

**Commercial Speech:  
The valuable right to speak freely about matters affecting one's livelihood**

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**ABSTRACT**

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Economic theory suggests that interfering with the right to speak freely about matters concerning livelihood will 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 forecasting methods used make accurate forecasts unlikely, and the theory suggests regulation will fail. Unsurprisingly, then, 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, crowd out commercial voices, amplify selected voices, and quell others. Eliminating barriers to the free flow of speech would leave Australians better informed, and better off.

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Kesten is co-author of "Evidence on the Effects of Mandatory Disclaimers in Advertising" in the Fall 2012 issue of the *Journal of Public Policy & Marketing*, and of "Effects of corporate social responsibility and irresponsibility policies" in the 2013 volume of the *Journal of Business Research*.

## Experimental evidence on disclaimer removes regulation from the books

In 2007, I was involved in preparing evidence, for a Florida court case, on the effect of a government-mandated disclaimer on consumers.<sup>1</sup> My colleague<sup>2</sup> 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 American Academy of Implant Dentistry (AAID) qualifications.<sup>3</sup> One version of the qualified dentist's ad included the *Florida mandatory disclaimer*. The disclaimer stated that the American Dental Association does not recognize the AAID as "a bona fide specialty accrediting organization."

When 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.<sup>4</sup> The findings from our experiment convinced the judge that the disclaimer was inconsistent with the public interest and could not, therefore, be justified.

## Experimental evidence fails to support speech mandates

We looked for evidence on whether the harm caused by the Florida disclaimer was unusual.<sup>5</sup> Anecdotes abound. 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 cannot, however, disentangle long-run causes and effects in complex and uncertain situations, so we looked for experimental evidence.

We found eighteen studies. For example, more high school students exposed to "DANGER, Shallow Water, You Can Be Paralyzed, NO DIVING" 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 as "low fat," consumers, especially overweight ones, ate up to 50 percent 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 confuses buyers, and is either ineffective or harmful. As it happened, two law professors (Ben-Shahar and Schneider) had been reviewing evidence on mandatory disclosures at the same time as we were looking at speech restrictions. They came to the same conclusion.<sup>6</sup>

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<sup>1</sup> *Ducoin, Francis J., D.D.S., et al. v. Dr. Ana M. Viamonte Ros, in her official capacity as the State Surgeon General, et al.* (2009), 2003 CA 696. [Available from [http://www.aaid-implant.org/uploads/cms/documents/ducoin\\_final\\_judgment.pdf](http://www.aaid-implant.org/uploads/cms/documents/ducoin_final_judgment.pdf)]

<sup>2</sup> Professor J. Scott Armstrong, Wharton School, University of Pennsylvania. [jscottarmstrong.com]

<sup>3</sup> AAID credentialing is described on their website, here: <http://aaid.com/credentialing/index.html>

<sup>4</sup> The experiment is described in full in Green, K. C. & Armstrong, J. S. (2012). Evidence on the effects of mandatory disclaimers in advertising. *Journal of Public Policy and Marketing*, 31, 293–304. [Final draft available from <http://www.kestengreen.com/g&a-mandatory.pdf>]

<sup>5</sup> Our review of prior evidence on speech mandates is also described in Green & Armstrong (2012).

<sup>6</sup> See Ben-Shahar, Omri, and Carl E. Schneider (2011), "The Failure of Mandated Disclosure," *University of Pennsylvania Law Review*, 159, 647–749. Also, their 2014 book, *More than you wanted to know: The failure of mandated disclosure*.

## **Experts fail to forecast the effects of speech regulations**

Here is a challenging statement: Experts are *useless* at making predictions about what will happen in complex uncertain situations. The conclusion, from decades of research on forecasting, is that experts' judgmental forecasts are about as accurate as those of novices, or just guessing.<sup>7</sup>

This is a problem. Government attempts to regulate what can, cannot, and must be said, are currently based on expert judgments of what will happen.

## **Scientific forecasting to help predict effects of speech regulation**

There is an alternative to experts' judgments, and guessing; namely, scientific forecasting. Scientific forecasting is the product of evidence from decades of testing of alternative approaches in many disciplines.<sup>8</sup>

We now have a *unifying theory of forecasting*: The Golden Rule of Forecasting. The Rule is to be conservative when forecasting. To put it another way: Forecast unto others, as you would have them forecast unto you.<sup>9</sup>

Conservative forecasting is simple in concept. First, you need to know everything worth knowing about the situation. Second, apply that knowledge using scientific forecasting methods.

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?

To help check if the predictions of benefits from a speech regulation are sound, we've provided an online checklist of 28 guidelines at [goldenruleofforecasting.com](http://goldenruleofforecasting.com).

## **The Iron Law of Regulation foils regulators**

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

The problem is that a regulator cannot know enough about the situation, and the preferences and circumstances of the citizens whose lives 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 people as if chess pieces.

## **The natural role of sellers**

Sellers 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.

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<sup>7</sup> See discussion and references to evidence under "Avoid unaided judgment" in the Golden Rule paper referenced in footnote 9, below.

<sup>8</sup> See Armstrong, J. S. (ed.) (2001). *Principles of Forecasting: A handbook for researchers and practitioners*. Kluwer: Boston, MA, and [forecastingprinciples.com](http://forecastingprinciples.com).

<sup>9</sup> Armstrong, J. S., Green, K. C., & Graefe, A. (2014). Golden Rule of Forecasting: Be Conservative. *Journal of Business Research*, forthcoming. [Available from [goldenruleofforecasting.com](http://goldenruleofforecasting.com)].

## **The natural role of buyers**

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. We should nevertheless reject the 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.

## **The natural role of the media**

Commercial media organizations 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.

## **Regulation and government provision subvert natural roles**

In practice, we buy and sell and live and work in an environment in which the government regulates speech.

Sellers have to conform to regulations that dictate what they 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 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.<sup>10</sup>

## **The Australian Broadcasting Corporation crowds out free speech**

The ABC quells speech. 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

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<sup>10</sup> See Green, K. C. & Armstrong, J. S. (2012). Have the courts protected free speech for business people? JPP&M Internet Appendix. [Available from <http://www.kestengreen.com/g&a-mandatory-appendix.pdf>]

considerable power over the content and the limits of the speech people hear in Australia. Our livelihoods are harmed as a result of the diminishment of alternative voices.

### **Conclusions and action steps**

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 and expenditures than political debates about, for example, border control.

In sum, the freedom of commercial speech is just as deserving of protection as that of any other speech.

Economic theory and experimental evidence both reject speech restrictions because they reduce welfare. Unfortunately, the weight of reason and evidence is often rejected with the unsupported claim that "things are different this time."

With that obstacle in mind, I propose that any speech restriction should be discarded, *unless* evidence, from scientific experiments and forecasting, of a clear net benefit is produced.<sup>11</sup>

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<sup>11</sup> For further discussion of these points, see Armstrong, J. S. & Green, K. C. (2012). Should we put a price on free speech? *Journal of Public Policy and Marketing*, 31, 325. [Final draft available from [http://www.kestengreen.com/a&g-free\\_speech.pdf](http://www.kestengreen.com/a&g-free_speech.pdf)]