



## Why Doesn't Commercial Speech Count As Free Speech?

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In 2007, I was involved in preparing evidence on the impact of a government-mandated disclaimer on consumers for a Florida court case. My colleague, Professor J. Scott Armstrong, and I commissioned fieldworkers to show two advertisements to Florida shopping mall visitors. The ads were for implant dentistry services.

One of the dentists made no claim to credentials for performing implants. The other advertised his qualifications from the American Academy of Implant Dentistry (AAID). The version of the qualified dentist's ad included the *Florida mandatory disclaimer* which stated that the American Dental Association does not recognize the AAID as 'a *bona fide* specialty accrediting organization'.

The mall visitors were asked: 'Which dentist would you recommend to a friend who needed implant dentistry?' More of those who had seen the disclaimer chose the dentist without the



credentials. The results of the experiment were published in the *Journal of Public Policy and Marketing* in 2012. The findings of our experiment convinced the judge that the disclaimer was inconsistent with the public interest and therefore could not be justified.

### Looking for evidence of harm

We looked for evidence to determine whether the harm caused by the Florida disclaimer was unusual and found many similar stories. For example, when the U.S. Federal Trade Commission lifted their prohibition on comparative health claims, cigarette companies developed ways to reduce harmful tar and nicotine levels. Anecdotes and non-experimental studies, however, cannot disentangle long-run causes and effects in complex and uncertain situations. So we looked for experimental evidence and found eighteen studies.

For example, despite signs stating 'DANGER', 'Shallow Water', 'You Could Be Paralysed', 'NO DIVING', more high school students exposed to these signs dived into the shallow end. More people chose to watch violent movies when the description included a warning message. When M&Ms were labelled 'low fat', consumers—especially overweight ones—ate up to 50 per cent more. And people with health complaints who had seen TV drug ads including mandated product risk disclosures were less knowledgeable about the drugs' benefits.

The clear conclusion from the studies is that government-mandated speech is either ineffective or harmful. As it happened, two law professors—Omri Ben-Shahar and Carl Schneider—had been reviewing evidence on mandatory disclosures at the same time that we were looking at speech restrictions. They came to the same conclusion in their 2011 paper 'The Failure of Mandated Disclosure', published in the *University of Pennsylvania Law Review*.

### The Iron Law of Regulation

Here is a challenging statement: experts are *useless* at making predictions about what will happen in complex uncertain situations. The statement is the conclusion from decades of research on forecasting. Experts' judgmental forecasts are about as accurate as those of novices or guesses in such situations. Because government attempts to regulate what can, cannot, and must be said are currently based on expert judgments of what will happen. What can we then conclude about the efficacies of speech regulations?

The Iron Law of Regulation is: there is no form of market failure, however egregious, that is not eventually made worse by the political interventions intended to fix it.

Regulators cannot know enough about the situation and the preferences and circumstances of the citizens whose lives he or she wishes to regulate. This has been known for a long time— even before 1759 when Adam Smith referred to the conceit of the fellow who imagines he can arrange peoples' lives as he arranges chess pieces.

There is, however, an alternative to experts' judgments and guessing: scientific forecasting.



Scientific forecasting is the product of evidence from decades of testing alternative approaches in many disciplines.

That evidence is conveniently collected in J. Scott Armstrong's *Principles of Forecasting: A handbook for researchers and practitioners*. We now have a unifying theory of forecasting: The Golden Rule of Forecasting. The Rule is to be conservative. Conservative forecasting is simple in concept. First, know everything worth knowing about the situation. Second, apply that knowledge using scientific forecasting methods.

To put it another way: forecast unto others as you would have them forecast unto you. (To help check if predictions of benefits from a regulation are sound, there is an online checklist of 28 guidelines at [goldenruleofforecasting.com](http://goldenruleofforecasting.com)).

Yes: the Golden Rule provides a high standard for would-be speech regulators to meet. But isn't that appropriate given that government regulations involve compulsion and may cause harm?

### **'Just following regulations'**

Sellers must provide buyers with products that they want at prices they can afford in order to be profitable. Sellers know more about their product, their market, and their customers than anyone else, and need to take care of their reputation for fair dealing if they are to survive. Buyers aim to use their money in ways that give them the greatest benefit. They know that sellers are motivated by self-interest and so are inclined to be sceptical about sellers' claims. Competing sellers, word-of-mouth, and a vigilant media help buyers to beware.

All of us wonder sometimes at the way other people spend their time and money. Nevertheless, we should reject the conceited illusion that some of us are so knowing, so clever, and so pure of motive that by controlling speech, we can make other people happier than they would otherwise have been.

In practice, we buy, sell, live, and work in an environment in which the government regulates speech. Sellers have to conform to regulations that dictate what they can and cannot say and what they must say. Buyers know this and, especially when they see or hear government-mandated messages, assume that the government is looking after them, and so are less vigilant and sometimes more rebellious.

Because sellers have the responsibility of free speech taken from them, they are less motivated to take care. If harm does occur, sellers can claim that they were 'just following regulations'.

For example, before governments mandated poisons labelling, sellers took elaborate precautions to avoid harming their customers. They used dark blue textured bottles in exotic shapes to warn all, including the illiterate and blind, that the contents were dangerous. Government-mandated warnings needed a large smooth surface to display them. Sellers switched to plain clear bottles.

### **How the ABC harms free speech**



Commercial media organisations hope to make profits by providing information—in the form of advertisements, community announcements, warnings, news, commentary, discussion, political speech, and investigative reports—that readers, listeners, and viewers value. In doing this, the media helps people make decisions that affect their livelihoods. Thanks to technological advances and economic growth, people have better access to information now than ever before.

Commercial media outlets compete for the attention of Australians, but much attention is diverted to the ABC's advertising-free offerings. Commercial media, as a consequence, have a smaller and less diverse voice than would otherwise be the case. Because the ABC is government owned, its speech is widely perceived to be less biased and more authoritative. The perceived authority of the ABC gives its staff considerable power over the content and the limits of the speech people hear in Australia. Thus the ABC has the effect of quelling speech. Our livelihoods are harmed as a result of the diminishment of alternative voices.

There is no clear basis for distinguishing between commercial and political speech. Both political decisions and commercial transactions affect people's livelihoods. As for importance, most people are more pressingly concerned about matters that directly affect their incomes than they are about political debates on the ABC's Q&A programme, for example.

The freedom of commercial speech is just as deserving of protection as that of any other speech. Any speech restriction should be discarded unless evidence from scientific experiments and forecasting can demonstrate there is or will be a substantial long-term net benefit to society.

Economic theory suggests that interfering with the right to freely speak about matters concerning livelihood can cause harm, and yet such speech is regulated and subject to other government influences. Speech regulation assumes accurate prediction of the costs and benefits of an intervention, and intervention only when the net is positive. The current forecasting methods are unlikely to provide accurate forecasts, and consequently it is most likely that any regulation will fail to achieve its goals.

Unsurprisingly, there is no evidence that commercial speech regulation has ever been beneficial. Further, government interventions in the form of media and research funding and lent authority not only crowd out commercial voices, but they also amplify selected voices and quell others. Eliminating the barriers to the free flow of speech would leave Australians better informed and better off.