

21 Health Matrix 189, *

omitted). Smokers and other opponents of tobacco regulation are suspicious of these justifications and "detect the unmistakable signature of animus toward the cultural values that smoking expresses." *Id.* at 137. Opponents of smoking regulation, meanwhile, also publicly conform their arguments to the norm of public reason, pointing to studies which show that smoking actually reduces public health care expenditures (because smokers die much younger than non-smokers), or by arguing that because drinking and driving causes far more harm than does second-hand smoke, public health advocates should turn their attention to restricting drinking in bars rather than forbidding smoking in bars. *Id.* at 138-39. Advocates of tobacco regulation look past such secular arguments and see instead opponents motivated by "a constellation of negative values, such as weakness, crudeness, and irrationality, along with a culpable heedlessness of social obligation." *Id.* at 137.

n50 But see Ackerman, *supra* note 41, at 20-21. Ackerman argues that the norm of public reason is not all that difficult for humans, as is evidenced by our continual compliance with the myriad discourse norms that govern different aspects of our lives:

To be a competent social actor, I must constantly engage in a process of selective repression-restraining the impulse to speak the truth on a vast number of role-irrelevant matters so as to get on with the particular form of life in which I am presently engaged. . . . Rather than assault the very idea of role playing, it seems wiser to seek relief in the marvelous human capacity to shift role engagements over time. I can be a lawyer, teacher, construction worker, father, baseball coach-as well as a liberal citizen.

Id. The difference between Ackerman and Kahan is the difference between intuition and social science. Ackerman's common sense leaves him confident in our capacities for objectivity; Kahan relies on experimental evidence demonstrating that in important ways that confidence is misplaced.

n51 As with advertising, corporations are as a matter of constitutional law entitled to engage in this political speech. See *The Public Choice Problem in Corporate Law*, *supra* note 8.

n52 For example, junk food corporations have spent millions of dollars to fund a substantial amount of political speech organized through issue advocacy groups, political advertising, and local, state, and federal lobbying efforts. See generally MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION, AND HEALTH* (Darra Goldstein ed., 2002) (reviewing food industry efforts to influence food regulation); MICHELE SIMON, *APPETITE FOR PROFIT* (2006) (reviewing food industry influence on political process). In these arenas the industry has not argued against restrictions on the sale and advertising of junk food on the grounds that such regulations would diminish profits and would be bad for their shareholders. Instead, the industry has in its political speech adopted a public interest idiom that has focused on the idea that restrictions on junk food regulations should not be adopted because they would undermine individual responsibility and diminish consumer choice. See *Broken Scales*, *supra* note 25, at 1769-1802. Among other accomplishments, these efforts have resulted in the adoption of laws forbidding lawsuits against food corporations for obesity-related harms in at least twenty-three states. David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 365 (2007).

n53 See, e.g., Steven Brill, *On Sale: Your Government. Why Lobbying is Washington's Best Bargain*, TIME, July 12, 2010, at 28. Brill quotes Dave Wenhold, President of the American League of Lobbyists:

If you banned all lobbying tomorrow, the legislative process would grind to a halt. You can call us special interests, but the ones who are especially interested are the ones who can explain the consequences of writing a bill this way or that way. We make the system work.

Id. at 28. Another trade-association executive interviewed by Brill argued:

Most members [of Congress] may know one or two issues well, if that. Then you have a 26-year old kid, maybe he's sic even 30 and went to a good law school, who's on the staff working 10 hours a day and is supposed to tell his sic boss how to do derivatives regulation or credit-card reform. Are you kidding?

Id. at 32.

n54 Many studies describe a widespread "distrust" of corporations. See, e.g., Fairfax, *supra* note 26, at 787.

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