so applying traditional First Amendment neutrality and reasonableness tests should provide a satisfactory resolution.

CONCLUSION

Government speech plays a critically important role in communicating health information and in shaping the public's health beliefs and behavior. When the government's duty to protect the public health seems either to conflict with or to complicate its duty not to restrict the speech of others, judges should not completely disregard public health in favor of free speech concerns. Courts traditionally have not included health concerns in First Amendment analysis. This discussion has identified three categories of free speech and health cases and explained how courts can consider the public health implications of their decisions in each.

Free speech and public health need not be in opposition to one another, nor is it necessary to rewrite First Amendment jurisprudence to integrate public health and free speech concerns. When courts view cases from a public health perspective, both the benefits and risks of governmental power become clearer. It is necessary for the government to be able to choose and communicate its own message without being forced to provide a means of promoting others' viewpoints. On the other hand, because the government holds a great deal of power over speech markets in general and public health dialogue in particular, courts must limit its ability to distort or suppress ideas in the many circumstances in which others' speech will not be attributed to the government. In the long term, a speech market in which the government's own clearly delineated message co-exists with the ideas of others is the best arrangement to promote both public health and free speech.